February 10, 2006

SECTION 108 STUDY GROUP

INFORMATION FOR THE MARCH 2006 PUBLIC ROUNDTABLES AND REQUEST FOR WRITTEN COMMENTS

INTRODUCTION:

This document provides background information and detailed discussion on the issues set forth in the February 15, 2006 Federal Register notice titled "Notice of public roundtables with request for comments," issued by the Copyright Office and the Office of Strategic Initiatives of the Library of Congress. Parties wishing to participate in the March public roundtables and/or submit comments should read this background document thoroughly. Please note that this document is intended to supplement the Federal Register notice. For convenience, it also includes all logistical and procedural information from the Federal Register notice.

SUMMARY:

The Section 108 Study Group of the Library of Congress seeks comment on certain issues relating to the exceptions and limitations applicable to libraries and archives under section 108 of the Copyright Act, and announces public roundtable discussions. The Federal Register notice (1) requests written comments from all interested parties on the specific issues identified in the notice, and (2) announces public roundtable discussions regarding certain of those issues, as described in the notice. The issues covered in the notice relate primarily to eligibility for the section 108 exceptions and copies made for purposes of preservation and replacement.

DATES:

Roundtable Discussions: The first public roundtable will be held in Los Angeles, California on Wednesday, March 8, 2006, from 8:30 a.m. to 4:00 p.m. P.S.T. An additional roundtable will be held in Washington, D.C. on Thursday, March 16, 2006 from 9:00 a.m. to 4:30 p.m. E.S.T. Requests to participate in either roundtable must be received by the Section 108 Study Group by 5:00 p.m. E.S.T. on Feb. 24, 2006.

Written Comments: Interested parties may submit written comments on any of the topics discussed in the Federal Register notice after 8:30 a.m. E.S.T. on March 17, 2006, and on or before 5:00 p.m. E.S.T. on April 17, 2006.

ADDRESSES:

All written comments and requests to participate in roundtables should be addressed to Mary Rasenberger, Policy Advisor for Special Programs, U.S. Copyright Office. Comments may be sent (1) by electronic mail (preferred) to the e-mail address

section108@loc.gov; (2) by commercial, non-government courier or messenger, addressed to the U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE, Washington, DC 20559-6000, and delivered to the Congressional Courier Acceptance Site (CCAS), 2nd and D Streets, NE, Washington, DC, between 8:30 a.m. and 4:00 p.m. E.S.T.; or (3) by hand delivery by a private party to the Public Information Office, U.S. Copyright Office, James Madison Memorial Building, Room LM-401, 101 Independence Avenue, SE., Washington, DC 20559-6000, between 8:30 a.m. and 5:00 p.m. E.S.T. (***See* "Submissions Procedure" below for file formats and other information about electronic and non-electronic submission requirements.**) Submission by overnight service or regular mail will not be effective.

The public roundtable in Los Angeles, California will be held at the UCLA School of Law, Room 1314, Los Angeles, CA 90095, on Wednesday, March 8, 2006. The public roundtable in Washington, D.C. will be held in the Rayburn House Office Building, Room 2237, Washington, D.C. 20515, on Thursday, March 16, 2006.

FOR FURTHER INFORMATION CONTACT:

Chris Weston, Attorney-Advisor, U.S. Copyright Office, Email: cwes@loc.gov; Telephone (202) 707-2592; Fax (202) 252-3173.

BACKGROUND:

The Section 108 Study Group was convened in April 2005 under the sponsorship of the Library of Congress' National Digital Information Infrastructure and Preservation Program (NDIIPP),[1] in cooperation with the U.S. Copyright Office. The group was named for section 108 of the Copyright Act,[2] which provides special exceptions to the exclusive rights of copyright owners[3] for libraries and archives. The Study Group is charged with examining how the section 108 exceptions and limitations may need to be amended, specifically in light of the changes produced by the widespread use of digital technologies. The nineteen-member Study Group is made up of experts in copyright law, from the various copyright industries, as well as from libraries, archives, and museums. The group intends to submit findings and recommendations on how to revise section 108 to the Librarian of Congress by late 2006. More detailed information regarding the Section 108 Study Group can be found at www.loc.gov/section108.

To date, the Study Group has principally focused on issues relating to: (1) eligibility for the section 108 exceptions; (2) amendments to the preservation and

[1] NDIIPP was created by the Miscellaneous Appropriations Act of 2001, Pub. L. No. 106-554, 114 Stat. 2763 (2000), which appropriated $100,000,000 (subsequently reduced by a rescission of $220,000) to the Library of Congress to plan and carry out the National Digital Information Infrastructure and Preservation Program (NDIIPP). Under the NDIIPP legislation, Congress charged the Library of Congress with leading a national program, in collaboration with other federal and non-federal entities, to create a national digital collection and preservation strategy. See www.digitalpreservation.gov for more information regarding NDIIPP.

[2] 17 U.S.C. 108.

[3] 17 U.S.C. 106.

replacement exceptions in subsections (b) and (c), including amendments to the three-copy limit, the 108(c) triggers, the separate treatment of unpublished works, and off-site access restrictions; (3) proposals for a new exception to permit the creation of preservation-only/restricted access copies in limited circumstances; and (4) a new exception to permit capture of websites and other online content. The Study Group now seeks input, through both written comment and participation in the public roundtables described in the Federal Register notice, on whether there are compelling concerns in any of the areas identified that merit a legislative or other solution and, if so, what solutions might effectively address those concerns without conflicting with the legitimate interests of authors and other rights-holders.

Section 108 of the Copyright Act provides limitations on the exclusive rights of copyright owners by allowing libraries and archives to make unauthorized reproductions and distributions of copyrighted works under certain limited conditions. [4] Section 108 was enacted as part of the 1976 Copyright Act in recognition of the vital role of libraries and archives to our nation's education and cultural heritage, and their unique needs in serving the public. The exceptions were carefully crafted to maintain a balance between the legitimate interests of libraries and archives, on the one hand, and rights-holders, on the other, in a manner that best serves the national interest.

It has been observed that, because section 108 was drafted with analog materials in mind, it does not adequately address many of the issues unique to digital media, either from the perspective of rights-holders or of libraries and archives. Digital media – from text to motion pictures to recorded sound – are rapidly transforming how copyrighted works are created and disseminated, and also how libraries and archives preserve and make those works available. Increasingly, digital content embodies much of the nation's intellectual, social and cultural history. Libraries, archives, and other cultural heritage institutions, in carrying forward their missions, are acquiring and incorporating large quantities of digital works into their holdings to ensure the continuing availability of these works to future generations.

Digital works present different challenges for libraries and archives, as well as for rights-holders, including the fact that libraries' and archives' preservation and use of digital materials implicate copyright in ways that analog materials do not. In the planning stages for NDIIPP, copyright issues were identified as one of the major hurdles to effective digital preservation – the fact that digital preservation cannot be conducted without making multiple copies, and the lack of statutory copyright exceptions that clearly permit activities necessary for effective preservation. [5] In many of their day to day activities, such as cataloging and storage, libraries and archives must make copies, often temporary, of digital works due to the nature of digital technology – whereas copies

[4] While the Copyright Act uses the term "copies and phonorecords," this document, for the sake of brevity, will use the term "copies" to refer to all fixed reproductions of copyrighted works, regardless of media or subject matter.

[5] LIBRARY OF CONGRESS, PRESERVING OUR DIGITAL HERITAGE: PLAN FOR THE NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM (2002), *available at* http://www.digitalpreservation.gov/.

are not made for the cataloging and storage of analog works. Section 108 does not address these routine digital copies.

As the history of section 108 shows,[6] the available technologies necessarily influence where and how an appropriate balance can be struck between the interests of libraries and archives, on one hand, and creators and publishers, on the other. As technologies change, it is important to review the exceptions available to libraries and archives to ensure they remain current and maintain the appropriate balance among the interests of creators and other rights-holders and libraries and archives. This fact was recognized by the Copyright Office in its 1988 subsection 108(i) report[7] recommending to Congress that these periodic reviews be expanded to study the impact of new technologies on the section 108 balance.[8]

The task before the Section 108 Study Group is to identify those areas where new technologies have so changed the activities of libraries and archives that the effectiveness or relevance of applicable section 108 exceptions are called into question. Where amendment is recommended, the Study Group will attempt to formulate appropriate, workable solutions. This re-examination also provides an opportunity to clarify certain ambiguous provisions of section 108 that have frustrated full compliance.

AREAS OF INQUIRY:

Public Roundtables: Due to time constraints, the Study Group will not be discussing all of the issues addressed in the Federal Register notice and this document at the March roundtables. Each of the four general topic areas will be addressed, but discussion of the second topic area ("Amendments to current subsections 108(b) and (c)") will be limited to off-premises access. As noted below, written comments, however, may address any of the issues set out in the notice. Participants in the roundtable discussions will be asked to respond to the specific questions set forth below under the following topics:

A. Eligibility for the section 108 exceptions.
Los Angeles, CA: Wednesday, March 8, morning session
Washington, DC: Thursday, March 16, morning session

B. Proposal to amend subsection 108(b) and (c) to allow access outside the premises in limited circumstances.

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[6] *See* MARY RASENBERGER & CHRIS WESTON, OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT: BACKGROUND, HISTORY, AND MEANING [DRAFT], *available at* www.loc.gov/section108/papers.html for a review of the history of section 108 and the discussions and work leading up to it.

[7] The 1976 Copyright Act included a requirement (subsection 108(i)) that the Copyright Office consult with stakeholders and issue a report in 1983 - and every five years thereafter - assessing whether section 108 had achieved the intended balance between the rights of copyright owners and the needs of libraries and archives. *See* CONF. REP. NO. 94-1773, at 71 (1976). This requirement was repealed in 1992. Pub. L. No. 102-307, 106 Stat. 264, 272.

[8] THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108): SECOND REPORT 128-29 (1988).

Los Angeles, CA: Wednesday, March 8, morning session
Washington, DC: Thursday, March 16, morning session

C. Proposal for a new exception for preservation-only restricted access copying.
Los Angeles, CA: Wednesday, March 8, afternoon session
Washington, DC: Thursday, March 16, afternoon session

D. Proposal for a new exception for the preservation of websites.
Los Angeles, CA: Wednesday, March 8, afternoon session
Washington, DC: Thursday, March 16, afternoon session

Written Comments: The Study Group seeks written comment on each of the topic areas identified in the Federal Register notice. Comment will be sought on other general topics pertaining to section 108 – such as making copies upon patron request, interlibrary loan, eReserves, and licensing – at a later date (and may be the subject of future roundtables).

Nothing in the Federal Register notice or this background document is meant to reflect a consensus or recommendation of the Study Group. Discussion on these issues is ongoing, and the input the Study Group receives from the public through the roundtables, the written submissions and otherwise is intended to further those discussions.

DISCUSSION:

Topic 1: Eligibility for Section 108 Exceptions

General Issue

What criteria should be used to determine institutional eligibility to take advantage of the section 108 exceptions – should eligibility be based upon the nature of an institution, the institution's activities, or a combination thereof?

Background

The provisions of section 108 apply only to "libraries" and "archives." Neither term is defined in the statute. Instead, subsection 108(a) lists certain criteria that libraries and archives must meet in order to take advantage of the exceptions. Subsection 108(a)(1) requires that the reproduction and distribution be made "without any purpose of direct or indirect commercial advantage." Subsection 108(a)(2) requires that the collections of the library or archive be "(i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field."[9]

[9] In addition, subsection 108(a)(3) requires that reproductions made by libraries and archives under section 108 bear the copyright notice as it appeared on the original copy, or, if no such notice exists, a legend stating that the reproduced work may be protected by copyright.

Concerns have been raised that the terms "libraries" and "archives" increasingly have been used by some in a generic sense to embrace online or virtual collections of information, as well as the physical institutions traditionally associated with libraries and archives, and that the statute is not clear as to whether these non-physical types of entities are covered by section 108. It has been suggested that, if section 108 were to be revised, it would be important to further clarify what types of institutions are covered by it. This could be done by adding criteria to subsection 108(a), or by providing definitions of "libraries" and "archives."

The roundtable discussions will address whether section 108 should include specific definitions of what is meant by "libraries" and "archives" and, if so, which characteristics of these institutions should be included in the definitions. In addition, the roundtable discussions will raise the question of whether section 108 should be applicable to other types of institutions.

For instance, the Study Group has considered whether section 108 should be limited to nonprofit or government libraries and archives, whose mission it is to provide materials and services for public – not private – benefit. The statute currently limits eligibility to reproduction and distribution that is not made for any purpose of direct or indirect commercial advantage – focusing on the activity rather than the nature of the institution. The House of Representatives committee report accompanying the 1976 Copyright Act states that this limitation only bars commercial advantage from attaching to the act of reproduction, not to the overall goal of the institution where the reproduction takes place.[10] The earlier Senate report views subsection 108(a)(1) as "intended to preclude a library or archives in a profit-making organization from providing photocopies of copyrighted materials to employees engaged in furtherance of the organization's commercial enterprise."[11] In practice, it has been difficult to reconcile these statements and determine with certainty when and how for-profit institutions can take advantage of section 108. Further, given the availability of blanket licenses for many copyrighted works, the need to include for-profit institutions within section 108 has been questioned.

The Study Group has also looked at revisiting whether "virtual" libraries and archives (*i.e.*, libraries and archives that only provide access electronically and not via physical premises) should be eligible under section 108. The Senate report on the Digital Millennium Copyright Act (DMCA) states that section 108 applies only to libraries and archives in the conventional sense – institutions that conduct their operations through physical premises.[12] Increasingly, however, libraries and archives are building digital-only collections and some libraries and archives may in the future make their collections available solely through electronic networks.

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[10] H.R. REP. NO. 94-1476, at 75 (1976).
[11] S. REP. NO. 94-473, at 67 (1975).
[12] S. REP. NO. 105-190, at 62 (1998) ("Although online interactive digital networks have since given birth to online digital 'libraries' and 'archives' that exist only in the virtual (rather than physical) sense on websites, bulletin boards and homepages across the Internet, it is not the Committee's intent that section 108 as revised apply to such collections of information").

Questions have also been raised as to whether other types of institutions should be included under section 108 given the similarity of their missions. Museums, for instance, increasingly provide services and roles that overlap with those of libraries and archives. Prior to the 1976 Act, a number of competing priorities influenced museum activities. Copyright legislation was not at the forefront of museum concerns because, at that time, many of the works in museum collections were in the public domain and a number of museums also had libraries and archives as part of their institutions. It has been suggested that museums now deal with digital and other materials that raise copyright issues and that there is no reasonable basis for not now including museums.

Another important area to address is outsourcing. Nothing in section 108 expressly extends any of its exceptions to outsourced activities, but many libraries and archives do in fact use contractors to provide certain services, including some of the activities that are covered under section 108. Outsourcing is likely to become increasingly used in connection with digital materials. It has been suggested that it would be helpful to clarify whether and when outsourcing should be permitted, and, if so, under what conditions.

The Study Group has discussed, for instance, whether any permitted outsourcing should be limited to entities acting on behalf of a library or archives as legal "agents." In other words, any copies or distributions would be made solely on behalf of the library or archives, and not for the benefit of the contractor itself. Other questions that have arisen include whether such outsourcing activities should be limited to the United States (so that U.S. law and jurisdiction would apply), and whether it be required that any copies made by the contractor be destroyed or returned to the library or archives.

Specific Questions

Should further definition of the terms "libraries" and "archives" (or other types of institutions) be included in section 108, or additional criteria for eligibility be added to subsection 108(a)?

Should eligible institutions be limited to nonprofit and government entities for some or all of the provisions of section 108? What would be the benefits or costs of limiting eligibility to institutions that have a nonprofit or public mission, in lieu of or in addition to requiring that there be no purpose of commercial advantage?

Should non-physical or "virtual" libraries or archives be included within the ambit of section 108? What are the benefits of or potential problems of doing so?

Should the scope of section 108 be expanded to include museums, given the similarity of their missions and activities to those of libraries and archives? Are there other types of institutions that should be considered for inclusion in section 108?

How can the issue of outsourcing be addressed? Should libraries and archives be permitted to contract out any or all of the activities permitted under section 108? If so, under what conditions?

Topic 2: Amendments to Current Subsections 108(b) and (c), Including (i) Three-Copy Limit, (ii) New Triggers Under Subsection 108(c), (iii) Published Versus Unpublished Works, and (iv) Off-Premises Access to Digital Copies.

Subsections 108 (b) and (c) permit qualifying libraries and archives to make additional copies of works that they have legally acquired for their collections for preservation or replacement purposes, respectively.

Subsection 108(b) applies to unpublished works only. It allows a library or archives to make up to three copies, in digital or analog form, of an unpublished work already in its collection for purposes of preservation and security or for deposit for research use in another library or archives. These copies can be reproduced in digital format only if they are not made available to the public in that format outside the premises of the library or archives.

Subsection 108(c) applies to published works. It permits a library or archives to make up to three copies of a published work already in its collection for replacement purposes, if the following "trigger" conditions are met: (1) the work is either damaged, deteriorating, lost, stolen, or in an obsolete format, and (2) the library or archives, after a reasonable effort, determines that an unused copy of the work cannot be obtained at a fair price. This provision was intended to ensure that items in library collections that are no longer on the market are preserved in usable form despite factors – like time, chance, and technology – beyond the library's control. Digital copies made under subsection (c) may not be made available outside the premises of the library or archives.

Several revisions to the existing subsections 108(b) and (c) have been considered, including proposals to: (i) replace the three-copy limit in both (b) and (c) with a "reasonable/limited" number of copies; (ii) add additional triggers under subsection 108(c) to permit the making of replacement copies where the original copy held by the library or archives is inherently unstable and at risk of near-term loss; and (iii) permit limited off-site use of digital copies under certain circumstances. In addition, the question has been raised as to whether the separate treatment of published and unpublished works should be retained.

The Study Group has also noted that, if there is no provision for the circumvention of technological protection measures (TPMs) or the ability to obtain non-protected materials under section 108, as a practical matter, libraries and archives will not be able to utilize the section 108 exceptions in connection with works containing TPMs. Given the likelihood of increasing use of TPMs, and likelihood of works containing them becoming an increasing percentage of library and archives collections, the inability to circumvent TPMs could override any exceptions that enable libraries and archives to preserve digital works. One suggestion is to craft an exception akin to that found in subsection 112(e)(8) of the Copyright Act, that would, for instance, require the rights-holder to provide the means to make a copy permitted under section 108, and permit the library or archives to circumvent TPMs only if these means are not provided.

i. Three Copy Limit

(*Note: This sub-topic will not be discussed at the March roundtables.*)

General Issue

Should the three-copy limit in subsections (b) and (c) be replaced with a more flexible limit, such as "a limited number of copies as reasonably necessary for the permitted purpose"?

Background

Initially, subsections (b) and (c) permitted the making of only a single copy. The limit was raised to three copies as part of the DMCA amendments in 1998. Although the legislative history states that the amendments were intended to allow libraries and archives to take advantage of digital technologies,[13] the three-copy limit more closely tracks microform preservation standards (of an "iron mountain" copy, a master copy, and a use copy)[14] than it does the realities of digital preservation.

While using digital technologies to preserve copies of works originally fixed in traditional analog media avoids many problems – such as finding shelf space, dealing with chemical deterioration, and creating temperature and humidity controls – digital preservation presents its own set of challenges. Among these are the necessity of making multiple back-up copies, creating preservation-ready formats, and migrating those formats to work with new display and rendering technologies. Each of these steps involves reproducing the copy. Moreover, digital works are distributed electronically among staff for purposes of cataloging and transforming them; each time a work is electronically distributed through the library's internal staff network, a copy is made. Indeed, each time a copy is accessed for any reason, a temporary copy is made.

In light of the technical requirements for ensuring the continued integrity of digital materials and providing access to them, it does not appear feasible to make and preserve a digital copy of a work without making many more than three copies over the life of the copyright. The Study Group thus has considered other types of limits that could replace the "three copy" rule. It has been suggested that "a limited number of copies as reasonably necessary for the permitted purpose" might provide a more suitable measure in the digital context.

Precedent for a "limited number" is found in subsection 108(f)(3) (permitting the reproduction and distribution of audiovisual news programs). In the case of copies for preservation and replacement, the notion of a "limited number" would be further qualified as that number which is reasonably necessary to preserve or replace the copy that has been lost, damaged, etc., as applicable. The creation of additional access copies for the collection would not be permitted; only those copies that reasonably need to be made to create and preserve the replacement or preservation copies could be made.

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[13] *See* S. REP. NO. 105-190, at 60-61 (1998).
[14] See RASENBERGER & WESTON, *supra* note 6, at 26.

The Study Group has discussed other alternatives to the existing three-copy limit, such as limiting the number of copies in existence at any given time, rather than the total number. Other proposals have included eliminating the focus on number of copies made altogether and instead focusing on limits on access.

Specific Questions

Should the three-copy limit in subsections 108 (b) and (c) be replaced with a flexible standard more appropriate to the nature of digital materials, such as "a limited number of copies as reasonably necessary for the permitted purpose"? Would such a conceptual, as opposed to numerical, limit be sufficient to protect against potential market harm to rights-holders? What other limits could be used in place of an absolute limit on the number of copies made?

As an alternative, should the number of existing or permanent copies be limited to a specific number? Or, would it be sufficiently effective to instead tighten controls on access?

Are there any compelling reasons to also revise the three-copy limit for analog materials?

ii. Additional Triggers under Subsection 108(c)

(*Note: This sub-topic will not be discussed at the March roundtables.*)

General Issue

Should the list of events that must occur before a library or archives is allowed to make replacement copies under subsection 108(c) be expanded to include "unstable" and "fragile," or similar terms – in addition to "damaged, deteriorating, lost, stolen" or in an "obsolete format" – in order to allow for up-front replacement of material at risk of near-term or sudden loss?

Background

Replacement of digital works often requires action in anticipation of damage or loss, since digital media has shown a tendency to deteriorate and lose its integrity more quickly than analog materials. At the same time, it is often difficult to detect loss of data in digital objects, as their deterioration is not, like that of books, immediately apparent. Moreover, once bits are lost, they are difficult, if not impossible, to restore.[15] For instance, when a book becomes brittle its deterioration is visible to the naked eye and the text is often still readable, but a digital work may lose irretrievable data before it is known to be deteriorating. Preservationists have noted that if they wait for a digital work to start deteriorating, it may be too late, and thus it is often not clear when and how a replacement copy can be made.

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[15] For background on the problems surrounding digital preservation, *see e.g.* JEFF ROTHENBERG, COUNCIL ON LIBRARY AND INFO. RES., AVOIDING TECHNOLOGICAL QUICKSAND: FINDING A VIABLE FOUNDATION FOR DIGITAL PRESERVATION (1999), *available at* http://www.clir.org/pubs/abstract/pub77.html.

While all digital materials are inherently unstable, certain digital files or media are particularly at risk of imminent deterioration. The question is whether those materials – or all digital materials – should receive special treatment under subsection 108(c). It has also been noted that some analog works are also inherently fragile (*e.g.*, a tape that breaks as soon as it is run in a machine) and that waiting for them to deteriorate to replace them would render replacement impossible.

The Study Group has considered whether the list of events that must occur before a library or archives is allowed to make replacement copies under subsection 108(c) should be expanded to include "unstable" (for digital materials) and "fragile" (for analog materials) or similar terms to permit the up-front replacement of material that is at risk of near-term or sudden loss. Definitions for these terms might be required in order to limit their scope. In addition, it has been suggested that "deteriorating" be defined to limit the scope of materials potentially encompassed. The requirement to first make a reasonable effort to find an unused copy at a fair price would still apply in any event. The issue of whether to replace "unused" with "usable" was also discussed by the Study Group.

Specific Questions

To address the potential of loss before a replacement copy can be made, should subsection 108(c) be revised to permit the making of such copies prior to actual deterioration or loss? Specifically, should concepts such as "unstable" or "fragile" be added to the existing triggers – damaged, deteriorating, lost, stolen, or obsolete – to allow replacement copies to be made when it is known that the media is at risk of near-term loss? In other words, should libraries and archives be able to make "pre-emptive" replacement copies before deterioration occurs for particularly unstable digital materials – bearing in mind that a search must first be made for an unused copy? If so, how should such concepts be further refined or defined so as not to include all digital materials?

Are there any analog materials that similarly are so fragile that they are at risk of becoming unusable and unreadable almost immediately – and where the ability to create stable replacement copies prior to loss would be equally important?

iii. Published versus Unpublished Works

(*Note: This sub-topic will not be discussed at the March roundtables.*)

General Issue

Are there any compelling reasons to revisit section 108's separate treatment of unpublished and published works in subsections 108(b) and (c), respectively?

Background

Subsection 108(b) currently gives broader privileges for the reproduction and distribution of unpublished works for preservation purposes than does subsection 108(c) for published works. Up to three copies can be made "for preservation and security or for deposit for research use in another library or archives." There is no requirement that the

originally acquired copy be damaged, deteriorating, lost, stolen or in obsolete format, or that an effort be made to find an unused copy.

Unpublished material collected by libraries and archives is frequently one-of-a-kind (or one-of-a-few), and thus not available in the marketplace. Because there is unlikely to be another copy available if the library or archives' copy is lost or damaged, the public interest in the library or archives' preservation may be greater than it would be for a published work. Moreover, there may be less likelihood of economic harm or of displacing a market for the work for many of the kinds of unpublished materials available in libraries and archives (*e.g.*, research data, research papers, private papers and letters). On the other hand, there are classes of unpublished works that are intended to be published or may nevertheless have a potential future market.

Specific Questions

Are there any compelling reasons to revisit section 108's separate treatment of unpublished and published works in subsections 108(b) and (c), respectively? Are there other areas where unpublished and published works should receive different treatment under section 108 than those currently specified in the statute? Are there any reasons to distinguish in section 108 between unpublished digital and unpublished analog works?

Should section 108 take into account the right of first publication with respect to unpublished works?[1] If so, why and in what manner? Would the right of first publication, for instance, dictate against allowing libraries and archives to ever permit online access to unpublished materials – even with the user restrictions described above?

Should section 108 treat unpublished works intended for publication differently from other unpublished materials, and if so, how?

iv. Access to Digital Copies Made under Subsections 108(b) and (c)

General Issue

Should subsections 108(b) and (c) be revised to permit off-site access in certain limited circumstances to the digital replacement and preservation copies made under those provisions?

Background

Currently, section 108 requires that libraries and archives that make digital copies for preservation or replacement purposes restrict public availability of those copies to their "premises." This applies to tangible digital media (*e.g.*, CDs and DVDs) as well as to purely electronic materials (*e.g.*, electronic journals). "Premises" are understood to be the actual buildings that house the libraries and archives, not the wider campus or community of which the libraries or archives may be a part. Increasingly, libraries and archives want to be able to make digital copies of works available online or otherwise off-site for various preservation, access, and storage reasons. Expanding non-licensed

[16] *See* Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

electronic access to digital works, however, presents very serious concerns to publishers, authors, and other rights-holders, given the ease of copying and re-transmission of digital media. It is for this reason that the on-premises restriction for digital copies was included in the DMCA revisions to section 108.[17] Moreover, given the growing availability of and markets for licensed copies in digital form, rights-holders are particularly concerned that permitting libraries to digitize works and make them available online could usurp potential markets.

Members of the library and archives community have commented that, since the passage of the DMCA, there is an increasing expectation that libraries and archives provide electronic services. Libraries and archives, say these commentators, cannot adequately serve their patrons if they operate solely as "brick and mortar" institutions. For example, users of research libraries are often geographically diverse, and their work would benefit greatly if they could receive information electronically instead of having to travel to the physical location where the information is located. It has been suggested that the physical premises restriction is anachronistic and also unnecessary given existing technologies. At the same time, the concerns of rights-holders that this restriction was meant to address remain quite relevant.

The Study Group has considered whether there may be ways to relax the premises restriction to reflect current library and archives practices and support the public interest in broader knowledge and scholarship, but do so without jeopardizing the legitimate interests of rights-holders.

To help guide its thinking, the Study Group has looked at whether off-site use of digital copies could be effectively limited so that it parallels the off-site use of analog works. While risk of user infringement can never be completely eliminated, even for analog works, the idea would be to reduce the risks associated with the off-site use of digital works to an acceptable level. A library's making copies of works in its collection available over its public website would indisputably create great risks of market loss to rights-holders. The question is whether there are ways to allow off-site uses of digital works so that those uses more closely resemble uses of analog works. For instance, should a library be permitted to lend an electronic book or journal to one user for a limited period of time in the same way it lends a traditional book (*i.e.*, by letting one user at a time "check" out the copy for a limited period of time in order to read it) – provided measures are taken to ensure that the use does not in fact exceed the comparable analog use? Some publishers for electronic materials have permitted this type of use under license agreements, so there is precedent to look to in determining how effectively libraries and archives can manage this type of "eLending." Another important question is whether libraries and archives should be permitted to lend tangible copies of digital works made under subsections 108(b) or (c) for off-site use.

[17] S. REP. NO. 105-190, at 61-62 (1998).

The Study Group has discussed various ways of limiting off-site use so that the risks to rights-holders might be sufficiently eliminated. These are:

A. Limiting the permitted number of simultaneous users of a work to one per each legally acquired copy of the work,
B. Limiting off-site access to the library or archives' community of users, where a sufficiently well-defined community exists,
and
C. Requiring technological measures and user agreements to enforce the above limits and to prevent downloading and further transmission by the user.

In the Study Group's discussions, it has become apparent that concerns regarding off-site access to digital materials may vary depending on the format in which the work was originally acquired and the format of the copy – *i.e.*, whether the preservation or replacement copies were made from analog, tangible digital, or intangible digital source formats, and whether the copies themselves are embodied in a tangible media, such as a CD or DVD, or exist as electronic files only, such as MP3s. Because rights-holders have an economic interest in controlling how their works are reproduced, manipulated and distributed, an electronic copy of a work that has previously existed only in analog form presents different marketplace concerns than an electronic copy of a digital work. For instance, where the rights-holder has not yet digitized the work and a digital market for the work has not yet been created, the distribution of the work in digital form by a library or archives could adversely affect the market for future authorized digital versions of the work. Providing online access to electronic files might also be distinguished from the lending of a CD or DVD. The former may be viewed as presenting particularly great risks of unauthorized downstream copying and downloading unless carefully controlled.

Specific Questions

Are there conditions under which electronic access to digital preservation or replacement copies should 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)? If so, what conditions or restrictions should apply?

Should any permitted off-site access be restricted to a library or archives' "user community"? How would this community be defined for the different types of libraries? To serve as an effective limit, should it represent an existing and well-defined group of users of the physical premises, rather than a potential user group (*e.g.*, anyone who pays a member fee)? Should off-site electronic access only be available where a limited and well-defined user community can be shown to exist?

Should restricting remote access to a limited number of simultaneous users be required for any off-site use? Would this provide an effective means of controlling off-site use of digital content so that the use parallels that of analog media? If a limit on simultaneous users is required for off-site access to unlicensed material, what should that number be? Should only one user be permitted at a time for each legally acquired copy? Do effective technologies exist to enforce such limits?

Should the use of technological access controls by libraries and archives be required in connection with any off-site access to such materials? Do the relevant provisions of the TEACH Act (17 U.S.C. 110(2)) provide a good model? Would it be effective to also require library and archives patrons desiring off-site access to sign or otherwise assent to user agreements prohibiting downloading, copying and downstream transmission?

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 archives were acquired in analog, tangible or intangible digital formats? What are the different concerns for each?

Topic 3: New Preservation-Only Exception

General Issue

Are there compelling reasons to create a new exception that would permit a select group of qualifying libraries and archives to make copies of published works in their collections solely for preservation purposes, and without having to meet the requirements of subsection 108(c)?

Background

The inherently unstable nature of digital materials and the fact that they generally need to be actively preserved present unique problems for preservation. As noted above, loss of integrity, deterioration of bits, and obsolescence of hardware and software can occur without notice, before preservation arrangements can be made. Evolving best practices for digital preservation require that actions be taken to preserve digital materials early in the life cycle and, in some cases, almost from the time of creation. If left "on the shelf" to be discovered at some later date, digital media may no longer be accessible and the readable data may be incomplete. As noted above, it may be difficult to effectively preserve published digital materials within the current parameters of the section 108 exceptions, because waiting for a digital work to become damaged, lost, stolen, or obsolete, or to deteriorate, as currently required by subsection 108(c), may be tantamount to abandoning its preservation.

The Study Group has queried whether, in addition to or in place of amendments to subsection 108(c), the characteristics of digital media require an exception to permit qualified institutions to make preservation copies of "at risk" works prior to loss. Such an exception would permit a select group of qualifying "preservation-ready" libraries and archives to make copies of works in their collections solely for preservation purposes without having to meet the requirements of subsection 108(c). The goal would be to craft the exception in a manner that would protect rights-holders' exclusive reproduction and distribution rights, while permitting recognized preservation institutions to create up-front digital copies as insurance to protect against future loss of those works.

The Study Group has considered several important ways in which such an exception might be limited in order to ensure that it is used only for its stated purpose – preservation of at risk works for posterity (and to guard against its potential abuse as a means to avoid purchasing additional copies):

A. *Limit to "At Risk" Works:* Only "at risk" works would be subject to the exception. How one would define "at risk " for these purposes is an open question. Among the criteria that the Study Group has considered to determine whether a particular work is "at risk" are:

   i. The copy is at risk for near-term loss, destruction, *or* disintegration due to the unstable, fragile, or ephemeral nature of the medium, or the uniqueness of the object;

   ii. There is a risk that the copy, or its integrity, will not otherwise be preserved by any other entity;

   ii. The work is not commercially available;

   iv. The copy may be vulnerable to damage or deterioration due to the unstable or fragile nature of its construction or condition; *and*

   v. The copy may be lost due to failure or imminent obsolescence of its technical format, the technology needed to perceive it, or maintenance services relating to these technologies.

B. *Limit to Qualified Digital Preservation Libraries and Archives:* Because not all libraries and archives eligible under section 108 have the ability or resources either to conduct effective digital preservation, or to maintain adequate security for digital archives, the exception might be limited to certain eligible institutions, namely those that employ recognized best practices or can otherwise be trusted to effectively preserve the materials and maintain them in restricted repositories under the required conditions. Qualifying criteria could be laid out in section 108 or by reference to an external set of best practices or standards-setting body. Such criteria, for instance, might include:

   i. Complying with technical best practices for digital preservation, such as those regarding the authenticity and integrity of information, and security of the works, including:

      a. A robust storage system with backup and recovery services;

      b. A standard means of verifying the integrity of ingoing and outgoing files, and for continuing integrity checks;

      c. The ability to assess and record the format, provenance, intellectual property rights, and other significant properties of the information to be preserved;

d. Unique and persistent naming of information objects so that they can be easily identified and located;

e. A standard security apparatus to control authorized access to the information; and

f. The ability to store the files in non-proprietary formats that could be easily transferred and used should the archive of record need to change.

ii. Providing an open, transparent means of auditing these archival practices.

iii. The demonstrable ability to fund the cost of long-term preservation.

iv. A nonprofit mission related to the preservation of the national scientific or cultural heritage.

v. Complying with certain restricted (or "dark") archiving best practices – *i.e.*, adequate access rules and controls to ensure compliance regarding who is authorized to access the content of the archive for maintenance, how, and when.

vi. Providing preservation services to institutions that do not qualify for the preservation-only exception.

vii. A legally binding succession plan in the event the institution ceases to exist or becomes ineligible for the exception.

A number of different mechanisms have been suggested to determine whether a given institution qualifies as eligible. These range from self-qualification based on criteria set out in the statute, self-qualification or certification with an audit process, the creation of an oversight body that could help settle disputes and determine when an entity did not comply or ceased to comply, to a full accreditation or certification process administered by a third party. In addition, it has also been suggested that only a limited number of institutions be accredited or certified.

C. *Copies Maintained in Restricted Archive:* All copies made under this preservation-only exception would be kept in a restricted archive available only to authorized custodians. Public access to a preservation-only copy could only be granted if a subsection 108(c) trigger event occurs (*e.g.*, deterioration, loss, etc.), the work enters the last 20 years of its term (subject to the conditions set forth in subsection 108(h)), the copyright expires, or the rights-holder grants permission. This restriction would be designed to avoid creating a windfall or loophole for libraries (*i.e.*, whereby libraries could acquire cost-free additional copies of a work that they would otherwise have to purchase).

D. *Labeling Required:* Another possible condition is a requirement that all copies made under the exception contain a legible notice that the copy was

made by the institution under its section 108 authority. The notice might also include the date on which the preservation-only copy was made. Such a notice would help avoid user confusion about whether a copy made under section 108 (and the formats or quality of the copy) is an original "as published" copy.

Specific Questions

Given the characteristics of digital media, are there 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)? Does the inherent instability of all or some digital materials necessitate up-front preservation activities, prior to deterioration or loss of content? If so, should this be addressed through a new exception or an expansion of subsection 108(c)?

How could one craft such an exception to protect against its abuse or misuse? How could rights-holders be assured that these "preservation" copies would not serve simply as additional copies available in the library or archives' collections? How could rights-holders be assured that the institutions making and maintaining the copies would maintain sufficient control over them?

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? Are there circumstances where such an exception might also be justified for making digital preservation copies of "at risk" analog materials, such as fragile tape, that are at risk of near-term deterioration? If so, should the same or different conditions apply?

Should the copies made under the exception be maintained in restricted archives and kept out of circulation unless or until another exception applies? Should eligible institutions be required to establish their ability and commitment to retain materials in restricted (or "dark") archives?

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? Should eligibility be determined solely by adherence to certain statutory criteria? Or should eligibility be based on reference to an external set of best practices or a standards-setting or certification body? Should institutions be permitted to self-qualify or should there be some sort of accreditation, certification or audit process? If the latter, who would be responsible for determining eligibility? What are the existing models for third party qualification or certification? How would continuing compliance be monitored? How would those failing to continue to meet the qualifications be disqualified? What would happen to the preservation copies in the collections of an institution that has been disqualified? Further, 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)?

Topic 4: New Website Preservation Exception

General Issue

Should a special limited exception be created to permit the online capture and preservation by libraries and archives of certain website or other online content?

Background

The Study Group has discussed the possibility of creating a new exception specifically to permit the capture and preservation of certain publicly available websites and other content made publicly available through public networks (*i.e.*, the Internet, Internet2 and similar future networks). Websites and other online content present unique preservation problems that might merit their receiving special treatment. This exception would differ from the preservation-only exception in that it would permit a library or archives to capture and copy online content that is not already in its collection without express permission of the rights-holder.

Online content is particularly ephemeral in nature, and most non-commercial sites are not archived, yet often contain a rich record of our social and political history. Moreover, websites and other freely available online content are rarely available for acquisition by purchase. There is no market for libraries and archives to purchase a copy of or the right to copy the contents of a non-commercial website on a particular date. Moreover, unrestricted publicly available Internet sites arguably carry implicit permission to download their content, and, in those cases, there may be less potential harm to rights-holder interests.

A website-specific exception might be akin in some senses to current subsection 108(f)(3), enacted as part of the 1976 Act. That provision permits libraries and archives to capture audiovisual news programs off the air.[17] In 1976 Congress determined that, given the importance of national news broadcasts and the lack of systematic preservation of these broadcasts, libraries and archives should be able to copy them off the air for preservation and lending.[18] The same determination might be made today with respect to certain online content, especially where the content is made freely available, without restriction, over public networks.

[17] Note that the language of subsection 108(f)(3) does not clearly lay out the exception. This is an area of the existing statute where clarification is desirable.

[18] *See* S. REP. NO. 94-473, at 69 (1975). Subsection 108(f)(3) legitimized the Vanderbilt University library program of capturing television news program off-air and allowed it to build its Television News Archive into a resource of national importance.

It has also been suggested that such an exception could instead be limited to the Library of Congress as an amendment to the mandatory deposit provisions of the Copyright Act.[19]

Many informational websites are of significant historical value and change on a frequent basis, monthly or weekly, if not daily or hourly. Yet, most are not archived or preserved on any systematic basis. (Even media sites that archive individual articles often do not archive the web pages themselves.) Informational sites, like news programming, often have little value once the information is "stale." Yet this information can be of important historical value. The blog that provides a first-hand account of a major historical event may have an expected life span of only a month or so, and may not be archived anywhere.

Capturing and preserving websites carries additional complications. For a website preservation exception to be effective, it would have to permit not only the capture of a site's content, but also the software necessary to preserve the user experience, software that is usually proprietary and owned by a third party. Unauthorized capture of this software would have to be conditioned so that it could not be used for any other purpose than to render the website. Another issue noted is that there are often multiple rights-holders of content on any given web page, including advertisements, which generally have a distinct set of proprietary rights.

Other important concepts that a website preservation exception might address include:

A. The potential for excessive web crawling and capture to disable websites is very real, at least given the current state of the technologies. This problem could be considered in drafting such an exception either by limiting those who can use the exception, limiting the amount of permissible crawling, or observing "no trespassing" type notices, such as "no archive" meta-tags or "robots.txt"-type commands that are presently used on some sites to block access to certain material.

B. Restricting public access to the captured content.

C. Requiring the lapse of a specified period, such as six months or a year, before online access to the captured site is permitted. This will prevent taking users away from the site itself and its advertisers.

D. Requiring libraries and archives to clearly label preserved public network content, so as to avoid confusion with the source content if both become internet-accessible.

Specific Questions

Given the ephemeral nature of websites and their importance in documenting the historical record, should a special exception be created to permit the online capture and

[19] 17 U.S.C. 407.

preservation by libraries and archives of certain website or other online content? If so, should such an exception be similar to subsection 108(f)(3), which permits libraries and archives to capture audiovisual news programming off the air? Should such an exception be limited to a defined class of sites or online content, such as non-commercial content/ sites (*i.e.*, where the captured content is not itself an object of commerce), so that news and other media sites are excluded? Should the exception be limited to content that is made freely available for public viewing and/or downloading without access restrictions or user registration?

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 site owners or operators be notified ahead of the crawl that captures the site that the crawl will occur? Should "no archive" meta-tags, robot.txt files, or similar technologies that block sites or pages from being crawled be respected?

Should the library or archives 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)?

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? If electronically available, under what conditions? Should the lapse of a certain period of time be required? Should labeling be required to make clear that captured pages or content are copies preserved by the library or archives and not from the actual site, in order to avoid confusion with the original site and any updated content?

SUBMISSIONS PROCEDURE:

Requests to Participate in Roundtable Discussions

The roundtable discussions will be open to the public. However, persons wishing to participate in the discussions must submit a written request to the Section 108 Study Group. The request to participate must include the following information: (1) the name of the person desiring to participate; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a written summary of no more than four pages identifying, in order of preference, in which of the four general roundtable topic areas the participant (or his or her organization) would most like to participate and the specific questions the participant wishes to address for each general roundtable topic area.

The written summary must also identify the preferred date/location (***see* "Areas of Inquiry: Public Roundtables" above for detail**). Space and time constraints may require us to limit participation in one or more of the topic areas, and it is likely that not all requests to participate will be granted. Identification of the desired topic areas in order of preference will help the Study Group to ensure that participants will be heard in the area(s) of interest most critical to them. The Study Group will notify each participant

in advance of his or her designated topic area(s), and the corresponding time(s) and location(s).

Note also for those who wish to attend but not participate in the roundtables that space is limited. Seats will be available on a first- come, first-served basis. However, all discussions will be transcribed, and transcripts subsequently made available on the Section 108 Study Group website (www.loc.gov/section108).

Written Comments

Written comments must include the following information: (1) the name of the person making the submission; (2) the organization(s) represented by that person, if any; (3) contact information (address, telephone, telefax, and e-mail); and (4) a statement of no more than 10 pages, responding to any of the general issues or specific questions in this notice.

Submission of Both Requests to Participate in Roundtable Discussions and Written Comments.

In the case of submitting a request to participate in the roundtable discussions or of submitting written comments, submission should be made to the Section 108 Study Group by e-mail (preferred) or by hand delivery by a commercial courier or by a private party to the appropriate address listed above. Submission by overnight delivery service or regular mail will not be effective due to delays in processing receipt.

If by e-mail (preferred): Send to the e-mail address section108@loc.gov a message containing the information required above for the request to participate or the written submission, as applicable. The summary of issues (for the request to participate in the roundtable discussions) or statement (for the written comments), as applicable, may be included in the text of the message, or may be sent as an attachment. If sent as an attachment, the summary of issues or written statement must be in a single file in either: (1) Adobe Portable Document File (PDF) format; (2) Microsoft Word version 2000 or earlier; (3) WordPerfect version 9.0 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

If by hand delivery by a private party or a commercial, non-government courier or messenger: Deliver to the appropriate address listed above, a cover letter with the information required above, and include two copies of the summary of issues or written statement, as applicable, each on a write-protected 3.5-inch diskette or CD-ROM, labeled with the legal name of the person making the submission and, if applicable, his or her title and organization. The document itself must be in a single file in either (1) Adobe Portable Document File (PDF) format; (2) Microsoft Word Version 2000 or earlier; (3) WordPerfect Version 9 or earlier; (4) Rich Text File (RTF) format; or (5) ASCII text file format.

Anyone who is unable to submit a comment in electronic form (either through electronic e-mail or hand delivery of a diskette or CD-ROM) should submit, with a cover

letter containing the information required above, an original and three paper copies of the summary of issues (for the request to participate in the roundtable discussions) or statement (for the written comments) by hand to the appropriate address listed above.