

**Before the Section 108 Study Group
and the Copyright Office Library of Congress**

**In the Matter of
Issues Related to the Exceptions and Limitations
Applicable to Libraries and Archives
under Section 108 Copyright Act
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I am the university librarian at UCLA. At UCLA the University Archives, the entity responsible for the historical record of the university, reports to the university librarian, and so my comments regarding Section 108 revisions will represent library and archival constituents, perspectives, and needs and are an expansion of oral comments made at the Roundtable in March 2006 in Los Angeles, California.

The UCLA Library is ranked among the top ten research libraries in North America and is a campus-wide network of libraries serving programs of study and research vital to all areas of the university. It has one of the country's premier collections and is one of the most heavily used. The Library's special collections of manuscripts, rare books, and specialized materials contain primary and rare resources in the arts, music, humanities, life and physical sciences, and social sciences. Its rare book holdings consist of more than 350,000 volumes, while its non-book holdings comprise more than thirty thousand manuscripts, five million photographs, and some 630,000 maps, music manuscripts, sheet music, sound recordings, art, architectural drawings, graphic arts, and ephemera. The UCLA Library's collections including the University Archives as a whole are open to the general public for reference and research, and the Library places a priority on providing the highest quality collections and services to the UCLA community and to present and future generations of users.

My comments regarding revising Section 108 are focused on two primary areas: 1) realigning Section 108 in light of the purpose of copyright and in particular on reconceptualizing "premises" to meet the needs of modern society while keeping the legislative intent to protect commercial interests balanced with important public and societal interest in the creation, access, and preservation of knowledge; and 2) the need for archiving of Web sites as an essential component of our cultural and historical record. In addition, my comments conclude with a legislative proposal to revise Section 108.

Revisiting Section 108: The Purpose of Copyright and the Exemption for Libraries and Archives

Increasingly, more and more content is available in digital format. In 2003 Hal Varian's study *How Much Information?*¹ found that the world produces one and two extrabytes of unique information, the World Wide Web contained 170 terabytes of information – seventeen times the size of the Library of Congress – and that the volume of the Web continues to grow dramatically. In addition, commercial publishers estimate that most if not all of their journal content is or will soon be available in digital format. In response to the growing availability and diversity of digital content, collections, and services, our faculty and students increasingly rely on the advantage of digital technology and utilize remote access to our expanding digital collections. In today's higher education networked environment, teaching and learning are collaborative and distributed, with students and faculty accessing primary source material remotely, bringing library content into the classroom or where they study. Access not requiring a visit to the physical building housing the library or archive was previously not possible when all content and collections were only accessible by visiting the premises of the library or archive that held them. The digital age has brought content directly to our users.

The original drafters of the Constitution recognized the inherent tension and the need for balancing competing interests between protecting the expression of ideas for profit and the freedom of expression. Authors and publishers must be provided some economic incentive, along with limited property rights, but the dissemination of knowledge must be ensured “to promote science and the useful arts” characteristic of a democracy, in which the public can benefit from the knowledge others have created. Libraries, archives, and cultural memory institutions in the United States have long respected and participated in this balance by educating users about copyright law and other use and user restrictions, while at the same time facilitating the appropriate use of copyrighted material in the creation and preservation of knowledge.

Libraries and archives have historically provided an important but under-acknowledged societal and cultural role as collectors, keepers, and preservers of knowledge and information over time. In *The Future of the Past: Preservation in American Research Libraries*, Abby Smith comments on the nature and critical role of libraries, archives, and cultural memory institutions:

¹ Varian, Hal and Lyman, Peter. 2003. *How Much Information?* 2003.
<<http://www.sims.berkeley.edu/research/projects/how-much-info-2003/>>

Recorded knowledge is as fragile as the medium on which it is recorded and as enduring as the human resolve to transmit it. In the United States, where full access to the human record is important for citizenship and scholarship, libraries play a critical role in the acquisition, preservation, and dissemination of that record (Smith, 1999, p. 3) .

The Copyright Office report entitled *Overview of the Libraries and Archives Exemption in the Copyright Act*² also recognizes the vital role of libraries and archives is “to ensure that the public interest in dissemination of works is best served...” (Copyright Office, 2005, P. 1) It is against this historical context and in keeping with the constitutional purpose of maintaining the balance in copyright law that I offer my comments regarding revisions to Section 108.

Revisiting the Concept of Premises in the Digital Age

The legislative history of the DMCA pertaining to Section 108 and subsections (b) and (c) reflects the commercial copyright industry’s early concern about digital technologies, specifically, the “risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution....” It is important to contrast the comments and concerns expressed by commercial copyright owners reflected in the legislative history of the DMCA with the historical and current reality in today’s U.S. libraries, archives, and cultural memory institutions. Libraries, archives, and cultural memory institutions have a longstanding, existing operational model for defining and restricting access to their user communities and for providing the same identifiable user communities with secure remote access regardless of the users’ physical locations. For the past decade libraries have increasingly acquired access to digital content through license agreements that define the user community. During this same time there has been a significant expansion in the scope and duration of copyright protection, and yet copyright owners continue to seek total control over the access and use of digital content in conflict with the purposefully limited monopoly intended by Congress to also provide for the important public interest in access for education and dissemination of knowledge. In higher education, campus networks include security to authenticate and restrict access only to the campus community.

In general, authorized users in academic libraries are defined as the current students, faculty, and staff at their institutions. Over the past ten years, libraries, particularly U.S. academic libraries, have extensive experience licensing digital content and collections on behalf of their users. Libraries

² Rasenberger, Mary and Weston, Christopher. 2005. Overview of the Libraries and Archives Exemption in the Copyright Act: Background, History and Meaning. .
<http://www.loc.gov/section108/docs/_background_paper.doc>

and publishers have a history of agreeing to license terms and conditions that allow libraries to provide secure remote access to a defined set of identifiable authorized users within a secure networked digital environment. While any security system is never perfect, the limited definition of authorized or permitted users and the use of IP addresses and other forms of authentication to limit access – including user agreements that presumably include a copyright notice that the user cannot redistribute the material – afford sufficient protections. Similar agreed practice should be employed as the basis for redefining premises for purposes of Section 108.

Currently, Section 108 (b) and (c) contain a restriction asserting that the distribution of digital content (under the section) “is not made available to the public in that format outside the premises of the library or archive.” I would like to highlight five reasons the current definition and restriction of premises to library physical locations only in Section 108 should be revisited and revised, followed by a brief section on proposed revisions, implementation, and a legislative proposal:

1. The term “premises” should be reconceptualized in the digital environment to focus on defining the authorized user community rather than on defining the physical locations of libraries and archives. Digital preservation, security copies, or digital surrogates of unpublished material under copyright held in library and archival collections provide an effective method to preserve the original. This provision was added in 1998 to enable use of digital technologies for library and archival preservation. An example is digitization of data sets from the 1975 NASA Viking Mission to Mars, which were subsequently lost: “despite the space agency’s best efforts to keep the tapes in a climate controlled environment, time left them crackling and brittle. Furthermore, when scientists attempted to re-use some of the data in the late 1990s, they found they could not decode the formats used. In the end they had to track down the old printouts and retype everything.”³ Once digitized under Section 108 (b) for preservation or security purposes, the digitized replacement content should be accessible as the originals would be. If the originals would not have been restricted to physical premises only, the digitized replacement copies should not be either.
2. Digital replacement copies of published works provide libraries and archives with the opportunity to replace material from their collections that they have previously lawfully purchased and that is not currently available in the market. Consider, for example, an out-of-print scholarly monograph of which the owning library’s copy is “damaged, deteriorating, lost, or stolen...” Since the statute requires that a “library or archive has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price,” then no harm can be made to a market that does not exist. In an effort to balance a copyright owner’s longterm property interest in the current copyright term duration with library and archives’ service of copyright used to promote science and the useful arts, a system of opt-out should be instituted. In this way copyright owners can effectively exploit their interests throughout copyright term while libraries and archives fulfill their fundamental mission.
3. Libraries already have defined their user community – whether it's card holders or “students, staff and faculty.” Premises should be reconceptualized and redefined to include

³ Digital Preservation Coalition. 2006. “Mind the Gap: Assessing Digital Preservation Needs in the UK”. <http://www.dpconline.org/docs/reports/uknamindthegap.pdf>

the identifiable user communities of libraries and archives. In higher education, networks routinely provide access control, thereby restricting access to those authorized as students, faculty, and staff. This type of routine network security and access control could be employed for digital copies under Section 108 (b) and (c).

4. The digital copy or surrogate should include the same restrictions as the original. If the original NASA data sets were accessible to UCLA students, faculty, and staff, then the preservation copy should be treated in a similar manner. In the digital environment, within in the context of higher education, access controls are routinely employed to control the right to use campus resources and services. A comment made by Kathleen Bursley, Reed Elsevier, at the Los Angeles Roundtable illustrates that on this subject, libraries and commercial copyright holders agree: “I would say that while you shouldn’t have more rights under the original license or original material, I’m not sure you should have less either.” (Bursley, Los Angeles Transcript, p. 30).

5. The process of digital preservation requires at least some type of limited or restricted access to insure accuracy, integrity, and persistence. Digital copies can not be left static and still remain readable over time. Limited access to digital preservation copies made by libraries and archives should be available under the same conditions as the originals to their identifiable user community. As explained by Lynne Brindley, chair of the UK Digital Preservation Coalition, digital copies require routine and ongoing maintenance: “gone are the days when archives were dusty places that could be forgotten until they were needed – the digital revolution means all of us – organisations and individuals must regularly review and update resources to ensure they remain accessible.”⁴ (Brindley, Digital Preservation Coalition, 2005)

Proposed Revisions to Section 108—Legislative Proposal

Proposal to Revise 108 (b) and (c) Regarding Reconceptualizing Premises

There are two simple approaches that could be employed to amend Section 108 (b) and (c) in light of reconceptualizing premises. The first, as I explained earlier, is to simply reconceptualize the definition of premises and update the legislative history to reflect that in the digital age, premises will be defined to include a library’s or archive’s identifiable user community regardless of physical location, in which access can be restricted via a secure network. This new definition of premises under Section 108 could be included and supplement the legislative history to provide guidance on the matter. This approach provides the most flexibility and would allow for revisiting as time and technological advances warranted. The second approach would be simply to delete the reference to restricting premises in (b) (2) and (c) (2). The omission would recognize that in the digital environment, limitations as to physical locations and restrictions are inappropriate and conflict with technological and practical functionality. An additional component of either implementation’s approach is to

⁴ Digital Preservation Coalition. Mind the Gap: Assessing Digital Preservation Needs in the UK. Press Release. <http://www.tessella.com/Media%20Centre/PressReleases/MindTheGapPressRelease.htm>

develop and include an opt-out mechanism. In this way, copyright owners can come forward and identify themselves with appropriate documentation, thereby insuring that their property rights remain commercially exploitable, regardless of whether the owner is aware of them or chooses to exploit them commercially at the early stages of the copyright term. Another option for copyright owners to insure control over future access and use of digital preservation, replacement, or security copies under Section 108 would be an end-user click-through agreement that may be employed by the copyright owner. This too would insure end-user compliance. In the digital environment end-user click-through agreements are fairly routine and are similar to notices placed on photocopy machines related to education and compliance with federal copyright law. End-user click-through agreements could provide additional educational outreach related to copyright ownership as well as provide end users with notice of any additional restrictions on use.

I have two comments on the concept of simultaneous users. First, regarding the technology: the idea of “simultaneous users” implies a particular choice of technology. On the Internet there is no measure of simultaneity. All accesses are responded to sequentially, but they are also so rapid that, depending on your server, many thousands of people can be served in a few minutes. This is because the Internet interaction is “stateless” – the Web site you contact sends you its response, and your interaction ends. “Simultaneous users” implies either logging on to a system or staying on (more than a Web interaction), or it means using a system of checking out digital resources to users, such as is the case with ebook lending systems. Both of these require a level of computing that is far beyond what individual libraries are capable of. Kathleen Bursley, Reed-Elsevier, agrees that simultaneous users is not a good approach and so testified at the Los Angeles Roundtable: “one thing that was suggested to me by all the comments put together was that simultaneous users may not make sense in a number of areas, but maybe in those areas user registration or user identification or something maybe would make sense, and maybe would obviate the need to impose a simultaneous user restriction...” (Bursley, Los Angeles Transcript, p. 22). Second, one characteristic of digitized content is increased functionality. There is no reason to go back to a limited, analog-only, physical check-out model when you are dealing with digitized or digital content. Increasingly in higher education assignments, learning, teaching, and research are done collaboratively or in an interdisciplinary environment, requiring more than a one-to-one access. Since the digitized content under discussion is by definition created when there is no commercially available product to use for educational and research purposes, access should be determined on the basis of access to the original.

Proposal for Exemption for Preservation of Websites

I enthusiastically support a legislative proposal for a new exemption or expansion of Section 108 to include preservation and archiving of Web sites. Web site preservation is essential for the preservation of our cultural record. It should be noted at the outset that digital data loss and the resulting loss of cultural heritage and memory is a very real issue, problem, and growing concern to libraries, archives, and cultural memory institutions. The Digital Preservation Coalition UK's study *Mind the Gap: Assessing Digital Preservation Needs in the UK* found that loss of digital data is commonplace and that more than 70% of respondents stated that data had been lost in their organization (Mind the Gap, 2005, p. 18). Valuable and unique digital content is disappearing as I draft these comments. The average life span of a Web site is one hundred days.⁵ Studies reveal that Web site URLs are generally not maintained, and libraries and archives are among the only institutions creating and maintaining persistent URLs as a means to provide continuous access to dynamic and fragile digital content.⁶ At a minimum, preservation by qualified libraries, archives, and cultural memory institutions of free and publicly available Web sites that are not commercially available or exploited should be allowed and, in fact, encouraged. The growth of digital information has simply outpaced our existing infrastructure to adequately address and preserve the historical and cultural record for future generations.

An example of the volatile and short-lived duration of historic and valuable Web content can be illustrated by a Campaign Literature Project coordinated at the UCLA Library. Immediately following the November 8, 2005, California Special Election, we received a call from Governor Arnold Schwarzenegger's campaign staff asking if we captured the entirety of the blog section of their campaign Web site. Apparently they had accidentally deleted all the information from their own servers. Fortunately, because of an election campaign collection project we were working on, we were able to provide the content creators a copy of some of the contents of this unique and valuable historical record that would otherwise have been lost forever. However, in this case we were not able to capture the entirety of the blogs due to the technical limitations of our capture software, so some of this information may well be permanently lost.

⁵ Weiss, Rick. 2003. "On the Web, Research Work Proves Ephemeral: Electronic Archivists Are Playing Catch-Up in Trying to Keep Documents From Landing in History's Dustbin." *Washington Post*. November 24: A08

⁶ Dellavalle, Robert P., *et al.* 2003. "Going, Going, Gone: Lost Internet References." *Science* 302 (October 31): 787-788, Preserving our digital heritage: Plan for the National Digital Information Infrastructure and Preservation Program" (Library of Congress, Washington, DC, 2002); at www.digitalpreservation.gov/repor/ndiipp_plan.pdf.

This is just one of numerous examples – if libraries, archives, and cultural memory institutions are prohibited from preserving this type of digital-only material, much of it will be lost forever. In terms of creating a new exception to Section 108 to permit the online capture and preservation by libraries and archives of certain Web sites, the above examples illustrate the importance of the role of libraries and archives to preserve the cultural and historical record. Further, the Web site/copyright creators themselves increasingly rely on the libraries and archives to capture and preserve their content for present and future generations.

Government-sponsored or -produced information (taxpayer-funded) is also disappearing from the Web. This greatly impacts the integrity and completeness of our cultural record. For example, the Department of Energy removed environmental impact reports from its Web site. According to the American Library Association, the Department of Energy has removed nine thousand scientific research reports from its Web site. In addition, the Defense Technical Information Center has removed thousands of documents from its Web site⁷.

When a print publication is issued an ISBN number in the United States, an archival copy of the publication is sent to the Library of Congress. Similar procedures for creating a permanent record of print publications for digital publications are in place in other countries including the U.K..⁸ This isn't the case for Web-based publications. Without the preservation efforts made by libraries and archives, this material, which provides evidence and the record of our cultural heritage, will be lost.

As stated earlier, a standard opt-out policy should be included. However, it is not necessary that the opt-out policy be included formally in the legislation. Instead, a Web protocol should be developed that would be used by the community.

Additional Comments: Aligning 108 in the Digital Age with the Purpose of Copyright to Promote Science and the Useful Arts

Eligibility for Section 108 Exceptions

I support the inclusion of museums and other cultural memory institutions, including virtual libraries, that meet the overarching criteria of Section 108 (1) (2) and (3) be included in Section 108. Professor David Nimmer of UCLA mentioned at the Los Angeles Roundtable that his reading of the statute does not require further statutory revision: "It seems to me that there is no need to amend Section 108,

⁷ The American Library Association (ALA) website cites *The Washington Post* article by Ariana Eunjung Cha, "Risks Prompt U.S. to Limit Access to Data; Security, Rights Advocates Clash Over Need to Know," *Washington Post*, February 24, 2002, pg. A1. The ALA website with referencing the cite and other examples can be found at <http://www.ala.org/ala/godort/godortcommittees/godorteducation/pastprojects/chronology.htm>

⁸ See Legal Deposit Libraries Act available at <http://www.opsi.gov.uk/acts/acts2003/20030028.htm>

because we don't have the history of litigation of market failure. However, when the language was first adopted in 1976, when Congress said it was talking about a copy currently in the collections of the library or archives, to quote Section 108 (b) (1), it's clear they were referring to the dinosaur bones – Kathleen Bursley's phrase – or the Aaron Copeland manuscripts or early recording. Now, although Congress said it did not wish to extend that to a purely virtual archive, nonetheless, by the language of the statute it seems that it does apply; if there is an Internet archive that currently downloads copies of Web sites, to me what is on the server of the internet archive is a copy currently in the collection of that archive, so applying the language of the statute the way that it currently reads, it does seem to me that is [a] vastly broader than what Congress enacted in 1976 and what Congress may have intended when it amended the language in 1998, so we have to be cognizant of that as we move forward.” (Nimmer, Los Angeles Transcript, p. 22)

Outsourcing under Section 108 and Section 117

Outsourcing is commonplace and routinely done by institutions, organizations, and government entities of all types, particularly as it relates to emerging information technologies and digital preservation. It is apparent that U.S. libraries and archives simply do not have the financial or technical resources to engage in effective digital preservation programs without outside expert assistance. Even premier U.S. research university libraries and archives are challenged by the increasing volume and imperative to preserve disappearing, degrading, fragile, and unique resources of all types. In addition, our institutions have limited budgets and resources. Moreover, collections of older format materials including cylinder, wire recordings, and early computer tapes require expertise often lacking within university libraries and archives. Regarding the issue of outsourcing, my suggestion is that if the material and collections to be digitized or preserved are owned by a qualified library or archive under Section 108 that outsourcing should be allowed. One method to accomplish this would be to modify Section 108 to include language similar to Section 117 of the Copyright Act to authorize the qualified library or archive “to make or authorize the making of another copy” (17

U.S.C. 117). Following the approach taken by Section 117 would easily amend Section 108 and provide the additional benefit of harmonizing Title 17 overall.

Removal of subsection (i)

Section 108 (i) currently exempts a “musical work, a pictorial, graphic, or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news...” (17 U.S.C. 108 i). There are many pictorial, graphic, or musical works that are not currently available on the market and that are likely not going to ever be available or commercially exploited. In fact, libraries, archives, and museums often hold original, unique materials that they have curated, organized, and made available for non-commercial education use only and that require preservation. Examples of this type of material are: historical photographs taken by personal friends or family of the donor which were never intended to be commercially exploited, vernacular music and field recordings made by researchers for further research and study and that are not available on the market and where copyright ownership is complex and layered, international AIDS or other poster collections that are intended for mass distribution and yet have complex copyright and rights-related issues. These materials are of great intellectual and research interest to our community of users. I propose that Section 108 (i) be eliminated and that the criteria for inclusion in Section 108 found in Section 108 (a) (1) (2) (3) and (b) (1) (2) and (c) (1) (2) and (d) (1) (2) and (f) (1) (2) (3) (4) be applied equally to content and collections regardless of format or type. As discussed above, restrictions to users and use as well as development of a standard opt-out clause and an end-user click-through agreement that prohibits any additional distribution can provide sufficient restrictions and security while at the same time also providing the balance required by Congress for preservation and dissemination of knowledge.