society of american archivists
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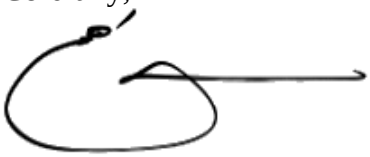
4 May 2006

Mary Rasenberger
Policy Advisor for Special Programs
U.S. Copyright Office
By email: section108@copyright.gov

Dear Ms. Rasenberger:

Please accept the attached written comments on proposed revisions to Section 108.

Cordially,



Richard Pearce-Moses
President, 2005-2006

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SOCIETY OF AMERICAN ARCHIVISTS

Written Testimony on Proposed Revisions to 17 USC 108

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(1) ELIGIBILITY FOR THE SECTION 108 EXCEPTIONS

Archivists work in many different kinds of institutions. Many archivists work in the for-profit corporate sector, acquiring, keeping, preserving, and making accessible important historical and cultural resources. These archives are maintained for use by the corporation, but frequently they are also open to non-affiliated researchers. The archival access provided to researchers from outside the corporation is usually offered as a public service, and is not a source of direct commercial profit (indeed, to our knowledge, non-profit archives are more likely to charge for research services than are the archives of for-profit corporations). The corporation does not own copyright to all the materials in its collections. Corporate archives have therefore relied on Section 108 to make copies of records for researchers, participate in interlibrary loan programs, and copy unpublished materials for preservation purposes. As H.R. Rep. No. 94-1476, noted in 1976, "the 'advantage' referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located." We are not aware that any abuse has occurred under the current law, and see no reason to alter the current provisions to exclude all archives in for-profit enterprises from eligibility under Section 108, limiting it only to non-profits.

SAA recommends that public and private, for-profit and non-profit institutions continue to be eligible for the 108 exemptions so long as the collections comply with the current §108(a) limitations, namely that the reproduction or distribution cannot be for the purpose of direct or indirect commercial advantage and the institutions are "(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, "

The term "archives" is commonly used to describe both the institution that collects and the collections themselves.[1] Many kinds of institutions have archives (collections of largely unpublished primary sources). Museums, libraries, historical societies, and other organizations often have collections of archival materials. The current language of Section 108 limiting the right to make copies may be read to exclude these institutions, because it is not clear whether "archives" is being used in the institutional or collection sense—if the former then many institutions holding archival collections would have no right to make copies. We believe that the exemptions available in 108 are not intended to benefit the institutions *per se*, but rather the users of collections held by those institutions.

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[1] Richard Pearce-Moses, *A Glossary of Archival and Records Terminology* (Society of American Archivists, 2005). Available online at http://www.archivists.org/glossary/. For example, see the definition for archives, "1. Materials created or received by a person, family, or organization, public or private, in the conduct of their affairs and preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of their creator, especially those materials maintained using the principles of provenance, original order, and collective control; permanent records. – 2. The division within an organization responsible for maintaining the organization's records of enduring value. – 3. An organization that collects the records of individuals, families, or other organizations; a collecting archives."

SAA recommends that, rather than focusing on the nature of the institution, the legislation should focus on the nature and use of the materials. Because museums and historical societies collect the same sort of materials as archives and libraries, and because they make the material available to researchers in a similar fashion, SAA believes that Section 108 should be construed to extend the 108 exceptions to museums and historical societies.

Proposals to allow a limited number of qualified institutions to make preservation copies without infringing copyright could mean the loss of significant collections. Generally, archival holdings consist of unique materials. As the state records assessments, conducted with funding from the National Historic Publications and Records Commission in the 1980s and 1990s clearly documented, even the smallest and least well-supported repositories hold important archival collections. Proposals to limit the making of preservation copies to only certain 'qualified' institutions will result in collections at other institutions being lost.[2]

SAA recommends that all institutions with archival holdings be allowed to make preservation copies. There is no demonstrated need to limit the ability of cultural heritage institutions to preserve their holdings for the benefit of the general public.

Almost all archives have musical works, pictorial and graphic works, and motion pictures and other audiovisual works in their holdings. These materials are sought after and used by a wide range of researchers, and these researchers approach such materials no differently—in terms of sources for understanding and interpreting the past—than textual works. Indeed, in the past two decades archivists have become explicitly more conscious of the importance of photos, films, maps, and music as sources in their own right rather than merely as illustrations of textual sources. Thus we strongly support the request of the Music Library Association to remove 108(i) because there is no sound reason for treating images, music, and audiovisual work differently from textual material.

SAA recommends that subsection (i) be deleted

(2) PROPOSAL FOR A NEW EXCEPTION TO PERMIT CAPTURE OF WEBSITES AND OTHER ONLINE CONTENT

The act of preservation has two distinct meanings: "To keep for some period of time; to set aside for future use" and "To take action to prevent deterioration or loss."[3] Archivists preserve records in both senses of the word.

Documents published on the web are unique and, at the same time, at significant risk of loss. Once a creator deletes a document from its server, it is no longer easily accessible and may well

[2] None of the original assessment reports are available electronically, but all can be ordered from the state historical records advisory boards (SHRABs). In addition, several states have done follow-up reports which are available on-line <http://www.statearchivists.org/shrabs.htm>.

[3] Pearce-Moses, *Glossary*.

be lost for all time. The nature of the web, its fluid change and lack of any comprehensive collection point, make it a good candidate for special coverage by Section 108.

The nature of the medium makes it impossible to obtain permission from the copyright owner first to capture websites and then make the copies required as part of the preservation process. Yet it is important that websites and other online documents be preserved. These will be the raw material of future scholarship; we will also need preserved websites in order to verify, in the future, the citations in current scholarship and legal arguments. It is important that this material be preserved for scholarship, even if it is later learned that the material is incorrect or otherwise of questioned utility.

SAA recommends that archives, libraries, museums, and other cultural heritage institutions be allowed to capture, for preservation purposes, content freely distributed on the web or through other sources. They should be immune from legal actions that challenge the research use of this material.

(3) PROPOSAL FOR A NEW EXCEPTION TO PERMIT THE CREATION OF PRESERVATION-ONLY/RESTRICTED ACCESS COPIES IN LIMITED CIRCUMSTANCES

Archivists seek to acquire, keep, organize, and make accessible select materials of enduring value and to preserve those materials in perpetuity so that they are available to researchers in the future. Because many of the items with which archivists work are unique, preservation is of critical importance. Often the only way to preserve an item is by making a copy of that work. If a copy is not made, the work may be lost.

The Society of American Archivists believes that the right to make preservation copies is essential to meet the spirit of the copyright clause of the Constitution. "The monopoly privileges that Congress may authorize under the copyright clause of the Constitution are neither unlimited nor primarily designed to provide a special private benefit; rather, the limited grant is a means by which an important public purpose may be achieved."[4]

Preservation is best done prior to substantial damage to the original. This is especially true of digital objects. Given the fragile nature of digital media and rapid obsolescence of hardware and software, all digital materials are "fragile." It is imperative that archives, libraries, and museums be able to preserve the fragile items in their holdings at the optimum moment. Best practices also recommend keeping backup copies of all information in digital format. Institutions are encouraged to have redundant backups to ensure that at least one copy of the bitstream is protected in case of media or hardware failure.

SAA recommends that institutions be allowed to create and keep a reasonable number of copies of materials for preservation and limited access purposes.

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[4] 18 Am Jur 2nd, Copyright and Intellectual Property §1. Sony Corp of American v Universal City Studios, Inc (US) 78 L Ed 2d 574, 104 S Ct 774, 220 USPQ 665, reh den (US) 80 L Ed 2d 148, 104 S Ct 1619, 224 USPQ 736.)

(4) 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.

I. THREE COPY LIMIT

A migration program to combat obsolescence can require numerous copies over time. Any modifications to 108(b) must take this into account. The timing of copies for preservation must also shift and be more responsive to support preservation. Deterioration of digital items occurs on a more rapid pace than that of traditional paper-based items. Loss is invisible until access is required, usually at a point when most preservation attempts are too late. In the digital age, a three-copy limit does not serve the goals of preservation, security, and deposit. We strongly support a suggestion referred to by the Study Group that would allow "a limited number of copies as reasonably necessary for the permitted purpose."

We will add that the history of 108 makes clear that there was no desire to limit the number of copies for preservation purposes. As Chris Weston noted in his excellent history,[5] the initial formulation of the language spoke about copies (plural) for purposes of preservation and deposit. Unfortunately the final language of the 1976 statute picked up the language developed for 108(c) and dropped the plural.

Making one copy of a work does not meet Congressional intent – namely, that unpublished works be preserved by making copies and allowing limited distribution of those copies. The 1976 section 108(b) said: "The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives." There was nothing in the law to suggest that this was a one-time right of reproduction, just as the rights of reproduction in (d) and (e) (copying by user) were not one-time rights. An archives could make as many copies as required, so long as those copies were being made solely for the purposes of preservation, security, or deposit.

Unfortunately, by specifying the number of copies as being either one (1976) or three (1998 Digital Millennium Copyright Act amendment), it is harder to read the amended law as allowing for unlimited single distributions of a work for purposes of deposit. In effect, to accomplish the archival goals imagined by the 1976 addition of 108 preservation provisions, SAA believes the section should be read as follows (with added text in italics): "The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or *to individual copies duplicated* for deposit for research use in another library or archives . . . ." We wish to see 108(b) clarified to ensure that it follows original Congressional intent – namely, that archives should be free to preserve unpublished works following best practices and to make multiple individual copies for deposit in other libraries.

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[5] "Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning," April 2005, www.loc.gov/section108/docs/108_background_paper.doc

SAA recommends that institutions be allowed to create and keep a "limited number" of copies of materials for preservation and permitted access purposes.

II. ADDITIONAL TRIGGERS UNDER SUBSECTION 108(C)

We agree with our colleagues in the American Library Association that libraries and archives should be permitted to engage in proactive preservation of both digital and analog materials. As the comments from ALA notes, many analog materials, whether print or magnetic media,

> remain at high risk and should be considered for preservation treatment prior to any use. Moreover, exempt institutions should not be held to a specific definition of 'at risk.' Both defining "at risk" and making determinations of at risk versus 'safe' materials would be administratively difficult and could be prohibitively expensive. Rather, the institutions should make preservation decisions in keeping with their missions and then apply necessary access and use restrictions in accordance with the law and with agreements with rights holders.

The Study Group suggests that such "pre-loss" preservation copies must be strictly controlled:

> Since the preservation copies would be intended to serve as "pre-loss" preservation copies and not replacement copies (meaning the originally acquired copy is still in the library's or archives' collection), there is no readily apparent rationale for permitting the preservation copies to also be made available to users. *Doing so could create a windfall for libraries and archives* by allowing them to make additional copies available without purchasing them. Accordingly, should preservation-only copies be maintained in restricted archives and kept out of circulation unless or until another exception applies? [Emphasis added.][6]

The idea of a "windfall" is quite implausible in the real world of library and archives administrators; even the least conscientious among them will find it difficult to translate preservation copies into any sort of budget bounty. However unlikely this threat is, it can be eliminated by a) restricting pre-loss preservation copying to unpublished material, which have no further copies in the marketplace which the repositories might otherwise be expected to purchase, or; b) requiring adherence to existing best practices, which identify specific roles for each preservation copy (e.g., preservation master, duplication master, access copy) and permitting only one access copy.

SAA recommends that concepts such as "unstable" or "fragile" be added to the existing triggers to allow replacement copies to be made when it is known that the media are at risk of near-term loss.

III. PUBLISHED VERSUS UNPUBLISHED WORKS

There is tremendous interest among libraries and archives in providing better access to unpublished material. In the best of all possible worlds, archives could digitize their holdings and put them online for use by students and other researchers. It would improve scholarly

[6] From the January 19, 2006 document, "Preservation-Related and Other Issues to be Addressed in the Section 108 Study Group Public Roundtables."

productivity and equality of access by cutting down on the number of increasingly expensive research trips. It would also assist with the education of K-12 students, many of whom are being taught in programs that emphasize working with primary source materials, and it would expand the reach of adult, non-academic learners who otherwise cannot take advantage of archival materials.

Unfortunately the exceptionally long copyright terms hamper the ability of archivists to make unpublished materials available. This is particularly frustrating to archivists since in 99.9% of the cases for unpublished documentary material, the creator of the work did not need the promise of a copyright monopoly to create the work, and copyright is standing in the way of its distribution and use by others in support of the "progress of science and the arts." It is also problematic because so many of the unpublished works are also orphan works.

The Study Group asks, "Should section 108 take into account a right of first publication, as outlined in the *Harper & Row* case,[7] with respect to unpublished works?" There are two avenues of response. The first is to note that the context of this question seems to ask whether first publication rights would have an effect on the application of either the 108(b) or 108(d) and (e) provisions—that is, on the preservation and the user services and interlibrary loan copying rights of libraries. The kind of copying done for preservation or done to meet either deposit or service to individual remote users would not meet the definition of publication in Section 101, and thus logically could not be interpreted to intrude on first publication rights.

The second avenue of response is to note that while the Supreme Court identified a right of first publication in the *Harper & Row* decision, it did so under specific circumstances quite different from the vast quantity of unpublished works that comprise the value of our nation's archives. The court's discussion of this "right" focused on its commercial aspects. The Supreme Court correctly noted that the copyright owner's commercial interests would be harmed if the right to first publication were not exclusive. As the Court noted,

> The author's control of first public distribution implicates not only his personal interest in creative control, but his property interest in exploitation of prepublication rights, which are valuable in themselves and serve as a valuable adjunct to publicity and marketing.[8]

The Harper & Row case involved a living author and his for-profit assigns, making, the commercial right of first publication of central importance to that case – by violating Harper & Row's right to first publication, *The Nation* magazine usurped Harper & Row's own intent to publish (and profit) from the work. It is the commercial harm to the copyright owner, therefore, that was the focus of the Court's concern. The decision is by and large silent on the implications for works that were not intended for commercial release. It is difficult to imagine that the Court would have argued after Harper & Row that initiative to publish the papers of Thomas Jefferson and Calvin Coolidge would have to shut down because they might negatively impact the prepublication rights of their multitudinous heirs who are unlikely to know that they even own rights in the papers.

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[7] Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985).

[8] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 550-555 (1985).

The Court concluded that "Under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." It is reasonable to conclude, however, that the publication of "orphan works" where the copyright owner is not known (and may not even know that he or she owns the rights) and which are of limited commercial value does not constitute the "ordinary circumstances" of commercial publication considered in the decision.

Justice Story, in *Folsom v. March*, noted that there are times when the government has the right if not the duty to publish unpublished items containing "historical, military, or diplomatic information," even against the will of the writers.[9] Private individuals as well, he believed, had the right to publish private letters "upon fit and justifiable occasions." The right of first publication, therefore, is far from an absolute right, and it seems clear that it is not a right that is managed effectively under Federal copyright.

The Study Group states that "there are classes of unpublished works that are intended to be published or may nevertheless have a potential future market" and asks whether section 108 should "treat these materials differently from other unpublished materials, and if so, how?" Assessing the existence of a potential future market is an impossible burden to place on archivists or librarians, since even publishers are frequently mistaken about the commercial viability of a work. Similarly, intent to publish is not the same as ability to publish (which again is not the same as ability to make a profit or earn income from publication). The possibility of one work out of ten thousand having commercial viability is an insufficient risk to warrant erecting impediments to preservation copying more onerous than those in 108(h)2. For that same reason, the restriction to published works in 108(h) should be removed.

SAA recommends that 108(b) retain the right to make preservation copies of unpublished works with only those conditions currently stated and that it not be amended to include a requirement that the originally acquired copy of unpublished material be damaged, deteriorating, lost, stolen or in obsolete format, or that an effort be made to find an unused copy. Given the nature of unpublished archival material, it is unlikely that there could be another copy available if a library's or archive's copy is lost or damaged .

SAA recommends that the restriction to published works in 108(h) be removed.

IV. ACCESS TO DIGITAL COPIES MADE UNDER SUBSECTIONS 108(B) AND (C)

The Internet has fundamentally changed the process of research. In the past, limiting access to an actual physical building was understandable as the majority of users came in the door. With the growth of access to materials and communication via the Web, researchers and their topics are geographically diverse. This upheaval in research must be addressed in regard to access to digitally preserved materials online if copyright law is to advance society as much today as it did following the original enactment of federal copyright in 1790.

[9] Folsom v. Marsh, 9 F. Cas. 342 (1841).

Section 108(a)(2) allows exceptions for preservation copying to be extended to libraries and archives if their collections are "(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." Making materials available via the Internet certainly expands the number of individuals who may use that material. However, the principle of right to access has not changed, only the means by which someone can gain that access.

While it may be possible to limit the number of concurrent users of materials, a requirement to implement this technology may be prohibitive for smaller institutions. A click-through notice informing patrons of restrictions on the reproduction or use of the materials is similar to the current requirement that libraries and archives post notices near public photocopiers. However, a requirement that patrons register violates their privacy rights, and there is no similar requirement associated with public photocopiers.

SAA recommends that institutions, including virtual institutions, be allowed to provide online access to archival content in the absence of any evidence of a copyright owner's interest in commercially exploiting his/her intellectual property.

SAA recommends that procedures be established to protect both owners of copyright and institutions providing access. Copyright owners should be provided with a mechanism to challenge distribution of their materials as part of an archival collection, while Section 108 should protect institutions providing access to archival materials from damages.

SAA recommends that patrons downloading material be required to click through a notice about copyright and further reproduction or use of the materials.

SAA discourages any requirement that would limit the number of concurrent users and opposes any requirement that patrons register to download materials.