

Society of American Archivists

Statement on U.S. Copyright Office Draft Revision of Section 108: Library and Archives Exceptions in U.S. Copyright Law [Docket No. 2016-4]

The following statement was prepared by the SAA Intellectual Property Working Group in advance of a July 11, 2016, meeting with the U.S. Copyright Office to discuss the office's June 7 [Notice of Inquiry](#) regarding Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law [Docket No. 2016-4]. The statement was approved by the SAA Executive Committee on July 7, 2016.

The Society of American Archivists (SAA) welcomes the opportunity to respond to the Copyright Office's questions regarding Section 108. SAA is the oldest and largest organization of archivists in North America. It serves the education and information needs of its members, including more than 6,200 individual archivists and institutions, and provides leadership to help ensure the identification, preservation, and use of the nation's historical record. To fulfill this mission, SAA exerts active leadership on significant archival issues by shaping policies and standards, and serves as an advocate on behalf of both professionals who manage archival records and the citizens who use those records.

In contrast to the opinion expressed in the Notice of Inquiry, SAA does not consider Section 108 to be obsolete or in need of serious reform. It is used every day by practicing archivists all across the country. To the extent that the Section contains specific conditions and restrictions, it has perhaps not aged well. Fortunately there are many Sections that express a general goal without imposing unreasonable conditions. Furthermore, the "Fair Use savings" clause, Section 108(f)(4), ensures that actions that are not otherwise authorized in Section 108 may, under appropriate conditions, still be undertaken by archives.

Although there are aspects of Section 108 that could be updated, the benefits of doing so are likely to be small while the cost of getting agreement on the changes is likely to be high. SAA would prefer to see the Copyright Office focus on other areas of greater concern, including reform of statutory damages (a serious impediment for archives that may own published unclaimed copyrighted works) and implementation of an international treaty that would support fuller engagement by American archivists with those international communities whose heritage is often found in U.S. archives.

That said, SAA recognizes that the Office has made Section 108 reform a priority. We strongly believe that Section 108's place in the law incentivizes the vital part that archives and libraries play in our society by granting our institutions special privileges, and so any and all reforms to Section 108 must be made with an eye toward either expanding on existing permitted uses by archives (and libraries) or adding new permitted activities. Archivists certainly do not need a host of new hurdles to jump over in order to engage in permitted activities. We therefore will oppose any proposed reforms to Section 108 that do not serve to extend archivists' permitted activities under this or any other section of the Copyright Act. SAA's responses below to the Office's questions provide information on the perspective

of practicing archivists. It is our hope, however, that our responses will convince the Office that now is not an appropriate time to rewrite or amend Section 108.

Eligibility

1. *The attributes that an institution should possess in order to be eligible for the section 108 exceptions, and how to prescribe and/or regulate them.*

Section 108 currently does not define what constitutes an archives. Although the term “archives” frequently is misused,¹ SAA is not aware of any instances in which self-described archives have abused the exceptions found in Section 108. Furthermore, the other restrictions found in Section 108 limit the likelihood that a non-archival entity calling itself an “archives” to be eligible for the 108 exemptions could hurt the interests of a rights holder. For example, Section 108(a) stipulates that reproductions and distributions cannot be made for “direct or indirect commercial advantage”; replacement copies made under 108(c), user copies made under 108(e), and copies of works in their last 20 years of copyright made under 108(h) may be made only after a search for a copy in the market; and 108(g) precludes the use of the exceptions if the reproduction or distribution is “systematic.” Even if an alleged infringing online site, such as Sci-Hub, wished to call itself an “archives” (or a “library”), its lack of compliance with these requirements would preclude it from use of the safe harbor afforded by Section 108.

In short, the absence of precise definitions for libraries and archives has not been a problem in the analog era. It is difficult to envision how it would become a problem with digital libraries, archives, and museums. A law that expresses principles and relies on common understandings is less likely to become outdated over time as those understandings evolve. This is fortunate, for there is no national standard that defines a repository as an “archives.” Mixed collections of unpublished and published records are found in government, academia, historical societies, corporate entities, religious bodies, labor unions, research laboratories, tribal organizations, and museums, to name a few. No single entity could certify or credential the repositories found in these organizations as “archives.”²

If, however, the Copyright Office has concrete evidence that a more rigorous definition is needed to protect the interests of rights holders, two options are possible. The simplest would be to specify that in addition to the existing requirements, Section 108 applies to organizations that meet the eligibility requirements for a grant from the Institute of Museum and Library Services (IMLS).³ “Archives” are implicitly included in its categories of eligible libraries, and IMLS will adapt its eligibility requirements as the profession’s understanding of what constitutes libraries, archives, and museums evolves. The other acceptable alternative would be to adopt the functional requirements recommended in the Section 108 Study Group Report: “These new eligibility criteria include possessing a public service mission, employing trained library or archives staff, providing professional services normally associated with

¹ See, for example, the misuses of the term “archives” cited by William Maher in “Society and Archives,” the incoming SAA presidential address, 30 August 1997, *The American Archivist* 61:2 (Fall, 1998): 252-265: <http://www.archivists.org/governance/presidential/maher-1.asp>.

² This may be why the National Historical Publications and Records Commission, the grant-making arm of the National Archives and Records Administration, does not bother to define “archives” as part of its eligibility requirements. See <http://www.archives.gov/nhprc/apply/eligibility.html>.

³ Those requirements are currently specified at <https://www.ims.gov/grants/apply-grant/eligibility-criteria>.

libraries and archives, and possessing a collection comprising lawfully acquired and/or licensed materials.”

Rights Affected

2. *Limiting section 108 to reproduction and distribution activities, or extending it to permit public performance and display as well.*

There are at least two reasons why it would be desirable to add public performance and display options to Section 108.

First, there may be times when it is more secure to perform or display a work than it is to make a copy for distribution. Imagine, for example, that one wanted to make available to a remote user a copy of a textual work made under 108(d) or 108(e). Currently one has to make and distribute a reproduction that becomes the property of the user. It might decrease the possibility of future infringement if one could simply display the work to the remote user rather than providing the copy, as is authorized for certain works under 108(h).

The need to publicly perform or display a work would be even greater if, as we hope, Section 108(i) is removed, thus removing restrictions on the reproduction and distribution of musical, pictorial, graphic, sculptural, and audiovisual works. There are many times when it would be more efficient for the repository, and safer for a rights owner, if the repository could display a pictorial or graphic work or stream a sound recording or audiovisual work.

Copies for Preservation, Security, Deposit in Another Institution, and Replacement

3. *Restricting the number of preservation and security copies of a given work, either with a specific numerical limit, as with the current three-copy rule, or with a conceptual limit, such as the amount reasonably necessary for each permitted purpose.*

SAA feels strongly that a conceptual limit of what is reasonably necessary for each permitted purpose is required. When Section 108 was first passed, there were no limits on the number of copies that could be deposited in another institution.⁴ The General Services Administration suggested the adoption of 108(b) precisely to spread the number of unpublished collections as broadly as possible. It made no sense to impose the three-copy restriction later. We know that multiple copies are the surest way to ensure the longevity of digital information. If the copies that are made for preservation do not increase the total number of copies made available to the public, they should be considered to be ephemeral copies, much as those specified in Section 112, and ignored.

4. *The level of public access that a receiving institution can provide with respect to copies of both publicly disseminated and non-publicly disseminated works deposited with it for research purposes.*

Section 108(b) is often referred to as a “preservation and security” section. But as archivist Peter Hirtle has noted:

⁴ Peter Hirtle, “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/commentary_and_analysis/2006_08_hirtle.html.

When one examines the original legislative rationale for Section 108(b), however, it becomes rapidly apparent that access, and not preservation, was the driving impetus for inclusion of the section in the 1976 Copyright Act. Congress wanted to ensure that scholars had ready access to unpublished research materials. Such access could be secured by authorizing the distribution of copies of the unpublished research materials to other libraries and archives. Congress apparently accepted the arguments that limited distribution of facsimiles of unpublished manuscripts would in no way conflict with the publication and distribution rights of the copyright owner; scholarship and commercial distribution are not in conflict.⁵

SAA agrees with Hirtle's conclusion that "limited networked digital access to unpublished material would better address the problems that Congress tried to solve in 1976." Our experience is that users increasingly expect that archival material will be online. One of the most promising approaches is the use of a "virtual reading room," a networked environment that mimics practices in physical archives. Researchers must identify themselves and agree to abide by the rules of the repository, which include agreeing to respect copyright, privacy, and other rights. They would then be allowed to read and, in the spirit of 108(d) and 108(e), request copies of digitized and born-digital materials from the servers of the repository.

The virtual reading room makes material broadly available for specialized research while at the same time protecting the economic interests of authors who may be represented in the collections. It provides a level of access that is less than that offered by purely online collections, but is much more than can be afforded by physical reproductions.

One important distinction must be made. Few archival collections consist solely of unpublished material. It is common to find newspaper clippings and other printed ephemera mixed in among correspondence and original writings.⁶ It would be cost-prohibitive to conduct a copyright investigation on each scrap of potentially published material.⁷ Currently archives that are making such material available online are claiming fair use, but it would be far better if the material were available in a virtual reading room under the auspices of a revised 108(b) that authorized the limited distribution of archival, rather than unpublished, materials.

⁵ Ibid.

⁶ See, for example, the series entitled "Photographs and Printed Material" in the Florence Knoll Bassett Papers in the Archives of American Art at the Smithsonian Institution, <http://www.aaa.si.edu/collections/container/viewer/Portfolio-Photographs-of-Florence-Knoll-and-Others-and-Articles-in-Newspapers-and-Magazines--224307>, or many of the items in the NAACP Papers Collection, housed in the Library of Congress and digitized and made accessible by ProQuest: http://cisupa.proquest.com/ksc_assets/history_vault/naacppapers.pdf.

⁷ A recent instructive example of the prohibitive costs associated with conducting searches for the copyright owners of scrapbooks is provided by the "Digitising the Edwin Morgan Scrapbooks" project at the University of Glasgow. Morgan, the first Scottish national poet, left 16 volumes of scrapbooks containing an estimated 54,000 images. A project to identify images on the web met with only extremely limited success. It concluded that "it seems modest to suggest it would be sufficient to spend an average half an hour on each item to determine copyright or carry out a diligent search. Yet in the case of the circa 54,000 items in the 16 scrapbooks, that would take one person nearly 15 years, working for 7 hours a day, 5 days per week." Kerry Patterson, "Diligent Searching in the Dark: Identifying Images out of Context." *CREATE* blog, 3 June 2015, <http://www.create.ac.uk/blog/2015/06/03/diligent-searching-in-the-dark-identifying-images-out-of-context/>.

Copies for Users

5. *Conditioning the unambiguous allowance of direct digital distribution of copies of portions of a work or entire works to requesting users, and whether any such conditions should be statutory or arrived at through a rulemaking process.*

One of the great strengths of 108 has been that Sections 108(d) and 108(e) are technologically neutral. There is no specification as to the form that copies for users must take, nor are delivery mechanisms specified. This has meant that the statute has remained relevant as delivery methods have evolved from microfilm to photocopies to digital delivery. Copies requested by users are distributed in a number of different ways. Sometimes a copy is simply emailed to a user if it is just a single page or relatively small request. More commonly, copies are posted to a file server and an address for downloading the documents sent to the user. A decade ago, this might have been an FTP server. Today services like Dropbox sometimes are used.

Because subsections (d) and (e) are silent on technology, archives have been able to easily adapt to and adopt new, more efficient technologies as they appear. SAA is opposed to imposing new conditions on the delivery of copies to users. Conditions would do nothing to protect the rights of rights holders. Anyone who wanted to infringe using a copy of a work provided by a library could do so simply by bypassing any technological protection measures imposed on the work or, at worst, by simply scanning and reposting any analog copy made from a digital file.

Some might argue that if, as we propose, Section 108(i) is removed, conditions on the digital distribution of those formats currently exempt from Sections 108(d) and 108(e) should be imposed. SAA doubts that requiring a condition such as streaming would prevent the appearance on a file-sharing site of a copy of a musical sound recording or audiovisual work. It would, however, limit the utility of the copy for the user. In many cases, researchers need long-term access to copies of the unpublished works that are found in archives for their research. Archives may currently distribute copies of news programs to researchers by lending using Section 108(f)(3). We believe that a modern Section 108 should allow archives the option to stream or distribute copies of all works, including musical sound recordings and audiovisual works, when either small portions are requested or copies of entire works are not available at a reasonable price. SAA opposes technological conditions that will do little to deter a dedicated infringer but will hamper the ability of serious researchers to delve into the work.

Preservation of Internet Content

6. *Conditioning the distribution and making available of publicly available internet content captured and reproduced by an eligible institution.*

To the extent that archives already capture publicly available content and make it available, this has been done under an assertion of fair use. In the event of a complaint from a copyright owner, public accessibility to past internet content is removed. This is currently most often conducted in conformance with the Internet Archive's Oakland Archive Policy,⁸ but as professional practices in this area evolve, the standards are likely to change as well. Any amendment to Section 108 should be crafted with the primary intention of *incentivizing* activity by those qualifying institutions that may be uncomfortable asserting their fair use rights. An explicit provision that exempts the capture and distribution of publicly

⁸ <http://groups.ischool.berkeley.edu/archive/aps/removal-policy.html>.

available internet content could, therefore, be beneficial, provided that any conditions imposed on the activity are limited to “reasonable conditions” or “standard professional practice.” Furthermore, there should be explicit authority to bypass any non-negotiated “terms of service” and other “click-through” and “browse-wrap” agreements, as is discussed in the response to question 7. If there are too many restrictions or qualifications, archives would either continue to rely on fair use or not bother collecting, preserving, and making publicly available internet content.

Relation to Contractual Obligations

7. *How privileging some of the section 108 exceptions over conflicting contractual terms would affect business relationships between rights-holders and libraries, archives, and museums.*

Non-negotiated agreements (such as end user license agreements and web terms of service) pose enough of a potential problem for archives that no effort to amend Section 108 should be made unless the issue is addressed.⁹ Although they typically appear in quasi-sales environments, such as digital music or software purchases, they are not sales for the purposes of Title 17 and so they do not generate “lawfully acquired copies” under the terms of Section 109(a).

Where archives seek to acquire records or personal papers of an institution or individual, long-term preservation and provision of access to born-digital records pose a particularly difficult problem. Software and electronic media formats tend to age badly, and in some cases the only available means of presenting a digital object is through the software in which it was created. This is why archives attempt to acquire relevant software along with digital files. However, because software often is bound in shrink wrap licenses between the original “purchaser” and the company that produced it, archives cannot take advantage of many of the exceptions and limitations in the law that would otherwise allow us to effectively serve our users.

Likewise, digital objects such as sound recordings, e-books, and similar works often form an important part of the personal papers of a person of interest, but are also bound in very restrictive terms of service to which the archives will not have been a party. These terms generally forbid any kind of transfer of ownership in the copy, and thus will generally render an archives' acquisition of the work an infringement. An archives ought to be able to acquire, preserve, and serve materials from donors without fear of interference by prior license agreements to which the archives is not a party.

SAA insists upon a conditioned non-enforceability clause for non-negotiable point-of-sale licenses.

Outsourcing

8. *What activities (e.g., digitization, preservation, interlibrary loan) to allow to be outsourced to third-party contractors, and the conditioning of this outsourcing.*

Archives and libraries already assume and act as if they are permitted to outsource any and all Section 108 activities to their choice of third-parties. As the burden on archives to preserve more—and more varied—material continues to grow and funding for archives shrinks, it is increasingly important that

⁹ Archivists rely heavily on negotiated agreements in the acquisition and maintenance of their collections. These negotiated agreements will sometimes include restrictions on the right to reproduce and distribute the material. Although archivists generally prefer not to accept such restrictions, it is sometimes necessary to do so in order to achieve the ultimate goal of their preservation.

archives be able to outsource their activities to organizations with the capacity and expertise to perform these functions, rather than going to the expense of buying equipment and hiring specialized personnel to, essentially, reinvent the wheel. In the case of audio preservation, for example, it is almost always less expensive, more practical, more effective, and generally much less wasteful to send materials to a vendor with specialized equipment and experience in handling and reformatting the recordings than it is to build a new audio preservation lab. This is especially true with certain obsolete formats for which the number of spare parts available is finite, and labs literally must compete with each other in auctions to repair their machines, thus increasing everyone's cost.

There is no benefit to anyone in preventing outsourcing of Section 108 activities, provided that the vendor (or other third party) follows best practices in maintaining the integrity of the process. If a third party functioning like an employee of the institution creates preservation copies, or loan copies, on behalf of an archives, there should be no functional difference, vis-a-vis any of the rights holder's Section 106 interests, over an archives having provided the service in house. The same number of copies is made and the use of the material is the same; the only difference is who performed the service. There is no need to “condition” outsourcing, especially because there is no evidence that in almost four decades of outsourced activities, any harm has been caused to the rights holder. It should be enough to state that the general rules of agency apply.

Other

9. Whether the conditions to any of the section 108 exceptions would be better as regulations that are the product of notice-and-comment rulemaking or as statutory text.

In general, SAA supports trusting archives and libraries to rely on their own professional best practices. A carefully crafted statute—one that is sufficiently broad as to be adaptable to technological changes over time but is sufficiently limiting as to not cause substantial harm to rights holders—is preferable to notice-and-comment rulemaking.

Rulemaking has not proven to be an effective alternative. Although the notice-and-comment process has been useful in allowing all parties to express their positions publicly in policy studies similar to this one, its use in actual rulemaking has largely been a failure. The triennial rulemaking for Section 1201 has brought many useful recommendations for exceptions from the public, but few have actually come to fruition. When exceptions are adopted, they are often unnecessarily and unhelpfully narrow. With respect to use of audiovisual works, for example, the current first 1201 exemption, which addresses motion pictures (including television shows and videos), permits circumvention of technological protections only for a small subset of formats, users, and uses, thus allowing technological protections to legally prevent many otherwise non-infringing uses. Furthermore, proposing exemptions is a time- and resource-intensive task, as considerable research and effort (and, often, legal expenses) must be spent every three years, a process that will always favor the better-funded industry players.

SAA believes that archivists have shown that they can be trusted to make use of exceptions and limitations responsibly, in ways that do not cause inappropriate harm to rights holders. Micromanaging the profession through either rulemaking or overly restrictive statutes (such as the TEACH Act) will only result in harm to our cultural heritage.

10. *Whether and how the use of technical protection measures by eligible institutions should apply to section 108 activities.*

As discussed earlier, for limitations and exceptions to be meaningful, they must not allow copyright holders to prevent their application or discourage use by eligible institutions. Section 108 is useful to the extent that it can actually be used by those institutions, but technical requirements for the use of the privileges risk excluding many, many archives, for all practical purposes. This is especially true for small archives not associated with a larger institution. Many archives that qualify under the current Section 108 requirements are staffed by a single archivist, who may be the only information professional in the institution. Law that is written with a view toward larger institutions could be worse than useless to these "lone arrangers."

11. *Any pertinent issues not referenced above that the Copyright Office should consider in relation to revising section 108.*

- A. Topic 10 speaks to whether any of the 108 exceptions should be conditioned on the use by eligible institutions of technological protection measures. A different and more challenging issue is the acquisition and preservation of digital content protected by such measures. As SAA noted in its 18 February 2016 comment on the 1201 rulemaking process, it makes no sense to provide preservation exceptions in 108(b) and 108(c) if those exemptions are dependent on securing an exemption that would allow one to gain access to content. SAA hopes that the Office's current investigations into 1201 rulemaking will lead to a complete overhaul of 1201, but 108 can also be used to fix part of the problem. A provision that states that qualifying institutions may bypass effective technological protection measures in order to carry out any of the activities authorized by 108 (and ideally by 107 as well) would be welcome.
- B. Under 108, it is currently impossible to create at the request of another archives a copy of a published work for addition to the general collections of the requesting repository. This is the case even if the work is out-of-commerce and the work itself, because of complex rights ownership, has turned into a "hostage." These are works that are, in the words of Lydia Pallas Loren, "constrained in their movement by the restricting combination of the set of rules established by copyright law and the absence of the owner who could release the works from what binds them in their confinement."¹⁰ In some cases, putative rights owners refuse to grant permission for a hostage work to be copied for another archives because they do not know themselves if they actually have the rights to do so. To address this issue, SAA proposes that something similar to Section 54 in New Zealand law, which allows for copying for the collection of other libraries, be added to Section 108.¹¹

In closing, SAA would like to emphasize again that Section 108 is working as is. It is used every day by archivists to preserve unpublished collections, make copies for users, and limit institutional liability for any contributory copyright infringement that could theoretically arise from the use of duplication equipment. The lack of litigation around Section 108 (or archives in general) is an indicator that it has

¹⁰ Loren, Lydia Pallas, "Abandoning the Orphans: An Open Access Approach to Hostage Works" (October 1, 2012). *Berkeley Technology Law Journal*, Vol. 27: 1431, 2012; Lewis & Clark Law School Legal Studies Research Paper No. 2012-10. Available at SSRN: <http://ssrn.com/abstract=2049685>.

¹¹ <http://www.legislation.govt.nz/act/public/1994/0143/latest/link.aspx?id=DLM345986>

not been a problem, especially when it is used in conjunction with Section 107. Further, in the face of rapid technological, legal, and professional change in this area, it would be almost impossible to legislate wisely. The Section 108 Study Group report, while useful for its time, has been largely superseded by more recent technological and legal developments. In addition, recommendations that were developed prior to the outcome of the rise of mass digitization projects in libraries and archives are unlikely to be of continuing value.

SAA would welcome efforts to broaden the scope of the law as an encouragement to archivists everywhere to engage in the culturally important mission of acquiring, preserving, and making available the records of our society, but will vigorously oppose any actions to limit or condition Section 108 and Section 107 activities by archives.