

The Section 108 Study Group Report

An Independent Report
sponsored by the United
States Copyright Office
and the National Digital
Information Infrastructure
and Preservation Program of
the Library of Congress

March 2008

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This Report was finalized without the assistance of our valued colleague Robert L. Oakley, who passed away on September 29, 2007. Bob brought a depth of experience and spirit of open inquiry to the group that improved our work immeasurably, and we were particularly saddened that he could not help us see this work through to completion. The Section 108 Study Group mourns our loss, and remembers Bob with fondness and respect.

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Laura N. Gasaway & Richard S. Rudick
Co-Chairs, Section 108 Study Group

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EXECUTIVE SUMMARY

Introduction

Rapidly evolving digital technologies have transformed the way that works of authorship are created, disseminated, stored, preserved, accessed, and experienced for scholarly, entertainment, or other purposes. Rights holders – including authors, musicians, artists, publishers, photographers, computer programmers, record companies, and motion picture studios – are now creating and distributing works in digital formats, and as a result their practices have undergone significant changes. Libraries, archives, and museums, in keeping with their missions to collect, preserve, and make available the cultural heritage on behalf of the American people, have likewise altered many of their traditional procedures and practices and have started to collect new materials.¹ Increased use of digital technologies has prompted a corresponding increase in the public’s expectations regarding access to content. Users have begun to expect trustworthy, immediate desktop access to digital materials from all sources, whether local or remote.

Copyright law structures many of the relationships among users, creators, and distributors of copyrighted content. Due to the rapid pace of technological and social change, the law embodies some now-outmoded assumptions about technology, behavior, professional practices, and business models. Section 108 of the Copyright Act of 1976, which provides libraries and archives with specific exceptions to the exclusive rights of copyright owners, was enacted in the pre-digital era. At that time, works were created and distributed primarily in analog format, and library and archives copying consisted of photoduplication and microform. Much has changed since then. The Digital Millennium Copyright Act (DMCA), enacted in 1998, amended portions of section 108, but its provisions only began to address the preservation practices of libraries and archives in the digital environment, and did not attempt to be a comprehensive revision of that section.

The Library of Congress’s experience in planning for the National Digital Information Infrastructure and Preservation Program (NDIIPP) and the ongoing work of the U.S. Copyright Office indicated that new technologies had altered the activities of libraries and archives in such a way as to call into question the continued relevance and effectiveness of section 108 of the Copyright Act. Consequently, NDIIPP, in cooperation with the U.S. Copyright Office, convened the 19-member Section 108 Study Group, an independent body reflecting the range of stakeholder interests.

The Study Group’s mission statement, approved at its first convening session in April 2005, reads:

¹ Notes on terminology: One of the Study Group’s recommendations is to amend section 108 so that it applies to museums as well as libraries and archives. For convenience, this Report refers to “libraries and archives” throughout, but “libraries and archives” should be read to include museums for all recommendations and other proposals described in this Report, unless specifically noted. Where distinctions are made among libraries, archives, or museums, the text will refer to them separately. The term “rights holders” is used to refer to authors of all types of copyrighted works, and those to whom authors have licensed or assigned rights in their works.

The purpose of the Section 108 Study Group is to conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of digital technologies. The group will study how section 108 of the Copyright Act may need to be amended to address the relevant issues and concerns of libraries and archives, as well as creators and other copyright holders. The group will provide findings and recommendations on how to revise the copyright law in order to ensure an appropriate balance among the interests of creators and other copyright holders, libraries and archives in a manner that best serves the national interest.

Copyright law should represent a balance among the legitimate interests of the different entities working with copyrighted materials, and while members of the Study Group were not always in agreement on the shape and form of that balance, all agreed on its fundamental importance.

This Report is addressed first to the Librarian of Congress and the Register of Copyrights, who convened the Study Group. The conveners intended the work of the group to provide a basis on which legislation could be drafted and recommended to Congress. The Study Group worked for almost three years, during which its members volunteered their service and expertise, and it believes that it has fulfilled its goal in the preparation of this Report, which summarizes its recommendations, conclusions, and discussions.

The Study Group operated on a consensus basis. Where recommendations are made, they reflect agreement on the part of all participants, although that agreement is often conditioned on satisfactory resolution of related outstanding issues, as outlined more fully in the Report.

Legal Framework

The authority for U.S. copyright law derives from the U.S. Constitution, which empowers Congress to provide “exclusive rights” to “Authors and Inventors” for a limited period of time in order “to promote the Progress of Science and useful Arts.” These exclusive rights provide authors the right to do and to authorize, and to exclude anyone else from performing, certain activities with respect to the copyrighted work during the term of copyright.

The exclusive rights are not absolute. They are subject to specific exceptions and limitations, which are set out in sections 107 to 122 of the Copyright Act. These exceptions describe certain uses of copyrighted works that may be made freely, without permission. In crafting exceptions, Congress and the courts have been mindful of the need to avoid harm to the incentives to create and disseminate works of authorship that copyright law was designed to foster and still serve the public good by ensuring the dissemination of knowledge. Most applicable to libraries and archives are the exceptions found in section 108 of the Act and the fair use provisions in section 107. A comprehensive summary of the legal landscape is provided in Section II of this report.

The Study Group examined the exceptions in the Copyright Act relevant to libraries and archives, focusing in particular on the provisions of section 108. Those provisions can be divided into four general groups: (1) provisions governing eligibility and conditions for use of the exceptions; (2) provisions relating to preservation and replacement activities; (3) provisions relating to copies made for users; and (4) miscellaneous provisions.

Recommendations, Conclusions, and Other Outcomes

The Study Group’s recommendations, conclusions, and other outcomes of its discussions are described in this Report in three separate sections:

- “Recommendations for Legislative Change” addresses issues for which the Study Group agreed a legislative solution is appropriate and agreed on recommendations for legislative change. These recommendations often are subject to the resolution of related outstanding issues, discussed in detail in the body of the Report.
- “Conclusions on Other Issues” addresses issues on which the Study Group had substantive discussions, and agreed a legislative solution might be appropriate, but for which it has no specific recommendations on the major issues.
- “Additional Issues” addresses additional important issues that the Study Group discussed.

The following sections of this Executive Summary present the key recommendations and observations; the body of the Report describes the legal context and discussions of the group in greater detail. Each of the recommendations, conclusions, and other outcomes listed below contain hyperlinks in the online version to the full discussion of the issue in the Report.

1. Recommendations for Legislative Change

Following are the issues for which the Study Group agreed that a legislative solution is appropriate and agreed on recommendations for legislative change. These recommendations are subject to the resolution of related outstanding issues, discussed in detail in the body of the Report.

Eligibility

Museum Eligibility Under Section 108

Issue:

Museums are currently not eligible for the section 108 exceptions. Should they be, and if so, under what conditions?

Recommendation:

Museums should be eligible under section 108.

See full discussion of eligibility exceptions in section IV.A.1.

Additional Functional Requirements: Subsection 108(a)

Issue:

Subsection 108(a) contains certain minimal qualifying criteria for the section 108 exceptions, but does not define the terms “library” or “archives.” Should subsection 108(a) be revised or supplemented?

Recommendations:

- 1. The current requirements for section 108 eligibility as set forth in subsection 108(a) should be retained.**
- 2. Libraries and archives should be required to meet additional eligibility criteria. These new eligibility criteria include possessing a public service mission, employing a trained library or archives staff, providing professional services normally associated with libraries and archives, and possessing a collection comprising lawfully acquired and/or licensed materials.**

Outsourcing of Section 108 Activities

Issue:

Section 108 currently specifies that only libraries, archives, and their employees may take advantage of its exceptions. Should libraries and archives be allowed to authorize outside contractors to perform on their behalf (“outsource”) activities permitted under section 108?

Recommendations:

- 1. Section 108 should be amended to allow a library or archives to authorize outside contractors to perform at least some activities permitted under section 108 on its behalf, provided certain conditions are met, such as:**
 - a. The contractor is acting solely as the provider of a service for which compensation is made by the library or archives, and not for any other direct or indirect commercial benefit.**
 - b. The contractor is contractually prohibited from retaining copies other than as necessary to perform the contracted-for service.**
 - c. The agreement between the library or archives and the contractor preserves a meaningful ability on the part of the rights holder to obtain redress from the contractor for infringement by the contractor.**

See full discussion of preservation and replacement exceptions in section IV.A.2.

Preservation and Replacement Exceptions

Replacement Copying

Issue:

Subsection 108(c) currently permits libraries and archives to make up to three copies of a published work for replacement purposes under certain conditions, such as deterioration or loss. Should these conditions be amended, particularly to address the impact of digital technologies?

Recommendations:

- 1. The three-copy limit in subsection 108(c) should be amended to permit libraries and archives to make a limited number of copies as reasonably necessary to create and maintain a single replacement copy, in accordance with recognized best practices.**
- 2. “Fragile” should be added to the list of conditions that may trigger replacement reproduction of a physical work. A fragile copy is one that exists in a medium that is delicate or easily destroyed or broken, and cannot be handled without risk of harm.**
- 3. The requirement that a library or archives may not make a replacement copy unless it first determines that an unused replacement cannot be obtained at a fair price should be replaced with a requirement that a usable copy cannot be obtained at a fair price.**
- 4. There may be circumstances under which a licensed copy of a work qualifies as a copy “obtainable at a fair price.” This determination should be made on a case-by-case basis.**
- 5. The prohibition on off-site lending of digital replacement copies should be modified so that if the library’s or archives’ original copy of a work is in a physical digital medium that can lawfully be lent off-site, then it may also lend for off-site use any replacement copy reproduced in the same or equivalent physical digital medium, with technological protection measures equivalent to those applied to the original (if any).**

Preservation of Unpublished Works

Issue:

Subsection 108(b) permits libraries and archives to make up to three preservation, security, and deposit copies of unpublished works. Should this provision be amended, particularly to address the impact of digital technologies?

Recommendations:

1. **Subsection 108(b) should be limited to unpublished works that have not been publicly disseminated.²**
2. **Number of Copies**
 - a. **Subsection 108(b)'s three-copy limit should be amended to permit libraries and archives to make a limited number of copies of unpublished works as reasonably necessary to create and maintain a copy for preservation or security purposes. This amendment should apply to analog as well as digital materials.**
 - b. **Subsection 108(b)'s three-copy limit on the number of deposit copies of unpublished works that can be made should be amended to a reasonable limit on the number of institutions to which libraries and archives can deposit a copy of an unpublished work.**
 - c. **Subsection 108(b) (or legislative history) should clarify that a library or archives that receives a deposit copy of an unpublished work from another library or archives is not permitted to make further copies for preservation purposes or for deposit in other libraries or archives.**
3. **The prohibition on off-site lending of digital copies of unpublished works made under subsection 108(b) should be modified so that if the library's or archives' original copy of an unpublished work is in a physical digital medium that can lawfully be lent off-site, then it may also lend for off-site use the preservation and/or deposit copy of the work reproduced in the same or equivalent physical digital medium with technological protection measures equivalent to those applied to the original (if any).**

Preservation of Publicly Disseminated Works

Issue:

Section 108 does not provide for the making of preservation copies of published works – only of unpublished works. Many published works, particularly those in digital form, are at risk of loss if copies are not made before harm occurs. Should an exception be added that would permit libraries and archives to reproduce published works in their collections for preservation purposes prior to detectable deterioration or loss? Should such an exception apply to works that have been publicly disseminated even if they have not been technically published under the copyright law?

Recommendations:

1. **An exception should be added to section 108 to permit a library or archives qualified under the proposed exception to make a limited number of copies as reasonably necessary to create and maintain a preservation**

² For purposes of this Report, “publicly disseminated” means the work has been intentionally made available to the public by any means whatsoever, including broadcast or electronic transmission via the Internet or other online media, whether or not distributed or offered for distribution in material copies. Where the term “unpublished work(s)” is used in connection with a recommendation regarding subsection 108(b), it should be read to mean “unpublished and not publicly disseminated.”

copy of any at-risk published or other publicly disseminated work in its collections, provided that:

- a. The number of copies made is limited to those that are reasonably necessary to create and maintain a copy of the work for preservation purposes, in accordance with recognized best practices;
 - b. The library or archives restricts access to the preservation copies to that which is necessary to effectively maintain and preserve the work;
 - c. The preservation copies may be used to make copies pursuant to subsections 108(c) or (h); and
 - d. The preservation copies are labeled as such.
2. Criteria to determine if a particular library or archives is “qualified” to avail itself of this exception should include whether the library or archives:
- a. Maintains preservation copies in a secure, managed, and monitored environment utilizing recognized best practices. The following general principles for best practices should be observed for digital preservation (and for analog preservation to the extent applicable):
 - i) A robust storage system with backup and recovery services;
 - ii) A standard means of verifying the integrity of incoming and outgoing files, and for continuing integrity checks;
 - iii) The ability to assess and record the format, provenance, intellectual property rights, and other significant properties of the information to be preserved;
 - iv) Unique and persistent naming of information objects so that they can be easily identified and located;
 - v) A standard security apparatus to control authorized access to the preservation copies; and
 - vi) The ability to store digital files in formats that can be easily transferred and used should the library or archives of record need to change.
 - b. Provides an open, transparent means of auditing archival practices;
 - c. Possesses the ability to fund the cost of long-term preservation;
 - d. Possesses a demonstrable commitment to the preservation mission; and
 - e. Provides a succession plan for preservation copies in the event the qualified library or archives ceases to exist or can no longer adequately manage its collections.
3. The qualifying criteria for this exception should make allowances for institutions with limited resources that cannot create their own sophisticated preservation systems.

Preservation of Publicly Available Online Content

Issue:

Publicly disseminated online content, including websites, presents new and unique preservation issues, which are not addressed in section 108. Should a new exception be added to section 108 that would permit libraries and archives to capture and copy such content for preservation and access? If so, what limits should be placed on the capture of the content and on the provision of public access to the content once it is captured?

Recommendations:

- 1. A new exception should be added to section 108 to permit libraries and archives to capture and reproduce publicly available online content for preservation purposes, and to make those copies accessible to users for purposes of private study, scholarship, or research.**
 - a. “Publicly available” for purposes of this exception is defined as publicly disseminated online content (such as websites) that is not restricted by access controls or any type of registration, password, or other gateway requiring an affirmative act by the user to access the content.**
 - b. Once a library or archives has captured publicly available online content, it should be allowed to provide access to its preservation copies of this content to researchers on the library’s or archives’ premises.**
 - c. Libraries and archives should be permitted to make the captured content available remotely to their users, but only after a specified period of time has elapsed.**
- 2. Opting Out**
 - a. Rights holders should be able to opt out of allowing libraries and archives to capture their publicly available online content, with the exception of government and political websites. The recommendation to include an opt-out clause is conditioned on the Library of Congress being able to copy and preserve all publicly available online content, regardless of the rights holder’s desire to opt out.**
 - b. Rights holders who do not opt out of capture and preservation of their publicly available online content should be able to separately opt out of allowing libraries and archives to make their content available remotely to users.**
- 3. Libraries and archives should be prohibited from engaging in any activities that are likely to materially harm the value or operations of the Internet site hosting the online content that is sought to be captured and made available.**
- 4. Libraries and archives should be required to label prominently all copies of captured online content that are made accessible to users, stating that the content is an archived copy for use only for private study, scholarship, and research and providing the date of capture.**

See full discussion of Miscellaneous Issue exceptions in section IV.A.3.

Television News Exception

Issue:

Subsection 108(f)(3) permits libraries and archives to copy television news programs off the air and lend the copies to users. Should this exception be amended to permit libraries and archives to provide access to those copies by means other than the lending of physical copies?

Recommendations:

- 1. The television news exception should be amended to allow libraries and archives to transmit view-only copies of television news programs electronically by streaming and similar technologies to other section 108-eligible libraries and archives for purposes of private study, scholarship, or research under certain conditions, and after a reasonable period has passed since the original transmission.**
- 2. Any amendment should not include an exception permitting libraries and archives to transmit downloadable copies.**

Miscellaneous Issues

Unsupervised Reproducing Equipment

Issue:

Subsection 108(f)(1) states that section 108 imposes no liability on a library or archives for copyright infringement accomplished through the “unsupervised use of reproducing equipment located on its premises,” provided the equipment bears a copyright warning. How should section 108 address libraries’ and archives’ liability regarding the use of portable, user-owned equipment, such as handheld scanners?

Recommendation:

Subsection 108(f)(1) should be amended so that nothing in section 108 is construed to impose liability for copyright infringement on a library or archives or its employees for the unsupervised use, by a user, of the user’s personal reproducing equipment, provided the library or archives posts notices visible in public areas of its premises stating that the making of a copy may be subject to the copyright law.

Reorganization of the Section 108 Exceptions

Issue:

Many practitioners find section 108’s organization confusing and are not always certain of the relationship among its provisions. Should the exceptions be reorganized to make them easier to understand? If so, how?

Recommendation:

The provisions of section 108 should be reorganized in the following sequence so that they read in a more logical fashion: (1) eligibility for and other qualifications to the exceptions, (2) preservation and replacement activities, (3) copies for users, and (4) miscellaneous provisions.

2. Conclusions on Other Issues

Following are the Study Group's conclusions with respect to issues on which it had substantive discussions, and agreed a legislative solution might be appropriate, but has no specific recommendations on the major issues.

Copies for Users Exceptions

Direct Copies and ILL: Subsections 108(d) and (e)

Issue:

Subsections 108(d) and (e) allow libraries and archives to make and distribute single copies to users, including copies via interlibrary loan (ILL), under certain conditions. Should these exceptions be amended in light of the increasing use of digital technologies both by libraries and archives and by rights holders?

Conclusions:

- 1. The Study Group concluded in principle that the single-copy restriction on copying under subsections 108(d) and (e) should be replaced with a flexible standard more appropriate to the nature of digital materials, such as allowing a limited number of copies as reasonably necessary for the library or archives to provide the requesting user with a single copy of the requested work – but only if any electronic delivery of digital copies is subject to adequate protections.**
- 2. Electronic delivery of copies under subsections 108(d) and (e) should be permitted only if libraries and archives take additional adequate measures (1) to ensure that access is provided only to the specific requesting user, and (2) to deter the unauthorized reproduction or distribution of the work. The Study Group members agreed that adequate measures will depend on the type of work and context of the use, but did not agree on which measures would be adequate, and particularly whether technological protection measures should be required in any given case.**
- 3. The current requirement that “the copy or phonorecord become the property of the user” should be revised to state that the library or archives may not retain any copy made under these provisions to augment its collections or to facilitate further ILL.**
- 4. Users should be permitted to make ILL requests only through their own libraries and not directly of another library. This is the current practice,**

but there was no agreement on whether specific statutory clarification is necessary.

5. The terms “fair price” in subsections 108(c) and (e) and “reasonable price” in subsection 108(h) should be reconciled and a single term used to avoid confusion.

Non-Text-Based Works Excluded by Subsection 108(i)

Issue:

Subsection 108(i) excludes musical works, pictorial, graphic or sculptural works, and motion pictures and other audiovisual works (collectively referred to as “non-text-based works”) from the copies for users exceptions of subsections 108(d) and (e). Should any or all of subsection 108(i)’s exclusions be eliminated? If so, what conditions should be placed on the reproduction and distribution of the non-text-based works presently excluded?

Conclusions:

1. **It may be possible to expand the exceptions in subsections 108(d) and (e) to cover certain non-text-based works that are not currently eligible. More factual investigation, however, would be helpful to determine whether eliminating subsection 108(i) in whole or in part would adversely affect the markets for certain works currently excluded from coverage under subsections 108(d) and (e), or would otherwise harm the legitimate interests of rights holders.**
2. **If subsection 108(i) is retained, it should be amended as follows:**
 - a. **Limit the excluded categories of works to those where copying under subsections 108(d) and (e) might put the work at particular risk of market harm.**
 - b. **Broaden the categories of “adjunct” works that may be eligible for subsection 108(d) and (e) treatment, and use a formulation other than “adjunct” that captures the concepts of “embedded” or “packaged with.”**
3. **If subsection 108(i) is amended so that subsections 108(d) and (e) apply to additional categories of works, then additional conditions should be included in subsections 108(d) and (e) to address the risks particular to those types of works.**

3. Additional Issues

Following are the outcomes of the Study Group’s discussions with respect to certain additional issues.

Virtual Libraries and Archives

Issue:

Section 108 is generally interpreted to exclude virtual-only libraries and archives (those that do not conduct their operations through physical premises). Should such entities be permitted to take advantage of the section 108 exceptions?

Outcome:

Currently there are very few examples of virtual-only libraries and archives that meet the existing and recommended criteria for section 108 eligibility. The Study Group discussed, but did not agree on, whether it is premature to determine if virtual-only libraries and archives should be covered by section 108.

Display and Performance of Unlicensed Digital Works

Issue:

Section 108 does not address user access to unlicensed digital works lawfully acquired by libraries or archives, including access via performance or display. Is an amendment to section 108 concerning such access warranted?

Outcome:

The Study Group discussed, but did not agree on:

- 1. Whether section 108 should be revised – or section 109(c) clarified – to permit libraries and archives to make temporary copies of digital works incidental to on-site public display.**
- 2. Whether section 108 should be revised to permit libraries and archives to perform unlicensed digital works publicly on their premises and to create temporary copies incidental to such performance, provided that the performance is made to no more than one person or a few people at a time, and only for purposes of private study, scholarship, or research.**

Licenses and Other Contracts

Issue:

Subsection 108(f)(4) states that nothing in section 108 in any way affects contractual obligations. Are there circumstances in which any of the section 108 exceptions should apply notwithstanding the terms of a license or other contract?

Outcome:

The Study Group agreed that the terms of any negotiated, enforceable contract should continue to apply notwithstanding the section 108 exceptions, but disagreed as to whether section 108, especially the preservation and replacement exceptions, should trump contrary terms in non-negotiable agreements.

Circumvention of Technological Protection Measures

Issue:

Libraries and archives are not permitted to circumvent technological protection measures (TPMs) that effectively control access to a work (“technological access controls”) for the purposes of exercising the section 108 exceptions, absent a determination in an applicable administrative rulemaking proceeding. Should such circumvention ever be permitted, particularly for replacement and preservation copying?

Outcome:

The Study Group discussed proposals to allow the circumvention of TPMs for the purposes of exercising the section 108 exceptions, and while all agreed that the role of libraries and archives in preserving copyrighted works is a matter of national concern, there was not agreement on whether a recommendation in this area was needed and, if so, what kind of recommendation would be appropriate.

E-Reserves

Issue:

The reproduction of copyrighted works for use as reserve academic course materials is currently done pursuant to permission or fair use. Should an exception dealing with the reproduction and distribution of copyrighted works for use as electronic reserve materials (“e-reserves”) be added to section 108?

Outcome:

The Study Group discussed whether to recommend any changes to the copyright law specifically to address e-reserves and determined not to recommend any changes at the present time.

Pre-1972 Sound Recordings

Issue:

U.S. sound recordings made before 1972 are not subject to federal copyright law, and thus are not covered by the section 108 exceptions. Is an amendment permitting libraries and archives to exercise the section 108 exceptions for pre-1972 sound recordings warranted?

Outcome:

The Study Group observes that, in principle, pre-1972 U.S. sound recordings should be subject to the same kind of preservation-related activities as permitted under section 108 for federally copyrighted sound recordings. The Study Group questioned whether an amend-

ment to section 108 would be feasible without addressing the larger issue of the exclusion of pre-1972 sound recordings from federal copyright law.

Remedies

Issue:

Libraries and archives may be subject to payment of costs and reasonable attorneys' fees in certain circumstances under section 505 even in cases where damages are remitted under subsection 504(c)(2) because the library or archives or its employees had reasonable grounds to believe the infringing activity was fair use. Should the law be amended to exempt libraries and archives from the payment of costs and reasonable attorneys' fees in cases where damages are remitted under subsection 504(c)(2)?

Outcome:

The Study Group discussed, but did not agree on, whether section 505 should be amended at this time.

I. Introduction

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I. INTRODUCTION

This Report is addressed to the Librarian of Congress and the Register of Copyrights. It summarizes almost three years of deliberations and presents a variety of recommendations related to exceptions in the copyright law applicable to libraries and archives. The Section 108 Study Group, named for the relevant section of the copyright law, was convened by the Library of Congress and the U.S. Copyright Office to consider how copyright exceptions for libraries and archives should be revised to respond to the challenges and opportunities presented by digital technologies.

The Study Group adopted the following mission statement:

The purpose of the Section 108 Study Group is to conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of digital technologies. The group will study how section 108 of the Copyright Act may need to be amended to address the relevant issues and concerns of libraries and archives, as well as creators and other copyright holders. The group will provide findings and recommendations on how to revise the copyright law in order to ensure an appropriate balance among the interests of creators and other copyright holders, libraries and archives in a manner that best serves the national interest.

The group's members believe that the interests of the American people will best be served by ensuring that copyright exceptions preserve the copyright law's incentives to stimulate literary and artistic creativity for the general public good, while permitting libraries and archives to provide important services to their users in furtherance of this same goal. The work of the Study Group specifically focused on maintaining section 108's balance in the face of challenges from new technologies, rapidly evolving forms of content, new business models, and escalating, diverse user expectations. Consistent with its mandate to reexamine the section 108 exceptions, the Study Group concentrated on the role of libraries and archives in the promotion of knowledge, which provides the basis for such exceptions. It did not attempt to resolve policy questions related to copyright law generally.

A. Roadmap to the Report

The body of this Report consists of four main sections:

This Section I, the "Introduction," lays out (1) the background of the Study Group, including its purpose, its composition, and the nature of its work, and (2) the challenges raised by digital technologies that gave rise to the formation of the Study Group and that set the context for its work.

Section II, "The Legal Landscape," describes the purposes of copyright law and its limits, the context for the library and archives exceptions, and the current section 108 exceptions.

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Section III, “Overarching Themes,” discusses important topics that permeated the group’s discussions.

Section IV, “Issue Discussions,” contains substantive descriptions of each of the significant issues that the Study Group discussed and its recommendations, conclusions, or other outcomes of its discussions. The issues are divided into three sections, based upon whether and how the group resolved them:

- Section IV.A (“Recommendations for Legislative Change”) addresses the legislative recommendations of the group, namely those issues for which the Study Group agreed a legislative solution is appropriate and agreed on recommendations for legislative change. These recommendations are often subject to the resolution of related outstanding issues.
- Section IV.B (“Conclusions on Other Issues”) addresses issues on which the Study Group had substantive discussions, and agreed a legislative solution might be appropriate, but for which it has no specific recommendations on the major issues.
- Section IV.C (“Additional Issues”) addresses additional important issues that the Study Group discussed.

To set out the issues comprehensively and clearly, within each Issue Discussion there are four primary subsections:

- Issue: description of the issue and its importance.
- Recommendation/Conclusion/Outcome: a statement of the group’s proposals for legislation in Section IV.A, and/or other agreed conclusions or outcomes, as applicable, in Sections IV.B and C.
- Current Law Context: legal background.
- Discussion: explanation of the major points of discussion surrounding each issue and the significant concerns raised by various members.

The Study Group operated on a consensus basis. Where recommendations are made, those recommendations reflect the unanimous agreement of all participants, although as should be clear from the Report that agreement is often conditioned on satisfactory resolution of related outstanding issues. Proposals discussed by the group, but not presented here as recommendations, found varying levels of support among the Study Group members. While there were significant differences in perspective between rights holders and librarians and archivists, there were also many points of overlapping interests and understanding, as well as significant variations in perspective within each group. Thus, when the Report refers to “some members” or “other members,” the reader should not assume it is referring to any particular subset of group members and should not ascribe any particular set of views exclusively to either rights holders or libraries and archives unless so stated.¹

¹ Notes on terminology: One of the Study Group’s recommendations is to amend section 108 so that it applies to museums as well as libraries and archives. For convenience, this Report refers to “libraries and archives” throughout, but “libraries and archives” should be read to include museums for all recommendations and other proposals described in this Report, unless specifically noted. Where distinctions are made among libraries, archives, or museums, the text will refer to them separately. The term “rights holders” is used to refer to authors of all types of copyrighted works, and those to whom authors have licensed or assigned rights in their works.

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The subject matter of this Report does not always lend itself to a linear discussion. To avoid repetition, but enable the reader to find relevant information quickly, references are made to other sections throughout the Report as needed, and a running outline is provided to help the reader keep track of the issues.

B. Background: The Section 108 Study Group

1. Purpose of the Study Group

In October 2002, the Library of Congress' National Digital Information Infrastructure and Preservation Program (NDIIPP) completed its initial planning phase and published a plan to address digital preservation at the national level.² The NDIIPP Plan identified copyright as a potentially serious impediment to the preservation of important digital collections and recognized that solving certain copyright issues was crucial to achieving long-term preservation of important digital content.

By that time, the U.S. Copyright Office had come to realize that, despite some changes made in 1998, section 108 was at risk of becoming functionally and technologically irrelevant to contemporary library and archives and rights holder practices.³ The Copyright Office, as the administrator of U.S. copyright law, has an ongoing interest in ensuring that the law is current and effective so that it continues to meet its constitutional objectives. In 2004, the Copyright Office and NDIIPP together determined that the time was ripe to address copyright issues related to libraries' and archives' use of new and evolving digital technologies to preserve, reproduce, distribute, and otherwise provide access to copyrighted materials.

To commence work in this area, NDIIPP and the Copyright Office decided that the best course would be to obtain the collective advice of a group of experts from the relevant communities. They convened the Section 108 Study Group in April 2005 for the purpose of reexamining the copyright exceptions and limitations applicable to libraries and archives in light of the widespread use of digital technologies. The conveners asked the Study Group to identify the relevant areas of the law in need of updating and to formulate recommendations for legislative change.

The conveners sought findings and realistic recommendations for legislation that would enable libraries and archives to perform important services but would also address reasonable concerns of rights holders – not a wish list of copyright amendments. An effort was made to assemble a group of individuals from among the myriad relevant interested parties and to provide the group with the necessary resources

² NDIIPP is a congressionally mandated program to build a network of committed partners to collect, preserve, and ensure long-term access to digital materials for the benefit of Congress and the nation. The Library of Congress was authorized by Congress in 2000 to develop and execute a plan for a National Digital Information Infrastructure and Preservation Program. The Plan – PRESERVING OUR DIGITAL HERITAGE: PLAN FOR THE NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM (2002) [hereinafter NDIIPP PLAN], available at http://www.digitalpreservation.gov/library/pdf/ndiipp_plan.pdf – was approved by Congress in 2002. See <http://www.digitalpreservation.gov> for more information regarding NDIIPP. NDIIPP is administered by the Library's Office of Strategic Initiatives.

³ The text of section 108 is attached as Appendix A.

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and assistance to enable it to produce a work product that the Copyright Office and Congress would find useful in crafting legislation.

2. Composition of the Study Group

Although convened and administered by the Copyright Office and the Library of Congress, and funded through NDIIPP, the Study Group is an independent body, and its deliberations and recommendations reflect no entity's opinions but its own.

In convening the Study Group, the Library and the Copyright Office attempted to construct the group in a way that would encourage creative, balanced, and thoughtful recommendations for amendments to section 108. A group of 19 individuals, all experts in their various fields, was selected.⁴ Members were chosen from the library, archives, and museum communities; from scholarly communities; from related not-for-profits; from various rights holder communities; and from other relevant professional disciplines. Two co-chairs were selected, one from the publishing community and one from the library community.

Members were asked to serve as individuals because of the experiences and perspectives they might bring to bear, and not as representatives of any particular entity or community. An effort was made to limit the size of the Study Group in order to facilitate its operation while including as many diverse views and relevant areas of expertise as possible. To ensure continuity in the discussions, and to minimize the need for the Study Group to review old ground and start conversations anew for the benefit of new or temporary participants, temporary substitutes and alternates were not permitted. Finally, so that Study Group members could speak freely and consider a full range of ideas without concern for the views of their respective communities or industries, the meetings were closed to the public. The group agreed that its specific deliberations would remain confidential until the release of this Report, and that no comments would be attributed to any individual.

3. Overview of the Study Group's Processes and Work

Beginning in April 2005, the Study Group met approximately bimonthly, at each meeting tackling some new issues and revisiting others not yet resolved. An evolving schedule of issues for each meeting was maintained on the Study Group's website at www.loc.gov/section108, where the public was also invited to submit written comments. In its meetings the Study Group members thoroughly examined the issues described in this Report. Between meetings, the Study Group reviewed relevant materials, commented on drafts, gathered information, and worked in small subcommittees to facilitate understanding of complex issues and to propose solutions to thorny problems.

⁴ A list of the Study Group members is attached as Appendix B.

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Experts and advisers were brought in to educate the Study Group in areas where members felt they lacked a particular perspective or sufficient knowledge.⁵ Public comment was sought through a series of roundtables (referred to as the “Roundtables”), and written comments (referred to as the “Comments”) were solicited in the Federal Register notices issued by the Copyright Office on behalf of the Study Group dated February 15, 2006 (“First Notice”), and December 4, 2006 (“Second Notice”).⁶ The views expressed at the Roundtables and through the Comments have proven provocative and useful, and underpin many of the recommendations presented here. (Those who participated in the Roundtables and submitted Comments are referred to collectively as “Commenters.”)

In their deliberations, the Study Group members worked hard to listen to each other and to understand each other’s perspectives. As a result, they came to a much better understanding of each other’s interests and contributions and attempted to formulate solutions that would address each other’s concerns. They generally found that they shared, and felt that their respective communities shared, certain underlying fundamental values even when they disagreed on how the law should best promote those values. These are the same values embodied in the U.S. copyright law – fostering the creation and dissemination of creative expression.

C. The Digital Challenge: The Effect of New Technologies on the Balance of Section 108

Digital technologies are rapidly transforming the way works of authorship – from literature to motion pictures to recorded sound to various types of new multimedia works – are experienced, as well as the way they are created, disseminated, stored, accessed, and preserved. Digital technologies enable rights holders to make more content available to more people, to disseminate material more quickly and efficiently, and to reissue older material with better quality or new functionality (for example, digitally remastered works on CDs and DVDs). In addition, new technologies permit rights holders to offer more choices in the manner in which materials are sold or licensed to users and to limit the use of their materials through digital rights management (DRM) systems and technological protection measures (TPMs).⁷

⁵ The list of consulting experts is attached as Appendix C.

⁶ The first two public Roundtables were held on March 8 and 16, 2006, in Los Angeles, Calif. and Washington, D.C., respectively. Each addressed the issues of eligibility for section exceptions, amendments to current subsections 108(b) and (c); a new preservation-only exception; and a new, separate exception aimed at the preservation of online content. 71 Fed. Reg. 7999 (Feb. 15, 2006). A third Roundtable took place on January 31, 2007, on the topics of amendments to current subsections 108(d), (e), and (g)(2) regarding copies for users, including interlibrary loans; amendments to subsection 108(i); and limitations on access to electronic copies, including via performance or display. 71 Fed. Reg. 70434 (Dec. 4, 2006). The February and December 2006 Federal Register notices along with lists of the Roundtable Participants and Commenters are attached in Appendices D-J. The comments are posted at <http://loc.gov/section108/comment.html>. The Roundtable transcripts are posted at <http://www.loc.gov/section108/roundtables.html>.

⁷ While there is no universally accepted definition of DRM, this Report uses the term to mean a technological system that identifies intellectual property rights relevant to particular works in digital formats, and that can manage access to and use of those works on a permission basis. This Report uses the term TPMs in the sense used in 17 U.S.C. § 1201 to mean technological measures that protect copyrighted material against unauthorized copying or access.

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Digital technologies are also changing how libraries and archives preserve and make works available to their users. Increasingly, much of the nation's and the world's intellectual, social, and cultural history is being embodied in digital formats. To fulfill and advance their public missions, libraries and archives are now acquiring large numbers of works in digital formats, providing access to those materials, and, in some cases, converting analog materials into digital form in order to preserve them. These activities are consistent with the historic role of libraries and archives in preserving information and creative expression to ensure their continued availability to future generations.

The embodiment of works in digital formats creates new challenges for collection, preservation, and provision of access by libraries and archives, and for the creation, dissemination, and protection of those works by rights holders. Digital works implicate copyright law in ways very different from analog works. The Study Group identified a number of general characteristics of digital technologies that change the way libraries and archives and their users interact with copyrighted content and that affect rights holders' ability to control the use of their works:

- Digital content cannot be “read” without the intermediation of a machine.
- Machines read and render digital content by copying it. As a result, copies are routinely made in connection with any use of a digital file. While these copies may be temporary or incidental to the use, they are considered “reproductions” under the copyright law for which authorization is required absent an applicable exception.
- The amount and types of works being produced and disseminated have grown enormously, as well as the number of creators of publicly disseminated works (for example, “user-generated content” available online).
- There have been tremendous leaps in the speed and convenience of access to content through the use of digital technologies. User expectations have changed as a result; they expect fast, convenient, online access to many forms of content.
- As digital technologies give libraries and archives new abilities to disseminate materials to their users, publishers of these materials may see themselves competing with libraries and archives in new ways. This may be particularly evident in the case of scholarly materials, which often have small markets composed primarily of libraries, educational institutions, scholars, and researchers.
- Digital works, especially those distributed electronically, are often made available under licenses that specify the permitted types of use. Those licenses may or may not permit uses that section 108 or other copyright exceptions would allow.
- In some cases, digital technologies are replacing traditional mechanisms for the distribution of copies with the provision of licensed access. Where licenses do not provide for acquisition of copies by libraries or archives, the onus for preservation falls on the owners of the works.⁸

⁸ See Section IV.A.2.a.iv (“Consortial Approaches to Digital Preservation”) for a discussion of shifting preservation responsibilities.

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- Rights holders' business models are changing as they increasingly earn revenues from the licensing of works (or portions of works) in digital form rather than from outright sales.
- It is possible for almost anyone to make digital copies that are identical or nearly identical in quality to the original copy of a work instantly, easily, and at little or no cost. The ease with which perfect copies can be widely disseminated creates increased exposure for rights holders and heightens their concerns about threats to their markets. While TPMs are sometimes used to help protect digital works from unauthorized use, they are not a panacea.
- The use of DRM systems and TPMs to protect against unauthorized uses may prevent libraries and archives from preserving culturally important works or increase the costs and difficulty of doing so.
- Preservation of digital materials, including digital copies of born-analog material, is different from analog preservation. Active steps to preserve materials may be required early in the life of a digital work due to the inherent instability of many digital media and formats and the rapid obsolescence of formats and equipment necessary to render the digital files and make them readable. Also, effective preservation of digital materials often calls for the making of multiple copies.⁹

Key characteristics of digital works implicating copyright law

Machine mediation

Use = copying

Increase in amount and types of works

Speed and convenience of access

Distribution abilities of libraries and archives

Increase in electronic distribution and licensing of content

Licensed access replacing library and archives ownership

Ease of copying and distribution

Use of technological rights management and protection systems

Preservation must be active; requires multiple copies

⁹ See Section IV.A.2.a.ii ("How Preserving Digital Works Differs from Preserving Analog Works") for a more complete description of digital reproduction.

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II. THE LEGAL LANDSCAPE

A. The Context for the Library and Archives Exceptions

1. The Purposes of Copyright

The authority for U.S. copyright law is found in Article I, Section 8 of the U.S. Constitution, which empowers Congress to enact laws “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” To the framers of the Constitution, “Science” meant knowledge or learning.¹⁰ Copyright was intended to serve as “an engine of free expression.”¹¹

During the term of copyright protection, the exclusive right granted to creators of all forms of copyrightable expression (referred to collectively in copyright law as “authors”) allows authors to control whether and how their works are published and under what conditions, including whether and how to be compensated. By enabling authors to benefit from their works, monetarily or otherwise, copyright provides them with the incentive to create, publish, and disseminate creative and intellectual works, thereby “adding the fuel of interest to the fire of genius.”¹² “By establishing a marketable right to the use of one’s own expression, copyright supplies the economic incentive to create and disseminate ideas.”¹³ As the Supreme Court has explained,

The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance the public welfare through the talents of authors and inventors in “Science and useful Arts.”¹⁴

Ensuring that authors and publishers can profit from their creative efforts is essential to the U.S. system of copyright:

The attempt to deprecate the interest of the copyright owner by reason of profits it has realized through its copyrights is directly contrary to the theory on which copyright law is premised. The copyright law celebrates the profit motive, recognizing that the incentive to profit

¹⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 242-243 (U.S. 2003) (Breyer, J., dissenting) (citing EDWARD C. WALTERSCHEID, *THE NATURE OF THE INTELLECTUAL PROPERTY CLAUSE: A STUDY IN HISTORICAL PERSPECTIVE* 125-126 (William S. Hein & Co. 2002)).

¹¹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 558 (1985).

¹² Abraham Lincoln, “Lecture before the Springfield, Ill. Library Assn.: Discoveries, Inventions and Improvements (Feb. 22, 1860),” in *THE WISDOM OF ABRAHAM LINCOLN*, at 104 (Marion Mills Miller ed., 1908).” Lincoln’s statement, made with reference to the patent system, is equally apt for copyright.

¹³ *Harper & Row*, 471 U.S. at 558.

¹⁴ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

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from exploitation of copyrights will redound to the public benefit by resulting in the proliferation of knowledge.¹⁵

As James Madison stated in the *Federalist Papers*, referring to the copyright clause in the Constitution: “The utility of this power will scarcely be questioned . . . The public good fully coincides in both cases with the claims of individuals.”¹⁶

The genius of United States copyright law is that it balances the intellectual property rights of authors and publishers with society’s need for the free exchange of ideas. By harnessing the power of private enterprise to creative energy, which might otherwise be dependent on patronage or government support, a healthy copyright system promotes freedom, open communication, and diversity of thought. While the “immediate effect of our copyright law is to secure a fair return for an author’s creative labor,” its ultimate goal is “to stimulate artistic creativity for the general public good.”¹⁷

The U.S. copyright system has multiple interdependent dimensions and its benefits include economic advantages. A key element is the contribution of the publishers and other rights holders to the U.S. economy and particularly to U.S. trade. The protections provided by copyright law support the creative industries, including the millions of people engaged in the production, marketing, and distribution of creative works,¹⁸ and at the same time expand the knowledge base.

Of no less importance, the copyright exceptions, including section 108, promote the collection, preservation, research, study, and further development of this knowledge base. Collectively, the protections and exceptions support both a vital economy of trade in copyrighted goods and services, as well as a “knowledge economy” of education and expertise. These two economies are interdependent: the trade in creative content and the fertile environment for creativity and knowledge provided in part by libraries and archives work together to produce significant economic benefits for the nation as a whole.

2. Overview of the Exclusive Rights

The “exclusive right” provided to copyright owners is actually a “bundle” of rights that describe activities with respect to the copyrighted work that only the author, or those authorized by the author, may engage in during the term of copyright. Under current law, the term of copyright protection for most works is the life of the author plus 70 years.¹⁹ Those rights – which an author can sell or license separately or together – include:

¹⁵ American Geophysical Union v. Texaco, Inc., 882 F. Supp. 1, 27 (S.D.N.Y. 1992), *aff’d*, 60 F.3d 913 (2d Cir. 1994).

¹⁶ THE FEDERALIST No. 43 (James Madison) (1788).

¹⁷ Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). Put another way, “the monopoly created by copyright thus rewards the individual author in order to benefit the public.” *Harper & Row*, 471 U.S. at 546.

¹⁸ STEPHEN E. SIWEK, INT’L INTELLECTUAL PROP. ALLIANCE, COPYRIGHT INDUSTRIES IN THE U.S. ECONOMY: THE 2006 REPORT 11 (2007), available at http://www.iipa.com/pdf/2006_siwek_full.pdf.

¹⁹ The current term for works made for hire is 120 years from creation or 95 years from publication, whichever expires first. See Lolly Gasaway, *When U.S. Works Pass into the Public Domain*, <http://www.unc.edu/~uncclng/public-d.htm> (last visited Mar. 14, 2008).

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1. *The reproduction right (the right to make copies)*. As defined in section 101, a “copy” of a work may be any material object in which the work is fixed, or embodied, and from which it can be perceived, reproduced or communicated, either directly or with the aid of a machine.²⁰ In the digital context, “copies” include reproductions on the hard drive of a computer (such as those that reside on network servers) or on a physical, removable medium (such as copies on DVDs, CDs, etc.), as well as reproductions in the RAM of a computer when a user views a work.²¹
2. *The right to create adaptations (also known as “derivative works”)*. A “derivative work” is a work that is based on a copyrighted work, but which contains new material that is “original” in the copyright sense. A movie version of a novel, for instance, is a derivative work. Merely scanning a work to digitize it, on the other hand, involves no original authorship, so the resulting digital version is considered a reproduction and not a derivative work.
3. *The right to distribute copies of the work to the public*. The right of distribution encompasses distribution of copies to the public “by sale or other transfer of ownership, or by rental, lease or lending.”²² Making copies of a work available for public downloading over an electronic network has been held to qualify as a public distribution and therefore implicates an exclusive right of the rights holder.²³ The distribution right is limited by the “first sale doctrine,” which allows the owner of a particular copy of a copyrighted work to give or lend that copy to someone else – such as a library lending a book to a patron. The first sale doctrine does not, however, authorize the owner of a copy to make another copy, and because “transferring” a work electronically entails making a new copy, the first sale doctrine does not apply.²⁴
4. *The right to perform the work publicly*. The Copyright Act states that to perform a work means to recite, render, play, dance, or act it, with or without the aid of a machine. The meaning of the term “publicly” is discussed below. This public performance right does not extend to sound recordings, which have their own narrowly tailored right of public performance, discussed below.
5. *The right to display the work publicly*. To display a work means to show a copy of it, either directly or with the aid of a device or process.
6. *Performance right in sound recordings*. Copyright owners of sound recordings do not have the same right of public performance that attaches to most other works. Instead, they have a more limited right to perform the work publicly “by means of a digital audio transmission.”²⁵

²⁰ Technically, a copy of a sound recording is known as a “phonorecord,” but for purposes of this Report, all reproductions of copyrighted works will be referred to as “copies.”

²¹ *E.g.*, MAI Sys. Corp. v. Peak Computer, 991 F.2d 511 (9th Cir. 1993), cert. dismissed, 510 U.S. 1033 (1994); see also THE REGISTER OF COPYRIGHTS, DMCA SECTION 104 REPORT 107-123 (2001), available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

²² 17 U.S.C. §106(3) (2007).

²³ See, e.g., A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1014 (9th Cir. 2001); Playboy Enter., Inc. v. Russ Hardenburgh Inc., 982 F. Supp. 503, 513 (N.D. Ohio 1997).

²⁴ 17 U.S.C. § 109(a) (2007). See THE REGISTER OF COPYRIGHTS, *supra* note 21, at 78-80 (discussing the inapplicability of the first sale doctrine to digital transmissions that involve making a copy rather than merely transferring an existing physical copy).

²⁵ 17 U.S.C. § 106(6) (2007).

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To perform or display a work “publicly” under section 101 of the Copyright Act means to perform or display it anywhere that is open to the public or anywhere that a “substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.” Transmitting the performance or display to such a place also makes it public. It does not matter if members of the public receive the performance at the same time or different times, at the same place or different places. Making a work available to be received or viewed by the public over an electronic network is a public performance or display of the work.²⁶

3. Copyright Limitations and Exceptions

The exclusive rights do not provide absolute protection. Copyright is limited in time and scope, is subject to a number of exceptions and limitations, and contains “built-in First Amendment accommodations.”²⁷ Only creative expression is protectable; ideas, facts, systems, processes, and procedures are not.²⁸ While the general rule is that original works are copyrightable, there are some exceptions. For example, works created by U.S. government employees are not subject to copyright.²⁹

The first of the exceptions listed in the Copyright Act is fair use, allowing for the use of copyrighted expression without permission from the rights holder in certain circumstances. In addition to fair use, which is codified in section 107, sections 108 to 122 of the Act provide other, more specific exceptions to and limitations on the exclusive rights.

The various exceptions and limitations cover many different kinds of uses, such as exceptions for distance education and exceptions that allow reproduction for the blind and disabled, as well as the section 108 exceptions applicable to libraries and archives. In addition, some types of works – musical compositions and sound recordings, for example – are subject to “compulsory” or “statutory” licenses for certain uses. Such a license provides a specific legal authorization (in other words, the copyright owner cannot deny permission) to use a copyrighted work in certain ways or for certain purposes, as long as the user pays the required fee and otherwise meets the conditions in the law.

Not all uses that are in the public interest automatically warrant an exception. In some cases, the constitutional goal of copyright is better served if the cost of certain uses is borne by society generally, rather than by the authors and other rights holders of works that would be affected.³⁰

²⁶ See, e.g., *Playboy Enters., Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).

²⁷ *Eldred*, 537 U.S. at 219 (citing *Harper & Row*, 471 U.S. at 560).

²⁸ See 17 U.S.C. § 102(b) (2007).

²⁹ See, e.g., 17 U.S.C. § 105 (2007) (no copyright protection for works of the U.S. government). See also *Banks v. Manchester*, 128 U.S. 244 (1888) (no copyright protection for laws).

³⁰ Thus, for example, there is no blanket exception that allows schools to copy textbooks rather than purchase them, despite the beneficial role of schools in society.

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4. The Rationale for Copyright Exceptions and Limitations

Congress and the courts have long recognized that allowing some reasonable uses of copyrighted works without permission or compensation is fully consistent with and sometimes required by the ultimate goal of copyright: to promote the progress of knowledge. Creative works inspire new creations, which in turn inspire others, but this “engine of free expression” does not function unless the works so created are made available to the public.

There are certain public interests that on balance outweigh copyright rights in certain circumstances. Where Congress has found that public policy concerns warrant exceptions or limitations, it has tried to circumscribe the exception or limitation so that it complements the fundamental aims of copyright law and preserves the incentives to create or to invest in the creation of new works. For instance, potential market harm is a factor that must be weighed in determining whether a use is a fair use under section 107, as discussed in Section II.C.5.a (“Fair Use”).

In this vein, the drafters of the 1976 Copyright Act determined that certain services provided by libraries and archives should be permitted within the copyright law with more certainty than is provided by fair use. They also determined that some acts that might not qualify as fair use were still desirable and should be allowed. The current section 108 exceptions, discussed below, are all examples of Congress’s attempt to permit certain library and archives uses “while guarding against the potential harm to the copyright owner’s market.”³¹ Other examples of exceptions in the Copyright Act that have been carefully circumscribed to avoid unreasonable harm to creators and other rights holders include:

- Making backup copies of computer programs in section 117 requires that all such copies be made for archival purposes and that they be transferred when the original copy is transferred, so that copies of the program do not proliferate.
- Performance and display of copyrighted works for online distance education in subsection 110(2) is limited to accredited nonprofit educational institutions and requires, among other things, that works so used be accessible only to enrolled students and protected by technological measures from redistribution or retention for longer than the class session.
- Privileges to reproduce and distribute copies of protected works for the visually impaired and others with disabilities in section 121 are available only if the copies are in specialized formats “exclusively for use by blind or other persons with disabilities.”

5. Standards and Principles for Copyright Exceptions and Limitations

U.S. copyright law provides no definitive legal standard for the acceptable scope of copyright exceptions and limitations. The fair use doctrine and surrounding case law provide some guidance on how exceptions can be crafted to permit beneficial

³¹ S. REP. NO. 105-190, at 61-62 (1998).

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and reasonable uses without causing undue harm to rights holders. The legislative history of the 1976 Act and its amendments illustrates that Congress, in creating exceptions, is influenced by notions of what is fair and reasonable, mindful that an exception should not swallow the affected right or interfere with the incentive to create and disseminate original works of authorship.³²

Most directly relevant, the Berne Convention’s “three-step test” (described below), which is incorporated into subsequent copyright treaties to which the United States has adhered, provides express guidance on acceptable exceptions and limitations.³³

6. Obligations Under International Treaties

In considering exceptions and limitations to copyright, Congress must be mindful of relevant U.S. treaty obligations. The principal international copyright treaty is the Berne Convention for the Protection of Literary and Artistic Works. Article 9(2) of the Berne Convention limits the nature and scope of exceptions to copyright rights that members (including the United States) may create. Article 9(2) provides:

It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.

Exceptions and limitations must thus satisfy a three-step test: (1) they must relate to “certain special cases,” (2) they may not conflict with a normal exploitation of the work, and (3) they may not unreasonably prejudice the author’s legitimate interests. Berne article 9(2) refers only to reproduction rights, but the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, to which the United States has also adhered, provide that all rights granted under those treaties will be governed by the Berne article 9(2) standard.³⁴

While the Berne Convention itself has no enforcement mechanism, the requirements of Berne were incorporated into the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)³⁵ and are

³² The general principle is that courts should resort to legislative history only if the statute is not clear on its face. *See, e.g., Ardestani v. INS.*, 502 U.S. 129, 135-36 (1991) (“The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances. . . . when a contrary legislative intent is clearly expressed.”) Reference to legislative history is, however, prevalent in copyright cases. *See, e.g., Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 743-49 (1989); *Bonneville Int’l Corp. v. Peters*, 347 F.3d 485, 496-99 (3d Cir. 2003).

³³ The Berne Convention for the Protection of Literary and Artistic Works Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne Convention] is the principal international copyright treaty, with 162 members. The U.S. became a Berne member in 1989.

³⁴ WIPO Copyright Treaty art. 10, Dec. 20, 1996, S. Treaty Doc. No. 105-12, 36 I.L.M. 65, 83 (1997); WIPO Performances and Phonograms Treaty art. 16, Dec. 20, 1996, S. Treaty Doc. No. 105-17, 36 I.L.M. 76, 85-86 (1997). These treaties technically do not preclude the U.S. from imposing broader exceptions with respect to works of its own authors, but in this case such a distinction would likely be unworkable, as libraries and archives could not easily determine whether a work is a United States work or a Berne Convention work.

³⁵ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakech Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments - Results of the Uruguay Round vol. 31, 33 I.L.M. 81 (1994).

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now subject to the WTO dispute resolution procedures. Accordingly, the United States is subject to sanctions in WTO enforcement proceedings if its copyright exceptions exceed what is permitted under the three-step test.³⁶

B. Exceptions for Libraries and Archives: Section 108 and Related Laws

1. The Role of Libraries and Archives

Libraries and archives play a vital societal role, contributing to intellectual, cultural, and economic advancement, creativity, and the public good. As one librarian articulated it:

The . . . Library represents a fundamental public good in our democracy. It assures the right, privilege, and the ability of individuals to choose and pursue any direction of thought, study or action they wish. The Library provides the capital necessary for us to understand the past and plan for the future. It is also our collective memory, as history and human experience are best preserved in writing. . . . [L]ibraries are fundamental in empowering people to take charge of their lives, their governments, and their communities.³⁷

Libraries and archives collect and bring together in single repositories books, journals, music, and a wealth of other materials from a variety of sources in a way that no single individual could, thereby streamlining and facilitating the process by which authors and creators learn from and build upon the work of others. Libraries and archives open to the general public provide an opportunity for learning for all, including those who cannot afford to purchase books and other materials. As historian Arthur M. Schlesinger has observed, “The public library has been historically a vital instrument of democracy and opportunity in the United States Our history has been greatly shaped by people who read their way to opportunity and achievements in public libraries.”³⁸

Libraries’ missions include collecting publicly disseminated materials relevant to their user communities, aggregating content from diverse creators and publishers, preserving content in their collections, and providing access to materials regardless of the ability to pay. Professional library staff also organize and curate their collections and provide reference services to members of their user communities.

³⁶ A WTO panel ruling that §110(5) of the U.S. Copyright Act violates the three-step test is currently the authoritative interpretation of component parts of that test. Panel Report, *United States – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R (June 15, 2000). See also SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 759-778 (Oxford Univ. Press 2006). For a condensed description of the ruling, see THE REGISTER OF COPYRIGHTS, REPORT ON ORPHAN WORKS 61-65 (2006), available at <http://www.copyright.gov/orphan/orphan-reportfull.pdf>.

³⁷ Gary E. Strong, *Libraries Empower People to Participate in a Civil Society*, in EMERGING VISIONS FOR ACCESS TO THE 21ST CENTURY LIBRARY, CONFERENCE PROCEEDINGS 2 (Council on Library and Info. Res., 2003), available at <http://www.clir.org/pubs/reports/pub119/strong.html>. Mr. Strong is the former head of the Queens Borough Public Library in New York City and is now university librarian at UCLA.

³⁸ VLADIMIR F. WERTSMAN, THE LIBRARIAN’S COMPANION 144 (2nd ed. 1996) (citing LIBRARY NEWS, Winter 1982, at 4).

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Archives, as distinguished from libraries, accession, collect, maintain, and preserve published and unpublished papers, manuscripts, and other materials. They create collections consisting primarily of unique, irreplaceable materials that would be lost were it not for the intervention of these institutions, which organize them and make them available for the public benefit.

Both libraries and archives maintain and preserve important materials over time, so they are available to future generations. These institutions serve users from different parts of society with different needs, from casual borrowers to scholars who require obscure information resources and assistance from highly qualified professionals to locate them.

In the Copyright Act of 1976, Congress recognized the importance of the services provided by libraries and archives in helping to create and maintain an informed citizenry. It provided, in section 108 of the Act, exceptions specifically for libraries and archives. Those exceptions permit them, under certain conditions, to reproduce and distribute lawfully acquired copyrighted works for specified purposes, where such activities can be conducted without material harm to the legitimate interests of rights holders.

2. Brief Background and History of Section 108

Library and archives duplication and distribution of copyrighted works has been a source of tension between rights holders and libraries and archives since the advent of commercially available reproduction equipment. In 1935, the National Association of Book Publishers (NABP) and the Joint Committee on Materials for Research of the American Council of Learned Societies entered into a voluntary agreement, nonbinding and limited in scope, known as the “Gentlemen’s Agreement.” The agreement set out the standard for acceptable conduct for libraries, archives, and museums concerning the duplication of copyrighted works.³⁹

It provided that a library, archives, museum or similar institution could make a single “photographic reproduction” of a part of a work in its collection for a scholar, provided that the scholar represented in writing that the copy was sought for purposes of research, the institution provided the reproduction without profit, and the recipient was given notice that misuse of the reproduction could result in copyright infringement.⁴⁰

The agreement further said that copies that substitute for the purchase of a book “would not be fair” and that orders for photocopying “which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted.”

³⁹ THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 14 (1983) [hereinafter 1983 REGISTER’S REPORT], available at <http://www.copyright.gov/reports/library-reproduction-1983.pdf>. For a more detailed discussion of the history of section 108, see MARY RASENBERGER & CHRIS WESTON, OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT: BACKGROUND, HISTORY, AND MEANING (2005), [http://www.loc.gov/section108/docs/108backgroundpaper\(final\).pdf](http://www.loc.gov/section108/docs/108backgroundpaper(final).pdf), attached as Appendix E; and Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen’s Agreement of 1935*, 53 J. COPYRIGHT Soc’y U.S.A. 545 (2006), available at <http://hdl.handle.net/1813/2719>.

⁴⁰ The full agreement is reproduced in RASENBERGER & WESTON, at 4-5.

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Until the 1976 Act, library and archives duplication was governed by common law fair use standards, informed by the Gentlemen’s Agreement and its progeny.

There were sporadic attempts to create a statutory exception for library and archives photocopying subsequent to the Gentlemen’s Agreement, but not until the late 1960s, when work on a general copyright revision intensified, did the effort to create a library and archives photocopying exemption gain momentum. The themes that marked the legislative debates over a library and archives exception remain current today. Libraries and archives viewed the ability to make photocopies as inherently fair and reasonable and essential to their public service missions. Rights holders were concerned that these photocopies could cut into their reasonably anticipated returns and consequently diminish the incentive to create new works. If a user could obtain a photocopy of a work, why would he or she buy it, and if one library can borrow what it needs from another, why would any but a few libraries buy it? These concerns were particularly acute for scholarly and educational publishers that relied principally on sales to libraries and scholars.

In the final push toward the 1976 Copyright Act, library and archives copying for users and interlibrary loan were the most hotly debated portions of section 108, but eventually Congress arrived at a compromise on these issues allowing limited copying for users and interlibrary loan reproduction under guidelines established by the National Commission on New Technological Uses of Copyrighted Works (CONTU).⁴¹

On October 19, 1976, President Gerald Ford signed into law the Copyright Act of 1976, which for the first time included a statutory exception specifically applicable to certain activities of libraries and archives. Because these exceptions were new, Congress recognized that section 108 would have to be reviewed over time. Subsection 108(i) as originally enacted included a requirement that the Copyright Office consult with stakeholders every five years and report on whether the intended balance had been achieved.⁴² In its 1983 report, the Copyright Office proposed modest recommendations for legislative change, none of which was adopted. In its 1988 report the Office recommended that the reporting requirement be expanded to encompass a study on the effects of new technology on the section 108 balance. The reporting requirement was never amended to mandate such a study and was itself repealed in 1992.

When it was enacted, section 108 represented an attempt to balance the exclusive rights that enable authors and publishers to invest time and money in the creation and publication of creative works with the ability of libraries and archives to serve the needs of scholars and other users, by disseminating knowledge and facilitating creativity. Section 108 has been amended periodically since 1976, as discussed in the following overview of its provisions. But until now it has never been subject to a comprehensive reexamination in light of changing technologies and practices of libraries and archives and publishers.

⁴¹ CONF. REP. NO. 94-1773, at 71 (1976). See *infra* note 51 for more information about the CONTU guidelines.

⁴² 17 U.S.C. § 108(i) (1976) (repealed 1992, Pub. L. No. 102-307, 106 Stat. 264, 272).

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C. Overview of Section 108

This Section briefly describes the basic contours of each of the existing provisions of section 108. More detailed discussions of the provisions discussed by the Study Group can be found in Section IV (“Issue Discussions”) of this Report.

1. Eligibility

Section 108 provides privileges to “libraries” and “archives,” but nowhere in the Copyright Act are these terms defined. Instead, section 108 provides threshold requirements for determining which libraries and archives and which of their activities are eligible. To qualify for any of the section 108 exceptions, (1) the library or archives must be open to the public, or at least to researchers in a specialized field; (2) the reproduction and distribution may not be for direct or indirect commercial advantage; and (3) the library or archives must include a copyright notice on any copies provided, or if no notice appears on the original copy, a legend that the work may be protected by copyright.⁴³

Libraries and Archives as Physical Premises. Section 108 was drafted when libraries and archives were generally understood to be brick-and-mortar institutions with primarily physical materials in their collections. In passing the 1998 Digital Millennium Copyright Act (DMCA) amendments to section 108, Congress indicated that it did not intend to broaden the scope, and that purely virtual institutions were not eligible:

[J]ust as when section 108 of the Copyright Act was first enacted, the term “libraries” and “archives” as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public. Although online interactive digital networks have since given birth to online digital “libraries” and “archives” that exist only in the virtual (rather than physical) sense on websites, bulletin boards and homepages across the Internet, it is not intended that section 108 as revised apply to such collections of information.⁴⁴

Museums. Museums are not currently eligible under section 108, although museum copying was included in the 1935 “Gentlemen’s Agreement.” Why museums

⁴³ Specifically, subsection 108(a) requires that “(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage; (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and (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.” As originally passed, subsection 108(a) required libraries and archives to include a notice of copyright on any reproduction and distribution, but it was amended in the Digital Millennium Copyright Act to “ease the burden on libraries and archives” where there was no copyright notice on the source copy. S. REP. NO. 105-190, at 60 (1998).

⁴⁴ S. REP. NO. 105-190, at 62 (1998).

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were not included in section 108 in 1976 is not completely clear and is discussed in Section IV.A.1.a (“Museum Eligibility Under Section 108”) of this Report.

2. Copying for Preservation and Replacement

Section 108 contains several provisions that permit reproduction for the purpose of maintaining works in a library’s or archives’ collections by preserving or replacing them. Subsection 108(b) permits copying unpublished works for preservation or deposit in another library or archives for research; subsection 108(c) permits making copies of published works to serve as replacements; and subsection 108(h) permits copying and other uses of certain works in their last 20 years of protection for preservation, scholarship, or research. In addition, subsection 108(f)(3), although it does not mention preservation, indirectly provides for preservation of television news programs.

Subsection 108(b). Subsection 108(b) is specifically directed to preservation activities. It applies solely to *unpublished* copyrighted works and allows libraries or archives to make up to three copies “solely for purposes of preservation and security or for deposit for research use in another library or archives.” To be eligible, the work must be currently in the collections of the library or archives, and any copy made in digital format may not be made available to the public in that format outside the library or archives premises.

Subsection 108(c). Subsection 108(c) applies to *published* works. It allows libraries and archives to make up to three copies of a published work in their collections to replace one that is damaged, deteriorating, lost, or stolen, or the format of which has become obsolete. However, the library or archives may make replacement copies only if it first determines, after reasonable effort, that an unused replacement cannot be obtained at a fair price. As with copies of unpublished works, copies in digital format may not be made available to the public outside the library or archives premises. Although subsection 108(c) deals with copying for replacement and does not specifically address preservation, it is sometimes viewed as a preservation provision because it enables libraries and archives to replace copies of works in their collections that would otherwise be lost.

Distinction between Subsections 108(b) and (c). The legislative history of section 108 does not explain the rationale for treating published and unpublished works differently – specifically, why the exception for unpublished works is for “preservation,” while the exception for published works is for “replacement.” What may be implicit is that unpublished materials are often unique; if a library or archives waits until the original copy is deteriorating or destroyed, it may be too late to replace it. Accordingly, “insurance” copies of unpublished works may be made, so that if the original deteriorates, a copy remains. Also, these copies may be given to other institutions, presumably to spread the risk of loss, but also to allow limited distribution of material valuable to scholars. Finally, because copies of unpublished works are not available on the market, it makes no sense to require a library or archives to seek an unused copy before reproducing the original.

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Published works, on the other hand, usually exist in multiple copies. Unused replacement copies often will be available on the market and thus can be purchased. Library and archives copying is permissible only when an unused copy of a work is not reasonably available for purchase at a fair price, in which case it is often at greater risk of loss, and library or archives copying may be the only way to ensure its preservation.

DMCA Amendments to Subsections 108(b) and (c). Until the DMCA was enacted, copying under subsections 108(b) and (c) was limited to a single copy of a work “in facsimile form.” The DMCA changed these provisions to permit up to three copies and to allow those copies to be made in digital form, in recognition of the changing practices of libraries and archives. The three-copy limit actually reflected microfilm preservation practices, however, rather than the requirements of digital preservation.

Congress was aware in 1998 of digital copying’s potential threat to rights holders’ interests, citing the “risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution of additional copies or phonorecords of the work.”⁴⁵ In amending subsections 108(b) and (c) to allow digital copies, Congress was careful to limit use of those copies to library and archives premises, explaining:

[T]his proviso is necessary to ensure that the amendment strikes the appropriate balance, permitting the use of digital technology by libraries and archives while guarding against the potential harm to the copyright owner’s market from patrons obtaining unlimited access to digital copies from any location.⁴⁶

“Premises” are understood to be the actual buildings housing the library or archives, not the wider campus or community in which the library or archives may be situated.⁴⁷

In another DMCA amendment occasioned by rapidly advancing technology, Congress added works stored in formats that have become “obsolete” to the categories of published works that libraries and archives are permitted to copy under subsection 108(c). A format is considered obsolete if “the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”

Subsection 108(h). Subsection 108(h) allows a library or archives to reproduce, distribute, perform, or display in facsimile or digital form a copy of a published work during the last 20 years of its term, for purposes of preservation, scholarship, or research. To take advantage of this provision, however, a library or archives must first make a reasonable investigation to determine that the work is not subject to normal exploitation and cannot be obtained at a reasonable price, and that the copyright

⁴⁵ *Id.* at 61.

⁴⁶ *Id.* at 61-62.

⁴⁷ See *id.* at 62; Laura N. Gasaway, *America’s Cultural Record: A Thing of the Past?*, 40 *HOUS. L. REV.* 643, 654 (2003).

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owner has not filed a notice to the contrary in the Copyright Office. Subsection 108(h) was added to the law in 1998, when the copyright term was extended by 20 years from life of the author plus 50 years to life plus 70 years and, as of 2005, covers all categories of works.

Subsection 108(f)(3). Subsection 108(f)(3) allows libraries and archives to reproduce and lend “a limited number of copies of an audiovisual news program.” According to the legislative history of the 1976 Copyright Act, this exception was intended to allow libraries and archives to make off-the-air videotape recordings of daily newscasts of the national television networks, which report the major events of the day, for limited distribution for research use.⁴⁸ Like subsection 108(c), this subsection does not refer directly to preservation, but nevertheless has served an important preservation role.

3. Copies for Users

Section 108 also allows libraries and archives, under certain conditions, to reproduce and distribute to users copies of all or a portion of a copyrighted work. Certain works, including musical works, pictorial, graphic and sculptural works (other than illustrations or similar adjuncts to literary works), and audiovisual works, including motion pictures, are not subject to the section 108 “copies for users” exceptions.⁴⁹

Specifically, a library or archives may reproduce and distribute, in response to a user’s request, “no more than one article or other contribution to a copyrighted collection or periodical issue,” or “a small part” of any other copyrighted work from its collection or that of another library or archives. It may also copy all or a substantial portion of a user-requested work if it determines, after reasonable investigation, that a copy cannot be obtained at a fair price. There are other conditions that apply to these reproduction and distribution privileges: (1) they can be used only if “the library or archives has had no notice that the copy would be used for purposes other than private study, scholarship, or research;” (2) the copy becomes the property of the requesting user (so the exception does not become a means of collection building); and (3) the library or archives displays a copyright warning where it accepts requests for copies.⁵⁰

According to subsection 108(g), these exceptions encompass only “isolated and unrelated reproduction or distribution of a single copy . . . of the same material on separate occasions.” They do not apply when a library or archives “is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies” of the same material, whether at one time or over a period of time. Nor do they apply to a library or archives that “engages in the systematic reproduction or distribution of a single or multiple copies” of a work. The statute expressly states that libraries and archives may participate in interlibrary

⁴⁸ H.R. REP. NO. 94-1476, at 77 (1976).

⁴⁹ 17 U.S.C. § 108(i) (2007). Audiovisual news programs are a separate category. See 17 U.S.C. § 108(f)(3) (2007).

⁵⁰ 17 U.S.C. § 108(d)-(e) (2007).

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arrangements so long as the practice does not substitute for a subscription to or purchase of the work and is not intended to do so.⁵¹

4. Other Provisions

Reproducing Equipment on Library or Archives Premises. Subsections 108(f)(1) and (f)(2) deal with the legal implications of reproducing equipment on library or archives premises. The former provides that nothing in section 108 makes a library or archives liable for unsupervised use of reproducing equipment on its premises, provided that the equipment contains a notice that making copies may be subject to the copyright law. Subsection (f)(2) provides that nothing in section 108 absolves from liability an individual who uses such equipment, or who requests a copy from a library or archives and uses the copy in a manner that exceeds fair use.

Contracts. Subsection 108(f)(4) makes clear that the provisions of section 108 do not supersede any contractual obligations a library or archives may have with respect to a work that it wishes to copy (for example, under a subscription or donor agreement).

Relationship of Section 108 to Fair Use. Subsection 108(f)(4) also states explicitly that nothing in section 108 “in any way affects the right of fair use as provided by section 107.”⁵² The applicability of fair use to preservation activities is discussed below.

5. Other Important Related Areas of Law

a. Fair Use

In addition to section 108, libraries and archives rely upon fair use to make copies of copyrighted works for preservation and other purposes. Section 107 of the Copyright Act provides that the fair use of a copyrighted work is not an infringement. Fair use has long been part of copyright case law and was introduced into the statute in 1976. Certain uses are favored in the statute: “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, and research.” But neither these nor any other uses are automatically considered to be

⁵¹ With regard to what qualifies as “such aggregate quantities as to substitute for a subscription to or purchase of such work,” Congress looked to guidelines formulated by the National Commission on New Technological Uses of Copyrighted Works (CONTU) in consultation with representatives of library associations, publishers, and authors. The guidelines indicate, for example, that six or more copies of an article or articles from a given periodical within five years of a particular request constitute “aggregate quantities as to substitute.” H.R. CONF. REP. NO. 94-1733, at 72-73 (1976). The CONTU guidelines are incorporated in the Conference Committee Report accompanying the 1976 Copyright Act. The Committee cautioned, however, that the guidelines were not “explicit rules” governing all cases, but merely guidance in the “most commonly encountered interlibrary photocopying situations.” It went on to observe that the guidelines “deal with an evolving situation that will undoubtedly require their continuous reevaluation and adjustment.” *Id.* at 71.

⁵² The House Report accompanying the 1976 Copyright Act provides a useful example of such a fair use. It observes that even though musical works are excluded from some of the specific privileges in section 108, fair use remains available with respect to such works: “In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work.” H.R. REP. NO. 94-1476, at 78 (1976).

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“fair.” The determination is fact-specific and involves consideration of at least four factors in each case:

1. The purpose and character of the use, including whether such use is of a commercial nature or for nonprofit educational purposes.
2. The nature of the copyrighted work.
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
4. The effect of the use upon the potential market for or value of the copyrighted work.

As noted above, section 108 was not intended to affect fair use. Certain preservation activities fall within the scope of fair use, regardless of whether they would be permitted by section 108. For example, the House Report accompanying the 1976 Copyright Act specifically mentions copying deteriorating prints of motion pictures produced before 1942 for archival preservation, an activity not addressed by section 108, as an example of fair use.⁵³ At the same time, Congress made clear that “section 108 authorizes certain photocopy practices that may not qualify as a fair use.”⁵⁴

b. Significance of Publication

Until the 1976 Copyright Act became effective, state law protected unpublished works, and federal law protected published works that met the statutory requirements. Once a work was published, it lost state law protection. If it was published with notice it was entitled to protection under federal law. If it was published without notice, it entered the public domain.⁵⁵

The 1976 Act created a unitary system of copyright, embracing unpublished works within the federal system and preempting state laws that provide rights equivalent to those provided by federal law in works that come within the subject matter of copyright.⁵⁶ The law continues to treat published and unpublished works differently in certain respects, however. As discussed above, the exceptions in section 108 that permit libraries and archives to copy works in their collections treat published and unpublished works differently, and the scope of fair use is generally narrower with respect to unpublished works.

Section 101 of the Copyright Act defines publication as follows:

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords

⁵³ *See id.* at 73.

⁵⁴ *Id.* at 74.

⁵⁵ *But see* 17 U.S.C. § 104A (2007) (regarding restoration of copyright in certain foreign works). To avoid the severe consequences of publication without notice (known as divestitive publication, because it resulted in loss of the copyright), courts developed the doctrine of limited publication. A limited publication occurs when the work is distributed to a select group of people for a limited purpose, without the right to reproduce or redistribute. Limited publication without notice does not result in divestiture. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 4.13[A] (4th ed. 2007).

⁵⁶ 17 U.S.C. § 301(a) (2007). State law protection for pre-1972 sound recordings is not preempted until February 15, 2067. 17 U.S.C. § 301(c) (2007).

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to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

Thus, a work is “published” only when it is distributed in copies.⁵⁷ Copyrightable works are routinely disseminated without the distribution of copies, for example, through live performance, nonsyndicated broadcast radio or television, or Internet display or streaming that does not permit downloading copies. When a work has been distributed *only* by these means, and not in material copies, it is not considered published. A work distributed online for which downloads or printouts of copies are enabled by the rights holder, for instance, is considered “published.”

c. Technological Protection Measures

Section 1201 of Title 17, enacted as part of the DMCA, prohibits anyone from circumventing a “technological measure that effectively controls access to a work.” There is no ban on circumventing a technological measure that protects a right of a copyright owner, such as reproduction or distribution, without controlling access to the work. Circumventing a copy control in and of itself, for example, is not prohibited.⁵⁸

Section 1201 also prohibits manufacturing, providing, or trafficking in devices or services primarily designed to circumvent either access controls or rights controls. There are a number of exceptions to these anti-circumvention provisions, but none of them apply specifically to library and archives access for preservation or replacement copying.⁵⁹

In addition to the statutory exemptions, section 1201 provides for a rulemaking proceeding to be conducted every three years by the Copyright Office on behalf of the Librarian of Congress. The purpose of the proceeding is to determine whether users of any particular class of copyrighted works are, or are likely in the ensuing three years to be, adversely affected by the prohibition against circumventing technological access controls in their ability to make noninfringing uses of those works. When the Librarian finds, upon a recommendation from the Copyright Office, that such adverse effects are present or are likely with respect to one or more particular classes of works, the DMCA exempts those classes of works from the prohibition against circumventing technological access controls for the next three years. Those

⁵⁷ See Section IV.A.2.b. (“Rethinking the Published/Unpublished Distinction”) for further discussion on the meaning of publication.

⁵⁸ If the circumventor goes on to make an infringing use of the protected work, he or she will be liable under copyright law. With current technologies, however, there is not always a clear line between access controls and rights controls. See, e.g., Memorandum from Marybeth Peters, Register of Copyrights, to James Billington, Librarian of Congress, 44-45 (Oct. 27, 2003) (setting forth the Register’s recommendations related to the rulemaking on exemptions to prohibition on circumvention of copyright protection systems for access control technologies), available at <http://www.copyright.gov/1201/docs/register-recommendation.pdf>.

⁵⁹ Subsection 1201(d) provides an exemption for nonprofit libraries, archives, and educational institutions for purposes of determining whether to purchase a work, but it is not applicable to preservation copying. There are also exemptions for law enforcement and other government activities, reverse engineering, encryption research, preventing access of minors to material on the internet, protection of personally identifying information, and security testing. 17 U.S.C. § 1201(e)-(j) (2007).

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exemptions remain in effect until the next rulemaking proceeding, at which time a new application must be filed demonstrating a continued or likely adverse impact if an exemption is to remain in effect.

The authority to create additional exemptions does not extend to section 1201's ban on manufacturing, providing, or trafficking in circumvention devices and services.

d. Remedies

Remedies for civil copyright infringement include monetary damages, temporary and permanent injunctions, and impoundment and destruction of infringing materials.⁶⁰ The court may award attorneys' fees and costs to the prevailing party in an infringement lawsuit, but a prevailing plaintiff may be awarded costs and fees only if the copyright on the work in the lawsuit was timely registered.⁶¹

Timely registration also entitles a plaintiff to opt for statutory damages rather than actual damages. Statutory damages range from \$750-\$30,000 per work (and up to \$150,000 for willful infringement). The court may reduce this amount to \$200 for an innocent infringer, and may not award statutory damages against certain individuals, including employees or agents of nonprofit libraries, archives or educational institutions who reproduced copyrighted materials in the scope of their employment believing it to be a fair use.⁶²

Finally, the Eleventh Amendment to the U.S. Constitution provides that "the Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by any Citizen of another State." The Supreme Court has held that Congress may not act pursuant to the Commerce Clause or the Patents and Copyright Clause to subject the states to suits for money damages. Accordingly, libraries and archives run by state universities and other state entities are immune from copyright damages.⁶³

e. Orphan Works

In 2005 the Copyright Office undertook an inquiry into the problem of copyrighted works the owners of which cannot be identified or located by potential users, referred to as "orphan works." The Office was concerned that the inability to locate copyright owners was discouraging beneficial uses of copyrighted works. Potential users were reluctant to make orphan works available to the public, or use them as the basis for new creative endeavors, because they were concerned that if the copyright owner later came forward they could incur substantial damages, or be forced to settle for an amount disproportionate to the value of the use in order to avoid an injunction.

⁶⁰ 17 U.S.C. §§ 502-504 (2007).

⁶¹ 17 U.S.C. §§ 505, 412 (2007).

⁶² 17 U.S.C. § 504(c).

⁶³ See Section III.E ("Sovereign Immunity").

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The Office issued its report in January 2006 and recommended that the Copyright Act be amended to limit the remedies available against users of orphan works who (1) demonstrate that they performed a reasonably diligent search to find the copyright owner without success, and (2) provide reasonable attribution to the author and copyright owner. The limitation on remedies the Office proposed was twofold. First, it would limit monetary relief to reasonable compensation for the use – completely eliminating monetary relief where the use is noncommercial and the user ceases the use upon notice. Second, it would limit the ability of the copyright owner to obtain injunctive relief, so that a user who relied on the work’s orphan status could continue to exploit a derivative work based on that orphan work. Orphan works legislation, based in part on the Copyright Office report, was introduced but not passed in the 109th Congress, and it is likely to be reintroduced in the future.

If orphan works legislation is enacted, it will provide some relief to libraries and archives, which then will be able to copy and disseminate orphan works with a greatly diminished fear of liability for copyright damages. It would not respond to all of their concerns, however, because not all of the works that libraries and archives want to copy for preservation and to make available to remote users are orphan works. At the same time, orphan works issues arise broadly across many different uses in addition to those of libraries and archives, and so the Study Group agreed that orphan works legislation, and not the Section 108 Study Group, would be the appropriate place to address them.

f. Exceptions Specific to the Library of Congress⁶⁴

The copyright owner of a work published in the United States is required to deposit two copies of the “best edition” in the Copyright Office “for the use or disposition of the Library of Congress.”⁶⁵ Mandatory deposit is the principal means by which the Library of Congress builds its collections. This provision provides the Library with an opportunity to add the deposit copies to its collections or transfer them to another library; it does not require the Library to acquire or preserve them.⁶⁶

As discussed in Section II.C.5.b. (“Significance of Publication”), under the definition of publication in the Copyright Act, a work is not published unless it is distributed in copies. Works that are widely disseminated through performance, for example on the radio or television, but not distributed in copies, are considered unpublished and therefore not subject to the general mandatory deposit requirement. To allow the Library to acquire nonsyndicated radio and television programs for its collections without imposing undue hardship on copyright owners, the law permits

⁶⁴ The Study Group agreed that exceptions specific to the Library of Congress were outside the scope of its work and thus has no findings or recommendations relevant to those provisions. This section is provided for background purposes only.

⁶⁵ 17 U.S.C. § 407(a)-(b) (2007).

⁶⁶ 17 U.S.C. § 704 (2007). Deposits not selected by the Library are retained by the Copyright Office “for the longest period considered practical and desirable by the Register of Copyrights and the Librarian of Congress.” After that period they may, in their joint discretion, order the disposal or other disposition of copies of published works. 17 U.S.C. § 704(d). While the Library collects widely, what it “particularly preserves tends to be its special collections – those unique maps, manuscripts, photographs, films, radio broadcasts, and materials in other formats held only by the Library of Congress.” Deanna Marcum & Amy Friedlander, *Keepers of the Crumbling Culture*, D-LIB MAG., May 2003, available at <http://www.dlib.org/dlib/may03/friedlander/-05friedlander.html>.

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the Library to tape “transmission programs” and make copies for archival purposes. It also allows the Register of Copyrights to make a demand for deposit of a specific transmission program (which the broadcaster can satisfy by gift, a loan to allow the Library to copy it, or by sale at cost), but does not permit blanket demands.⁶⁷

⁶⁷ 17 U.S.C. § 407(e) (2007). Section 101 defines a transmission program as “a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.” In addition, the American Television and Radio Archives Act authorizes the Librarian of Congress to reproduce and distribute a transmission program of “a regularly scheduled newscast or on-the-spot coverage of news events” for preservation, security, or research. 2 U.S.C. § 170(b) (2007).

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III. OVERARCHING THEMES

A. Shared Values and Tensions

The Study Group members all share many of the same values, most notably the belief in the importance of promoting knowledge by encouraging creative expression and its dissemination. Publishers, authors, librarians, archivists, and scholars all recognize that freely available information is a crucial currency of democracy. U.S. copyright law promotes expression and therefore knowledge and learning by providing incentives for authors to create and publishers to invest in and disseminate new works of authorship. Libraries and archives also play an essential role in promoting this public good by collecting, preserving, and providing the public with increased access to the cultural and historical materials that form the basis of common knowledge and understanding – materials that inspire and enable new creative works.

Authors and other rights holders on the one hand, and libraries and archives on the other, are both critical to advancing the creation and distribution of works of authorship, and their traditional roles have been largely complementary. They find common ground on many issues and enjoy mutually respectful and productive commercial relationships.⁶⁸ Although copyright has long been the source of debate among them, fundamentally each has a crucial role in making accessible the world's literature, art, music, and knowledge. The tension evident in many of the discussions described in this Report derives from the different emphases that rights holders, and libraries and archives, may place on different parts of this equation.

Authors and other rights holders rely on the incentives provided by copyright, which allows them to control and benefit from the public dissemination of their works and in turn promotes the continued creation and dissemination of new works of authorship. The primary focus of libraries and archives is the continued availability, as opposed to the creation, of works for their users, which they typically provide by acquiring, housing, providing access to, and preserving over the long term. Libraries and archives seek freedom under the law to employ digital technologies as important tools in advancing their core missions. While also interested in wide dissemination, publishers need to ensure that authors are compensated and that they can continue to invest in new works of authorship. They are concerned that the absence of adequate, defined limitations on the use of digital technologies will seriously diminish the copyright incentives by contributing to the widespread unauthorized distribution of copyrightable works. Libraries and archives generally do not question the need for appropriate limits, but there is a range of perspectives on what exactly those limits should be.

The Study Group recognizes that this Report may sometimes read like a competition between two sides, leading the reader to wonder where his or her interests are

⁶⁸ Libraries are a major purchaser of copyrighted works. See, e.g., Francine Fialkoff, *The Library Market*, LIBRARY JOURNAL, July 15, 2007, available at <http://www.libraryjournal.com/article/CA6457209.html>.

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represented. The answer is that the interests of the American people are best served by a careful balance among a number of varied, intersecting interests. For copyright law to work optimally, the core values of preservation and public access and the incentives to create and publish new works should reinforce one another, not work at cross-purposes. The difficult work of the Study Group was to find a way to formulate library and archives copyright exceptions in a way that respects all of these values and best represents the interests of the nation as a whole.

B. The Impact of New Technologies

Digital technologies, including the Internet and similar online media, have changed the way many works are distributed, perceived, collected, and preserved. This has major implications for copyright law, as described in Section I.C (“The Digital Challenge: The Effect of New Technologies on the Balance of Section 108”). Several themes relating to the effects of new technologies ran throughout the Study Group’s discussions. They are described in other parts of the Report and include: (1) opportunities for new revenue sources derived from new distribution methods, (2) increased risks of lost revenue and control from unauthorized copying and distribution, (3) essential changes in the operations of libraries and archives, (4) changing expectations of users and the uses made possible by new technologies, and (5) creation of a growing body of works that are publicly disseminated, but not in physical media, and thus do not fit neatly into section 108’s binary view of copyrighted works as either “published” or “unpublished.”⁶⁹

In addition, the use of digital technologies has served to blur somewhat the traditional roles of libraries and archives and rights holders. Libraries and archives can become “publishers” in the sense that they have reproduction and distribution capabilities far beyond those provided by older, analog technologies. At the same time publishers, with their newly acquired abilities to create, manage, and provide access to databases of information, can now provide some of the functions that in the past were associated primarily with libraries and archives.

C. The Rule of Law

Section 108 is out of date and in many respects unworkable in the digital environment. This was the Copyright Office’s and NDIIPP’s primary impetus for convening the Study Group – to start the process of amending the law.

In contrast to the flexibility of section 107’s fair use provisions, which require a careful balancing of factors in each specific factual situation, section 108 was intended to provide straightforward guidance on permissible uses. In many respects it no longer serves this function effectively. Laws so outdated as to make compliance virtually impossible invite varying interpretations, and what was once a carefully

⁶⁹ Increased risks to rights holders, changes in the operation of libraries and archives, and changes in user expectations driven by new technologies are addressed throughout this Report. Issues regarding works that are widely disseminated yet technically unpublished are discussed in Section IV.A.2.b (“Rethinking the Published/Unpublished Distinction”).

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crafted compromise becomes ambiguous. The ambiguity in part reflects efforts to apply laws written in one technological era to circumstances never envisioned when those laws were adopted. Some users may welcome this ambiguity as providing flexibility, but laws that are significantly out of step with practice and inconsistently interpreted may encourage those who need to rely on them to dismiss them as irrelevant and out of date. This dynamic has the potential to undermine respect for the law.⁷⁰

To ensure that section 108 is workable in the digital environment, as well as to retain the credibility of the law, its provisions should be amended to address current technologies in a manner that is fair to rights holders and the users of libraries and archives alike.

D. Distinguishing Between Types of Works: Commercialization as a Factor?

It was apparent in many of the Study Group’s discussions that the concerns raised by rights holders and libraries and archives often related to different sorts of works. Typically, although certainly not exclusively, rights holders’ concerns related to works subject to, or likely to be subject to, commercial exploitation. Libraries’ and archives’ principal concerns in these discussions often related to the preservation of and access to works not readily available in the marketplace. With scarce resources, librarians and archivists tend not to invest in preserving “commercial” works available on the market.

The Study Group considered whether a bright line could be drawn in the statute to allow libraries and archives to enjoy expanded exceptions only for the preservation of works not subject to commercial exploitation (such as older, out-of-print films or books, and certain publicly available online content), without competing with the markets for more “commercial” content.⁷¹ It proved difficult to draw a bright line between what the Study Group members understood as “commercial” as distinguished from “noncommercial” works, and the group reached no agreement on whether or how to draw such a line. Among other concerns, it was noted that using commercialization as a benchmark ignores rerelease and “long tail”⁷² markets, particularly in an environment in which new digital distribution channels and platforms are driving increased demand for content. Moreover, such a benchmark ignores the various noneconomic aspects of copyright, such as the author’s right to maintain

⁷⁰ “Inconsistency in the laws themselves or in their application can erode the rule of law; inconsistency can call a legal system’s legitimacy into question.” RONALD A. CASS, *THE RULE OF LAW IN AMERICA* 120 (2001), citing LON FULLER, *THE MORALITY OF LAW* 90-93, 210-11 (Yale Univ. Press, rev. ed. 1969).

⁷¹ A variety of proposals were discussed, including expanded privileges for works that cannot be obtained on the market at a reasonable price (akin to subsections 108(c) and (e)) or, per the suggestion of a Roundtable participant, for works that had not been significantly exploited for the previous 20 years. See Comment in Response to First Notice, David Nimmer 3-12 (Apr. 4, 2006), <http://www.loc.gov/section108/docs/Nimmer.pdf>.

⁷² “Long tail” is a phrase describing how new distribution models can make niche products economically viable. See, e.g. Chris Anderson, *The Long Tail*, *Wired*, Oct. 2004, available at <http://www.wired.com/wired/archive/12.10/tail.html>.

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control over whether, how, when, and in what format a work is made available to the public.

E. Sovereign Immunity

Throughout the Study Group’s discussions, concerns about potential harm to rights holders’ interests were exacerbated by the limited legal accountability for copyright violations by libraries and archives operated by states or their instrumentalities. The Eleventh Amendment to the U.S. Constitution provides that “the Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by any Citizen of another State.” Thus, Congress’s authority to provide for lawsuits against states or their instrumentalities is limited. The Supreme Court has held that Congress may not subject the states to suits for money damages under the Commerce Clause or the Patents and Copyrights Clause.⁷³ State sovereign immunity extends to universities and libraries run by states or their instrumentalities,⁷⁴ which are thus immune from copyright damages.⁷⁵ This makes it far less likely that a copyright owner will bring suit against such entities.

In 1976, when section 108 first became part of the law, prior to the Supreme Court’s holding in *Seminole Tribe v. Florida*, state universities and libraries were understood to be subject to damages for copyright infringement, but in this respect the landscape has changed. The Study Group believes that it would have been able to reach greater consensus on certain proposed changes to section 108 if not for the issue of sovereign immunity. Many of the largest U.S. libraries are state-operated, and rights holders are concerned they will not be able to obtain effective redress should such libraries exceed the bounds of section 108 or fair use. Because litigation thus may not be a realistic option in these cases, some group members felt that rights holders need more definitive protections in the statute itself. If the sovereign immunity problem were solved, it might facilitate more liberal exceptions in some areas.

⁷³ *Seminole Tribe v. Florida*, 517 U.S. 44 (1996); *see also* *College Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (states immune to money damage suits for trademark infringement); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627 (1999) (states immune to money damage suits for patent infringement). The Fifth Circuit, following these cases, held that states are consequently immune from paying damages in copyright infringement suits. *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000).

⁷⁴ *Chavez*, 204 F.3d at 603 (University of Houston is a state entity); *Xechem Int’l, Inc. v. Univ. of Tex. M.D. Anderson Cancer Ctr.*, 2003 U.S. Dist. LEXIS 26247 (S.D. Tex. Mar. 19, 2003) (concerning state hospitals), *aff’d*, 382 F.3d 1324 (Fed. Cir. 2004).

⁷⁵ It is unclear, however, whether the staff of state universities or other state entities could be held personally liable.

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IV. ISSUE DISCUSSIONS

A. Recommendations for Legislative Change

1. Eligibility

a. Museum Eligibility Under Section 108

i. Issue

Should museums be eligible for the section 108 exceptions?

ii. Recommendation

Museums should be eligible under section 108.

iii. Current Law Context

Section 108 currently applies to libraries and archives and their employees acting within the scope of their employment. Museums currently have the benefit of the section 108 exceptions only to the extent that they house, or are part of, a library or archives that meets the threshold requirements of subsection 108(a).

iv. Discussion of Recommendation

(a) *Background: Why museums were not originally included in section 108*

As noted in Section II.B.2 (“Brief Background and History of Section 108”), museums were included in the 1935 Gentlemen’s Agreement, but not in section 108 of the 1976 Copyright Revision Act. While there is no definitive record as to why museums were not considered for section 108, it is clear that museums were not active in many of the debates surrounding the legislation. For a number of reasons, copyright was not a major concern for most museums at that time.

In the decades leading up to the 1976 Act, American museums were primarily concerned with art and natural history – collections of paintings, antiquities, sculpture and decorative arts, fossils, meteorites, and other unique objects. Many of these objects were not protected by copyright because they were not protectable subject matter or were already in the public domain. In addition, some artworks entered the public domain due to publication without notice. Under the Copyright Act of 1909, if a work was “published” through the sale of copies that lacked a copyright notice

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(for example, in photographs, postcards, or posters) the work lost its protected status under copyright law.⁷⁶

Furthermore, the reproduction technology up through the 1960s and 1970s was far more rudimentary than it is now, particularly for non-text-based materials, and museums rarely engaged in reproduction themselves. When museums were asked to make copies of the objects in their collections for others, particularly color copies, they often directed the inquirer to photographs and drawings in existing print materials, rather than provide copies.

(b) Why add museums now?

The Study Group recommends that museums be covered under section 108, subject to at least the same subsection 108(a) conditions for eligibility as libraries and archives. Museums now are more likely to be in the position of making copies of materials in their collections for preservation, replacement, private study, and research and face more and increasingly complex copyright issues. Improvements in reproduction technology have enabled museums to copy objects in their collections more effectively, and some of the works now entering museum collections – such as digital artworks, databases, and research materials – are readily reproducible.

Many museums now provide a greater amount of information related to the non-copyrightable objects they collect, preserve, and display, such as writings, drawings, and other documentation describing the conditions under which the material was obtained, cataloged, and analyzed (for example, in field and laboratory notes). This information generally exists in copyrightable documents, paper or electronic form, and is often critical to scholarly uses of the collections.

Museums serve the needs of scholars unable to visit a collection in person, but whose research sometimes requires reproductions of unique works or access to views of the artifacts and copies of the related documentation. The technology to provide reproductions of non-text-based materials has improved dramatically, and the cost of making such copies has decreased, so museums are far more likely to provide copies for research use than they did 30 years ago.

Museums, libraries, and archives are not the same, of course, but they share fundamental missions: collection and preservation of, and access to, material of cultural and scientific importance for the purpose of furthering human understanding. Over time and as technology improves, the differences among these institutional attributes will be increasingly ones of degree. Libraries will continue to emphasize collection and access to information, archives will continue to focus on preservation of entire collections, and museums will continue to concentrate on their core mission of collection and display of unique objects. In the digital world, however, these functions likely will continue to converge, and there is no clear reason to differentiate among

⁷⁶ In some circumstances even the sale of the original without a copyright notice was held to divest copyright. *See* *Atl. Monthly Co. v. Post Publ'g Co.*, 27 F.2d 556 (D. Mass. 1928). Under the Copyright Act of 1976, copyright owners could in some situations avoid loss of copyright even where a work was published without notice, and in 1988 the Berne Convention Implementation Act repealed the notice requirement. In 1998 the Uruguay Round Agreements Act restored copyright in certain foreign works that entered the public domain due to failure to publish with a copyright notice (or for other reasons). 17 U.S.C. §§ 104A(a), 104A(h)(6) (2007).

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these types of collecting institutions in their ability to collect, preserve, display, and provide access to their collections.⁷⁷

The Study Group agreed that museums should be eligible under section 108, but there was not agreement on the inclusion of for-profit museums. Museums in any event would be subject to the criteria in the current subsection 108(a) and to the recommended additional functional requirements discussed below.

⁷⁷ In fact, many other countries afford museums copyright exceptions comparable to those of libraries and archives. *See, e.g.,* Council Directive 2001/29/EC, art.5(c), 2001 O.J. (L 167) 10, 16 (EC).

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b. Additional Functional Requirements: Subsection 108(a)

i. Issue

Should the conditions for section 108 eligibility specified in subsection 108(a) be revised or supplemented?

ii. Recommendations

1. **The current requirements for section 108 eligibility as set forth in subsection 108(a) should be retained.**
2. **Libraries and archives should be required to meet additional eligibility criteria. These new eligibility criteria include possessing a public service mission, employing trained library or archives staff, providing professional services normally associated with libraries and archives, and possessing a collection comprising lawfully acquired and/or licensed materials.**

iii. Current Law Context

Section 108 applies to libraries, archives, and their employees acting within the scope of their employment. Neither the term “library” nor “archives” is defined in the statute. It is clear, however, that not every collection of objects and materials that calls itself a library or archives is eligible for the exception.⁷⁸ Subsection 108(a) sets forth several very general criteria for eligibility:

- Subsection 108(a)(1) requires that any reproduction or distribution made under section 108 be made “without any purpose of direct or indirect commercial advantage.” According to the House Report accompanying the 1976 Act, libraries or archives in for-profit organizations (such as law firms or industrial research centers) are not automatically precluded from taking advantage of section 108. Nonetheless, commercial entities rarely qualify under this standard because it is difficult to separate their activities from some commercially advantageous purpose.⁷⁹
- Subsection 108(a)(2) requires that the collections of a library or archives must be “(i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.” This provision comes closest to describing the type of entities intended to be covered. It is designed to exclude truly private libraries and archives, and in the analog world has served as an effective means of doing so. Personal book, music, or photo collections do not qualify under section 108 unless they are open to the public, or at least to researchers. Corporate libraries and archives are eligible only so long as they are willing to make their collections open to other researchers in

⁷⁸ For judicial interpretations of what a library or archives is, see *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1494 n.6 (11th Cir. 1984) (noting that a commercial organization that videotapes television news programs and sells the tapes is not an “archive” within the meaning of section 108); *United States v. Moran*, 757 F. Supp. 1046, 1051 (D. Neb. 1991) (indicating that a commercial video rental store does not operate as a library or archives, and thus cannot make unauthorized “replacement” copies of copyrighted works under section 108).

⁷⁹ See H.R. REP. NO. 94-1476, at 74 (1976). The Senate Report accompanying the 1976 Act states that subsection 108(a)(1) “is intended to preclude a library or archives in a profit-making organization from providing photocopies of copyrighted materials to employees engaged in furtherance of the organization’s commercial enterprise.” S. REP. NO. 94-473, at 67 (1975).

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the field (including, for example, employees of a competitor).⁸⁰ In the online world, however, this condition does not effectively distinguish private collections from those that serve the public. Without any further qualification, private collections that are made available to the public through websites might be considered to qualify as “open to the public.”

- Subsection 108(a)(3) requires that a copyright notice (or, if the original does not have a copyright notice, a legend stating that the work may be protected by copyright) must be included on any copy reproduced under section 108.

iv. Discussion of Recommendations

(a) Background

When section 108 was adopted in 1976, there was a shared understanding that libraries and archives were trusted, stable institutions with missions to collect, preserve, and make available materials and resources of cultural or scientific significance. As a result, it was not necessary to explain or define which types of libraries or archives were intended to be covered, other than to distinguish between those that provide public access and those that do not. The passage of time, the development of information technologies, and the entry of new organizations into the roles traditionally served by libraries and archives have diluted this shared understanding.

Widespread use of digital technologies to save and aggregate documents has encouraged the use of the terms “library” and “archives” in a broad sense to include various collections of information in digital form. The term “archives” is sometimes used to refer generally to saved information (an “e-mail archive,” for example). Entities also may refer to themselves as archives simply because they have amassed a database of information, regardless of whether they have any professionally trained archives staff or the commitment and ability to ensure the cultural and historical record by providing long-term retention of and access to the archived materials. The term “library” is colloquially used to refer to any set of collected information, regardless of whether a professional librarian supervises the acquisition and organization of the materials or assists in making them accessible to users. In these contexts, neither of the terms “library” or “archives” necessarily connotes a trusted institution acting for the public good. The evolving usage of these terms has the potential to obscure the types of entities that are covered by section 108.

The Study Group discussed several ways in which the eligibility requirements might be amended so that not every entity that calls itself a library or archives and is open to the public (including via online technologies) is eligible. The principal ideas, discussed below, include (1) adding definitions or functional requirements to subsection 108(a) and/or (2) adding a requirement of nonprofit or government status. The only additions on which the Study Group reached consensus were the new functional requirements.

⁸⁰ 1983 REGISTER’S REPORT, *supra* note 39, at 78 (“[A] library whose collections are available only “through interlibrary loan of materials” should not fairly be said to have met the standards set out in § 108(a)(2)”).

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(b) Should definitions or additional functional requirements be added to subsection 108(a)?

In considering whether definitions should be added to qualify entities as eligible libraries or archives under section 108, the Study Group consulted definitions for these terms promulgated by the relevant professional societies.⁸¹ In perusing these definitions and library and archives mission statements, the group realized that it would be difficult to create one-size-fits-all definitions. The group did, however, identify a shared set of public service-oriented functions performed by the types of libraries and archives that it agreed should be covered by section 108 and concluded that such functional requirements could provide a useful means of determining eligibility.

The Study Group thus recommends that libraries and archives be required to meet additional functional requirements to be eligible for the section 108 exceptions. The functional eligibility criteria would consist of attributes of traditional or other professional libraries and archives and would include the following:

- A public service mission (this could include a for-profit library or archives as long as its mission is a public service one);
- Provision of library and archives services including, as appropriate, acquisition, selection, organization, description, curation, reference and retrieval, preservation, communication, and lending;
- Professional library or archives staff, such as librarians, archivists, information scientists, museum administrators, preservationists, and curators; and
- A collection comprising lawfully acquired and/or licensed materials.

(c) Should functional requirements be included in the statute or in legislative history?

The Study Group discussed, but did not reach agreement on, two alternative approaches to implementing functional criteria: including them in the statute itself or including a reference to them in the statute and a more detailed description in the legislative history. Including them in the statute as formal criteria for eligibility would have the advantage of providing greater clarity and could lead to greater acceptance of the expanded exceptions by rights holders and members of the creative community. Since courts are sometimes reluctant to consider legislative history,

⁸¹ See, e.g., Am. Library Ass'n, Core Values of Librarianship (2004), available at <http://www.ala.org/ala/oif/statementspols/corevaluesstatement/corevalues.htm> (naming freedom of access to the public, confidentiality, social responsibility, and service to the public good as core traits that should be upheld by public libraries); Richard Pearce-Moses, Soc'y of Am. Archivists, A Glossary of Archival and Records Terminology (2005), http://www.archivists.org/glossary/term_details.asp?DefinitionKey=156 (An archives consists of "materials created or received by a person, family, or organization, public or private, in the conduct of their affairs and preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of their creator, especially those materials maintained using the principles of provenance, original order, and collective control; permanent records"); AM. ASS'N OF MUSEUMS, CHARACTERISTICS OF AN ACCREDITABLE MUSEUM (2004), available at <http://www.aam-us.org/museumresources/accred/standards.cfm> (emphasizing the traits of public trust and accountability, a clear mission, a secure administrative structure, collections stewardship, education and interpretation, and financial stability); INT'L COUNCIL OF MUSEUMS, ICOM STATUTES, art. 2 (2001), available at <http://icom.museum/statutes.html#2> (defining a museum as, in part, "a non-profit making, permanent institution in the service of society and of its development, and open to the public, which acquires, conserves, researches, communicates and exhibits, for purposes of study, education and enjoyment, material evidence of people and their environment").

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relying primarily on legislative history to introduce new criteria for eligibility might make them less effective than if they were included in the statute.

Including a simple reference to functional requirements in the statute with a more complete description in the legislative history also has advantages, however. This approach would provide flexibility over time to allow for changes in professional norms and technology. If the wording of the statute is too specific, it is less adaptable to changing circumstances and technological environments. As an additional safeguard, the legislative history could recognize mechanisms for formally identifying libraries and archives, such as charters issued by state agencies and accreditation.⁸²

(d) Should a nonprofit requirement be added to subsection 108(a)?

The Study Group discussed but did not reach agreement on a proposal to limit section 108 eligibility solely to nonprofit and government libraries and archives, in order to ensure that the exceptions are used only by entities whose sole legal mission is to work for the public benefit rather than to seek profits for the benefit of their owners. For some members, this was a particular concern in the case of museums.⁸³

Under this proposal only libraries and archives recognized as nonprofits under sections 501(c)(3) or 509(a) of the U.S. Internal Revenue Code, as well as government entities, would be eligible for the section 108 exceptions. Such a requirement would eliminate libraries and archives housed in commercial ventures, such as for-profit hospitals and pharmaceutical companies.

Arguments for adding a nonprofit/government requirement

Under state law and the United States Internal Revenue Code, nonprofit, tax-exempt entities are required to declare their commitment to a particular mission.⁸⁴ This mission must fall within the scope of certain activities that promote the public good, such as charitable, scientific, literary, or educational purposes. A nonprofit or government organization's public-service mission is indicative of the type of commitment to public service that the group believes section 108 is intended to support, in contrast to the commercial goals and obligations of for-profit organizations.⁸⁵

Allowing for-profit entities to take advantage of section 108, rather than requiring them to obtain permission for copying, may amount to a subsidy from the rights holders to the owners of those for-profit entities. Eliminating for-profit libraries and archives could promote trust in section 108-eligible institutions and enhance the possibility of rights holder support for expanding the exceptions.

⁸² See, e.g., Library of California Act, CAL. EDUC. CODE § 18830(a) (2006).

⁸³ See Section IV.A.1.a ("Museum Eligibility Under Section 108").

⁸⁴ See generally INTERNAL REVENUE SERVICE, PUB. 557: TAX-EXEMPT STATUS FOR YOUR ORGANIZATION (rev. 2005).

⁸⁵ It was also noted that the Institute of Museum and Library Services, the primary source of federal support for libraries and museums, requires that grant applicants be either a unit of state or local government or a nonprofit organization. Inst. of Museum & Library Serv's, Grant Applications – Eligibility Criteria – Libraries, http://www.ims.gov/applicants/libraries_shtm (last visited Mar. 14, 2008).

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Arguments against adding a nonprofit/government requirement

Certain libraries and archives that belong to for-profit entities, such as for-profit hospitals or corporate libraries or archives, support research and education in ways consistent with the original intent of section 108. Although technically for-profit, these entities also serve a public function – for example, by providing timely access to specific information and materials on a noncommercial basis. They also play an important role in interlibrary loan programs as active lenders. For-profit schools, universities, and other educational organizations provide the same educational benefits as nonprofit entities and should not be disadvantaged by being denied the benefits of section 108.⁸⁶ In 1976 Congress chose not to limit the applicability of section 108 to nonprofit and government libraries and archives. Those who argued against adding a nonprofit/government requirement asserted that there is no compelling reason to change this policy now.

⁸⁶ See, e.g., Comment in Response to First Notice, Carla J. Funk, Medical Library Association 4 (Apr. 27, 2006) (noting that a for-profit hospital's medical library may also provide health care information to consumers in the community), http://www.loc.gov/section108/docs/Funk_MLA.pdf. See also Comment in Response to First Notice, Gordon Theil, Music Library Association 1-2 (Apr. 17, 2006) (noting that corporate archives contain such valuable materials as correspondence relating to the collaborative process, production materials, and original manuscripts), http://www.loc.gov/section108/docs/Theil_MLA.pdf.

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c. Outsourcing of Section 108 Activities

i. Issue

Should libraries and archives be allowed to authorize outside contractors to perform on their behalf (“outsource”) activities permitted under section 108?

ii. Recommendations

1. Section 108 should be amended to allow a library or archives to authorize outside contractors to perform at least some activities permitted under section 108 on its behalf, provided certain conditions are met, such as:

- a. The contractor is acting solely as the provider of a service for which compensation is made by the library or archives, and not for any other direct or indirect commercial benefit.**
- b. The contractor is contractually prohibited from retaining copies other than as necessary to perform the contracted-for service.**
- c. The agreement between the library or archives and the contractor preserves a meaningful ability on the part of the rights holder to obtain redress from the contractor for infringement by the contractor.**

iii. Current Law Context

Section 108 does not expressly permit libraries and archives to authorize others to perform any of the section 108 activities. Subsection 108(a) states that “[I]t is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work.” By including this language, Congress clearly protected library and archives employees from liability, but also implied that only library and archives employees, not independent contractors, could take advantage of section 108.⁸⁷ There are other parts of the copyright law in which an eligible entity is expressly permitted to “authorize” others to perform the specific activity.⁸⁸ And in certain other statutes, where Congress intended a benefit or duty to extend to contractors, it has so stated.⁸⁹ Such intent is not manifest in section 108.

⁸⁷ Furthermore, the House Report accompanying the 1976 Copyright Act states, “[I]t would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.” H.R. REP. NO. 94-1476, at 74 (1976). The report makes this point in connection with the concept of direct or indirect commercial advantage, but the passage does illuminate original congressional intent regarding whether a library or archives may authorize others to perform section 108 activities.

⁸⁸ Under the work-for-hire doctrine the copyright in a work prepared by an employee within the scope of his employment vests in the employer. 17 U.S.C. § 101 (2007). Copyright may also vest under this doctrine in a contracting party that specially orders or commissions the work; the work must meet certain eligibility requirements, and the contracting party as well as the author must expressly agree to it in a written contract that both have signed. *Id.* Similarly, section 117 of the Copyright Act allows the owner of a work of a computer program to authorize others to make a lawful copy for archival purposes.

⁸⁹ *See, e.g.* 50 U.S.C. § 438 (2007) (defining “employee” of the U.S. government as including government contractors for purposes of access to classified information).

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iv. Discussion of Recommendations

(a) Background

Members of the Study Group, Commenters, and NDIIPP partners have all noted that libraries and archives are increasingly employing contractors to perform section 108 activities on their behalf. In the early days of photographic reproduction, libraries outsourced copying for users to reproduction shops. Similarly, libraries that have used microfilm for preservation seldom have performed the microfilming in-house. Currently, the technical requirements for digitization and for certain types of analog copying mean that many libraries and archives must, as a practical matter, use contractor assistance to make section 108-permitted copies in a number of different circumstances, particularly for preservation and replacement copying.

While some organizations eligible for section 108 may have the skills and resources within their organization to perform the authorized activities with respect to digital materials, many do not. Nor is it efficient or practicable for every organization eligible under section 108 to invest in the infrastructure, staffing, and training to perform these activities on an independent basis. Contractors can reduce the costs of performing section 108 activities, to the benefit of the public.

Although outsourcing of certain activities has become common among libraries and archives, amending section 108 expressly to permit it raises concerns in the digital environment. Outsourcing may require providing digital copies of copyrighted works, sometimes including entire databases, to commercial entities that are unaccountable to rights holders. Members of the Study Group are concerned about accountability and about ensuring, to the extent possible, that outsourcing section 108-permitted activities does not create undue risks of infringement, such as the distribution by contractors or their employees of unauthorized digital copies of a work. Moreover, there may be no meaningful way for rights holders to seek redress for infringement from the contractor if the contractor is not subject to suit in the United States. The ability of state-operated libraries and archives to claim sovereign immunity, as discussed in Section III.E (“Sovereign Immunity”), was of particular concern to some members in this context.

(b) Permit outsourcing

The Study Group recommends that section 108 be amended to permit a library or archives to authorize outside contractors to perform at least some activities allowed under section 108 on its behalf, provided certain conditions are met.

Clarifying whether and under which circumstances libraries and archives may outsource activities permitted by section 108 and still qualify for the section 108 exceptions will benefit all interested parties. The Study Group discussed a number of possible conditions, many of which are conditions that the library or archives would be obliged to pass through and impose on the contractor through an enforceable contract, and recommends the following:

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(1) Recommended conditions

No ongoing benefits to contractors

To balance the risks of outsourcing against the benefits, the Study Group recommends that contractors be contractually prohibited from conducting any section 108 activities on their own behalf or for their own benefit, other than for direct compensation for services. Activities conducted in whole or in part for a business-related purpose of the contractor or where the contractor retains copies for its own purposes are not currently covered under section 108 and should not be covered by any new provision permitting libraries and archives to authorize others to perform the section 108-excepted activities.⁹⁰

No retention of copies

To address concerns that contractors maintain adequate security to prevent copies from being disseminated without authorization, the Study Group recommends that contractors be contractually prohibited from retaining copies, unless the retention of those copies is essential to the outsourced service (for example, if the vendor is providing storage services), or from using such copies for any other purpose.

Ability of rights holder to obtain redress for infringement

The Study Group recommends that a written agreement between the library or archives and the contractor preserve a meaningful ability on the part of the rights holder to obtain redress from the contractor for infringement by the contractor. This is especially important in the case of foreign contractors that have no assets in the United States or that infringe U.S. works abroad. The members did not agree on the specific means by which this should be accomplished, however. Several proposals are described below.

(2) Other possible conditions

Redress for contractor infringement

To address concerns about the potential inability to seek redress from contractors the group looked at several alternatives:

- The library or archives and the contractor should be made jointly and severally liable for any infringing activities by the contractor or through its negligence (recognizing, however, that sovereign immunity might prevent holding a state-operated entity liable).
- The contractor should be contractually required to submit to U.S. jurisdiction and have assets in the United States, or be bonded and insured in this country. The contractor should agree to nationwide personal jurisdiction. A rights holder should be able to sue in its home jurisdiction and not be required to “chase” a contractor.

⁹⁰ The Google Books Library Project, in which Google scans books from a partner library’s collections and then retains copies for its own independent business purposes, is an example of the type of activities conducted by a contractor for its own purposes that would not be covered under this recommendation.

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- The contractor should agree to injunctive relief without bonding and other legal requirements and to a provision that rights holders are third party beneficiaries.

Sovereign immunity

State-operated entities performing section 108 activities through the use of contractors should be required to waive or agree not to invoke sovereign immunity, if it is legally possible for the state-operated entity to do so.

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2. Preservation and Replacement Exceptions

a. Background: Digital Preservation and Copyright

The specific characteristics of digital materials – described in Section I.C. (“The Digital Challenge: The Effect of New Technologies on the Balance of Section 108”) – affect the way they are preserved and how their preservation is treated under copyright law.⁹¹ While the primary focus of this Report is the impact of digital technologies, the issue discussions that follow this Section propose revisions applicable to both analog and digital works. The Study Group recognizes that analog copying remains an essential part of library and archives preservation practices and that preservation copying in some cases may be a hybrid of analog and digital approaches. For instance, material might be scanned using digital technology as an interim step in creating an analog preservation copy.

i. The Role of Libraries and Archives in Digital Preservation

Preservation promotes copyright’s fundamental goal of fostering knowledge and understanding by ensuring the continued availability of creative works and a rich and enduring intellectual legacy upon which new works of authorship can be built.

Section 108 recognizes the important role libraries and archives historically have played in preserving and providing access to the cultural memory. They have developed the expertise to decide what to collect, how to preserve what is collected, and how to provide access to preserved materials. As a result, libraries and archives have been entrusted with certain legal privileges, including the section 108 exceptions, which assist them in exercising these responsibilities.

The current section 108 exceptions relevant to preservation – principally subsections 108(b), (c), and (h) – were developed with analog materials in mind, before digital technologies became commonly available. Digital works have characteristics fundamentally different from analog works, however, and the section 108 provisions do not adequately address the preservation of digital materials or the ways in which digital technology can facilitate the preservation of analog works.

Today, many important works of authorship—from scholarly monographs to popular songs to scientific data sets—are being created and disseminated in digital form. In addition, because of the concern about preservation of paper-based sources and the preference of users for electronic information, many libraries and archives engaged in preservation work now scan analog works to create and preserve digital copies, rather than use, for instance, microfilm as they may have in the past. Digital technology is also used to make replacement copies of works that have deteriorated

⁹¹ This Report uses the term “preservation” to mean the managed activities, including conservation, reformatting, replication, and disaster prevention, necessary to ensure continued access for as long as necessary to materials found in libraries and archives. Digital preservation is intended to ensure the long-term viability, renderability, and understandability of digital content.

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or are otherwise unreadable. Digital copies are easier and faster to produce than analog copies and can be made available over modern networks.

Libraries and archives must be able to effectively manage and preserve these digital materials just as they do similar works in analog form, to ensure that these works will survive to serve as the raw material from which future historians will reconstruct the story of our unique and changing times.

ii. How Preserving Digital Works Differs from Preserving Analog Works

The relative ease and low cost of making and storing digital copies in some ways makes them easier to preserve. But digital materials present distinct challenges for long-term preservation. These challenges include technical obsolescence of hardware and software; sudden and unseen degradation, particularly with infrequently used items; and the ephemerality of many digital works, particularly those not disseminated in physical copies. The cumulative effect of these factors is that digital preservation requires the making and active management of multiple copies over time, stored in multiple locations, prior to deterioration and the loss of information.

(a) Need for multiple copies

As described in the Introduction, copies of a digital work are made whenever it is accessed, transmitted, or used in any manner. To preserve a digital work effectively, it must be copied many times over, at its acquisition and throughout its life. Copies are made for purposes of normalizing the data for ingest into a digital repository, tagging or otherwise associating the files with metadata, migrating the data to new formats when necessary, and periodically checking, refreshing, and replicating the data to ensure against loss of bits. Best practices may also require keeping copies in multiple locations to avoid the risks of an isolated disaster, such as a power loss, flood, fire, or major hardware failure. Moreover, numerous temporary copies are made whenever the work is accessed or transferred for cataloging, curatorial, or preservation reasons.

(b) Hardware and software obsolescence

Technical obsolescence affecting digital materials arises from two sources: hardware or storage media on which the information is encoded and software systems (and the formats) that render the bits interpretable by other systems that are, in turn, comprehensible to users. The storage media itself – such as optical discs or hard drives – may degrade, making the stored information irretrievable. Digital formats, systems, and hardware advance, and older systems may no longer be supported. If the content is not copied and migrated to new, supported formats and hardware before obsolescence in any one of these elements occurs, then the content may become irretrievable and inaccessible. There is little gray area with digital storage; unlike analog media, if digital media degrade, they do not remain partially perceivable, but generally become completely inaccessible.

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(c) Sudden and unexpected deterioration

Analog materials tend to deteriorate visibly and incrementally. Physical clues, such as the yellowing of a photograph, trigger awareness of the need to reproduce and preserve the content. Digital media, by contrast, often deteriorate and lose integrity much more rapidly than their analog counterparts,⁹² and the deterioration of digital materials may not be readily visible until the material is actually compromised. The expected lives of many digital media are still relatively short. For example, predictions of the practical physical longevity of CDs range from five to 59 years, digital tape from two to 30 years, and magnetic disk from five to 10 years.⁹³ There are, of course, cases where digital formats have been shown to be more durable than their analog counterparts, such as DVDs versus videotapes.

In addition, digital works can be written over or inadvertently corrupted. The loss of a few bits may render an entire file inaccessible or distort the content. Digital media may fail unexpectedly and catastrophically, perhaps without warning, and many failures are irreversible.⁹⁴

(d) Ephemerality and virtual dissemination

Digital technologies have spurred new modes of distribution, based on providing access to information over the Internet (and other computer networks), thus changing the nature of library and archives collections. The “collection” as perceived by the user is not necessarily synonymous with the collective body of material owned by a library or archives, since so many digital works are licensed. Often, the library or archives never possesses an actual copy of the licensed work, but has access rights to it.

Works distributed in physical copies tend to remain on shelves in libraries, archives, or people’s homes. The distribution of works in multiple physical copies creates a natural means of spreading the risk of loss. Because works distributed electronically tend not to exist in multiple physical copies, digital preservationists must reduce the risk of loss through other means. Compare an e-journal subscription to a print journal subscription, for instance. The former is a license to access the content, not the purchase of hard copies. Libraries and archives retain print subscription copies, and given a broad enough distribution, chances are some copies will survive well into the future without any active preservation efforts. But like works that are broadcast through television or radio, a digital copy that is made available by license over a network does not become part of the library’s or archives’ collection. Absent special circumstances or agreements, including licenses that permit retaining or making copies for preservation, such works generally are not preserved by libraries

92 “Storage media for digital assets are physically not very durable. They are composite, made of a number of different materials such as synthetic resins, metals, and carrier media, where different materials have different requirements for the preservation, and may even adversely affect each other.” Suzanne Keene, University College London, Now You See It, Now You Won’t: Preserving Digital Cultural Material: Practical Challenges: Physical Deterioration, <http://www.suzannekeene.info/conserv/digipres/phys.htm> (last visited Mar. 14, 2008).

93 “Digital information lasts forever—or five years, whichever comes first.” JEFF ROTHENBERG, ENSURING THE LONGEVITY OF DIGITAL INFORMATION 2 (1999), available at <http://www.clir.org/PUBS/archives/ensuring.pdf>.

94 New data recovery technologies are developing, but currently they are extremely costly and often are not able to rescue entire files. Data recovery may become easier and cheaper over time.

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and archives over the long term. Ironically, while works of authorship disseminated electronically have the potential to garner millions more users than works in analog form, they are also at far greater risk of loss precisely because they are not distributed in physical copies.

Crawling technologies enable the capture of websites and other Internet content for preservation, but doing so involves potentially infringing copying, and libraries and archives do not commonly use these technologies.

iii. Digital Preservation Requires Active Management

As a rule, analog materials such as text on paper can be preserved in their original analog format so that they retain their authenticity and usability for decades and even centuries by largely passive means, the most important of which is the provision of clean, stable storage conditions that deter the natural process of media degradation. On occasion interventions are required, such as deacidification of paper, cleaning a disc or painting, even rerecording when the media is beyond repair. For analog works such steps are typically necessary only intermittently, perhaps every generation. In the words of Nashville music studio owner John Nicholson, “I get folks coming in here with waterlogged boxes of analog tape where there’s actual mildew on the reels, and we can still clean them up and get them to sound great. You show me a hard drive that can handle that.”⁹⁵

Digital materials, however, do not self-preserve or even necessarily survive under conditions of benign neglect. Rather, effective preservation requires active and continual efforts. Redundant copies must be mirrored in multiple locations, and the content must be actively managed – that is, appropriately tagged with metadata, kept secure, consistently refreshed, reformatted, and migrated (or emulated) to new media over time as prior media become obsolete – in order to remain accessible over time.

iv. Consortial Approaches to Digital Preservation

The enormous scale of production of digital content, its highly distributed nature, and the very costly initial investments that must be made in building a reliable preservation infrastructure mean that no single institution can undertake this work alone. The making, managing, cataloging, and storing of digital preservation copies for the numerous diverse file formats already in existence may require different sets of expertise, systems, and technologies. As a result, much of the major institutional digital preservation being performed today is done through consortial arrangements. Networks of trustworthy institutions – nonprofits, educational institutions, vendors, content creators, owners, and distributors – sharing roles and responsibilities are already developing.⁹⁶

⁹⁵ Bill Werde, *The End of Analog*, RollingStone.com, Feb. 2, 2005, http://www.rollingstone.com/artists/beastieboys/articles/story/6881713/the_end_of_analog.

⁹⁶ Two organizations that work with libraries and archives and rights holders to preserve electronic literature are Portico (www.portico.org) and LOCKSS (<http://www.lockss.org/lockss/Home>).

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b. Rethinking the Published/Unpublished Distinction

i. Introduction

Early in the Study Group’s discussions it became apparent that section 108’s bifurcation of copyrightable works into two distinct spheres, published and unpublished, fails to address adequately a sizable portion of the ever-increasing body of works disseminated to the public through broadcast or electronic means. This body of works includes works transmitted to users by means of television, radio, and the Internet, rather than through the transfer of physical, hard copies, such as books, CDs, or DVDs. From a preservation perspective, these works give rise to separate considerations from works published in hard copy or works that are unpublished and have not been publicly disseminated in any form.

These works may or may not technically be considered published under the law. As discussed below, whether they are considered published depends on whether material copies are distributed, and in the case of works made available on the Internet, on whether they can be printed or downloaded with the rights holders’ authorization. In fact, works disseminated via broadcast or the Internet have characteristics of both published and unpublished works. Like published works, they have been made generally available to the public, and therefore do not carry with them the same concerns regarding the author’s right of first publication as private, unpublished materials. Like unpublished works, they have a high risk of loss because hard copies generally are not available for purchase by libraries and archives; hence stable, physical copies of such works do not exist in multiple places. Even when copies of these works may be downloaded with the rights holders’ authorization (and therefore are published within the meaning of the Copyright Act), they often are downloadable only in formats that do not lend themselves well to preservation by libraries and archives.

ii. Current Law

(a) Meaning of “published”

Under the Copyright Act, a *published work* is one that has been distributed in material copies.⁹⁷ Section 101 of the Copyright Act defines “publication” as a *distribution of copies or phonorecords* to the public by sale or other transfer of ownership or by rental, lease, or lending. Copies and phonorecords in turn are defined as *material objects*. Together, these definitions embody two principal requirements for a work to be deemed published. First, the distribution must be “to the public.” A work may be considered published as long as the general public has the opportunity to acquire copies, even if only a small number of copies, or no copies, are actually distributed. Second, the distribution must involve the transfer of “material” copies. Works that are distributed to the public without a transfer of a material copy, such as works disseminated by broadcast or online streaming, do not qualify as published.

⁹⁷ Although the statute defines “copies” as material objects, this Report often uses the (admittedly redundant) term “material copies” to make clear that the Study Group is referring to “copies” as defined under the Copyright Act and interpreted by the case law. See Section II.A.2 (“Overview of the Exclusive Rights”).

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The material copies requirement of publication does not necessarily mean that a copy must actually change hands for the work to be published. Courts have found a publication to have taken place when the public (with the authorization of the rights holder) has the ability to produce material copies of copyrighted works, such as through downloading an electronic copy or printing a copy of a work distributed through the Internet. In a succession of cases, courts have ruled that the unauthorized dissemination of works such as sound recordings, photographs, and software through the Internet infringes the rights holder’s distribution right because the public obtains the ability to make material copies of the protected works.⁹⁸ On the other hand, works are not deemed published when they are publicly performed or displayed by broadcast, streaming, or other forms of dissemination that do not enable a user to make a copy.

“Publication” is the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

“Copies” are material objects in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object in which the work is first fixed.

(b) Separate treatment of published and unpublished works

Section 108 provides separate treatment for published and unpublished works in connection with preservation-related activities, with broader reproduction and distribution privileges for unpublished works than for published works. Subsection 108(b), the only provision in section 108 that expressly addresses preservation, permits libraries and archives to make up to three copies of an unpublished work for purposes of preservation, security, and deposit for research use in other libraries and archives.⁹⁹

There is no parallel exception for the preservation of published works. Subsection 108(c) permits libraries and archives to make up to three copies of a published work to replace a copy that is damaged, deteriorating, lost, stolen, or in an obsolete format, when a copy cannot be obtained at a fair price. Though not a true preservation provision, subsection 108(c) in fact has been used by libraries and archives to preserve published works in their collections. Copies can be made to replace works that would otherwise be lost to the particular library or archives. Such copying has

⁹⁸ See, e.g., *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1014 (9th Cir. 2001); *Playboy Enterprises, Inc. v. Russ Hardenburgh Inc.*, 982 F.Supp.2d 398, 401 (S.D.N.Y. 2002).

⁹⁹ See Section II.C (“Overview of Section 108”).

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enabled libraries and archives to maintain copies of older published analog and digital materials in their collections.

The legislative history of section 108 does not articulate a rationale for providing different, somewhat broader copying privileges for unpublished works than for published works. Presumably, the reason is that unpublished works are often one-of-a-kind or few-of-a-kind, and are therefore inherently at risk. The existence of multiple copies of a work, preferably in multiple locations, has long been identified as one of the surest means to ensure preservation.¹⁰⁰ Unpublished works in the collections of a library or archives often are not held anywhere else, however, and so unless the library or archives is able to preserve its copy, there is a very real risk that the work may be lost to posterity. It is for this reason that subsection 108(b) permits libraries and archives to take proactive steps to preserve a copy of an unpublished work before it is damaged, deteriorating, lost, or stolen.

The risk of loss of a published work, on the other hand, is generally distributed among multiple copies. When a library’s or archives’ copy is lost, a replacement copy often can be purchased. Where one cannot be obtained at a fair price, subsection 108(c) allows a copy to be made. An unstated assumption appears to be that other copies will usually exist from which to buy or make a replacement copy. Thus, subsection 108(c) requires the library or archives to wait until the work is already damaged or lost, and then search for a copy at a fair price, before it may make a copy of the work.

Summary of the current section 108 preservation-related provisions:

108(c) – Replacement Copying

Permits copying for replacement of published works that are damaged, deteriorating, lost, stolen, or stored in an obsolete format if an unused replacement cannot be obtained at a fair price.

108(b) – Preservation and Deposit Copying

Permits copying of unpublished works for preservation, security, or deposit in other libraries or archives.

¹⁰⁰ “[L]et us save what remains: not by vaults and locks which fence them from the public eye and use in consigning them to the waste of time, but by such a multiplication of copies, as shall place them beyond the reach of accident.” Letter from Thomas Jefferson to Ebenezer Hazard (Feb. 18, 1791), in THOMAS JEFFERSON, THE WRITINGS OF THOMAS JEFFERSON 127 (Richard Holland Johnston, ed., 1904).

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iii. “Public Dissemination” as an Organizing Principle

The Study Group proposes that, in modifying the section 108 preservation-related provisions, rather than focus on whether or not works are published, the appropriate distinction should be between (1) works that have not been disseminated to the public, and (2) works that have been disseminated to the public with the authorization of the rights holder. For certain exceptions, such as subsection 108(c), the Study Group recognizes that it will be appropriate to further distinguish between those works that have been disseminated to the public in copies (i.e., published) and those works that have been made available to the public but not in material copies.

In contrast to the term “published,” this Report uses the term “publicly disseminated” to refer to works that have been made available to the general public with the authorization of the rights holder by any means, whether through the distribution of material copies or otherwise. The term is intended to cover works transmitted by broadcast, streaming, and other electronic transmission via the Internet, as well as those transferred in hard copies or other “material” copies. The making available of a work by a library or archives only for private viewing, listening, or reading on-site is not a public dissemination.

“Publicly Disseminated” for purposes of this Report means the work has been made available to the general public with the authorization of the rights holder by any means, whether or not through the distribution of copies.

“Not Publicly Disseminated” for purposes of this Report means a work has not been made available to the general public through any means. Works that have not been publicly disseminated are a subset of “unpublished” works.

Specifically, the Study Group recommends that:

1. The proposed new preservation-only exception discussed in this Report should apply to works that have been publicly disseminated;¹⁰¹
2. The proposed new online content preservation exception discussed in this Report should apply to works that have been publicly disseminated;¹⁰²
3. Subsection 108(b), currently applicable to all unpublished works, should instead apply to works that have not been publicly disseminated;¹⁰³
4. Subsection 108(c), currently applicable to published works, should continue to apply to works that have been publicly disseminated in material copies – i.e., that have been published;¹⁰⁴ and

¹⁰¹ See Section IV.A.2.e (“Preservation of Publicly Disseminated Works”).

¹⁰² See Section IV.A.2.f (“Preservation of Publicly Available Online Content”).

¹⁰³ See Section IV.A.2.d (“Preservation of Unpublished Works”).

¹⁰⁴ Conceptually, subsection 108(c) could be revised to apply to the broader category of all publicly disseminated works, but this was not discussed by the Study Group. As a practical matter, works subject to subsection 108(c) in any event would continue to consist predominantly of published works, as they comprise the majority of publicly disseminated works already in library and archives collections.

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5. The television news exception in current subsection 108(f)(3) would continue to allow libraries and archives to copy for acquisition and to distribute in limited circumstances certain publicly disseminated material.¹⁰⁵

¹⁰⁵ See Section IV.A.2.g (“Television News Exception”).

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c. Replacement Copying

i. Issue

Should the subsection 108(c) conditions under which libraries and archives are permitted to make replacement copies of published works in their collections be revised, particularly to address the impact of digital technologies?

ii. Recommendations

1. **The three-copy limit in subsection 108(c) should be amended to permit libraries and archives to make a limited number of copies as reasonably necessary to create and maintain a single replacement copy, in accordance with recognized best practices.**
2. **“Fragile” should be added to the list of conditions that may trigger replacement reproduction of a physical work. A fragile copy is one that exists in a medium that is delicate or easily destroyed or broken, and cannot be handled without risk of harm.**
3. **The requirement that a library or archives may not make a replacement copy unless it first determines that an *unused* replacement cannot be obtained at a fair price should be replaced with a requirement that a *usable* copy cannot be obtained at a fair price.**
4. **There may be circumstances under which a licensed copy of a work qualifies as a copy “obtainable at a fair price.” This determination should be made on a case-by-case basis.**
5. **The prohibition on off-site lending of digital replacement copies should be modified so that if the library’s or archives’ original copy of a work is in a physical digital medium that can lawfully be lent off-site, then it may also lend for off-site use any replacement copy reproduced in the same or equivalent physical digital medium, with technological protection measures equivalent to those applied to the original (if any).**

iii. Current Law Context

Subsection 108(c) applies only to *published* works. It provides that:

- Libraries and archives may make up to three copies of a published work to replace a work in their collections.
- The work being replaced must be “damaged, deteriorating, lost, or stolen, or . . . the existing format in which the work is stored [is] obsolete.”¹⁰⁶ These conditions are referred to in this Report as replacement triggers.
- Before making a replacement copy, the library or archives must first make a reasonable effort to obtain an unused copy of the work at a fair price. Only if it cannot obtain such a copy may the library or archives then reproduce the work.

¹⁰⁶ A format is considered obsolete “if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or no longer reasonably available in the marketplace.” 17 U.S.C. § 108(c) (2007).

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- Replacement copies may be made in digital form provided the library or archives does not make digital copies available to the public outside its premises.

iv. Discussion of Recommendations

(a) Background

Works in a library’s or archives’ collection sometimes become damaged, disappear, or are rendered unusable when their format becomes obsolete. The existing subsection 108(c) enables libraries and archives to make replacement copies of published works in their collections when one of these events occurs and a replacement copy cannot be obtained at a fair price. Although subsection 108(c) deals with copying for replacement purposes and does not specifically address preservation, it is sometimes viewed as a *de facto* preservation provision because it enables libraries and archives to maintain in their collections copies of works that would otherwise be lost or inaccessible.¹⁰⁷

The Study Group finds that the subsection 108(c) exception has generally proved workable in the analog context and that libraries and archives should continue to be able to make replacement copies of copyrighted works in their collections under certain circumstances. Several amendments are recommended to the provisions of subsection 108(c), mainly to address new issues arising from the use of digital technologies.

(b) Number of copies

The Study Group agreed that the three-copy limit in subsection 108(c) is ill-suited for digital reproduction, particularly given the technical requirements of creating replacement copies in digital form and ensuring their continued integrity and accessibility. It recommends that the three-copy limit be replaced by a flexible standard that permits a limited number of copies as reasonably necessary to create and maintain a single replacement copy, in accordance with recognized best practices.

The current three-copy limit was modeled on best practices developed for microfilm preservation, which call for a camera negative, a print master, and a service or use copy – and not on digital reproduction standards, which are substantially different.¹⁰⁸ While a three-copy limit may be feasible for microfilming a deteriorating monograph for continued user access, it does not work for creating a digital copy of that same work. There appears to be no exact number of copies that would enable libraries and archives to preserve or replace analog works digitally, and it is impossible to anticipate how digital preservation technologies will develop. Even under current practice it is usually necessary to make numerous intermediate copies in order to generate a single digital “use” copy to replace a work in a library or archives

¹⁰⁷ For further discussion on the difference between preservation and replacement, see Section II.C.2 (“Copying for Preservation and Replacement”).

¹⁰⁸ See, e.g., CAROL C. HENDERSON, AM. LIBRARY ASS’N, LIBRARY PRESERVATION: CHANGES INCORPORATED IN H.R. 2281, THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (PL 105-304) 1 (Nov. 12, 1998), <http://www.ala.org/ala/washoff/WOissues/copyright/dmca/preservation.pdf>.

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collection. Over time, additional copies must be made to refresh and update that digital copy to ensure that it remains usable as technologies and formats evolve.

The Study Group recommends a flexible, “reasonably necessary” standard for a number of reasons. First, this standard recognizes that the nature of digital reproduction does not allow for a set number of copies. Second, it provides realistic limits on the number of copies by (1) allowing only the limited number of copies reasonably necessary to make a single replacement copy of a work, and (2) restricting the number of replacement copies of a work available to users to the number of copies of the work originally owned by the library or archives. For example, in making a replacement copy of a deteriorating book that is not available in the marketplace, a library or archives would be permitted to make as many copies as reasonably necessary in the process of creating the replacement copy and in maintaining that replacement copy in an accessible format. If the library or archives owned only one copy of the book, it would be allowed to maintain only one replacement copy for use at any given time in lieu of the original.

Finally, the flexibility of the proposed standard is appropriate for both digital and analog reproduction. While the three-copy limit has proven generally workable for analog works, the goal of the exception would be better met and easier to implement with a technology-neutral standard. Provided that the limitations outlined above are properly implemented and conscientiously followed, libraries and archives will be able to make more robust replacement copies without unduly harming the rights holders’ ability to exploit the work.

(c) Adding “fragile” as a new replacement trigger

The Study Group recommends that “fragile” should be added to the list of conditions that can trigger replacement reproduction of a work embodied in a physical medium. Adding “fragile” would permit libraries and archives to make replacement copies of certain works in their collection before their existing copies deteriorate or are lost. A replacement copy could also be provided to users in lieu of the fragile source copy, so the fragile source copy can be kept in restricted storage for its protection. Amending the statute would make it clear that fragile media present unique problems for replacement and can be reproduced under the conditions of subsection 108(c) without harming the rights holder, since a library or archives will be able to make a replacement copy of a fragile work only if a usable copy is not available on the market.

For the purposes of this recommendation the Study Group defines a “fragile copy” as one that is embodied in a physical medium that is at risk of becoming unusable because it is delicate or easily destroyed or broken and cannot be handled without risk of harm. Examples of fragile copies include audio and videotapes of early radio and television broadcasts and reel-to-reel tapes; media that has known problems with chemical instability; and works that demonstrate obvious fragility upon ingest by a library or archives, such as videotapes that fall apart after a single viewing. To clarify what is meant by fragile, the legislative history could provide detailed examples of what may and may not be fragile. Further, the legislation should clarify that the term “fragile” should be interpreted on a case-by-case basis according

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to the factors identified, and not broadly to mean, for instance, all analog tape recordings or all digital media.

(d) Requiring a search for a “usable” copy of a work

The Study Group recommends that the requirement that a library or archives may not make a replacement copy unless it first determines that an *unused* replacement cannot be obtained at a fair price should be replaced with a requirement that it first determine that a *usable* replacement cannot be obtained at a fair price.

As originally drafted in 1976, subsection 108(c) did not permit libraries and archives to make digital replacement copies. Digital copies can have greater utility than analog copies and do not necessarily degrade with use the way analog copies do. Once a digital copy is made, a library or archives may never have to purchase further replacement copies, even if such copies become available on the market. Since the passage of the DMCA, digital replacement copies have been permitted, and certain of the Study Group’s recommendations should make it easier for libraries and archives to create and maintain these digital copies. The change from “unused” to “usable” will help preserve the original statutory balance.

Requiring libraries and archives to search for usable rather than unused copies should not impose a substantial burden. Current market tools and practices in many cases enable them to locate replacement copies more easily than they could in 1976. Then, a systematic search for used books was very time consuming. It required perusal of myriad used book catalogs and lists published by various dealers. Often, by the time the catalog or listing was produced and distributed, another customer had acquired the copies listed as available. Today, the online market for used books has made it possible to locate used books quickly and to order them with the click of a mouse. These used copies may not necessarily have been used at all, but are simply pre-owned – in some cases by individual resellers.¹⁰⁹ Copies sold as used may actually be new or virtually new.¹¹⁰

The term “usable” is intended to mean usable for library or archives purposes – that is, not simply readable or perceivable but of such a quality that it could be borrowed and read by numerous individuals over time. Works that are deteriorating, torn, misprinted, badly stained, and similarly damaged or worn would not qualify as usable from this perspective. Legislative history should be drafted to make this clear.

¹⁰⁹ See, e.g., Comment in Response to First Notice, Roy Kaufman, John Wiley & Sons, Inc. 7 (Apr. 28, 2006) (describing the website abebooks.com, a search engine for rare and out-of-print books), http://www.loc.gov/section108/docs/Kaufman_Wiley.pdf.

¹¹⁰ See, e.g., Amazon.com Condition Guidelines, <http://www.amazon.com/gp/help/customer/display.html?nodeId=1161242> (last visited Mar. 14, 2008). For books, “new” describes “[a] brand-new, unused, unread copy in perfect condition.” “Like new” describes “[a]n apparently unread copy in perfect condition . . . pages are clean and are not marred by notes or folds of any kind.” “Very Good” describes “[a] copy that has been read, but remains in excellent condition. Pages are intact and are not marred by notes or highlighting. The spine remains undamaged.”

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(e) The meaning of “obtainable at a fair price”

The expanding availability of works in digital formats for license by libraries and archives has enabled the rapid expansion of resources available to users through library and archives collections. In practice, this means that a library or archives seeking to replace a damaged copy of a journal issue may find that while a physical replacement is not available, the publisher may offer to license the title to the library or archives in electronic format. Accordingly, the Study Group agreed that there may be circumstances in which licensed access to a work will qualify as a copy “obtainable at a fair price,” but that this determination should be made on a case-by-case basis.

The Study Group does not recommend a specific formula for determining when a licensed work is a suitable replacement for a physical copy owned by the library or archives. Two issues must be considered in such an inquiry: the nature of the license and its cost.

First, does the licensed work truly replace the physical work in terms of functionality and user access? The thrust of the replacement exception is that the library or archives owns one copy of a work, and when it can no longer use that copy, seeks ownership of a second copy. Licensing, however, is not the same as ownership. Ownership includes the ability to add a work to one’s permanent collection, to make replacement copies, and to lend that copy to others. A licensed copy of a work may not allow a library or archives such flexibility. But in some cases availability of a work via license is sufficiently similar to ownership that it is reasonable to consider a work so offered as obtainable at a fair price. For example, a license that allows a copy of the work to be downloaded and stored locally, or otherwise permits the licensee to obtain a retention copy, would be much more likely to function as a replacement than a license that offers only access, especially if provided on a time-limited or other restricted basis.

The second issue is whether the terms of the license constitute a “fair price.” It clearly would be unfair if access to a replacement copy of an individual work could be accomplished only through the purchase of a long-term commitment to a database license or through the acquisition of multiple works in a fixed “bundle.” When works are bundled together, there is the expectation that the price for the aggregated bundle will be higher than the price for a single work. To insist that a library or archives accept a bundled work as a replacement copy could force libraries and archives to purchase works they have no interest in acquiring. Another relevant consideration is whether the library or archives already has a license that includes access to the particular work, and if not, whether such access can be added to an existing license at a reasonable cost.

(f) Off-premises access to digital replacement copies

In barring libraries and archives from making digital replacement copies available outside their premises, Congress believed that it struck “the appropriate balance, by permitting the use of digital technology by libraries and archives while guarding against the potential harm to the copyright owner’s market from users obtaining un-

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limited access to digital copies from any location.”¹¹¹ The Study Group considered whether this is still the appropriate balance, or whether off-premises access to digital replacement copies can be conditioned in such a way as to protect rights holders’ markets from potential harm that might otherwise result.

(1) Physical digital copies

Subsection 108(c) does not differentiate between digital works in the form of physical media (such as a CD or DVD) and nontangible digital copies that are delivered electronically, such as via electronic network transfer, and not in a physical medium.¹¹² In the case of copies in physical media, the library or archives is generally allowed to circulate the original copy outside of its premises, as it would a book. The digital replacement copy made under subsection 108(c), however, is restricted to use within the premises even if the library or archives has been unable to find an unused replacement at a fair price.

The Study Group recommends that if a library’s or archives’ original copy of a work is in a physical digital medium that lawfully can be lent off-site, such as a purchased DVD, then it may also lend for off-site use any replacement copy reproduced in the same or equivalent physical digital medium in place of the library’s or archives’ original copy. This means that if a library or archives were permitted to make the original copy of the work available off-premises, then it should enjoy the same privilege for the digital replacement copy, provided it is in the same or equivalent format.

The requirement that the copy be in the same or equivalent format applies not only to the functionality of the replacement copy, but also to its technological protection measures. The digital replacement copy should include TPMs that are at least as effective as those on the original, so that replacement copies are not more susceptible to infringing uses than their source copies and do not unfairly affect markets for works in new media formats.

(2) Remote electronic access

The Study Group’s recommendation does not address the question of whether remote access (access provided to persons outside the premises of the library or archives via an electronic network) to digital replacement copies should ever be permitted.

Libraries and archives seek the ability to provide remote access to replacement copies made from either analog or digital originals. Libraries and archives are beginning to make and retain on their servers replacement copies of analog as well as digital originals for the convenience of access, storage, and increased functionality (such as full-text searching). Modern researchers and other library and archives users increasingly expect libraries and archives to provide digital copies to them wherever they are located. But providing remote access to server copies lacks the

¹¹¹ S. REP. NO. 105-90, at 61-62 (1998).

¹¹² For convenience, this Report refers to (1) digital copies in the form of physical media (such as a CD or DVD) as “physical digital copies,” and (2) digital copies delivered purely in electronic form as “electronic copies.”

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practical limitations of physical lending and raises substantial concerns on the part of rights holders about the potential to interfere with their markets.

Arguments for remote access

Permitting libraries and archives to provide remote access to electronic replacement copies would facilitate researcher access to these out-of-print materials. Requiring users to visit the physical location of the holding institution could make the difference between whether they see the item or not. Many libraries and archives already have the ability to make digital copies available remotely to researchers and scholars through secure authentication and authorization procedures and so, it is argued, remote access can be provided without undue risks to copyright.

Those who argue for allowing remote access concede that remote access would have to be limited by some reasonable means to the specific user requesting access (such as through the use of secure, password-protected, time-limited URLs, “e-lending” software that provides short term access to a particular user, or even e-mail) and not made broadly available online to an entire user community. The Study Group discussed a number of proposals to allow remote access to digital replacement copies under conditions that seek to mimic those of off-site lending of physical analog media and reduce the risks of harm to the market for the works at issue. The restrictions that were considered include:

- Granting access only to the defined user community of a library or archives (such as a public library’s designated geographic region or an educational institution’s students, faculty, and staff).
- Placing simultaneous user restrictions equal to the number of lawfully acquired copies that the library or archives has in its collection.
- Requiring TPMs on digital replacement copies to hinder unauthorized use.
- Implementing user agreements for remote access that would: (1) require verification that the access is requested for private study, scholarship, or research; (2) specify a limited duration of use; and (3) require an agreement not to download (other than to make a single copy for the user) or further distribute copies.
- Mandating that a library or archives disable remote access to a digital replacement copy if the rights holder reintroduces the work to the marketplace in digital form. (Details on how the library or archives is notified of this would have to be worked out.)
- Requiring a copyright warning on or with the delivery of any replacement copy made available electronically to an off-site user.

These conditions were suggested as a means of preserving some of the natural speed bumps of the analog lending process and to address concerns about creating disincentives for rights holders to reintroduce older works in electronic form. Concerns were noted about some of these restrictions, however, including the dif-

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faculty of defining user communities for some libraries and archives¹¹³ and the current unavailability of affordable protection technologies – beyond authentication and authorization procedures – that libraries and archives could implement themselves to hinder unauthorized use. In addition, such restrictions, including limits on the number of simultaneous users, may conflict with user expectations and experience with digital information and be difficult to enforce.

Arguments against remote access

Balanced against arguments in favor of permitting remote access to replacement copies are concerns about the potential of remote access to materially interfere with online and other markets for copyrighted works. Some group members do not believe that the proposed conditions described above provide sufficient protection to avoid material harm to copyright interests. An exception designed to further the legitimate public policy goal of ensuring the ability of libraries and archives to replace works in their collection as they become damaged or lost should not be construed in a way that grants the library or archives, by statutory means, broad new distribution and new media rights in replacement copies that they did not have with respect to the original copies; nor should it undermine the exercise of the exclusive rights. The happenstance of an original copy of a work becoming lost, damaged, or destroyed should not convey to the library or archives greater rights in the replacement copy than were obtained with the original copy.

Such unauthorized remote access privileges, it is argued, could discourage the development of authorized digital rereleases and new media markets, particularly in an environment in which copyright owners are actively seeking to develop new business models based on “on-demand,” remote access to their works. In some cases, allowing remote access to electronic replacement copies could grant a library or archives greater rights than the publisher itself has. For example, a publisher may not own the rights necessary to rerelease the work electronically, or may be in the process of acquiring the rights. This process often demands a sizable investment of time and money, and a publisher would be at a competitive disadvantage to a library or archives that is able to digitize and provide online access to the same work without engaging in any rights clearance process.

User community definitions, simultaneous user restrictions, and other limitations do not adequately address the problem. Regardless of the conditions proposed in order to mimic the physical lending of a copy in the digital space, digital distribution of digital content raises issues that the physical lending of a copy does not. For many industries, the nature of “on-demand” delivery is seen as different altogether, implicating a different set of rights and in some cases a different audience. Moreover, digitized works are susceptible to full-text searching and, some argue, the inclusion of this functionality in a work should be the decision of the rights holder. In addi-

¹¹³ User communities of many libraries and archives can be narrowly defined (*e.g.*, enrolled students at a university). For others the user community includes a much broader group of people (*e.g.*, citizens of a state). User communities may not be geographically based at all; they may be based on interests and subjects, such as archives devoted to a person, family, place, or other subject. And some institutions, such as general art or other museums, may view their user communities as the public at large. See discussion in Section IV.B.1.b.iv (“Direct Copies and ILL: Subsections 108(d) and (e): Discussion”).

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tion, the viral nature of electronic distribution could easily defeat attempts to restrict remote access to a library’s or archives’ user community.

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d. Preservation of Unpublished Works

i. Issue

Should subsection 108(b), which permits libraries and archives to make preservation and deposit copies of unpublished works, be amended, particularly to address the impact of digital technologies?

ii. Recommendations

1. **Subsection 108(b) should be limited to unpublished works that have not been publicly disseminated.**¹¹⁴
2. **Number of Copies**
 - a. **Subsection 108(b)'s three-copy limit should be amended to permit libraries and archives to make a limited number of copies of unpublished works as reasonably necessary to create and maintain a copy for preservation or security purposes. This amendment should apply to analog as well as digital materials.**
 - b. **Subsection 108(b)'s three-copy limit on the number of deposit copies of unpublished works that can be made should be amended to a reasonable limit on the number of institutions to which libraries and archives can deposit a copy of an unpublished work.**
 - c. **Subsection 108(b) (or legislative history) should clarify that a library or archives that receives a deposit copy of an unpublished work from another library or archives is not permitted to make further copies for preservation purposes or for deposit in other libraries or archives.**
3. **The prohibition on off-site lending of digital copies of unpublished works made under subsection 108(b) should be modified so that if the library's or archives' original copy of an unpublished work is in a physical digital medium that can lawfully be lent off-site, then it may also lend for off-site use the preservation and/or deposit copy of the work reproduced in the same or equivalent physical digital medium, with technological protection measures equivalent to those applied to the original (if any).**

iii. Current Law Context

Subsection 108(b) applies to *unpublished* works only. It provides that:

- A library or archives may make three copies, in digital or analog form, of an unpublished work already in its collection solely for purposes of preservation and security or for deposit in another library or archives. This copy limit is parallel to subsection 108(c), which applies to replacement copies of published works.
- There is no requirement that the library or archives first seek to purchase a copy, as it must do before making a replacement copy under subsection 108(c).

¹¹⁴ Where the term “unpublished work(s)” is used in connection with a recommendation regarding subsection 108(b), it should be read to mean “unpublished and not publicly disseminated.”

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- There is no requirement that the original copy from the library’s or archives’ collection already be damaged, deteriorating, lost, stolen, or in obsolete format before a copy can be made.
- Copies may be made in digital form, but the library or archives may not make digital copies available to the public outside the premises.

Underlying subsection 108(b) are legal concepts relating to publication, and the author’s right of first publication, that must be untangled in order to understand the provision fully. The right of first publication protects the author’s decision whether to publish a work at all. Authors may prefer to keep their works private, and the copyright law entitles them to do so.¹¹⁵ The right of first publication is not specifically enumerated in the Copyright Act, but is inherent in section 106(3), which affords copyright owners the right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” As the legislative history makes clear, this provision was intended to give the copyright owner the right to control the first public distribution of his or her work, as well as subsequent distributions.¹¹⁶

iv. Discussion of Recommendations

(a) Background

Subsection 108(b) allows libraries and archives to make copies of unpublished works for the purposes of preservation, security, and deposit for research use in other libraries and archives. The provision is often referred to as a preservation provision, but it allows reproduction of unpublished works for security purposes as well. For instance, a library or archives could make a copy of a one-of-a-kind unpublished work available to users under this exception in order to safeguard and secure the integrity of its original copy.

In addition, subsection 108(b) recognizes the importance of making one-of-a-kind unpublished works available for scholarship and research. Unpublished works are of fundamental importance in many fields of scholarship. Subsection 108(b) therefore allows the library or archives that owns a copy of an unpublished work to make up to three copies of the work for deposit in other libraries or archives in order to make the work more readily accessible to researchers.¹¹⁷

¹¹⁵ See Section II.C.5.b (“Significance of Publication”) for a full discussion of the meaning of the term “publication” under the Copyright Act.

¹¹⁶ H. REP. NO. 94-1476, at 62 (1976). See also S. REP. NO. 93-473, at 58 (1976) (“Under [§106(3)] the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement.”). The Supreme Court described the first publication right as “implicat[ing] a threshold decision by the author whether and in what form to release his work.” *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 553 (1985). According to the Court, the right of first publication protects an author’s “personal interest in creative control [and] his property interest in exploitation of prepublication rights,” rights that are “valuable in themselves and serve as a valuable adjunct to publicity and marketing.” *Id.* at 555. In enacting subsection 108(b) Congress presumably found that the limited distribution permitted under the deposit provision would not interfere with the copyright owner’s right of first publication.

¹¹⁷ Subsection 108(b) provides for “three copies . . . solely for purposes of preservation and security or deposit for research use” It is not clear if this means three copies altogether or three for preservation and security and three for deposit.

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Because widespread distribution could adversely affect the author’s right of first publication, the availability of deposit copies must be balanced against this right. For that reason, the number of copies of unpublished works permitted is currently limited to three. The effect on the right of first publication of permitting limited reproduction and distribution will vary depending on the type of unpublished work. The economic impact might be minimal for works such as personal letters or e-mail messages not intended for public distribution, but intentions may change over time, and the right of the author to decide whether and when to publish is fundamental.¹¹⁸ For manuscripts or other works that the author or his or her heirs may seek to publish, there may be a strong interest in protecting future exploitation, as well as in preserving the right to decide when and under what circumstances to publish. And for works that have already been publicly disseminated but that remain technically unpublished, such as nonsyndicated television broadcasts, the concerns are more akin to those related to published works – namely the effect on potential new opportunities for commercial exploitation.

(b) Application of subsection 108(b) to unpublished works that have been publicly disseminated

The Study Group recommends that subsection 108(b) be limited to works that are unpublished and not publicly disseminated. Given the characteristics of unpublished works that have been publicly disseminated, they are better addressed in the proposed new general preservation-only and online content preservation exceptions.

Subsection 108(b) appears to have been intended primarily to cover nonpublic works – those that were never publicly disseminated or intended for public dissemination. This includes archival personal or business documents, such as letters, journals, drafts, financial documents, and photos and their digital equivalents: e-mail, digital photos, and other electronic files in various formats. According to the 1983 Register’s Report, the provision was primarily designed to apply to “an archival collection of original manuscripts, papers, and the like, most of which are unpublished, and for which a rigorous preservation regime serves the needs of archives and scholars.”¹¹⁹ The Study Group finds that subsection 108(b) remains suitable for such works, as well as for manuscripts, photographs, and other works that the author may have intended for publication but have not yet been sold or publicly disseminated. If libraries and archives do not preserve these works, they may be lost. Moreover, there is generally little risk of harm to the rights holder arising from their archival preservation and use.

Works that are disseminated over the Internet or broadcast via television or radio, but not distributed in copies, are also considered unpublished under the copyright law, but raise somewhat different issues than do other “unpublished” works, as described in Section IV.A.2.b (“Rethinking the Published/Unpublished Distinction”).

¹¹⁸ Other considerations outside of copyright law, such as privacy, might also limit the ability to distribute an unpublished work, but those are not the subject of this Report.

¹¹⁹ A later analysis stressed that the desire to improve scholarly access to unpublished material, and not just preservation, were of central concern to the drafters of subsection 108(b). Peter Hirtle, *Digital Access to Archival Works: Could 108(b) Be the Solution?* in COPYRIGHT & FAIR USE (Stanford Univ. Libraries, 2006), http://fairuse.stanford.edu/commentary_and_analysis/2006_08_hirtle.html.

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This category, which is likely to grow as new electronic distribution models become more common, includes nonsyndicated television or radio programming, Internet content made available for streaming but not for download, and computer games accessed online. As a practical matter, subsection 108(b) is rarely used for these publicly disseminated but unpublished works, because the exception applies only to works already in a library's or archives' collection, and authorized copies of these works are not generally available for purchase by libraries and archives. But copies might be acquired by other means, such as by donation or the fair use exception.

(c) Number of copies

(1) Number of preservation and security copies

The Study Group recommends that subsection 108(b)'s three-copy limit be amended so that libraries and archives are permitted to make a limited number of copies of unpublished works as reasonably necessary to create and maintain a copy for preservation or security purposes. This recommendation applies to analog as well as digital materials.

The three-copy limit is as unworkable for preservation copying under subsection 108(b) as for replacement copying under subsection 108(c). As described in Section IV.A.2.a ("Background: Digital Preservation and Copyright"), digital works are necessarily copied many times over in the course of making and maintaining preservation and deposit copies, and it is impossible to specify an exact number of copies. As noted throughout this Report, the Study Group concluded that it would be more effective to control the distribution and access to copies than to mandate an absolute limit on the total number of permissible copies.

Although the amendment is principally necessary to address digital technologies, the group recommends that a reasonableness standard apply to the number of copies that can be made of both analog and digital works. The number of copies required for preservation is dependent on the media and differs even among different types of analog media. Some analog media may require making a number of copies while others may be adequately preserved with one or two copies. The language proposed by the group would allow only that number necessary to effectively preserve the particular work.

(2) Number of deposit copies

The Study Group recommends that subsection 108(b)'s three-copy limit on the number of deposit copies of unpublished works that can be made should be amended to a reasonable limit on the number of institutions to which libraries and archives can deposit a preservation copy of an unpublished work.

The group believes that this recommendation is consistent with the original section 108, which did not limit the number of copies of an unpublished work that could be made for deposit in other libraries or archives over time. Increased scholarly access was a primary concern in enacting this provision, and the drafters of the exception apparently concluded that this limited distribution would not compete with the

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copyright owner's right to exploit the work commercially or affect the right of first publication. Multiple deposit copies also reduce the risk that the work will be lost because of institutional failure, geographic catastrophe, or theft.

The Study Group considered concerns about the potential for the deposit provision to usurp the right of first publication if the number of copies is not strictly limited. But it appears that making copies for deposit in other libraries or archives has never been a frequent practice, even when there was no limit on the number of deposit copies under the law.¹²⁰ Thus, it is unlikely that the proposed limit will have a significant impact on the right of first publication, especially if appropriate restrictions are put in place.

(3) Ability of receiving libraries and archives to further reproduce deposit copies

The Study Group recommends that subsection 108(b) (or legislative history) clarify that a library or archives that receives a deposit copy of an unpublished work from another library or archives should not be permitted to make further copies for either preservation or deposit.

The current subsection 108(b) is unclear as to whether a library or archives in receipt of a copy of an unpublished work is permitted to make further copies for its own preservation purposes or deposit additional copies in other libraries and archives. It is the Study Group's understanding that, as a matter of general practice, deposit copies received under subsection 108(b) are not treated as part of the receiving library's or archives' collection, and the receiving library or archives does not take specific measures to preserve them. Receiving libraries and archives also do not appear to read the statute as enabling them to make further deposits in other libraries or archives. The Study Group members agreed that the law should reflect this practice.

(d) Off-premises access to digital preservation copies

Like subsection 108(c), subsection 108(b) currently permits libraries and archives to provide public access to digital preservation copies only on the premises of the library or archives. To serve their users better, libraries and archives seek the ability to use digital technologies to provide public access to digital works off-site, as well as within the institution, by lending copies made in physical digital media and by providing remote access. The Study Group agreed that libraries and archives should be permitted to provide off-site access to physical digital copies within certain parameters but did not agree whether remote access to electronic copies of unpublished works should be permitted.

¹²⁰ The Study Group understands that archives generally prefer to provide access to items in their collections than to deposit the materials in another institution. Subsection 108(b) is most useful in cases such as when a manuscript collection is divided between two institutions: a microfilm copy can allow one or both institutions to have a complete set of documents. Or when records that are of core importance to one institution are found in a different repository, subsection 108(b) allows the first institution to have ready access to the source materials for its history.

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(1) Physical digital media

The Study Group’s recommendation for off-site access to copies in physical digital media is the same for subsection 108(b) copies as for subsection 108(c) copies.¹²¹ The statute should be revised so that, if the library’s or archives’ original copy of an unpublished work is embedded in a physical digital medium, it should be permitted to make a copy in the same or equivalent format available for off-site use, provided there are no contractual prohibitions on the original being made accessible off-site, such as pursuant to a donor agreement through which the work was acquired. For example, if a collection of e-mails was donated to a library or archives in CD format, and the rights holder (who may or may not be the donor) does not prohibit the library or archives from lending that original copy for off-site use, then it should be permitted to lend a physical preservation or security copy of that CD for off-site use as well. If TPMs were employed in the original (recognizing this is now rare for unpublished materials collected by libraries and archives), then TPMs that are at least as effective should be applied to any copy lent for off-site use.

(2) Remote access

There was no agreement within the Study Group on whether remote electronic access to digital subsection 108(b) copies should ever be permitted. The arguments for and against allowing remote electronic access that are discussed in connection with subsection 108(c) copies apply here as well.¹²² Other issues arose with respect to the subsection 108(b) copies due to the unpublished status of the works. Those are described below.

Arguments for permitting remote access

Amending subsection 108(b) to permit libraries and archives to reproduce and remotely deliver electronic preservation copies of unpublished works would have certain advantages:

- Networked access to unpublished works would expand and enhance scholarship and research.
- Scholars and students usually do not have the resources or time to travel to remote repositories to view and work with unpublished materials. Remote availability would enable them to study such works.
- Scholarly access to works held in archives with limited hours would be greatly enhanced.
- Remote access could take the place of deposit copying, in which case the library or archives that owns the material and is in the best position to convey information about any access and use restrictions would become responsible for administering access.

Supporters of remote access to digital copies of unpublished works recognize that certain restrictions and conditions are especially necessary in the case of unpublished works in order to respect the copyright owner’s right of first publication, as

¹²¹ See Section IV.a.2.c.iv (“Replacement Copying: Discussion of Recommendations”).

¹²² *Id.*

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well as any commercial interests that there may be in the material. The same conditions proposed for remote access to subsection 108(c) replacement copies would also apply to subsection 108(b) copies. To be clear, their proposal is not to allow libraries and archives to publish these copies on the Internet, such as by posting them on publicly available websites. Instead, they propose to allow libraries and archives to electronically deliver a work to a single individual by, for instance, e-mail, FTP delivery, or providing access to a copy online through a secure, personalized, temporary URL. In addition to the conditions proposed for remote access to replacement copies under subsection 108(c), several additional provisions were suggested to address the concerns unique to unpublished works:

- The documents presented to the user should be images of the original pages. (An online compilation of facsimile documents is not likely to damage a market for an edited, annotated version of the original documents), and
- Procedures to register scholars before they can work with online unpublished research materials could be required.

Arguments against permitting remote access

Libraries and archives should not be permitted to provide remote access to subsection 108(b) copies. It is inconsistent to permit a library or archives to make a copy available off-site if the original was limited to on-site access.¹²³ Further, an exception aimed at encouraging preservation and deposit should not be expanded to include distribution privileges in new media formats.

The case against remote access to unpublished works is made stronger by the potential such access has to interfere with the right of the copyright owner to determine whether and in what form to release the work at all. Providing remote access to an unpublished work could constitute an unauthorized distribution that infringes the author's right of first publication. It is questionable whether an exception that allows a library or archives to interfere in this way with the right of first publication could ever be a balanced one. In the case of physical deposit copies, concerns about interfering with the right of first publication are somewhat mitigated by the limits inherent in access to the physical copies housed on library and archives premises. Allowing remote access would severely alter that balance, regardless of the limitations imposed.

A blanket rule that would allow remote access to all types of unpublished works also risks violating U.S. obligations under the Berne Convention and TRIPs. Some commentators read a right of first publication – or “divulcation” – into the Berne Convention.¹²⁴ While Berne's article 9(2) (the “three-step test” for exceptions and limitations described in Section II.A.6 (“Obligations Under International Treaties”)) does not prohibit exceptions with respect to unpublished works, application of the

¹²³ This argument is also made regarding subsection 108(c) copies. *Id.*

¹²⁴ *See, e.g.*, Berne Convention, *supra* note 33, art. 10.1 (limiting quotation exception to works that have “already been lawfully made available to the public”); and art. 10bis. 1 (limiting news reporting exception to works already published or broadcast). While the TRIPs agreement has an explicit exception for certain moral rights (so that they are not enforceable through the WTO), that exception does not pertain to the divulcation right. *See generally* RICKETSON & GINSBURG, *supra* note 35, at 13.28-13.29.

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three-step test disfavors exceptions for works that are both unpublished and not publicly disseminated.¹²⁵

Rejecting an exception for remote access to digital preservation copies of unpublished works does not leave libraries and archives without the means to serve users of those works. They can continue to serve users as they currently do. And the proposed “orphan works” legislation would provide the opportunity to make available remotely those unpublished works whose owners cannot be identified or located under the terms of that legislation. Moreover, in certain factual situations, fair use or other exceptions may allow remote use. Finally, licenses permitting remote access can be sought.

¹²⁵ RICKETSON & GINSBURG, at 13.29.

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e. Preservation of Publicly Disseminated Works

i. Issue

Should an exception be added to section 108 that would permit qualified libraries and archives to reproduce published works in their collections for preservation purposes prior to detectable deterioration? Should such an exception apply to publicly disseminated as well as to published works?

ii. Recommendations

1. **An exception should be added to section 108 to permit a library or archives qualified under the proposed exception to make a limited number of copies as reasonably necessary to create and maintain a preservation copy of any at-risk published or other publicly disseminated work in its collections, provided that:**
 - a. **The number of copies made is limited to those that are reasonably necessary to create and maintain a copy of the work for preservation purposes, in accordance with recognized best practices;**
 - b. **The library or archives restricts access to the preservation copies to that which is necessary to effectively maintain and preserve the work;**
 - c. **The preservation copies may be used to make copies pursuant to subsections 108(c) or (h); and**
 - d. **Preservation copies are labeled as such.**
2. **Criteria to determine if a particular library or archives is “qualified” to avail itself of this exception should include whether the library or archives:**
 - a. **Maintains preservation copies in a secure, managed, and monitored environment utilizing recognized best practices. The following general principles for “best practices” should be observed for digital preservation (and for analog preservation to the extent applicable):**
 - i) **A robust storage system with backup and recovery services;**
 - ii) **A standard means of verifying the integrity of incoming and outgoing files, and for continuing integrity checks;**
 - iii) **The ability to assess and record the format, provenance, intellectual property rights, and other significant properties of the information to be preserved;**
 - iv) **Unique and persistent naming of information objects so that they can be easily identified and located;**
 - v) **A standard security apparatus to control authorized access to the preservation copies; and**

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vi) The ability to store digital files in formats that can be easily transferred and used should the library or archives of record need to change.

- b. Provides an open, transparent means of auditing archival practices;**
- c. Possesses the ability to fund the cost of long-term preservation;**
- d. Possesses a demonstrable commitment to the preservation mission; and**
- e. Provides a succession plan for preservation copies in the event the qualified library or archives ceases to exist or can no longer adequately manage its collections.**

3. The qualifying criteria for this exception should make allowances for institutions with limited resources that cannot create their own sophisticated preservation systems.

iii. Current Law Context

There are no current exceptions that permit libraries and archives to make copies of published works in order to preserve them prior to deterioration or loss. Libraries and archives are permitted, under subsection 108(c), to make replacement copies of published works after they are lost, stolen, damaged, or deteriorating, or their formats have become obsolete. But they cannot make copies until one of these triggering events occurs, and then only if an unused copy of the work is not available on the market at a fair price.

iv. Discussion of Recommendations

(a) Background

The lack of a specific provision for preservation copies of published works is a significant gap in section 108. A new exception would ensure that libraries and archives can preserve works of long-term value that are likely to suffer irreparable damage or loss before a replacement copy can be made under the terms of subsection 108(c).

Increasingly, copyrighted works are disseminated in digital form. Unlike a book or photograph that may deteriorate slowly over a long period of time, yet remain readable or perceivable, digital materials can degrade rapidly and invisibly and suddenly become completely inaccessible and irreproducible.¹²⁶ Accordingly, it may be impossible to create a usable replacement once degradation has been detected. Preemptive and active preservation, including making multiple reproductions of a work periodically from the point of acquisition, is necessary to prevent both digital and other at-risk works from being lost to future scholars, historians, and other users.

(b) New “preservation-only” exception proposed

¹²⁶ See Section IV.A.2.a (“Background: Digital Preservation and Copyright”) for a more complete discussion of the differences between digital and analog materials with respect to preservation.

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The Study Group recommends the adoption of a new “preservation-only” exception to permit specially qualified libraries and archives to make a limited number of copies of published or publicly disseminated at-risk works in their collections for purposes of preservation.¹²⁷ Unlike replacement copies made under subsection 108(c), libraries and archives would not be permitted to make these copies available to users as part of the library’s or archives’ collections, but could use them to make copies permitted under subsections 108(c) or (h).¹²⁸

The Study Group recommends that the exception apply to analog as well as digital materials. Although the rationale for the proposed exception was initially driven by the characteristics of digital materials, the group found that there are at-risk analog works that also require proactive preservation.

The Study Group agreed that certain conditions should be included in such a preservation exception to ensure that the equilibrium in section 108 is maintained and the exception is used only for preservation purposes. The exception should be carefully crafted to address the needs of libraries and archives in their capacity as preservationists serving the public good, but without unduly harming the incentives to create and distribute new works or previously published works in new media formats. The Study Group proposes several different types of limitations to ensure that the exception is used appropriately to permit only legitimate preservation activities.

(c) The new exception should be limited to at-risk works

The new preservation-only exception should be limited to at-risk works. The Study Group found that there is insufficient need for libraries or archives to make preservation copies of published or publicly disseminated copyrighted works where there is no evidence of any significant risk of loss, such as for works readily available on the market. The case for permitting libraries and archives to make preservation copies is far more compelling when a work is at-risk – for example, when it is unlikely to be preserved for the long term by anyone else.

(1) The meaning of the term “at-risk”

The Study Group closely examined how the term “at-risk” should be defined for the purposes of the preservation-only exception. Speaking in general terms, all members agreed that inherent in the definition of at-risk is the notion that the work is in danger of being lost unless action is taken.

To develop a more complete understanding of the term “at-risk,” the Study Group sought comments in the First Notice¹²⁹ and surveyed the initial set of NDIIPP digital preservation partners regarding which materials they considered to be most

¹²⁷ It is important to note that this exception would apply only to copies of works that a library or archives has already *legally* acquired for its collection, and does not allow copying for purposes of acquiring new works.

¹²⁸ Copies can be made under subsection 108(h) if the owner of a published work in its last 20 years of copyright protection cannot be located and a reasonably priced copy cannot be found.

¹²⁹ 71 Fed. Reg. 7999 (Feb. 15, 2006).

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at-risk.¹³⁰ Examples of at-risk materials identified include ephemeral online content such as websites, material in nonsustainable formats or media that rapidly deteriorate (magnetic tape) or depend upon obsolete software and hardware (certain CD-ROMs), content stored only in one place, and content likely to be overwritten or destroyed unless actions are taken to preserve it.

(2) Criteria for determining when a work is at-risk

Based on its examination, the Study Group proposes criteria for determining when a work is at-risk. Libraries and archives are usually best equipped to judge whether a particular copy of a work requires immediate preservation copying. Nevertheless, the Study Group believes that clear, if necessarily general, definitions of key terms such as “at-risk” will make the law easier to comply with and guard against unintended consequences.¹³¹ The Study Group was unable to agree on the exact definition of “at-risk” for the reasons discussed below, but the following proposed criteria provided the framework for its discussions.

- a. The work is unique or sufficiently rare that the library or archives has a reasonable belief that it owns the only copy or one of the few copies in existence.
- b. The library’s or archives’ copy of the work is at-risk for near-term loss, destruction, or disintegration due to the unstable or ephemeral nature of the format or medium, or because the technology required to perceive the work is at imminent risk of failure or obsolescence.
- c. The work is not commercially available and the rights holder is not preserving the work in a secure, managed, and monitored preservation environment.

The group agreed that the first two criteria are appropriate aspects of a definition of “at-risk.” Including rights holder preservation and commercial availability as factors in defining “at-risk” is not without controversy, however.

Libraries and archives do not generally view commercially available works as at-risk and often are less interested in preserving them.¹³² At the same time, these are the very works that rights holders are most concerned about protecting, and eliminating them from the exception addresses many rights holder concerns about the effect that this new exception may have on markets for their works.

It was suggested that rights holder preservation be considered as a factor in determining whether a work is at-risk. If the rights holder is preserving the work in a secure, managed, and monitored preservation environment utilizing best practices,

¹³⁰ The NDIIPP digital preservation partners consist of a group of consortia involved in identifying, collecting, and preserving digital materials within a nationwide digital preservation infrastructure. These consortia were identified by NDIIPP through national, competitive procurement processes and represent pioneering efforts in relatively large-scale digital preservation projects in several media and formats. They have received partial funding from NDIIPP.

¹³¹ Compare the Study Group’s definition of a fragile copy in Section IV.A.2.c.iv (“Replacement Copying: Discussion of Recommendations”) (“[a copy] that is embodied in a physical medium that is at risk of becoming unusable because it is delicate or easily destroyed or broken, and cannot be handled without risk of harm”). The Study Group recognizes that there is some overlap between this definition and what would be considered at-risk under the proposed preservation-only exception.

¹³² This is not necessarily true for works disseminated only online, however.

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then it would not be deemed at-risk. Rights holders have a critical role in ensuring comprehensive and effective digital preservation of their works. One impact of digital technologies is that rights holders can keep works available longer and reintroduce them into the marketplace more easily, which provides greater business incentives for preservation. Including rights holder preservation in determining whether a work is at-risk may further enhance the incentive for rights holders to preserve their works under conditions mirroring those required of libraries and archives. This would help distribute the responsibility and expense of digital preservation among rights holders, libraries, and archives.

Some question whether rights holders’ preservation commitments can ever substitute for library and archives preservation activities. Preservation requires long-term investment of time and resources, which can be difficult to reconcile with changing business models, profitability goals, and ownership. Moreover, while libraries and archives may be concerned with preserving the integrity of all distinct editions of works – including the original edition, and especially at-risk editions – authors and publishers may choose, for legal or business reasons, to invest in preserving only a newer, corrected version of a work. Digital preservation best practices, including the importance of multiple distributed copies, should also be a consideration in determining whether, and if so under what circumstances, rights holder preservation could eliminate a work from the “at-risk” category.

The value of preservation copies of at-risk works held solely by rights holders and possibly inaccessible to researchers was also questioned. To remedy that concern, it was proposed that only rights holders that provide credentialed researchers with on-site access to preserved works could preclude libraries and archives from preserving those same works under this exception, particularly if a copy of the work is not obtainable at a fair price.

Determining the exact mechanics of when and how a library or archives could determine whether a rights holder is preserving a particular work could prove challenging. One possibility is to require the rights holder to provide general notification of its preservation activities through some formalized means, such as a registry in the Copyright Office similar to the registry provided for under subsection 108(h). Alternatively, the responsibility for determining if a particular work is being adequately preserved by a rights holder could be placed on the library or archives seeking to make a preservation copy.

(d) Only libraries and archives that qualify as trusted preservation institutions should be eligible for the new exception

The preservation-only exception should be limited to certain qualified institutions, namely those libraries and archives that have the ability to preserve at-risk works effectively and maintain them in a secure environment, utilizing recognized best practices. Such a limitation is critical to the success of such an exception.

Many libraries and archives do not actively engage in comprehensive preservation of works in their collections, nor do they have the ability to undertake effective digital preservation or to maintain adequate security with respect to the copies that

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the new exception would allow. Thus there is no clear rationale for permitting these institutions to avail themselves of the preservation-only exception. This exception is proposed to ensure that publicly disseminated at-risk works are systematically preserved and maintained for long-term use – not to enable all libraries and archives to digitize their existing collections. Libraries and archives that have not adopted digital preservation best practices, as described below, should not be able to take advantage of the exception.

(1) Qualification criteria

A library or archives that wishes to take advantage of this exception should meet certain qualifying conditions. These conditions would be in addition to the general section 108 eligibility criteria contained in subsection 108(a) and would apply only to this exception. They include: conforming to recognized best practices, allowing audits of archival practices, demonstrating sufficient funding, having a proven commitment to the preservation mission, possessing a standard security apparatus, and providing a succession plan.

(2) Process for qualification

The Study Group considered several alternative proposals for determining how libraries and archives could become qualified for the preservation-only exception and for ensuring that they continue to meet the qualification requirements for as long as they retain preservation copies. These proposals include:

- *Self-qualification*: Permitting libraries and archives to determine for themselves whether their procedures and activities meet statutory criteria to qualify for this exception. This is how the current exceptions in the Copyright Act work.
- *Self-qualification with standards-setting collective*: Allowing libraries and archives to self-assess, as in the first proposal, but in accordance with standards established by a standards-setting collective. Self-assessments would be reviewed on a periodic basis, either by self-audit or third-party audit. The purpose of such audits would be to review the records and practices of the library or archives to determine whether it meets or continues to meet the requisite qualifications. Public disclosure of the results of audits, including self-audits, could be required.
- *Self-qualification with oversight body*: Permitting self-qualification, with or without auditing (as in the first two proposals), supplemented by an oversight body with authority to settle disputes without litigation. In addition to providing a forum for complaints, this body could offer a means for policing compliance by imposing sanctions in appropriate cases.
- *Certification or other third-party qualification process*: Establishing a formal certification or other third-party qualification process, under which one or more authorized entities would undertake a full review of a library’s or archives’ practices and procedures to determine whether it meets the qualifications. Periodic audits could be conducted to ensure continued compliance. Different content industries could have different authorized qualification bodies, as preservation might vary according to the type of work or media. Such entities might be organizations comprising representatives of all interested parties, including rights holders, to ensure standardization of preservation prac-

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tices and avoid duplication of efforts. This function could be given to newly formed entities or existing ones, working with the interested stakeholders.¹³³ There are already a number of activities developing around audit and certification processes that might provide guidance.¹³⁴

- *Automatic qualification based on membership in a federal digital preservation consortium:* Joining a federal program or a consortium, as identified in the statute, provided such program or consortium has criteria for membership that include the employment of best practices and a demonstrable preservation plan. This is proposed as a variation on certification. The NDIIPP program, for instance, is developing a strategy for creating a national network of digital preservation partners. The network partners collectively might be responsible for collecting and preserving digital content of value to Congress and the nation.

The Study Group agreed in principle that any qualification process should be kept as simple and as nonbureaucratic as possible, although there was no agreement on which qualification process should be adopted. The main difference of opinion was whether third-party qualification is necessary or if libraries and archives should be allowed to self-qualify.

Arguments for self-qualification

Libraries and archives should be able to determine for themselves whether they meet the qualification criteria, as is the case elsewhere in the Copyright Act. Digital preservation is too important for this preservation-only exception to exclude entities with unique and valuable holdings but which lack the resources to undertake a rigorous qualification process. Any approach that makes preservation of at-risk works the exclusive province of a small group of sophisticated research libraries and archives, or that places unnecessary, cumbersome, and costly burdens on libraries and archives attempting to meet important policy goals is problematic. If an unqualified institution tries to take advantage of an exception, the rights holder’s legal recourse is to seek damages and/or injunctive relief in a suit for copyright infringement.

Arguments for a third-party qualification process

Third-party oversight of qualification is justified because the proposed preservation exception would explicitly permit libraries and archives systematically to make and retain digital copies of publicly disseminated works. This exception could enhance the risks to rights holders from unauthorized distribution of copyrighted works unless appropriate best practices, such as those for security, are followed. In this view, clear criteria for qualification and third-party oversight in the statute or in regulations avoid the need for litigation to resolve whether best practices are being observed in any given case. Litigation is costly and time consuming, and, moreover, in many cases principles of state sovereign immunity make it impossible to recover damages or attorneys’ fees in a suit against a state-operated library or archives.¹³⁵

¹³³ A third-party certification process might require federal funding, making it less attractive to legislators.

¹³⁴ In March 2007 the Research Libraries Group (a unit of the Online Computer Library Center) and the Center for Research Libraries published the Trustworthy Repositories Audit & Certification: Criteria and Checklist, available at <http://www.crl.edu/PDF/trac.pdf>. There are also parallel studies under way in Europe.

¹³⁵ See also, Comment of Allan Adler, Association of American Publishers 11 (Apr. 27, 2006) (noting that publishers are loath to sue libraries and archives), http://www.loc.gov/section108/docs/Adler_AAP.pdf.

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(3) Best Practices

As noted above, one of the recommended qualifying criteria is conformance with the recognized best practices. The Study Group separately considered the question of how to identify best practices at a given time and for a particular category of works, and whether a library or archives is conforming to them.

With the ongoing evolution of technology and technical infrastructure and the fact that best practices will vary by content type and media, the group recognizes that best practices cannot be statutorily defined with any specificity. The statute could contain some general principles for best practices, however, and more specificity could be provided by reference to the best practices issued by a named entity or group of named entities or by regulation. The general principles for best practices encompass the following: a robust storage system, a means of ensuring file integrity, the ability to record significant properties of the material, the persistent identification of each digital object, a standard security apparatus, and storage in transferable file formats.

Several strategies for determining best practices were proposed. Some Study Group members believe that citing to the general principles for best practices noted immediately above is sufficient. Libraries and archives would determine for themselves whether they met the criteria, as they do for the current subsection 108(a) criteria. Under this view, libraries and archives are in the best position to determine best practices at any given time for a particular work.

On the other hand, a third-party qualification process would point to a third party (or another entity) to identify the appropriate best practices. This entity could be a specially formed organization that includes representatives of rights holders, as well as of libraries and archives, to ensure that best practices are not defined solely by a single stakeholder group. Groups already working on describing best practices for digital preservation could serve as trusted sources of best practices.¹³⁶ Other members believe that it would be preferable to issue regulations, subject to update from time to time, or to refer in legislative history to examples of best practices documented to date.

(4) Recognition of the need to make provision for entities with limited resources

Raising the bar too high for qualification for the preservation-only exception could exclude libraries and archives with limited resources, including those with unique materials, whose participation in the digital preservation process should be encouraged. For example, few entities will be interested in collecting the online edition of a small-town newspaper other than a local library or archives.

The Study Group thus considered different levels or standards for qualification depending on the size and nature of the library or archives, or the type of content to

¹³⁶ Among the U.S. organizations developing digital preservation best practices, and that might be referred to as sources of best practices, are the Digital Library Federation (DLF), the National Information Standards Organization (NISO), the National Institute of Standards and Technology (NIST), and the Online Computer Library Center (OCLC). In the United Kingdom the Digital Curation Centre (DCC) and the Joint Information Systems Committee (JISC) are doing similar work, as is NESTOR in Germany.

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be preserved. A small local archives that preserves only select types of material, for example, might have to meet a modified set of best practices. The exception could be structured so that such entities are required to work in cooperation with qualified libraries and archives to preserve their holdings. Whatever other modifications to standards and best practices might be made to encourage the participation of smaller or less sophisticated entities, however, the Study Group agreed that all libraries and archives qualified under this exception should be held to the requirement of providing adequate security for their preservation copies.

The qualification process could also take into account the growing movement toward consortial approaches to digital preservation, where a consortium as a whole might qualify, but not each of the individual members.¹³⁷

(5) Loss of qualification

Libraries and archives that cease to comply with the applicable standards (or that cease to exist) should no longer qualify for the preservation-only exception. Any copies made under the exception and maintained in the care of such an institution should be transferred to another qualified institution.

(e) Number of copies

The Study Group recommends that the number of copies that a qualified library or archives is permitted to make of any at-risk work should be limited to the number necessary to maintain, migrate, normalize, and refresh preservation copies to ensure that a usable preservation copy remains in existence. In addition, reproductions of preservation copies can be made under subsections 108(c) and (h), as described in subsection (g), below.

(f) Access to preservation copies should be restricted

The Study Group finds that it is important to separate preservation and access activities conceptually in order to craft workable, balanced preservation exceptions. If libraries and archives are concerned about preserving works in their collections, and if rights holders perceive that their ability to exploit their markets could be harmed by lost sales and increased user access to these works, then an obvious solution is to allow preservation copying without increasing access.

The Study Group recommends that access to these preservation copies themselves (as distinct from the copies that can be made from them as described in the section immediately below) be restricted to that which is necessary to maintain and preserve the works effectively and in a renderable form. Many group members believe that only custodial and curatorial staff of the library or archives need to have access in order to ensure that the works are effectively maintained and preserved, and that limiting access in this way would avoid the attendant risks of public access. Others argue that a certain level of researcher access is necessary to keep the data alive and ensure it remains usable.

¹³⁷ See Section IV.A.2.a.iv (“Consortial Approaches to Digital Preservation”).

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Restricting access to these preservation copies reduces potential harm to rights holders’ exclusive reproduction and distribution rights, without affecting a library’s or archives’ ability to conduct effective preservation activities in a timely manner. These preservation copies are intended to protect against loss of the original, and not to serve as user or access copies. Indeed, in some cases the preservation copy would be maintained in an archival format that is not suited for user access.

If libraries and archives were able to use preservation copies for any purpose, including as access copies for users, the proposed preservation-only exception would incidentally provide libraries and archives with the ability to make additional free copies of works in their collections for their users without permission of or compensation to the publisher or author. This disincentive to purchase additional copies of a work potentially harms the market for the work, especially in the case of specialized or educational materials that rely heavily on the library and archives market and whose publishers generally operate on very small profit margins.

(g) Copies can be made from preservation copies only for limited purposes

A principal purpose for permitting qualified libraries and archives to make preservation copies of at-risk works is to ensure that a reproducible copy remains available from which a replacement copy can be made under subsection 108(c). Accordingly, a crucial piece of the proposed exception is to allow replacement copies to be made from such preservation copies if the library’s or archives’ original copy meets the subsection 108(c) conditions (deteriorates, becomes destroyed, lost, stolen, or obsolete and a copy can not be purchased at a fair price). In addition, the Study Group recommends that libraries and archives be permitted to reproduce such preservation copies under subsection 108(h) conditions (the owner of a work in its last 20 years of copyright protection cannot be located and a reasonably priced copy cannot be found). The new provision would not replace the subsection 108(c) or (h) exceptions, but would serve as a complement to ensure that copies exist from which to make otherwise permitted copies.

Because not all libraries and archives will be qualified to make preservation copies, it is important that entities qualified under the exception be authorized to make subsection 108(c) or (h) copies for other libraries and archives (qualified or not) that meet the respective subsection 108(c) or (h) conditions. Assume, for example, that Library A is not qualified to make preservation copies of publicly disseminated works, and a work in its collection is destroyed and a copy is not available on the market. Library B, which is qualified to make preservation copies, and has a preservation copy of the work in question, should be permitted to make a replacement copy for Library A. Allowing qualified libraries and archives to provide these services to other libraries and archives would reduce the risk of loss of materials held by non-qualified libraries and archives.

(h) Preservation copies should be identified

The Study Group recommends requiring a notice on any copy made under this exception that contains the name of the library or archives that made the preservation copy, and a legend indicating that the copy was made by the library or archives under

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its section 108 authority. Thus, a preservation copy might be identified as follows: “This copy was made by [name of library or archives] on [date] under section 108 of the Copyright Act for preservation purposes. It may not be further distributed.” For digital copies, the notice should be in the form of a persistent identifier such as a watermark, so that a typical user cannot easily remove it.

Identifying the copies as preservation or archival copies will serve to protect the integrity of the work by avoiding confusion of the preservation copy with the original, particularly if the preservation copy is different in quality or format than the original. The notice can also help limit infringing downstream distribution of preservation copies. Copyright holders have legitimate interests in preventing confusion between commercial and preservation copies of a work, and an identification requirement is relatively unobtrusive in comparison to the potential harm to the rights holder.

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f. Preservation of Publicly Available Online Content

i. Issue

Should a new exception be added to section 108 that would permit libraries and archives to capture and copy certain publicly disseminated online content (for example, websites and blogs) for preservation and access? If so, what limits should be placed on the capture of the content and on the provision of public access to the content once it is captured?

ii. Recommendations

1. **A new exception should be added to section 108 to permit libraries and archives to capture and reproduce publicly available online content for preservation purposes, and to make those copies accessible to users for purposes of private study, scholarship, or research.**
 - a. **“Publicly available” for purposes of this exception is defined as publicly disseminated online content (such as websites) that is not restricted by access controls or any type of registration, password, or other gateway requiring an affirmative act by the user to access the content.**
 - b. **Once a library or archives has captured publicly available online content, it should be allowed to provide access to its preservation copies of this content to researchers on the library’s or archives’ premises.**
 - c. **Libraries and archives should be permitted to make the captured content available remotely to their users, but only after a specified period of time has elapsed.**
2. **Opting Out**
 - a. **Rights holders should be able to opt out of allowing libraries and archives to capture their publicly available online content, with the exception of government and political websites. The recommendation to include an opt-out clause is conditioned on the Library of Congress being able to copy and preserve all publicly available online content, regardless of the rights holder’s desire to opt out.**
 - b. **Rights holders who do not opt out of capture and preservation of their publicly available online content should be able to separately opt out of allowing libraries and archives to make their content available remotely to users.**
3. **Libraries and archives should be prohibited from engaging in any activities that are likely to materially harm the value or operations of the Internet site hosting the online content that is sought to be captured and made available.**
4. **Libraries and archives should be required to label prominently all copies of captured online content that are made accessible to users, stating that**

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the content is an archived copy for use only for private study, scholarship, and research and providing the date of capture.

iii. Current Law Context

No provision of the Copyright Act expressly allows libraries and archives to capture publicly disseminated online content and create a permanent copy of it for their collections.

The provisions of section 108 generally apply only to materials already in an institution’s collection and do not encompass the acquisition of content that occurs as a result of, or in the course of, web harvesting. Subsection 108(f)(3) is currently the sole exception: it permits libraries and archives to record broadcasts of audiovisual news programming off the air and to lend copies of the programs to users.¹³⁸

As described in Section II.C.5.f (“Exceptions Specific to the Library of Congress”), the Library of Congress has the right to require the publisher of any copyrightable work published in the United States to deposit two copies of the work with the U.S. Copyright Office for the use of the Library of Congress.¹³⁹ This legal deposit provision is technically applicable to websites that are deemed “published” under the law.¹⁴⁰

iv. Discussion of Recommendations

(a) Background

Publicly disseminated online content presents unique preservation issues for libraries and archives and for rights holders. Works that are created for and made available on websites and other Internet-based forums are important sources of information and creative expression. Preserving the online experience requires capturing not just the content itself (for example, an essay or a photograph), but the entire site, including software, advertisements, pop-ups, and other relevant material integral to the website. Much as media historians examine 19th century newspapers in their entirety, scholars researching online content may need access not only to what was available on the Web, but also the context in which it was available.

Websites and other online content can be captured for archival purposes by using automated search tools (“spiders”) programmed to search particular online locations at specific intervals and to capture the content found at these locations. This content is then saved or “harvested” by the capturing organization on its own servers and, depending on the circumstances, may be made available to the public.

¹³⁸ This is known as the “Vanderbilt exception” because it legitimized the Vanderbilt University library program of capturing television news programs off-air. It is discussed in detail in Section IV.A.2.g.iv (“Television News Exception: Discussion of Recommendations”).

¹³⁹ 17 U.S.C. § 407(a)-(b) (2007).

¹⁴⁰ See Section IV.A.2.b.ii (“Rethinking the Published/Unpublished Distinction: Current Law”) for a discussion of when a website may be deemed published. Content published only online is currently exempt from mandatory deposit by the Copyright Office regulations. 37 C.F.R. § 202.19(c)(5) (2007).

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Relatively few libraries and archives presently collect and preserve material made available online, although the number is growing. Many libraries and archives lack the necessary resources or expertise to capture and preserve web content; others that might have the resources are reluctant to do so because it involves making a copy of copyrighted content, for which there is no explicit exception in the law.

Capturing online content implicates the right of reproduction, and making it available to the public also implicates the rights of distribution, public performance, and/or public display, depending on the nature of the content. Organizations that currently collect and archive online content rely on fair use or seek permissions.¹⁴¹ But the applicability of fair use is uncertain, and seeking permissions is time-consuming, expensive, and generally yields frustratingly thin results.¹⁴² As a result, many libraries and archives limit Internet collecting activities, even where web-based materials would be a natural and important part of their collections. A vast amount of valuable digital information thus is lost every day.

(1) Television news exception precedent

Capturing Internet content is similar in some respects to collecting television news: both types of material contain potentially important cultural and historical content, but neither is distributed in copies that a library or archives can purchase for preservation purposes.

Subsection 108(f)(3) was adopted to permit libraries and archives to copy television news programming off the air, under the rationale that it is content important to the nation that is otherwise unlikely to remain available for research over the long-term.¹⁴³ And, like television news, much publicly available online content, especially from those sites dealing with current events and popular culture, derives its principal economic value (for example, advertising revenue) from its immediacy.

(b) Limited exception permitting capture and public access

The Study Group recommends the adoption of a new exception to permit libraries and archives to capture and reproduce publicly available online content for preservation purposes and to make those copies publicly accessible for purposes of private study, scholarship, or research. Such an exception will enable more libraries and archives to undertake this socially valuable activity. The three characteristics of online content that present the most compelling rationale for adding this exception – ephemerality, market unavailability, and transaction costs – are described below.

¹⁴¹ The Internet Archive, for example, captures millions of pieces of publicly available online content, but does not seek the rights holders’ permission in advance. It does, however, respect requests from rights holders not to capture their content or make it publicly accessible. These requests are conveyed either automatically via a robots.txt file embedded in the site where the content resides or through direct contact with the Archive after the content is captured. Comment in Response to First Notice, Michelle Kimpton, Internet Archive 2 (Apr. 7, 2006), http://www.loc.gov/section108/docs/Kimpton_Internet-Archive.pdf. Other more targeted initiatives such as the Library of Congress’s web capture project have in some cases sought permission in advance from rights holders to harvest their content. Or, in the case of content with greater risk of impermanence – such as sites established solely in response to a single event – permission to provide access is sought after the material is harvested.

¹⁴² For example, the Library of Congress’s web archiving team claims a response rate to permission requests of less than 50 percent.

¹⁴³ See S. REP. NO. 94-473, at 69 (1975).

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Ephemerality. Unlike most other content collected by libraries and archives, online content is particularly ephemeral in nature. The average life of a website is said to be less than 100 days,¹⁴⁴ and little of what is available on the Internet is archived in any systematic way, either by content owners or third parties. Internet-based content such as websites and blogs may provide rich information about current events and culture. But because this information is often made available to the public for only a brief time, after which it is changed or removed, its historic value cannot always be assessed in time to preserve it. For example, a blog that provides a firsthand account of a major historical event may have a limited life span. In the physical world, librarians and archivists have the relative luxury of relying upon the passage of time to tell them which of the materials in their collections are windows on past cultures and events. The sheer amount of potentially valuable Internet-based expression, combined with its lack of permanence, do not allow such repose. Collection needs to occur soon after its dissemination.

Market Unavailability. There is no viable market in which a library or archives can purchase copies of such online content for their collections. Certainly, some publicly available Internet content is eventually published, but this is a small percentage of what is publicly available, and is often in a different format that significantly alters the nature of the work and its functionality.

Transaction Costs. Publicly available online content also presents logistical roadblocks to preservation. Many websites contain multiple works owned by different rights holders, and the proprietor of a website may not even know how many or what separate works reside on his or her site. The transaction costs incurred in clearing rights for all of the content on every website a library or archives is interested in acquiring simply overwhelms the act of capturing and curating the content itself. The Study Group believes that encouraging the creation of collections of publicly available online content is a public policy goal that necessitates excepting libraries and archives from seeking permission to capture such content.

Effect on rights holders. Aside from the benefits to scholarship and history likely to be realized from such an exception, rights holder interests may be served as well. Rights holders who lack their own digital preservation resources will be able to rely on libraries and archives to preserve a record of their online content.¹⁴⁵ Conversely, the potential for injury to the rights holders of online content is minimal if the restrictions proposed by the Study Group are implemented, since the content at issue is already freely available to the public through the Internet.

(c) Definition of “publicly available”

“Publicly available online content” is defined, for purposes of this exception, as publicly disseminated online content (such as websites) not restricted by access con-

¹⁴⁴ See, e.g., Jim Barksdale & Francine Berman, *Saving Our Digital Heritage*, WASHINGTON POST, May 15, 2007, at A15 (“The average life span of a website is only 44 to 75 days”), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/05/15/AR2007051501873.html>.

¹⁴⁵ Rights holders can also take advantage of archived online content as a source of evidence of copyright and trademark infringement. See David Kesmodel, *Lawyers’ Delight: Old Web Material Doesn’t Disappear*, WALL ST. J., July 27, 2005, at A1; Tom Zeller, Jr., *Keeper of Expired Web Pages Is Sued Because Archive Was Used in Another Suit*, N.Y. TIMES, July 13, 2005, available at <http://www.nytimes.com/2005/07/13/technology/13suit.html>.

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trols or any type of registration, password, or other gateway requiring an affirmative act by the user to access the content. The Study Group recommends that the exception apply to all publicly available online content.

The Study Group extensively discussed how to limit the online content exception to prevent harm to the commercial incentive to use the Internet to disseminate works of authorship. Requiring registration, assent to terms of use, or any other act by the user prior to access is an unambiguous indication that the rights holder of the online content intends to retain a certain level of control over his or her works. The group decided that the existence of access controls or any type of registration, password, or other gateway is an appropriate way to differentiate between what should and should not be considered publicly available for the purpose of this exception. This restriction excludes many websites that require registration but are otherwise “free” to the public. Because much Internet content that is initially free is later made accessible only for a fee, the group believes that this is a viable way to distinguish content that the rights holder intends to retain control of or exploit in the market from content intended to remain freely available.

“Click-wrap” agreements, for instance, whereby a user is asked to assent to licensing terms by clicking “accept” or “okay” prior to being given access to the rest of the website, may be used to prevent a site from being deemed publicly available. In contrast, so-called “browse-wrap” agreements posted on websites announce terms of use but do not require such an overt act of assent. The Study Group generally agreed that sites that use only browse-wrap agreements should be considered publicly available for purposes of this exception – and therefore subject to capture – since no active indication of consent is required.¹⁴⁶

(d) Public access

The Study Group recommends that, once a library or archives has captured publicly available online content, it should be allowed to provide access to its preservation copies of this content to researchers on the library’s or archives’ premises.

Because this content was originally freely available online, the Study Group believes libraries and archives should also be permitted to make the captured content available remotely to their users, but only after a reasonable period of time has elapsed and only if it is marked as an archived copy.

Requiring such an embargo on remote access and requiring that copies be marked (see below) will reduce the risk that the archived copy will be mistaken for the original or divert viewers from the source site and its advertisers.

¹⁴⁶ The Study Group expresses no opinion on the general validity of browse-wrap agreements. See Section IV.C.3.d.ii (“Negotiable Versus Non-Negotiable Agreements”) for a discussion of the legal effect of click-wrap and browse-wrap licenses.

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(e) Opting out

(1) Opting out of capture

The Study Group recommends that rights holders should be able to opt out of allowing libraries and archives to capture their publicly available online content, with the exception of government and political websites. The recommendation to include an opt-out clause is conditioned on the Library of Congress being able to copy and preserve all publicly available online content, regardless of the rights holder’s desire to opt out.

This opt-out provision is intended to protect the public interest in rights holders retaining a reasonable level of control over how their works are used. There are a variety of mechanisms by which a rights holder can provide notice of its desire to opt out. The most efficient way currently appears to be by including an explicit “no archive” metatag or similar technological stop sign on the site, or by responding to a notice of the crawl or query sent out with or ahead of the crawl. If a library’s or archives’ crawler encounters such a tag, or if the library or archives is otherwise notified that the rights holder does not want the content captured, then it may not capture the content. If the library or archives receives notice after the crawl has occurred, it should remove the content or, if removal is not technologically feasible, block access to the content.

Even when their content is made freely and publicly available on the Internet, rights holders may have legitimate interests in retaining control over it. Providing rights holders with the ability to opt out should reduce concerns about the exception.¹⁴⁷

(2) Exception to opt-out for political and government sites

In order to ensure that online works of government and political organizations can be preserved, the Study Group recommends that those organizations not be allowed to opt out of capture and preservation of their websites. Libraries and archives should be permitted to capture publicly available online content from sources such as the following *regardless* of whether the rights holder(s) opt out:

- Federal, state, and local government entities;
- Political parties;
- Campaigns for elected office; and
- Political action committees (as defined in relevant law).

This provision is designed to ensure that libraries and archives can effectively fulfill one of their core purposes: cultivating informed participants in the democratic process. The types of sources listed above play an important role in educating the public about all facets of political and cultural history, and especially about the po-

¹⁴⁷ The experience of the Internet Archive, which permits opt-out, and other libraries and archives that seek permission seems to indicate that most rights holders of Internet sites do not believe that capture and preservation by libraries or archives will harm them. See Kimpton, *supra* note 141, at 2.

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litical process. These sites contain important primary research material for future scholars.

In the past, when a government agency altered its policies or updated information it provided to the public, the earlier versions usually remained available because there was no practical way to recall them. But information on the Internet can be altered or removed without notice and without leaving a record of what was previously there. Thus, as a matter of public policy, entities that have been entrusted with the duties of governance, or are formed to influence the political process, should not be allowed to opt out of public scrutiny.

(3) Library of Congress as fail-safe for opted-out content

For some group members, an essential condition for allowing opt-outs is that the Library of Congress be legally permitted to capture and preserve all publicly available online content. The Library is already empowered under the mandatory deposit provisions of the Copyright Act to collect all content deemed published, and the Study Group believes that it should also be permitted to collect publicly available content even if legally unpublished under the Copyright Act’s definition of “publication.” This will enable important aspects of the national culture to be reliably preserved, even when a rights holder has opted out. The Study Group supports such a fail-safe provision as a means to ensure that important historical content will remain available to scholars and researchers.

(4) Separate opt-out for remote access to captured content

The Study Group recommends that rights holders that do not opt out of capture and preservation of their publicly available online content should be able to separately opt out of allowing libraries and archives to make their content available remotely to users.

The decision of a rights holder not to opt out of having its content preserved does not necessarily imply a desire to have this content made available remotely by the capturing library or archives. Thus, the Study Group believes it is appropriate to offer a separate opportunity to opt out of remote access. One benefit of this two-tiered opt-out process is that it allows copyright owners who object to public availability of archived copies of their online content, but not necessarily to the preservation of that content, to express this preference, resulting in a greater amount of material preserved. Opt-out can be effected by notice at any time through the same mechanisms described above. Once such notice is received, the library or archives should block remote access to the content.

(5) Opt-out in context

To be clear, the Study Group is not suggesting that an opt-out approach to copyright generally is applicable or appropriate here or in any other context. Use of the term “opt-out” may raise certain connotations that are not intended. The opt-out provisions described here are proposed simply as a means of limiting an otherwise broader, but important, exception. The Study Group believes that limiting the scope

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of the online content capture and preservation exception through a provision that permits concerned rights holders to opt out will reduce any potential harm to rights holders, while also allowing for the type of web capture and preservation that the exception is designed to foster.¹⁴⁸

(f) No harm to content hosts

The potential for excessive web crawling and capture to disable websites or otherwise impair network resources is very real and should be addressed in the proposed exception. Libraries and archives should be required to take reasonable measures to ensure that they do not materially harm the operation of the websites, blogs, or other online content sources that they crawl. The Study Group recommends that further consideration be given to ways to avoid material harm from website crawls under the proposed exception and methods of redress for rights holders that can demonstrate actual harm.

(g) Provision of notice on publicly accessible copies

The Study Group recommends that libraries and archives be required to label all copies of online content captured under the proposed exception that are made accessible to users, stating that the content is an archived copy for use only for private study, scholarship, and research, and providing the date of capture.

This requirement serves two purposes. The first is to give notice to users that the archived copy cannot be used for commercial or other nonintended purposes. The second is to avoid confusion with the current version of the website from which the content was captured, since the content may subsequently have been changed or retracted.

¹⁴⁸ This proposal is somewhat akin to the subsection 108(h) provision that permits rights holders to effectively opt out of allowing libraries and archives to use their works during the last 20 years of the copyright term through notice to the Copyright Office that the work is either subject to normal commercial exploitation or can be obtained at a reasonable price. In both cases, the “opt-out” serves not as a requirement for or limitation on the exercise of exclusive rights, but rather as a means for a copyright owner to exclude its works from an otherwise generally applicable statutory exemption.

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g. Television News Exception

i. Issue

Should subsection 108(f)(3) – the “television news exception” – be amended to permit libraries and archives that have made copies of audiovisual news programs under the exception to provide access to those copies by means other than the lending of physical copies?

ii. Recommendations

1. **The television news exception should be amended to allow libraries and archives to transmit view-only copies of television news programs electronically by streaming and similar technologies to other section 108-eligible libraries and archives for purposes of private study, scholarship, or research under certain conditions, and after a reasonable period has passed since the original transmission.**
2. **Any amendment should not include an exception permitting libraries and archives to transmit downloadable copies.**

iii. Current Law Context

Subsection 108(f)(3) provides: “Nothing in this section . . . shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program” This exception permits libraries and archives to acquire copies of audiovisual news programs by copying them off the air or otherwise for their collections. The limitation on distribution to *lending* a copy implies that the copy must be returned to the library or archives.¹⁴⁹ It also implies that a physical copy must be provided. The House Report accompanying the 1976 Copyright Act expands on the meaning of “audiovisual news programs.” It provides that subsection 108(f)(3):

is intended to apply to the daily newscasts of the national television networks, which report the major events of the day. It does not apply to documentary (except documentary programs involving news reporting as that term is used in section 107), magazine-format or other public affairs broadcasting dealing with subjects of general interest to the viewing public.¹⁵⁰

iv. Discussion of Recommendations

(a) Background

Subsection 108(f)(3) was drafted to ensure that Vanderbilt University’s Television News Archive and similar television news archives could capture off air and preserve television news without legal challenge under the copyright law. The exception recognizes the ephemerality of such programs, as well as their potential im-

¹⁴⁹ See H.R. REP. NO. 94-1476, at 77 (1976). Copies of text-based works made for users, in contrast, must become the property of the user.

¹⁵⁰ *Id.*

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portance for scholarship and research.¹⁵¹ The public policy goal of the television news exception – to ensure independent third-party resources for news broadcasts and the ability of the public to access these resources – continues to be an important one.¹⁵²

(b) Lending copies of news programs via electronic transmission

The Study Group recommends that the television news exception should not be amended to permit libraries and archives to transmit downloadable copies.

The Study Group also recommends that the television news exception be amended to permit libraries and archives to transmit view-only copies of television news programs electronically by streaming and similar technologies to other eligible libraries and archives for purposes of private study, scholarship, or research under certain conditions and after a reasonable period has passed since the original transmission.

In the case of television news programs, requiring physical lending may present an unnecessary impediment to scholarly research. The Study Group believes that it is possible under certain limited conditions for libraries and archives to transmit copies electronically without harm to the rights holders' markets. The current limitation on distribution creates additional costs by requiring libraries and archives to make, package, and mail videotape copies to requesting users, but without providing additional security for rights holders. As a practical matter, it is easier for users to reproduce and redistribute videotapes than to do so for streamed video.

(c) Recommended conditions

In allowing for expanded access to audiovisual news programs it is important to preserve the “lending” characteristic of the exception, since permitting users to retain copies increases the risk that the programs will be copied and distributed in competition with authorized, commercial versions of the same content. This is a greater concern today than when the exception was first drafted, because at that time copies of old television news programs were rarely marketed by rights holders. Recently, some owners of television news content have started to provide Internet access to both current and historic television news programs.

The Study Group agreed that a key element to maintaining a “lending” model in the digital context is to prohibit the transmission of permanent electronic, downloadable copies of television news programs. Accordingly, transmissions by libraries and archives of archived television news programs should be limited to view-only technologies, such as streaming, that do not provide the end user with a permanent copy.

¹⁵¹ See S. REP. NO. 94-473, at 70 (1975). The Vanderbilt Television News Archive, begun in 1968, is a comprehensive collection of U.S. news programs. It is the principal source for scholars researching historic television news programs, and is of significant historical and cultural importance.

¹⁵² For further discussion of the rationale behind the television news exception in relation to the proposed online content exception, see Section IV.A.2.f.iv (“Preservation of Publicly Available Online Content: Discussion of Recommendations”).

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To address concerns that a broad exemption allowing libraries and archives to transmit news programs, even on a delayed basis, could compete with new markets for television news, the Study Group discussed a number of different conditions and models for providing electronic access. First, it recommends that libraries and archives be permitted to provide electronic transmission only for purposes of private study, scholarship, or research (mirroring the condition for providing copies to users under subsections 108(d) and (e)). While the current law is silent on the purposes to which the lent segments of news programs can be put, the legislative history indicates that the exception was intended to authorize “limited distribution to scholars and researchers for use in research purposes.”¹⁵³ Some members think that “teaching” should also be expressly added to clarify that these materials can be used in the classroom. In addition, the library or archives should not be permitted to provide access by electronic transmission until a reasonable period of time has elapsed from the original broadcast to avoid harming the market for recent news programming.

The Study Group recommends that libraries and archives be permitted to transmit the programming to other section 108-eligible libraries and archives, with user access limited to viewing on the premises of the other library or archives.

(d) Other types of access proposed

In addition to allowing streaming transmission on the premises of libraries and archives, other proposals were considered but not agreed upon by all. One was to permit streaming transmissions directly to users outside the library’s or archives’ premises under certain conditions. The current subsection 108(f)(3) allows libraries and archives to send a physical copy of a news program to anyone who requests it. Consequently some believe there is no reason to preclude individual user electronic access to the same material because the potential threat to developing markets for current and historic news programs or other harm to rights holders could be tempered by permitting view-only access for the specific user and placing various conditions on such access. Conditions could include those proposed for remote electronic access to copies made under subsections 108(b) or (c), including restricting access to the library’s or archives’ user community, effectively limiting access to only one user at a time, and requiring users to agree not to reproduce or further distribute the program.¹⁵⁴

A second proposal would allow streaming access to users of other libraries or archives, but only through the users’ own libraries or archives. Under this model, a library or archives could obtain a stream from the collecting entity, but rather than limit access to on-site viewing, it could in turn provide its own users with remote access. In other words, an interlibrary loan model could be used, where the stream is made not to a user directly but to a user through the intermediary of another library. At the very least, the proponents of this idea suggest, libraries and archives in educational institutions should have the ability to redirect the streams into the institution’s classrooms. There was no agreement within the Study Group on these points.

¹⁵³ H.R. REP. NO. 94-1476, at 77.

¹⁵⁴ See, e.g., Section IV.A.2.c.iv (“Replacement Copying: Discussion of Recommendations”).

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3. Miscellaneous Issues

a. Unsupervised Reproducing Equipment

i. Issue

Should libraries and archives be required to prohibit users from using personal reproducing equipment to reproduce copyrighted works on their premises? Should they be protected from infringement liability resulting from users' personal reproduction equipment if they post notices to alert users about copyright infringement (such as those currently required for equipment located on library or archives premises)?

ii. Recommendation

Subsection 108(f)(1) should be amended so that nothing in section 108 is construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use by a user of the user's personal reproducing equipment, provided the library or archives posts notices visible in public areas of its premises stating that the making of a copy may be subject to the copyright law.

iii. Current Law Context

In order for a library or archives to avoid liability for copies made by users on unsupervised reproducing equipment located at the library or archives, it must post a notice to inform users of copyright law. Specifically, subsection 108(f)(1) states that

Nothing in this section . . . shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: *Provided*, That such equipment displays a notice that the making of a copy may be subject to the copyright law”

No specific language for the notice is provided in the statute; the library or archives may use any language it chooses as long as it effectively communicates that making a copy may be subject to copyright law. Many libraries and archives appear to use a version of the copyright warning developed by the Register of Copyrights

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to meet the requirements of subsection 108(d)(2),¹⁵⁵ while others use the language suggested by the American Library Association.¹⁵⁶

iv. Discussion of Recommendation

(a) Background

Library and archives users are no longer limited to making copies with on-site photocopiers. Some users bring in their own reproducing equipment, such as hand-held scanners, cameras, and even cell phones. As these technologies improve, their use will increase. While some libraries and archives have policies against the use of such devices, most do not have the resources to enforce such a prohibition.

(b) Require notice rather than banning user-owned equipment

The Study Group agreed that section 108 should not require libraries and archives to prohibit the use of user-owned equipment on their premises. Such a requirement would place an unrealistic burden on libraries and archives to police and enforce the prohibition.

Instead, the Study Group recommends that subsection 108(f)(1) be amended so that nothing in section 108 is construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use by a user of the user's personal reproducing equipment. Because portable copying devices can be used anywhere in a library or archives, the Study Group recommends that libraries and archives be required to post clearly visible notices that the making of a copy may be subject to the copyright law in all appropriate public areas on the library's or archives' premises, as well as on (or if impractical, adjacent to) all on-site reproduction equipment. An institution that fails to post such notices would forfeit this protection against secondary liability for users' infringing activity using personal equipment or equipment located on its premises.

The language of the notice should be essentially the same as that provided on libraries' or archives' reproducing equipment, but should make clear that copyright law applies to copies made with the use of any photographic, scanning, or copying device. The group suggests that sample wording for the notice could be developed by the Register of Copyrights, as was done for the subsection 108(d)(2) notice.

¹⁵⁵ This notice reads, in relevant part:

Notice: Warning Concerning Copyright Restriction:

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

37 C.F.R. § 201.14 (b) (2007).

¹⁵⁶ "Notice: The copyright law of the United States (Title 17 U.S. Code) governs the making of photocopies or reproductions of copyrighted material; the person using this equipment is liable for any infringement." AM. LIBRARY ASS'N AND NAT'L EDUC. ASS'N, THE COPYRIGHT PRIMER FOR LIBRARIANS AND EDUCATORS 13 (1987).

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b. Reorganization of the Section 108 Exceptions

i. Issue

Should section 108 be reorganized to make it easier to understand? If so, how?

ii. Recommendation

The provisions of section 108 should be reorganized in the following sequence so that they read in a more logical fashion: (1) eligibility for and other qualifications to the exceptions, (2) preservation and replacement activities, (3) copies for users, and (4) miscellaneous provisions.

iii. Discussion of Recommendation

The Study Group proposes dividing the provisions of current section 108 into four subsections: (1) eligibility and other qualifications to the exceptions, (2) preservation and replacement activities, (3) copies for users, and (4) miscellaneous provisions.

Eligibility for and other qualifications to the exceptions

1. Current subsection 108(a) provides threshold eligibility criteria for all of the section 108 exceptions. This should be clarified by making it a “chapeau” – that is, by deleting the subsection number or by stating at the beginning that “all of the section 108 exceptions are conditioned by the following.”
2. Current subsections 108(g) and 108(g)(1) should be moved into this first subsection, as they also condition all of the exceptions.

Preservation and replacement

This subsection would include the following exceptions, including existing ones and those recommended in this Report:

1. New preservation-only exception for publicly disseminated works.
2. New online content preservation provision.
3. Preservation of unpublished works (current subsection 108(b)), as amended.
4. Replacement copies of published works (current subsection 108(c)), as amended.
5. Television news exception (current subsection 108(f)(3)), as amended.

Copies for users

This subsection would include the following exceptions:

1. Current subsection 108(d) (copies of portions of works from the library’s or archives’ collections and interlibrary loan), as amended. The provisions of subsection 108(g)(2) should be incorporated into the same subsection because they apply only to subsection 108(d).

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2. Current subsection 108(e) (copies of larger portions or entire works from the library's or archives' own collection and from interlibrary loan), as amended.
3. Current subsection 108(i) (exclusions from copies for users exceptions), if retained and as amended.

Miscellaneous provisions

This subsection would include the following exceptions:

1. Current subsection 108(f)(1) (section 108 not to be construed to impose liability for unsupervised reproducing equipment if required notices are posted), as amended.
2. Current subsection 108(f)(2) (liability of users whose requests or equipment usage exceed fair use).
3. First clause of current subsection 108(f)(4) (relation to fair use).
4. Second clause of current subsection 108(f)(4) (primacy of contractual terms).
5. Current subsection 108(h) (exceptions for works in the last 20 years of their copyright term), although this provision may be used for preservation purposes as well.

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B. Conclusions on Other Issues

1. Copies for Users Exceptions

a. Current Library and Archives Practices

The provisions found in subsections 108(d), (e), and (g)(2) allow libraries and archives to make copies directly for their users, as well as for interlibrary loan (ILL). The following describes current general library and archives practices under those exceptions.

i. Direct Copies for Users

Libraries may make copies of materials in their collections directly for their own users under either subsections 108(d) or (e), but currently this is a relatively rare practice, mainly because of the expense.¹⁵⁷ Instead, library users typically are directed to make their own copies, with certain exceptions. Many libraries make copies for users in limited circumstances, such as when an original copy is too fragile to handle. Academic libraries may provide copies of materials to faculty upon request. In addition, as libraries store more material off-site, they may want the ability to deliver copies electronically from that off-site facility to their users.¹⁵⁸

Archives, in contrast, tend to make direct copies from their collections for their own users on a more frequent basis.¹⁵⁹ Because archives typically focus on a particular subject matter, their user communities may be more geographically dispersed than those of libraries – hence the increased need for user copies for researchers in other parts of the world.¹⁶⁰ Archives are also more likely to copy entire works because many of their holdings are composed of smaller units (such as personal letters), and so the user is more likely to request a reproduction of the entire work. Archives generally do not participate in formal ILL arrangements as do libraries.

ii. Interlibrary Loan Copies

ILL is the practice of one library (the requesting library) placing a request on behalf of one of its users with another library (the fulfilling library) for materials that the requesting library does not possess or have immediately available. ILL practices encompass the lending of the item itself, such as a book, audiovisual material, or microfilm (referred to as “returnables”), as well as the provision of copies

¹⁵⁷ See, e.g., Comment in Response to Second Notice, Tomas A. Lipinski, Center for Information Policy Research, School of Information Studies, University of Wisconsin—Milwaukee 3 (Mar. 8, 2007), <http://www.loc.gov/section108/docs/Lipinski-UnivofWisMilwaukee.pdf>.

¹⁵⁸ See, e.g., Comment in Response to Second Notice, Elizabeth A. Wilson, University of Washington 2 (Mar. 7, 2007), <http://www.loc.gov/section108/docs/Wilson-UnivofWashingtonLibes.pdf>.

¹⁵⁹ See, e.g., Comment in Response to Second Notice, Janice T. Pilch, University of Illinois at Urbana-Champaign 2 (Feb. 27, 2007), <http://www.loc.gov/section108/docs/Pilch-UIUC.pdf>.

¹⁶⁰ See Comment in Response to Second Notice, Elizabeth Adkins, Society of American Archivists 4 (Mar. 16, 2007), <http://www.loc.gov/section108/docs/Adkins-SAA.pdf>.

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of requested items, such as journal articles, and conference papers (referred to as “nonreturnables”).¹⁶¹

Lending returnable items does not involve making copies, so the activity does not implicate copyright, and subsections 108(d) and (e) do not apply. The Study Group’s inquiry focused on instances when a library, upon receiving an ILL request, creates and sends a reproduction to the requesting institution under subsections 108(d) or (e), rather than lending the original. Libraries often provide ILL copies due to policies such as those prohibiting the circulation of journal volumes or of fragile or rare materials outside of the library.

Specific procedures governing ILL services differ according to a library’s mission and available resources, though it is standard practice for libraries to follow the guidelines in the American Library Association’s *Interlibrary Loan Code for the United States*.¹⁶² Libraries use digital technologies, such as online databases, ILL management systems, and document transmission software, to send and receive ILL copies. The processes used by most libraries, however, still require manual activities, such as verifying citation data, making a trip to the shelf, scanning or copying pages, preparing materials for shipment, and managing a variety of records on borrowers, charges, and service fees.

Because of the associated expense and labor, many libraries have established reciprocal ILL arrangements with other libraries. For requests outside of such an ILL arrangement, libraries may charge cost-recovery fees.

Many libraries now use electronic technologies to make and deliver nonreturnable copies for ILL purposes. Some of the means of delivering nonreturnables are:

- **Ariel:** Ariel is a document transmission program that sends computer files to the requesting library via the Internet. It was designed to enable the requesting library to print out the document for the user.¹⁶³
- **E-mail (PDF or TIFF):** Documents in PDF or TIFF formats are sent as e-mail attachments. PDF (Portable Document Format) is a file format that preserves the formatting of the original document. The multipage TIFF (Tagged Image Format File) requires a TIFF viewer. Large images tend to be sent as TIFF files.
- **Odyssey:** The Odyssey software allows sites to send and receive electronic documents to other Odyssey sites, OCLC ILLiad sites, and through other vendor’s software that supports the Odyssey protocol.
- **Fax:** Documents are sent via fax to the number listed in the library’s institution record. Often the item must be scanned or photocopied before being sent via fax.
- **Mail:** Documents may be photocopied or scanned, printed, and mailed in hard copy to the institution’s postal address indicated on request.

¹⁶¹ Library reproduction for ILL is a separate function from what is known as “document delivery”: commercial services that provide reproduced copies of works directly to users. Document delivery reproduction is not covered under section 108 and is generally conducted under licenses, with royalties payable for the copying.

¹⁶² AM. LIBRARY ASS’N, INTERLIBRARY LOAN CODE FOR THE UNITED STATES EXPLANATORY SUPPLEMENT, available at <http://www.ala.org/ala/rusa/protocols/referenceguide/interlibraryloancode.cfm> (last visited Mar. 14, 2008).

¹⁶³ Jonathan Lavigne & John Eilts, *The Evolution of Ariel*, in *ARIEL: INTERNET TRANSMISSION SOFTWARE FOR DOCUMENT DELIVERY* 3, 5-6 (Gary Ives, ed., 2000).

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- **Pick up:** Documents are held for patron pick up at location specified by library.
- **Web:** The patron receives an e-mail message containing a hyperlink to a website containing the requested document. Typically, the website is password protected and the document automatically deleted after a certain number of days (usually seven to 14) or a specific number of viewings, as determined by the library's policy.¹⁶⁴

¹⁶⁴ For more information on ILL practices, see ANNE K. BEAUBIEN, ASS'N OF RESEARCH LIBRARIES, ARL WHITE PAPER ON INTER-LIBRARY LOAN (2007), http://www.arl.org/bm~doc/ARL_white_paper_ILL_june07.pdf.

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b. Direct Copies and ILL: Subsections 108(d) and (e)

i. Issue

Should the provisions that allow libraries and archives to make and distribute copies for users, including copies supplied via interlibrary loan, be amended in light of the increasing use of digital technologies both by libraries and archives and by rights holders?

ii. Conclusions

1. **The Study Group concluded in principle that the single-copy restriction on copying under subsections 108(d) and (e) should be replaced with a flexible standard more appropriate to the nature of digital materials, such as allowing a limited number of copies as reasonably necessary for the library or archives to provide the requesting user with a single copy of the requested work – but only if any electronic delivery of digital copies is subject to adequate protections.**
2. **Electronic delivery of copies under subsections 108(d) and (e) should be permitted only if libraries and archives take additional adequate measures (1) to ensure that access is provided only to the specific requesting user, and (2) to deter the unauthorized reproduction or distribution of the work. The Study Group members agreed that adequate measures will depend on the type of work and context of the use but did not agree on which measures would be adequate, and particularly whether technological protection measures should be required in any given case.**
3. **The current requirement that “the copy or phonorecord become the property of the user” should be revised to state that the library or archives may not retain any copy made under these provisions to augment its collections or to facilitate further ILL.**
4. **Users should be permitted to make ILL requests only through their own libraries and not directly of another library. This is the current practice, but there was not agreement on whether specific statutory clarification is necessary.**
5. **The term “fair price” in subsections 108(c) and (e) and “reasonable price” in subsection 108(h) should be reconciled and a single term used to avoid confusion.**

iii. Current Law Context

Both subsections 108(d) and 108(e) permit a library or archives to make a single copy of a copyrighted work from its collections upon the request of a user. The copy may be provided pursuant to a request from the library’s or archives’ own user, or pursuant to an ILL request from another library or archives on behalf of one of its users.

Subsection 108(d) provides that libraries and archives may reproduce and distribute a single copy of “no more than one article or other contribution to a copy-

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righted collection or periodical issue, or . . . a copy or phonorecord of a small part of any other copyrighted work.” Subsection 108(e) allows libraries and archives to reproduce and distribute an “entire work, or . . . a substantial part of it” if the library or archives first determines, “on the basis of a reasonable investigation,” that “a copy or phonorecord of the work cannot be obtained at a fair price.” Both subsections require that (1) the copy become the property of the requesting user (so that libraries and archives cannot use these exceptions as a means to enlarge their collections),¹⁶⁵ (2) the library or archives has no notice that the copy will be used for any purpose other than “private study, scholarship, or research,” and (3) the library or archives prominently displays a copyright warning.

Subsections 108(d) and (e) are subject to several significant conditions. First, subsection 108(i) prevents subsections 108(d) and (e) from being used for most non-text-based works.¹⁶⁶ Second, the subsection 108(a) conditions apply, of course, including the requirement that the copying activity may not be conducted with “any purpose of direct or indirect commercial advantage.” Subsection 108(g) further limits the scope of the provisions to “isolated and unrelated reproduction and distribution of a single copy or phonorecord of the same material on separate occasions.” Subsection 108(g)(1) precludes the provisions from applying when a library or archives, or its employee, is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.

Subsection 108(g)(2) further limits subsection 108(d)’s exception for copying articles or small parts of works by prohibiting the “systematic reproduction of single or multiple copies or phonorecords of material described in subsection (d),” and clarifies that copies made for ILL do not violate the prohibition against systematic copying if they “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.” This provision is intended to prevent libraries and archives from dividing the purchase of periodicals and sharing them through ILL arrangements. Congress specifically rejected such consortial buying arrangements because they would tip the balance too far in favor of libraries and archives and materially affect sales.¹⁶⁷

The CONTU guidelines provide additional guidance. They are not law, but were endorsed by Congress as a “reasonable interpretation” of subsection 108(g)(2).¹⁶⁸ The guidelines are followed by most libraries and are embraced by the American Library Association ILL code. They state that a library or archives may not receive, in a single calendar year, more than five copies of an article or articles published in any

¹⁶⁵ See MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.03[E][2][b] (2004).

¹⁶⁶ See Section IV.B.1.c (“Non-Text-Based Works Excluded by Subsection 108(i)”).

¹⁶⁷ See H.R. REP. 94-1476, at 74-75 (1976).

¹⁶⁸ H.R. CONF. REP. NO. 94-1733, at 72-74 (1976). See Section II.C.4 (“Other Provisions”) for a description of the CONTU Guidelines.

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given periodical within five years prior to the date of the request. The guidelines do not govern ILL copies of periodical materials published more than five years prior to a request. The guidelines also prohibit a library or archives from receiving within a single calendar year more than five copies of or from any nonperiodical work – such as a work of fiction or poetry. Recordkeeping requirements are included in the guidelines as well.

iv. Discussion

(a) Background

Just as rights holders have begun to distribute their copyrighted materials by electronic means, libraries and archives have changed the way they provide access to those materials to their users. Some have started using digital media to make and deliver copies directly to their own users or through ILL. Libraries and archives find it difficult to meet users' needs for private study, scholarship, and research today without using digital technologies to make and provide access to copies. Most scholars today expect digital access to research materials. Moreover, an increasing amount of material of scholarly importance is born digital, and it may not be possible for a library or archives to create a usable analog copy to provide the user.

The current subsections 108(d) and (e) were drafted with analog copying in mind, principally photocopying. Nothing in the “copies for users” exceptions expressly precludes the use of digital technologies, but, along with subsections 108(a) and (g), they do provide that only a single copy can be made to fulfill a user's request.¹⁶⁹ As described in Section II.A.2 (“Overview of the Exclusive Rights”), as a technical matter, producing and then transmitting a digital copy involves the production of temporary, incidental copies, which are deemed “copies” under the Copyright Act. Moreover, if the source copy is analog, then at least two nontemporary copies result at the end – one on the library's or archives' server (unless intentionally deleted) and one for the user. The Copyright Act provides no express exception for these copies.

It is important to distinguish between permitting libraries and archives to make digital copies for users and permitting electronic delivery of those copies. Permitting digital reproduction in order to produce a copy for users increases flexibility in how libraries and archives can produce the copies, but the copies produced may still be delivered by analog means. For example, a printout could be made from the digital copy and then sent to the requesting library or user via analog means, such as fax or mail. Alternatively, the source file could be made available electronically via e-mail or posted on a website with a secure URL for access by the user.¹⁷⁰

¹⁶⁹ Subsection 108(a) states that “it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce *no more than one copy or phonorecord of a work*, except as provided in subsections (b) and (c) . . .” 17 U.S.C. § 108(a) (2007) (emphasis added).

¹⁷⁰ See Section IV.B.1.a (“Current Library and Archives Practices”) for a description of the various approaches libraries and archives take to distribution of copies for users.

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Given this context, the Study Group considered revisions to subsections 108(d) and (e) that would allow for limited digital copying and distribution, reflecting the current practices with which group members were comfortable, under conditions sufficient to prevent expanded use of the exceptions that could materially interfere with commercial markets. Specifically, the Study Group examined the following issues: restrictions on the number of copies, restrictions on digital copying or distribution, retention of copies, searches for a copy at a fair price, and the CONTU guidelines.

(b) Number of copies

The Study Group concluded that the single-copy restriction in subsections 108(d) and (e) should be replaced with a flexible standard more appropriate to the nature of digital materials, such as allowing a limited number of copies as reasonably necessary for the library or archives to provide the requesting user with a single copy of the requested work – provided adequate conditions are placed on electronic delivery of digital copies. This amendment would apply both to copies made for a library’s own users and to ILL copies. The Study Group believes that neither the single-copy limit nor any absolute limit on the number of copies is workable in the context of current technologies, for substantially the same reasons it reached that conclusion with respect to copies made under subsections 108(b) and (c).¹⁷¹ The new language provides a sufficient limit while enabling the use of digital technologies.

(c) Electronic delivery of copies for users

One effect of eliminating the single-copy restriction in subsections 108(d) and (e) would be to clarify that libraries and archives may make incidental, temporary digital copies in the process of providing a single copy to a user. It would also allow libraries and archives to deliver a copy to a requesting user electronically.

Concerns about electronic access to copies for users

A necessary condition for some Study Group members to consider allowing electronic delivery is to require the use of appropriate protection measures. They are concerned that amending subsections 108(d) and (e) expressly to permit the creation of temporary, incidental copies and digital delivery would open the door to practices that would compete with rights holders’ markets for the sale and licensing of their works. Under this view, the single-copy limit, requiring delivery through analog means, is an important limitation that prevents the use of subsections 108(d) and (e) from threatening the markets for copyrighted works. If a user must travel to a library or archives to obtain a copy made by his or her local institution or through ILL (and in some cases to request it), the number of libraries from which the user will make such requests is naturally limited. But the friction inherent in this system is greatly reduced if the user can locate materials online and make requests for copies directly to any library or archives without regard to geography or institutional affiliation.

¹⁷¹ See Sections IV.A.2.d.iv (“Preservation of Unpublished Works: Discussion of Recommendations”) and IV.A.2.c.iv (“Replacement Copying: Discussion of Recommendations”), respectively.

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A significant concern of some is that, if digital copying and access are permitted under subsections 108(d) and (e) without further qualification, libraries and archives could legally provide services that are functionally equivalent to commercial document delivery and even *de facto* universal on-demand access. These services clearly would compete directly with the markets that rights holders rely upon to stay in business. Document delivery services, collective licensing, and individual permissions transactions that result in the payment of royalties or permissions fees are increasingly important sources of revenue for rights holders. Although libraries and archives report that they are disinclined to provide such services to users outside of their traditional user communities because of the costs, nothing in the current provisions prevents libraries or archives from doing so. A law that expressly allows such practices could enable libraries and archives to legally provide on-demand access to users throughout the country on a cost-recovery basis. Moreover, costs involved in fulfilling such requests may decrease as collections become increasingly composed of born-digital materials.

Finally, if libraries and archives are permitted to provide electronic copies to users, there is a greatly increased risk that users may further distribute copies of those works, potentially displacing sales, absent adequate, appropriate measures to restrict further distribution. Most rights holders carefully control the online distribution of their works in order to keep them secure, through technological measures and user agreements. Where rights holders authorize third parties to provide access, they commonly require in their contracts that such measures be utilized. Rights holders are thus concerned about unlicensed entities, including libraries and archives, having the ability to distribute their works online without such agreements and controls in place.

Response to concerns about electronic access to copies for users

In practice, other group members responded, libraries and archives already provide electronic access to their own users with no reported problems; amending the law to expressly provide for temporary incidental copies thus is unlikely to result in abuse. Subsection 108(a) prevents the use of subsections 108(d) and (e) for any profit-making purpose, and so it is clear that commercial, unlicensed document delivery services cannot take advantage of the copies for users exceptions. Moreover, subsection 108(g) and the CONTU guidelines limit the number of copies of a given article that a library or archives can request.

Moreover, the expense and labor of providing copies to users is not necessarily reduced by the use of digital technologies, making it unlikely that libraries and archives will want to offer copies to users outside of their defined communities. Even when works are digitized, providing copies can present significant delays that are unacceptable to many users. Thus, these members argued, the expense and time and their associated limitations on the community served continue to place sufficient friction in the system to protect the balance among interests.

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These views were tempered by a general willingness by these group members to consider additional conditions on copying for users, provided such conditions do not place unreasonable burdens or expense on libraries and archives.

(d) Proposed restrictions on electronic delivery

Various measures that libraries and archives should take in delivering electronic copies to users were considered, specifically those that would adequately (1) ensure that only the authorized end user has access and (2) prevent unauthorized downloading, copying, or other use of the work. The Study Group agreed that some measures would be appropriate, but did not agree on what those measures should be.

One proposal was to allow point-to-point delivery technologies that are readily available to libraries and archives, such as e-mail or the use of a password-protected, unique, secure URL, to ensure that only the requesting user has access to the copy. Use of a secure web page from which the user may access the copy for a limited time would also afford protection against unauthorized use of copies provided under subsections 108(d) and (e). Some group members view these methods of delivery as acceptable, but only if they include adequate protection against infringing conduct with respect to the transmitted material.

Conditions to prevent further downstream distribution could include limiting access to certain works by a type of transmission that allows performance or display but does not enable downloading. Alternatively, libraries and archives could employ technologies that allow downloading, but prohibit or limit the number of copies that can be printed. In addition, the Study Group discussed requiring the use of persistent identifiers, such as rights metadata, technological protection codes, or watermarks embedded in the electronic copy, identifying it as one made by the library or archives under section 108 and providing notice of copyright to the user.

In addition to or in lieu of technological measures, the Study Group discussed the possibility of requiring the user receiving an electronic copy under subsection 108(d) or (e) to agree in writing that he or she will not use the copy provided other than for private study, scholarship, or research, or in any unauthorized manner. Not all group members agreed that user agreements should be required, or that they would be adequate substitutes for TPMs.

While the general view of the group was that adequate protective measures would vary depending on the nature of the work and mode of distribution, there were a variety of perspectives on how to draw that line. On the one hand, libraries and archives may be in the best position to determine which measures are necessary in any given instance. On the other hand, to ensure consistent and adequate practices, these measures could be clearly set out in the statute or, alternatively, in regulations. Because technology will continue to advance, the Study Group agreed that the statute should not require specific technologies.

(e) Limit requests to users' own library

Two other proposals were considered by the Study Group to address the potential that subsections 108(d) and (e) could be used in ways that compete with rights holders'

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markets. The first would prohibit unmediated ILL; the second would prohibit libraries and archives from providing copies directly to users outside of their traditional user communities.

The group agreed that ILL arrangements should continue to be mediated in some manner by the requesting user's library. Although ILL is a loan from one library to another, current practice is that ILL mediation takes place only on the "front" – or requesting – end of the transaction. The user makes a request through his or her own library, not directly to the other library. Fulfillment may be made directly to the user as long as the requesting library is notified and it counts the request under the CONTU guidelines.

One of the myriad impacts of digital technologies is the ability of a library or archives to provide services to anyone anywhere, thus enabling disintermediation of the services. To prevent this disintermediation and avoid any resulting competition with licensed document delivery services and other markets, a proposal was made to limit the provision of electronic copies for users and ILL services to a library's or archives' user community. Many libraries and archives already limit the provision of copies for users to their existing user communities.¹⁷² Most libraries have well-defined user communities limited to a geographic area of residence or affiliation with a business or institution, such as a university, that are used to define the scope of permitted users under content and software license agreements. Archives and national and specialized libraries generally do not have such well-defined user communities, but instead define their user communities in terms of a particular field or fields of research served by the library or archives.

Some members do not believe user community restrictions are feasible because not all eligible entities have sufficiently well-defined user communities. Moreover, they note the importance of being able to service users outside of defined user communities on an occasional basis for scholarship, research, and private study.

The Study Group did not reach agreement on this issue, due in part to the difficulty in defining a user community for certain libraries and for archives.

(f) Retention of copies

The Study Group concluded that the current requirement that "the copy or phonorecord become the property of the user" should be revised to provide instead that the library or archives may not retain any copy made under these provisions in order to augment its collections or to facilitate further ILL. Requiring that the copy become the property of the user makes no sense in the context of electronic access, since there is no single, physical copy given to an end user. In providing an electronic copy to a user, the library or archives is in fact making and sending a copy of the copy – not the copy itself. The purpose of the provision is to prevent the library or archives from keeping an additional copy for its collections, and that should be stated directly

¹⁷² See, e.g., Comment in Response to Second Notice, Janice T. Pilch, University of Illinois at Urbana-Champaign 3 (Feb. 27, 2007), <http://www.loc.gov/section108/docs/Pilch-UIUC.pdf>

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Changing the requirement should not impose a new burden on libraries and archives. Borrowing and lending libraries consistently reported in the Comments that they do not keep ILL copies, partly because of technical difficulty and expense, but primarily because ILL requests are seldom made twice for the same item.¹⁷³ Archives, however, reported that they sometimes do keep the digital copies they make for users when the original materials are fragile, rare, and subject to damage by repeated scanning.¹⁷⁴ It was noted that in many cases these are unpublished materials and so subsection 108(b) applies. The proposed amendment to allow replacement copies of fragile materials also may address archives' concerns about copying fragile published materials.¹⁷⁵

(g) Search for a copy at a fair price

Subsections 108(d) and (e) currently treat reproduction of entire works or substantial parts thereof differently from reproduction of articles or small parts of larger works. Under subsection 108(e) libraries and archives may copy entire works only after they determine that another copy of the work is not available at a “fair price.” But no such requirement exists for articles or small parts of larger works under subsection 108(d). Because there is a growing market for the purchase of single articles and small parts of copyrighted works, some Study Group members believe that such works should no longer be treated differently from complete works under section 108. Others believe that adding such a requirement would undermine the very purpose of subsection 108(d): to provide researchers with access to works they need and which their local libraries or archives do not own.

Regardless of how that issue is resolved, all Study Group members agreed that the use of “fair price” in subsections 108(c) and (e) and “reasonable price” in subsection 108(h) should be reconciled and a single term used to avoid confusion. The Study Group believes the terms are intended to mean the same thing, and using two different terms in the same section of the Act may suggest otherwise.

(h) CONTU guidelines

The Study Group believes the CONTU guidelines that limit the number of ILL copies and provide recordkeeping requirements may need to be reviewed to determine whether they require revision to address digital media and evolving practices. For instance, the current CONTU guidelines apply only to periodicals published within the last five years. Statistics show, however, that 47.5 percent of ILL requests in 2005 among medical libraries were for works published more than five years earlier.¹⁷⁶ Thus, it might be reasonable to consider, among other changes, the possibility of applying the guidelines to works published over a longer time frame. Other changes might be considered to address electronic delivery of text-based works other

¹⁷³ See, e.g., Comment in Response to Second Notice, American Library Ass'n & Ass'n of Research Libraries 4 (Feb. 26, 2007), <http://www.loc.gov/section108/docs/ALA-ARL.pdf>.

¹⁷⁴ See Comment in Response to Second Notice, Elizabeth Adkins, Society of American Archivists 4 (Mar. 16, 2007), <http://www.loc.gov/section108/docs/Adkins-SAA.pdf>.

¹⁷⁵ See Section IV.A.2.c.iv (“Replacement Copying: Discussion of Recommendations”).

¹⁷⁶ Eve-Marie Lacroix & Maria Elizabeth Collins, *Interlibrary loan in US and Canadian health sciences libraries 2005: update on journal article use*, 95(2) J. MED. LIBR. ASSOC. 189, 192 (2007) (reporting a study of 2.48 million items requested through the National Library of Medicine's DOCLINE clearinghouse), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?tool=pmcentrez&artid=1852633&blobtype=pdf>.

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than journal articles and of non-text-based works. Changes to the CONTU guidelines are outside the scope of the Study Group’s work, however. These observations, as well as those noted in Section IV.B.1.c.iv (“Non-Text Based Works Excluded by Subsection 108(i): Discussion”), are offered only as a topic for future investigation.

c. Non-Text-Based Works Excluded by Subsection 108(i)

i. Issue

Should subsection 108(i) be amended to allow libraries and archives to copy musical works, pictorial, graphic or sculptural works, or motion pictures or other audiovisual works (collectively referred to as “non-text-based works”) for users under subsections 108(d) and (e)? Should any or all of subsection 108(i)’s exclusions be eliminated and, if so, what conditions should be placed on the reproduction of the non-text-based works that are presently excluded?

ii. Conclusions

- 1. It may be possible to expand the exceptions in subsections 108(d) and (e) to cover certain non-text-based works that are not currently eligible. More factual investigation, however, would be helpful to determine whether eliminating subsection 108(i) in whole or in part would adversely affect the markets for certain works currently excluded from coverage under subsections 108(d) and (e), or would otherwise harm the legitimate interests of rights holders.**
- 2. If subsection 108(i) is retained, it should be narrowed as follows:**
 - a. Limit the excluded categories of works to those where copying under subsections 108(d) and (e) might put the work at particular risk of market harm.**
 - b. Broaden the categories of “adjunct” works that may be eligible for subsection 108(d) and (e) treatment, and use a formulation other than “adjunct” that captures the concepts of “embedded” or “packaged with.”**
- 3. If subsection 108(i) is amended so that subsections 108(d) and (e) apply to additional categories of works, then additional conditions should be included in subsections 108(d) and (e) to address the risks associated with library or archives copying particular to those types of works.**

iii. Current Law Context

Subsection 108(i) states:

The rights of reproduction and distribution under [section 108] do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, dia-

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grams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

This provision prohibits libraries and archives from utilizing the copies for users exceptions of subsections 108(d) and (e) for most non-text-based works, with two principal exceptions: sound recordings¹⁷⁷ and audiovisual news programs (already subject to an exception under subsection 108(f)(3) that permits distribution to users).¹⁷⁸ Pictorial and graphic works are among the non-text-based works excluded from subsection 108(d) and (e) treatment, but, as the last clause of subsection 108(i) provides, they are covered if they are published as “illustrations, diagrams or similar adjuncts” to a text-based or other covered work.

iv. Discussion

(a) Background

The legislative history does not explain the genesis of subsection 108(i). The relevant House, Senate, and Conference Reports are silent on why certain works are excluded from the subsection 108(d) and (e) exceptions. The House Report accompanying the 1976 Copyright Act states only that fair use still applies to libraries and archives copying non-text-based materials for users with legitimate scholarly or research purposes.¹⁷⁹

(b) Permitting copies for users of non-text-based works

The Study Group questioned the continued relevance and usefulness of subsection 108(i)’s exclusion of non-text-based works from the “copies for users” exceptions. Subsection 108(d) and (e) copies are intended for scholarly purposes, namely “private study, scholarship, or research.” Subsection 108(i) appears to create a disproportionate impact on some academic disciplines, such as music and art scholarship, although both textual and non-text-based works now may be experienced with the same technology, in the same manner, and often together in multimedia works, including most websites. From the perspective of many scholars, there are no differences between these types of works.

At the same time, the Study Group recognizes that broadening the applicability of subsections 108(d) and (e) may create new risks that the conditions to those exceptions do not currently address. As a result, most group members agreed that subsection 108(i) should be eliminated in whole or in part only if subsections 108(d) and (e) are amended to include appropriate additional conditions to prevent a material impact on the commercial exploitation of the affected works. Study Group members suggested a number of creative and competing proposals to protect against potential adverse market impact for particular types of non-text-based works, but the group did not reach a consensus on any of them. The various proposals are discussed below.

¹⁷⁷ Even though sound recordings *per se* may be copied under subsections 108(d) and (e), if they embody musical works they are excluded.

¹⁷⁸ Dramatic works, pantomimes, choreographic works and architectural works also are not specifically excluded by subsection 108(i).

¹⁷⁹ H.R. REP. NO. 94-1476, at 78 (1976).

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(c) Existing conditions to subsections 108(d) and (e)

The existing conditions in section 108 already address certain concerns about the potential effect of applying subsections 108(d) and (e) to new categories of works. First, subsection 108(g)(2) bars systematic reproduction and distribution, and so would prohibit copying any non-text-based works in quantities likely to conflict with rights holder interests. Guidelines such as those formulated by CONTU could be developed to assist in defining what would constitute systematic reproduction in these contexts.

Second, subsection 108(e) permits reproduction of an entire work only if it is not available on the market at a fair price, meaning that a user cannot obtain a copy of an entire work from his or her library or through ILL if the work is available on the market. Were subsection 108(i) eliminated, this condition makes it less likely that a library's or archives' provision of copies for users of a commercial work, such as a motion picture or musical work would compete with markets for the work.

Finally, as noted above, copies can be made under subsections 108(d) and (e) only if the library or archives is unaware that the copy will be used for purposes other than private study, scholarship, or research.

Some Study Group members believe that existing conditions to subsection 108(d) and (e) are insufficient to protect against harm to markets for non-text-based works if libraries and archives are permitted to make copies under subsections 108(d) and (e). The subsection 108(e) requirement to seek a copy on the market goes only so far: it applies only to entire works or substantial parts of works and does not protect works that are unavailable at a given time but which may be later reintroduced into the market. Moreover, the "private study, scholarship, or research" condition does not sufficiently limit use, because "private study" has been interpreted very broadly to include anything more than mere recreation, but less than formal scholarship. Private study thus may not exclude the home viewing of commercial entertainment products.¹⁸⁰

(d) Additional conditions proposed

Additional protections in subsections 108(d) and (e) were suggested as a means of addressing specific risks inherent to certain categories of newly covered non-text-based works. These proposed conditions range from requiring users to sign a statement attesting that the copy is being requested solely for private study, scholarship, or research, to requiring libraries and archives to employ technological protection measures to limit access or the ability to make copies – such as through the use of streaming or other technologies that do not allow retention of a copy.

¹⁸⁰ "Scholarship and research may connote a qualitatively more advanced form of inquiry than mere study. Investigation and analysis in the humanities and the social sciences may be regarded as either scholarship or research, but in the so-called 'hard sciences,' the term research rather than scholarship is generally applied. Except, perhaps, in dealing with the concept of 'private' . . . the distinction between 'study' on one hand and 'scholarship' and 'research' on the other, does not appear to be significant. Arguably, none of these terms are applicable to reproductions of most works of fiction, if made for the purpose of leisure reading." MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 8.03[E][2][d] (2004).

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(1) Commercial entertainment works

Most of the concerns about extending subsections 108(d) and (e) to non-text-based works relate to works intended for commercial entertainment. The group recognized that the markets for these works may be more sensitive to the impact of copies made under subsections 108(d) and (e) than are the markets for other categories of works. This is especially true if digital distribution of copies for users were permitted, since nonscholarly users often seek only a one-time performance or temporary access to the work rather than ownership or repeated access. Moreover, such works invite more widespread copying and are especially vulnerable to downstream infringing uses. The entertainment industry has already established markets for the on-demand streaming or digital download of musical sound recordings, and significant markets for the on-demand streaming or digital download of audiovisual works and works of visual art are rapidly developing. Rights holders in these industries are concerned that allowing libraries and archives to provide digital copies of such works, especially if provided online, could adversely affect their markets for such works.¹⁸¹

Many of the proposals discussed by the Study Group addressed concerns about interfering with markets and preventing the unauthorized downloading or distribution of works currently not eligible for copying under subsections 108(d) or (e).

The various alternatives proposed address concerns relating specifically to non-text-based commercial entertainment works included:

- Amending subsection 108(i) so that subsections 108(d) and (e) apply to all works except certain commercial entertainment works, including motion pictures, musical works, and possibly other types of commercial entertainment works deemed particularly vulnerable to harm due to copying by libraries and archives for users.
- Permitting analog copying of non-text-based commercial entertainment works under subsections 108(d) and (e), but prohibiting digital reproduction or distribution of these copies.
- Prohibiting the use of subsections 108(d) and (e) with respect to any work (or any non-text-based work) if the work is being commercially exploited at the time, or is likely to be so in the future.

In addition, Study Group members made a number of proposals for limiting risks related to the characteristics of particular types of works. They include:

(2) Works of visual art

- Requiring libraries and archives to ensure that persistent identifiers are embedded in any user copy of a work of visual art, whether the copies are small thumbnails or otherwise, identifying the copyright owner, if known. This

¹⁸¹ The Study Group found it difficult in practice to find a balanced and reasonable way to categorically separate “commercial” from “noncommercial” works. Works that are not being commercially exploited today may be released or rereleased at any point in the future, and rights holders argued that they should not lose their right to decide when and where to publish or otherwise release their works. See Section III.D (“Distinguishing Between Types of Works: Commercialization as a Factor?”).

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would in part address the concern of visual artists that unattributed works may be inadvertently considered “orphaned.”

- Mandating that libraries and archives deliver content in a way that reduces unauthorized downstream use by, for example, watermarking, reducing image resolution, or using other technological measures.

(3) Musical works embodied in sound recordings

- Requiring a low-quality threshold for copies of musical works distributed in sound recordings, such as one-half the audio and/or video quality of the lowest quality commercially available product.

(4) Performances of motion pictures, other audiovisual works, and musical works embodied in sound recordings

- Prohibiting the application of subsections 108(d) and (e) to works that are protected by technological protection measures.
- Requiring that any copies made under subsections 108(d) and (e) for electronic delivery be transmitted without the ability to download a copy (that is, using technologies such as streaming), or with other technological means to prevent the work from being downloaded or distributed.
- Requiring technological protection measures to deter further distribution or downloading by the user.

None of these proposals met with the unanimous support of the Study Group. Among the most vigorously debated proposals were those requiring libraries or archives to apply technological access controls, copy controls, or watermarks in order to protect against downstream distribution or downloading. Some group members regard such requirements as too costly and complex for libraries and archives to implement and believe their imposition could defeat the purpose of the provisions – enhanced access to these works for private study, scholarship, and research. Moreover, restrictions that would allow access only via streaming transmissions or the like may not meet the standards of scholarly practices, which often require the retention of source materials.

(e) Small parts of non-text-based works

Subsection 108(d) allows a library or archives under certain conditions to provide a user with “an article or other contribution to a copyrighted collection or periodical issue” or a “small part of any other copyrighted work.” The Study Group identified, but did not resolve, a number of issues and concerns regarding how to apply the limitation of a “small part” to a non-text-based work. One concern is that small parts of certain types of works, such as films or television programs, may not be sufficient for study or research. In addition, it is not always clear what constitutes a small part of a work outside the realm of text.

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(1) Visual works

Most visual works, for instance, are not readily divisible into small parts – at least not parts that users are likely to request copies of for study, scholarship, or research purposes (if for no other reason than the difficulty of specifying exactly which portions one would like to see). “Thumbnails” or reduced-resolution images are arguably merely small parts of a work, since each thumbnail may represent only a small percentage of an image’s total visual information. For purposes of identification, though, thumbnails may represent the “whole” work, since it is possible to tell what is in a painting or illustration even from a thumbnail. Thumbnail images also have growing economic value derived from their use in mobile phones and other hand-held devices.

(2) Musical works

With respect to musical works, it is unclear whether an individual song would be deemed a “small part” of an album or songbook in which it is contained, for purposes of subsection 108(d). If so, copyrighted songs could be provided to users without any showing of commercial unavailability. This could disrupt the market for individual songs – one of the musical works rights holders’ core markets – especially given the potential difficulties of enforcing the requirement that user copies be provided only for private study, scholarship, or research.

(3) Audiovisual works

A small part of a motion picture or television program – that is, a short clip – could be useful to a historian or other scholar, but is less likely to be useful to a film scholar. Film scholars’ research generally involves viewing and reviewing the film, slowing it down, speeding it up, and comparing it to other works by the same artist or in the same genre, which requires a copy of the entire film. At the same time concerns were expressed about interference with developing markets for film clips.

(f) Adjuncts or embedded works

The Study Group agreed that, at a minimum, the clause at the end of subsection 108(i) referring to adjunct works should be amended to include additional types of adjunct works, principally to address the proliferation of multimedia works.

Increasingly, scholarly works are produced and published in web-based and other multimedia formats, often as text-based works that incorporate excerpts of musical, audiovisual, or visual works. In this context the current reference to “pictorial or graphic works published as illustrations, diagrams, or similar adjuncts” is unnecessarily limiting. The Study Group believes that the clause should also apply to other types of adjunct or embedded works, including musical and audiovisual works that are distributed as part of a text-based work.

In addition, the Study Group agreed that the current reference to “similar adjuncts” does not by itself adequately describe the various ways in which a non-text-

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based work may relate to a text-based work. Should subsection 108(i) be retained, the Study Group suggests adopting a better formulation than the term “adjunct” to describe the relationship of the embedded, secondary work to the principal (text-based) work, one that embraces the concepts of “embedded” or “packaged with.”

(g) CONTU revisions

Finally, the Study Group believes that eliminating or modifying subsection 108(i) may also require revising the CONTU guidelines so that they apply to additional types of media besides text-based works. As noted above, it is outside the purview of the group’s work to recommend any specific changes to extra-legislative guidelines.

(h) Further factual investigation

The Study Group recommends further factual investigation to determine the potential market effects of allowing works currently excluded by subsection 108(i) to be covered by subsections 108(d) and (e). Evolving business models and consumer behavior make it difficult for the Study Group to evaluate the effects of such a change without resorting to speculation.

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C. Additional Issues

1. Virtual Libraries and Archives

a. Issue

Should virtual-only libraries and archives (those that do not conduct their operations through physical premises) be permitted to take advantage of the section 108 exceptions?

b. Outcome

Currently there are very few examples of virtual-only libraries and archives that meet the existing and recommended criteria for section 108 eligibility. The Study Group discussed, but did not agree on, whether it is premature to determine if virtual-only libraries and archives should be covered by section 108.

c. Current Law Context

Section 108 does not directly address the eligibility of libraries and archives that lack publicly accessible physical premises. The exceptions are generally understood to include only libraries and archives established as, and operating through, physical premises, including whatever online resources such entities provide.

The 1998 DMCA amendments added a provision that expressly permits digital copies to be made under subsections 108(b) and (c), but prohibit libraries and archives from making any such digital copies “available to the public in that format outside the premises of the library or archives.” The Senate Report accompanying the DMCA states that section 108 was intended to only cover “entities that are established as, and conduct their operations through, physical premises” and not mere “websites, bulletin boards and homepages.”¹⁸² Because purely virtual entities do not, as a matter of definition, operate through physical premises, the legislative history would appear to except them from coverage under section 108.¹⁸³

¹⁸² S. REP. NO. 105-190, at 62 (1998). See Section II.C.2 (“Copying for Preservation and Replacement”) for a full description of the DMCA amendments.

¹⁸³ See S. REP. NO. 105-190, at 62. (“The ease with which such sites are established online literally allows anyone to create his or her own digital ‘library’ or ‘archives.’ The extension of the application of section 108 to all such sites would be tantamount to creating an exception to the exclusive rights of copyright holders that would permit any person who has an online website, bulletin board or a homepage to freely reproduce and distribute copyrighted works. Such an exemption would swallow the general rule and severely impair the copyright owners’ right and ability to commercially exploit their copyrighted works.”)

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d. Discussion

i. Background

Many traditional libraries and archives are developing virtual collections of digitized and born-digital materials alongside their analog collections. In some cases, entities with services and missions similar to those of traditional libraries and archives are building virtual collections composed solely of digitized and born-digital materials and providing access to these collections only online. This Report refers to these entities as “virtual-only” libraries and archives. The Study Group discussed whether the section 108 exceptions should apply to virtual-only libraries and archives, provided they meet all other eligibility criteria. If so, the group queried whether an amendment or new legislative history is necessary to counter the DMCA legislative history quoted above. Finally, the group asked, if virtual-only entities were eligible under section 108, as a practical matter, to what extent would they be able to take advantage of the exceptions, especially if the restrictions on off-premises use currently contained in section 108 are retained?¹⁸⁴

The drafters of the DMCA and its accompanying legislative history were concerned about excluding mere websites from section 108. Whether they foresaw and intended to exclude virtual-only, professional libraries and archives is unclear. Such entities are a relatively recent phenomenon – so new, in fact, that the Study Group could find very few examples.¹⁸⁵

(a) *Digital collections versus virtual-only entities*

Where electronic collections exist alongside analog collections in a library or archives with physical premises, as is true in many institutions today, the Study Group believes there is no question that the institution and its digital collections are eligible under section 108. The question here is whether virtual-only libraries and archives that provide only remote electronic access can or should be permitted to take advantage of the exceptions. While they may possess physical premises where their servers are located and employees work, if they are not providing access through these locations it is unlikely they would be deemed to be “conducting operations” through physical premises. The legislative history seems to exclude such entities from section 108 eligibility.

ii. Need for Virtual Institution Eligibility

It may be premature to determine whether virtual libraries and archives should be included in section 108 because there are so few, they are so new, and there is not enough information available about their activities. Many of the virtual collections that the group discussed are part of larger libraries or archives with physical premises,

¹⁸⁴ See Section II.C.2 (“Copying for Preservation and Replacement”).

¹⁸⁵ The developing American Archive of public broadcasting is one example. See http://www.pts.org/PTVissues/digitalTV/The_American_Archive.cfm (last visited Mar. 14, 2008). See also the Internet Archive, at <http://www.archive.org> (last visited Mar. 14, 2008); JSTOR, at <http://www.jstor.org/about/> (last visited Mar. 14, 2008).

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and so the group believes they are already covered under section 108.¹⁸⁶ And most of the existing virtual-only institutions that operate independently from a traditional library or archives fail to meet all of the functional eligibility criteria recommended in Section IV.A.1.b (“Additional Functional Requirements: Subsection 108(a)”) of this Report.¹⁸⁷ The Study Group thus had difficulty finding sufficient pertinent examples to enable it to understand fully the issues surrounding section 108’s potential coverage of virtual-only libraries and archives that are not part of a larger library or archives and that meet the group’s concept of a true library or archives. Most group members believe it would be best to wait until the problem is clearly manifested and defined before determining whether a legislative solution is called for.

In contrast, others believe that the issue of including virtual libraries and archives under section 108 should be taken up in the near future, even if there are still relatively few examples. In their view, virtual libraries and archives would disseminate information and advance knowledge in the same way as traditional libraries and archives. Failing to include them within section 108’s purview detracts from their legitimacy and could inhibit their development and ability to serve their users. Under this view it would be inconsistent as a matter of policy to exclude them from the section 108 exceptions.

iii. Impact of Including Virtual Institutions

If virtual-only entities were to be covered by section 108, several issues would have to be addressed.

(a) Physical premises as a proxy for accountability

The Study Group discussed whether a library’s or archives’ possession of physical premises can serve as an important proxy for accountability. There is a range of views within the Study Group on how central physical premises are to accountability, particularly if more detailed eligibility criteria are included in the statute.

Arguments for physical premises as a proxy for accountability

An institution with sufficient capital to build or buy, maintain, and staff a library or archives building is more likely to be accountable to rights holders and others. This is partially because physical premises represent assets, making an entity less likely to be judgment-proof, and partially because a physical edifice is viewed as a sign of an institution’s commitment and dedication of resources. This accountability allows rights holders to trust that the section 108 exceptions are being exercised in a way that furthers the public interest. Online databases or “archives,” on the other

¹⁸⁶ E.g., California Digital Library (part of the University of California), <http://www.cdlib.org> (last visited Mar. 14, 2008); MetaArchive (a collaborative venture supported by several universities and the Library of Congress), <http://www.metaarchive.org/> (last visited Mar. 14, 2008); Southeast Asia Digital Library (housed and maintained by Northern Illinois University), <http://sea.lib.niu.edu/> (last visited Mar. 14, 2008); World Digital Library (sponsored by the Library of Congress), <http://www.worlddigitallibrary.org/project/english/index.html> (last visited Mar. 14, 2008).

¹⁸⁷ E.g., Video Game Music Archive, at <http://www.vgmusic.com> (last visited Mar. 14, 2008). The Study Group did not address whether existing entities such as the Internet Archive or the Open Content Alliance would meet the functional requirements.

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hand, can be put together with relatively little investment. The evidence of infringing databases of copyrighted works assembled on the Internet in various contexts makes rights holders wary of reducing the section 108 eligibility threshold so as to potentially include entities that do not have the same financial, institutional, and reputational concerns.

Arguments against physical premises as a proxy for accountability

Physical premises is an imperfect and unnecessary proxy for accountability, particularly because the new eligibility criteria that the Study Group recommends under section 108(a) (requiring professional staff, provision of user services, provision of access, mission of public service, and lawfully acquired collections),¹⁸⁸ if adopted, would effectively exclude virtual institutions that do not demonstrate a significant level of accountability from section 108 eligibility. In some cases, the functional requirements may be a more accurate measure of accountability than a physical structure.

Compromise proposal

A potential compromise suggested by some Study Group members, but not agreed to by all, is to make virtual-only libraries and archives eligible under section 108 only if they are affiliated with an established entity with physical premises, which would not itself need to be a library or archives. The affiliated entity could be a government agency, a university, or a business, for instance. Under this proposal independent virtual libraries and archives could partner with brick-and-mortar institutions to become eligible for section 108.

(b) Application of the section 108 exceptions to virtual-only institutions

An important issue is whether and to what extent virtual-only institutions could effectively take advantage of the current section 108 exceptions, if eligible. The collections of virtual-only libraries and archives by definition can be accessed by the public only remotely, but section 108 currently provides few opportunities for remote access. A virtual-only library or archives could make copies under subsections 108(b) and (c), for instance, but could not provide access to them. The ability to provide remote electronic access to users under subsections 108(d) and (e) also remains very much in doubt due to the current single-copy limit.¹⁸⁹ The only provision that a virtual entity clearly could use to provide access under the current exceptions is subsection 108(h), relating to works in the last 20 years of their copyright term. Whether sufficient benefit would be obtained from the inclusion of virtual entities under section 108 to justify additional risks to copyrighted works is questionable. Moreover, virtual institutions usually must rely upon permissions and licenses to provide access to copyrighted material in their collections, and the terms of the licenses will control, notwithstanding section 108.

¹⁸⁸ See Section IV.A.1.b.iv (“Additional Functional Requirements: Subsection 108(a): Discussion of Recommendations”).

¹⁸⁹ See Section IV.B.1.b.iii (“Direct Copies and ILL: Subsections 108(d) and (e): Current Law Context”).

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2. Display and Performance of Unlicensed Digital Works

a. Issue

Should section 108 be amended to address library and archives user access to lawfully acquired unlicensed digital works, including access via performance or display?

b. Outcome

The Study Group discussed, but did not agree on:

1. **Whether section 108 should be revised – or section 109(c) clarified – to permit libraries and archives to make temporary copies of digital works incidental to on-site public display.**
2. **Whether section 108 should be revised to permit libraries and archives to perform unlicensed digital works publicly on their premises and to create temporary copies incidental to such performance, provided that the performance is made to no more than one person or a few people at a time, and only for purposes of private study, scholarship, or research.**

c. Current Law Context

Whenever a digital work is displayed or performed, temporary, incidental copies of the work are made by the playback machine or device. These copies are considered reproductions under the copyright law, and the display or performance itself, if “public,” also implicates the exclusive rights. A performance or display is considered public under the copyright law if it occurs at any place open to the public. Because a library or archives must be open to the public, or at least to nonaffiliated researchers, to be eligible to take advantage of section 108, any performance or display provided by a library or archives to its users may be deemed public, even if it is made to no more than a few users at a time, such as the performance of a sound recording of a musical work in a library’s or archives’ listening booth or kiosk.¹⁹⁰

Unless a public performance or display is authorized by license (whether express or implied) or by an exception such as fair use, the performance or display, along with any incidental copies made in rendering the performance or display, may be infringing. Section 108 does not address public performances or displays, nor does it address the making of temporary copies in the course of a public display or performance or otherwise providing access to a work.

¹⁹⁰ See, e.g., *Columbia Pictures Indus., Inc. v. Aveco*, 800 F.2d 59, 63 (3rd Cir. 1986). It is established library practice, however, to allow users individually to view performances in public libraries, so long as the performances are private and not viewable by others. See, e.g., AM. LIBRARY ASS’N, VIDEO AND COPYRIGHT: ALA LIBRARY FACT SHEET NUMBER 7 (Oct. 2002), available at <http://www.ala.org/ala/alalibrary/libraryfactsheet/alalibraryfactsheet7.cfm>.

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Section 109(c) of the Copyright Act, however, provides an exception to the public display right:

[T]he owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

This provision permits any owner of a copy of a work, including libraries and archives, to display that copy, but its application to digital works is unclear, since it allows the display of the “particular” copy only, not the creation of temporary copies made to display a digital work.

There is no parallel exception for public performances in the Copyright Act that would allow libraries and archives to perform digital works from their collections on their premises.¹⁹¹ To the extent they do so without authorization, they must rely on fair use.

d. Discussion

i. Background

Libraries and archives commonly acquire rights to digital works, particularly those that exist in purely electronic form, pursuant to licenses. The terms of the licenses control the use of the work, notwithstanding the section 108 exceptions. There are instances where libraries and archives have lawfully obtained copies of a work in digital form other than through a license. Examples include donated personal or business files such as e-mails or other documents (for which there is no donor agreement or the donor agreement is silent on use rights), electronic manuscripts such as drafts of novels or notes, and legally captured websites. While it appears that libraries and archives in general assume they are permitted to make the temporary copies necessary to access the unlicensed works, either through implied licenses or fair use, there is no clear legal guidance on the scope of permitted use. The ability to provide access to a work by a public performance, such as by means of a video installation or by providing the ability to listen to a sound recording or view a motion picture in a booth, is similarly unclear.

The Study Group found that access to unlicensed digital works was not a priority among many stakeholders and is still evolving as a discrete issue. Libraries in general do not appear to have many unlicensed works in electronic formats. Archives and museums are likely to have many more unlicensed digital works in their collections, however, and, depending on the nature of the collections, expressed a need for a public performance exception or a display exception that applies to digital works.

¹⁹¹ Although section 110 contains several limited exceptions to the public performance right, some of which conceivably would apply to a particular library’s or archives’ performances, there are no exceptions that apply generally.

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ii. Public Display

For categories of works such as visual and audiovisual art, viewing a digital work in a library or archives requires that it be publicly displayed and that temporary copies be made to enable that display. Section 109(c), described above, permits owners of a copy of a work to display it publicly under certain limitations, but the language of this exception does not clearly accommodate the temporary copies required for the display of digital works such as computer art.

Some Study Group members proposed a recommendation to clarify that section 109(c) applies to digital works, or that the provision be revised to allow libraries and archives to make and display the temporary and incidental copies necessary to achieve the display of a digital work. They argued that this change will present little risk of harm to rights holders, as it does not permit a library or archives to display a work beyond the on-premises, one-image-at-a-time limits of the current 109(c). The Study Group did not address the ability of libraries and archives to display a work publicly by remote access.

iii. Public Performance

Some Study Group members supported revising section 108 or 109 to permit libraries and archives to perform unlicensed digital works publicly on their physical premises and to create the temporary copies incidental and necessary to render such performances, provided that the performance is made in a station or booth environment to no more than one person or a few people at a time and the performance is requested for purposes of private study, scholarship, or research. This proposed exception would cover the performance of an unlicensed digital video or MP3 file in a library's listening or viewing booth, but would not cover the same performances to a group in the library's auditorium. In their view, this limited ability of libraries and archives to permit users to view or listen to unlicensed digital works on their premises will not interfere with the market for such works.

iv. Concerns

Introducing public performance and display exceptions into section 108 could lead to unintended and harmful consequences for rights holders, according to some group members. Moreover, in their view it is unclear that the law as it stands now is incapable of accommodating the concerns of libraries and archives, or that such concerns call for expanding the library and archives exception to cover unauthorized performance and display.

Concerns were also raised that creating copyright exceptions for temporary copies only in the library and archives context would raise more questions than it would answer, and have unintended effects in other areas of the copyright law, given that questions posed by temporary copies exist throughout the Copyright Act.

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3. Licenses and Other Contracts

a. Issue

Should the subsection 108(f)(4) provision that states that nothing in section 108 in any way affects contractual obligations be amended? Specifically, are there circumstances in which the section 108 exceptions should apply notwithstanding the terms of a license or other contract?

b. Outcome

The Study Group agreed that the terms of any negotiated, enforceable contract should continue to apply notwithstanding the section 108 exceptions, but disagreed as to whether section 108, especially the preservation and replacement exceptions, should trump contrary terms in non-negotiable agreements.¹⁹²

c. Current Law Context

Subsection 108(f)(4) reads in pertinent part: “Nothing in this section . . . in any way affects . . . any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.” The House Report states, “This clause is intended to encompass the situation where an individual makes papers, manuscripts, or other works available to a library with the understanding that they will not be reproduced.”¹⁹³ Although enacted prior to the development of markets for licensing electronic media, the provision covers any enforceable contract that a library or archives enters into for the acquisition of materials or for access to materials, and includes non-negotiable licenses, such as shrink-wrap and click-wrap agreements.

d. Discussion

i. Background

When a library or archives purchases a work in a physical medium, it owns the physical copy. It may sell or otherwise dispose of that copy as it wishes pursuant to the first sale doctrine,¹⁹⁴ and it may take advantage of the section 108 exceptions. If a library or archives acquires material pursuant to a license (which is often the case for electronic journals), then under subsection 108(f)(4) the license terms apply notwithstanding the section 108 exceptions.

¹⁹² See Section IV.A.2.f.iv (“Preservation of Publicly Available Online Content: Discussion of Recommendations”) regarding non-negotiable agreements as a factor in defining the “public availability” of online content.

¹⁹³ H.R. 94-1476, at 77 (1976).

¹⁹⁴ The first sale doctrine is discussed in Section II.A.2 (“Overview of the Exclusive Rights”).

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Libraries and archives now obtain access to many digital materials through license rather than through the purchase of physical copies. Licensing provides significant benefits to libraries and archives in terms of efficiency, flexibility, and storage. At the same time, many librarians and archivists are concerned about those license terms that restrict the ability to use the section 108 exceptions and the increasing predominance of licensed over purchased materials, which could render section 108 largely irrelevant, particularly for licensed, born-digital works.¹⁹⁵ This development could diminish the ability of libraries and archives to preserve and provide access over the long term to these materials.

ii. Negotiable Versus Non-Negotiable Agreements

The Study Group members agreed that the contract clause of subsection 108(f)(4) should continue to apply at least with respect to agreements that are negotiable and enforceable. Freedom to contract is a fundamental principle in American law, and the statutory nullification of a contract is generally allowed only in cases of unequal bargaining power (as reflected in certain labor and employment laws) and contracts that are unconscionable, fraudulent, or threats to public safety (as reflected in consumer protection laws). The Copyright Act expressly provides that contractual terms may be nullified in only one instance – when an author or his heirs wish to terminate a transfer or grant of rights after 35 years.¹⁹⁶ The Study Group does not believe that the goal of preservation warrants interfering with valid, negotiated, enforceable agreements at this time.

Preservation is nonetheless an important public policy objective, and some Study Group members believe it is sufficiently important that *non-negotiable* licenses, such as shrink-wrap, click-wrap, and browse-wrap agreements, not be permitted to trump the section 108 exceptions, particularly the preservation and replacement provisions.¹⁹⁷ There was not consensus within the Study Group on this issue of whether subsection 108(f)(4) should apply to non-negotiable agreements.

Arguments for allowing section 108 to trump non-negotiable licenses

When a license between a rights holder and a library or archives is or can be negotiated, each party has a chance to bargain for the terms it believes are fair and beneficial. While not every license negotiation takes place on a level playing field, sometimes libraries and archives have the upper hand, and sometimes rights holders do.

This is not the case for non-negotiable agreements, such as shrink-wraps or click-wraps. Many licenses to electronic content are in the form of a click-wrap or shrink-

¹⁹⁵ A report of a Study Group subcommittee notes that there appears to be some movement in certain publishing sectors for licenses that better accommodate library and archives exercise of the section 108 exceptions.

¹⁹⁶ 17 U.S.C. § 203 (2007).

¹⁹⁷ These colloquial names for types of agreements are based on the activities used to manifest assent to be bound. Shrink-wrap agreement notices commonly appear on the boxes of computer software. They indicate that by opening the package (often shrink-wrapped), the user agrees to the license terms that are enclosed with the product. Click-wrap and browse-wrap agreements are described in Section IV.A.2.f.iv (“Preservation of Publicly Available Online Content: Discussion of Recommendations”).

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wrap agreement, where the library or archives is given only a “take it or leave it” option with no opportunity to affect the terms of the bargain. Whether these agreements are enforceable or not is fact-specific. By and large, courts have held that they are enforceable, at least where affirmative assent to the terms is manifested.¹⁹⁸ Because adherence to these non-negotiable terms could interfere with the ability to preserve important materials for posterity and undermine the public policy goals of section 108,¹⁹⁹ some group members proposed amending subsection 108(f)(4) to provide that the rights and privileges granted under section 108 may not be waived by a non-negotiable contract.

Arguments against allowing section 108 to trump non-negotiable licenses

Other group members believe that the question of whether an enforceable contract has been formed via browse-wrap, click-wrap, or any other type of non-negotiable agreement should continue to be decided by reference to existing state law and judicial decisions that address issues related to the enforceability of contracts, and not determined by changes in federal copyright law. They point out that, although courts generally enforce non-negotiable contracts, there are well-developed rules under state law for “policing the bargain” and for refusing to enforce contracts where enforcement would be unjust. For example, a court may void a contract it finds to be unconscionable or that violates a statutory rule.²⁰⁰ A court may also invalidate a particular term of a contract if it finds that the term violates a tenet of public policy, such as a clause that unfairly dictates the forum in which disputes are to be litigated.²⁰¹ Under this view, existing legal tools are sufficient to address contractual issues among libraries and archives and rights holders.

All Study Group members agreed that voluntary efforts to develop and negotiate model terms and informal guidelines may provide the best near-term solution to the inability of libraries and archives to preserve and make replacement copies of licensed content. The Study Group lauds such extra-legislative efforts, but they are beyond the scope of the group’s mandate.

¹⁹⁸ Click-wrap licenses that present license terms and require the user to accept or reject them prior to the use of the licensed information, such as through the use of an “I agree” button, have been found valid and enforceable. *See* *Specht v. Netscape Communications Corp.*, 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001). But situations in which notice and consent are more ambiguous, including browse-wraps and other similar licenses, will depend upon the facts regarding notice and consent. *See* *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004); *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 32 (2d Cir. 2002).

¹⁹⁹ In particular, the practice of web harvesting, as described in Section IV.A.2.f.iv (“Preservation of Publicly Available Online Content: Discussion of Recommendations”) would be significantly affected by adherence to non-negotiable browse-wrap contracts.

²⁰⁰ *See, e.g.*, *Pro CD v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996).

²⁰¹ *See, e.g.*, *Scarcella v. America Online No. 1168/04 2004 WL 2093429*, at *1 (NY Civ. Ct., Sept. 8, 2004), *aff’d*, 811 N.Y.S.2d 858 (N.Y. App. Term 2005); *America Online v. Superior Court of Alameda County*, 108 Cal. Rptr. 2d 699, 710 (Ct. Appl. 2001).

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4. Circumvention of Technological Measures that Effectively Control Access to a Work

a. Issue

Should libraries and archives be permitted to circumvent technological protection measures (TPMs) that effectively control access to a work (“technological access controls”) in order to exercise the section 108 exceptions, particularly for replacement and preservation copying?

b. Outcome

The Study Group discussed proposals to allow the circumvention of TPMs for the purposes of exercising the section 108 exceptions, and while all agreed that the role of libraries and archives in preserving copyrighted works is a matter of national concern, there was not agreement on whether a recommendation in this area was needed and, if so, what kind of recommendation would be appropriate.

c. Current Law Context

Section 1201 of Title 17, enacted as part of the DMCA, prohibits anyone from circumventing a “technological measure that effectively controls access to a work.” It also prohibits manufacturing, providing, or trafficking in devices or services primarily intended to circumvent access controls or copy controls.²⁰² There are a number of exceptions to the anticircumvention provisions set out in section 1201, but none of them apply specifically to libraries and archives that circumvent access controls to make preservation copies or engage in any other activity permitted by section 108.²⁰³ Moreover, while there is no prohibition on the act of circumventing copy controls, libraries and archives contend that they generally do not have staff capable of circumventing copy controls and would need to obtain the tools or services to do so from elsewhere, but the manufacture and distribution of such tools and services are prohibited by section 1201.

In addition to the statutory exceptions, section 1201 provides for a rulemaking proceeding conducted by the Copyright Office every three years. The purpose of the proceeding is to determine whether users of any particular class of copyrighted works are, or are likely to be, adversely affected in their ability to make noninfringing uses by the section 1201 prohibition against circumventing technological access controls. If the Librarian of Congress finds, upon the recommendation of the Copyright Office, that such adverse effects are present or are likely with respect to one or more particular classes of works, section 1201 exempts those classes of

²⁰² Note that, with current technologies, there is not always a clear line between access controls and copy controls. See, e.g., Peters, *supra* note 58, at 44-45.

²⁰³ 17 U.S.C. § 1201(d)-(j) (2007). See Section II.C.5.c (“Technological Protection Measures”) for further information.

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works from the prohibition against circumventing technological access controls for the next three years. Those exemptions remain in effect until the next rulemaking proceeding, at which time a new application must be filed demonstrating a continued or likely adverse impact for an exemption to remain in effect.

There have been three rulemaking proceedings to date. The Copyright Office has taken the position, based on the legislative history surrounding the enactment of the rulemaking provision, that the proponents of an exemption have the burden of proof and that mere assertions of possible adverse effects are not sufficient to warrant an exemption. A proponent must come forward with evidence of actual or potential adverse effects. In the first two rulemaking proceedings, the Copyright Office concluded that it had to define the “particular class” of works solely with reference to characteristics of the class and not with reference to the purpose of the use. In the most recent rulemaking, however, it modified its position, concluding that it was permissible in some cases to further refine a particular class of copyrighted works by reference to the users or uses for which the exemption was sought.²⁰⁴

As a result of the most recent rulemaking proceeding, the Librarian exempted six classes of works. Among those exemptions was one specifically directed to preservation activities, proposed by the Internet Archive:

Computer programs and video games distributed in formats that have become obsolete and that require the original media or hardware as a condition of access, when circumvention is accomplished for the purpose of preservation or archival reproduction of published digital works by a library or archive. A format shall be considered obsolete if the machine or system necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.²⁰⁵

d. Discussion

i. Background

Librarians and archivists are concerned that the use of technological protection measures may be growing and that the prohibition against circumventing technological access controls will impede their ability to preserve and provide access to the nation’s creative output. Preserving a digital work often requires adding metadata, migrating the original copy to archival formats or other new formats, or emulating the original format as prior formats become obsolete or incompatible with the

²⁰⁴ Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies, 71 Fed. Reg. 68472, 68473 (Nov. 27, 2006) (codified at 37 C.F.R. § 201.40). The Copyright Office recognized that continued adherence to its prior rule put it in the difficult position of having to grant an exemption for an entire class of works to accommodate a narrow noninfringing use, or deny an exemption for the narrow noninfringing use because of the adverse consequences of granting it for the entire class of works. In particular, the Office granted an exemption for “audiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.”

²⁰⁵ *Id.*, at 68474. A similar exemption was granted in the 2003 rulemaking.

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software that manages them. Librarians and archivists have expressed concern that TPMs will interfere with the ability to conduct these activities.²⁰⁶

The Study Group discussed these concerns and proposals to allow for the circumvention of TPMs for the purposes of exercising the section 108 exceptions. The various perspectives are summarized below. Although all agreed that the role of libraries and archives in preserving copyrightable works is a matter of national concern, there was no agreement on whether a recommendation in this area was needed, and, if so, what kind of recommendation would be appropriate.

ii. Proposals

(a) Create a new exception for circumvention for preservation and replacement

The Study Group considered a proposal for a new exception to section 1201 that would permit libraries and archives to circumvent access controls for purposes of preservation and replacement. Reliance on the existing rulemaking process, proponents argued, is too uncertain for such an important public policy matter. It is not clear if such an exception could be obtained through such proceedings and, even if it were, it would last for only three years, with no assurance of renewal. Relying on the rulemaking, some members contended, would not provide the certainty that libraries and archives would need to devote resources to preservation, an activity that by definition far exceeds the three-year exemption period. Further, exceptions granted under the rulemaking can be applied to “certain classes of works” only. Preservation, however, is an essential activity for almost all types of works, and its successful practice depends on elements such as file formats and storage media, and not on the class to which a work belongs.²⁰⁷

A second proposal discussed was to amend section 108 rather than section 1201 to provide that libraries and archives can make TPM-free copies only if they cannot obtain a copy from the rights holder. Rather than an outright exemption, this would be a variation on the type of provision found in the current section 112(e)(8).²⁰⁸ Under this proposal, the library or archives would first have to ask the rights holder for a copy with technological access controls disabled, and only if the rights holder refused could the library or archives permissibly circumvent. Rights holders might

²⁰⁶ Complying with the provisions intended to protect the integrity of copyright management information in 17 U.S.C. § 1202 does not appear to interfere with preservation activities, however.

²⁰⁷ See also Peters, *supra* note 58, at 63 (“In essence, the problem confronting archival activity in the digital age is a “use-based” concern that is more appropriate for congressional consideration and properly crafted legislative amendment than it is for this rulemaking”).

²⁰⁸ Section 112(e) is a statutory license that allows a transmitting organization that is authorized by law to transmit public performances of sound recordings to make a copy of those sound recordings solely to facilitate its own transmissions or for archival purposes. Subsection 112(e)(8) provides that if technological measures prevent the transmitting organization from reproducing the sound recording,

the copyright owner shall make available to the transmitting organization the necessary means for permitting the making of such [copy] as permitted under this subsection, if it is technologically feasible and economically reasonable for the copyright owner to do so. If the copyright owner fails to do so in a timely manner in light of the transmitting organization’s reasonable business requirements, the transmitting organization shall not be liable for a violation of section 1201(a)(1) of this title for engaging in such activities as are necessary to make such [copies] as permitted under this subsection.

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prefer to provide libraries and archives with a clean copy rather than let the libraries and archives conduct the circumvention. This would ensure that the file does not become altered or corrupted in the process of removing the technological access control. And, from the library's and archives' perspective, it may be easier and cheaper to get a copy of the material from the rights holder. Some members objected to this proposal on the grounds it is too burdensome for rights holders and would require them to employ additional staff just to respond to requests for TPM-free copies.

(b) No amendment necessary

Some members argued that there is no need for any amendment to the law because the rulemaking process already provides libraries and archives with a mechanism to obtain an exception from the anticircumvention provision. When and if there is evidence that libraries and archives are in fact adversely affected in their ability to make copies under section 108 due to the use of TPMs, they can apply for an exception under the rulemaking. Particularly given the expanded application of this authority in the last rulemaking, proponents of this view suggest that there is no evidence that the rulemaking mechanism cannot meet the preservation needs of libraries and archives, in the event that the market and technology do not. The rulemaking also has the benefit of providing for narrow exemptions targeted to specific problems, rather than broadly applicable exemptions that risk unintended harm.

Arguably, the terms of negotiated licenses might offer another way to establish conditions under which libraries and archives could circumvent TPMs for preservation and replacement purposes, or obtain copies for preservation without the need to resort to circumvention.

In any event, an outright exception allowing libraries and archives to circumvent TPMs may violate the United States' international obligations, as reflected in a number of recent free trade agreements. Some members believe that such an exception could create significant risks for rights holders and seriously erode the benefits of section 1201.

(c) Circumvention devices and services

A particularly contentious issue is whether the Copyright Act should allow the development and sale of devices and services to enable permitted circumvention by libraries and archives. Currently, the DMCA stipulates that the Librarian of Congress may grant exemptions from the DMCA's prohibition only for acts of circumvention. Exemptions from the DMCA's prohibition on the manufacture, distribution, and importation of circumvention tools and services are not within the scope of the rulemaking. In some cases a circumvention exemption may be meaningless to libraries and archives without a parallel exception to permit devices to be made and distributed to enable circumvention or to allow circumvention services to be offered to libraries and archives. While some circumvention tools may be readily available on the Internet (although not legally), others are not.

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If it is demonstrated that preservation activities are significantly hampered because libraries and archives are unable to engage in legally permitted circumvention of TPMs for lack of the technological means, some members believe an exception to the trafficking ban should be created, which could be carefully crafted to ensure that the means of circumvention are legally available only to libraries and archives for authorized preservation activities.

Such an amendment to enable trafficking in circumvention devices or services is opposed by other members, who point out that such trafficking is prohibited because once circumvention tools and services become available on the market, it is virtually impossible to prevent their use for illegal circumvention. The ban against circumvention, they argued, would be meaningless if “user friendly” circumvention tools and services were readily available.

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5. E-Reserves

a. Issue

Should an exception dealing with the reproduction and distribution of copyrighted works for use as electronic reserve materials (“e-reserves”) be added to section 108?

b. Outcome

The Study Group discussed whether to recommend any changes to the copyright law specifically to address e-reserves and determined not to recommend any such changes at the present time.

c. Current Law Context

Section 108 does not currently address copying and distribution by libraries and archives for e-reserve purposes. Fair use may apply in some cases, depending on the circumstances; otherwise permission must be obtained for e-reserve copying and distribution of copyrighted materials.

d. Discussion

i. Background

E-reserves is the practice of making academic course materials available online to students enrolled in that course, generally on a password-protected site or other password-protected basis. It is intended to replace or supplement traditional reserve practice when course materials or photocopies of course materials are placed in a reserve section of the academic library for student use.

ii. Address E-Reserves in Section 108?

Policies surrounding e-reserves appear still to be evolving and are the subject of several disputes between academic institutions and publishers. The Study Group believes that e-reserves should not be specifically addressed in section 108 legislation at this time and that fair use guidelines or best practices for e-reserves ultimately may be preferable to a legislative solution.

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6. Pre-1972 Sound Recordings

a. Issue

Should section 108 be revised to cover U.S. sound recordings made before 1972?

b. Outcome

The Study Group observes that, in principle, pre-1972 U.S. sound recordings should be subject to the same kind of preservation-related activities as permitted under section 108 for federally copyrighted sound recordings. The Study Group questioned whether it is feasible to amend the Copyright Act without addressing the larger issue of the exclusion of pre-1972 sound recordings from federal copyright law.

c. Current Law Context

Sound recordings were not protected under federal copyright law until February 15, 1972. All U.S. sound recordings first fixed prior to that date (“pre-1972 sound recordings”) are protected only under state law.²⁰⁹ Generally, copyright law is exclusively a matter of federal law: the Copyright Act of 1976 expressly preempts all state laws that provide equivalent rights to those provided in the federal statute. That preemption provision, however, has a specific carve-out for state laws protecting pre-1972 sound recordings. Federal copyright law will not preempt these laws until 2067.²¹⁰

State law protection for pre-1972 sound recordings generally takes two forms: (1) statutes that criminalize intentional unauthorized copying and distribution of sound recordings for profit, and (2) civil law (usually common law, that is, judge-made law and not statutory law) prohibiting unauthorized copying and distribution of sound recordings, usually in a commercial context. The criminal statutes are fairly similar from state to state, and generally do not embrace the types of activities that libraries and archives undertake. The applicable civil law, however, varies from state to state. State courts may protect sound recordings under a number of different legal theories, such as unfair competition, misappropriation, and common law copyright.

²⁰⁹ The copyright in certain foreign sound recordings was restored as part of the Uruguay Round Agreements Act of 1998 and codified in 17 U.S.C. § 104A, 104A(h)(6) (2007).

²¹⁰ 17 U.S.C. § 301(c) (2007).

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d. Discussion

i. Background

Due to the variety of applicable state laws, it is difficult for a library or archives to determine the scope of protection for sound recordings in every applicable state. Moreover, because most of the state cases concerning pre-1972 sound recordings have involved unauthorized distribution for commercial purposes, the existence and scope of exceptions to these common law rights, if any, for the activities of libraries and archives is unclear.²¹¹ While state courts may look to federal copyright law for guidance in determining whether particular user activities should be allowed, they are not required to do so. Many librarians and archivists are reluctant to copy and disseminate older sound recordings in the face of this patchwork of state laws that lack well-delineated exceptions.

The general consensus of the Study Group is that some pre-1972 recordings have great historical and cultural value, and it is important to preserve them for future generations. While some of them also have great commercial value and are being preserved by their owners, many are being preserved only by cultural heritage entities.

ii. Coverage Under Section 108?

The group discussed whether to recommend that section 108 treat pre-1972 sound recordings the same as post-1972 sound recordings, at least with respect to the exceptions for preservation and replacement copying. This result might be achieved through a narrow, targeted amendment to section 301(c) – the provision that preserves state law protection for pre-1972 sound recordings until 2067. For instance, a clause could be added to specify that section 108 overrides any state protection for the limited purpose of preservation and replacement of pre-1972 sound recordings. While the group was not opposed in principle to preservation of pre-1972 sound recordings under section 108, there was some concern about reopening the federal preemption issue. Attempts to amend section 301(c) could have unintended consequences and result in the erosion of state copyright laws that continue to provide the basis for business decisions and commercial investments with respect to pre-1972 recordings.

The Study Group also discussed potential solutions other than, or in addition to, legislation. Cooperative arrangements among libraries, archives, and sound recording rights holders, for instance, could ensure the preservation of these older recordings in the same manner as some moving images are currently preserved.²¹²

²¹¹ For more information on this topic, see JUNE M. BESEK, COPYRIGHT ISSUES RELEVANT TO DIGITAL PRESERVATION AND DISSEMINATION OF PRE-1972 COMMERCIAL SOUND RECORDINGS BY LIBRARIES AND ARCHIVES (2005), available at <http://www.clib.org/pubs/reports/pub135/pub135.pdf>.

²¹² See, e.g., UCLA Film & Television Archive, <http://www.cinema.ucla.edu/collections/Profiles/columbia.html> (noting cooperative preservation program with Columbia Pictures) (last visited Mar. 14, 2008).

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7. Remedies

a. Issue

Should section 505 of the copyright law be amended to exempt libraries and archives from attorneys' fees in certain circumstances?

b. Outcome

The Study Group discussed, but did not agree on, whether section 505 should be amended at this time.

c. Current Law Context

Section 504(c)(2) states in part that when a court has found copyright liability, it shall remit statutory damages if the infringer is a nonprofit educational institution, library or archives, or an employee or agent of such an entity acting within the scope of his or her employment, if the infringer had reasonable grounds for believing that his or her use of the copyrighted work was fair use under section 107. This provision was enacted to protect library and archives employees acting in good faith.²¹³

The attorneys' fees provision in section 505 does not have a similar exclusion for libraries, archives, and nonprofit educational institutions or their employees acting in good faith. Section 505 provides the court with discretion to allow the recovery of full attorneys' fees by the prevailing party against any party except the United States. Libraries and archives or their employees found liable for copyright infringement but whose damages are remitted under subsection 504(c)(2) nevertheless may be subject to attorneys' fees. This may represent an anomaly in the law that some group members believe should be fixed.

d. Discussion

The Study Group considered whether to recommend amending section 505 to provide that no attorneys' fees could be awarded to a prevailing plaintiff if the infringer was a library or archives, or an employee of a library or archives, that qualified for remission of damages under section 504(c)(2). Some group members believe that libraries and archives should enjoy the certainty that if infringement damages are remitted, they will not be liable for attorneys' fees. Other members disagreed that a revision to the law is necessary since the award of attorneys' fees is within the court's discretion, and the Study Group is not aware of any instance in which a court has awarded attorneys' fees where the damages were remitted. The Study Group did not agree on whether such an amendment is necessary or appropriate.

²¹³ H.R. Rep. No. 94-1476, at 148 (1976).

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V. CONCLUSION AND NEXT STEPS

The Study Group has completed its work and entrusts to the Copyright Office the task of proposing draft legislation. The Study Group understands that the Copyright Office may hold hearings or otherwise seek comment or input and will propose draft legislation for amending section 108. It is the group's hope that the Report's analysis of the issues and discussion of its recommendations, findings, and agreements, and even disagreements, will prove useful to its sponsors, the Copyright Office and the Library of Congress's NDIIPP program, as well as to Congress and other interested parties. The Study Group thanks the Library of Congress and the Copyright Office for the opportunity to participate in this important project and looks forward to the eventual passage of balanced amendments updating section 108 to address the shifting landscape created by new technologies.

Appendices

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A. Text of section 108

§ 108. Limitations on exclusive rights: Reproduction by libraries and archives¹

- (a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if —
- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
 - (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
 - (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.
- (b) The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if —
- (1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and
 - (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.
- (c) The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if —
- (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
 - (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.
- For purposes of this subsection, a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.

¹ The Copyright Amendments Act of 1992 amended section 108 by repealing subsection (i) in its entirety. Pub. L. No. 102-307, 106 Stat. 264, 272. In 1998, the Sonny Bono Copyright Term Extension Act amended section 108 by redesignating subsection (h) as (i) and adding a new subsection (h). Pub. L. No. 105-298, 112 Stat. 2827, 2829. Also in 1998, the Digital Millennium Copyright Act amended section 108 by making changes in subsections (a), (b), and (c). Pub. L. No. 105-304, 112 Stat. 2860, 2889. In 2005, the Preservation of Orphan Works Act amended subsection 108(i) by adding a reference to subsection (h). It substituted “(b), (c), and (h)” for “(b) and (c).” Pub. L. No. 109-9, 119 Stat. 218, 226, 227.

- (d) The rights of reproduction and distribution under this section apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work, if —
- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
 - (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.
- (e) The rights of reproduction and distribution under this section apply to the entire work, or to a substantial part of it, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if —
- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
 - (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.
- (f) Nothing in this section —
- (1) shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises: Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law;
 - (2) excuses a person who uses such reproducing equipment or who requests a copy or phonorecord under subsection (d) from liability for copyright infringement for any such act, or for any later use of such copy or phonorecord, if it exceeds fair use as provided by section 107;
 - (3) shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program, subject to clauses (1), (2), and (3) of subsection (a); or
 - (4) in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.
- (g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee —
- (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, 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.

(h)(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

(2) No reproduction, distribution, display, or performance is authorized under this subsection if —

(A) the work is subject to normal commercial exploitation;

(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.

(i) The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news, except that no such limitation shall apply with respect to rights granted by subsections (b), (c), and (h), or with respect to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

B. Study Group Members

Laura Gasaway (*co-chair*)

Associate Dean for Academic Affairs, Professor of Law, and former Director of the Law Library, University of North Carolina School of Law

Richard Rudick (*co-chair*)

Former Senior Vice President and General Counsel, John Wiley & Sons. Vice Chair, Board of Directors, Copyright Clearance Center

June Besek (*legal advisor*)

Executive Director and Director of Studies, Kernochan Center for Law, Media, and the Arts, Columbia Law School

Troy Dow

Vice President of Government Relations, The Walt Disney Company

Jesse Feder

Director for International Trade and Intellectual Property, Business Software Alliance

Martha Fishel

Chief, Public Services Division, National Library of Medicine, March 2006 – January 2008

Peter Givler

Executive Director, Association of American University Presses

Peter Hirtle

Intellectual Property Officer, Cornell University Library

Nancy Kopans

General Counsel and Secretary, JSTOR

Eve-Marie Lacroix

Chief, Public Services Division, National Library of Medicine, April 2005 – January 2006

James Neal

Vice President for Information Services and University Librarian, Columbia University

Miriam Nisbet

Former Legislative Counsel; American Library Association. Current Director of the Information Society Division, United Nations Educational, Scientific and Cultural Organization (UNESCO)

Robert Oakley

Professor of Law and Director, Law Library, Georgetown University Law Center
deceased September 29, 2007

B. Study Group Members (continued)

John Schline

Senior Vice President of Corporate Business Affairs, Penguin Group (USA)

Lois Wasoff

Attorney at Law. Former Vice President and Corporate Counsel, Houghton Mifflin Company

Donald Waters

Program Officer for Scholarly Communication, The Andrew W. Mellon Foundation

Steven Weissman

Associate General Counsel, Time Inc.

Paul West

Senior Vice President of National Studio Operations, Universal Mastering Studios

Maureen Whalen

Associate General Counsel, J. Paul Getty Trust

Nancy Wolff

Attorney, Cowan, DeBaets, Abrahams & Sheppard, LLP

C. List of Experts Consulted

Tracey Armstrong

Executive Vice President, Copyright Clearance Center

- Licensing and e-reserves

Martha Anderson

Director of Program Management for the National Digital Information Infrastructure and Preservation Program, Library of Congress

- Digital preservation, dark archiving, and preserving web content

Eileen Fenton

Executive Director, Portico

- Preserving e-journals

Jane Ginsburg

Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia Law School

- Unpublished works

Roberta R. Kwall

Raymond P. Niro Professor of Intellectual Property Law and Director of the Center for Intellectual Property Law & Information, DePaul University College of Law

- Unpublished works

David Pierce

Archivist and historian, consultant to the Library of Congress Motion Picture, Broadcasting and Recorded Sound Division

- Access Issues related to moving image and recorded sound

Bill Rosenblatt

Giant Steps Media Technology Strategies

- Technical protection measures

D. Federal Register Notice Vol. 71, No. 31, Docket 06-10801, Feb. 16, 2006

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a \$1.3 million civil penalty, to come into compliance with RCRA including to upgrade its tanks, and to monitor its tanks for leaks. The proposed settlement also provides for the City to implement injunctive relief, including installation of a centralized monitoring system for all USTs operated by three city agencies: the Fire Department, the Department of Transportation, and the Police Department.

The Department of Justice will receive for a period of thirty (30) days from the date of this publication comments relating to the Consent Decree. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611, and should refer to *United States v. City of New York*, D.J. No. 90-7-1-07807.

The Consent Decree may be examined at the Office of the United States Attorney, 86 Chambers Street, New York, New York 10007, and at the Region II Office of the U.S. Environmental Protection Agency, Region II Records Center, 290 Broadway, 17th Floor, New York, NY 10007-1866. During the public comment period, the Consent Decree also may be examined on the following Department of Justice Web site, <http://www.usdoj.gov/enrd/open.html>. A copy of the Consent Decree may also be obtained by mail from the Consent Decree Library, P.O. Box 7611, U.S. Department of Justice, Washington, DC 20044-7611 or by faxing or e-mailing a request to Tonia Fleetwood (tonia.fleetwood@usdoj.gov), fax no. (202) 514-0097, phone confirmation number (202) 514-1547. In requesting a copy from the Consent Decree Library, please enclose a check in the amount of \$4.25 (25 cents per page reproduction cost) payable to the U.S. Treasury.

Ronald G. Gluck,

Assistant Section Chief, Environmental Enforcement Section, Environment and Natural Resources Division.

[FR Doc. 06-1420 Filed 2-14-06; 8:45 am]

BILLING CODE 4410-15-M

LIBRARY OF CONGRESS**Copyright Office**

[Docket No. 06-10801]

Section 108 Study Group: Copyright Exceptions for Libraries and Archives

AGENCY: Office of Strategic Initiatives and Copyright Office, Library of Congress.

ACTION: Notice of public roundtables with request for comments.

SUMMARY: The Section 108 Study Group of the Library of Congress seeks comment on certain issues relating to the exceptions and limitations applicable to libraries and archives under section 108 of the Copyright Act, and announces public roundtable discussions. This notice (1) requests written comments from all interested parties on the specific issues identified in this notice, and (2) announces public roundtable discussions regarding certain of those issues, as described in this notice. The issues covered in this notice relate primarily to eligibility for the section 108 exceptions and copies made for purposes of preservation and replacement.

DATES: Roundtable Discussions: The first public roundtable will be held in Los Angeles, California on Wednesday, March 8, 2006, from 8:30 a.m. to 4 p.m. P.S.T. An additional roundtable will be held in Washington, DC on Thursday, March 16, 2006 from 9 a.m. to 4:30 p.m. E.S.T. Requests to participate in either roundtable must be received by the Section 108 Study Group by 5 p.m. E.S.T. on February 24, 2006.

Written Comments: Interested parties may submit written comments on any of the topics discussed in this notice after 8:30 a.m. E.S.T. on March 17, 2006, and on or before 5 p.m. E.S.T. on April 17, 2006.

ADDRESSES: All written comments and requests to participate in roundtables should be addressed to Mary Rasenberger, Policy Advisor for Special Programs, U.S. Copyright Office. Comments may be sent (1) by electronic mail (preferred) to the e-mail address section108@loc.gov; (2) by commercial, non-government courier or messenger, addressed to the U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000, and delivered to the Congressional Courier Acceptance Site (CCAS), 2nd and D Streets, NE., Washington, DC, between 8:30 a.m. and 4 p.m. E.S.T.; or (3) by hand delivery by a private party to the Public Information Office, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000, between 8:30 a.m. and 5 p.m. E.S.T. (*See Supplementary Information*, Section 4: "Procedures for Submitting Requests to Participate in Roundtable Discussions and for Submitting Written Comments" below for file formats and other information about electronic and non-

electronic submission requirements.) Submission by overnight service or regular mail will not be effective.

The public roundtable in Los Angeles, California will be held at the UCLA School of Law, Room 1314, Los Angeles, CA 90095, on Wednesday, March 8, 2006. The public roundtable in Washington, DC will be held in the Rayburn House Office Building, Room 2237, Washington, DC 20515, on Thursday, March 16, 2006.

FOR FURTHER INFORMATION CONTACT: Chris Weston, Attorney-Advisor, U.S. Copyright Office, E-mail: cwes@loc.gov; Telephone (202) 707-2592; Fax (202) 252-3173.

SUPPLEMENTARY INFORMATION:**1. Background**

The Section 108 Study Group was convened in April 2005 under the sponsorship of the Library of Congress's National Digital Information Infrastructure and Preservation Program (NDIIPP) in cooperation with the U.S. Copyright Office. The Study Group is charged with examining how the section 108 exceptions and limitations may need to be amended, specifically in light of the changes produced by the widespread use of digital technologies. More detailed information regarding the Section 108 Study Group can be found at www.loc.gov/section108.

To date, the Study Group has principally focused on the issues identified in this notice, namely those relating to: (1) Eligibility for the section 108 exceptions; (2) amendments to the preservation and replacement exceptions in subsections 108 (b) and (c), including amendments to the three-copy limit, the subsection 108(c) triggers, the separate treatment of unpublished works, and off-site access restrictions; (3) proposal for a new exception to permit the creation of preservation-only/restricted access copies in limited circumstances; and (4) proposal for a new exception to permit capture of websites and other online content. Pursuant to 2 U.S.C. 136, the Study Group now seeks input, through both written comment and participation in the public roundtables described in this notice, on whether there are compelling concerns in any of the areas identified that merit a legislative or other solution and, if so, what solutions might effectively address those concerns without conflicting with the legitimate interests of authors and other rights-holders.

2. Areas of Inquiry

Public Roundtables. Due to time constraints, the Study Group will not be

discussing all of the issues addressed in this notice at the March roundtables. Each of the four general topic areas will be addressed, but discussion of the second topic area (“Amendments to current subsections 108(b) and (c)”) will be limited to off-premises access. As noted below, written comments, however, may address any of the issues set out in this notice. Participants in the roundtable discussions will be asked to respond to the specific questions set forth below (*see* **Supplementary Information**, Section 3: “Specific Questions”) during discussions on each of the four following topics, at the following places and times:

A. Eligibility for the section 108 exceptions:

Los Angeles, CA: Wednesday, March 8, morning session
Washington, DC: Thursday, March 16, morning session

B. Proposal to amend subsections 108(b) and (c) to allow access outside the premises in limited circumstances:

Los Angeles, CA: Wednesday, March 8, morning session
Washington, DC: Thursday, March 16, morning session

C. Proposal for a new exception for preservation-only/restricted access copying:

Los Angeles, CA: Wednesday, March 8, afternoon session
Washington, DC: Thursday, March 16, afternoon session

D. Proposal for a new exception for the preservation of websites:

Los Angeles, CA: Wednesday, March 8, afternoon session
Washington, DC: Thursday, March 16, afternoon session

Written Comments. The Study Group seeks written comment on each of the topic areas identified in this notice. Comment will be sought on other general topics pertaining to section 108—such as making copies upon patron request, interlibrary loan, eReserves, and licensing—at a later date (and may be the subject of future roundtables).

3. Specific Questions

The Study Group seeks comment and participation in the roundtable discussions on the questions set forth below. Background information and a more detailed discussion of the issues can be found in the document titled “Information for the March 2006 Public Roundtables and Request for Written Comments” located on the Section 108 Study Group Web site at <http://www.loc.gov/section108>. It is important to read this background document in order to obtain a full understanding of the issues surrounding the following questions and provide appropriate input through written comments or participation in the roundtable discussions.

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)?

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?

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?

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?

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?

Topic 2: Amendments To Current Subsections 108(b) and (c)

Three Copy Limit. (This topic will not be addressed at the March roundtable discussions.) 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?

Additional Triggers under Subsection 108(c). (This topic will not be addressed at the March roundtable discussions.) 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?

Published versus Unpublished

Works. (This topic will not be addressed at the March roundtable discussions.) 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?

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?

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

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?

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?

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? 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?

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? 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?

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?

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)? 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)? 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?

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?

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?

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? 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? 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? 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)?

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

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?

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)?

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? 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?

4. Procedure for Submitting Requests to Participate in Roundtable Discussions and for Submitting Written Comments

Requests to Participate in Roundtable Discussions. The roundtable discussions will be open to the public. However, persons wishing to participate in the discussions must submit a written request to the Section 108 Study Group. The request to participate must include the following information: (1) The name of the person desiring to participate; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a written summary of no more than four pages identifying, in order of preference, in which of the four general roundtable topic areas the participant (or his or her organization)

would most like to participate and the specific questions the participant wishes to address for each general roundtable topic area.

The written summary must also identify the preferred date/location (*see* **Supplementary Information**, Section 2, "Areas of Inquiry: Public Roundtables" above for detail). Space and time constraints may require us to limit participation in one or more of the topic areas, and it is likely that not all requests to participate will be granted. Identification of the desired topic areas in order of preference will help the Study Group to ensure that participants will be heard in the area(s) of interest most critical to them. The Study Group will notify each participant in advance of his or her designated topic area(s), and the corresponding time(s) and location(s).

Note also for those who wish to attend but not participate in the roundtables that space is limited. Seats will be available on a first-come, first-served basis. However, all discussions will be transcribed, and transcripts subsequently made available on the Section 108 Study Group Web site (<http://www.loc.gov/section108>).

Written Comments. Written comments must include the following information: (1) The name of the person making the submission; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a statement of no more than 10 pages, responding to any of the general issues or specific questions in this notice.

Submission of Both Requests to Participate in Roundtable Discussions and Written Comments. In the case of submitting a request to participate in the roundtable discussions or of submitting written comments, submission should be made to the Section 108 Study Group by e-mail (preferred) or by hand delivery by a commercial courier or by a private party to the appropriate address listed above. Submission by overnight delivery service or regular mail will not be effective due to delays in processing receipt.

If by e-mail (preferred): Send to the e-mail address section108@loc.gov a message containing the information required above for the request to participate or the written submission, as applicable. The summary of issues (for the request to participate in the roundtable discussions) or statement (for the written comments), as applicable, may be included in the text of the message, or may be sent as an attachment. If sent as an attachment, the summary of issues or written statement

must be in a single file in either: (1) Adobe Portable Document File (PDF) format; (2) Microsoft Word version 2000 or earlier; (3) WordPerfect version 9.0 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

If by hand delivery by a private party or a commercial, non-government courier or messenger: Deliver to the appropriate address listed above, a cover letter with the information required above, and include two copies of the summary of issues or written statement, as applicable, each on a write-protected 3.5-inch diskette or CD-ROM, labeled with the legal name of the person making the submission and, if applicable, his or her title and organization. The document itself must be in a single file in either (1) Adobe Portable Document File (PDF) format; (2) Microsoft Word Version 2000 or earlier; (3) WordPerfect Version 9 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

Anyone who is unable to submit a comment in electronic form (either through electronic e-mail or hand delivery of a diskette or CD-ROM) should submit, with a cover letter containing the information required above, an original and three paper copies of the summary of issues (for the request to participate in the roundtable discussions) or statement (for the written comments) by hand to the appropriate address listed above.

Dated: February 9, 2006.

Marybeth Peters,

Register of Copyrights.

[FR Doc. E6-2127 Filed 2-14-06; 8:45 am]

BILLING CODE 1410-21-F

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Agency Information Collection Activities: Proposed Collection; Comment Request

AGENCY: National Archives and Records Administration (NARA).

ACTION: Notice.

SUMMARY: NARA is giving public notice that the agency proposes to request extension of a currently approved information collection, the Financial Disclosure Report, Standard Form 714, that is used to make personnel security determinations, including whether to grant a security clearance, to allow access to classified information, sensitive areas, and equipment; or to permit assignment to a sensitive national security position. The public is invited to comment on the proposed

information collection pursuant to the Paperwork Reduction Act of 1995.

DATES: Written comments must be received on or before April 17, 2006 to be assured of consideration.

ADDRESSES: Comments should be sent to: Paperwork Reduction Act Comments (NHP), Room 4400, National Archives and Records Administration, 8601 Adelphi Rd, College Park, MD 20740-6001; or faxed to 301-837-3213; or electronically mailed to tamee.fechhelm@nara.gov.

FOR FURTHER INFORMATION CONTACT:

Requests for additional information or copies of the proposed information collection and supporting statement should be directed to Tamee Fechhelm at telephone number 301-837-1694, or fax number 301-837-3213.

SUPPLEMENTARY INFORMATION: Pursuant to the Paperwork Reduction Act of 1995 (Pub. L. 104-13), NARA invites the general public and other Federal agencies to comment on proposed information collections. The comments and suggestions should address one or more of the following points: (a) Whether the proposed information collection is necessary for the proper performance of the functions of NARA; (b) the accuracy of NARA's estimate of the burden of the proposed information collection; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways, including the use of information technology, to minimize the burden of the collection of information on all respondents; and (e) whether small businesses are affected by this collection. The comments that are submitted will be summarized and included in the NARA request for Office of Management and Budget (OMB) approval. All comments will become a matter of public record. In this notice, NARA is soliciting comments concerning the following information collection:

Title: Financial Disclosure Report.

OMB number: 3095-0058.

Agency form number: Standard Form 714.

Type of review: Regular.

Affected public: Business or other for-profit.

Estimated number of respondents: 25,897.

Estimated time per response: 2 hours.

Frequency of response: On occasion.

Estimated total annual burden hours: 51,794 hours.

Abstract: Executive Order 12958 as amended, "Classified National Security Information" authorizes the Information Security Oversight Office to develop standard forms that promote the

E. Commenters to Federal Register Notice Vol. 71, No. 31, Docket No. 06-10801, Feb. 16, 2006

Allan Adler / Association of American Publishers, Inc
 Prudence S. Adler & Emily Sheketoff, et al. / Association of Research Libraries & American Library Association
 Sandra Aistars / Time Warner Inc.
 William Y. Arms / Faculty of Computing and Information Science, Cornell University
 Fritz E. Attaway / Motion Picture Association of America, Inc.
 Howard Besser / Moving Image Archiving and Preservation Program, New York University
 Caitlyn Byrne
 Paul D. Callister, Mary Alice Baish, & Douglas Newcomb / American Association of Law Libraries & Special Library Association
 J. Robert Cooke / University Faculty Library Board, Cornell University
 Denise Troll Covey / Carnegie Mellon University Libraries
 Patricia Cruse / California Digital Library, University of California Libraries
 Carla J. Funk / Medical Library Association
 Mahnaz Ghaznavi, et al. / International Research on Permanent Authentic Records in Electronic Systems (InterPARES)
 Paul Gherman / Jean and Alexander Heard Library, Vanderbilt University
 Jason Y. Hall / American Association of Museums
 Virginia (Macie) Hall / Visual Resources Association
 Carl M. Johnson / Copyright Licensing Office, Brigham Young University
 Roy S. Kaufman / John Wiley & Sons, Inc.
 Michael A. Keller & Mariellen F. Calter / Stanford University Libraries and Information Resources
 Curtis L. Kendrick / City University of New York Library
 Michele Kimpton / Internet Archive
 Bonnie Klein / Commerce, Energy, NASA, Defense Information Managers Group (CENDI)
 Aaron T. Kornblum / Western Jewish History Center, Judah L. Magnes Museum
 Keith Kupferschmid / Software & Information Industry Association
 Edward Lee Lamoureux / Multimedia Program and Department of Communication, Bradley University
 John Laudun / University of Louisiana, Lafayette
 Tomas A. Lipinski / Center for Information Policy Research, School of Information Studies, University of Wisconsin—Milwaukee
 Patrice A. Lyons
 Victoria McCargar & Peter F. Johnson
 David Nimmer
 Richard Pearce-Moses / Society of American Archivists
 Janice T. Pilch / University Library of the University of Illinois at Urbana-Champaign
 Aline Soules / University Library, California State University – East Bay
 Gary E. Strong / UCLA Library
 Gordon Theil / Music Library Association
 Margaret N. Webster / Art Libraries Society of North America

F. Participants in the March 8, 2006 Public Roundtable, Los Angeles, California

Kathleen Bursley / Reed–Elsevier, Inc.
Mimi Calter / Stanford University Libraries and Information Resources
Kenneth Crews / Copyright Management Center, Indiana University
Grover Crisp / Sony Pictures Entertainment
Patricia Cruse / California Digital Library, University of California Libraries
James Gilson / Natural History Foundation
Jared Jussim / Sony Pictures Entertainment
Brewster Kahle / Internet Archive
Michele Kimpton / Internet Archive
David Nimmer
Richard Pearce–Moses / Society of American Archivists
Michael Pogorzelski / Association of Moving Image Archivists
Liza Posas / Autry National Center
Sherrie Schmidt / Association of Research Libraries & American Library Association
Cynthia Shelton / University of California – Los Angeles
Janice Simpson / Association of Moving Image Archivists
Gordon Theil / Music Library Association
Jeff Ubois / Television Archive
Jeremy Williams / Warner Bros. Entertainment

G. Participants in the March 16, 2006 Public Roundtable, Washington, DC

Alan Adler / Association of American Publishers, Inc.

Paul Aiken / The Authors Guild, Inc.

William Arms / Faculty of Computing and Information Science, Cornell University

Howard Besser / InterPARES & Moving Image Archiving and Preservation Program,
New York University

Dwayne Buttler / University of Louisville & MetaArchive

Michael Capobianco / Science Fiction and Fantasy Writers of America, Inc.

Jan Constantine / The Authors Guild, Inc.

Denise Troll Covey / Carnegie Mellon University Libraries

Kenneth Crews / Copyright Management Center, Indiana University

Donna Ferullo / Purdue University

Ken Frazier / Association of Research Libraries & American Library Association

Paul Gherman / Vanderbilt Television News Archives

Carl Johnson / Copyright Licensing Office, Brigham Young University

Roy S. Kaufman / John Wiley & Sons, Inc.

Curtis Kendrick / City University of New York Library

Keith Kupferschmid / Software and Information Industry Association

Edward Lee Lamoureux / Multimedia Program and Department of Communication,
Bradley University

David Langevin / Houghton Mifflin Company

Tomas Lipinski / Center for Information Policy Research, School of Information
Studies, University of Wisconsin – Milwaukee

Dr. Logan Ludwig / Medical Library Association

Patrice Lyons

Victor S. Perlman / American Society of Media Photographers, Inc.

Janice T. Pilch / University Library of the University of Illinois at Urbana–Champaign

Rebecca Pressman

Carol Richman / SAGE Publications

Scott Teissler / Turner Broadcasting Systems, Inc.

Sarah Wiant / American Association of Law Libraries

H. Federal Register Notice Vol. 71, No. 232, Docket No. 07-10802 December 4, 2006

time of the preparation of the notice of the preliminary finding.

OSHA's recognition of TUV, or any NRTL, for a particular test standard is limited to equipment or materials (i.e., products) for which OSHA standards require third-party testing and certification before use in the workplace. Consequently, if a test standard also covers any product(s) for which OSHA does not require such testing and certification, an NRTL's scope of recognition does not include that product(s).

Many UL test standards also are approved as American National Standards by the American National Standards Institute (ANSI). However, for convenience, we use the designation of the standards developing organization for the standard as opposed to the ANSI designation. Under our procedures, any NRTL recognized for an ANSI-approved test standard may use either the latest proprietary version of the test standard or the latest ANSI version of that standard. You may contact ANSI to find out whether or not a test standard is currently ANSI-approved.

Conditions

TUV must also abide by the following conditions of the recognition, in addition to those already required by 29 CFR 1910.7:

OSHA must be allowed access to TUV's facilities and records for purposes of ascertaining continuing compliance with the terms of its recognition and to investigate as OSHA deems necessary;

If TUV has reason to doubt the efficacy of any test standard it is using under this program, it must promptly inform the test standard developing organization of this fact and provide that organization with appropriate relevant information upon which its concerns are based;

TUV must not engage in or permit others to engage in any misrepresentation of the scope or conditions of its recognition. As part of this condition, TUV agrees that it will allow no representation that it is either a recognized or an accredited Nationally Recognized Testing Laboratory (NRTL) without clearly indicating the specific equipment or material to which this recognition is tied, or that its recognition is limited to certain products;

TUV must inform OSHA as soon as possible, in writing, of any change of ownership, facilities, or key personnel, and of any major changes in its operations as an NRTL, including details;

TUV will meet all the terms of its recognition and will always comply with all OSHA policies pertaining to this recognition; and

TUV will continue to meet the requirements for recognition in all areas where it has been recognized.

Edwin G. Foulke, Jr.,

Assistant Secretary of Labor.

[FR Doc. E6-20406 Filed 12-1-06; 8:45 am]

BILLING CODE 4510-26-P

LIBRARY OF CONGRESS

Copyright Office

Docket No. 07-10802

Section 108 Study Group: Copyright Exceptions for Libraries and Archives

AGENCY: Office of Strategic Initiatives and Copyright Office, Library of Congress.

ACTION: Notice of a public roundtable with request for comments.

SUMMARY: The Section 108 Study Group announces a public roundtable discussion on certain issues relating to the exceptions and limitations applicable to libraries and archives under the Copyright Act, and seeks written comments on these issues. This notice (1) announces a public roundtable discussion regarding the issues identified in this notice and (2) requests written comments from all interested parties on the issues described in this notice. These issues relate primarily to making and distributing copies pursuant to requests by individual users, as well as to provision of user access to unlicensed digital works.

DATES: Roundtable Discussions: The public roundtable will be held in Chicago, Illinois, on Wednesday, January 31, 2007, from 8:30 a.m. to 4 p.m. C.S.T. Requests to participate must be received by the Section 108 Study Group by 5 p.m. E.S.T. on January 12, 2007.

Written Comments: Interested parties may submit written comments on any of the topics discussed in this notice from 8:30 a.m. E.S.T. on February 1, 2007, to 5 p.m. E.S.T. on March 9, 2007.

ADDRESSES: All written comments and requests to participate in roundtables should be addressed to Mary Rasenberger, Director of Program Management, National Digital Information Infrastructure and Preservation Program, Office of Strategic Initiatives, Library of Congress. Comments and requests to participate may be sent (1) by electronic mail

(preferred) to the e-mail address section108@loc.gov, or (2) by hand delivery by a private party or a commercial, non-government courier or messenger, addressed to the Office of Strategic Initiatives, Library of Congress, James Madison Memorial Building, Room LM-637, 101 Independence Avenue S.E., Washington, DC 20540, between 8:30 a.m. and 5 p.m. E.S.T. If delivering by courier or messenger please provide the delivery service with the Office of Strategic Initiatives phone number: (202) 707-3300. (See **Supplementary Information**, Section 4: "Procedures for Submitting Requests to Participate in Roundtable Discussions and for Submitting Written Comments" below for file formats and other information about electronic and non-electronic submission requirements.) Submission by overnight service or regular mail will not be effective.

The public roundtable will be held at DePaul University College of Law, Lewis Building, 10th Floor, Room 1001, 25 E. Jackson Boulevard, Chicago, Illinois, 60604, on Wednesday, January 31, 2007.

FOR FURTHER INFORMATION CONTACT: Christopher Weston, Attorney-Advisor, U.S. Copyright Office. E-mail cwes@loc.gov, Telephone (202) 707-2592, Fax (202) 707-0815.

SUPPLEMENTARY INFORMATION:

1. Background.

The Section 108 Study Group was convened in April 2005 under the sponsorship of the Library of Congress' National Digital Information Infrastructure and Preservation Program (NDIIPP), in cooperation with the U.S. Copyright Office. The Study Group seeks written comment on and participation in a roundtable discussion scheduled for January 31, 2007, on the issues described in this notice. The Study Group is an independent committee charged with examining how the exceptions and limitations to the exclusive rights under copyright law that are applicable specifically to libraries and archives, namely those set out in section 108 of the Copyright Act, may need to be amended to take account of the widespread use of digital technologies. More detailed information regarding the Section 108 Study Group and its work can be found at <http://www.loc.gov/section108>.

Section 108 was included in the 1976 Copyright Act in recognition of the vital role of libraries and archives to our nation's education and cultural heritage, and their unique needs in serving the public. The exceptions were carefully crafted to maintain a balance between

the legitimate interests of libraries and archives on the one hand, and rights-holders on the other, in a manner that best serves the national interest.

The evolution of copyright law demonstrates that the technologies available at any given time necessarily influence where and how appropriate balances can be struck between the interests of rights-holders and users. As the Copyright Office recognized in 1988, it is important to review the section 108 exceptions periodically to ensure that they take account of new technologies in maintaining a beneficial balance among the interests of creators and other rights-holders and libraries and archives. See *The Register of Copyrights, Library Reproduction of Copyrighted Works* (17 U.S.C. 108): Second Report 128–29 (1988). In that spirit, the Section 108 Study Group is charged with the task of identifying those areas in which new technologies have changed the activities of libraries and archives, users, and rights-holders, so that the effectiveness or relevance of applicable section 108 exceptions are called into question. The Study Group will attempt to formulate appropriate, workable solutions where amendment is recommended.

In March 2006, the Study Group held public roundtable discussions in Los Angeles, California, and Washington, D.C., and requested written comments on issues relating to general eligibility for the section 108 exceptions, as well as preservation and replacement copying. Specifically, interested parties were asked to comment on (1) proposed amendments to the preservation and replacement exceptions in subsections 108(b) and (c), (2) a proposal to permit preservation copies of published works in limited circumstances, (3) a proposal to permit preservation copies of certain types of Internet content, and (4) questions on what entities should be eligible to take advantage of the section 108 exceptions. With regard to the latter, the Study Group considered questions of whether to restrict section 108 eligibility to nonprofit and government entities, whether to expressly include purely virtual entities, and whether to include museums. The Study Group anticipates that it will recommend that section 108 be amended to cover museums as well as libraries and archives. Although museums are not expressly addressed in this notice, the Study Group requests that you consider the questions set forth below in light of their potential effects on museums, as well as on libraries and archives. The written comments and roundtable transcripts from March 2006

are available on the Web site <http://www.loc.gov/section108>.

Recently, the Study Group examined the provisions of section 108 governing copies made by libraries and archives at the request of users, including interlibrary loan copies, as well as whether any new provisions relating to copies, performances or displays made in the course of providing access are necessary. Specifically, the Study Group seeks public input on whether any amendment is warranted to (1) the subsection 108(d), (e) and (g) provisions addressing copies made for users, including copies made under interlibrary loan arrangements; (2) the exclusions currently set out in subsection 108(i) that prohibit libraries and archives from taking advantage of subsections (d) and (e) for most non-text-based works; and (3) allow libraries and archives to make copies of unlicensed electronic works in order to provide user access and to provide access via performance or display.

Note that any amendments to section 108 must conform to the United States' international obligations under the Berne Convention to provide exceptions to exclusive rights only "in certain special cases" that do "not conflict with the normal exploitation of the work" and do not "unreasonably prejudice the legitimate interests" of the rights-holder. The Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, art. 9(2), 25 U.S.T. 1341, 828 U.N.T.S. 221.

Nothing in this **Federal Register** notice is meant to reflect a consensus or recommendation of the Study Group. Discussions are ongoing in the areas of inquiry described below, and the input the Study Group receives from the public through the roundtable, the written submissions, and otherwise is intended to further those discussions.

Pursuant to 2 U.S.C. 136, the Study Group now seeks input, both through written comment and participation in the public roundtable described in this notice, on whether there are compelling concerns in any of the areas identified that merit a legislative or other solution and, if so, which solutions might effectively address those concerns without conflicting with the legitimate interests of other stakeholders.

2. Areas of Inquiry.

Public Roundtable. Participants in the roundtable discussions will be asked to respond to the specific questions set forth below in each topic area in this **Federal Register** notice.

Written Comments. The Study Group also seeks written comment on the topic

areas and specific questions identified in this Federal Register notice.

3. Specific Questions.

The Study Group seeks written comment and participation in the roundtable discussions on the questions set forth below in this Section 3, inclusive of Topics A, B and C.

TOPIC A: AMENDMENTS TO CURRENT SUBSECTIONS 108(d), (e), AND (g)(2) REGARDING COPIES FOR USERS, INCLUDING INTERLIBRARY LOAN

General Issue

Should the provisions relating to libraries and archives making and distributing copies for users, including via interlibrary loan (which include the current subsections 108(d), (e), and (g), as well as the CONTU guidelines, to be explained below) be amended to reflect reasonable changes in the way copies are made and used by libraries and archives, taking into account the effect of these changes on rights-holders?

Background

Subsections 108 (d) and (e) provide exceptions to the exclusive rights of reproduction and distribution, permitting libraries and archives to make single copies of copyrighted works for users. Subsection (d) permits the copying of articles or portions of works, and subsection (e) allows the copying of entire works in limited circumstances.

Specifically, subsection (d) allows libraries and archives to reproduce and distribute a single copy of "no more than one article or other contribution to a copyrighted collection or periodical issue, or . . . a copy or phonorecord of a small part of any other copyrighted work." 17 U.S.C. 108(d) (2003).

Subsection (e) allows the reproduction and distribution of an "entire work, or . . . a substantial part of it" if the library or archives first determines, "on the basis of a reasonable investigation," that "a copy or phonorecord of the work cannot be obtained at a fair price." 17 U.S.C. 108(e). Additionally, both subsections require that (1) the copy become the property of the requesting user (so that libraries and archives cannot use these exceptions as a means to enlarge their collections, see *Nimble B. Nimmer & David Nimmer, Nimmer on Copyright* § 8.03[E][2][b] (2004)), (2) the library or archives making the copy has no notice that the copy will be used for any purpose other than "private study, scholarship, or research," 17 U.S.C. 108(d)(1) and (e)(1), and (3) the

library or archives displays prominently at the place where orders are accepted a copyright warning in accordance with requirements provided by the Register of Copyrights. This notice must also appear on the order form. 17 U.S.C. 108(d)(2) and (e)(2). Subsections (d) and (e) apply where a user makes a direct request of the library or archives providing the copy, as well as where copies are provided by another library or archives through interlibrary loan. Interlibrary loan is the practice through which libraries request material from, or supply material to, other libraries. Its purpose is to obtain, upon request of a library user, material not available in the user's own library. Where an *entire* work, such as a book, is sought, the library's copy of the book itself is usually delivered to the requesting user's library, called the borrowing library. There are cases, however, where it is unsafe or impractical to ship the work, such as if the copy is particularly fragile, rare, or unwieldy. In such cases, the fulfilling library or archives may create and deliver a copy instead, provided a copy cannot otherwise be obtained at a fair price and the other conditions of subsection (e) are met. Where just a *portion* of the work is sought, the library or archives may provide a copy under the conditions set out in subsection (d).

The scope of subsections (d) and (e) is limited by subsection (g), which states that the section 108 exceptions apply only to "the isolated and unrelated reproduction and distribution of a single copy or phonorecord of the same material on separate occasions." 17 U.S.C. 108(g). Subsection (g)(1) further mandates that the provisions do not apply where a library or archives, or its employee:

is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group . . .

17 U.S.C. 108(g)(1). In addition, interlibrary loan or other user copies of articles or small portions of larger works under subsection (d) are limited by subsection (g)(2). This subsection states that section 108 does not permit the "systematic reproduction of single or multiple copies or phonorecords of material described in subsection (d)," and clarifies that copies made for interlibrary loan purposes do not violate the prohibition against systematic copying provided they "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." 17 U.S.C. 108(g)(2). This provision was included with the intention of preventing certain practices from developing under the rubric of "interlibrary loan," such as systematic arrangements among libraries to effectively divide up and share subscriptions or purchases (such as where libraries X, Y, and Z all would like to obtain journals A, B, and C, so they agree that library X will purchase a subscription to journal A, library Y to journal B, and library Z to journal C, and they will share each subscription with each other through interlibrary loan). It was agreed in 1976 that these types of consortial buying arrangements should not be sanctioned by section 108 because by tipping the balance too far in favor of the interests of libraries they would materially affect sales.

Guidelines for interpreting the phrase "such aggregate quantities as to substitute for a subscription to or purchase of such work" were promulgated in 1976 by the National Commission on New Technological Uses of Copyrighted Works (CONTU) at the request of Congress and published in the Conference Report on the Copyright Act of 1976. The CONTU guidelines are not law, but were endorsed by Congress as a "reasonable interpretation" of subsection (g)(2). H.R. Conf. Rep. No. 94-1733, at 72-74 (1976). The guidelines (available in full at <http://www.copyright.gov/circs/circ21.pdf>) state that a library may not receive in a single calendar year more than five copies of an article or articles published in any given periodical within five years prior to the date of the request. The guidelines do not govern interlibrary loan copies of periodical materials published more than five years prior to a request. In addition, the guidelines provide that a library may not receive within a single calendar year more than five copies of or from any given non-periodical work — such as fiction and poetry.

The CONTU guidelines also include certain administrative requirements. All interlibrary loan reproduction requests must be accompanied by a certification that the request conforms to the guidelines, and libraries and archives that request copies must keep records of all fulfilled interlibrary loan reproduction requests for at least three full calendar years after the requests are made.

Subsection 108(i) further qualifies subsections (d) and (e) by functionally limiting their application primarily to text-based works. Subsection (i) states that copies for users may not be made from:

a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news,

except that no such limitation shall apply with respect to . . . pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to works of which copies are reproduced or distributed in accordance with subsections (d) and (e).

17 U.S.C. 108(i).¹ For brevity's sake, this notice will refer to those categories of works excluded from subsections (d) and (e) by subsection (i) as "non-text-based works," and those currently covered by (d) and (e) as "text-based." A further description of subsection (i) and questions about whether and how it might be amended are set forth in Topic B, below.

The current subsections (d) and (e) were enacted with the Copyright Act of 1976, and, as such, were drafted with analog copying in mind, namely photocopying. Nothing in the provisions expressly precludes their application to digital technologies. However, digital copying under subsections (d) and (e) is effectively barred by subsection 108(a)'s single-copy limit. Subsection (a) states that "it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce *no more than one copy or phonorecord of a work*, except as provided in subsections (b) and (c)." 17 U.S.C. 108(a) (emphasis added). As a practical and technical matter, producing a digital copy generally requires the production of temporary and incidental copies, and transmitting the copy via digital delivery systems such as e-mail requires additional incidental copies. The Copyright Act does not provide any express exception for such copies, although section 107 (which sets forth the fair use exceptions) might apply in some cases, and licenses might be implied in others.

Libraries and archives maintain that their missions require them to be able to make and/or provide digital copies to users "both directly and via interlibrary loan" in order to respond to the fact that research, scholarship, and private study are now conducted in a digital environment. There is an increasing amount of so-called "born-digital" material in the collections of libraries and archives, and many users expect to receive materials electronically. There are also increased efficiencies and decreased costs when digital technologies are used. Overall, it is argued that it makes little sense in this day and age to require libraries and archives to print analog copies of requested materials and deliver them in person, by mail, or by fax. The Study

¹Note that subsection(i) does not exclude pantomimes, choreographic works, or sound recordings that do not incorporate musical works from the subsection (d) and (e) exceptions.

Group's understanding is that, as a matter of practice, some libraries and archives do in fact already engage in digital copying in making copies for users under section 108, and necessarily make incidental intermediate digital copies in doing so, but do not retain those copies and often deliver a non-electronic version to the user.

It is important to distinguish between permitting libraries and archives to make digital copies for users and permitting digital delivery of those copies. Permitting the making of *digital* copies for users would provide increased flexibility in how libraries and archives can produce the copies. Those digital copies might be distributed in any number of ways, for instance: (1) a photocopy could be made from an analog source and then sent via fax or mail to the requesting library; (2) a printout could be made from a digital source to create an analog copy, which is then sent via fax or mail to the requesting library; (3) a digital source file could be sent to the requesting library via e-mail or posted on a Web site with a secure URL for access by the user; or (4) a digital scan could be made from an analog source, which is then sent electronically as in example number three. Electronic delivery, as in examples three and four above, would provide increased efficiency and would allow libraries and archives and their users to take greater advantage of digital technologies to enable increased access to those works unlikely to be found in local libraries. Electronic delivery raises distinct issues from digital copying.

Just as digital technologies allow libraries and archives new opportunities to serve the public, the same technologies allow copyright owners to develop new business models and modes of distribution. Rights-holders have remarked that giving libraries and archives the ability to deliver copies to users electronically, unless reasonably limited, potentially could cause significant harm to rights-holders by undermining markets for digital works. Many rights-holders are shifting toward new models of distribution and payment. For instance, markets are emerging for the online purchase of articles or small portions of text-based works. Theoretically, if a user can obtain a copy online from any library through interlibrary loan, he or she might be less likely to purchase a copy, even if purchases could be made conveniently. An additional concern is that copies provided to users electronically are susceptible to downloading by the user and to downstream distribution via the

Internet, potentially multiplying many times over and displacing sales.

Rights-holders are also concerned about digital copies being made available by libraries and archives under subsections (d) and (e) to users outside their traditional user communities, without the mediation of the user's own library. Online technologies allow libraries and archives to serve anyone regardless of geographic distances or membership in a community. Many of the section 108 exceptions were put in place on the assumption that certain natural limitations, or inherent inefficiencies in making photocopies, would prevent the exceptions from unreasonably interfering with the market for the work. For example, it was presumed that users had to go to their local library to make an interlibrary loan request. The technological possibility of direct digital delivery did not exist. But if it were to become possible under the 108 exceptions, for instance, for any user electronically to request free copies from any library from their desks, that natural friction would break down, as would the balance originally struck by the provisions. As such, the potential for lost sales could increase from negligible to measurable against the bottom line, and as such "conflict with the normal exploitation of the work." Berne Convention, art. 9(2).

One could, for instance, envision direct-to-user interlibrary loan arrangements where a user could search for, request and receive a reproduction of a copyrighted work online from any library without having to go through the user's own library that would directly compete with the rights-holders' markets. It is not clear to the Study Group that the existing provisions of subsections (d) and (e) would prevent libraries and archives from providing this type of universal on-demand access if digital copying and delivery are permitted without further qualification. While subsection (g) and the CONTU guidelines would limit the ability to use subsections (d) and (e) for such interlibrary loan practices for certain materials, they would not necessarily eliminate it. The question then is how to craft rules around digital copying and delivery to enable libraries and archives to service users efficiently, without opening up the exception in a way that could materially interfere with markets for copyrighted works—just as subsections (d) and (e) were limited in 1976 by subsection (g) in order to avoid the potential for those exceptions to be used in a way that would cause material market harm.

The primary issue for comment and discussion in Topic A is whether and under what circumstances digital copying and distribution under subsections (d) and (e) should be allowed. In responding to the questions posed in Topic A, please note that the Study Group is seeking responses regarding the application of subsections (d) and (e) as currently limited by subsection (i) (i.e., principally restricted to *text-based* materials). Questions about applying subsections (d) and (e) to non-text-based works will be addressed in Topic B. Also note that the Topic A questions address copies made for a library's or archives' own users, as well as interlibrary loan copying.

Specific Questions

1. How can the copyright law better facilitate the ability of libraries and archives to make copies for users in the digital environment without unduly interfering with the interests of rights-holders?

2. Should the single-copy restriction for copies made under subsections (d) and (e) 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 library or archives to provide the requesting patron with a single copy of the requested work"? If so, should this amendment apply both to copies made for a library's or archives' own users and to interlibrary loan copies?

3. How prevalent is library and archives use of subsection (d) for direct copies for their own users? For interlibrary loan copies? How would usage be affected if digital reproduction and/or delivery were explicitly permitted?

4. How prevalent is library and archives use of subsection (e) for direct copies for their own users? For interlibrary loan copies? How would usage be affected if digital reproduction and/or delivery were explicitly permitted?

5. If the single-copy restriction is replaced with a flexible standard that allows digital copies for users, should restrictions be placed on the making and distribution of these copies? If so, what types of restrictions? For instance, should there be any conditions on digital distribution that would prevent users from further copying or distributing the materials for downstream use? Should user agreements or any technological measures, such as copy controls, be required? Should persistent identifiers on digital copies be required? How would libraries and archives implement such requirements? Should such

requirements apply both to direct copies for users and to interlibrary loan copies?

6. Should digital copying for users be permitted only upon the request of a member of the library's or archives' traditional or defined user community, in order to deter online shopping for user copies? If so, how should a user community be defined for these purposes?

7. Should subsections (d) and (e) be amended to clarify that interlibrary loan transactions of digital copies require the mediation of a library or archives on both ends, and to not permit direct electronic requests from, and/or delivery to, the user from another library or archives?

8. In cases where no physical object is provided to the user, does it make sense to retain the requirement that "the copy or phonorecord becomes the property of the user"? 17 U.S.C. 108(d)(1) and (e)(1). In the digital context, would it be more appropriate to instead prohibit libraries and archives from using digital copies of works copied under subsections (d) and (e) to enlarge their collections or as source copies for fulfilling future requests?

9. Because there is a growing market for articles and other portions of copyrighted works, should a provision be added to subsection (d), similar to that in subsection (e), requiring libraries and archives to first determine on the basis of a reasonable investigation that a copy of a requested item cannot be readily obtained at a fair price before creating a copy of a portion of a work in response to a patron's request? Does the requirement, whether as applied to subsection (e) now or if applied to subsection (d), need to be revised to clarify whether a copy of the work available for license by the library or archives, but not for purchase, qualifies as one that can be "obtained"?

10. Should the Study Group be looking into recommendations for revising the CONTU guidelines on interlibrary loan? Should there be guidelines applicable to works older than five years? Should the record keeping guideline apply to the borrowing as well as the lending library in order to help administer a broader exception? Should additional guidelines be developed to set limits on the number of copies of a work or copies of the same portion of a work that can be made directly for users, as the CONTU guidelines suggest for interlibrary loan copies? Are these records currently accessible by people outside of the library community? Should they be?

11. Should separate rules apply to international electronic interlibrary loan

transactions? If so, how should they differ?

TOPIC B: AMENDMENTS TO SUBSECTION 108(i)

General Issue

Should subsection 108(i) be amended to expand the application of subsections (d) and (e) to any non-text-based works, or to any text-based works that incorporate musical or audiovisual works?

Background

As noted in the background to Topic A above, subsection (i) excludes most categories of non-text-based works from the exceptions provided to libraries and archives under subsections (d) and (e).

Questions have been raised as to why this exclusion was written into the law. The relevant House, Senate, and Conference Reports are silent on the matter, beyond the House Report's emphasizing that libraries and archives are free to avail themselves of the section 107 fair use factors in copying non-text-based materials for users. See H.R. Rep. No. 94-1476, at 78 (1976). One likely reason for the exclusion is that the principal copying device of concern in 1976, when section 108 was enacted, was the photocopier. Most libraries and archives did not possess the technology to make quality copies of non-text-based works and so may not have pressed for the right to do so.

As more material is generated in digital media that blurs the lines between traditional format types, subsection (i)'s exclusion of most non-text-based categories of works is being called into question. Increasingly, works are produced in multimedia formats, including some traditionally text-based works, such as presentations, papers, and journals. It has been argued that excluding these categories of works from some accommodation under subsections (d) and (e) hampers scholarly access to a critical and growing body of intellectual and creative material. In addition, restrictions on copies for users of non-text-based works are seen by some as placing a greater burden on researchers, scholars, and students of music, film, and the visual arts than on those who study text-based works, in that there are greater obstacles to obtaining research materials.

Eliminating the subsection (i) exclusions would raise a number of challenges, however. The subsection (d) and (e) exceptions were drafted to address text-based works; there are legitimate questions as to whether the provisions' respective conditions can be applied successfully to non-text-based materials in a digital environment. For

instance, the current subsection (d) boundaries of "an article or other contribution to a copyrighted collection or periodical issue," 17 U.S.C. 108(d), do not neatly apply to non-text-based works. In the context of section 108, is one song on an album equivalent to an article in a journal? Is one photograph an entire work by itself or part of a larger copyrighted compilation? What if the song or photograph is available individually? In addition, business models used to market and distribute content may be affected differently depending on the media. Given evolving online entertainment business models, the ability to make and/or distribute digital copies could have different effects on markets for recorded sound and film, for instance, than on markets for text-based materials. Each of the issues raised previously in Topic A should be reconsidered in light of non-text-based media, as it is possible that views may change depending on the media.

Specific Questions

1. Should any or all of the subsection (i) exclusions of certain categories of works from the application of the subsection (d) and (e) exceptions be eliminated? What are the concerns presented by modifying the subsection (i) exclusions, and how should they be addressed?

2. Would the ability of libraries and archives to make and/or distribute digital copies have additional or different effects on markets for non-text-based works than for text-based works? If so, should conditions be added to address these differences? For example: Should digital copies of visual works be limited to diminished resolution thumbnails, as opposed to a "small portion" of the work? Should persistent identifiers be required to identify the copy of a visual work and any progeny as one made by a library or archives under section 108, and stating that no further distribution is authorized? Should subsection (d) and (e) user copies of audiovisual works and sound recordings, if delivered electronically, be restricted to delivery by streaming in order to prevent downloading and further distribution? If so, how might scholarly practices requiring the retention of source materials be accommodated?

3. If the exclusions in subsection (i) were eliminated in whole or in part, should there be different restrictions on making direct copies for users of non-text-based works than on making interlibrary loan copies? Would applying the interlibrary loan framework to non-text-based works

require any adjustments to the CONTU guidelines?

4. If the subsection (i) exclusions were not eliminated, should an additional exception be added to permit the application of subsections (d) and (e) to musical or audiovisual works embedded in textual works? Would doing so address the needs of scholars, researchers, and students for increased access to copies of such works?

TOPIC C: LIMITATIONS ON ACCESS TO ELECTRONIC COPIES, INCLUDING VIA PERFORMANCE OR DISPLAY

General Issue

Should section 108 be amended to permit libraries and archives to make temporary and incidental copies of unlicensed digital works in order to provide user access to these works? Should any exceptions be added to the copyright law to permit limited public performance and display in certain circumstances in order to allow for user access to unlicensed digital works?

Background

Access to digital materials particularly those that exist in purely electronic form is generally granted pursuant to a license. There are, however, instances in which libraries and archives have lawfully obtained copies of electronic materials for which they have no license, and it is expected that this may increasingly be the case. Examples include donated personal or business files such as e-mails or other documents (where the donor agreement is silent on use rights), electronic manuscripts such as drafts of novels or notes, and legally captured Web sites. The mediation of a computer or other machine is necessary to perceive these works, and in the course of rendering the works in perceivable form, temporary and incidental copies are made. Libraries and archives have no clear guidance on whether they may make the copies incidental or otherwise required to perceive digital works.

In some cases, a license to make temporary, incidental copies of unlicensed digital works can be implied. For instance, it is commonly accepted that there are implied rights to make the incidental copies necessary to play a DVD or CD on a computer. The question is what, if any, implied rights exist for libraries and archives to facilitate access to other kinds of materials? What about works acquired in purely electronic form that are stored on a library's or archives' servers from which they must be copied and transmitted to a terminal for user access? In addition, display and/or performance as well as reproduction

rights may be implicated in accessing these works.

The Study Group seeks input on how significant an issue this is whether libraries and archives have and are likely in the future to have a sufficient number of unlicensed digital works to merit legislative attention.

The European Union's Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society provides one potential model for addressing these questions. It directs that member states may enact copyright exceptions permitting publicly accessible libraries, museums, educational institutions, and archives to communicate or make available "for the purpose of research or private study, to individual members of the public by dedicated terminals on the[ir] premises . . . works and other subject-matter not subject to purchase or licensing terms which are contained in their collections." Council Directive 2001/29/EC, art. 5(3)(n), 2001 O.J. (L 167) 10, 17. Would a similar exception be appropriate in the U.S.?

Certain digital works can be accessed only through display or performance. In providing access to these works, libraries and archives that are open to the public (as they must be to qualify under subsection 108(a)) may need to publicly display or perform the works. For instance, if a library, archives, or museum publicly exhibits a work of audiovisual art, a motion picture, or a musical work, the exhibition would normally constitute a public performance. There are currently no express exceptions in section 108 that address public performance or display. Section 109(c) of the Copyright Act provides an applicable exception to the display right:

[T]he owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owners, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

17 U.S.C. 109(c) (2003). This provision gives libraries and archives some leeway in displaying copies that they own, but it does not address the issues of any incidental copies that may be necessary in order to achieve this display. There is no parallel exception in the Copyright Act for public performances.

Note that for purposes of this discussion it is assumed that where the work was acquired through a license, the terms of the license govern and trump the section 108 exceptions, per subsection 108(f)(4).

Specific Questions

1. What types of unlicensed digital materials are libraries and archives acquiring now, or are likely to acquire in the foreseeable future? How will these materials be acquired? Is the quantity of unlicensed digital material that libraries and archives are likely to acquire significant enough to warrant express exceptions for making temporary copies incidental to access?

2. What uses should a library or archives be able to make of a lawfully acquired, unlicensed digital copy of a work? Is the EU model a good one namely that access be limited to dedicated terminals on the premises of the library or archives to one user at a time for each copy lawfully acquired? Or could security be ensured through other measures, such as technological protections? Should simultaneous use by more than one user ever be permitted? Should remote access ever be permitted for unlicensed digital works? If so, under what conditions?

3. Are there implied licenses to use and provide access to these types of works? If so, what are the parameters of such implied licenses for users? What about for library and archives staff?

4. Do libraries and archives currently rely on implied licenses to access unlicensed content or do they rely instead on fair use? Is it current library and archives practice to attempt to provide access to unlicensed digital works in a way that mirrors the type of access provided to similar analog works?

5. Are the considerations different for digital works embedded in tangible media, such as DVDs or CDs, than for those acquired in purely electronic form? Under which circumstances should libraries and archives be permitted to make server copies in order to provide access? Should the law permit back-up copies to be made?

6. Should conditions on providing access to unlicensed digital works be implemented differently based upon the category or media of work (text, audio, film, photographs, etc.)?

7. Are public performance and/or display rights necessarily exercised in providing access to certain unlicensed digital materials? For what types of works? Does the copyright law need to be amended to address the need to make incidental copies in order to display an electronic work? Should an exception be added for libraries and archives to also perform unlicensed electronic works in certain circumstances, similar to the 109(c) exception for display? If so, under what conditions?

4. Procedure for Submitting Requests to Participate in Roundtable Discussions and for Submitting Written Comments.

Requests to Participate in Roundtable Discussions. The roundtable discussions will be open to the public. Persons wishing to participate in the discussions must submit a written request to the Section 108 Study Group. The request to participate must include the following information: (1) the name of the person desiring to participate; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a written summary of *no more than four pages* identifying, in order of preference, in which of the three general roundtable topic areas the participant (or his or her organization) would most like to participate and the specific questions the participant wishes to address in each topic area.

Space and time constraints may require that participation be limited in one or more of the topic areas, and it is likely that not all requests to participate can be accommodated. Identification of the desired topic areas in order of preference will help the Study Group to ensure that participants will be heard in the area(s) of interest most critical to them. The Study Group will notify each participant in advance of his or her designated topic area(s).

Note also for those who wish to attend but not participate in the roundtables that space is limited. Seats will be available on a first-come, first-served basis. All discussions will be transcribed, and transcripts subsequently made available on the Section 108 Study Group Web site (<http://www.loc.gov/section108>).

Written Comments. Written comments must include the following information: (1) the name of the person making the submission; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a statement of no more than 10 pages, responding to any of the topic areas or specific questions in this notice.

Submission of Both Requests to Participate in Roundtable Discussions and Written Comments. In the case of submitting a request to participate in the roundtable discussions or of submitting written comments, submission should be made to the Section 108 Study Group by e-mail (preferred) or by hand delivery by a commercial courier or by a private party to the address listed above. Submission by overnight delivery service or regular mail will not

be effective due to delays in processing receipt.

If by e-mail (preferred): Send to the e-mail address section108@loc.gov a message containing the information required above for the request to participate or the written submission, as applicable. The summary of issues (for the request to participate in the roundtable discussion) or statement (for the written comments), as applicable, may be included in the text of the message, or may be sent as an attachment. If sent as an attachment, the summary of issues or written statement must be in a single file in either: (1) Adobe Portable Document File (PDF) format, (2) Microsoft Word version 2000 or earlier, (3) WordPerfect version 9.0 or earlier, (4) Rich Text File (RTF) format, or (5) ASCII text file format.

If by hand delivery by a private party or a commercial, non-government courier or messenger: Deliver to the address listed above a cover letter with the information required, and include two copies of the summary of issues or written statement, as applicable, each on a write-protected 3.5-inch diskette or CD-ROM, labeled with the legal name of the person making the submission and, if applicable, his or her title and organization. The document itself must be in a single file in either (1) Adobe Portable Document File (PDF) format, (2) Microsoft Word Version 2000 or earlier, (3) WordPerfect Version 9 or earlier, (4) Rich Text File (RTF) format, or (5) ASCII text file format.

Anyone who is unable to submit a comment or request to participate in electronic form (either through e-mail or hand delivery of a diskette or CD-ROM) should submit, with a cover letter containing the information required above, an original and three paper copies of the summary of issues (for the request to participate in the roundtable discussions) or statement (for the written comments) by hand to the appropriate address listed above.

Dated: November 28, 2006

Marybeth Peters,

Register of Copyrights.

[FR Doc. E6-20480 Filed 12-1-06; 8:45 am]

BILLING CODE 1410-21-F

NATIONAL TRANSPORTATION SAFETY BOARD

SES Performance Review Board

AGENCY: National Transportation Safety Board.

ACTION: Notice.

SUMMARY: Notice is hereby given of the appointment of members of the National

Transportation Safety Board Performance Review Board.

FOR FURTHER INFORMATION CONTACT: Anh Bolles, Chief, Human Resources Division, Office of Administration, National Transportation Safety Board, 490 L'Enfant Plaza, SW., Washington, DC 20594-0001, (202) 314-6355.

SUPPLEMENTARY INFORMATION: Section 4314(c)(1) through (5) of Title 5, United States Code requires each agency to establish, in accordance with regulations prescribed by the Office of Personnel Management, one or more SES Performance Review Boards. The board reviews and evaluates the initial appraisal of a senior executive's performance by the supervisor, and considers recommendations to the appointing authority regarding the performance of the senior executive.

The following have been designated as members of the Performance Review Board of the National Transportation Safety Board. This list published previously on Friday, November 24, 2006. However, a change to membership has occurred since that time and here is the updated membership list.

The Honorable Robert L. Sumwalt, Vice Chairman, National Transportation Safety Board; PRB Chair.

The Honorable Deborah A.P.hersman, Member, National Transportation Safety Board.

Steven Goldberg, Chief Financial Officer, National Transportation Safety Board.

Lowell Martin, Deputy Executive Director, Consumer Products Safety Commission.

Frank Battle, Deputy Director of Administration, National Labor Relations Board.

Joseph G. Osterman, Managing Director, National Transportation Safety Board.

Dated: November 29, 2006

Vicky D'Onofrio,

Federal Register Coordinator.

[FR Doc. 06-9502 Filed 12-1-06; 8:45 am]

BILLING CODE 7533-01-M

NUCLEAR REGULATORY COMMISSION

Advisory Committee on Reactor Safeguards (ACRS)

Meeting of the ACRS Subcommittee on Reliability and Probabilistic Risk Assessment; Notice of Meeting

The ACRS Subcommittee on Reliability and Probabilistic Risk Assessment (PRA) will hold a meeting on December 14 and 15, 2006, Room T-2B1, 11545 Rockville Pike, Rockville, Maryland.

I. Commenters in Response to Federal Register Notice Vol. 71, No. 232, Docket No. 07-10802, Dec, 4, 2006

Elizabeth Adkins / Society of American Archivists
 Allan Adler / Association of American Publishers, Inc.
 American Library Association and Association of Research Libraries
 Fritz E. Attaway / Motion Picture Association of America, Inc.
 Brandon Burke et al. / Associated Audio Archivists Committee of the Association for Recorded Sound Collections
 Denise Troll Covey / Carnegie Mellon University Libraries
 Kenneth D. Crews / Copyright Management Center, Indiana University
 James Cuno et al. / The Art Institute of Chicago, The Metropolitan Museum of Art, The Museum of Modern Art, Solomon R. Guggenheim Foundation, Los Angeles County Museum of Art, and American Association of Museums
 Jonathan A. Franklin and Mary Alice Baish / American Association of Law Libraries
 Frederic Haber / Copyright Clearance Center, Inc.
 Eric Harbeson et al. / Music Library Association
 Richard Isaac / Bastyr University Library
 Roy S. Kaufman / John Wiley & Sons, Inc.
 Michael A. Keller and Mariellen F. Calter / Stanford University Libraries and Information Resources
 Dr. Kimberly B. Kelley / University of Maryland University College
 Keith Kupferschmid / Software & Information Industry Association
 Thomas C. Leonard / University of California Libraries
 Tomas A. Lipinski / Center for Information Policy Research, School of Information Studies, University of Wisconsin – Milwaukee
 Steven M. Marks and Steven J. Metalitz / Recording Industry Association of America
 Kathy Martin / Willamette Falls Hospital
 Joan M. McGivern and Sam Mosenkis / American Society of Composers, Authors and Publishers
 Mary Minow / California Association of Library Trustees and Commissioners
 Mary Kaye Nealen / University of Great Falls
 Louise Nemschoff / Attorney for Carol Serling, widow of author Rod Serling
 John P. Ochs / American Chemical Society
 Victor S. Perlman / American Society of Media Photographers, Inc.
 Janice T. Pilch / University Library of the University of Illinois at Urbana-Champaign
 Keenan Popwell / SESAC, Inc.
 Jane D. Saxton / Bastyr University Library
 Mark Seeley / International Association of Scientific, Technical & Medical Publishers
 Kevin L. Smith / Duke University Libraries
 Lizabeth A. Wilson / University of Washington Libraries
 Tanner Wray and Charlotte C. Rubens / Sharing and Transforming Access to Resources Section of the Reference and User Services Association, a division of the American Library Association

J . Participants in the January 31, 2007 Public Roundtable, Chicago, Illinois

Alan Adler / Association of American Publishers, Inc.
Paul Aiken / The Authors Guild, Inc.
Sandra Aistars / Time Warner
Tracey Armstrong / Copyright Clearance Center
Dwayne Buttler / University of Louisville & MetaArchive
Mimi Calter / Stanford University Libraries and Information Resources
Susan Carr / American Society of Media Photographers
Mary Case / American Library Association & Association of Research Libraries
Denise Troll Covey / Carnegie Mellon University Libraries
Kenneth Crews / Copyright Management Center, Indiana University
Judy Feldman / Feldman and Associates
Eric Harbeson / Music Library Association
Roy S. Kaufman / John Wiley & Sons, Inc.
Keith Kupferschmid / Software and Information Industry Association
Tomas Lipinski / Center for Information Policy Research, School of Information Studies, University of Wisconsin – Milwaukee
Dr. Logan Ludwig / Medical Library Association
William J. Maher / Society of American Archivists
Dr. Marc Maurer / National Federation of the Blind
Steven J. Metalitz / Entertainment Software Association
Mary Minow / California Association of Library Trustees and Commissioners & LibraryLaw.com
Rob Morrison / University Library, National–Louis University
John P. Ochs / American Chemical Society
Janice T. Pilch / University Library of the University of Illinois at Urbana–Champaign
Keenan Popwell / SESAC, Inc.
Mark Seeley / International Association of Scientific, Technical and Medical Publishers
Nicholas Sincaglia
Keith Ann Stiverson / American Association of Law Libraries

K. Background Paper on Section 108

OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT: BACKGROUND, HISTORY, AND MEANING

by MARY RASENBERGER AND CHRISTOPHER WESTON

INTRODUCTION

This paper is intended to provide an overview of the history and general background of the exceptions and limitations for libraries and archives under the copyright law, and the provisions of 17 U.S.C. § 108 specifically. Section 108 allows libraries and archives to engage in the limited, unauthorized, reproduction and distribution of copyrighted works. This paper reviews the history of section 108, its meaning, and the rationales behind its provisions.

The purpose of copyright law, as stated in Article I, Section 8 of the U.S. Constitution, is to “Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . .”¹ These exclusive rights provide incentives to authors in order to increase the publication and dissemination of intellectual works. To ensure that the public interest in dissemination of works is best served, copyright law also balances the exclusive rights of creators and publishers against the interests of subsequent users and others who provide access to works through certain exceptions and limitations on the exclusive rights, including provisions such as fair use and section 108. The exclusive rights incentives enable authors and publishers to invest both time and money in the creation and publication of creative works, while the exceptions and limitations ensure that the uses of those works are not restricted by the exclusive rights in ways that would be unreasonably detrimental to the public interest. Depending upon where they sit in this creative marketplace, rights-holders and libraries and archives have varying perspectives on how to calibrate the balance so that the purposes of copyright are best achieved.

Speaking in gross generalizations, libraries and archives place primary importance on the value of providing access to their patrons, viewing copyright issues through the lens of the public’s need for uninhibited information flow in order to fully participate in creative, intellectual, and political life. Rights-holders, on the other hand, emphasize the value of exclusive rights for creators, recognizing that without incentives and compensation to creators and their publishers, the amount and quality of creative and intellectual works available to the public will be severely diminished. Of course, for copyright law to work optimally, the core values of dissemination to the public and incentives to create should reinforce one another, not work at cross-purposes. This was the task before the drafters of the 1976 Act, as well as the Digital Millennium Copyright Act, and the Copyright Term Extension Act, each of which addressed the needs of libraries and archives in a world of changing technology. This paper traces those efforts up to the present. The task before us today is to write the next chapter.

¹ U.S. CONST. Art. I, § 8, cl. 8.

PART 1: HISTORY OF THE LIBRARY AND ARCHIVES EXCEPTIONS

COPYRIGHT AND LIBRARIES: 1909-1955

THE COPYRIGHT ACT OF 1909

The Copyright Act of 1909, which governed throughout the first three-quarters of the 20th century, contained no express exceptions or limitations – for libraries or otherwise – to the exclusive right of authors to “print, reprint, publish, copy, and vend.”² Duplication and other uses of copyrighted works by libraries and archives under the 1909 Act were governed exclusively by the common-law doctrine of fair use. Reproduction was far more cumbersome, of course, and, as a result, less prevalent in the first half of the century. Libraries and archives had always made hand-copies of works in their collections, and began to make machine reproductions at the beginning of the 20th century. But it was not until the advent of the modern photocopier machine that the activities of libraries and archives had the potential for significant economic impact on markets for copyrighted works. Indeed, it was not until 1968 that the first infringement case was brought against a library.³ The *Williams & Wilkins* case provided the first express legal authority relating to libraries’ reproductions of copyrighted works, although it was soon superseded by the Copyright Act of 1976.⁴

Certain standards of practice arose among libraries and archives in the absence of explicit legal rules. Handwritten transcriptions of written works in a library’s collection made by scholars, for instance, were generally considered fair.⁵ Photographing pages of books was a practice that arose in the early part of the century and was viewed by many in the library community (but not without dispute by publishers) as essentially the same act as hand-transcription and therefore similarly as fair use. Indeed, editions of the Library of Congress’s “Rules and Practice Governing the Use of Books” in the early part of the century explicitly allowed the photographing of copyrighted works in the Library’s collection, and stated that “photo-duplicates of books, newspapers, maps, etc. can be furnished at a reasonable rate by means of the Photostat installed in the Chief Clerk’s

² Copyright Act of 1909, Pub. L. No. 349, 35 Stat. 1075 (1909).

³ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d per curiam by an equally divided court*, 420 U.S. 376 (1975). *Williams & Wilkins* was decided in favor of the publisher plaintiff by a judge of the U.S. Court of Claims in 1972. In 1973, the full Court of Claims reversed, holding for the library defendant. It is this latter opinion that is cited throughout this paper. In 1975, the Supreme Court affirmed the full Court of Claims decision, but did not issue an opinion explaining its ruling. *See infra* text pp. 16-20.

⁴ Throughout this paper, use is made of the terms “library copying,” “library photocopying,” “reproduction by libraries and archives,” and other similar terms. Unless otherwise stated, we are referring to unauthorized reproductions.

⁵ *See Williams & Wilkins*, 487 F.2d at 1350.

Office.”⁶ And, as discussed below, more specific standards of practice arose through the development of non-binding guidelines.⁷

THE “GENTLEMEN’S AGREEMENT” AND OTHER GUIDELINES

The “standard of acceptable conduct” for library and archive practice until the Copyright Act of 1976 was the 1935 “Gentlemen’s Agreement” on library duplication of copyrighted works.⁸ The voluntary agreement, struck between the National Association of Book Publishers (NABP) and the Joint Committee on Materials for Research of the American Council of Learned Societies was non-binding and limited in scope. Nevertheless, the Gentlemen’s Agreement and its progeny served as authority on what constituted “fair use” reproduction for libraries for over thirty years.

Robert C. Binkley, a young and energetic historian at Western Reserve University and chair of the Joint Committee, was the driving force behind the Gentlemen’s Agreement.⁹ He led the Joint Committee on a course to harmonize the possibilities of the new technology for researchers with the realities of copyright law.¹⁰ From the start, Binkley focused the discussions on making single, non-commercial copies for individual researchers, realizing that advocating a general educational copying privilege would, because of its potential to harm sales of textbooks, set the publishers irrevocably against the plan.¹¹

In 1933, Binkley, on behalf of the Joint Committee, wrote to the Copyright Office for advice on how to proceed, and received a pessimistic reply from the Acting Register of Copyrights (William L. Brown) stating that library reproductions of entire works were plainly infringements of the copyright owner’s exclusive rights.¹² After discussions with publishers, the Joint Committee then determined that the best course of action would be to pursue an explicit exception for libraries in the copyright law itself.¹³ Harry Lydenberg, a member of the Joint Committee and the director of the New York Public Library, met with members of the NABP, the American Library Association, and librarians from Brooklyn and Yale in March of 1935 to press for their support for such legislation.¹⁴ The NABP, while recognizing the merits of allowing single-copy

⁶ *Id.* at 1351. In addition the Library of Congress policy said, “the Library gives no assurance that the photograph may be reproduced or republished or placed on sale. These are matters to be settled with the owner of the copyright.”

⁷ It is interesting to note that, in the 1973 *Williams & Wilkins* appeal, the U.S. Attorney General argued that, based on the history of pre-1909 copyright law, “copying” under the 1909 Act should not be considered an infringement of the copyright in books and periodicals, only “printing,” “reprinting,” and “publishing.” See *Williams & Wilkins*, 487 F.2d, at 1350.

⁸ THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 14 (1983) [hereinafter 1983 REGISTER’S REPORT].

⁹ Peter Hirtle, Fair Use, Research, and Libraries: The Gentlemen’s Agreement of 1935, at 3 (September, 2004) (unpublished draft manuscript, on file with the U.S. Copyright Office). The authors of this paper thank Peter Hirtle for his enlightening study, and for permitting us to rely upon it for this discussion.

¹⁰ See Jackson S. Saunders, *Origin of the “Gentlemen’s Agreement” of 1935*, in REPROGRAPHY AND COPYRIGHT LAW 159, 162 (Lowell H. Hattery & George P. Bush eds., 1964).

¹¹ See Hirtle, *supra* note 9, at 6-7.

¹² See Saunders, *supra* note 10, at 162.

¹³ See *id.* at 164-165.

¹⁴ See Hirtle, *supra* note 9, at 17-18.

reproductions for scholars, refused to back a legislative approach, claiming that a library exception would require “so great a need of hedging it about with restriction, whereases, and provisos, as to endanger, if not nullify” its usefulness.¹⁵

The Joint Committee agreed with the publishers to pursue a voluntary agreement,¹⁶ even though it was aware that such an agreement could not bind all publishers. Any publisher would still be free to sue for infringement, even where the copying was clearly within the terms of the agreement.¹⁷ Moreover, the issues of interlibrary loan and the use of periodical articles were not addressed.¹⁸ Nevertheless, such an agreement was seen as better than nothing.

The Gentlemen’s Agreement, finalized on June 3, 1935, reads as follows:

The Joint Committee on Materials for Research and the Board of Directors of the National Association of Book Publishers, after conferring on the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction, have agreed upon the following statement:

A library, archives office, museum, or similar institution owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction or reduction of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research; provided

(1) That the person receiving it is given due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction constituting an infringement under the copyright law;

(2) That such reproduction is made and furnished without profit to itself by the institution making it.

The exemption from liability of the library, archives office or museum herein provided for shall extend to every officer, agent or employee of such institution in the making and delivery of such reproduction when acting within the scope of his authority of employment. This exemption for the institution itself carries with it a responsibility to see that library employees caution patrons against the misuse of copyright material reproduced photographically.

Under the law of copyright, authors or their agents are assured of "the exclusive right to print, reprint, publish, copy and vend the copyrighted work," all or any part. This means that legally no individual or institution can reproduce by photography or photo-mechanical means, mimeograph or other methods of reproduction a page or any part of a book without the

¹⁵ Letter from Harry M. Lydenberg to Robert C. Binkley (Mar. 27, 1935), *quoted in Hirtle, supra* note 9, at 17.

¹⁶ *See* Saunders, *supra* note 10, at 165.

¹⁷ *See* Hirtle, *supra* note 9, at 12.

¹⁸ Letter from Robert C. Binkley to Harry M. Lydenberg (Apr. 1, 1935), *cited in Hirtle, supra* note 9, at 18-19.

written permission of the owner of the copyright. Society, by law, grants this exclusive right for a term of years in the belief that such exclusive control of creative work is necessary to encourage authorship and scholarship.

While the right of quotation without permission is not provided in law, the courts have recognized the right to a "fair use" of book quotations, the length of a "fair" quotation being dependent upon the type of work quoted from and the "fairness" to the author's interest. Extensive quotation is obviously inimical to the author's interest.

The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription.

In order to guard against any possible infringement of copyright, however, libraries, archives offices and museums should require each applicant for photo-mechanical reproductions of material to assume full responsibility for such copying, and by his signature to a form printed for the purpose assure the institution that the duplicate being made for him is for his personal use only and is to relieve him of the task of transcription. The form should clearly indicate to the applicant that he is obligated under the law not to use the material thus copied from books for any further reproduction without the express permission of the copyright owner.

It would not be fair to the author or publisher to make possible the substitution of the photostats for the purchase of a copy of the book itself either for an individual library or for any permanent collection in a public or research library. Orders for photo-copying which, by reason of their extensiveness or for any other reasons, violate this principle should not be accepted. In case of doubt as to whether the excerpt requested complies with this condition, the safe thing to do is to defer action until the owner of the copyright has approved the reproduction.

Out-of-print books should likewise be reproduced only with permission, even if this reproduction is solely for the use of the institution making it and not for sale.¹⁹

(signed)

ROBERT C. BINKLEY, Chairman
 Joint Committee on Materials for Research
 W. W. NORTON, President
 National Association of Book Publishers²⁰

¹⁹ *The "Gentlemen's Agreement" of 1935*, in REPROGRAPHY AND COPYRIGHT LAW 157 (Lowell H. Hattery & George P. Bush eds., 1964).

²⁰ The NABP, followed by the Book Publishers Bureau formed in 1938, in turn followed by the American Book Publishers Council, are predecessor organizations to the present-day Association of American Publishers (formed in 1970).

The Gentlemen's Agreement was circulated throughout the library and publishing communities in late 1935.²¹ It was praised by many as a "useful clarification" of fair use standards, but some librarians had criticisms, particularly of its treatment of out-of-print works, and of its failure to address the issue of reproductions for educational use.²² Nevertheless, the agreement did serve as an acceptable standard of practice for several decades.²³ Indeed, some elements of the Agreement's single-copy limits, warnings to users, bars on copying entire works, and emphasis on scholarship survive today in Section 108, particularly in sub-sections (d) and (e), dealing with copies made upon requests from users.²⁴

In 1941, the American Library Association (ALA) adopted the "Reproduction of Materials Code."²⁵ The Code incorporated provisions of the Gentlemen's Agreement concerning library reproductions of portions of copyrighted works for scholars, and includes additional guidance on uncopyrighted material and unpublished manuscripts. It also reiterated the Agreement's assertion that it memorializes the "practical and customary" meaning of "fair use" as applied to libraries, as opposed to creating a new privilege.²⁶ The Reproduction of Materials Code, which was in effect through the 1960s, reads as follows:

- I. NON-COPYRIGHT MATERIAL (published works not copyrighted in the United States, or on which copyright has expired)
 - a. *Out-of-Print*. There appear to be no legal or ethical reasons for any restrictions on library reproduction of such materials, either for use within the institution or for sale.
 - b. *In Print*. There are no legal restrictions on reproduction of such materials, whether of foreign or domestic origin. In the case of works which have not been copyrighted in the United States, however, it is evident that it would not be in the best interests of scholarship to engage in widespread reproduction which would deprive the publisher of income to which he appears to be entitled and might result in suspension of the publication. It is recommended, therefore, that before reproducing uncopyrighted material less than twenty years old, either for sale or for use within the library, libraries should ascertain whether or not the publication is still in print and, if it is in print, should refrain from reproducing whole number or volumes or series of volumes. This recommendation does not apply to reproduction of individual articles or extracts which are to be reproduced without profit.
- II. COPYRIGHT MATERIAL

²¹ See Hirtle, *supra* note 9, at 23-24.

²² See *id.* at 24.

²³ See 1983 REGISTER'S REPORT, *supra* note 8, at 14.

²⁴ See *id.* at 15.

²⁵ A.L.A. News, *Reproduction of Materials Code*, 35 A.L.A. BULL. 84 (1941).

²⁶ See *id.*

- a. *Out-of-Print*. This material enjoys the complete protection of the Copyright Law but the courts recognize that “fair use,” which includes reasonable copying, may be made of copyright material. The final determination as to whether any act of copying is a “fair use” rests with the courts. But the practical and customary meaning of “fair use” applicable to reproduction for research purposes was agreed upon in 1935 by the National Association of Book Publishers and the Joint Committee on Materials for Research. The Book Publishers Bureau, which now exercises the functions of the old association, has acknowledged the agreement. The agreement recognizes the right of a library to make and deliver a single photographic reproduction of a part of a book or periodical volume in which copyright still subsists to a scholar who represents in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for purposes of research. The agreement requires (1) that the library give to the person receiving the reproduction due notice in writing that he is not exempt from liability to the copyright proprietor for any infringement of copyright by misuse of the reproduction and (2) that the library furnish such reproduction without profit to itself. It is recommended that, in all cases which do not clearly come within the scope of the agreement, either the scholar requiring the reproduction or the library to which the request is made seek the permission of the copyright owner before reproducing copyright material. Special care is called for in the case of illustrations or articles that are covered by a special copyright in addition to the general copyright on the whole book or periodical. Attention is called to the fact that a publisher’s permission is not legal protection to the library unless the publisher is either the copyright owner or an agent of the owner duly authorized to grant such permission.
- b. *In Print*. Legally there is no distinction between in print and out-of-print copyright material. Reproduction of in print material, however, is more likely to bring financial harm to the owner of the copyright, and it is recommended that libraries be even more careful than in the case of out-of-print material.

III. MANUSCRIPTS

Manuscript material is protected by common law but the restrictions on its reproduction are probably less rigid than those on copyright material. Reproduction may probably be made to assist genuine scholarly research if no publication is involved. Libraries should, however, be careful to observe any restrictions of copying such material that have been stipulated by the donor.

It is recommended that when acquiring manuscripts, libraries seek a definite understanding regarding the publication

rights, since, in manuscripts, the literary property as distinct from the physical property, usually belongs to the author or his heirs. It is further recommended that, when consent to publication is given by the donor, evidence be secured that he has actually acquired the literary property or is authorized to act for the owner of the literary property.²⁷

In addition to its Reproduction Code, the ALA in 1952 adopted a “General Interlibrary Loan Code,” which expressly relied upon the parameters set out in the Gentlemen’s Agreement.²⁸ This Code, which continued to be cited as an authority into the 1970s, noted that reproduction of works for interlibrary loan – especially entire books and periodicals, or multiple copies – is fraught with copyright risks, and thus stated that “any request, therefore, that indicates acceptability of a photographic substitution . . . should be accompanied by a statement with the signature of the applicant attesting to his responsibility for observing copyright provisions in his use of the photographic copy.”²⁹

EARLY LEGISLATIVE EFFORTS, 1934-1944

Before delving into the next important phase – the library-copyright negotiations of the 1960s and 1970s – it may be illuminating to look at some earlier but failed legislative attempts at granting libraries and other cultural institutions special copyright exemptions. Robert C. Binkley, the prime mover behind the Gentlemen’s Agreement, was also active in seeking a legislative carve-out for library copying. In 1935 Congress was considering various pieces of legislation to ratify the Berne Convention on international copyright.³⁰ Binkley secured the cooperation of the American National Committee on International Intellectual Cooperation, chaired by James T. Shotwell, in order to insert a library provision into the ratifying legislation.³¹ The provision, written by Joint Committee member Harry Lydenberg, read:

Nothing herein set forth shall render liable to infringement of copyright any library, museum, archives office, or similar organization reproducing copyright material in its care on behalf of a scholar, student, or investigator who, in the opinion of the librarian or curator or archivist, calls for this reproduction in good faith – not for republication – for the purpose of study or scholarship or research, and who in writing orders this

²⁷ *Id.*

²⁸ See Louis Charles Smith, *The Copying of Literary Property in Library Collections*, 46 *LAW LIBR. J.* 197, 205-206 (1953).

²⁹ *Id.*

³⁰ See ABE A. GOLDMAN, *COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, STUDY NO. 1: THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION FROM 1901 TO 1954*, at 8-9 (1955), *reprinted in* 86TH CONG., *COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE: STUDIES 1-4*, at 8-9 (Committee Print 1960).

³¹ See Hirtle, *supra* note 9, at 11.

reproduction and absolves the library, museum, or archives office of responsibility for infringement.³²

Shotwell's committee approved this language, but it was never inserted into any proposed legislation.³³

The first instance of a library copying provision appearing in introduced legislation was in a 1940 general copyright revision bill,³⁴ also intended to allow the United States to join the Berne Convention.³⁵ Again, the library provision was partly based on the work of the Joint Committee on Materials for Research.³⁶ In a memo presented to the Shotwell Committee in 1938, the Joint Committee argued for much more latitude for scholars to reproduce copyrighted works than was given by the Gentlemen's Agreement, saying that "the provisions of the copyright law should leave intact the free right to copy as part of the normal procedure of research. This right to copy should never be confused with the right to publish."³⁷ The Joint Committee memo also urged that libraries be permitted to make copies of out-of-print works "as additions to library resources," perhaps under a statutory license.³⁸ Finally, in the first mention of reproduction for preservation and replacement, the Joint Committee recommended that libraries be allowed to copy damaged books for continued public access.³⁹

The language eventually inserted in the 1940 bill adopted only some of the Joint Committee's suggestions. It stated that libraries may make single copies of unpublished works for research purposes, and may also make single copies of published works, provided the works had been previously publicly offered for sale, and were currently out-of-print.⁴⁰ Copying of a published work was additionally conditioned upon the copyright owner failing to file its intention to re-publish the work within 30 days of a notice of the library's wish to copy the work.⁴¹ The Copyright Office would administer this system.⁴² In addition, the library would have to tender the original purchase price of the work to the Copyright Office, which would set up a trust fund for future claimants.⁴³ It was a complicated provision, the bill died, and the provision was never revived.⁴⁴

A far more limited library copying bill was introduced in 1944, which would have permitted the Library of Congress to make copies of any published copyrighted work for

³² Minutes of the American National Committee on International Intellectual Cooperation (Mar. 9, 1935), at 9, *quoted by* Hirtle, *supra* note 9, at 11.

³³ Hirtle, *supra* note 9, at 12. None of the general copyright revision bills introduced in the 1935-36 Congress were enacted. GOLDMAN, *supra* note 30, at 10.

³⁴ S. 3043, 76th Cong. (1940).

³⁵ GOLDMAN, *supra* note 30, at 10-11.

³⁶ BERGE VARMER, COPYRIGHT OFFICE OF THE LIBRARY OF CONGRESS, STUDY NO. 15: PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES, at 55 (1959), *reprinted in* 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE: STUDIES 14-16, at 55 (Committee Print 1960).

³⁷ JOINT COMMITTEE ON MATERIALS FOR RESEARCH, MEMORANDUM ON COPYRIGHT ON BEHALF OF SCHOLARSHIP (1938), *quoted in* VARMER, *supra* note 36, at 55.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ S. 3043, 76th Cong. § 12 (1940), *reprinted in* VARMER, *supra* note 36, at 54.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See* VARMER, *supra* note 36, at 55.

members of Congress, judges, federal agencies, certain authorized federal officers, and others who certify that only fair use will be made of the copy.⁴⁵ As with the 1940 bill, no action was taken.⁴⁶

COPYRIGHT AND LIBRARIES, 1955-1976

There was relatively little action of significance regarding library photocopying during the next decade or so. As noted above, no lawsuits alleging copyright infringement via photocopying were filed – either against libraries or their patrons – until 1968. Of course, the duplication technologies of the 1930s when the Gentlemen’s Agreement was created were far from the modern copying machine, in terms of speed, ease of use and reproduction quality.⁴⁷ The threat to authors’ and publishers’ bottom line was relatively negligible compared to the havoc about to be wrought by the high-speed photocopier. By the 1960s, the technology had advanced substantially, increasing the means and ease by which libraries could serve the public, and thus, the means and ease by which copyrights could be infringed. Robert C. Binkley wisely noted in 1935 that the Gentlemen’s Agreement would “protect what libraries have done in the past, but not what they might do in the future.”⁴⁸ As the early photoduplication technology provided impetus for the Gentlemen’s Agreement, so did the modern photocopier with respect to the fifteen years of negotiations culminating in section 108 of the Copyright Act of 1976.

By 1960, publishers and libraries were finding the Gentlemen’s Agreement unworkable. Advances in copying technology had produced a dramatic increase in the instances and amounts of photocopying by libraries and their patrons. Publishers particularly objected to the increase in interlibrary loan photocopying by libraries, especially the practice of divvying up journal subscriptions among two or more institutions in a consortium, on the understanding that the institutions would share copies of the periodicals.⁴⁹ Library copying of scientific literature was another sticking point. The profit margin on scientific publishing was so small, and the amount of material being copied so large, that some publishers began to require licenses.⁵⁰ The 1960s photocopying technology was a revolutionary step in the use of copyrighted works, and this animated much of the debate over library photocopying for the next sixteen years.

⁴⁵ S. 2039, 78th Cong. § 1 (1944), *reprinted in* VARMER, *supra* note 36, at 55-56.

⁴⁶ VARMER, *supra* note 36, at 56.

⁴⁷ Library photo-reproduction in the 1930s was done via Photostat machines that photographed, developed, rinsed, and fixed copies at a rate of one to three per minute. They required special photographic paper, as well as chemicals and trained operators. *See* ROBERT C. BINKLEY, JOINT COMM. ON MATERIALS FOR RESEARCH OF THE SOC. SCI. RESEARCH COUNCIL AND THE AM. COUNCIL OF LEARNED SOC’YS, *MANUAL ON METHODS OF REPRODUCING RESEARCH MATERIALS* 71-76 (1936); DAVID OWEN, *COPIES IN SECONDS: CHESTER CARLSON AND THE BIRTH OF THE XEROX MACHINE* 79-81 (2004).

⁴⁸ Letter from Robert C. Binkley to James T. Shotwell (Apr. 1, 1935), *quoted in* Hirtle, *supra* note 9, at 18.

⁴⁹ *See* Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey*, 84 *LAW LIBR. J.* 341, 348 (citing Louise Weinberg, *The Photocopying Revolution and the Copyright Crisis*, 38 *PUB. INTEREST* 99, 100-01 (1975)).

⁵⁰ *See id.* (citing Weinberg at 102-06).

THE 1959 STUDY, 1961 REGISTER'S REPORT, AND 1963 DRAFT BILL

In 1955, Congress asked the Copyright Office to prepare a series of reports on aspects of copyright law to serve as the basis for a total overhaul of the Copyright Act. Between 1955 and 1963 the Copyright Office commissioned and/or produced 35 separate studies,⁵¹ the fifteenth of which was Borge Varmer's "Photoduplication of Copyrighted Material by Libraries." Varmer's study – like the Gentleman's Agreement – focused on copying for purposes of research and scholarship. Such copying, Varmer argued, was "indispensable" to researchers, because the sheer number of publications make it impossible for libraries to serve their patrons solely through loans.⁵² Regarding copying for preservation, Varmer concluded that this was a "less urgent" matter than research copying, and suggested that, as long as copies of a work were unavailable from the publisher, preservation copying was legitimate – a conclusion he reached for interlibrary loan copies as well.⁵³

Varmer did not make explicit recommendations for research copying by non-profit libraries.⁵⁴ Instead, he set out four possible scenarios. The first was to enact a general statutory provision permitting private copying.⁵⁵ This had the advantage of simplicity, but would not provide enough protection for copyright owners.⁵⁶ Varmer's second scenario was to enact a detailed statutory provision qualifying which types of libraries would be covered, how many of what kind of copyrighted works they could copy, and for what purposes.⁵⁷ This is the model eventually embraced in the 1976 Act – despite Varmer's concerns that libraries would find it too restrictive and complex, and

⁵¹ The studies were numbered as follows: 1. The History of U.S.A. Copyright Law Revision From 1901 to 1954 (1955), 2. Size of the Copyright Industries (1959), 3. The Meaning of "Writings" in the Copyright Clause of the Constitution (1956), 4. The Moral Right of the Author (1959), 5. The Compulsory License Provisions of the U.S. Copyright Law (1956), 6. The Economic Aspects of the Compulsory License (1958), 7. Notice of Copyright (1957), 8. Commercial Use of the Copyright Notice (1959), 9. Use of the Copyright Notice by Libraries (1959), 10. False Use of Copyright Notice (1959), 11. Divisibility of Copyrights (1957), 12. Joint Ownership of Copyrights (1958), 13. Works Made for Hire and On Commission (1958), 14. Fair Use of Copyrighted Works (1958), 15. Photoduplication of Copyrighted Material By Libraries (1959), 16. Limitations on Performing Rights (1958), 17. The Registration of Copyright (1958), 18. Authority of the Register of Copyrights to Reject Applications for Registration (1959), 19. The Recordation of Copyright Assignments and Licenses (1958), 20. Deposit of Copyrighted Works (1960), 21. The Catalog of Copyright Entries (1960), 22. The Damage Provisions of the Copyright Law (1956), 23. The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study (1958), 24. Remedies Other Than Damages for Copyright Infringement (1959), 25. Liability of Innocent Infringers of Copyrights (1958), 26. The Unauthorized Duplication of Sound Recordings (1957), 27. Copyright in Architectural Works (1959), 28. Copyright in Choreographic Works (1959), 29. Protection of Unpublished Works (1957), 30. Duration of Copyright (1957), 31. Renewal of Copyright (1960), 32. Protection of Works of Foreign Origin (1959), 33. Copyright in Government Publications (1959), 34. Copyright in Territories and Possessions of the United States (1959), and 35. The Manufacturing Clause of the U.S. Copyright Law (1963). The studies were published as committee prints of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary between 1960 and 1963.

⁵² See VARMER, *supra* note 36, at 49.

⁵³ See *id.* at 64.

⁵⁴ He did recommend, however, that multiple copying by corporate libraries be governed by a royalty arrangement. See *id.*

⁵⁵ See *id.* at 65.

⁵⁶ See *id.*

⁵⁷ See *id.*

that advances in technology would overtake its usefulness.⁵⁸ The scenario Varmer deemed the most workable was his third one, a statutory provision mandating that nonprofit institutions could make and supply copies only for research, study, and related purposes like maintenance of a library's collections or for another library, with the details to be filled in through administrative rulemaking.⁵⁹ Varmer's fourth scenario was a new voluntary agreement between libraries and copyright owners.⁶⁰

Of the seven interest groups who commented on Varmer's study, only two thought that legislation was the best way to address library photocopying.⁶¹ This opposition to a statutory solution would predominate in both the library and owner communities until the late 1960s.

In June 1961, the Register of Copyrights published a wide-ranging report on copyright law reform, which included a recommendation of a statutory provision governing library photocopying.⁶² New statutory language, the Register said, was necessary because uncertainty about fair use limits was harming researchers, and, hence, undermining intellectual progress.⁶³ In addition, publishers needed protection from the levels of infringement facilitated by new copying technology.⁶⁴ The basic concept to be used when addressing this conflict, the Register announced, was that "photocopying should not be permitted where it would compete with the publisher's market."⁶⁵ Thus, the Register recommended a blanket license system for businesses making multiple copies,⁶⁶ and the following statutory language for non-profit libraries:

The statute should permit a library, whose collections are available to the public without charge, to supply a single photocopy of copyrighted material in its collections to any applicant under the following conditions:

(a) A single photocopy of one article in any issue of a periodical, or of a reasonable part of any other publication, may be supplied when the applicant states in writing that he needs and will use such material solely for his own research.

(b) A single photocopy of an entire publication may be supplied when the applicant also states in writing, and the library is not otherwise informed, that a copy is not available from the publisher.

⁵⁸ *See id.* at 65-66. Varmer notes that the library photocopying provision (section 7) of the United Kingdom Copyright Act of 1956 had been criticized as too complicated and restrictive. Section 7 provided separate and detailed rules for library copying for articles in periodical publications, parts of other published works, complete published works, and unpublished works, and mandated further regulations by the Board of Trade. *See id.* at 59-61.

⁵⁹ *Id.* at 66.

⁶⁰ *Id.*

⁶¹ Comments were received on behalf of the Music Publishers Association of the United States, the Curtis Publishing Company, the New York Public Library, the American Association of University Professors, attorneys who represented television and newspapers, and law professor Melville B. Nimmer. *Id.* at 73-76.

⁶² REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW (1961) [hereinafter 1961 REGISTER'S REPORT].

⁶³ *See id.* at 25.

⁶⁴ *See id.* at 25-26.

⁶⁵ *Id.* at 26.

⁶⁶ *See id.*

(c) Where the work bears a copyright notice, the library should be required to affix to the photocopy a warning that the material appears to be copyrighted.⁶⁷

Reaction to the Register's library copying recommendations was mixed. Publishing groups supported the Register's statutory language, but proposed adding a requirement that libraries must determine whether a complete work is available from the publisher or the publisher's agent before copying it.⁶⁸ The Author's League registered extreme displeasure, stating that the Register's proposal was a "grave threat to the fundamental right to print and publish copies," and urging that library copying should continue to be governed under a common-law fair use regime.⁶⁹ Library representatives agreed with the Author's League that codification of library copying rules was a bad idea, but for completely opposite reasons. They asserted that there was "great danger" in the statutory language, because it would freeze what was allowable at the very moment that technology is advancing.⁷⁰ What the libraries advocated was allowable under fair use (specifically, "fill[ing] orders for single copies of any published work or any part thereof" as an "extension of normal and traditional library service")⁷¹ went far beyond what publishers and authors found acceptable. In a statement on the effects of this library copying impasse, a witness remarked, "if we don't recognize it, it is going to be done or, more accurately, it will be continued to be done in a clandestine manner and the publishers and their authors, who have royalty arrangements in some cases, will receive no benefit in the process."⁷²

Despite the somewhat negative response to the Register's 1961 proposal, a 1963 draft copyright revision bill included a section with very similar language.⁷³ Predictably, it met a similar fate, with author, publisher, and library groups attacking it for the same reasons they attacked the 1961 proposal.⁷⁴ The Copyright Office ultimately agreed that the time was not right for a provision in the copyright law specifically addressing library copying, saying that, "at the present time the practices, techniques, and devices for reproducing visual images and sound and for 'storing' and 'retrieving' information are in such a stage of rapid evolution that any specific statutory provision would be likely to prove inadequate, if not unfair or dangerous, in the not too distant future."⁷⁵

⁶⁷ *Id.*

⁶⁸ See *Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Printed for the Use of the House Comm. on the Judiciary*, 88th Cong. 35-36 (1963) (statement of Horace S. Manges, Counsel, American Book Publishers Council, Sept. 14, 1961).

⁶⁹ *Id.* at 256 (written statement of the Authors League of America, Feb. 23, 1962).

⁷⁰ *Id.* at 34 (statement of William H. Hogeland, Jr., Joint Libraries Comm. on Fair Use in Photocopying, Sept. 14, 1961).

⁷¹ *Id.* at 34 (statement of Edward G. Freehafer, Director, New York Public Library, Sept. 14, 1961).

⁷² *Id.* at 43 (statement of Joseph A. McDonald; Smith, Hennessey & McDonald; Sept. 14, 1961).

⁷³ SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL 26 (1965) [hereinafter 1965 REGISTER'S REPORT].

⁷⁴ See, e.g., 1983 REGISTERS REPORT, *supra* note 8, at 20.

⁷⁵ 1965 REGISTERS REPORT, *supra* note 73, at 26.

LEGISLATIVE EFFORTS, 1964-1967

The 1964 and 1965-66 copyright revision bills did not include library photocopying provisions, but the issue was debated as vigorously as ever, this time in the arena of fair use. Libraries sought legislative affirmation that fair use, as encoded in the statute, would include library photocopying.⁷⁶ Authors and publishers resisted this interpretation.⁷⁷ An exchange between library and author representatives at a hearing on the 1964 bill encapsulates the debate:

GOSNELL [American Library Association]: I certainly assume that it [the fair use provision] covers photocopying as it is practiced and advocated by the library people in their statement on the doctrine of fair use.

KARP [Authors League of America]: Just so that somebody doesn't go picking over the record of these proceedings ten years hence and find that Mr. Gosnell's statement went unchallenged, let me point out that his assumptions about the relationship of fair use to photocopying are entirely gratuitous and completely erroneous. Fair use doesn't cover photocopying, and I don't think that any court would hold that it did . . . all of this discussion simply indicates that the doctrine of fair use is much better left to the courts . . .⁷⁸

At hearings on the 1965-66 revision bill, much of the discussion on unauthorized library photocopying focused on its financial effects. Library groups pointed to a study they had commissioned showing that “the present practices of libraries with respect to single copies are traditional and essential and are not damaging to the interests of copyright holders.”⁷⁹ Authors and publishers painted a more ominous picture, warning that libraries that make single copies are in fact replacing the role of publishers,⁸⁰ and may ultimately destroy school and library markets.⁸¹ One publisher representative warned that library reproductions of scientific texts, by diminishing the market for those texts, could eventually force more scientific reliance on government largesse, and ultimately “direct governmental intervention in science publishing, with an authoritarian bureaucracy loosening or tightening the pursestrings and thereby deciding which

⁷⁶ See, e.g., *Copyright Law Revision Part 5: 1964 Revision Bill with Discussions and Comments, Printed for the use of the House Comm. on the Judiciary*, 89th Cong. 103 (1965) (testimony of Charles F. Gosnell, Chairman, Comm. on Library Issues, American Library Ass'n, Aug. 6, 1964).

⁷⁷ See, e.g., *id.* (testimony of Irwin Karp, Authors League of America, Aug. 6, 1964).

⁷⁸ *Id.*

⁷⁹ *Copyright Law Revision: Hearings Before Subcomm. No. 3 of the Comm. on the Judiciary, House of Representatives, on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835*, 89th Cong. 452 (1966) (testimony of Rutherford D. Rogers, Chairman, Joint Library Comm. on Copyright, Jun. 3, 1965).

⁸⁰ See, e.g. *id.* at 1431 (testimony of Bella L. Linden, American Textbook Publishers Institute, June 30, 1965).

⁸¹ See, e.g. *id.* at 86 (statement of Rex Stout, President, Authors League of America, May 26, 1965).

scientific journals, even which scientific articles, are to be allowed to publish, and which must perish.”⁸²

Two comments from the 1965 hearings are particularly interesting to note in that they reveal how some participants in the debate foresaw the possibility of the evolving technology, while others failed to. Charles Gosnell of the ALA argued that photocopying bore a minimal risk to publishers because “in these days of mass production no isolated one-at-a-time copying system can ever compete in cost or in quality with original central publications.”⁸³ When asked whether the ALA’s position on library copying would change if such a copying system came into being, Gosnell replied that the hypothetical was “impossible.”⁸⁴ On the other hand, Frederick Burkhardt of the American Council of Learned Societies (ACLS) foresaw that the use of electronic storage and retrieval systems “with quick, direct access from other locations by electronic means, could well reduce the sales to individual libraries of works such as periodicals and reference books.”⁸⁵

Burkhardt’s testimony also advocated inserting a library copying provision in the revision bill, something that the ALA and the publishers still opposed.⁸⁶ But the House Judiciary Committee took Burkhardt’s point, and in its 1966 report on the revision bill, announced that a workable library copying compromise was “overdue,” and urged “all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.”⁸⁷

In the same report, the Judiciary Committee also added a new provision, urged in 1965 by the General Services Administration, historians, archivists, and educators, on reproduction of works in archival collections.⁸⁸ It was the first iteration of the current section 108,⁸⁹ and provided:

Notwithstanding the provisions of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution.⁹⁰

The explanation of this provision, to which the committee noted there was “little or no opposition,” said it would not permit archives to make machine-readable copies, to

⁸² *Id.* at 1511-12 (statement of Lyle Lodwick, Director of Marketing, Williams & Wilkins Co., Aug. 4, 1965).

⁸³ *Id.* at 471 (testimony of Charles F. Gosnell, Chairman, Comm. on Library Issues, American Library Ass’n, Jun. 3, 1965).

⁸⁴ *Id.*

⁸⁵ *Id.* at 1556 n.13 (statement of Frederick Burkhardt, American Council of Learned Societies, Aug. 4, 1965).

⁸⁶ *See id.* at 1555-56.

⁸⁷ H.R. REP. NO. 89-2237, at 65 (1966).

⁸⁸ *Id.* at 66.

⁸⁹ *See* DRAFT SECOND SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1975 REVISION BILL ch.III p.9 (1975) [hereinafter 1975 DRAFT REGISTER’S REPORT].

⁹⁰ H.R. REP. NO. 89-2237, at 5.

distribute the copies to scholars or the public, or to override prior contractual arrangements.⁹¹

The 1967-68 copyright revision bill contained the same section 108 provision on preservation of unpublished works as the prior bill, and hearings on the legislation produced no significant discussion regarding its language. The focus of publishers, libraries, and education groups during the 1967 hearings was on computer uses of copyrighted works,⁹² but a shift in the photocopying debate emerged as well. The Joint Libraries Committee on Copyright⁹³ concluded that a voluntary agreement with publishers over the fair use parameters for single copying was impossible, and that to rely purely upon fair use would leave libraries constantly open to the threat of litigation.⁹⁴ Thus, the Joint Libraries Committee urged the adoption of a library copying provision to the revision bill. Publishers did not join the Joint Libraries Committee's call for new legislation. Instead, they recommended developing a royalty payment system,⁹⁵ or a "flat, nominal, nonpunitive tax on copying machines and their entire output."⁹⁶

The next year, the Williams & Wilkins publishing company filed suit against the National Library of Medicine and the National Institutes of Health for copyright infringement. This case – the first ever addressing libraries' copying privileges under fair use – was a "bombshell" (according to the 1983 Register's Report), which significantly influenced the legislative deliberations over section 108.⁹⁷

⁹¹ *Id.*, at 66-67.

⁹² See 1983 REGISTER'S REPORT, *supra* note 8, at 41.

⁹³ This group originated with a suggestion in 1954 by then-Register of Copyrights Arthur Fisher that libraries should take the initiative in preventing photocopying abuses. Initially named the Joint Libraries Committee on Fair Use in Photocopying in 1957, the group consisted of the Association of Research Libraries, American Association of Law Libraries, American Library Association, and Special Libraries Association. Verner W. Clapp, *Library Photocopying and Copyright: Recent Developments*, LAW LIBR. J. 10, 13 (1962). The Joint Libraries Committee's primary work was a survey of library photocopying practices, the results of which were published in 1961 – revised in 1963 – with the conclusion that library photocopying did not harm publishers, and that it should be library policy to copy entire works or portions thereof for researchers, after determining whether or not a copy was available commercially. See 1975 DRAFT REGISTER'S REPORT, *supra* note 89, at ch.III p.5. At some point between 1961 and 1965 the Committee's name changed to the Joint Libraries Committee on Copyright. See *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyright of the Comm. on the Judiciary, United States Senate, on S. 597, 90th Cong. 614* (1967) (testimony of Prof. Erwin C. Surrency, Chairman, Joint Libraries Comm. on Copyright, Apr. 4, 1967).

⁹⁴ See, e.g. *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyright of the Comm. on the Judiciary, United States Senate, on S. 597, 90th Cong. 617* (1967) (testimony of Prof. Erwin C. Surrency, Chairman, Joint Libraries Comm. on Copyright, Apr. 4, 1967) ("As a librarian, I can assure you that I have had publishers come into my library to investigate what materials we were photocopying and try to encourage us to stop all activity in this field. The mere enactment of the present bill will encourage threats of lawsuits over [library copying]. I cannot see institutions litigating this matter to establish the practice under the doctrine of fair use. Librarians feel that we would like to have some protection and not be forced to negotiate from a weak position.").

⁹⁵ See *id.* at 53 (statement of the Authors League of America, Mar. 15, 1967).

⁹⁶ *Id.* at 978 (testimony of Lyle Lodwick, Director of Marketing, The Williams & Wilkins Co, Apr. 11, 1967).

⁹⁷ 1983 REGISTER'S REPORT, *supra* note 8, at 27-28. *Williams & Wilkins* was the first of only a handful of published court decisions regarding copyright infringement by a non-profit library or archive (as opposed to libraries or archives in for-profit institutions). See, e.g., *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (suit against a church operating public libraries); *Bridge*

1968-1976 LEGISLATIVE EFFORTS AND THE *WILLIAMS AND WILKINS* CASE

In 1968 the ALA proposed an amendment to the copyright revision bill to provide that “it would not be an infringement of copyright for an academic institution or library to ‘reproduce a work or a portion thereof’ provided this was not done for commercial advantage.”⁹⁸ Book publishers responded that inclusion of such language would force them to withdraw their support from the bill.⁹⁹ The copyright revision bill introduced at the beginning of the 1969-70 Senate was identical to the prior version in its treatment of libraries and archives, and did not include the ALA amendment.¹⁰⁰ However, when the bill was reported out of the Subcommittee on Patents, Trademarks, and Copyrights in December 1969 it included a brand-new two-page Section 108 containing the basic elements of what was eventually enacted in 1976 as 108(a), (b), (c), (f), and (g).¹⁰¹ In the words of the Subcommittee report, describing the provision in part:

The bill provides that under certain conditions it is not an infringement of copyright for a library or archives to reproduce or distribute no more than one copy or phonorecord of a work. The reproduction or distribution must not be for any commercial advantage and the collections of the library or archives must be available to the public or to other persons doing research in a specialized field. The measure also specifies that the reproduction or distribution of an unpublished work must be for the purpose of preservation and security, or for deposit for research use in another library or archives. The bill further provides that the reproduction of a published work must be for the purposes of replacement of a copy that is damaged, deteriorating, lost, or stolen, and that the library or archives has determined that an unused replacement cannot be obtained at a normal price from commonly-known trade sources in the United States. The rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine.¹⁰²

Whether or not the 1969 section 108 originated with the ALA’s 1968 proposal, or was influenced by the filing of the *Williams & Wilkins* suit, the new measure produced a major change in the legislative deliberations, being the first time that language permitting unauthorized library or archive photocopying of published, copyrighted works appeared in active federal legislation since 1944.

Publications, Inc. v. F.A.C.T. Net, Inc., 183 F.R.D. 254 (D. Colo. 1998) (suit against non-profit corporation operating a library and archive).

⁹⁸ S. REP. NO. 91-519, at 8-9 (1969).

⁹⁹ *Id.* at 9.

¹⁰⁰ S. 543, 91st Cong. § 108 (Jan. 22, 1969).

¹⁰¹ S. 543, 91st Cong. § 108 (Committee Print, Dec. 10, 1969).

¹⁰² S. REP. NO. 91-1219, at 5-6 (1970).

The new section 108 would have to wait until 1973, however, for a full debate on its merits, as no action was taken for the remainder of the 1969-70 Congress, and copyright revision as a whole was held up during the 1971-72 term by cable TV issues.¹⁰³

Meanwhile, in 1972, U.S. Court of Claims Commissioner James Davis issued his ruling in *Williams & Wilkins*. The publisher had sued the National Library of Medicine and the National Institutes of Health for infringement by making unauthorized photocopies of Williams & Wilkins' journals for its staff and for other researchers.¹⁰⁴ Commissioner Davis found for the plaintiff, stating that:

Whatever may be the bounds of "fair use" as defined and applied by the courts, defendant is clearly outside those bounds. Defendant's photocopying is wholesale copying and meets none of the criteria for "fair use." The photocopies are exact duplicates of the original articles; are intended to be substitutes for, and serve the same purpose as, the original articles; and serve to diminish plaintiff's potential market for the original articles since the photocopies are made at the request of, and for the benefit of, the very persons who constitute plaintiff's market. Defendant says, nevertheless, that plaintiff has failed to show that it has been harmed by unauthorized photocopying; and that, in fact, plaintiff's journal subscriptions have increased steadily over the last decade. Plaintiff need not prove actual damages to make out its case for infringement.¹⁰⁵

Davis's ruling stunned the library community, as it essentially put single-copy photoduplication of articles outside the bounds of fair use, and rendered moot the argument that photocopies do not harm publishers. Commissioner Davis also dismissed the Gentlemen's Agreement, stating that whatever force it might have had as evidence of usual and customary practice in 1935 was of little significance in an age where photocopying was "rapid, cheap, and readily available."¹⁰⁶

Hearings on the 1973 copyright revision bill began shortly after, with libraries and publishers facing an extensive new library copying provision, as well as the 1972 *Williams & Wilkins* decision. The ALA, Association of Research Libraries (ARL), and Medical Library Association began the hearings by proposing an amendment in response to Commissioner Davis's ruling.¹⁰⁷ Section 108(d) of the 1973 bill conditioned library copies of both portions of a work or an entire work upon a prior determination that an

¹⁰³ See S. REP. NO. 92-74, at 8 (1971).

¹⁰⁴ *Williams & Wilkins*, 487 F.2d, at 1346-47. Williams & Wilkins was a major publisher of scientific and medical journals. It alleged that the National Library of Medicine (NLM) had made unauthorized copies of articles in its journals for National Institutes of Health researchers and an Army researcher, for use in their professional activities. The journals in question were *Medicine*, *Pharmacological Reviews*, *The Journal of Immunology*, and *Gastroenterology*. *Id.* at 1347, 1349. Note also that although the NLM regularly made copies of journal articles for other libraries, this was not made part of Williams & Wilkins' complaint. See *id.* at 1348.

¹⁰⁵ *Id.* at 1378 (Cowen, C.J., dissenting) (quoting trial judge's opinion).

¹⁰⁶ *Id.* at 1380 (Cowen, C.J., dissenting) (quoting trial judge's opinion).

¹⁰⁷ See, e.g., *Copyright Law Revision: Hearings Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, United States Senate, on S. 1361*. 93rd Cong. 89 (1973) [hereinafter *1973 Hearings*] (statement of Dr. Stephen A. McCarthy, Executive Director, Ass'n of Research Libraries, Jul. 31, 1973).

unused copy could not be obtained through normal trade sources.¹⁰⁸ The library groups felt that this requirement was unnecessary for copying articles or contributions to a periodical, and thus proposed amending 108(d) so that only copying an entire work would require a library to first determine commercial unavailability.¹⁰⁹ This amendment was intended both to counter the 1972 *Williams & Wilkins* decision and to facilitate interlibrary loan services.¹¹⁰ As a representative of the ARL argued, “a reader who is from a distant library seeking to obtain library materials through interlibrary loan will be particularly penalized . . . since he will not be in a position easily without substantial loss of time to comply with the [requirement to determine commercial unavailability].”¹¹¹

Publisher and author groups objected vehemently to both the original section 108 language and the library groups’ proposed amendment. Many argued, as they had in the past, that allowing single-copy reproduction would severely harm publishers, especially those in the scientific, technical, and medical fields.¹¹² Some, such as the Association of American Publishers, pushed for a clearance and licensing system.¹¹³ Others, such as the publishing house Harcourt Brace Jovanovich, argued that the National Commission on New Technological Uses of Copyrighted Works (CONTU), to be created under the 1973 bill, should be given a chance to study and compile data on the subject before section 108 could “freeze potentially detrimental measures into our laws for years to come and to remove any impetus for thorough consideration of this issue.”¹¹⁴

While the Senate Judiciary Patent, Trademark, and Copyright Subcommittee was considering these positions, the full U.S. Court of Claims narrowly reversed Commissioner Davis’ *Williams & Wilkins* ruling, holding that the NLM’s journal copying did constitute fair use under the four-factor test, and that the “record . . . fails to show a significant detriment to plaintiff but does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful.”¹¹⁵ The majority stressed, however, that its ruling should be read narrowly, and urged Congress to take action as soon as possible.¹¹⁶ The case was immediately appealed to the Supreme Court.

In the meantime, the Senate subcommittee reported the revision bill to the full Judiciary Committee in April 1974, keeping intact the essence of the library groups’ amendment by distinguishing between copies for users of portions of works (subsection (d)) versus entire works.¹¹⁷ The subcommittee also added subsections requiring notice of copyright to be placed on copies, and specifying those works which were barred from library and archive reproduction except for the purposes of preservation or

¹⁰⁸ S.1361, 93rd Cong. § 108 (1973).

¹⁰⁹ See, e.g., 1973 Hearings, *supra* note 107, at 90 (testimony of Dr. Stephen A. McCarthy, Executive Director, Ass’n of Research Libraries, Jul. 31, 1973).

¹¹⁰ See 1983 REGISTER’S REPORT, *supra* note 8, at 46.

¹¹¹ 1973 Hearings, *supra* note 107, at 90 (testimony of Dr. Stephen A. McCarthy, Executive Director, Ass’n of Research Libraries, Jul. 31, 1973).

¹¹² See, e.g., *id.* at 114-15 (testimony of Robert W. Cairns, Executive Director, American Chemical Society, Jul. 31, 1973).

¹¹³ See *id.* at 144 (statement of W. Bradford Wiley, Chairman and Chief Executive of the Ass’n of American Publishers, Jul. 31, 1973).

¹¹⁴ *Id.* at 130 (testimony of Ambassador Kenneth B. Keating, Harcourt Brace Jovanovich, Inc., Jul. 31, 1973).

¹¹⁵ *Williams & Wilkins*, 487 F.2d, at 1362.

¹¹⁶ *Id.* at 1362, 1363.

¹¹⁷ 1983 REGISTER’S REPORT, *supra* note 8, at 47.

replacement.¹¹⁸ More controversially, the subcommittee added a new provision, subsection (g)(2), stating that “the rights of reproduction and distribution under this section . . . do not extend to cases where the library or archives, or its employee: . . . (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d).”¹¹⁹ Subsection (g)(2) was greeted by “howls of outrage” by library groups, who saw it as taking away the very interlibrary loan flexibility given by the amendments to subsection (d).¹²⁰

Publishers and authors generally accepted the new restriction, arguing that “as a technical matter, a prohibition against systematic copying was implicit in the rest of the section; however, the amendment allowing nearly unrestricted single copying of journal articles and similar works made an explicit prohibition against doing this on a systematic basis essential.”¹²¹ Achieving compromise on the “systematic copying” issue was made more difficult by the fact that the same groups debating the copyright bill were also filing *amicus* briefs with the Supreme Court in the *Williams & Wilkins* case, a situation that tended to make their legislative positions “increasingly inflexible and tenacious.”¹²² The Copyright Office and the National Commission on Libraries and Information Science convened a series of meetings to arrive at a proper interpretation of “systematic,” but no consensus was ever reached.¹²³

The full Senate Judiciary Committee reported the revision bill in July 1974, and the Senate passed it in September, with the same language that the subcommittee had reported,¹²⁴ adding only the exception for audiovisual news programs, which was proposed by Senator Baker. This new provision was intended to legitimize the type of activities engaged in by the Vanderbilt University Television News Archive in Tennessee,¹²⁵ which had started building a major archive of national television news programming.

An identical revision bill was introduced in both the House and the Senate at the beginning of the 1975-76 Congress.¹²⁶ One month later, the Supreme Court split 4-4 on the *Williams & Wilkins* appeal, which automatically affirmed the full Court of Claims decision in favor of the NLM, but robbed that decision of any precedential weight.¹²⁷ Thus, free of litigation concerns for the time being, the publisher, author, library, and archive interest groups refocused on the copyright revision legislation and section 108. The Senate held a gargantuan 18 days of hearings from May through December 1975, and those sessions devoted to library and archive reproduction tended to revolve around the new “systematic copying” restriction.¹²⁸ Libraries complained that “it is impossible to determine exactly what it means,” but that “it appears . . . to be potentially applicable whenever a library makes a photocopy of an article or other portion of a published work

¹¹⁸ S. REP. NO. 93-983, at 11-13, 120-123 (1974).

¹¹⁹ *Id.* at 13, 121-123.

¹²⁰ 1975 DRAFT REGISTERS REPORT, *supra* note 89, at ch.III p.14.

¹²¹ *Id.*

¹²² *Id.* at ch.III p.15.

¹²³ *See id.*

¹²⁴ S. REP. NO. 94-92, at 5 (1975).

¹²⁵ 1975 DRAFT REGISTER’S REPORT, *supra* note 89, at ch.III p.21.

¹²⁶ *See id.* at ch.III p.15.

¹²⁷ *See id.* at ch.III p.16.

¹²⁸ *See* 1983 REGISTER’S REPORT, *supra* note 8, at 49.

in the context of a ‘system,’” such as a city or county branch library system, a university, or a regional consortia.¹²⁹ The libraries’ fear was that subsection (g)(2) would bar single copying for library patrons through interlibrary loan.¹³⁰

Publishers, relying in part on the Judiciary Committee’s 1974 report language, maintained that the “systematic copying” ban was both easily understandable and necessary:

We think it unnecessary to belabor the point that unauthorized systematic copying – the kind of copying that is done at a research center, or at a central resource point for use in a library network – is the functional equivalent of piratical reprint publication. Certainly this kind of copying must be paid for if, as the National Commission on Libraries and Information Science puts it, “the economic viability and continuing creativity of authorship and publishing” are to be protected.¹³¹

Apparently convinced by the library groups’ arguments, the House Judiciary Committee in 1976 added a proviso to Section 108(g)(2) stating 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.¹³²

This proviso, the House Report cautioned, would require “more-or-less specific guidelines” in order to be workable, guidelines that CONTU was in the course of drafting.¹³³

The CONTU guidelines on photocopying and interlibrary loan were published in the Conference Report on the Copyright Act of 1976, along with the House’s 108(g)(2) interlibrary loan proviso.¹³⁴ Setting forth specific rules under which libraries and archives could make interlibrary loan copies, the CONTU guidelines gave shape to the proviso’s bar on “aggregate quantities as to substitute for a subscription to or purchase of” a copyrighted work.¹³⁵ This was the final substantive brick in the Section 108

¹²⁹ *Copyright Law Revision: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice, of the Comm. on the Judiciary, House of Representatives, on H.R. 2223*, 94th Cong. 206 (1976) [hereinafter *1975 Hearings*] (statement of John P. McDonald, Executive Director, Ass’n of Research Libraries, May 14, 1975).

¹³⁰ See, e.g., 1983 REGISTER’S REPORT, *supra* note 8, at 49-50.

¹³¹ *1975 Hearings, supra* note 129, at 227 (statement of Charles H. Lieb, Copyright Counsel, Ass’n of American Publishers, May 14, 1975).

¹³² H.R. REP. NO. 94-1476, at 78 (1976).

¹³³ *Id.*

¹³⁴ CONF. REP. NO. 94-1773, at 71-74 (1976).

¹³⁵ *Id.* The full text of the CONTU guidelines is reprinted in U.S. COPYRIGHT OFFICE, CIRCULAR 21, REPRODUCTION OF COPYRIGHTED WORKS BY EDUCATORS AND LIBRARIANS 18-19 (1995) available at <http://www.copyright.gov/circs/circ21.pdf>.

edifice. The House and Senate both approved the Conference Report, and the Copyright Act of 1976 was signed by President Gerald Ford on October 19, 1976.¹³⁶

COPYRIGHT OFFICE REPORTS

The 1976 Copyright Act included a requirement – subsection 108(i) – that the Copyright Office consult with stakeholders and issue a report in 1983 – and every five years thereafter – assessing whether section 108 had achieved the intended balance between the rights of copyright owners and the needs of libraries and archives.¹³⁷ This requirement indicated that, even after fifteen years of negotiations, Congress wasn't entirely sure that it had gotten the balance right. The 1983 report was an enormous seven-volume effort (including appendixes). While noting that 1982 discussions between copyright owners and libraries on photocopying issues had been marked by “dominant and unrelieved” disagreement,¹³⁸ the report concluded that, for the most part, the 1976 balance was fair and workable.¹³⁹ The report did also propose four statutory recommendations, none of which was ever adopted:

1. Pursuant to an industry-library agreement, amend § 108 to allow the reproduction of an entire musical work if the library cannot locate the copyright owner.
2. In order to encourage more participation in collective licensing agreements, enact an “umbrella statute” limiting rights-holders to reasonable copying fee damages for infringement of specialty journals under certain conditions.
3. Clarify the requirement that library reproductions bear a copyright notice. (This requirement was ultimately revised by the DMCA amendments discussed below.)
4. Clarify that unpublished works are excluded from the exemptions for patron-requested reproductions.¹⁴⁰

The Copyright Office's follow-up 1988 report on the library exemption, a much briefer three-volume survey, re-affirmed the conclusion of the 1983 report, and cited remarks from copyright owners and libraries that, it maintained, “indicate a convergence of the sharply divergent views that these parties expressed during the first five-year review.”¹⁴¹ The only statutory recommendation this time around was to expand the scope of the 108(i) reports to encompass a study on the effects of new technology on the section

¹³⁶ 1983 REGISTER'S REPORT, *supra* note 8, at 55.

¹³⁷ CONF. REP. NO. 94-1773, at 71.

¹³⁸ 1983 REGISTER'S REPORT, *supra* note 8, at 11.

¹³⁹ *Id.* at 1.

¹⁴⁰ *See id.* at 360-62.

¹⁴¹ THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108): SECOND REPORT 39-41 (1988).

108 balance. If that couldn't be accomplished, the Copyright Office recommended that the five-year reporting process be either discontinued, or modified to require reports every ten years.¹⁴² A mandate to study the effects of new technology was not added to 108(i), and the five-year reporting requirement was deleted from the statute in 1992.¹⁴³

¹⁴² *Id.* at x, 129.

¹⁴³ S. REP. NO. 102-194, at 7 (1991).

PART II: SECTION 108: THE COPYRIGHT ACT OF 1976, THE DMCA, AND THE CTEA

Since 1976 section 108 of the Copyright Act has been modified only slightly: The Digital Millennium Copyright Act of 1998 (DMCA) amended subsections 108(a), (b), and (c) by, *inter alia*, extending the single copy limit to three copies. The Copyright Term Extension Act of 1998 (CTEA) added current section 108(h) permitting libraries, archives and non-profit educational institutions to use most categories of orphan works in their last 20 years of their copyright term. The following is a brief description of the provisions of the current section 108, as elucidated by the legislative history and Copyright Office reports and clarifications. Little mention of judicial interpretations of section 108 is made below, only because there is scant published case law specifically addressing its provisions. Finally, for brevity's sake, the term "libraries" is used to refer to "libraries and archives."¹⁴⁴

GENERAL LIBRARY EXCEPTIONS

Subsection 108(a) lays out the general conditions for libraries and archives to take advantage of the section 108 exceptions. It should be noted that the text and structure of subsection 108(a) have been a source of some confusion, appearing to some as granting an independent exception allowing single copies. However, the legislative history of the 1976 Act makes clear that 108(a) instead serves as a chapeau for the specific exceptions set forth in the subsequent provisions. The House Report, after explicating the language of subsection (a) regarding commercial advantage, public access, and notice of copyright, then states that "the rights of reproduction and distribution under section 108 apply in the following circumstances:"¹⁴⁵ and goes on to discuss the remainder of section 108.

Subsection 108(a) also lays out several conditions that must be met in order to take advantage of any of the section 108 exceptions and limitations:

- Only one copy of a work can be made, unless otherwise specified in the subsections that follow.

¹⁴⁴ Section 108 does not define "libraries" or "archives." The 1976 House Report, however, states that "a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies." H.R. REP. NO. 94-1476, at 74 (1976). In addition, the Senate Report to the DMCA notes that "just as when section 108 of the Copyright Act was first enacted, the term 'libraries' and 'archives' as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public." S. REP. NO. 105-190, at 62 (1998). *See also* Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1494 n.6 (11th Cir. 1984) (noting that a commercial organization that videotapes television news programs and sells the tapes is not an "archive" within the meaning of section 108); United States v. Moran, 757 F. Supp. 1046, 1051 (D. Neb. 1991) (indicating that a commercial video rental store does not operate as a library or archives, and thus cannot make unauthorized "replacement" copies of copyrighted works under section 108).

¹⁴⁵ H.R. REP. NO. 94-1476, at 75.

- Library copies cannot be made for direct or indirect commercial advantage. (§ 108(a)(1).) According to the 1976 House Report, this condition in itself does not preclude libraries in for-profit organizations (such as law firms or industrial research centers) from taking advantage of section 108, in that it only bars commercial advantage from attaching to the act of reproduction, not to the overall goal of the institution where the reproduction takes place.¹⁴⁶ Libraries in for-profit institutions may be excluded from section 108 privileges, however, by virtue of the following condition:
- Collections must be open to the public or to unaffiliated researchers in a specialized field. (§ 108(a)(2).) Unless a corporation is willing to make its collections open to other researchers in the field (which may include, for example, employees of a competitor), it cannot claim a section 108 privilege.¹⁴⁷ In addition, making a collection open to the public solely through interlibrary loan, does not qualify a library as “open” for the purposes of section 108.¹⁴⁸
- All library copies must bear a copyright notice identical to the one on the work being copied. If a work doesn’t have a copyright notice, the library copy must include a legend that states that the work may be protected under copyright. (§ 108(a)(3).) The 1976 Act said simply that the reproduction or distribution of a work by a library include a notice of copyright. The 1998 DMCA amendment eased this requirement by allowing libraries to state that a work “may” be protected.¹⁴⁹

Subsection 108(i) at the end of the section also sets forth another general qualifier. The reproduction and distribution of a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news is allowed only for preservation and replacement purposes. If pictorial and graphic works are published as parts of non-excluded works, then their copying is allowed. (§ 108(i).) Essentially, these provisions limit research-related copying to traditional print materials, while allowing preservation-related copying for a broader range of works.

EXCEPTIONS FOR PRESERVATION AND REPLACEMENT

Subsections 108(b) and (c) provide limited exceptions permitting libraries to make up to three copies of a copyrighted work for preservation, deposit or replacement purposes, under certain circumstances.

¹⁴⁶ *Id.* Note, however, that the Senate Report states that subsection 108(a)(1) “is intended to preclude a library or archives in a profit-making organization from providing photocopies of copyrighted materials to employees engaged in furtherance of the organization’s commercial enterprise.” S. REP. NO. 94-473, at 67 (1975).

¹⁴⁷ See 1983 REGISTER’S REPORT, *supra* note 8, at 78-79.

¹⁴⁸ See *id.* at 78.

¹⁴⁹ See S. REP. NO. 105-190, at 60 (1998).

Specifically, subsection 108(b) provides that a library may reproduce and distribute up to three copies of an unpublished work, solely for the purposes of preservation, security, or deposit for research in another library. (§ 108(b).) This provision was designed to apply to “an archival collection of original manuscripts, papers, and the like, most of which are unpublished, and for which a rigorous preservation regime serves the needs of archives and scholars.”¹⁵⁰ Libraries may not loan preservation copies of unpublished works to patrons, as this would infringe the copyright owner’s right of first publication.¹⁵¹ Initially applicable to only a single copy, the limit was raised to three copies as part of the DMCA amendments in 1998, at the same time that libraries were given the permission to make digital reproductions for preservation.¹⁵²

The rationale for raising the preservation copy limit to three, as opposed to a “limited number” as in subsection 108(f)(3), is not fully explained. The 1995 National Information Infrastructure Task Force Report – which was a foundational document for the DMCA drafters¹⁵³ – did recommend an allowance of “three copies of works in digital form,” “to accommodate the reality of the computerized library.”¹⁵⁴ But the three-copy limit more closely tracks the pre-digital (e.g., microform) preservation standard of an “iron mountain” copy, a master copy, and a use copy,¹⁵⁵ than it does the realities of digital preservation (in that digital copies are highly unstable and cannot be simply made once and for all and stored away). The DMCA Senate report does not explicitly link the three-copy expansion to the allowance of digital preservation copies, nor does it refer to the microform standard.¹⁵⁶

Triplicate reproduction and distribution of unpublished works are subject to two conditions:

1. The work must already reside in the collection of the library making the reproduction. (§ 108(b)(1).) The work does not have to reside in the collection of a library in whose collections it is deposited for research, however, according to the 1976 House Report.¹⁵⁷
2. If a work is reproduced in a digital format, the library’s right of distribution of that copy is limited to the library’s physical premises. (§ 108(b)(2).) The 1998 Senate Report states that this limitation is designed to limit the risk of digital copies of a work entering into widespread circulation and thus harming the owner’s potential market.¹⁵⁸

¹⁵⁰ 1983 REGISTER’S REPORT, *supra* note 8, at 105.

¹⁵¹ *See id.*, at 105-06.

¹⁵² *See* S. REP. NO. 105-190, at 61.

¹⁵³ *See, e.g., id.* at 2-3.

¹⁵⁴ WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE 227 (1995), *available at* <http://www.uspto.gov/web/offices/com/doc/ipnii/ipnii.pdf>.

¹⁵⁵ *See* CAROL C. HENDERSON, AMERICAN LIBRARY ASS’N, LIBRARY PRESERVATION: CHANGES INCORPORATED IN H.R. 2281 THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998 (PL 105-304) 1 (1998), *available at* <http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/preservation.pdf>.

¹⁵⁶ *See* S. REP. NO. 105-190, at 60-62 (1998).

¹⁵⁷ *See* H.R. REP. NO. 94-1476, at 75 (1976).

¹⁵⁸ S. REP. NO. 105-190, at 61-62.

Subsection 108(c) provides a right to create replacement copies for published works. It states that a library has the right of reproduction for up to three copies of an entire published work, so long as this right is exercised only to replace a work that is damaged, deteriorating, lost, stolen, or in an obsolete format. (§ 108(c).) Two additional conditions must be met in order to qualify for the this exception:

1. No copies can be made until the library first consults the copyright owner and standard trade sources¹⁵⁹ to determine that an unused copy cannot be purchased at a fair price. (§ 108(c)(1).)
2. If a work is reproduced in a digital format, that copy cannot be made available to the public outside the premises of a library with lawful possession of the digital reproduction. (§ 108(c)(2).)

This provision (also initially applicable only to a single copy) was designed to make sure that items in library collections are preserved in usable form despite factors – like time, chance, and technology – beyond the library’s control.¹⁶⁰ Unlike subsection 108(b), pertaining to unpublished works, this provision does not expressly provide libraries with the right to distribute the copies made.¹⁶¹ It is nevertheless implied that the library will retain the same rights of distribution to the copy as it did to the original version of the work (under the first sale doctrine), since the purpose of the provision is to permit continued access to the work.¹⁶² Also deemed implied is the ability of one library to make a replacement copy for another library, if that other library’s only copy of the work is lost or stolen, or is so badly damaged as to preclude the making of a readable copy from it.¹⁶³ Note that the ability to make a copy to replace an obsolete copy was added by the DMCA.¹⁶⁴ A format is considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace. (§ 108(c).)

EXCEPTIONS FOR PATRON RESEARCH

Sections 108(d) and (e) provide exceptions to permit reproduction and distribution of copyrighted works at the request of patrons, under certain circumstances. These rights vary depending on whether an article or contribution to a collective work is copied or the whole work is.

¹⁵⁹ H.R. REP. NO. 94-1476, at 75-76.

¹⁶⁰ See S. REP. NO. 105-90, at 62.

¹⁶¹ Note that a federal district court has ruled that “a library distributes a published work, within the meaning of the Copyright Act . . . when it places an unauthorized copy of the work in its collection, includes the copy in its catalog or index system, and makes the copy available to the public.” *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997). The meaning of this for libraries that make replacement copies under section 108 is unclear, as the *Hotaling* court declined to address the defendant’s 108(c) arguments. See *id.* at 204.

¹⁶² See S. REP. NO. 105-90, at 62 (1998).

¹⁶³ See 1983 REGISTER’S REPORT, *supra* note 8, at 114.

¹⁶⁴ See S. REP. NO. 105-90, at 62.

Pursuant to subsection 108(d), a library has the right to make one copy of a single article from a collection or a small part of a larger work at the request of a patron or other library under the following four conditions:

1. The work must be in the collection of the library where the patron makes the request, or of another library. (§ 108(d).)
2. The copy must become the property of the requesting patron, and cannot be added to the library's collections. (§ 108(d)(1).)
3. The library must have no notice that the copy will be used for anything other than research purposes. (§ 108(d)(1).)
4. The library must both display a copyright warning where copy orders are made, and attach the same warning to copy order forms. (§ 108(d)(2).)

Libraries are also allowed to make single copies of entire works, or substantial parts thereof, pursuant to patron requests, under the following five conditions: (§ 108(e).)

1. The library must first consult the copyright owner and standard trade sources¹⁶⁵ to determine that a used or unused copy cannot be purchased at a fair price. (§ 108(e).)
2. The work must be in the collection of the library where the patron makes the request, or of another library. (§ 108(e).)
3. The copy must become the property of the requesting patron, and cannot be added to the library's collections. (§ 108(e)(1).)
4. The library must have no notice that the copy will be used for anything other than research purposes. (§ 108(e)(1).)
5. The library must both display a copyright warning where copy orders are made, and attach the same warning to copy order forms. (§ 108(e)(2).)

FURTHER LIMITATIONS ON REPRODUCTIONS FOR PATRONS

Subsection 108(g) provides further limitations on the ability to make copies for library patrons. While isolated and unrelated reproductions of a single copy of the same material can be made by a library on separate occasions, such copying cannot be done if the library knows or has substantial reason to believe that it is engaged in the related or concerted reproduction or distribution of multiple reproductions of the same material, whether on one occasion or repeatedly, and whether intended for aggregate use by one or more individuals or for separate use by the members of a group. (§ 108(g)(1).) The

¹⁶⁵ H.R. REP. NO. 94-1476, at 75-76 (1976).

Senate Report, by way of example, states that “if a college professor instructs his class to read an article from a copyrighted journal, the school library would not be permitted . . . to reproduce copies of the article for the members of the class.”¹⁶⁶

Systematic reproduction of single articles or portions of larger works (as described in subsection (d)) is forbidden, even if the library is unaware that its reproductions are, in fact, systematic. (§ 108(g)(2).) According to the Copyright Office’s 1983 Report, whether or not reproduction is “systematic” is an objective test; if the reproduction is done via a common plan, regular interaction, organized or established procedure, then it is infringing.¹⁶⁷ The 1975 Senate Report, while saying that a specific definition of “systematic copying” is impossible, provides three examples:

(1) A library with a collection of journals in biology informs other libraries with similar collections that it will maintain and build its own collection and will make copies of articles from these journals available to them and their patrons on request. Accordingly, the other libraries discontinue or refrain from purchasing subscriptions to these journals and fulfill their patrons’ requests for articles by obtaining photocopies from the source library.

(2) A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions.

(3) Several branches of a library system agree that one branch will subscribe to particular journals in lieu of each branch purchasing its own subscriptions, and the one subscribing branch will reproduce copies of articles from the publication for users of the other branches.¹⁶⁸

A proviso to the “systematic copying” clause clarifies that it is not intended to prevent libraries from participating in interlibrary arrangements, so long as their purpose or effect is not to provide a receiving library with such aggregate quantities of material as to substitute for a subscription to or purchase of the work. (§ 108(g)(2).) In crafting this proviso, the House intended the meaning of “aggregate quantities” and “substitute for a subscription to or purchase of” to be clarified by guidelines developed by the Commission on New Technological Uses of Copyrighted Works (CONTU).¹⁶⁹ CONTU was established under separate legislation in 1974 for the purpose of studying the reproduction and use of copyrighted works by computers and other types of machine reproduction.¹⁷⁰ CONTU’s guidelines were published in the Conference Report for the

¹⁶⁶ S. REP. NO. 94-473, at 70 (1975).

¹⁶⁷ 1983 REGISTER’S REPORT, *supra* note 8, at 139.

¹⁶⁸ S. REP. NO. 94-473, at 70. In addition, the U.S. Court of Appeals for the Second Circuit has analyzed the meaning of “systematic” copying in the context of actions by a library in a for-profit corporation. This analysis, however, was within the fair use context, and did not directly address 108(g). *See American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 916, 919-20, 924-25 (2d Cir. 1994).

¹⁶⁹ *See* H.R. REP. NO. 94-1476, at 78.

¹⁷⁰ S. REP. NO. 94-92, at 15-16 (1975).

1976 Act.¹⁷¹ They do not have the force of law, but were endorsed by the conference committee as “a reasonable interpretation of the proviso of section 108(g)(2) in the most common situations to which they apply today.”¹⁷²

EXCEPTIONS FOR NEWSCASTS

Section 108 also includes a provision specific to audiovisual news programs. Section 108(f)(3) permits libraries to copy and distribute (by lending) a limited number of copies and excerpts of audiovisual news programs. The only conditions required for a library to avail itself of this exception are the general conditions set out in subsection 108(a). Distribution of audiovisual news program copies is limited to lending, in order to prevent performance or sale by the recipients.¹⁷³ Note that the House Report describes “audiovisual news programs” as “daily newscasts of the national television networks, which report the major events of the day.”¹⁷⁴

EXCEPTIONS FOR ORPHAN WORKS IN LAST TWENTY YEARS OF TERM

Subsection 108(h) was added in 1998 as part of the CTEA, which lengthened the term of copyright protection by 20 years.¹⁷⁵ Congress enacted subsection 108(h) in response to the concerns expressed about the increase in the number of older works that would be taken out of the public domain even though they are no longer available for purchase or subject to commercial exploitation.¹⁷⁶

Once a published work is in its last 20 years of copyright protection, a library or archives, including a nonprofit educational institution, may reproduce, distribute, display, or perform that work, provided that the library has determined after reasonable investigation:

1. The work is not currently subject to normal commercial exploitation. (§ 108(h)(2)(A).)
2. A new or used copy of a work is not available at a reasonable price. (§ 108(h)(2)(B).)
3. The rights-holder has not notified the Copyright Office that the work is either subject to normal commercial exploitation, or is available at a reasonable price. (§ 108(h)(2)(C).) It is interesting to note that no rights-holder has ever filed a notice under this provision.

¹⁷¹ CONF. REP. NO. 94-1733, at 72-74 (1976).

¹⁷² *Id.* at 71-72.

¹⁷³ *See* H.R. REP. NO. 94-1476, at 77 (1976).

¹⁷⁴ *Id.*

¹⁷⁵ H.R. REP. NO. 105-452, at 2 (1998).

¹⁷⁶ *See, e.g.* ARNOLD P. LUTZKER, AMERICAN LIBRARY ASS’N, PRIMER ON THE DIGITAL MILLENNIUM 24 (1999), available at <http://www.ala.org/ala/washoff/WOissues/copyrightb/dmca/dmcaprimer.pdf>.

This provision is currently modified by subsection 108(i) so that it does not apply to those categories of works listed in 108(i). This exclusion, however, was a technical error and that a bill is currently before Congress to correct it.¹⁷⁷

Note that the exception applies only to the library or archive itself and not to their patrons or other downstream users. (§ 108(h)(3).) Also note that the exception is not limited to analog reproduction, nor is there a requirement that the work already reside in the library's collection. The general subsection 108(a) conditions do apply, however.

LIABILITY

There are several provisions in the Copyright Act that limit the liability of libraries and archives, in section 108 and elsewhere. Section 108(f)(1) provides that libraries and their employees are immune from liability for copyright infringement for the unsupervised use of copying equipment located on library premises, provided that the equipment bears a notice that the user is subject to copyright law. If the equipment does not bear this notice, the library is not shielded from liability. Furthermore, employee use of a copier located in the library of a for-profit entity is presumptively “supervised.”¹⁷⁸

This does not, however, limited the liability of library patrons, who engage in unsupervised use of copying equipment, or who request copies of articles or small portions or larger works, where their initial copying or subsequent use of the copy exceeds the bounds of fair use. (§ 108(f)(2).)

Another important limitation of liability is found in subsection 504(c)(2). If a nonprofit library, archive or educational institution, or any employee or agent acting within the scope of employment, is found to have infringed a copyright, but had reasonable grounds to believe that the use of the work was “fair use” under section 107, statutory damages will not be imposed.

FAIR USE AND CONTRACTS

Last, but not least, subsection 108(f)(4) contains language to clarify that nothing in section 108 nullifies or affects a library's fair use rights or contractual obligations. Libraries may still avail themselves of fair use to the extent applicable. As a matter of practice, libraries rely heavily on fair use – particularly with respect to the use of digital works, for which there is currently little clear legislative guidance.

The clarification regarding contracts ensures that libraries honor those who donate works with the understanding that they will not be reproduced.¹⁷⁹ In addition, it makes clear that nothing in section 108 frees libraries from contracts, including license

¹⁷⁷ Preservation and Restoration of Orphan Works for Use in Scholarship and Education (PRO-USE) Act of 2005, H.R. 24, 109th Cong. (2005). According to Register of Copyrights Marybeth Peters, the failure to carve out subsection (h) from subsection (i) was an oversight. *Oversight Hearing on the “Operations of the Copyright Office” Before the Subcomm. on Courts, the Internet, and Intellectual Property of the Comm. on the Judiciary, United States House of Representatives, 108th Cong.* at 28 (2004) (statement of Marybeth Peters, Register of Copyrights, U.S. Copyright Office), available at <http://judiciary.house.gov/oversight.aspx?ID=49>; Marybeth Peters, *Copyright Enters the Public Domain*, 51 J. COPYRIGHT SOC'Y U.S. 701, 713 (2004).

¹⁷⁸ See H.R. REP. NO. 94-1476, at 75.

¹⁷⁹ H.R. REP. NO. 94-1476, at 77 (1976).

agreements, that they have entered into with rights-holders that prohibit or restrict reproduction, distribution, or the exercise of any other right.

CONCLUSION

As you can see, the provisions of section 108 were the product of extensive negotiations among the various interests, all prior to the full advent of digital media as we know it today. We are optimistic that the Section 108 Study Group will find ways to ensure that section 108 continues to maintain the copyright balance so that creators and users alike will reap the full benefits of the digital age.

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