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Attention Mary Rasenberger,

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Carnegie Mellon University Libraries is pleased with the initiative to study and consider amending section 108 in light of the changes precipitated by digital technologies. Preservation is a critical historic function of libraries and archives. When a copy in our collection begins to deteriorate or the format in which it is stored begins to become obsolete, our preference is to buy a fresh access copy. Unfortunately a fresh copy cannot always be purchased. Furthermore, waiting until our copy is at near risk of loss likely means that it is too late to make a quality copy. We need a legislative solution that balances the legitimate interests of libraries, archives, and rights holders.

Eligibility for section 108 exceptions

Carnegie Mellon University Libraries urges broadening the eligibility for section 108 exceptions to include museums and other cultural heritage institutions and organizations, including university media centers that collect and provide access to multimedia resources for education and research. We strongly recommend that the focus of the statute remain on the nature of the activities rather than the for-profit or non-profit status of the institution.

Eligible institutions should be able to outsource the activities allowed under section 108 because they will not necessarily have the expertise within the organization to do the work. Requiring permission or a license from the rights holder prior to outsourcing is not workable. Identifying and locating copyright owners is difficult if not impossible for materials no longer available in the marketplace. While the search for the owner is underway, important materials will further deteriorate or be lost and access to them will be restricted because fragile materials do not circulate outside of the library.

Typically the contracted company would not keep copies of the materials that it reproduced for the library or archive, though there may be circumstances where this is permissible. Appropriate circumstances would include when a company has a mission and history of providing trusted storage for preservation purposes and facilities equipped to maintain the environmental conditions necessary for long-term preservation. Iron Mountain is a good example.

Proposal to allow access to digital replacement copies from outside the premises

For all eligible institutions: if (a) the access copy in the collection becomes corrupted, deteriorated or otherwise unusable and (b) an unused replacement copy cannot be found at a fair price, then electronic access to a digital replacement copy should be permitted from inside or outside the premises. Under the current statute, access to the replacement is more restricted than access to the original. There is no compelling reason for this to be the case.

Remote access to digital replacement copies should be restricted to the institution's user community. Libraries already have an operational model for defining their user community and for providing their community with remote access to copyrighted works. Licensing contracts with publishers and aggregators define the user community in terms sufficient for these purposes.

Authentication and authorization are sufficient to determine whether a user is a legitimate member of the user community with permission to access the material remotely. The amendment to restrict remote access to digital replacement copies should

- *Not* be tied to users of the physical premises or, in the case of an academic library, to users of the physical campus premises. As more and more information becomes available online, many users need not come into the physical library or archive to do their work. Similarly, distance education courses might enable students to complete their work without coming to campus. Any attempt to define or restrict the user community to those who use the physical premises will unnecessarily disenfranchise users who are legitimate members of the community.

- *Not* limit the number of simultaneous users. There is no compelling reason to require use of digital media to parallel use of analog media or to treat legitimate members of the user community differently depending on whether they are inside or outside the premises. In higher education, many assignments require students to engage in group work. We should be focusing on how to leverage the capabilities of the technology to support teaching, learning, and research while minimizing the risks to copyright holders. Requiring one "legally acquired copy" of a digital work for each simultaneous user is technologically unwarranted and fiscally irresponsible.

There currently are no readily available, effective, affordable technologies to enforce access restriction to a limited number of simultaneous users. Requiring libraries to implement such technology would be prohibitively expensive and discriminatory. Not all eligible institutions have the programming expertise onboard to do the work. Access to licensed content is seldom restricted to a designated number of simultaneous users, and when it is, the vendor implements the technology

that monitors the number of users and applies the restriction. The cost and complexity of implementing the technology are not the responsibility of the licensing library.

The claim that allowing simultaneous use will enable libraries to circumvent purchasing multiple copies and the concern that allowing libraries to make replacement copies enables them to sidestep licensing backfiles reflect a misunderstanding or misinterpretation of the issue. Libraries can only make and provide access to a replacement copy *if no unused copy of the work is available at a fair price*. No one is lobbying to change this component of the statute. If the work is still available in the marketplace at a fair price, the library will purchase the item because (a) it's the law, (b) it is cheaper and easier to purchase the work than to make and maintain a preservation or replacement copy of the work, and (c) the purchased (unused) item is likely to be of higher quality than a preservation or replacement copy of a deteriorated, fragile (heavily used) work. The issue is not whether libraries should be allowed to make replacement copies of anything and everything in their collection, but whether and under what conditions they should be able to provide remote access to replacement copies of works that are *not* available in the marketplace at a fair or reasonable price. Given that these works are no longer available in the marketplace, what is the risk to copyright holders that would warrant restricting access to legally made replacement copies to a limited number of legitimate, simultaneous users, regardless of the location of the users?

The claim that replacement copies of earlier editions will hurt the market for new editions reflects an unfounded and mistaken assumption that libraries make replacement copies of everything in their collection. Libraries cannot afford to do this, and even if they could, they wouldn't. Libraries endeavor to provide their user communities with high quality, up-to-date information. Purchasing a new edition is generally preferable to making and maintaining a replacement copy of an earlier edition. Given the resource investment, careful selection would precede making replacement copies of any work in the collection.

Proposal for a new exception for preservation-only (restricted access) copying

Waiting until digital materials are damaged, deteriorated (corrupted), lost, stolen, or obsolete means that the materials are inaccessible and it is too late to preserve them. This is a sufficiently compelling reason to create a new exception that would allow libraries and archives to make up-front preservation copies of digital materials. However, the right to *reproduce* (copy) digital materials for preservation purposes is not enough. Preservation must entail the right to *migrate* the materials to new formats and platforms over time. Preservation copies must be accessible, even if they are not accessed. Enacting legislation that enables digital bits to be reproduced, refreshed and saved over time, but that prohibits the work required to be able to render those bits for use does not constitute a viable preservation strategy.[1]

Preservation-only copies should be kept in a secure, restricted archive that is inaccessible to the user community. The copies should not be moved out of the restricted archive to become or enable the creation of access (use) copies unless or until another exception applies.

[1] The same thinking applies to replacement copies. During the Section 108 roundtable in Washington DC, some participants wanted the statute to require that replacement copies be in the same format as the original. Requiring that a work in an obsolete format be replaced with a copy of the work in the same obsolete format makes no sense.

Access to preservation-only copies should be restricted to those responsible for ensuring their security and integrity. Anecdotes and data reported at the Section 108 roundtables indicate that so-called dark archives have been problematic; important content has been lost. Rather than dispense with the idea of a restricted archive, we propose the development of defining characteristics and best practices for creating and actively managing such an archive. Based on the evidence, the best practices must include restricted access, traditional system management, and limited, periodic use to sample the content as prelude to making informed decisions about when to refresh the files or question the integrity of the archival masters. The best practices must *not* include applying technological protection measures to the files in the archive. Such protection measures might be useful when the materials are moved out of the archive, but they are harmful to the materials in the archive, i.e., they prevent maintaining the highest quality archival copies.

The preservation-only exception should apply to

- All digital works (because they are inherently fragile and unstable) and to fragile or rare analog works. Though that might sound overly broad, in practice libraries and archives will only make preservation copies of works that they deem to be strategically important or sufficiently valuable to warrant the investment of their limited resources. Even if libraries were legally allowed to make preservation copies of all the reel-to-reel tapes, films, vinyl records, and VHS tapes in their collection that are no longer available in the marketplace, they would not have the human and financial resources to do it. Libraries and archives should be allowed to preserve important materials in their collections and trusted to make responsible assessments of when these materials are at risk.

- All libraries, archives, and other institutions eligible for section 108 exceptions and limitations. All qualify because of their shared mission to preserve and provide access to the intellectual, social and cultural record by engaging in reproduction and distribution activities "without any purpose of direct or indirect commercial advantage." Currently there are no mechanisms for accrediting, certifying or auditing preservation practices. Furthermore, best practices and standards for digital preservation will change over time. While we labor to reach consensus on the many questions raised regarding qualification, certification, monitoring, disqualification, etc., important materials are at risk and nothing can legally be done to preserve them. The problem we are grappling with is real and urgent. Passing legislation that relies on non-existent procedures or entities will not solve it. Requiring libraries and archives to establish their ability and commitment to create and maintain a restricted digital archive when there is no identified method for them to do this would be an ambiguity in the law likely to interfere with the legitimate exercise of the preservation-only exception.

Given the resource investment required to create and maintain preservation-quality copies and a restricted archive, libraries are not likely to make preservation copies of all digital materials they purchase. Materials designated for up-front preservation will be carefully selected. Certainly if another trusted entity has committed to preserving the materials, libraries will not duplicate the effort and expense.

Just as current legislation specifies that digital reproductions or replacements are not to be available to the public outside the premises of the library or archives, new legislation should specify that preservation-only copies are not to be available for access by the user community. Providing such access would constitute infringement.

Properly secured, preservation-only copies pose no risks to rights holders. In fact, preservation-only copies protect the existence and integrity of the rights holders' work. Copyrighted works exist only in fixed copies. Experience has demonstrated that "lots of copies keep stuff safe."[2] The following comment by Thomas Jefferson, displayed on the LOCKSS website at Stanford University, eloquently states the case: "...let us save what remains: not by vaults and locks which fence them from the public eye and use in consigning them to the waste of time, but by such a multiplication of copies as shall place them beyond the reach of accident."[3] Jefferson's observation remains true for analog materials and also applies to the urgent case for digital materials, all of which are fragile and unstable by nature, from their inception.

Proposal for a new exception for website preservation

We are in favor of a new exception that would allow eligible institutions to archive websites as a way of preserving social and cultural history. At minimum, the exception should allow archiving, for noncommercial purposes, of websites that are freely and publicly accessible. The current opt out strategy employed on the web, for example, through the use of robots.txt files to indicate web pages not to be archived or indexed, is working well. Changing to an opt in strategy is unwarranted. Sites containing only materials that are in the public domain, however, should not be able to opt out.

An embargo period during which an archived website would not be accessible, for example, six months from date of capture, would be acceptable for copyrighted materials. Thereafter, the archived website should be freely and publicly available. No access restrictions should apply, i.e., no authentication and authorization, no limit on the number of simultaneous users, and no restriction to use on the premises. No embargo should ever be applied to public domain materials. They should be freely and publicly available without restriction from the date of capture.

As with the exception to allow preservation-only copies, all institutions eligible for Section 108 exceptions and limitations should be able to archive websites. No certification should be required.

Additional comments: digital rights management (DRM) technologies

The background materials provided by the Section 108 study group note that unless eligible institutions are permitted to circumvent technological protection measures, in many cases they will not be able to make preservation and replacement copies regardless of any amendments to Section 108. A suggestion at the roundtable in Washington DC was to permit libraries to circumvent

[2] The open source software called LOCKSS, for "Lots Of Copies Keeps Stuff Safe," developed by Stanford University provides libraries with an easy and affordable way to collect, store, preserve, and provide access to their own, local copy of authorized content they purchase.

[3] Thomas Jefferson to Ebenezer Hazard, February 18, 1791. In *Thomas Jefferson: Writings: Autobiography, Notes on the State of Virginia, Public and Private Papers, Addresses, Letters*, edited by Merrill D. Peterson (New York: Library of America), 1984. Displayed in the LOCKSS website banner at http://lockss.stanford.edu/about/about.htm.

technological protection measures if and only if the copyright owner does not provide a version of the work without these protections (a version that can easily be copied) within a designated timeframe. Presumably this would mean identifying and locating copyright owners, tracking waiting periods, and – if the copyright owner does not respond or provide a protection-free copy, figuring out how to circumvent the technological protection measures. This solution is somewhat at odds with the intent of a right to make pre-emptive, up-front preservation-only copies of digital materials. Furthermore:

- Assuming that libraries would not be prosecuted for circumventing technological protection measures, why should they be required to invest resources in figuring out how to circumvent technologies designed not to be easily circumvented in order to exercise their rights under Section 108?
- Could institutions eligible under Section 108 share among themselves what they learn about circumventing various technologies or would such sharing be a criminal offense?
- What about institutions that do not have the resources or expertise to figure out how to circumvent technological protections? It does not follow from this lack of technical expertise that they do not have materials in need of replacement or preservation or the onboard expertise needed to create digital copies.
- If activities allowed under Section 108 can be outsourced, can eligible institutions outsource circumvention?

Technologies protected by the Digital Millennium Copyright Act that prohibit or deter the exercise of public rights or Section 108 exceptions are a paradox. During the Section 108 roundtables, publishers requested that libraries be required to add DRM to preservation and replacement copies. In contrast, publishers, aggregators, librarians, archivists, and lawyers participating in a workshop convened by the National Information Standards Organization (NISO) in May 2005 unanimously agreed that the position of "all rights are denied unless explicitly granted" taken by current technological protections measures, developed primarily by and for the media industries, interferes with scholarly and creative activity. To support or enable innovative use, the position must be that all rights are granted unless explicitly denied. Public rights and Section 108 exceptions must not be prohibited or deterred by technological protections. Asking libraries to implement technological protections that deny or deter legal rights and prohibit innovative use is tantamount to asking them to ignore their professional ethics. Furthermore, as noted earlier, technological protections degrade copies. Requiring DRM on preservation-only copies would be counter-productive.

Thank you for considering our comments.

Sincerely,

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