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Section 108 Study Group—Comments By Carl Johnson,<sup>1</sup>

### **Topic 1 - Eligibility for the Section 108 exceptions.**

Any revised library/archive definition should not be narrower or more restrictive than the present language of Section 108:

“... that the reproduction and distribution be made without any purpose of direct or indirect commercial advantage ...that the collections of the library or archive 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.”<sup>2</sup>

The revised definition of “libraries and archives” should remain flexible and should not be limited only to nonprofit or governmental entities. It should give consideration to library and archive activities as functions within an institution rather than strictly defined by institutional affiliation. The definition should be based on the nature of, and access to the collections, not merely on institutional existence.

It may be important to clarify the definition of a non-profit entity as distinguished from a non-profit activity. Caution is urged to not provide broad, all-encompassing privileges to non-profit entities and allow those entities to engage in for-profit activities, still claiming Section 108 privileges. For example, a qualifying non-profit entity, such as a library or archive, qualifying for Section 108 patron, preservation and replacement copying privileges, should not be permitted to make these copies available to the public for commercial gain through for sale transactions, commercial web sites, etc.

Museums and other cultural institutions could qualify if the definition for qualified exceptions is focused on non-profit activities rather than non-profit institutions. Since the qualifications for becoming a non-profit entity are mostly governed by business regulations and tax structuring rather than copyright compliance activities, it is important to carefully define what non-profit use activities qualify for Section 108 exceptions.

Responsible institutional copyright conduct, i.e., “trusted institution” may need definition and clarity as to what responsible copyright compliance behavior is within the framework of non-profit activities. A trusted institution should insure responsible behavior by its individual members through responsible administrative oversight and policies governing the use of copyrighted material within Section 108 privileges.

The application of any revised Section 108 privileges pertaining to outsourcing or contract services should be centered on the accountability of the involved entity. The outsourcing of library/archive services should function within the bounds of established legal concepts, practices and responsibilities.

### **Topic 2—Proposal to amend Subsection 108(b) and (c) to allow access outside the premises in limited circumstances.**

There is a definite need to provide traditional library services utilizing digital resources by remotely delivering content to a defined set of library remote users. The remote library patron should be able to digitally access content available in the library collection in similar fashion as does one who enters the physical premises of the library. Remote patrons should not be disadvantaged by not being present in the library. With the advancement of digital technology, it is unrealistic and impractical to limit access to the physical premises of the library.

A possible model to use as a pattern for considering revisions of Section 108 (b) and (c) is Section 110 (4). Section 110 (4) states in part:

“...the following are not infringements of copyright: performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if —  
(A) there is no direct or indirect admission charge; or  
(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of objection to the performance ...”<sup>3</sup>

The qualifying points mentioned in Section 110(4) above could be applied in the Section 108 context.

### **Topic 3—Proposal for a new exception for preservation-only restricted access copying.**

To adequately preserve the cultural and intellectual content of society, a broader exception for responsible preservation activities should be implemented. With the rapid increase of born-digital products, it becomes increasingly important to allow responsible preservation activity to occur without fear of copyright infringement. Born digital content is immediately at risk, often disappearing or failing to function because of the instability of the medium, the unavailability of playback equipment, and the non-availability of equivalent copies in the marketplace. Also, there is no reliable way to determine if digital content is deteriorating—neither eye can see nor obvious evidence exists to warn in advance of digital deterioration. Most often, when digital media products fail, they fail suddenly and without warning—“when it’s gone, it’s gone.” Once digital deterioration starts there is no incremental failure, it completes quickly, thereby not allowing for recovery and most often total failure occurs.

Yes, preservation-only copies by responsible institutions should be allowed. It is important to distinguish preservation only from access copies. The definition and criteria for preservation copies should be clearly defined and set forth. The definition of access copies requires different criteria and consideration. Perhaps more focused research and analysis regarding preservation strategies should be conducted by the Section 108 study group.

### **Topic 4—Proposal for a new exception for the preservation of websites.**

One possible alternative, and the preferred one, is a default condition of allowing automatic preservation activities to occur unless the copyright owner exercises an opt-out action. Conversely, another option is to have a default of opt-in, that is, there is no automatic preservation activity unless the rights holder exercises an opt-in approach. Yet another possible recommendation is to let the marketplace and courts resolve this issue.

The life cycle of web sites is less than other media; links and URL identifiers are often neither reliable nor persistent, thereby allowing digital content to be lost unless exempted responsible preservation actions of on-line content systematically occurs. Web site and other online content have become an important form of creative expression. Libraries, archives and other cultural institutions need legal authorization (Section 108 exception) to capture online content for preservation purposes.

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<sup>2</sup> 17 U.S.C. 108

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