

April 17, 2007

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

**In the Matter of
Issues Relating to the Exceptions and Limitations
Applicable to Libraries and Archives
Under Section 108 of the Copyright Act**

Comments of the Music Library Association

This document provides an expansion of oral comments made on behalf of the Music Library Association at the public roundtable discussion held by the Section 108 Study Group in Los Angeles, California, March 8, 2006 as well as additional comments regarding related topics not considered in that discussion. The Music Library Association is the professional association for music libraries and librarianship in the United States. It has an international membership of librarians, musicians, scholars, educators, and members of the book and music trades. The MLA's purpose is to promote the establishment, growth, and use of music libraries; to encourage the collection of music and music literature in libraries; to increase efficiency in music library service and administration; and to promote the profession of music librarianship.

Topic 1: Eligibility for Section 108 Exceptions

—Definition of libraries and archives. For purposes of §108 libraries and archives should be defined based on the nature of and access to their holdings. At issue is appropriate use of materials that may be held in such collections, not who owns or administers them. A broad definition is desirable, one that does not unduly deny use of content that would otherwise be accessible or preservable simply because it was held in a different type of repository. Library or archival materials held in a museum or historical society would still be eligible under the section.

—Eligibility. Eligibility should not be restricted to nonprofit or government entities but, again, should be based on content, access and use. We would suggest that the determinant be non-profit activity rather than nonprofit and government entities. The statute clearly defines requirements concerning the intent of the reproduction and access to the collections by the public or researchers. If any additional definition is necessary, it should be focused on the question of what is indirect commercial advantage.

Examples of archival materials held by for-profit institutions that are valuable to the performing arts community:

- Music publishers' archives, when they exist, can have materials of scholarly value such as original manuscripts, correspondence with composers and performers, documentation about commissions, documents used in the production of promotional materials.
- Similarly, recording companies hold historically significant information about composers, performers and recording sessions.
- Film and television studios may archive the only written versions of music composed by notable figures for motion pictures and television series. Such studios also hold a wealth of information relating to the collaborative creative process, including a variety of production materials, variant scripts and treatments, set designs, and costume designs.

These sorts of collections contain materials of great value to current and future scholars critically examining the historical, cultural, and sociological significance of creations in the performing arts and the institutions that produced and/or promoted them.

There are commercial companies that provide scholars and students access to their archives for independent research. Companies willing to provide such archival access without charge should be seen as performing a service similar to that of a nonprofit and should be able to make use of §108 options. Examples of such companies can be found in The Society of American Archivists *Directory of Corporate Archives*. Entries in this database often include information concerning "Conditions of Access", specifying if and how the public (mainly scholars and students) can access these collections. Institutions that provide access for free (or on a cost recovery basis) could be identified in this or similar databases, or through their own websites, and thus be shown to be acceptable for §108 exceptions.

The cost of limiting eligibility is the potential loss of unique content that is not preserved or made accessible simply because the owning institution is not deemed eligible.

—Virtual libraries. Format should not be a consideration in denying access or preservation. Digitized and born-digital content is increasingly taking the place of print materials in academic and research institutions. Open archives initiatives provide for the harvesting of information from diverse collections in remote locations, enabling scholars and students to benefit from consolidated collections devoted to specific genres or subjects. For digitized collections, access and preservation are often intertwined, so that the original physical artifact is preserved while its content is made accessible. To exclude virtual libraries from §108 would hinder the development of digital libraries, which is definitely not to the benefit of the academic and scholarly communities. Existing provisions in the copyright law and existing technology should be able to provide for safeguards against infringing uses without denying access to content simply because it is in electronic form. The responsibilities of the user are no less clear in making use of an electronic copy than a physical one. In many cases it may be easier to determine infringing use of electronic copies if that content is disseminated through the web.

—Outsourcing. Outsourcing should be permitted under §108. Not all libraries have the resources available to develop their own digitization programs, yet many have materials

that should be digitized, both for preservation and access purposes. Even large university libraries with digitization programs find it desirable to outsource, especially for unusual format materials (e.g. cylinder and wire recordings) or items with special preservation issues that require expertise lacking on the library's staff (e.g., discs and tapes with acetate coating).

If the materials are owned by the institution, the institution is recognized as eligible under 108, and the purposes and other criteria of the digitization conform to the requirements of the section, why should it matter whether the actual work is outsourced or performed in-house? Perhaps language could be incorporated into the section that clarifies that this is work for hire and that the product of that work (master and derivative files) is not to be kept by the vendor.

Topic 1: Additional issue concerning Eligibility for Section 108: Request for removal of subsection (i)

This review should not be completed without some consideration of the unfortunate continuing situation for music and other non-textual materials perpetrated by subsection (i). We respectfully request that this subsection be removed from §108. Inherent in this subsection is the completely inappropriate belief that musical works (and other works of art) do not contain material equal to textual works in their validity for users in the course of their private study, scholarship, research, or any other non-infringing uses under subsections (d) or (e). As it stands, it is possible for a library to copy for a user a recording of a poetic work read by the poet but not a recording of a piano piece played by the composer.

Topic 2-i: Three copy limit

We recommend that the section remove the specification of an actual number of digital copies that can be made and support the suggested idea of the phrase "a limited number". Due to the variety of file sizes and types within the digital realm - some ephemeral - which come into play in order to provide for effective preservation and access, the concept of copy becomes too fluid to allow effective regulation of access through a pre-defined small number of copies. Additionally, the inherent instability of digital materials calls for a system of multiple backups in preservation archives. This means backup files within an institution's preservation archive and the same material being preserved by multiple institutions. This should not be confused with multiple copies serving for access or distribution.

Topic 2-ii: Additional Triggers under Subsection 108(c)

We consider preservation of content through pre-emptive replacement a fundamental responsibility of libraries and archives. Librarians must be able to identify and select materials potentially at risk and then immediately provide preservation copying of their

content. It makes no sense to wait until a title is substantially or even partially destroyed before making a replacement copy. *This is equally true for both analog and digital materials.* In the case of digital materials, the dramatic manner in which content can be lost through deterioration – immediately and completely – renders them almost immediately within the realm of the unstable or fragile.

—Analog materials. While there are many types of analog materials that are immediately at risk, we are particularly concerned about sound recordings. Analog sound recordings, including cylinders, discs (e.g., 78rpm, 45rpm, LP) and tapes (e.g., wire, open reel, cassette), require preservation copies much sooner than is currently suggested by the language of subsection (c); each time such recordings are played there is degradation of content through heat and force, either from the contact of the stylus in the groove or the tape rubbing against the playback head. A stylus produces an enormous pressure against the groove. Repeated playing of a disc within a short period of time – likely in a research or instructional situation – significantly increases deterioration. Tape playing also requires a physical interface that will with repeated playings create deterioration. Unlike the printed book, it is not possible to reconstruct with a copy the full content of a sound recording once it is degraded. Because each play of an analog recording represents a deterioration of that recording, it is appropriate to consider recordings on these formats for immediate digital preservation if they fulfill the other “at risk” limits suggested by the Study Group for subsection (c).

Additionally, recordings that have been created on inherently unstable or sub-standard materials (e.g. disc or tape recordings on cellulose acetate or nitrate-base, paper tape, later polyester-based tapes with sticky shed syndrome, shellac discs, etc.) should definitely be considered for immediate preservation, as should audiocassette tapes. None of these formats are acceptable for long-term storage or repeated use.

Topic 2-iii: Published versus Unpublished Works

There is no reason to distinguish between unpublished and published materials under subsections (b) and (c). Our litany has been and will continue to be that the most significant concern must be preservation of and access to content, not format. While it is likely that published materials are generally (not always!) produced in multiple copies and, therefore, less in danger of loss than an unpublished work, the fact remains that a title not available to a user through loan or a copy due to rarity or cost may, in many cases mean that item might as well have been non-existent. Also, in the current environment, most digital material is considered “published” once it has left the confines of its original workstation. So, retaining the distinction between published and unpublished materials creates potential problems in defining that distinction.

—Right of first publication. Copyright terms now are so long that the right of first publication is essentially meaningless. An author’s work is now copyrighted until 70 years after his/her death. If a work has not been published within that time, surely libraries and archives should be allowed to provide access to it under the criteria of §108, as well as §107.

Topic 2-iv: Access to Digital Copies Made under Subsections 108(b) and (c).

—Off-site access. The idea of limiting access to the library premises, even if that can be expanded to include all the library physical locations on a campus, is outdated. We have generally considered the academic library to be an extension of the classroom, but it is now working in the other direction as well: as more and more secondary and primary source material is available remotely through the internet, scholars and students are finding it increasingly efficient to bring library content directly to the classroom, their home or in between, through websites and podcasts. Increasingly, more learning is occurring at home or in the dorm, in addition to the learning that occurs in the classroom or in the library. Course software can incorporate a syllabus, online chat, blogs, links to web sites, licensed databases and content created by the library in a manner that brings together relevant information in ways that are directly suited to the needs of the students, enabling them to review material at their own pace. Likewise, the process of humanistic research is beginning to change dramatically in the digital world, allowing for scholars to make use of digital surrogates of both primary and secondary source materials without having to travel to remote locations or wait to see the originals. Research is accomplished more quickly and more efficiently by enabling direct access to diverse sources of information. Moreover, preservation of the original physical item is enhanced because it is not being handled. The works under consideration here – i.e., works that would be digitized under subsections (b) and (c) – will have been selected for digitization because of the value of their content for research and instructional purposes, given the costs involved.

At the very least, the concept of “premises” should be expanded to include network domain, which would allow for efficient access to digital works by students, scholars, and instructors belonging to the institution that owns and provides access to digital content. Ideally, the work of researchers, students or instructors from other institutions should also be supported through access to digital works that are otherwise unavailable to them. Technological access controls enable libraries to limit access to identifiable communities, both through IP address and through ID/Password limits for particular courses and users. Additionally, library policies increasingly address fair-use assessments and libraries can provide controlled Internet or email access to information on a case-by-case basis.

—Access to digital replacement copies. For any situation in which the original physical item would have been loaned for use, the digital replacement copy should also be made accessible as a surrogate. The language of these sections makes it clear that the content of materials made under (b) and (c) will not be reasonably available elsewhere, so denying access outside the Library premises creates barriers to use that are, at best, inconvenient to requesters and, at worst, insurmountable to those who cannot travel to the Library.

Conditions of use could include an agreement from the borrower not to distribute the materials digitally and not to make more than one physical copy for their personal use. For certain types of material, content can be provided in ways that are not copy-friendly (e.g., streaming of audio or video, rather than down-loading), or embedding a digital watermark. Such content made available through web access could be controlled so that it was only made available to the specific requester for a temporary period of time. Or

digital files could be loaned on CDs or DVDs, which would be returned after use. Requesters could be made to view and acknowledge a copyright policy statement that clearly defines their restrictions before receiving the requested material.

—User community. A research library's user community can be appropriately defined to include scholars and students not formally affiliated with the institution. Again, we are considering content that is not going to be otherwise available or obtained at a fair price, content that will have value to scholars and students using the material for nonprofit research. Why create undue barriers? The user community for off-site use would be:

- faculty, students, and staff within the institution that owns the digitized content;
- scholars and students from other research institutions;
- persons from the community-at-large doing personal research.

Access for the second two groups (other research institutions, community-at-large) could be mediated, requiring some manner of formal request to access the information.

A public library should be permitted to include all branches of the library within its premises, so that people in remote and possibility underserved parts of a library system can have access at their closest branch. Additionally, technology can be employed to allow off-site access to individual users who are unable to visit or work in the library, including those who are unable to travel to the library (e.g., disabled users); those for whom specialized enabling software (such as Jaws) is necessary for use of the source, when the software is not available in the library; or scholars from remote locations. The user community would be the visitors to the library branches, with access limited to workstations within the physical premises of these branches.

—Simultaneous users. There is no reason to mimic analog materials in the digital realm. Particularly in this case, where we are considering materials that are generally not accessible to users, why does it matter if three people or 30 people use a resource at the same time or one right after another? The simultaneous user model was developed by the vendor community who license rights and profit from tiered access models requiring larger institutions to pay more. That is a commercial transaction. In this discussion there is no "seller" involved in the transaction and, thus, no reason to restrict simultaneous access.

—Distinctions between tangible and intangible electronic copies. There is no need for different rules for these entities because all the copies are digital and thus easily and quickly capable of being duplicated and transmitted to thousands of others. Use of technological protections on physical information carriers (e.g., CDs, DVDs) create roadblocks to non-infringing uses or, as we have recently seen, damage to equipment, and usually can be circumvented by those who would make illegal use of the content.

Topic 3: New Preservation-Only Exception

—New exception for qualifying libraries. We are concerned about the creation of a class of “select” libraries and do not support the idea of creating an exception that excludes libraries from taking full advantage of the preservation subsections of §108. Also, as mentioned in Topic II-i, the inherent instability of digital materials calls for a system of multiple backups in preservation archives that practically precludes limiting the number of eligible libraries. The focus should be on standards for any or all libraries to follow. What makes a unique or rare item in a non-select library less important for preservation than one in a select library? Most libraries implementing preservation work will wish to follow standards. Such standards can and should be made easily available through the Internet and libraries should be encouraged to document the standards that they are following on their own web sites.

—Control over digital copies. The practice under §108 has been always to keep the original exemplar after preservation (“Archival master”), but absolutely forbid its use by anyone. It serves as a back-up to the Preservation master should the latter ever be damaged. Similarly the Preservation master is used ONLY to make a circulating copy, and never to lend out when the circulating copy is unavailable. Only one copy therefore is ever actually “in use.” In the digital domain the differences are only in the details. There is still an “Archival master” in the original exemplar; the “Preservation master” is the high resolution uncompressed file, and the “Circulating copy” is the compressed file. That is the one to which all the authentication technology is applied. Rights-holders can be assured that libraries and archives maintain control over the preservation copies through the force of law. The institution would be subject to being sued or fined in violation of the law.

—“At risk” materials. The exception must apply to “at risk” materials and that category should include analog materials. For a more complete discussion concerning sound recordings, please see Topic 2-ii above.

—Restricted archives. Restriction of copies should be determined by the nature and condition of the original items. For analog materials, the copy is what should be used and the original archived, though the original should also be available in cases where the actual physical artifact is pertinent to the research or instruction. For born-digital materials, it is reasonable to restrict access to the digital preservation master and provide access only to a reference or use file.

All institutions deemed eligible for §108 exemptions should be eligible to maintain restricted archives though they should conform to accepted standards and best practices.

—Exception for eligible preservation institutions. There should be no limitation allowing only certain preservation institutions to take advantage of the exception. There is too much preservation work to be done. As stated in the Los Angeles Roundtable discussion by the representative from the Society of American Archivists, “We need all hands on deck”. Institutions should be permitted to self-qualify; however they should recognize that eligibility for taking advantage of this exception should be based on an external set of best practices or recognized standards. As recommended above, the adherence to

standards should be publicized by the institution through its web site or some other public notification.

If we are required to limit copying to select libraries or archives we have to provide them with the authorization to make copies of materials from and for unqualified institutions; otherwise there is an inequity in the manner in which we are determining what materials are worthy of preservation and who gets to have access to preserved materials. However, how can we be certain that these “qualified institutions” will think it is within the scope of their mission to accept all this outsourcing?

Respectfully submitted,

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