

**Society of American Archivists  
Council Meeting  
May 22 – 24, 2014  
Chicago, Illinois**

**Issue Brief: Archivists and Section 108 of the Copyright Act  
(Prepared by the Committee on Advocacy and Public Policy in  
Consultation with the Intellectual Property Working Group)**

This issue brief addresses the following priority within SAA's Advocacy Agenda, as adopted by the SAA Council in June 2012:<sup>1</sup>

**The Public's Right to Timely and Reasonable Use of Information**

America's first copyright act (1790) sought to strike a balance between encouraging the creation of new works and granting monopolies over knowledge, learning, and expression. Over time, both the scope and duration of copyright monopolies have increased, to the detriment of learning and broad creative expression. A more appropriate balance must be struck between the right of authors to benefit from the fruits of their labors for a limited time and the need of the public to use freely material for the greater benefit of society.

This brief was prepared by the Committee on Advocacy and Public Policy in consultation with the Intellectual Property Working Group and is consistent with previous work done by the IPWG on this topic.

**RECOMMENDATION**

**THAT the following issue brief on Section 108 of the Copyright Act be approved:**

**Section 108 of the Copyright Act**

**SAA POSITION**

Section 108 of the Copyright Act, the section that stipulates specific exemptions for archives and libraries, requires revision. Even at its inception in 1978, Section 108's exceptions were inadequate for archivists; however, in the digital age the gap has grown ever wider between the statute's provisions and the unchallenged practices of many archivists in support of preservation and increased public access.

A revised Section 108 should:

- Extend the eligibility of 108 to commercial entities, so long as they are not undertaking 108 activities for direct commercial advantage. Exceptions for digital preservation must recognize that many entities are engaged in the important task of preserving and providing access to our heritage.

<sup>1</sup> <http://www2.archivists.org/initiatives/saa-advocacy-agenda>

- Remove the stipulation that digital access to unpublished collections must be limited to the premises of the archives. Authorized users who have agreed to the rules of the repository (including the requirement to respect copyright and privacy when engaging in the general publication of a work) should be able to have remote access to collections in digital form.
- Explicitly recognize that archival collections typically contain both unpublished work and some material that may have been published at one time. That should not affect the inclusion of such published items within an archival collection being made available digitally.
- Remove format-specific restrictions in 108(i). All rights provided by Section 108 should be available to repositories regardless of whether the work in question is a letter, a musical score, a photograph, a sound recording, or a motion picture. The differences in the formats do not justify different treatment under the law.
- Modify 108(f)(4) so that the public benefits guaranteed by Section 108 cannot be limited or annulled by contractual obligations.

SAA adamantly opposes any attempt to restrict further the very limited exceptions in Section 108.

## **SAA WILL:**

[To be completed by the Council, at its discretion and depending on the circumstance.]

## **THE ISSUE**

Section 108 was initially proposed as a method to increase scholarly access to unique archival material by allowing archives to make copies of archival collections for deposit in other research institutions.<sup>2</sup> Subsequently provisions regarding library use were added to the text that was adopted in 1976.<sup>3</sup> The section was formulated at a time when typewriters, microfilm, and photocopies were the primary research technologies; archival materials existed primarily on paper, film, or magnetic tape. Subsequent amendments have attempted to keep the law current, but with only limited success. Furthermore, the rise of new services and practices in archives and libraries, and especially the advent of digital technologies, has made Section 108 largely irrelevant.

Congress has begun the process of reviewing all of Title 17 with an eye toward producing the next general revision to the Copyright Act, and review of Section 108 will be a major point of discussion. In addition, the World Intellectual Property Organization (WIPO) has begun discussion of a possible treaty setting minimum international standards for copyright exceptions for archives and libraries. A modern, coherent, and usable Section 108 could serve as a model for the rest of the world. It is thus timely to focus attention on Section 108 and the need to make it as effective as possible.

Section 108 has two great advantages over the fair use defense. First, Section 108 provides explicit assurance that certain actions are non-infringing. This clarity can encourage hesitant

<sup>2</sup> Peter Hirtle, "[Digital Access to Archival Works: Could 108\(b\) Be the Solution?](http://fairuse.stanford.edu/commentary_and_analysis/2006_08_hirtle.html)" Copyright & Fair Use web site, Stanford University Libraries (24 Sept. 2006)

[http://fairuse.stanford.edu/commentary\\_and\\_analysis/2006\\_08\\_hirtle.html](http://fairuse.stanford.edu/commentary_and_analysis/2006_08_hirtle.html).

<sup>3</sup> Mary Rasenberger and Chris Weston, "[Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning](http://www.section108.gov/docs/108BACKGROUNDPAAPER(final).pdf)," (April, 2005)

archivists who, because they are uncomfortable with their understanding of fair use or are unable to risk the cost of defending their understanding, needlessly limit public access to archival materials. Second, Section 108 authorizes some socially beneficial activities that may not constitute fair use, such as the copying of entire collections for deposit in other repositories.

The Section 108 Study Group compiled a set of practical (although conservative) recommendations for reform. They include:

- Addition of museums to the list of qualified entities;
- Creation of a preservation exception for all at-risk published material;
- Removal of the “3 copy” limitation on digital preservation copies; and
- Expanded preservation of digital resources, including collection and preservation of publicly accessible networked publications (i.e., websites).

Archives and libraries currently are actively engaged in all of these activities, and the law should be updated to reflect this reality of the digital world. For this reason, SAA endorses in full the Study Group’s recommendations. However, it is unlikely that Section 108 reform will adequately accommodate the archival profession’s mission to increase access to library and archival materials or foster the preservation of our digital heritage unless the amendment goes beyond what the Section 108 Study Group proposed.

## **ADDITIONAL REFERENCE SOURCES**

- Section 108 Study Group. 2008. The Section 108 Study Group report: an independent report sponsored by the United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress. Washington, D.C.: Section 108 Study Group. <http://www.section108.gov/>.
- Nelson-Strauss, Brenda, Alan Gevinson, Samuel Brylawski, and Patrick Loughney. 2012. The Library of Congress National Recording Preservation Plan. <http://purl.fdlp.gov/GPO/gpo37398>.
- Hirtle, Peter, “Digital Access to Archival Works: Could 108(b) Be the Solution?” Copyright & Fair Use web site, Stanford University Libraries (24 Sept. 2006). <http://fairuse.stanford.edu/2006/09/24/post/>
- Maher, William J. “Statement of SAA Representative to World Intellectual Property Organization Standing Committee on Copyright and Related Rights,” November 21, 2011, Geneva, Switzerland. <http://www2.archivists.org/statements/statement-of-saa-representative-to-world-intellectual-property-organization-standing-comm>

*Approved by the SAA Council: May 2014*

**Support Statement:** This issue brief supports SAA’s Advocacy Agenda and reflects the Society’s position on Section 108 of the Copyright Act. In addition, it provides background that may be useful to members and others who wish to understand the issue and advocate on behalf of SAA’s position.

**Relation to Strategic Plan:** Goal 1, Advocating for Archives and Archivists / Strategy 1.2.  
Educate and influence decision makers about the importance of archives and archivists.

**Fiscal Impact:** None, unless SAA determines that it will enter into one or more legal briefs to support its position on this issue.