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Mary Rasenberger
Director of Program Management
National Digital Information Infrastructure and Preservation Program
Office of Strategic Initiatives
Library of Congress
James Madison Memorial Building, Room LM-637
101 Independence Avenue S.E.
Washington, DC 20540

via e-mail to: section108@loc.gov

Re: Response by the Society of American Archivists to the Notice of Inquiry Concerning Section 108 Study Group: Copyright Exceptions for Libraries and Archives, *Federal Register:* December 4, 2006 (Vol. 71, No. 232) pages 70434-70440

Dear Ms Rasenberger:

On behalf of the Society of American Archivists (SAA), I write in response to the December 4, 2006 *Federal Register* (Vol. 71, No. 232) notice seeking information on certain issues relating to the exceptions and limitations applicable to libraries and archives under the Copyright Act. SAA serves the educational and professional needs of its members, including more than 4,700 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission, SAA exerts active leadership on significant archival issues by shaping policies and standards, and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

As professionals involved in the preservation and use of copyrighted works held in archives and manuscript repositories, archivists have long relied on Section 108 provisions to accomplish our core mission and serve students, scholars, and the public. We applaud the work of the Section 108 Study Group to examine what adjustments might be needed in Section 108 provisions in light of new technology. Archivists have long embraced the use of information technology as a way to connect our users with historical records and manuscripts that answer our users' research and study needs. At the same time, archivists have been very careful to balance this service mission with a respect of the copyrights of the authors of works we hold. In brief, Section 108, along with other provisions of the law, most notably Fair Use in Section 107, have been important tools in our work. For this reason the range of issues identified in the Section 108 Study Group's December 4, 2006, Notice of a Public Roundtable are of particular interest.

Our attached response on the particular issues in Topics A, B, and C identifies our specific concerns.

Sincerely,

ELIZABETH ADKINS
President, 2006–2007

527 SOUTH WELLS STREET, 5TH FLOOR | CHICAGO, IL 60607-3922 USA
TEL 312/922-0140 | FAX 312/347-1452 | E-MAIL info@archivists.org | WEB www.archivists.org

Topic A

Question 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?

The copyright law should allow archives to make and deliver digital copies of works that are not reasonably available to their users, and permit more flexibility in the creation of multiple copies in the digitization and delivery process. Most archives are small organizations, and much of the material they hold was not published widely, or was never published. Because archives generally collect materials many years after their creation, by definition the materials are not current. As a result, it is likely that duplication of archival material will pose a de minimus problem to rights holders' financial interests.

Question 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?

Yes. The single copy restriction should be changed to allow archivists to make copies as part of the digital duplication and transmission process that results in a single copy to the requesting patron. The process of digitization is time consuming and resource intensive. Archivists often wish to make several digital versions for specific uses; such as a high quality master for preservation, and lower-resolution copies to use when transmission time is a factor (for example, thumbnails for an online catalog or for images intended to be displayed on a monitor). The ability to make multiple versions at differing resolutions can help protect further reproduction of copies distributed over the web; creators are less likely to reuse lower-quality images suitable for viewing on a monitor. For example, monitors are – at best – 96 dpi resolution; that is much worse than what is reproduced in a newspaper, much less a book. (Newspapers are usually 200-300 dpi). The flexible standard should apply to both a repository's own users and copies made for remote users. Items that archives collect are very rare, and are not lent via interlibrary loan. Therefore, copies are the only way remote patrons can access archival material. Being able to make copies is thus absolutely vital to archives' mission.

Question 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?

Archives rely on subsection (d) to make copies for their own users. As noted above, archives do not lend their unique and rare materials through interlibrary loan, so all copies are requested by the archives' own users, both near and far, in order to facilitate their research in a collection. Most items are requested through a patron's direct inquiry to a reference archivist. If digital copies are expressly permitted, this will not result in a flood of additional copying, as changes in the amount of digital copying made for users will be constrained by the limited technology and personnel available at repositories to fill the requests.

Question 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?

The use of subsection (e) for requests by an archives' own users is prevalent. For example, a user at a distance might, for a particular collection, request copies of all correspondence exchanged in a specific period of time, which may consist of several folders worth of materials. However, it is unusual for a request for an entire work to come through inter-library loan auspices. In addition, many archives do not allow patron copying because of the uniqueness and fragility of their materials. Instead, they require that all copying be done by staff who are trained in the proper care and handling of the items. This results in a (relatively) high per page duplication cost for the patron. Under those circumstances archives very rarely create copies of an entire work unless, it is unique to our holdings and can be safely copied, such as unpublished manuscripts (personal letters and diaries, corporate memos and reports), photographs (snapshots), and early theses and dissertations that cannot be obtained through UMI.

As with digital copies under subsection (d), if digital copies of entire works are expressly permitted, this will not result in a flood of additional copying, as changes in the amount of digital copying made for users will be constrained by the limited technology and personnel available at repositories to fill the requests.

Question 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?

Archivists recognize that digital copies distributed to users do require some level of distribution control. Currently users are required to acknowledge with a signature that they understand the conditions placed on the copies they receive at the time of their request, and in cases of self-help copies, the copyright notice is prominently displayed. The onus of responsible use should remain on the archives patron in the digital arena as it does in the analog. Alternatively, it may be possible for a persistent identifier to be added to the digital copy, at the time of duplication if clear standards for their use can be made that would satisfy both libraries/archives and rights holders. Given the rapid changes in technology, specific technical solutions such as persistent identifiers should not be codified in law. Technology-based copy controls, should be avoided when possible, and if not possible, implemented with extreme care, since click-through licenses and DRM can prohibit lawful actions unnecessarily. In addition, requiring repositories to implement technical options could greatly increase costs of reproduction, effectively prohibiting small repositories from providing digital copies for patron request.

Question 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?

The materials held by archival repositories are unique, and the issue of "shopping" for user copies does not occur. In addition, requiring that digital copies be restricted to an archives' traditional or defined user committee would not be feasible for most public repositories. Archives' user communities are defined by those interested in the mission and collections of the archives, and those individuals may be scattered across the world. Digital copying will enable archives to overcome geographic barriers to serving their communities of users and serve them much more effectively.

Question 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?

Any limitations on sending digital copies directly to a user of archival collections would have a significant negative impact on the ability of archives to provide reference services to any user. As stated previously, rarely do any reference requests for archival collections come via ILL, we work almost exclusively directly with the user, and send requested copies directly to the user. Any change in this practice would prevent many users from using our collections, and it would prohibit many archives that are not a part of a library system from providing digital copies to reference requests.

Question 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?

Section 108 (d)(1) and (e)(1) should not be used to enlarge a receiving repository's collection via interlibrary loan, although the provisions of 108 (b) allowing copies for "deposit for research use in another library or archives" should remain unrestricted beyond the terms presently in 108 (b). Also, to clarify, the digital copy provided for a specific user should not be kept by the receiving library to make copies for other users. However, the repository in possession of the original material should be permitted to keep a digital copy. For digital copies of unique archival materials, it is considered best practices in preservation for the source library/archives to retain the digital files that they create for patron use, since this limits the wear and tear on popular items from repeated digitization.

Topic B
Question 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?

Our nation's archives maintain and preserve large collections of non-textual work: posters, architectural drawings, musical recordings, photographs, moving images, and more. But these collections are less accessible than textual records because of the arbitrary limits placed upon their duplication by Subsection 108(i) of the Copyright Act. Archivists need to have clear permission to be able to duplicate these types of materials for our users, or scholarship which depends upon access to audio and visual materials will continue to be relegated to second-class status. Therefore, we support the elimination of Subsection 108(i), so that non-textual items may be duplicated for users on the same basis as other materials in our collections.

Although audio and visual materials are of vital importance to many types of scholarship, including documentary film-making, music criticism and art history, the general public does not generally constitute a market for the materials we collect. Archival materials (by definition) are non-current, and not widely distributed. Concerns among rights holders that archives users would widely distribute the copies that they receive, in ways not justified by Fair Use, and thereby eviscerate sales or revenues, are unfounded. Indeed, for the vast amount of content we collect, there are no sales, and no prospect of any.

Question 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?

There is no justification for handicapping scholars' and students' non-infringing uses by requiring the distribution of copies of low resolution images, or recordings of reduced sampling rate. We would strongly object to restricting digital copies of visual works to thumbnails, because thumbnails are wholly inadequate for scholarly work, or even personal use and study. Archivists seek to be able to make copies for patrons in the format that best supports their work. It would be short-sighted to tie permission to duplicate audio and visual materials to particular current technology because the potential to impede future creative expression and innovation is significant; as such technological controls become obsolete at a half-life far less than that of copyright term.

As discussed in our response to Topic A, above, standard practice in archives requires that patrons sign a form acknowledging their duty to refrain from unauthorized use and copying of any duplicated materials they may receive. Copyright notices are prominently posted where self-duplication is permitted. Copyright notices may just as easily be posted on a website, or image databank as on a copying machine, which allows the responsibility for lawful use of materials to remain with the user.

Individuals who patronize archives are often intensely interested in the reliability and integrity of the materials. They want to know who made a document, and why, and when, and

how it was modified. To the extent that watermarking, or other persistent identifiers may overwrite or modify metadata for "born digital" documents, such a practice would be unacceptable for many archives users.

In addition, archives are often very small organizations, with limited staff (often one person), and little technological expertise. If the new law requires persistent identifiers, many archivists would not be able to comply with the law, and would prevent otherwise lawful uses of their collections because they could not implement the persistent identifier technology.

Question 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?

As related in the discussion of Topic A, archives generally interact directly with remote users, and not through the intermediary process of interlibrary loan. Other libraries and archives do not request copies of our materials in order to avoid purchasing their own copies or subscriptions, so, for archival materials, there is no reason to make rules different for interlibrary loan than for copies for individual users. Archives do have a history of depositing microfilm copies of selected collections at other repositories, where they may be used for research, and we would like to be able to continue with this practice, and to be able to make similar deposits for non-textual works.

Question 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?

Finally, at the very least, if the 108(i) restriction on the reproduction of non-textual works is not wholly eliminated, an additional exception should be added to permit the application of subsections (d) and (e) to musical or audiovisual works embedded in textual works. Although many archives collect records that would fit into this type of exception (such as websites, powerpoint presentations, email messages, and digital dissertations), archives users have not yet begun requesting access to these materials in great numbers. Archives obviously anticipate that researchers will want to access these materials in the future, however (or they would not collect them now). The Copyright Law should allow archives to provide access to these works by making copies for users.

Topic C
Question 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?

The 108 Study Group has made an important contribution in recognizing that access to and use of unlicensed digital works raises significant copyright issues. All use of a digital work implicates rights protected under copyright. Copying a digital file from a storage medium to RAM memory involves the rights of reproduction; sending copies to computers located across a network may implicate the right of distribution; displaying that work on a computer screen in a publicly accessible area may involve the right of public display and, if there are audiovisual elements in the work, the right of public performance.

The Study Group is mistaken, however, in its assertion that licensed access to digital materials is the most common form of access. The nation's archives have already begun to acquire, through legal transfer and donation, large numbers of unlicensed electronic works. They can be files of incoming emails stored in an administrator's computer, copies of word processing documents, electronic spread sheets, and digital presentations sent to an individual who then donates the files to a repository, and websites, PDF documents, and other quasi-electronic publications that may be distributed without any license information and subsequently gathered by the repository. There is little doubt that there is much more non-licensed information in the world today than there is licensed information, and much of that information is headed eventually to an archives.

Question 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?

The EU model is an effective start to thinking about how to provide access to this material. It would be unfortunate, however, if analog-like restrictions of number and place were brought to bear on digital information.

Question 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?

The Society of American Archivists does not have a comment on this question at this time.

Question 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?

The Society of American Archivists does not have a comment on this question at this time.

Question 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?

The Society of American Archivists does not have a comment on this question at this time.

Question 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.)?

The key issue is not to think about format, but rather the potential economic impact of increased access on the copyright owner and whether any harm that might accrue to the rightsholder is balanced by increased public benefit.

Question 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?

Archivists would like to see a limited right of public performance comparable to the existing public display right for any audiovisual work, digital or electronic. It is unfortunate that brief audiovisual excerpts are kept out of archival exhibits because of the fear that they could impinge on the public display rights.