



MOTION PICTURE ASSOCIATION
OF AMERICA, INC.
1600 EYE STREET, NORTHWEST
WASHINGTON, D.C. 20006
(202) 293-1966
FAX: (202) 293-7674

FRITZ E. ATTAWAY
EXECUTIVE VICE PRESIDENT
SPECIAL POLICY ADVISOR

April 28, 2006

Mary Rasenberger
Policy Advisor for Special Programs
United States Copyright Office
James Madison Memorial Building
LM-401
101 Independence Avenue, SE
Washington, DC 20559

Re: Written Comments Relating to the Copyright Office's 108
Study Group Copyright Exceptions for Libraries and Archives

Dear Ms. Rasenberger:

This is in response to the Federal Register Notice published by the Copyright Office on February 15, 2006, concerning the above-captioned matter. Motion Picture Association of America (MPAA) is a trade association representing seven of the largest producers and distributors of feature films, home video material and television programs. MPAA members are Buena Vista Pictures Distribution, Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal City Studios LLLP, and Warner Bros. Entertainment Inc.

As major owners of copyrighted audiovisual works, MPAA members have a significant interest in this proceeding, and have participated in the roundtable discussions previously held by the Copyright Office. These comments are intended to supplement the material presented at the previous

roundtables and to set forth MPAA's general position with regard to any amendment to Section 108 of the Copyright Act. MPAA is anxious to participate in any further stages of this proceeding and to comment on specific proposals for change.

In considering whether any changes to Section 108 are appropriate, it is critical to keep firmly in mind that Section 108 is an exemption to the reproduction right, and only in very limited circumstances a limitation on the distribution right (limitations on the distribution right do not apply to replacement copies or to preservation activities beyond deposit for research purposes in another library). Any changes that alter that fundamental balance, by creating new limitations to the distribution right that are unrelated to replacement or preservation, are beyond the scope of what Section 108 was ever intended to deal with, or what the Study Group should be considering. This examination should be narrowly focused on preserving the ability of libraries and archives to continue to fulfill their traditional roles, and should not attempt to fundamentally redefine status of libraries and archives under the Copyright Act.

Clearly, Section 108 should not be amended to give libraries and archives broader rights with respect to their replacement or preservation copies than they had in original copies. This principle is particularly important with respect to proposals for allowing remote access. In situations where a library or archive had the ability to lawfully make an original copy remotely accessible, then it is appropriate to consider ways to make a lawfully made replacement copy equally accessible. However, it would be inappropriate to use the fact that a copy of a work has become lost or deteriorated to justify creating limitations on copyright that did not apply to the original copy.

MPAA urges the Copyright Office to proceed with great caution in considering amendments to Section 108, particularly with respect to access to works reproduced under the Section 108 limitation. The consequences of a library providing access to a Section 108 reproduction in a bricks and mortar analog world

are necessarily limited both by the physical requirements of traveling to the library and finding the copy and the limitations inherent in the analog nature of the copy itself. In the viral world of cyberspace, distribution of a single, unprotected digital copy of a work can have disastrous consequences. Thus, great care must be taken to insure that any changes to Section 108 that implicate the digital environment do not damage the creative incentives copyrights are intended to promote.

The first principle in evaluating any proposed broadening of Section 108 limitations should be that it not interfere with the normal exploitation of the works subject to the proposed change. The digital environment in which we now live enables reproduction and mass distribution with a click of a mouse. Thus, great care must be taken to insure that Section 108 limitations do not provide a substitute for authorized use of copyrighted works, denying copyright owners their right to compensation and removing incentives for new creation. The proponents of Section 108 amendments should clearly demonstrate that the limitations proposed will not interfere with the ability of copyright owners to exploit the value of their works.

Proposals for access to digital copies should receive particular scrutiny. In those very limited circumstances where online access may be appropriate, proposals for such access should include a detailed description of technological measures that would be employed to restrict use to legitimate research by a defined user community and to prevent abuses. Such technological measures were required in the distant learning amendments to Section 110 and should be a condition to any on-line access permitted by Section 108.

And technological protection measures should not be only considered in the context of on-line access. Any proposed changes to the law that allow for distribution beyond the premises of the library or archive of ANY tangible digital copy made pursuant to Section 108 should require technological

protection measures that prevent unauthorized reproduction and distribution. Certainly a Section 108 copy should contain the same level of technological protection as the original.

The second principle for evaluating proposals for expanding the Section 108 limitations should be that they be necessary to achieve that section's purpose of enabling preservation of works that otherwise would cease to exist and/or be unavailable to future generations. For many works, new technology has significantly enhanced the ability to maintain copies, and has increased the economic incentives to do so by expanding markets. Technological and marketing developments have greatly reduced the threat that creative works will become unavailable. Certainly in the field of theatrical motion pictures and other audio-visual entertainment content, this material is being meticulously preserved and exploited, as pointed out in the testimony of Jared Jussim and Grover Crisp at the Los Angeles Roundtable.

A very important point made by Mr. Crisp is that preservation and copying are not the same thing. Section 108 should not become a gaping loophole in the Copyright Act that swallows up Section 106 rights. Section 108 should be carefully limited to true preservation activities -- activities that preserve works that otherwise would not be available. Mere copying for the purpose of having additional copies, and particularly the making available of further reproduction or distribution copies that interfere with the normal exploitation of a work, should be beyond the scope of Section 108.

New technology generally, and the Internet in particular, has made it very easy to reproduce and distribute copyrighted works. This has led many to believe that the exclusive rights provided in the Copyright Act should be limited so as to not "interfere" with technical capabilities and the conveniences technology makes possible. However, this theory would lead to the conclusion that copyright should be abandoned

altogether, which of course would eliminate the creative incentives that copyright has so effectively provided.

The focus of Section 108 should remain on preservation and should not be expanded to facilitate short term convenience at the expense of long term creativity.

Another important point made at the Los Angeles Roundtable is that any expansion of Section 108 beneficiaries must be accompanied by more vigilant measures to prevent abuses. In the words of Jeremy Williams, "The more flexible the definition of the institution, the more narrow the definition has to be of what the institution can do." Remedies for infringement, as pointed out by Mr. Jussim, are expensive and not always effective. The more parties that can take advantage of the Section 108 limitations, the greater the need to eliminate ambiguities that increase the cost of enforcement and create potential unintended loopholes in protection.

As with any abrogation of rights provided by the Copyright Act, the scope of Section 108 should not be expanded without a clear demonstration of need and effective safeguards to prevent abuses. The burden should be on the proponents of expanded Section 108 limitations to demonstrate that they are necessary to achieve the preservation purposes Section 108 was intended to serve, and that they will be accompanied by safeguards that prevent "mere" copying for the sake of convenience rather than preservation, and distribution beyond legitimate research requirements.

MPAA looks forward to continuing to participate in this discussion, and responding to any questions the Section 108 Study Group might have.

Sincerely,

A handwritten signature in blue ink, appearing to read "Greg E. Allman", is written over a horizontal line.