

Michael A. Keller

*Ida M. Green University Librarian
and Director of Academic
Information Resources*

*Cecil H. Green Library
Stanford, California
94305-6004*

*Michael.Keller@stanford.edu
telephone 650-723-5553
fax 650-725-4902*

The Stanford University Libraries

April 28, 2006

Mary Rasenberger
Policy Advisor for Special Programs
U.S. Copyright Office
James Madison Memorial Building
Room LM-401
101 Independence Avenue, SE
Washington, DC 20559-6000

Re: Section 108

Dear Ms. Rasenberger:

In response to the Section 108 Study Group's request for comments relating to the exceptions and limitations applicable to libraries and archives under section 108 of the Copyright Act, Stanford University Libraries and Information Resources (SULAIR) submits these recommendations.

In their background document of February 10, 2006, the Study Group outlined four broad topics for discussion, with several specific questions related to each topic. For clarity, our comments follow the outline provided in that document. However, we wish to emphasize our strong interest in and support for Topic 3, the development of an exception for preservation-only restricted access copying. Such an exemption is critical to us in our role as an archive, and in our opinion this is the area where the statute is most critically in need of revision.

Topic 1: Eligibility for Section 108 Exemptions

Not-for-Profit and Virtual Organizations

We concur with the general opinion at the Los Angeles roundtable that, while addition of the terms "museums" or "like institutions" to the statute would not be objectionable, the definition of libraries and archives given in the statute does not require further clarification. Two issues raised were: limiting the availability of the exemption to not-for-profit organizations; and definition of virtual libraries for statutory purposes. We feel that revising the statute on each of these points would be a mistake. The requirements of Section 108(a)(2) continue to be effective in defining the role of a qualifying institution, and these restrictions can be equally well applied to both physical and virtual organizations.

The not-for-profit expectation is effectively addressed in Section 108(a)(1), which specifies that copying performed under a Section 108 exemption must not be done for commercial advantage.

Further limiting the exemption to only not-for-profit organizations would impose unnecessary restrictions.

We do believe that Section 108 exemptions should be available to purely virtual libraries. However, it is even more critical that traditional brick and mortar institutions be able to apply the exemption to their growing virtual collections. While the preservation issues associated with digital collections and born-digital materials are different from analog media, the preservation need is just as real, if not greater, and the costs are significant. Standards for digital preservation are still nascent, but we cannot wait for standards to be formalized to begin preservation.

Also, while we believe that virtual libraries should be covered by this statute, we do not see a need to define virtual libraries in the statute. The existing language does not necessarily preclude such organizations, and what is required is simply an affirmative statement that the statute applies to digital as well as analog materials. Such a statement would eliminate any suggestion to the contrary, such as comments in the Senate Report for the DMCA which do exclude electronic materials. Attempting to define virtual libraries at this early stage in their development is limiting, and will necessitate further revision of the law in the future.

Outsourcing

We feel strongly that Section 108 should be revised to explicitly allow outsourcing. Addition of the phrase “or an independent contractor acting on the library or archive’s behalf” to Section 108(a) may be all that is needed here.

Many libraries do not have the technical expertise or staff time to perform the type of preservation work that is explicitly permitted under this statute. Libraries should be able to bring in outside expertise and manpower to perform these critical services, while remaining in compliance.

The current usage of microfilm as a preservation tool is a model here. Libraries have routinely relied on outsourcers for the past five decades to convert print materials to microfilm, with no objection.

Topic 2: Amendments to Section 108(b) and (c)

(i) Three copy limit

Strict enforcement of a three-copy limit effectively bars the creation of digital preservation copies under this statute, as the digital preservation process requires the creation of significant numbers of copies. We believe that digital preservation is important, and strongly advocate changes to this limit.

The three copy limit is easily addressed by distinguishing the copies made in the preservation process, which are many but ephemeral, from material made available for use. Within the confines of a secure, managed and monitored preservation environment, we believe libraries and archives should be permitted to make as many copies as necessary for digitization and preservation. This may involve a significant number of ephemeral copies of the material created during the conversion to digital format, as well as multiple, distributed stored copies for long term preservation. Access to this preservation environment, which may be physical or virtual, should be limited to those actively engaged in preservation of material or maintenance of the archive.

Access to material by users can then be addressed separately, and subjected to appropriate triggers. We believe access should be limited to authenticated users affiliated with the library or archive. Restrictions on simultaneous use can also be applied, if appropriate. See “Access to Digital Copies”, below, for further discussion.

(ii) Additional triggers and (iii) Published vs. unpublished works

We also feel it is important to distinguish between preservation and use when specifying trigger events. We do not feel triggers should be required for preservation-only copying, and advocate a new exemption in this regard. See Topic 3 below for further discussion. Triggers should therefore specify the conditions under which authenticated users would be permitted to access preserved materials.

We also feel that the distinction made between published and unpublished works in the current statute is more effectively made between commercialized and non-commercialized works. David Nimmer, in a separate submission to this group, has proposed an approach to this distinction that we feel is effective, requiring libraries to determine that no significant commercial use has been made of the work in the past 20 years before claiming a Section 108 exemption. This also addresses the requirement in Section 108(c)(1) that works cannot be alternately obtained at a reasonable price.

When understood to trigger use, rather than preservation, and to be applied to non-commercialized works, we feel that the triggers specified under 108(c) are generally appropriate, and can be applied to both published and unpublished works. Addition of “fragile” to the list of conditions would be helpful but not critical. Therefore, with this approach, libraries and archives could provide verified users access to digitally preserved materials under a Section 108 exemption if the original work had not been commercially exploited for 20 years, and the original was fragile, damaged, deteriorating, lost, or stolen, or the existing format in which the work was stored had become obsolete.

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

We support the revision of the statute to allow access to digital copies outside of the physical premises of the library. Particularly for born digital materials, which may be accessible to qualified users outside of the physical library in their original version, location-based usage is problematic. While remote access has the potential to increase the risk of inappropriate copying or redistribution of material by end users, we believe that access controls can be applied to minimize this risk, without requiring users to be in a specific location. In fact, user authentication and other technological restrictions may provide more security than simply restricting the access site. Furthermore, limiting Section 108 exemptions to works that are not being commercially exploited, as proposed by David Nimmer, minimizes the risk that content providers will be harmed.

We believe that restricting access to qualified institutional users is most effective. User authentication is a common practice among university and research libraries, and we believe that this level of control could effectively be applied to digital access under Section 108 exemptions. Restrictions on further reuse or redistribution by the patron would continue to apply, and restrictions on printing or downloading could be applied if required. Time limits on use or concurrent user limits could similarly be applied. However, we feel that for non-commercial material, authentication of the user is the most effective control.

Given the requirement in section 108(2) that a library be open to the public, it will be necessary for libraries to make materials available to unaffiliated users at some time. In these cases, we

believe that location-specific access is an appropriate restriction. That is, users who cannot be authenticated by the library's systems would need to visit the library in person. Libraries that do not have a physical presence would be limited to authenticated users only.

Topic 3: Proposal for a New Exception for Preservation-only Restricted Access Copying

Library materials, both analog and digital, are at risk every day. They are at risk not just from the creeping effects of time, use and changing technology platforms, but from floods, fires, and other catastrophic events that can destroy large numbers of works in a very short period. For the vast majority of works, libraries and archives are the only organizations investing in their long-term preservation. Allowing libraries and archives to preserve materials as they are acquired provides the best guarantee that materials will be available in the distant future. The current length of copyright terms make it impossible to wait until works enter the public domain to begin preservation. We therefore strongly advocate the creation of a new exemption that would allow libraries and archives to make preservation copies of materials in their possession.

Copies made under this new "preservation only" exemption would be housed in a secure environment, either physical or virtual, with access restricted to those actively involved in digitization or preservation. Multiple copies could be stored, as required for preservation purposes, but these materials would not be available for use until a triggering event occurred. Triggers generally involve damage to or loss of the original work, as currently indicated in 108(c), along with a determination that the work is no longer commercially available. When a triggering event occurs, the library can make the work available.

For digital materials that have protection against copying in them, we do advocate allowing libraries and archives to break protection in order to create a preservation copy of the materials. This preservation copy would be subject to the same access restrictions as other materials, as well any license agreements attached to the product. Again, if the original is lost or the file corrupted in some way, and the product is no longer commercially available, the preservation copy may be substituted.

Thank you for your consideration of these recommendations. We appreciate the efforts of the Section 108 Study Group to address this complex issue, and look forward to continued discussion and debate.

Sincerely,



Michael A. Keller
University Librarian
Stanford University



Mariellen F. Calter
Executive Assistant to the University Librarian
Stanford University