

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.