

March 28, 2006

Name:

Aline Soules
University Library
California State University - East Bay

Comment:

First, thank you for the opportunity to present my opinions and examples.

Eligibility for Section 108 exceptions

The challenge in defining terms like “libraries,” “museums,” “archives,” etc. is establishing sufficiently flexible parameters to encompass those who should be included and those who should be excluded. It is important to enable those who might be of service in arenas such as preservation and dis-enable those who might be equally of service. At first glance, it may seem easy to establish the extremes of inclusion (e.g., a library at a publicly-funded university) and exclusion (e.g., a company library available only to employees), but with today’s blending of activity and shared partnerships, this is much more difficult than it seems. Further, if you “clarify what types of institutions are covered,” work-around approaches are likely to emerge. Perhaps it would be better to provide a general set of guidelines that describe the types of purposes the Study Group envisions rather than being specific about types of institutions. This is akin to the concept of fair use because!

one criterion might be effect on the market rather than profit vs. non-profit institution because in these days of partnerships, e.g., between Google and Harvard, Stanford, U. of Michigan, and Oxford, the involved parties are both profit and non-profit. Activity and its purpose, therefore, are the key factors, rather than the nature/definition of the institution.

As for virtual libraries, archives, museums, etc. I support their inclusion. The format of information is subordinate to its content; so the “format” of the providing body should also be subordinate to the content, its preservation, and its mission. Further, in light of my opposition to the specific definition of institutions, I further believe that museums should be included as many of them are managing key primary sources in our human record and our goal, presumably, is to preserve that record in all its sources and forms.

When it comes to outsourcing, perhaps there can be some key guidelines to stipulate what conditions should be discussed and included in contracts with outsourcers. They are essentially working under the conditions of a “work for hire,” so the content is still exclusive to the library, museum, or archive that is contracting for the work. The outsourcer surely understands that the content is not the outsourcer’s to use or distribute without permission of the provider. And as we have learned, contract law takes precedence over copyright law, so a set of guidelines for areas of coverage in a contract should address this question.

As for existing criteria in Section 108(a)(2), I believe that if the institution is engaged in the preservation of the human record for posterity, that material should be made available to the public at large in a manner that is accessible. The collections should be “open to the public” both in all the form(s) in which it exists (physical and virtual), not just to researchers, even if they are the likely ones to seek out this information. The only exception I would make to this is if a private company chooses to preserve its own information entirely at its own expense. Otherwise, the material should be genuinely public and without barriers to access, such as highly bureaucratic hoops through which people have to jump.

Making Copies for Preservation and Replacement Purposes

When I was at the University of Michigan Business School in the early nineties, we had twenty years of data on CDs that we acquired from University Microfilms International (now ProQuest). As we were becoming a test site for their ABI Inform Jukebox product, we assumed that we would then be able to use the twenty years of historical information on the CDs that we had acquired earlier. Unfortunately, we both discovered that they were unreadable and UMI was also unable to tell us what information was on the disks. We kept them for several years, hoping to find a way to read them or, at least, to determine what information was included; however, after several years, we realized that neither we nor they were ever going to find out. Ultimately, we discarded them. Did UMI already have this information in their vault? Has it been preserved? We will never know. What we do know is that the old adage applies: it's not use closing the barn door after the horse has left the stable. Likewise, it's no use trying to preserve information after the format has become unreadable.

Information is lost all the time – I think of the microcard and the LP, although we're having more luck converting the latter format than the former. We can't expect to preserve information once the format on which it is stored becomes inaccessible. We must preserve it first and be prepared to re-preserve it as formats go in and out of use and become obsolete over a shorter and shorter time frame or the equipment becomes unavailable. The preservation game has become cyclical and constant. I urge the Study Group to find a way to permit libraries, museums, archives, other preservationists to be enabled to address this issue in an iterative manner as formats change and preservation and re-preservation are required.

As for the number of copies, could we please define “copies” as readable copies, not copies that occur because we are transferring information from one format to another and inadvertently storing it in “multiples”? The number of copies should be the number needed to complete the preservation process and/or the number of copies needed to ensure secure storage, including, potentially, more than one storage site or server (part of the preservation requirement for disaster planning).

As for the issue of replacement, libraries, museums, and archives should be permitted to replace pages, etc. to complete all their copies of print materials. In the case

of virtual content, they should be permitted a dark archive or the company with whom they contract should be asked to provide a replacement immediately on notification that the material has become inaccessible. Further, as companies can go out of business, an escrow arrangement should also be asked of them. In some cases, this is already arranged, but this is not yet universal. After all, preservation of the human record is only useful if it is accessible.

A question has been asked regarding minimizing or addressing risks to rights holders. If the contractors and the preservers can partner, then, presumably, specific risks and rights can be addressed. Generally, however, can we move to a more cooperative rather than adversarial relationship in these cases? Massive effect on the market needs to be considered, but some flexibility is needed. In the last few years, I see more and more attempt to control data. We used to use the slogan “information is power,” but what we meant was that knowledge was power and the ability to access information to develop knowledge was power. Instead, it has come to mean that the controller of information has power. A successful society cannot be founded on a premise that shuts down information transfer. It can only be founded on a premise that expands information transfer to foster learning and creativity.

In terms of preservation and copies, I recall an experience at the University of Windsor in the early eighties (“before Internet”!). We had unique pamphlets relating to the War of 1812 in the local area – Commodore Perry, Lake Erie, etc. In order to preserve these original materials, we decided to have them put on microfiche so that the information would be available without further damage to the materials. We ended up with three copies – a silver halide microfiche for preservation, a diazo microfiche that people could view, and the original which we placed in archive envelopes with archive inter-leaves and stored in a humidity and temperature controlled room. Certainly, if a researcher felt the need to view the actual pamphlet, we could make that available, but for most purposes, the diazo was sufficient and we could use the silver halide in order to make a new diazo if one was damaged. Our purpose was legitimate, the number of copies we made was reasonable, and we ha!

d no intention of profiting from any of this (we had a grant to do the work plus some of our own library funds). Somehow, in our digital age, we need that possibility to continue. If we were doing this today, we’d digitize the material, but we’d still need those copies – a digital copy in ‘storage’, a digital copy up on a web site, and the originals in an appropriate environment.

In your document you speak of circumscribing exceptions “to prevent potential injury to rights holders.” You offer, as an example, the idea that “only certain types of institutes might be qualified” and suggest that these institutes would be those which employ “best practices” or are “trusted preservation repositories.” This implies that only the current “haves” would be in a position to make pre-loss preservation copies, but that does not seem reasonable. I doubt the University of Windsor would be prestigious enough to qualify, yet what could be more important to a researcher on the War of 1812 than the pamphlets I just described? Surely, we should not set up a “class structure”

among organizations. We don't know where all the key content resides or what could be considered key in future.

As for permission to circumvent anti-copying technological protection measures," there are definitely circumstances that apply, namely fair use and preservation. Fair use should apply regardless of format; however, I suspect that this is a topic for a different round table, so I will concentrate on preservation. As my two personal stories attest, pre-loss preservation is essential. This applies equally to digital information. Format, once again, is not a criterion. Content is key and we need to preserve sites before they disappear. Further, they manifest a more ephemeral quality than has been the case in print format. "Here today, gone tomorrow" is an applicable slogan.

I strongly support the concept of broader privileges for the reproduction and distribution of unpublished works for preservation purposes for the reasons you outline in your paper. Further, there is likely to be a re-definition of "published" in light of various institutional repositories that are emerging, repositories where individuals can contribute their content with or without human intervention in the form of an organizational over-structure.

When it comes to the right of first publication, there is indeed some right when there is payment involved; however, much of what emerges is not paid information. It might also be considered that while the right of first publication has weight, an official copy could be placed in escrow until the right of first publication has been exercised. This ensures that the content is not lost.

Preservation of Websites

Creating an exception to permit the online capture and preservation of websites or online content is an important idea. I have a concern, however, with limiting this exception to a "class" of online content or websites. How can we know what will be important in the future? Do we want to entrench the class structure of information which is already unavoidable in our order of selection of information for digitizing? I hope not. Ideally, libraries could develop a systematic "capturing" plan together, possibly through the leadership of the Association of Research Libraries, but encompassing libraries beyond that membership. I agree that we cannot obtain permissions before some of the content disappears, but we are losing information every day, information that will be needed in future for historical and research purposes. I am also aware that funding such an initiative would be very difficult.

There are a number of suggestions for limiting the exception and notifying the creators of the content. I would hope that we could establish a "default" in favor of capture rather than non-capture, and simply allow creators to opt out with standard language that the crawler could "recognize." The issue of notifying owners prior to the crawl is a little like the current process of seeking copyright permissions – laborious, time-consuming, and difficult.

Restrictions on public access could begin by being equivalent to the access provided by the site at the moment of capture. In due course, access to restricted sites could be opened to the public domain.

Access to Digital Copies Outside the Premises of Libraries and Archives (and Museums)

I agree that restricting public availability of digital copies to their premises is anachronistic; however, it is better than nothing. First, preserve; then provide access. For those institutes that have a well-defined customer base, e.g., universities, perhaps remote access could be provided with authentication in the same manner as we provide access to databases, leaving on-site access available to faculty, students, staff, and “walk-ins.” That model has been working within its current limited scope and could perhaps be extended to this situation. The challenge, once again, is the “class structure,” where some are less “franchised” than others. The issues of alumni, relatives, etc., etc. are already difficult and apply to all levels of information, not just digital copies.

If this model were accepted, the issue of simultaneous user restrictions would be minimized. Ultimately, those who want access badly enough will get that access; they just get frustrated in the meantime. And those that don’t want it badly enough will go away, uninformed, but still be frustrated. This does not help encourage curiosity and learning.

The use of technological access controls for remote access beyond login/password by the user community seems unnecessary. I am not sure why the “use of technological measures and user agreements to enforce those restrictions would at a minimum seem to be appropriate.” Most licensed databases don’t require user agreements. Why do we need to do that here? It’s another barrier to reaching the information. As for the TEACH Act as a model, I have concerns about that as well. It is still insufficiently tested in the field. For some, there are problems interpreting the Act and understanding the extent of the exceptions.