

LIBRARY OF CONGRESS

Copyright Office

Docket No. 06-10801

Section 108 Study Group: Copyright Exceptions for Libraries and Archives

AGENCY: Office of Strategic Initiatives and Copyright Office, Library of Congress.

ACTION: Notice of public roundtables with request for comments.

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. This notice (1) requests written comments from all interested parties on the specific issues identified in this notice, and (2) announces public roundtable discussions regarding certain of those issues, as described in this notice. The issues covered in this 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 February 24, 2006.

Written Comments: Interested parties may submit written comments on any of the topics discussed in this 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, 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 **Supplementary Information**, Section 4: “Procedures for Submitting Requests to Participate in Roundtable Discussions and for Submitting Written Comments”* 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, E-mail: cwes@loc.gov; Telephone (202) 707-2592; Fax (202) 252-3173.

SUPPLEMENTARY INFORMATION:

1. Background

The Section 108 Study Group was convened in April 2005 under the sponsorship of the Library of Congress’s National Digital Information Infrastructure and Preservation

Program (NDIIPP) in cooperation with the U.S. Copyright Office. 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. 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 the issues identified in this notice, namely those relating to: (1) eligibility for the section 108 exceptions; (2) amendments to the preservation and replacement exceptions in subsections 108 (b) and (c), including amendments to the three-copy limit, the subsection 108(c) triggers, the separate treatment of unpublished works, and off-site access restrictions; (3) proposal for a new exception to permit the creation of preservation-only/restricted access copies in limited circumstances; and (4) proposal for a new exception to permit capture of websites and other online content. Pursuant to 2 U.S.C. 136, the Study Group now seeks input, through *both* written comment and participation in the public roundtables described in this 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.

2. Areas of Inquiry

Public Roundtables. Due to time constraints, the Study Group will not be discussing all of the issues addressed in this notice 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 this notice. Participants in the roundtable discussions will be asked to respond to the specific questions set forth below (*see* **Supplementary Information**, Section 3: “Specific Questions”) during discussions on each of the four following topics, at the following places and times:

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 subsections 108(b) and (c) to allow access outside the premises in limited circumstances:

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 this 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).

3. Specific Questions

The Study Group seeks comment and participation in the roundtable discussions on the questions set forth below. Background information and a more detailed discussion

of the issues can be found in the document titled “Information for the March 2006 Public Roundtables and Request for Written Comments” located on the Section 108 Study Group website at www.loc.gov/section108. It is important to read this background document in order to obtain a full understanding of the issues surrounding the following questions and provide appropriate input through written comments or participation in the roundtable discussions.

TOPIC 1: ELIGIBILITY FOR SECTION 108 EXCEPTIONS

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)

Three Copy Limit. (This topic will not be addressed at the March roundtable discussions.) 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?

Additional Triggers under Subsection 108(c). (This topic will not be addressed at the March roundtable discussions.) 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?

What are the risks to rights-holders of expanding subsection 108(c) in this manner? How could those risks be minimized or addressed?

Published versus Unpublished Works. (This topic will not be addressed at the March roundtable discussions.) 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? 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?

Access to Digital Copies Made under Subsections 108(b) and (c). 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's 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 archive 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 archive were acquired in analog, tangible or intangible digital formats? What are the different concerns for each?

TOPIC 3: NEW PRESERVATION-ONLY EXCEPTION

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

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 preservation by libraries and archives of certain website or other online content? If so, should such an exception be similar to section 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 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)?

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 archive and not from the actual site, in order to avoid confusion with the original site and any updated content?

4. Procedure for Submitting Requests to Participate in Roundtable Discussions and for Submitting Written Comments

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* **Supplementary Information**, Section 2, “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.

Dated: February 9, 2006.

Marybeth Peters,
Register of Copyrights.

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