

February 22, 2006

Mary Rasenberger
Policy Advisor for Special Programs
U.S. Copyright Office

Dear Ms. Rasenberger:

The Association of Research Libraries and the American Library Association request that Sherrie Schmidt, Arizona State University and Ken Frazier, Director, University of Wisconsin, Madison participate in the Section 108 Study Group Roundtable Discussions in Los Angeles and Washington, D.C. Mr. Frazier and Ms. Schmidt will address issues associated with all four topic areas.

ALA and ARL believe that provisions in section 108 do require modification to reflect the new realities of the digital environment. One of the purposes of the Section 108 exceptions is to assure the long-term preservation of copyrighted intellectual and cultural contributions. Thus there is a legitimate societal interest in assuring that these trusted cultural institutions continue to have legal support for undertaking best practices for the preservation of copyrighted content, without regard to the format by which the content is distributed.

Topic 2: There is a dramatic rise in digital services in libraries and in teaching, learning and research applications to best meet the needs of students, faculty, researchers and the public. The expectations of these users are that these resources will be available electronically, not only via the physical premises of the institution. Thus, an on-site premises only designation is not useful. It does not reflect the reality of how users work in a digital, networked environment.

Moreover, one of the great advantages of digital preservation of fragile works is that, not only does the fragile original not need to be manipulated or handled in any way (protecting it), but the scholarly interaction with the work can be done remotely, permitting a large increase in the amount of scholarship that can be produced with the work. A preferred approach would be to define a user community and then provide access to that user community, and have procedures in place to provide such access.

Restricting access by limiting the number of simultaneous users is arbitrary and does not reflect how libraries provide access and how our users work. For example, there may be a small user group, such as a class of students, but the teaching goal would be to enable all students to have access to a work at the same time, perhaps even in the classroom on their laptops. A limited simultaneous user approach is also problematic because it would require the creators of a database to develop and implement access restricted software for each project, making preservation projects much more difficult to implement and a barrier for institutions. This issue should be solved via authorizations and secure authentication software that protects user privacy.

Libraries and archives must be able to circumvent technological barriers to copying, solely in order to perform copying for the purposes permitted by Section 108. If such a provision is not included, the statutory permission to make preservation copies is illusory. Moreover, section 1201(c)(1) ensures that technological measures should not affect any statutory limitations on copyright such as Section 108.

The experience of the education community with implementing the TEACH Act has been one of enormous frustration. It has presented huge, oftentimes insurmountable burdens on educational institutions. As a consequence, few institutions utilize TEACH. Exporting TEACH-like requirements to section 108 would be a wrong approach and would undermine the goal of effectively updating section 108. In addition to imposing hefty technological requirements, TEACH is not acceptable to faculty as it does not reflect how faculty teach. For those students in the community, perhaps in rural areas, it is burdensome to keep pulling up a site. They may have a slow connection (this is particularly relevant to off premise access). The downstream control requirement is one of the biggest hurdles with TEACH. Not being able to have the work in any "accessible format" is very problematic. In a nutshell, TEACH places too many technological requirements on institutions, asks too much of teachers and gives faculty and students too little.

The rules for a replacement or preservation copy should be the same for a tangible and intangible digital format. As a principle, the library community has learned that rules for any existing format will grow outdated quickly and therefore become problematic for the long-term. Limitations by format prevent libraries from making the best decision as technology evolves.

With regards to access to digital copies made under subsections 108(b) and (c) and technological access controls, law should not mandate the use of specific technologies and should be sufficiently flexible to permit new approaches as technologies and practice evolve. While libraries and archives should be required to control and stipulate the conditions of off-site access, it would be unhelpful, indeed problematic, to mandate that this control be enforced by specific technologies or even that it be purely technological. Libraries and archives that create digital copies under subsections 108(b) and (c) should be required to enforce limitations on access and use through *appropriate and responsible means* including, but not limited to, requiring responsible use agreements, password protection and more.

Topic 3: Libraries and archives should be permitted to engage in proactive preservation of both digital and print materials. Many print materials remain at high risk and should be considered for preservation treatment prior to any use. Moreover, exempt institutions should not be held to a specific definition of "at risk." Both defining at risk and making determinations of at risk versus "safe" materials would be administratively difficult and could be prohibitively expensive. Rather, the institutions should make preservation decisions in

keeping with their missions and then apply necessary access and use restrictions in accordance with the law and with agreements with rights holders.

The inherent instability of digital materials necessitates up-front preservation activities. Libraries and archives need the ability to make copies of digital works under a preservation exception without limitation. The statutory scheme could permit copying under a general preservation exception, but require that copies made pursuant to this exception be maintained in a restricted or dark archive unless or until another exception applies or until they meet any requirement (such as moving into the public domain) that would allow them to be made generally available.

Certification is one approach to ensure that institutions engaging in preservation copying have the necessary resources to accomplish the task and are able to meet certain standards and pursue best practices. However, certification should not be limited to specific institutions, but rather the limits on the exception should be provided by the standards, best practices and resources required. In addition, valuable resources and collections that require preservation are found at libraries and archives throughout the country. These institutions all need to be able to legitimately engage in preservation activities. Limiting who can preserve will result in the loss of certain collections. Any institution permitted by Section 108(a) to take advantage of Section 108 should be entitled to become certified to take advantage of the preservation-only exception, if it meets established criteria. Those criteria should be established through a community-setting process rather than the statute itself, as they will be based on technological issues that will change rapidly over time. The library community is already establishing standards for trusted digital repositories and it would be problematic to have new certification requirements uncoordinated with existing initiatives. Strong restrictions limiting the creation and storage of preservation copies to only a small number of institutions would put the burden and cost of preservation on too few. The responsibility and work of preservation should be developed in such a way that it can be shared in a more distributed environment.

Topic 4: A special exception should be created to permit the capture and preservation by libraries and archives of websites and other online content. Such an exception should not be limited to a defined class of sites such as non-commercial sites. Many commercial sites have important information and material of great interest to people who study cultural history, media studies, history of graphic design, and more. Restricting permitted sites would discriminate against particular fields of study. In addition, an artificial division of eligible websites will not provide a "full snapshot" of the web as it exists at any one time. Again, the safeguards should reside in the restrictions on what the library may then do with the permitted copy, not in an attempt to prevent certain material from being preserved.

Any requirement of notification of website owners raises the same kinds of issues now being faced with orphan works: inability to find the owner, the email address on the website leads nowhere, a message is sent but there is no response.

The solution should be similar to that proposed for the orphan works issue. Institutions able to take advantage of Section 108 should be permitted to make preservation copies of websites with notification requirements (e.g. a requirement that an email be sent to a responsible person so designated on the website) until and unless the institution is specifically notified by the website owner, by a notice including the URL of the specific website, that a copy may not be made.

If libraries and archives cannot preserve all components that render the final object, then it is like being told that libraries and archives may preserve the pages of a book but not the glue or sewing that binds them together in the necessary order. Again, safeguards should reside in the permitted use – libraries cannot use such a copy to become a software distributor, but it is crucial to the future research use of preserved websites to recreate the full experience.

Topic 1: Tremendous resources are being committed to acquiring and creating digital works, to incorporating large quantities of digital works into collections, and to creating new collections. Because researchers need comprehensive, subject-based collections, the creation of virtual collections is central to libraries' ability to carry out their core mission. Virtual collections also allow libraries and archives to coordinate national efforts to systematically preserve collections. Non-physical or virtual libraries or archives should be included within the ambit of section 108 especially as more materials are created in digital only formats.

Libraries and archives should be permitted to contract out the activities permitted under section 108. Libraries do not necessarily have all the necessary expertise in-house and use vendors to provide a range of services for the preservation of and access to collections. These activities can include the creation of digital objects, cataloging and creation of metadata, storage and maintenance of digital files, servicing of these collections, and the archiving of files.

Sincerely,

Prudence S. Adler
Association of Research Libraries

Emily Sheketoff
American Library Association

Ken Frazier
Director
University of Wisconsin, Madison Libraries
728 State Street
Madison, WI 53706
608-262-2600, kfrazier@library.wisc.edu

Sherrie Schmidt
Dean of University Libraries
Arizona State University Library
113 Hayden Library
Tempe, AZ 85287-3956
480-965-3956
sherrie.schmidt@asu.edu