

Part II: Detailed Responses to Section 108 Working Group Questions

The American Library Association and the Association of Research Libraries convened a workshop to consider and receive additional input from members of the library and archival communities regarding the deliberations of the Section 108 Study Group. The Section 108 Study Group is examining the exceptions and limitations available to libraries and archives under Section 108 of the Copyright Act and considering changes to better meet the needs of libraries and archives in the digital environment. The Study Group is sponsored by the Library of Congress and the Copyright Office. On February 10, the Study Group released a *Background Paper* and requested comments on issues relating to library and archival exceptions under Section 108. The library community provided written and oral statements to the Study Group. Based on the additional input from the library community, the responses below 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.

Topic 1: Access to Digital Copies Made under Subsections 108(b) and (c).

- *Under what conditions should electronic access to digital preservation or replacement copies be permitted under subsections 108 (b) or (c) outside the premises of libraries or archives (e.g., via e-mail or the Internet or lending of a CD or DVD)?*

Libraries must continue to provide access to the materials in their collections. When libraries preserve or replace deteriorating or damaged materials, the new digital replacement copy should be available with the same conditions placed on the original work. Thus no new limitations should be added and access should remain consistent with the original work.

- *Should any permitted off-site access be restricted to a library's or archives' "user community"? How would this community be defined for the different types of libraries?*

The user community of a library consists of those individuals -- students, researchers, scholars, and members of the public -- who utilize the resources of the institution. These communities may be local, regional, institutional, and/or researchers specializing in a particular field or discipline. In order to determine how best to provide access to their collections, each institution applies "best practices" which evolve over time with new technologies and changing user information needs. Legislation should not interfere with library policies when libraries seek to enable, and not restrict, community use. As responsible stewards of library collections, libraries apply access and use policies including use restrictions when appropriate for the research, education and scholarly use by their user community.

- *Should off-site access be restricted to a limited number of simultaneous users? Required for any off-site use? Do effective technologies exist to enforce such limits?*

When used off-site, access and use policies for preservation and replacement copies of damaged or deteriorating works should be faithful to the limitations placed on the original work, while at the same time, leveraging the new teaching and collaborative opportunities offered by digital technology. Controlling simultaneous users may be appropriate for certain types of works under certain circumstances with different source materials justifying different ranges of simultaneous users. Libraries have an obligation to provide the broadest possible access to preserved digital copies in the same way as analog copies to the community that they serve without interfering with the market for non-commercial purposes.

It may be appropriate for libraries to utilize technologies to authenticate users but libraries should not employ DRM technologies to monitor or impose downstream control of an individual's use of information.

- *Should libraries and archives require that users sign or otherwise assent to user agreements prohibiting downloading, copying and downstream transmission?*

Libraries, archives and museums have an obligation to provide broad public access to resources in the digital environment in the same way as they do in the analog environment. Libraries routinely explain to users their rights and responsibilities regarding use of all types of information, including copyrighted works.

- *Should the rules be different depending on whether the replacement or preservation copy is a digital tangible copy or intangible electronic copy (e.g., a CD versus an MP3 file) or if the copies originally acquired by the library or archive were acquired in analog, tangible or intangible digital formats?*

As discussed above, libraries do believe that access to off-site resources and loans of digital works should depend on the nature of the original work preserved or replaced. In addition, there should not be new limitations placed on the digital item.

2. New Preservation-only Exception

What are the compelling reasons to create a new exception that would permit a select group of qualifying libraries and archives to make copies of "at risk" published works in their collections solely for purposes of preserving those works, without having to meet the other requirements of subsection 108(c)?

Libraries and other cultural institutions play a critical role in the preservation of our cultural and scholarly heritage and provisions in section 108 are central to achieving that role. Libraries, archives, and other institutions provide access to their collections of preserved materials as both an essential component of their preservation programs and of their missions. The questions raised in the February 10, 2006 *Background Paper* under this topic suggest that the Study Group

may be considering a bifurcated approach to questions of preservation access and preservation copying. Such a bifurcated approach seems inconsistent, if not incompatible, with the roles and missions of libraries, archives, and other cultural institutions. Another approach could be to frame the issue differently, e.g. there are compelling reasons for certain works to be preserved.

Libraries, archives, and other institutions have an obligation to engage in preservation activities to prevent the loss of vital cultural, historical, and scholarly resources. A vast amount of material lacks commercial value or the publisher may not have the interest and technical expertise to engage in preservation activities. It is important to note that the amount of material demanding preservation exceeds and will continue to exceed the capacity of organizations to fund, organize, and curate collections, forcing organizations to make hard, technical decisions concerning which materials to preserve.

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, 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.

- *How could one craft such an exception to protect against its abuse or misuse?*

As stated previously, libraries have an obligation to provide the broadest possible access to preserved digital copies in the same way as analog copies to the community that they serve without interfering with the market for non-commercial purposes. Libraries have long established their role as good stewards of works both in and out of copyright.

- *Should the exception only apply to a defined subset of copyrighted works, such as those that are “at risk”? If so, how should “at risk” (or a similar concept) be defined? Should the exception be applicable only to digital materials?*

Given the role that libraries undertake in preserving our cultural heritage, Congress should encourage, not discourage, preservation activities. Once produced, all works are potentially at risk of loss or destruction and the trade-offs between preserving now or in the future are within the core competency of library and archive professionals where the expertise resides.

“At risk” should remain a technical determination left to institutions and not frozen into federal copyright law. If Congress determines that a new exemption is needed, it should reflect the realities of preservation by adopting a similar approach for both published and unpublished works. Additionally, a legislative definition must recognize that commercial viability is no substitute for preservation. Many commercially viable works can be at risk of deterioration or loss. Finally, it should be noted that works that do not have a steward are also at risk.

The risk of loss applies both to physical and digital materials, regardless of format or media. The ability to preserve materials before their degradation and loss should apply equally to analog and digital materials. Again, with the sheer scope of works requiring preservation, library and archival experts make decisions about what to preserve due to limited resources.

- *Should the copies made under the exception be maintained in restricted archives and kept out of circulation unless or until another exception applies?*

The concept of dark archives is not feasible in the digital environment. We must use works in order to know that the resource is stable and not deteriorating. Although “dim” archives have limited uses, preservation best practices suggest that libraries should make their preservation archives available under certain circumstances for limited research and scholarly use. Certainly, access and use limitations placed on preservation materials should be no greater or substantively different than those for the original material preserved.

- *Should only certain trusted preservation institutions be permitted to take advantage of such an exception? If so, how would it be determined whether any particular library or archives qualifies for the exception? Who would manage the continuing compliance of qualified institutions?*

Given the enormous amount of works that require preservation, we must err on the side of caution to avoid any artificial limitations that could constrict the ability of institutions to preserve materials in their collections. The proposal to identify a group of qualifying libraries and archives would limit the number of institutions that could contribute to preservation efforts. This, in turn, would put new pressures on the remaining institutions engaged in preservation efforts. These burdens of certification and statutorily qualifying requirements would disenfranchise smaller organizations as well as discourage small-scale preservation projects and pilot initiatives at larger institutions. Smaller organizations play a critical role in the preservation and selection of materials, particularly those focused on local history and culture.

National legislation must take a long view with regards to the types and number of institutions that will need to engage in preservation activities. Congress should avoid limiting those activities to only selected institutions. Different types of libraries, archives, and museums have varying contributions to make to the preservation of culturally and historically significant works. For example,

organizations may have funding and important works requiring preservation but may lack the internal expertise so will seek assistance from outside agents. For example, some state libraries undertake preservation activities for collections of some smaller organizations, such as local libraries and historical societies. There are a variety of preservation models and these will continue to evolve. As a result, it is important to ensure continued flexibility permitting new business models to emerge.

Moreover, restricting the right to preemptively preserve digital materials in an era of evolving standards and practices would be 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 presumably create significant delay and barriers as criteria are established and institutions are certified under those criteria.

Finally, redefining the eligibility requirement in this way would compromise the recognition extended by Congress to libraries and archives in the drafting of the 1976 Copyright Act. It would undermine 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).

What would happen to the preservation copies in the collections of an institution that has been disqualified? Should qualified institutions be authorized to make copies for other libraries or archives that can show they have met the conditions for making copies under subsections 108(c) or (h)?

Many libraries and archives have succession plans in place for a variety of eventualities. If certification or qualification is required by federal law, and subsequently lost, responsible organizations will be prepared to transfer their preservation collection to sanctioned peers.

A number of possible triggers could prompt access including: resources that are unavailable from other sources; access for purposes of research and education; and business failure or geopolitical disaster.

3. New Website Preservation Exception

- *Do we need an exception to allow for the archiving of Web content?*

Websites represent an important and transitory record of contemporary events, politics, and culture. As a result, libraries and archives engage in web archiving and preservation projects. The scale and complexity of capturing and preserving websites is high. It is precisely because of this complexity that many institutions should be able to capture and preserve the World Wide Web. It will entail many institutions with differing expertise and a variety of approaches as we learn and

develop best practices. In addition, some libraries may want to capture and preserve one or more subject areas. This is consistent with long-standing collections policies of our institutions.

Section 107 of the Copyright Act, fair use, allows libraries and archives to capture these culturally significant records. Should Congress determine that such an 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.

- *If a special exception to permit the online capture and preservation of websites or other online content were created, should the exception be limited to a defined class of sites or online content (i.e. non-commercial content/ sites) or to content that is made freely available for public viewing (non-subscription, without access restrictions or user registration?)*

If Congress determines that a new exemption is necessary, it should not be based on classes of websites such as commercial or non-commercial. Current technology does not provide effective archiving tools that distinguish and/or avoid particular classes of websites. Moreover, distinctions between commercial and non-commercial content are becoming increasingly difficult to identify. It is best to keep criteria simple. For example, those materials that are freely and publicly available are obvious candidates for archiving and public availability.

- *Should there be an opt-out provision, whereby an objecting site owner or rights-holder could request that a particular site not be included? Should “no archive” meta-tags, robot.txt files, or similar technologies that block sites or pages from being crawled be respected?*

The interests of website owners in ensuring the exclusivity of their content should be balanced with the needs of scholars to study cultural records. In some instances, this may be a balance that is difficult to achieve. To that end, the use of meta-tags, robot exclusion directives or similar technology could be used to opt-out of the availability and display of archived materials. On the other hand, governmental and political websites should not be able to remove their publicly available content from public view.

- *Should the library or archive be permitted to also copy and retain a copy of a site’s underlying software solely for purposes of preserving the site’s original experience (provided no use is permitted other than to display/use the website)?*

Libraries and archives should be permitted to copy and retain software sent to the web browser as part of the website. Additionally, some exemptions for the software used to view embedded web content may also be appropriate. This may include javascript and stylesheets in order to render a page

- *If libraries and archives are permitted to capture online content, should there be any restrictions on public access? Should libraries and archives be allowed to make the copies thus captured and preserved available electronically, or only on the premises? Should the lapse of a certain period of time be required?*

Given the inherently public nature of any material archived and preserved by libraries and archives from online sources, copies of this material should be freely available to users. The availability of this material should be governed by best practices designed to avoid confusion between the originating site and the preserved copy. However, no particular legislated time lapse would be appropriate to accomplish this goal.

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