

AMENDING THE COPYRIGHT ACT FOR LIBRARIES AND SOCIETY: THE SECTION 108 STUDY GROUP

D-R-A-F-T

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Libraries house copyrighted books and journals in their collections, provide intellectual access to them through catalogs and indexes and make them available to users. Many researchers and readers are able to use library copies of the works over time, so access to the work is shared. Most libraries exist for this very purpose. Archival collections perform a similar function in that they collect papers, both unpublished and published works, organize them and make them available, often to the general public, again for shared access. These organizations, along with museums, serve public missions and each is recognized as a public good. The Copyright Act of 1976, for the first time in the history of copyright, specifically recognized the unique and important role that libraries and archives play in our society. For purpose of this paper, the word “libraries” also refers to archives as well unless they are specifically differentiated in the particular section.

The digital environment has permanently altered both the library landscape and the society they serve. Not only do libraries continue to acquire works in print but they also acquire access to materials through license agreements to provide electronic access to works, some of which are born digital. Libraries may even acquire the same work in multiple formats including both print and digital. In their role as preservers of works of literature, other written materials and media, libraries use digital technology to preserve works and make them available to users.

Libraries have always dealt with copyright issues but perhaps never more so than today. While a copyright owner may have no objection to the reproduction of works for preservation, what the library may do with preserved copies often is controversial. Should libraries be able to preserve copyrighted works by digital means and then make those digital copies available to scholars and researchers? To other libraries? And this is only one of the questions that libraries and archives seek to have answered regarding digital copies of copyrighted works. Should libraries be able to produce digital copies of analog works for a user at the request of that user? Instead of providing photocopies of articles and book chapters to satisfy interlibrary loan (ILL) requests, should libraries be able to provide a digital copy to the borrowing library for the user or directly to the end user?

In 1976 Congress provided an exception to the exclusive rights of the copyright owner that permitted libraries and archives to reproduce and distribute copyrighted works under certain circumstances. The exception recognized that libraries provide significant benefit to society. The exceptions worked well for libraries and their users for

printed works and photocopy technology, and were at least tolerable to copyright holders. Works in digital format presents different expectations and capabilities, however. For libraries, digital technology represents a significantly better method of preservation, improved ways to deliver copies of reproduced works to users at their request and enhanced ability to search and use these copies. For publishers and producers, digital technology offers additional ways to create new and enhanced products for new markets, the ability to count uses of the works and the methods by which to restrict uses through technological controls.

In late 2004, the Copyright Office and the Office of Strategic Initiatives (the home of the National Digital Information Infrastructure and Preservation Program¹) at the Library of Congress began to assemble a group of knowledgeable individuals to consider whether Section 108 of the Copyright Act should be amended to reflect changes that the digital revolution has brought to libraries and archives in order to permit them to use digital technology while not unduly impacting the rights of the copyright holder. Marybeth Peters, Register of Copyrights, had been concerned for some time that the balance in the Copyright Act had changed due to changes in technology, and she, along with Laura Campbell, Associate Librarian for Strategic Initiatives, established a group of 19 to address these issues and to make recommendations on changes needed in the law.² The Library of Congress provided outstanding staff support for this on-going and very time consuming effort.³ The mission of study is:

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 the changes wrought by digital media. 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.⁴

The Study Group held its first meeting in April 2005 and has been meeting regularly, since that time examining the issues, gathering information and discussing

¹ See <http://www.digitalpreservation.gov/>.

² The list of members is found at <http://www.loc.gov/section108/members.html>. About half the members are from the library, archives and museum communities and half are experienced in publishing, media companies and the like. In the guise of full disclosure, I co-chair this group along with Richard S. Rudick, recently retired General Counsel for John Wiley and Sons.

³ Mary E. Rasenberger, originally Policy Planning Adviser for Special Programs in the U.S. Copyright Office, was then named director of Program Management for NDIIIP serves as the primary staff person for the Study Group. Christopher Weston, Attorney-Advisor at the U.S. Copyright Office and Office of Strategic Initiatives, provides legal assistance to the group. Jenel Farrell, Special Assistant, Office of Strategic Initiatives, was replaced by Abbey Potter as librarian assistants to the Group. The group facilitator is John L. Warren, Managing Partner of IP Solutions.

⁴ Section 108 Study Group Mission Statement, at <http://www.loc.gov/section108/index.html>.

potential solutions to problems identified. Earlier time estimates of completion dates for the study have proven to be far too ambitious given the diversity of the members' views on these issues and the complexities of the issues. The group is now slated to complete its work in 2007.

This paper explains and details the issues being addressed by the Study Group and highlights the concerns of both libraries and those of publishers and producers. Part I discusses the present Section 108 and divides the issues into four sections: (1) eligibility for the library exception, (2) preservation and replacement copies, (3) copies for users and (4) miscellaneous issues. Part II offers a critique of the current Section 108 and the problems for digital copies. It also follows the same arrangement as the prior part. Part III presents potential solutions and recommendations for the issues identified in Part II. Part IV identifies the next step for the Study Group and Part V is the conclusion.⁵

I. Section 108 Background

In order to appreciate the work of the Section 108 Study Group, it is necessary to understand Section 108 itself. Referred to as the library exception, Section 108 represents Congressional recognition that many of the activities of libraries and archives involve reproduction and distribution of copyrighted works which are exclusive rights of the copyright owner. The exception is couched in terms of permitting libraries to reproduce and distribute copies of copyrighted works and declaring that within the conditions specified in Section 108, these activities do not constitute infringement of the rights of the copyright holder.

A. Eligibility

Section 108(a) is the enabling subsection that states what it takes to qualify for the exceptions to the copyright owner's exclusive rights that follow. Libraries and archives are eligible institutions if they reproduce and distribute no more than one copy or phonorecord under the conditions permitted and if: (1) there is no direct or indirect commercial advantage purpose for the reproduction and distribution, (2) the collection of the institution is either open to the public or to researchers doing research in a specialized field, and (3) "the reproduction or distribution of the work includes a notice of copyright that appears on the copy...." If there is no such notice on the work then the library or archive must include a legend on the reproduction indicating that the work may be protected by copyright.

B. Preservation and Replacement

Subsections (b) and (c) are the preservation and replacement sections, in which the library is copying for itself. Additionally, reproduction under Section 108(h) may be for preservation purposes as well. Section 108(b) applies only to unpublished works

⁵ This paper represents the views of the author and not necessarily those of other members of the Study Group or the Study Group as a whole.

and states that it is not infringement for a library to reproduce and distribute no more than three copies of an unpublished work for preservation, security or deposit for research in a another library or archive. If one of the copies is digital, however, that copy may not be used outside the premises of the library or archives.⁶ For published works, libraries have to satisfy more stringent requirements before they may reproduce copyrighted works. Section 108(c) permits libraries to make up to three copies of a work for replacement purposes and then only to replace a lost, damaged, deteriorating, stolen or obsolete copy of a work after the library has determined that it cannot obtain an unused replacement copy at a fair price. The same restriction on digital copies of works found in subsection (b) also applies: if a copy is digital, that copy may not be used outside the physical premises of the library.

Section 108(h) was added in 1998 by the Copyright Term Extension Act,⁷ and is an orphan works solution, to some extent. It permits libraries, archives and nonprofit educational institutions, in the last 20 years of a work's term, to reproduce the work under certain conditions and to distribute it through copies or by posting it on the library's website. The conditions are fairly onerous, however, and few libraries have actually taken advantage of the exception. The exception applies only to works in the last 20 years of their copyright term, and before a library may reproduce such a work, it must determine that the work is no longer subject to normal commercial exploitation and a copy cannot be obtained at a reasonable price or have notice from the copyright owner or its agent that either of these conditions exist. Section 108(h) is somewhat broader than the rest of the section in that it permits reproduction and distribution of covered material by nonprofit educational institutions as well as libraries and archives. Moreover, the activities covered are not limited to reproduction and distribution but also permit institutions to display or perform the works in addition to reproduction and distribution.

C. Copies for Users

Subsections 108(d), (e) and (g) relate to copies that a library makes or acquires through interlibrary loan for a patron. Under Section 108(d) a library or archives may make a single copy of journal article, chapter of a book, etc., at the request of a user if two conditions are met in addition to the notice requirement in Section 108(a): (1) the copy becomes the property of the user and (2) the library prominently displays and puts on order forms for the copies, the Register of Copyrights' warning of copyright. This subsection applies to copies made from the library's own collection as well as to copies obtained for users through interlibrary loan. Section 108(e) is not actually often used by libraries due to the difficulty of the conditions it imposes. A library may reproduce an entire work or a substantial portion thereof at the request of a user but must now satisfy three conditions. The two conditions from 108(d) carry over to (e), but additionally, a library may make these copies only after it has determined that a replacement cannot be obtained at a fair price. Unlike the similar requirement for 108(c), this requires

⁶ This provision was added by the Digital Millennium Copyright Act of 1998 Pub. L. 105-304 (1998), codified at various sections of 17 U.S.C.

⁷ Sonny Bono Copyright Term Extension Act, Pub. L. 105-298, 17 U.S.C. §§ 302-304 (2000).

searching for unused copies on the used book and journal market. Libraries are not required to keep records on copies made for users.

Section 108(g) states that the rights of reproduction and distribution in 108 apply only to isolated and unrelated reproduction of a single copy of the same material on separate occasions. The right does not apply to related or concerted reproduction of the same material even if it occurs on only one occasion or over a period of time, and whether the copies are intended for aggregate use by one or more people or for separate use by members of a group.⁸ The right also does not apply if the library engages in systematic reproduction and distribution of single or multiple copies, but this does not exclude participation in interlibrary loan.⁹

Interlibrary loan (ILL), a traditional library service for its users, is covered by the language of Section 108(g)(2) which states that nothing prevents libraries from participating in interlibrary arrangements. This is not unfettered, however, and those interlibrary arrangements must not provide the library with copies in such aggregate quantities to substitute for subscription to or purchase of a work. Much of interlibrary loan is governed by the CONTU¹⁰ Interlibrary Loan Guidelines¹¹ and ILL practice is informed by the American Library Association's Interlibrary Loan Code.¹² The CONTU ILL Guidelines then detail what constitutes such aggregate quantities to substitute for a subscription to or purchase of a work. The guidelines establish the so-called Suggestion of Five and state that each year a borrowing library may make five requests from a periodical title going back over the most recent five years (60 months). If the library owns the title but for some reason it is missing from the collection, or if the title is on order, the guidelines provide that copies made from these titles do not count in Suggestion of Five. For non-periodicals, the library may make five requests per year for the entire life of the copyright. The guidelines do not deal with materials older than five years. The borrowing library is required to maintain records for three calendar years and must certify that the request conforms to the guidelines. The lending library's responsibility is to require certification that the request conforms to the guidelines and not to fill requests that clearly violate them. There is no record-keeping responsibility on the part of the lending library.¹³

D. Other Library Exceptions

Section 108(f) contains four somewhat unrelated exceptions. Section (f)(1) says that neither a library nor its employees is liable for unsupervised use of reproduction

⁸ 17 U.S.C. § 108(g)(1) (2000).

⁹ *Id.* at § 108(g)(2).

¹⁰ CONTU is the National Commission on New Technological Uses of Copyrighted Works, which was appointed by Congress in 1975 to develop the interlibrary loan guidelines and determine what the statute should contain in order to deal with computer programs and databases. It issued its final report on July 31, 1978. While the ILL Guidelines are not law, they have a stamp of Congress and tend to be followed closely by libraries.

¹¹ Conf. Rep. No. 94-1733 (1975), *reprinted in* 17 Omnibus Copyright Revision Legislative History 71-74 (1977).

¹² ALA Interlibrary Loan Code, at <http://www.ala.org/ala/rusa/rusaprotools/referenceguide/interlibrary.htm>.

¹³ Conf. Rep., *supra* note 11, at 72-73.

equipment if that equipment displays a notice that making copies may be subject to the copyright law. Section 108(f)(2) clarifies that library users are liable if they exceed fair use by using library reproduction equipment or by requesting subsection (d) or (e) copies in excess of fair use. Libraries are permitted to reproduce and distribute a limited number of copies of audiovisual news programs under Section 108(f)(3). Section 108(f)(4) establishes that nothing in the section affects the right of fair use or any contractual obligations assumed when a library obtained a work in its collection.

Section 108(i) restricts the exceptions granted to libraries basically to text works with a couple of important exclusions. The rights of reproduction and distribution in Section 108 do not apply to all works; the following are excluded: (1) musical works, (2) pictorial, graphic or sculptural works, and (3) motion pictures or other audiovisual works other than ones dealing with the news. The exclusions to these restrictions are important to libraries as users often request copies of portions of these work. There is no limitation on preserving and replacing works that fall into these three categories under subsections (b), (c) and (h). Nor is there a limitation on pictorial or graphic works that are published as a part of an article as illustrations or diagrams.

II. Critique of Section 108 and Digital Copies

When Section 108 was enacted digital copying was little more than speculation. Today, libraries and archives can reproduce works by digital means as well as by photocopying. Library patrons often request a digital copy rather than a photocopy, and libraries want to meet the needs of those users and provide digital copies. Scanners are increasingly accurate and easy to use and have become ubiquitous in libraries and archives. Moreover, digital technology offers important new ways to preserve analog works that not only preserves them but offers additional search capabilities. While providing access or copies of born digital works to users tends to be governed by license agreements, such contracts are frequently silent about the preservation of these works.

A. Eligibility in the Digital World

Even which institutions should be eligible to take advantage of the Section 108 exceptions has been questioned. Including museums along with libraries and archives as eligible for the exceptions has been non-controversial with the Study Group. The same is not true about whether to include digital libraries, archives and museums as eligible organizations. Museums perform similar public functions as collecting organizations that serve a public mission to preserve the past and educate the public through displaying objects, books, works of art, etc. They have the same need to reproduce and distribute copies of works to researchers and scholars. While a physical premise defined our understanding of what constituted libraries, archives and museums, the same may not be true in the digital world. Including digital collections in the exception as opposed to digital libraries is not controversial. Defining these institutions to include virtual ones does not give copyright owners much solace. Digital collections that are connected to brick and mortar institutions, however, do provide some of the assurance to copyright holders such as assets that a plaintiff could seek if it sued for

infringement and a recognized management board or system. Content providers object to including virtual institutions because they believe it will be difficult to bring suit, hold anyone liable and recover damages for infringement against libraries for infringement.¹⁴

B. Digital Preservation and Replacement

The Digital Millennium Copyright Act recognized that often digital preservation is the becoming the preferred method for insuring the long-term availability and viability of works. The amendments it added to subsections (b) and (c), however, restricted digital copies made for preservation and replacement to use within the physical premises of the library. This immediately caused problems for libraries and their users since restriction to in-building use is not how libraries function today. Libraries want to be able to make available to their users digital copies made for preservation and replacement just as they make photocopies of these works available to them. Restriction to a defined user community such as the students, faculty and staff of an academic institution is much more attractive to college and university libraries and parallels the availability of licensed digital works. But what about large public libraries? Are their user groups well defined and controlled?

Limiting the use of digital replacement copies of analog works to on-premises use makes no sense for digital copies in tangible media such as a CD or DVD. For example, an original copy a library purchased of a music CD was not restricted to in-building use. After the library reproduces the CD to another tangible digital medium under the conditions specified in Section 108(c), restriction to in-building use seems unduly restrictive since the original CD could be checked out to a user and used anywhere. Clearly, Congress was not thinking about tangible digital media when it enacted the 1998 amendments but instead was thinking about distribution over digital networks which would constitute republication of the work.

Another problem with existing subsections (b) and (c) is the three copy limitation. To create a usable digital copy of an analog work requires that many copies be made initially. Technologically speaking, every time a digital work is viewed by either curatorial staff or by a user, another copy is made. Moreover, in order to insure that the work is usable over time, additional copies must be made. The three copy limitation actually reflects national microfilm standards and simply is not workable for the digital world.

C. Digital Copies for Users

Digital works such as full-text journals typically are made available to a library's patrons through a license agreement with a library that determines whether and in what form copies may be reproduced for users. Since most licenses grant users direct access to the digital work, any printing or downloading is done by the end user himself. It is likely that in the future, there will be digital works which a library might purchase outright instead of license, and how those can be reproduced for users is not covered in

¹⁴ After this point, the term "libraries" refers also to archives and museums in this paper.

the current law.

The common situation today involves a user who asks the library to scan the article or chapter and email it to the faculty member as a PDF file; others libraries scan the item and post it on a password protected website where the faculty member has a limited period of time to retrieve the scanned article. Section 108(g)(2) prohibits the systematic reproduction of copyrighted works under subsections (d) and (e). Most scholars who have written about these sections of the Copyright Act do not believe that the use of digital means to provide the copies makes the reproduction any more systematic than photocopying, and it is similar to the exclusion of interlibrary loan from the prohibition on systematic copying. While Section 108(e) permits the reproduction of a complete work or substantial portion of it, as stated above, few libraries actually take advantage of this exception even to provide users with photocopies. It is also unlikely that libraries will scan entire works for a user because the same conditions would have to be met in order to do so.

Interlibrary loan has also changed over the years with the advent of digital technology. Libraries seldom mail photocopies of articles today but instead use systems such as Ariel®¹⁵ to deliver the copies of the article. The borrowing library may produce a printed copy for the user or may post the article on a password protected website for retrieval only by that particular patron and within a specified short period of time. As libraries increasingly acquire journals in digital format, license agreements sometimes restrict the library's ability to provide copies of articles from those journals for ILL. If the library subscribes both to the print and the e-version of the journal, then it could scan an article from the print version for ILL and deliver it to the borrowing library.¹⁶ Publishers are also concerned about lending libraries that receive an ILL request from a borrowing library and provide digital ILL copies directly to end users rather than to a library even if a borrowing library counts the copy in its Suggestion of Five.

D. Other Library Exceptions and Digital Issues

As reproduction equipment has changed, it has been fairly easy to post notices that copyrighted works reproduced on unsupervised scanners and computer terminals along with photocopiers may be protected by copyright. Clearly, the purpose of Section 108(f)(1) is to relieve libraries from liability for the infringing activities of library patrons on unsupervised reproduction equipment. But the landscape has changed even further. In the past, one occasionally heard of a library user who would bring her own photocopier into a library, but it was rare. Today, scanners are smaller and more efficient, and patrons are bringing them into libraries. Patrons do not even have to use scanners – they occasionally are observed using cell phones to photograph pages of printed and graphic works. Certainly, this personal electronic equipment serves as unsupervised reproduction equipment, but it is neither managed nor owned by the

¹⁵ See http://www4.infotrieve.com/products_services/ariel.asp for a description of Ariel.

¹⁶ This reflects current ILL practice among many libraries and is not a statement that this activity clearly is permitted as fair use or under the current Section 108.

library.

The audiovisual news exception found in Section 108(f)(3) was clear in the analog world. Libraries could videotape the news and lend a limited number of copies. The Vanderbilt Television News Archive¹⁷ records news broadcasts and lends copies of these broadcasts to users on videotape. The language of the statute focuses on lending copies of television news broadcasts; it does not envision performance by digital means such as streaming technology which actually would be more secure than lending copies of videotapes or even other tangible digital media such as DVDs even if these copies then must be returned to the News Archive.

Section 108(i) details the exclusions from 108. Since 1978 librarians have been asking why some material is excluded since 1976. The House Report states that although photographs, graphic works, musical works and non-news audiovisual works are excluded, fair use may still apply to “photocopying or other reproduction of such works”¹⁸ It provides examples such as a musicologist requesting a photocopy of a portion of a score or a reproduction of portions of a phonorecord of a work.¹⁹

Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.²⁰

Libraries today seek to make digital copies of the works that they would have photocopied in the past because that is what their users request. Librarians see little reason to exclude these non-text works from Section 108 if all of the conditions are met for photocopies. Publishers and producers, on the other hand, fear widespread distribution of audiovisual, musical and graphic works if libraries provide digital copies.

Much to the chagrin of many librarians, Section 108(f)(4) is unequivocal in its statement that license agreements trump the Section 108 exceptions. Librarians have questioned whether this should remain true today. Negotiated licenses were all that existed in 1976, but today there are shrink wrap and click-on licenses which do not permit negotiation. Should Section 108 ever trump these licenses?

The Section 108 Study Group has examined these issues from all sides, gathered information from experts, and practitioners in the field, and from the content providers. The focus has been on developing solutions. Potential solutions are detailed in the next section.

III. Ideas and Potential Solutions

A. Eligibility

¹⁷ See <http://tvnews.vanderbilt.edu/>.

¹⁸ H.R. Rep. No. 94-1476, 94th Cong. (1975) *reprinted in* 17 OMNIBUS REVISION LEGISLATIVE HISTORY 78 (1977).

¹⁹ *Id.*

²⁰ *Id.* at 79.

The Study Group has considered long and hard whether it may be possible to define libraries, archives and museums in the statute or, in the alternative, to define them in functional terms. Another alternative may be to retain the current Section 108(a) criteria but to have different eligibility requirements for some of the permitted activities under a revised Section 108. This issue of virtual institutions is a complicated one as discussed above. To date, the Study Group been presented with no evidence of existing virtual libraries, museums and archives, but that is not to say that there would not be in the future. If virtual libraries (as opposed to virtual collections) are eligible for the 108 exceptions, then publishers and producers are likely to insist that there be statutory functional requirements and some presence within the territory of the United States.

Another eligibility issue concerns outsourcing. Does a library retain the Section 108 exception if it outsources some of the covered activities? It is interesting that this issue has really come to the forefront for digital preservation because libraries have outsourced certain activities for years. For example, libraries that used microfilm for preservation seldom performed the microfilming in-house, but instead they contracted with outside companies to conduct this activity for the library. Increasingly, ownership, and maintenance of photocopy machines and operation of in-house photocopy services has been outsourced to commercial enterprises despite the language in the House Report "...it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself."²¹ Neither libraries nor publishers seem to have been very concerned about the outsourcing of photocopying. As libraries consider using digital technology for preservation of both analog and digital works, outsourcing raises new concerns, however. For example, what activities may be outsourced? Digitizing materials for preservation? Storing digital preservation copies for the library? Providing access to preserved copies to users on behalf of the library? What restrictions should be placed on eligible institutions that use outsourcing to control the activities of the third party performing work for the institution? Should written contracts be required that specify all of the conditions such as monitoring performance; allowing no reproduction or retention of copies; assuming liability for infringement by contractors; restricting outsourcing to U.S. companies only or is bonding and insured sufficient; and submission to U.S. jurisdiction? What about state-supported institutions and Eleventh Amendment immunity? Is there any way to dealt with immunity and liability for infringement by contractors if the state institution is immune from suits for copyright damages?

B. Preservation and Replacement

Some of the issues and concerns for preservation and replacement copies in the digital world differ somewhat from each other but some are the same.

1. Preservation Copies

²¹ *Id.* at 74.

Most of the preservation concerns for are for published as opposed to unpublished works. For unpublished work, the right of first publication²² would also apply to the distribution of any digital preservation copies, making posting on the Internet or other distribution infringement absent a library exception. In order for digital preservation to be included in the Section 108 exceptions, the copy restriction must be removed. In fact, it likely is impossible to specify the number of copies that can be made for preservation since it is unknown exactly how many copies may be needed to preserve a particular work in digital form; instead, a more appropriate measure is a “reasonable” number of copies to accomplish the preservation. If the library chooses to preserve an at-risk analog work by analog means, the three-copy limitation for each copy the library owned may make sense to retain despite the fact that it is a national microfilm standard.

Another issue is how to identify when a copy is a preservation copy; even digital copies should be marked to indicate that they are preservation copies. Thus, later users or a publisher or producer who sees a copy will know that this is not an originally acquired copy but is instead a preserved copy or a replaced one.

For published works, establishing a “preservation only” exception would ensure that these works are not lost to society. It would create an exception for up-front preservation so that at-risk works would be preserved when they are received by a library without waiting for a triggering event such as deterioration of the work. How to define “at-risk” is somewhat controversial; perhaps the best definition is that the work is at risk for near term loss because the format is rare, unique, unstable, fragile, ephemeral or obsolete. A preservation-only exception raises a significant number of concerns for publishers and producers such as whether all libraries may take advantage of a preservation only exception. If so, under what conditions? Should the exception apply to all categories of works or just to text works? Or, should some works be omitted from the exception? Publishers and producers may ultimately support a preservation only exception but likely only if there are criteria that libraries must meet in order to take advantage of the exception. Further, motion picture companies, recording companies and others are likely to favor the exception only if there is some recognition that some companies are already preserving their own works, such as Disney. It may be possible to exclude works owned by companies that have a structured, systematic preservation program that ensures their works are not lost, and, in the case of producers such as Disney, can be remastered and re-released on a regular basis to new markets.

The eligibility requirements might be more stringent for preservation-only institutions, and not all libraries are likely to qualify. Standards likely would include the ability to manage the digitization project, to upgrade and refresh the copies as needed to insure viability and assurance that the institution will maintain the preserved copies long term. There is no existing certification procedure for preservation institutions but it might be possible to develop guidelines or other qualification-based criteria. Best practices or criteria could be developed by a group of preservation experts working

²² The right of first publication is grounded in Section 106 of the Act which grants authors the right to reproduce and distribute their works. The legislative history is silent about the right of first publication. See *Harper & Row Publ. v. Nation Enter.*, 471 U.S. 539, 555-60 (1985).

together with publishers and producers under the auspices of the American Library Association or the Library of Congress. Not only are criteria needed to establish how an institution qualifies for the exception but also what happens if it stops meeting those criteria. In other words, how does it transfer the digital preservation copies to another qualifying library so that the preserved works do not disappear from our cultural record.

2. *Replacement Copies*

In order to reach agreement on replacement copies to permit additional access beyond the premises (see discussion under “Access” below) it is likely that the requirement that a library conduct a reasonable search for an unused copy that is available at a fair price could be changed to a “usable” copy requirement. In other words, used copies today are much easier to locate because used book dealers typically make their catalogs available on the web. Thus, the argument is that libraries should not have the right to reproduce a copy only if an unused copy is not available if there is a usable copy available on the second-hand book market.

The triggers for replacement copies (lost, damaged, deteriorating, stolen or obsolete) likely should be expanded to include “fragile” since many analog formats are inherently fragile. Would the expansion apply only to analog copies and tangible digital media? Or should any expansion of the triggers also apply to digital works? Whether born digital works are inherently fragile is a matter of some disagreement.

The number of copies required to create a digital copy for preservation are the same as for replacement purposes. The argument regarding the number of replacement copies in analog form does differ. The library had a single analog copy, was unsuccessful in locating a replacement copy, so it reproduces a copy. Thus, a three-copy limitation may be sufficient for this purpose. Replacement copies, whether digital or analog, also should be labeled or marked to indicate that the copy is not an original copy.

3. *Website Preservation*

Libraries, museums and archives also seek the ability to preserve websites and other Internet content that have no access controls. Websites and other Internet publications and content are increasingly important as reflections of culture and society. Unfortunately, the creators of this content typically are not preserving the content, and websites and other Internet content disappears daily. While the Internet Archive²³ preserves many websites, libraries have a different reason for doing so and seek an exception to permit them to curate and index by subject websites of interest to their user groups. If this were allowed under an expanded Section 108 exceptions, there would have to be a number of restrictions such as: (1) limiting collection and preservation to publicly available networked content, (2) notice on captured content that it is a preserved copy available only for research and scholarship, (3) permitting rights-holders to opt out, but not government entities, political parties, political action committees and political campaigns. Thus, any Internet content protected by access controls such as registration would be excluded from the exception. Moreover, libraries that capture such content should ensure that their activities not materially harm the operation of the

²³ See <http://www.archive.org/index.php>.

site or the contents. Whether an Internet content preservation exception should honor *robots.txt* files is an important issue without an easy answer since unfortunately many government websites have *robots.txt* files.

1. *Access to Preservation and Replacement Copies*

Access to copies is made for preservation and replacement is even more contentious than whether libraries should be allowed to make the copies in the first instance. For many publishers and producers the real concern is what a library, archive or museum can do with preservation copies. They may believe that a library which makes digital preservation copies and then makes those available to off-site users is interfering with an existing or potential market. So, it is likely that access to preservation copies will not be unfettered. Instead, libraries may be required to have users execute a click-through agreement that limits their use to scholarship and research and warns users about further distribution prior to providing access.

For preserved unpublished works, on-site access to a digital copy is permitted under the current statute. There may be ways to structure access for digital preservation copies for research and scholarship only. Permitting off-site access to a digital copy is more controversial, but it may be possible to grant such access under very restrictive conditions such as requiring the library to apply technological protection measures (TPMs) to digitized copies and to require users to agree to certain conditions via click-through agreements.

Under a potential preservation-only exception, access to digital copies likely would be severely restricted to curatorial and custodial staff to ensure the viability of the digital copy. For researchers, probably only on-site access would be available. One unique use of preservation-only digital copies, however, would be to generate a replacement copy under Section 108(c) after the library tried to find a replacement copy. In other words, there would be little sense in requiring a library to re-digitize a damaged analog work that it had already digitized. More logically, after the triggering event and the unsuccessful search for a replacement copy, the library should be allowed to generate a use replacement copy from the digital preservation copy. Should another library be able to request a digital replacement copy from the preservation institution's preservation copy? One question is whether any user should have access to preservation only-copies? In fact, one could argue that the copy is no longer for preservation only if access is being granted to users. However, even on-site access could be restricted to researchers and scholars as opposed to public access on-site.

A major concern for publishers and producers is what happens if the publisher later reintroduces a work that had been unavailable when the library made a digital copy. Does it make sense that libraries must de-activate access to their digital copy produced under the preservation-only exception? If so, how would publishers notify libraries that a work was being reintroduced to the market? Publishers believe that digital replacement copies of analog works should continue to be restricted to on-site use. Librarians posit that off-site access to digital replacement copies should be allowed with appropriate controls, such as restricted to defined user communities with appropriate TPMs.

Certainly, if the replacement copy is tangible digital media (such as CD or DVD), that copy should not be restricted to in-library use.

2. *Performance and Display of Preserved and Replacement Copies*

By adding museums to the list of eligible institutions, a new issue arises, and that is the performance and display of digital preservation and replacement copies. Section 108 covers only reproduction and distribution except for 108(h), the 1998 addition to the Act for works for which the author has been deceased for 50 years.²⁴ Section 109(c) contains a limited exception for display that allows libraries to display original copies of copyrighted works to viewers at the place where the copy is located.²⁵ If a museum makes a digital preservation copy of an unpublished work, should it be able to display that digital copy on site in lieu of displaying the original work since it also owns the original copy? Is it possible to display it off-site to the public or limit any display to scholars and researchers? If so, should TPMs be required? The same issues apply to a work that typically would be performed, such as an unpublished documentary film. If the library preserves the work by digital means, should it be permitted to make that copy available only on-site or could it make it available to the public or to scholars and researchers off-site under certain conditions? If so, should the performance be restricted to streaming or to technologies that prevent downstream copying?

C. **Copies for Users**

Copies for users under Sections 108(d)-(e), including interlibrary loan, continue to raise considerable concerns for both publishers and producers and for librarians. It is important to note that few libraries actually produce copies for users. These activities represent a tiny percentage of overall library operations, and, in fact, are performed primarily by special collections within academic libraries and by archival collections. Further, Sections (d) and (e) are little used by public libraries. Most users make their own copies on unsupervised reproduction equipment. Neither Sections 108(d) or (e) differentiate between published and unpublished works, but there are several reasons to be concerned about libraries making copies of unpublished works for users such as privacy, the intent of the creator, the author's right to disclose or not disclose the work (i.e., the right of first publication). The user may be able to obtain a copy from a library under fair use for research and scholarship, however.²⁶

For several years, some libraries have been scanning unlicensed articles and providing PDF copies at the request of their users. According to the current law, the library may not retain the scanned image. What happens now when the library has made a digital preservation copy and a patron requests a digital copy of an article? Should the library have to re-scan the article from the printed source for the user or could it provide another copy from the preservation copy? The latter actually reduces

²⁴ See text at footnote 7.

²⁵ "Notwithstanding the provisions of section 106(5), the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located." 17 U.S.C. § 109(c).

²⁶ House Report, *supra* note 18, at 78-79.

the number of copies made. Publishers and producers are likely to insist that TPMs be attached to any unlicensed digital copy provided to a user. Should these TPMs include not only restrictions on access but also could be limited to “view only” or “view and print only.” Scholars and researchers are unlikely to find these restrictions palatable as the methodology for doing scholarly writing is changing with the ability to use digital technology, and scholars will need the ability to manipulate the digital copy.

Publishers and producers have questioned whether libraries have the right to make digital copies of analog works for off-site users absent a license to do so. One way to permit this may be to require a library first to determine whether single digital copies are available at a fair price. Users would not have to subscribe to a database to acquire this copy, but would need to purchase the single article if it were available at a reasonable price from the publisher. This would preserve the market for publishers that want to offer individual articles for sale.²⁷ Another restriction that publishers and producers have suggested is to require that the number of direct copies a library provides to users be tracked, much as the Interlibrary Loan Guidelines require for the borrowing libraries today.

If the library makes a digital copy available to a user, should it be only a temporary copy? In other words, the library posts the digital copy on a password-protected website and notifies that user that he must retrieve the copy within a very short period of time so that there is an expiration date, after which the content is deleted from the website by the library. Moreover, copies could be labeled as being made available for scholarship and research only.

Interlibrary loan copies for users raise a number of important issues, the first of which is whether the rules should differ for analog versus digital copies. Is there a reason for the statute to contain “speed bumps” for digital copies because of the increased danger they pose to publishers and producers? The time and expense of photocopying, as envisioned in the 1976 Act and the CONTU Guidelines, created inconvenience for the user and acted to reduce the aggregate number of copies made for users. So, a concern for the use of unlicensed digital copies for interlibrary loan is that digital copies present no such speed bumps – copies are available much more quickly and users have the ability to further download copies and distribute them to others absent restrictions on further distribution. One such restriction that might encourage publishers and producers to approve such an exception would be to narrow the categories or users who may request an ILL to the defined user community of the library. The CONTU Guidelines were drafted for the analog environment and they likely should be updated for the digital world. Should digital copies for ILL now be limited to research and scholarship? The statute currently includes “private study” which is not defined and could be broadly interpreted to include uses for hobbies, business uses, entertainment or personal development. The term was probably included in order to permit other non-commercial uses that might not lead to scholarly publication. Should private study be dropped as a reason for permitting ILL copies? It also seems

²⁷ A concern is that restricting digital copies for ILL to instances where there is not a copy available from the publisher at a fair price does not consider the poor who may be unable to afford to purchase a copy at any price. Would this result in digital copies for the rich but only analog copies for the poor?

reasonable to require that libraries which provide digital copies to satisfy ILL requests not only mark the copies as reproductions but also apply TPMs to those copies to prevent further distribution by the user to whom they are provided. Moreover, digital copies provided for ILL could be time-sensitive and/or permit printing but not downloading. What about providing ILL copies directly to end users? Clearly, this method of providing digital ILL copies is much faster than sending the copy to a borrowing library for delivery to the user. Is there any reason to restrict this if the copy is counted by a borrowing library?

If the Section 108(i) exclusions are eliminated or altered, it would also affect copies for users to include portions of audiovisual works, musical works, graphic works, etc. Some type of copy-tracking guideline would be needed to parallel the CONTU Suggestion of Five. Just how this might work unclear at present. On the other hand, digital copies could be restricted to text material only and copying other material for (d), (e) and ILL be limited to analog copying or tangible digital media to tangible media. If libraries are permitted to make digital copies of audiovisual and visual materials for users, should distribution be restricted to streaming or to on-site viewing only?

Publishers and producers are also likely to insist that copies made of portions of audiovisual works, musical works, etc., for ILL be marked to discourage commercial use while not interfering with research and scholarly uses.

D. Miscellaneous Issues

Section 108(f)(1) requires libraries to post notices on reproduction equipment that making a copy may be subject to the copyright law. Libraries, archives and museums certainly should consider reproduction equipment broadly and post notices on all types of library provided equipment. Publishers and producers have posited that libraries are simply inviting patrons to use their own reproduction equipment and thereby absolve themselves of liability. Because libraries do not want to contribute to infringement, they are working to develop guidelines on best practices regarding patrons who use their own scanners, laptops and cell phones to make copies. They are unlikely to be able to enforce any ban the use of such patron-owned equipment from the premises of the institution.

Whether to eliminate the current Section 108(i) exclusions is far from clear. Allowing libraries to make digital copies of portions of audiovisual works, musical works and graphic works concerns publishers and producers since digitization even of portions of these works may negatively impact the rights of the copyright owner and artistic intent. On the other hand, libraries and archives are already making copies of these works for scholars under Section 107 fair use, and there has been no complaint by copyright owners to date. Moreover, even if a library or user is willing to pay royalties for reproducing the portion copied for a user, there is no single royalty collecting agency. It is difficult to craft a recommendation dealing with audiovisual works so that commercial works are protected for their markets but access to copies of portions of thousands of independent and noncommercial films is not denied to scholars and researchers.

For Section 108(f)(3) and the Vanderbilt Television News Archive, the question is whether tangible copies of television broadcasts are all that can be lent to users.

Streaming requested television broadcasts to users would actually be more secure than lending tangible copies that could be reproduced. On the other hand, television networks are beginning to offer access to their archives for a fee, so streaming has significant potential to interfere with a developing market.

The question regarding Section 108(4) is whether it should be changed concerning whether license agreements trump the Section 108 exceptions. Negotiated licenses, which were all that were used in 1976, are no longer the only way license agreements that confront libraries. Click-through licenses are not negotiated and therefore the same justification for which takes precedence, the Act or a contract may not be present. Libraries certainly would like to see an amendment that would alter this provision and permit the statute to trump contract for non-negotiated licenses, especially for preservation purposes.

IV. Next Steps

The Section 108 Study Group has been meeting approximately bi-monthly since April 2005, gathering information, asking experts to clarify and increase our knowledge in particular areas and preparing short internal reports via subcommittees. Written comments were solicited, two roundtables were held for public input;²⁸ and background papers, written submission and testimony are published on the Study Group's website.²⁹ The Group has basically completed its work on preservation and is in the process of writing an Interim Report to address these issues and recommendations. The Interim Report is due at the end of the year or early in 2007.

The Study Group is well underway with its work on copies for users and has followed the same process for information gathering. A public roundtable will be held in Chicago on January 31, 2007,³⁰ and the *Federal Register* notice will soon be available. The Final Report is slated for publication in mid to late 2007. The report will be delivered to the Librarian of Congress who will forward it to the Register of Copyrights and to the Associate Librarian for Strategic Initiatives. Then the Copyright Office will consider the recommendations and findings contained in the report. Presumably the Register will accept some of the recommendations and will draft amendments or at least a proposal and hold public hearings or roundtables for input from interested parties about how the advisability of the proposal or amendments and how they should be structured. The next step would be draft legislation for submission. Then the normal the normal Congressional process would begin with introduction of the amendments, Congressional hearing, etc.

V. Conclusion

²⁸ See <http://www.loc.gov/section108/roundtables.html>.

²⁹ *Id.*

³⁰ Section 108 Study Group, Public Roundtable Announced for January 31, 2007, in Chicago, at http://www.loc.gov/section108/docs/SavetheDate_FINAL.pdf.

There are a couple of other issues and one recommendation that are likely to be addressed by the Study Group. The present Section 108 is poorly organized and confusing. Even though an initial goal was to simplify the library section so that ordinary librarians and archivists could understand it, this may prove to be impossible. However, reorganizing the sections with internal headings such as “preservation” and “copies for users” can be accomplished. Another issue and likely recommendation is that any statutory amendments be reconsidered every five years to see how they are working and whether any further changes are needed.

There is also a non-Section 108 issue that the Group will address and that is found in the remedies section of the Act. Section 504(c)(2) states:

The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library or archives acting within the scope of his or her employment who, or such institution, library or archives itself, which infringed by reproducing the work in copies or phonorecords....

This provides considerable comfort for these eligible institutions, but it does not deal with the issue of attorneys’ fees for institutions or their employees whose damages may have been remitted. Therefore, it has been suggested that Section 505 be amended to deny the award of attorneys fees to the prevailing plaintiff against an institution or employee whose damages are remitted.

The Study Group has found this to be interesting but very challenging work. Our job is to enable libraries, archives and museums to serve their users with digital technology while not unduly hampering the rights and both existing and potential markets of publishers and producers. In an effort to address every issue, the group may be tempted to focus on the problems and the outlying issues rather than developing recommendations for the huge majority of uses and users. The Study Group must constantly remind itself that, in its attempt to cover every issue, it not craft an overly-detailed set of rules that are so complicated no library, archive or museum can apply them.