

MEMORANDUM

Date: April 24, 2006

To: Mary Rasenberger
Policy Advisor for Special Programs,
U.S. Copyright Office

From: J. Robert Cooke, Chair
University Faculty Library Board
Cornell University
Ithaca, NY 14850

Re: Public Comment on Section 108: A Statement by the Cornell
University Faculty's Library Advisory Board Pertaining to U.S.
Copyright Law (Sect 108), April 2006

Our statement follows, but is also attached as a formatted PDF file.

The University Faculty Library Board, Cornell University: "Faculty
Concerns with Section 108 of U.S. Copyright Law and its Implications
for access to Academic Use of Digital Materials"

The University Faculty Library Board of Cornell University welcomes the opportunity to provide input into the revision of Section 108 of U.S. copyright law. We have spoken with representatives of our faculty for insights into how teaching and research at the university level is changing in relation to digital information, and the role that university libraries need to be able to play in the service of pedagogy in a digital age. As both creators and users of information, university faculty are in a unique and important position in regards to copyright law, and can offer a perspective that steps beyond the hardened political stances that currently dominate this important issue.

The university library is, more than ever, a vital hub for the collection, preservation, and circulation of digital information. And more than ever it must be free to maintain its collections, make those collections accessible in innovative ways, and host the tools necessary to work with and transform the content within. Faculty depend, in their teaching and research, on the library's ability to serve up information to the university community. But prohibitive technological and economic barriers, combined with legacy legal restrictions that could not have anticipated contemporary digital technologies, too often force the library to opt for cautious policies of restriction rather than cultivating an environment of

intellectual freedom.

While change in the law is often spurred by the arrival of a new technology, faculty face a more fundamental change: not just the proliferation of information technologies, but the 'digital culture' that is developing around them. Our students increasingly expect to be able to use information freely as part of their intellectual pursuits, and to have full use of the tools that maximize their ability to engage with and rework digital content. The careers they will pursue when they leave the university demand that they be nimble with information, expert in its use, and capable with its transformation. They reject artificial barriers, be they law or university policy, that disable the tools they know are available to them, and rightly so -- they are being asked to dive into a surging sea of information, and know that the difference between swimming and drowning is minute. Faculty are well aware of the importance of copyright to their work; but what is most troubling is when the restrictions on libraries and on academic use end up squelching classroom circulation of important content, close important work away behind artificial digital barriers, lock publicly funded research into private constraints, and render it impossible to make curricular decisions based solely on intellectual merit, as they should be.

Adjustments in Section 108 that commit to giving libraries the affirmative power to step up to this digital challenge, and that reaffirm the place of academic pursuits and intellectual freedom in the doctrine of copyright, will help university faculty lead their students into a digital future. From discussions with our faculty, we have identified a number of areas of particular concern:

Physical and electronic reserves are vital to the mission of the university; libraries need more freedom to make materials available to the university community and to proactively care for those materials as they circulate.

Because the circulation of physical materials incurs a greater risk of loss or damage, because those materials can include items that are rare, expensive, or fragile, and because the libraries have a unique expertise in preserving informational materials, libraries should have greater say about how and when to make copies of their materials in order to reasonably and proactively protect them from damage or loss and thereby ensure their availability to the university community. Making 'backup' copies of physical and digital materials simply has to be a part of the project of preservation, before damage is done. This should include having more leeway to digitize materials for these same reasons

The shrinking protections offered by Section 107's 'fair use' protections can in part be rectified by giving libraries greater freedoms in hosting and circulating content for the kinds of pedagogical purposes 'fair use' is meant to guard.

Again and again, the concerns raised by faculty from a variety of fields revolved around their ability to easily circulate materials of their choosing to their students digitally, whether that be into the classroom itself or as supplementary material for a course. The array of legal restrictions on the use of copyrighted materials, along with the clumsy and costly apparatus of clearing copyright for the classroom, has encouraged too many faculty to choose alternative materials for their students -- a choice that should only be based on intellectual relevance and pedagogical value. This is not only dangerous for quality teaching, it is also certainly not in the best economic interests of authors and publishers, who benefit from having their work assigned, read, considered, and built on. Copyright law must increasingly recognize academic use, and libraries' role in facilitating it, not just as an exception to a law otherwise dedicated to property and profit, but an activity fundamental to the intellectual ferment and cultural progress copyright law is intended to serve.

The role of the library is not just to preserve, but to provide access; allowing materials to freely circulate inside of password-protected networks is far preferable to technical copy protections that frustrate intellectual use.

The ability to make texts, images, audio, video, and other digital content available to students should be organized more around limiting access only to authorized users; libraries and universities should be authorized to determine who belongs inside the 'circle of trust' -- the university community as a whole, a team of scholars, or students enrolled in a specific course -- and be able to then free up the circulation of particular content inside of that circle. Diligently enforced password protection systems, as well as the use of streaming techniques for audio and video, should be considered a sufficiently valid protection to ensure that the use does not violate copyright. These kinds of access restrictions are much more amenable to faculty goals than are technical use restrictions. Digital Rights Management (DRM) and similar "content protections" are fundamentally anathema to the mission of the library and the intellectual community they serve, imposing too great a social cost for the meager protection they offer.

The ability to archive websites, either for small-scale research projects or classes, or on a massive scale for purposes of preservation, is and will continue to be a vital function of modern libraries.

It is counterintuitive that libraries can freely purchase copies of books for their collection, but have no clear legal authority to copy, preserve, and make available websites that are posted to the Internet for free, public use. These sites, more ephemeral than printed materials, are and will increasingly be a vital part of our cultural heritage, yet efforts to preserve them and include them in scholarly inquiry is hampered not only by technical challenges, but by ambiguity in the law. Copyright law needs to allow for the automatic preservation of publicly available online content by libraries, at their discretion. This may include developing simple ways for website designers to opt out of this archiving, but should maintain as the default the assumption that archiving is acceptable.

We thank the Library of Congress and the Copyright Office for opening up a dialogue on how copyright law might better serve the needs of libraries and the intellectual communities they serve as the production, use, circulation, and preservation of information shifts towards the digital. It is a vital moment not just to add this or that wrinkle to the existing rules, but to assert the values according to which these rules should be designed and applied. We look forward to continued collaboration in this vital project.

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J. Robert Cooke, Professor Emeritus
Department of Biological and Environmental Engineering
Cornell University
Ithaca, NY 14853