

Section 108 Study Group

Comments on Section 108 of the U.S. Copyright Act Submitted by University of Illinois at Urbana-Champaign April 17, 2006

The University Library of the University of Illinois at Urbana-Champaign respectfully submits the following comments in response to the request of the Section 108 Study Group for input on issues relating to the exceptions and limitations applicable to libraries and archives under section 108 of the Copyright Act. This statement is authorized by Paula Kaufman, University Librarian.

These comments are being submitted by Janice T. Pilch, Assistant Professor of Library Administration and Acting Head of Slavic and East European Acquisitions.

The organization represented is the University Library of the University of Illinois at Urbana-Champaign. The University Library, a campus-wide network of libraries serving programs of learning and research in many disciplines, is the third largest university research library in North America and the largest publicly-supported university research library in the world.

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Statement

Topic 2: Amendments to Current Subsections 108(b) and (c), Including (i) Three-Copy Limit, (ii) New Triggers Under Subsection 108(c), (iii) Published Versus Unpublished Works, and (iv) Off-Premises Access to Digital Copies

Three-Copy Limit

Should the three-copy limit in subsections 108(b) and 108(c) be replaced with a flexible standard more appropriate to the nature of digital materials?

The three-copy limit, based on a microform standard for preservation, does not seem appropriate for long-term digital preservation needs. Libraries and archives often need to make more than three copies of a work to migrate and store them on one or more servers.

To be effective, migration and backup processes must be repeated at regular intervals, requiring additional copying each time they occur. It is not unreasonable to assume that in the life of a digital work, it will be copied dozens or even hundreds of times. However, preservation migration and backup copies should not be conflated with service or use copies.

It would be appropriate either to replace the three-copy limit in subsections (b) and (c) with a more flexible limit, or to reword the provision to make a distinction between backup/temporary/dark copies and service/use/access copies. To provide the flexibility needed for reproduction of backup/temporary/dark copies into the future, we support the notion of a “limited number of copies as reasonably necessary for the permitted purpose” of digital preservation.

Are there any compelling reasons to also revise the three-copy limit for analog materials?

There is no pressing need to revise the three-copy limit to allow for materials that remain in analog formats, because the provision is adequate for the purposes of preserving and maintaining access to them in the long term. However, for the sake of simplifying the provision, it might be helpful to establish similar standards for analog and digital works. Allowing for a “limited number of copies as reasonably necessary for the permitted purpose” of preservation would establish more flexibility for possibilities that might develop with evolving technology for master/backup copies of analog materials.

Additional Triggers Under Subsection 108(c)

To address the potential of loss before a replacement copy can be made, should subsection 108(c) be revised to permit the making of such copies prior to actual deterioration or loss?

It is important to allow for the up-front preservation of material at risk of near-term or sudden loss. One of the most common dilemmas in libraries is the need to preserve unique works that are out of print or otherwise not replaceable, but are not actually deteriorating or damaged, and are at risk of near-term loss through theft, mishandling, or overuse.

In a different category are works that are inherently unstable and thus at risk of near-term loss. Concepts such as “unstable” or “fragile” need to be added to the list of triggers, to enable preservation of works, particularly digital works, that require attention before it is too late to save them. We support the idea of revising subsection 108(c) to permit reproduction of such copies prior to actual deterioration or loss. Such provisions exist in the copyright laws of other nations. For example, Estonia’s copyright law at Article 20 states: “A work included in the fonds or collection of archives, a public library or a public museum may be reproduced in a single copy without the authorization of its author and without payment of remuneration, in order to: 1) replace a work or a copy thereof which has been lost, destroyed or rendered unusable or, in the likelihood of such danger, make a

copy to ensure the preservation of the work. There is a likelihood of danger if a work or a copy thereof is the only one in a library, archives or museum and the termination of its lending or display is contrary to the functions under the articles of association of the library, archives or museum....”

We also support the suggestion for replacing the word “unused” with “usable”, in the section 108(c) condition that the right of reproduction applies only if “the library or archives has, after reasonable effort, determined that an unused replacement copy cannot be obtained at a fair price.” If an “unused” copy is available but is unusable due to its being in an obsolete format, or due to its own inherently fragile condition, the purchase of such an unused copy is not likely to serve any preservation purpose. The ability to replace the at-risk copy with a “usable,” not merely “unused” copy, is a critical aspect of preservation.

The concept of replacing unusable copies by usable copies exists in the laws of other nations. (The emphasis in this statement on the laws of Central and East European nations reflects the tendency of nations in that region to place a high value on library and archival exceptions.) The law of the Republic of Moldova states at Article 21: “It shall be permissible without the consent of the author or other holder of copyright and without payment of remuneration, but subject to mention of the name of the author whose work is used and of the source of the borrowing, to make reprographic reproduction in one copy, without gainful intent and to the extent justified by the aim pursued, (a) of a lawfully published work if the reproduction, in one copy, is made by a library or an archive service and if its purpose is to replace copies that have been lost, destroyed or have become unusable or to make a copy available to other libraries or similar archive services in order to replace in their own collections works that have been lost, destroyed, or have become unusable, where it is impossible to obtain copies of the work through usual channels....”

An additional factor to consider is that of regional encoding of audiovisual works (e.g. PAL, SECAM, NTSC, and numerical regional codes), an issue that arises among media librarians handling foreign audiovisual works and related to the issue of technological protection measures. If an unused replacement copy is not available in the same regional encoding at a fair price, media librarians may need to copy from an item in a different standard or embedded with a different regional code, an activity that is not clearly defined in the current law.

Published Versus Unpublished Works

Are there any compelling reasons to revisit section 108’s separate treatment of unpublished and published works in subsections (b) and (c), respectively?

It would seem appropriate for the sake of structural clarity to revisit Section 108’s separate treatment of unpublished and published works in subsections 108(b) and (c). Since the intention of 108(c) is to require replacement as the first option for preserving published works, with the understanding that only if replacement is not possible then

preservation copying is allowed, this should be stated as such, in a preservation subsection encompassing both published and unpublished works. There is no need to refer to one subsection as a preservation provision and the other subsection as a replacement provision if the latter activity serves as form of preservation. The additional privilege permitting deposit of preservation copies of unpublished works in another library or archives for research use should continue to apply, as now, only to unpublished works in normal circumstances.

Aside from the structural concern, it would be beneficial to modify the section 108(c) requirement that a reasonable effort be made to purchase an unused copy at a fair price to allow for extreme circumstances, such as natural disasters that destroy library collections on a large scale. A concrete example of the benefits of such a provision would be replacing library collections in the Gulf Coast in the aftermath of Hurricane Katrina. Libraries are hard pressed to repurchase published works they once owned, and are further pressed to replace damaged copies that are out of print. The current law does not provide for the kind of cooperative effort among libraries that would allow replacement of published works lost from collections in extreme circumstances. We suggest the possibility that the “unused replacement” requirement be waived in such exceptional circumstances, because the public interest in preservation and replacement outweighs the economic factor of displacing a current or potential future market for the work, and because the library’s original purchase of the work contributed to market compensation to rights holders.

Liberal provisions permitting libraries and archives to reproduce published works and provide them to other libraries and archives that have for any reason lost the works from their collections exist in the copyright laws of other nations. They are sometimes very broad, and do not even require a reasonable effort to obtain an unused copy at a fair price. For example, the law of the Russian Federation at Article 20 stipulates: “It is permitted without authorization of the author and without payment of remuneration, but with mandatory citation of the name of the author, the work being used, and the source of the borrowing to reproduce in a single copy without profit: 1) a lawfully published work by libraries and archives for the preservation or replacement of lost or damaged copies, in order to provide copies of the work to other libraries that for any reason have lost the works from their collections....”

Are there any reasons to distinguish in section 108 between unpublished digital and unpublished analog works?

It might be possible to minimize the distinction between unpublished digital and unpublished analog works by considering the concept of “direct service,” whereby digital copies are provided directly to users, in the way that unpublished analog materials are typically made available directly to individual users. Limited distribution of digital works would involve direct use by patrons on the premises of the library or archives originally owning the material, or on the premises of another library or archives where copies were deposited for research use. A good example of digital access simulating analog access is that of the Hannah Arendt Papers, a digital collection available to researchers in reading

rooms at the Library of Congress, the New School University in New York, and the Hannah Arendt Center at the University of Oldenburg.

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

“Publication” as defined in the U.S. copyright law 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.” We understand publication as making a work available to the public on an unrestricted basis. The right of first publication would not dictate against allowing libraries and archives ever to permit online access to unpublished materials, as per section 108(e), because with appropriate user restrictions, this activity would not constitute publication.

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) and (c) outside the premises of library or archives?

Given user expectations for electronic services, and the fact that library and archives users are increasingly defined as a virtual community, the restriction to physical premises is anachronistic, and we support the idea of relaxing the “premises” restriction to reflect current library and archival practices, without jeopardizing the legitimate interests of authors and their assigns.

Should any permitted off-site access be restricted to a library or archives’ “user community”?

It would be appropriate to restrict off-site access to a library or archives’ “user community” in the same manner that access to physical collections have traditionally been restricted to a user community for the library or archives, but great care will be needed in establishing practices that do not disadvantage small to mid-sized libraries and archives that may not be equipped to handle complex technologies or expensive registration schemes. A means of achieving this type of restriction might be to require or utilize the “user community” authentication processes that many academic and educational institutions already use to restrict access to designated users or user-groups. This permits off-site access, but restricts such access to the institution’s user community.

Should restricting remote access to a limited number of simultaneous users be required for any off-site use?

Restricting access to a specific number of simultaneous users provides some means, although not necessarily the most effective means, of controlling off-site use of digital content. It would be acceptable to limit access to a specific number of simultaneous users that is appropriate to the size of the user community of the institution, provided that the technological means for accomplishing this are not so cumbersome as to impede use, or so technically complex as to exclude smaller institutions from taking advantage of the exception.

It seems appropriate to require technological access controls in connection with any off-site access to such materials, following the reasonable principle that the means of implementing such controls do not compromise the privacy of users or unduly restrict scholarly and research activity. Given the difficulties that many institutions have faced in attempting to implement the TEACH Act, the relevant provisions of the TEACH Act do not provide a viable model.

Should the rules be different depending on whether the replacement or preservation copy is a digital tangible copy or intangible electronic copy or if the copies originally acquired by the library or archives were acquired in analog, tangible or intangible digital formats?

Distinctions involving the format of the replacement or preservation copy and the format of the copies originally acquired by the library or archives are contrary to the direction of scholarship and learning and will likely prove unproductive for the purpose of regulating off-site access to digital copies. As technology evolves, such distinctions become blurred. Moreover, students, researchers, and scholars do not limit their studies based on these distinctions. In order to meet the needs of the scholarly community, libraries and archives need to work with rules that are flexible enough to allow for evolving technology and that present the fewest technical complications. We favor a single set of rules for tangible and intangible copies, regardless of the format of the items originally acquired by the library or archives.

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)?

Given the inherently unstable nature of digital materials, it seems appropriate to introduce an exception to permit copying of “at risk” published works for purposes of preserving those works, without having to meet the other requirements of subsection 108(c). However, it seems inappropriate to limit preservation of “at risk” materials to a select group of qualifying libraries and archives. The notion of certification for specific institutions works against the preservation initiatives of many libraries, and it works against the need to distribute the burden and responsibility for preservation as broadly as

possible. While some institutions may choose to pursue certification of their digital repositories, any institution satisfying the criteria set in the present subsection 108(a) should be eligible to take advantage of a new “preservation-only” exception.

Should the exception only apply to a defined set of copyrighted works, such as those that are “at risk”? If so, how should “at risk” be defined?

There are many types of materials that could be defined as “at risk,” from those that are by their nature fragile, to unique and valuable items that are at risk of near-term loss through theft. We favor a broad definition of the term “at risk” to encompass as many criteria as possible. We support the concept put forth by Howard Besser of InterPARES/New York University at the public roundtable in Washington on March 16, 2006 that “at risk” works be defined as works whose life expectancy is shorter than the life of their copyright term.

Should the copies made under the exception be maintained in restricted archives and kept out of circulation unless or until another exception applies?

If the “at risk” published works are still copyrighted, it would be appropriate to maintain them in restricted archives and kept out of circulation unless or until another exception, such as fair use or a Section 108 trigger, applies.

Should eligible institutions be required to establish their ability and commitment to retain materials in restricted (or “dark”) archives?

An institution’s willingness to attest to its ability to create and maintain dark archives for digital material may be a condition stipulated by law, but should not require any other type of formality. This requirement could be satisfied through an appropriate library preservation policy. Indeed, in many cases the willingness to develop and sustain a “dim” archive (locally accessible) may fulfill the needs of a local institution to preserve purchased content while simultaneously protecting the rights of copyright holders.

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 websites or other online content?

We are in favor of a special exception to permit the online capture and preservation by libraries and archives of certain websites or other online content. Web-delivered content is increasingly central to, if not the only material used for, the projects of students, scholars and researchers. It is important to capture websites and online content that constitute an integral part of the knowledge base and cultural heritage of our society.

Should there be an opt-out provision, whereby an objecting site owner or rightsholder could request that a particular site not be included?

It would seem appropriate to include an opt-out provision, whereby an objecting site owner or rights-holder could request that a particular site not be included. In the absence of a statement on the website, or other notification indicating objection to online capture and preservation by libraries and archives, or a technical device blocking web-harvesting tools, the online capture and preservation would be permissible. In addition, those libraries behaving in good faith in the absence of such notification should not be liable for statutory damages and attorney fees. It does not seem necessary to require that operators be notified in advance that a webcrawl will occur, but “no archive” meta-tags and similar technologies that block sites should be respected.

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

It seems appropriate, and in some cases necessary, for a library or archives also to copy and retain a copy of a site’s underlying software solely for the purpose of preserving the site’s original experience, provided no use is permitted other than to render the website.

If libraries and archives are permitted to capture online content, should there be any restrictions on public access?

Given the assumption that unrestricted publicly available websites carry implicit permission for the public to view content, the only restriction on public access should follow the principle that if the site owner or operator objects to capture of the site for legitimate copyright reasons after it has been captured, then the captured copy should be closed to public access. Websites with “no-archive” metatags should not be captured. There is no compelling reason to require a lapse of a certain period of time before making the captured site available to the public. In fact there is no reasonable basis on which such a limit could be set, given the absence in the law of a requirement for a copyright notice indicating the date of posting or fixation. Labeling on the captured site would provide an effective means for identifying captured sites and for avoiding confusion between the original site and the captured site.