

## **The ALA and ARL Position on Access and Digital Preservation: A Response to the Section 108 Study Group**

### **Introduction**

In response to issues raised by initiatives such as the National Digital Information Infrastructure and Preservation Program (NDIIPP), in spring 2005 the U.S. Copyright Office and the Library of Congress convened the Section 108 Study Group. The Study Group is charged to investigate whether Section 108 of the Copyright Act, which grants exceptions to libraries and archives, should be updated to better address the use of digital technologies and networked-based resources. In the February 15, 2006, *Federal Register* (<http://www.loc.gov/section108/>), the Study Group requested feedback on their initial areas of study: access to digital copies, and two new exceptions, preservation-only copies and Web site preservation. The Association of Research Libraries (ARL), the American Library Association (ALA), and other library, museum, and archival associations provided comments and identified people who could raise their concerns at public roundtables in March 2006. Since that time, ARL and ALA have conferred with our members about their position on access and digital preservation. This paper describes our position and will be revised as we continue to collect feedback from our members.<sup>1</sup>

The mission of libraries is to preserve and provide access to information, regardless of format. Our ability to accomplish this mission is greatly enhanced by the exceptions currently offered in Section 108. We appreciate the extensive effort that the Section 108 Study Group has undertaken in reviewing the provisions in Section 108. We note however that any proposed changes to Section 108 should not be predicated on the use of restrictive conditions or technologies such as those included in the TEACH Act as these would severely interfere with the ability of libraries to achieve their missions. Such proposals would undermine the objective of the Section 108 Study Group which is to suggest revisions to Section 108 to better meet the needs of libraries and archives in the digital environment.

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The American Library Association and the Association of Research Libraries convened a workshop on June 1-2, 2006 to consider and receive additional input from members of the library and archival communities regarding the deliberations of the Section 108 Study Group. Based on the additional input from the library community, this paper and Part II, the more in depth responses, provide greater detail and in some instances, clarify the earlier statements filed in conjunction with the March Roundtables and the request for comment by the Study Group.

When Congress considers whether changes are necessary, we note that experience has shown that flexibility in copyright law is critical, especially in a time of rapid technological and organizational change. Rigidity in the law could inadvertently limit innovation and inhibit the ability of libraries to design new services, serve users, or work with new digital media and formats. Technological innovation is driving changes in institutional roles and the development of new practices and standards. Given the pace and breadth of change and what is at stake, we believe that the best approach is to re-affirm the fundamental rights and responsibilities of libraries to preserve and provide access to the evolving cultural and intellectual record and to provide a legal environment that enables the development of professional and institutional practices necessary to accomplish this mission on behalf of society. Indeed, we need to move away from technology-specific constructs, such as counting the number of copies (an artifact of microform technology), and instead address purpose and results in technology-independent ways.

### **Preservation of Library Collections**

Libraries and other cultural heritage institutions play a critical role in society by preserving works in their collections that are at risk of being lost. These works frequently have minimal commercial value, but they do have tremendous cultural or historical value. For these reasons, libraries should not be limited in their preservation activities by unnecessary qualifications and restrictions in Section 108. Distinctions between published and unpublished, digital and analog, copyright protected and public domain works are irrelevant in the context of preservation. All categories of works (audiovisual, literary, musical, sound recordings, etc.) are potential candidates for preservation. The loss of important works, regardless of format, from deterioration and neglect is tragic and can only be mitigated through the collective efforts of libraries and other cultural memory organizations acting on behalf of society broadly.

The Section 108 Study Group asked whether a preservation-only exception should be written into the statute to enable preemptive preservation of digital or analog works. Libraries agree that preemptive preservation of at-risk works is necessary, but question whether a new legislative exception is required to enable the practice and if so, how such an exemption would be framed.

If Congress considers such an exception necessary, we recommend that Congress define “at risk” as broadly as possible. Works can become endangered at any time for any number of reasons. Libraries continue to invest heavily in developing practices and techniques to recognize, monitor, identify and evaluate such endangered works in the digital realm. In addition, we recommend that the language “preservation-only copies” not be used. More accurate language would be “preemptive preservation copies.” Without access, preservation for the sake of preservation is both inappropriate for libraries and counter to the dual purpose of copyright: to foster and provide access to knowledge and creative work. There is no point in preserving works if library users cannot eventually access them. Under trigger conditions already present in section 108,

preservation copies in libraries' collections can be made accessible to our user communities.

The Section 108 Study Group also raised the question of whether preemptive preservation, if permitted, should be restricted to "trusted preservation institutions." For the following reasons, we believe such a restriction is not only unwarranted, but would be a serious mistake:

- Every library has unique resources, a unique collection and a unique collections policy that will allow decisions on when works should be preserved. Many have a distinct commitment to preservation activities. Every library should thus be encouraged to pursue its mission as recognized in current copyright law. Restricting the right to preemptively preserve materials will ultimately leave our society poorer by limiting the resources that can be mobilized throughout the library community to meet the challenges of digital preservation.
- Restricting the right to preemptively preserve digital materials in an era of evolving standards and practices is inappropriate. There currently is no generally accepted way to identify, certify or audit "trusted preservation institutions" or to manage the preservation copies of institutions that lose their certification. Under these circumstances, restricting preemptive preservation to trusted preservation institutions would create significant delay and barriers as criteria are established and institutions are certified under those criteria.
- Legislating such a restriction would overlook the gravity of the problem of at-risk works, the expertise of libraries and their commitment to standards and best practices, and the fiscal reality of libraries, which reinforces the need to select for preservation only those at-risk items that are of cultural and historical value to their clientele.
- Redefining the eligibility requirement in this way compromises the recognition extended by Congress to libraries and archives in the drafting of the 1976 Copyright Act. It undermines the purpose of Section 108 as a library and archive exception.

We recommend that Section 108 remain an exception for libraries and archives, broadened in scope to include museums and other cultural heritage organizations, but that no other changes be made to the requirements for eligibility or to the other conditions in section 108(a).

All libraries and other cultural memory organizations should adopt current best practices for digital preservation and be encouraged to preserve at-risk works in their possession and falling within their collection policies and priorities. Clearly, libraries will follow well-established traditions of collaborating both with other cultural memory organizations and with external sources of technical expertise to meet the challenges of digital preservation. Rather than legislating who can do what or how preservation is to be accomplished, best practices should be allowed to evolve naturally to meet the needs of at-risk works and the libraries endeavoring to preserve them. Creating additional, artificial limitations would at best restrict the ability of smaller institutions to preserve materials because of

undue burdens of compliance. At worst, it would seriously compromise the ability of all libraries to perform activities essential to accomplishing their mission.

### **Access to Preservation and Replacement Copies**

Under trigger conditions already present in section 108, preservation and replacement copies in libraries' collections can become accessible to our user communities. However, access to digital preservation and replacement copies is restricted to the library premises. The Section 108 Study Group raised the question of whether this restriction should remain.

We recommend that the prohibition on remote access to digital preservation and replacement copies be removed from Section 108 because the statute sufficiently constrains when preservation and replacement copies can be made and because libraries have demonstrated great care in protecting works—digital and otherwise—from unauthorized access, reproduction, and distribution. We recommend that preservation and replacement copies have no restrictions other than those explicitly assigned to the original work when it was acquired. For example, if licensed works have been acquired under a condition that only one simultaneous user can have access, this condition would remain true with a preservation and replacement copy.

### **Technological Protection Measures**

We appreciate that the Section 108 Study Group acknowledges the dilemma of creating preservation or replacement copies allowed by Section 108 when the original work has technological protection measures (TPM) that cannot be circumvented without breaching Section 1201 of the copyright law. Trusting that this discrepancy will be addressed at some time in the future, the question remains as to whether libraries should be required to apply the same TPM to their preservation and replacement copies. Our position is that TPMs are harmful to preservation copies and therefore should not be required. Requiring libraries to apply TPM would likely prohibit many of us from providing replacement copies, which would mean that these works are gone from our collections because by statute replacement copies can only be made if the work is not available in the marketplace. Furthermore, requiring libraries to apply technical protections that deny or deter the exercise of rights granted by copyright law would be inappropriate, and indeed conflict with the professional values of librarians. Libraries routinely inform users of their rights and responsibilities regarding use of works, including copyrighted works. We should not be obligated to control, monitor, or enforce technological protections tied to digital works, or to adjudicate the legality of user behaviors.

### **Preservation of Websites**

Clearly, digital materials accessible only through the Internet are now essential parts of the record of our society and culture. These materials must be preserved. Institutions such as the Internet Archive and the California Digital Library

already archive websites, relying on the doctrine of fair use. Though to date no lawsuits have challenged whether this is fair use of these materials, the Section 108 Study Group has asked whether a new legislative exception is needed to clarify the right to preserve websites.

Libraries agree that preserving Internet content is vital. When preserving websites, libraries rely upon Section 107. Should Congress determine that a new exception explicitly permitting the preservation of websites is necessary, we recommend that the exception not limit in any way existing rights of fair use. Furthermore, such an exception should not specifically address “websites” in their current form, but be cast more broadly to be technologically neutral, covering a variety of networked-based materials and formats, existing now or developed in the future.

Libraries must be able to harvest Internet materials that are freely and publicly available, including both commercial and non-commercial websites. We support the use of metatags, robot exclusion directives or similar technology for opting out of the availability and display of archived sites, with the exception that access to public domain materials must not be restricted. Best practices continue to develop in all areas of web harvesting, from opt-out methods to indicators that help distinguish archived materials from those that are part of a live site.

## **Conclusion**

As acknowledged in Section 108, libraries play a unique and significant role in society as stewards of our cultural and historical record and by providing users with access to the record regardless of social standing, economic background, ethnicity, or special circumstances. By providing equitable access, libraries enable everyone to learn, explore, and create. The shift to a digital environment has not changed our mission. Allowances for limited reproduction, preservation, and access to works must naturally occur under the purview of libraries in the most technologically secure way possible and without impinging on the economic interests of rights holders.

We recommend caution in revising Section 108. The potential for making mistakes in these early days of network-based resources is high. In summary, our recommendations are 1) eliminate the three-copy limit and replace it with the language proposed in the background paper, i.e., “a limited number of copies as reasonably necessary for the permitted purposes;” and 2) enable remote access to digital replacement copies with minimal restrictions consonant with access allowed for the original versions.

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