

February 20, 2006

Mary Rasenberger  
Policy Advisor for Special Programs  
U.S. Copyright Office  
101 Independence Ave. S.E.  
Washington D.C. 20559-6000

Attention Mary Rasenberger,

Carnegie Mellon University Libraries is pleased with the initiative to study and consider amending section 108 in light of the changes precipitated by digital technologies. Preservation is a critical historic function of libraries and archives. When a copy in our collection begins to deteriorate or the format in which it is stored begins to become obsolete, our preference is to buy a fresh access copy. Unfortunately a fresh copy cannot always be purchased. Furthermore, waiting until our copy is at near risk of loss likely means that it is too late to make a quality copy. We need a legislative solution that balances the legitimate interests of libraries, archives, and rights holders.

We would like to participate in the roundtable discussion of key issues. The remainder of this letter provides the requested contact and location information and, in order of preference, the topic areas in which we want to participate and the specific questions that we want to address for each topic.

Date/location: March 16, 2006 – Washington DC  
Name: Denise Troll Covey  
Topics: (B) Amending subsections 108(b) and (c) to allow access outside the library premises, and (C) A new exception for preservation-only copying  
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**Priority #1: (B) Proposal to amend subsections 108(b) and (c) to allow access outside the premises in limited circumstances**

- Are there conditions under which electronic access to digital preservation or replacement copies should be permitted under subsections 108(b) or (c) outside the premises of libraries or archives (e.g., via email or the Internet or lending of a CD or DVD)? If so, what conditions or restrictions should apply?

If (a) the access (use) copy in the library or archives collection becomes corrupted, deteriorated or otherwise unusable and (b) an unused replacement copy cannot be found at a fair price, then electronic access to a digital preservation or replacement copy should be permitted from inside or outside of the library or archives.

- Should any permitted off-site access be restricted to a library or archives’ “user community”? How would this community be defined for the different types of libraries? To serve as an effective limit, should it represent an existing and well-defined group of users of the physical premises, rather than a potential user group (e.g., anyone who pays a member fee)?

Remote access should be restricted to the library or archives’ user community. Libraries already have an operational model for defining their user community and for providing their user community with remote access to copyrighted works. Licensing contracts with publishers and aggregators define the user community in terms sufficient for these purposes. We think that the amendment to restrict off-site access to a library or archive user community should *not* be tied to users of the physical premises of the library or archive or, in the case of an academic library, to users of the physical campus premises. As more and more information becomes available online, many users need not come into the physical library or archive to do their work. Similarly, distance education courses might enable students to complete their work without coming to campus. Any attempt to define or restrict the user community to those who use physical premises will unnecessarily disenfranchise users who are legitimate members of the community served by the library or archive.

- Should restricting remote access to a limited number of simultaneous users be required for any off-site use? Would this provide an effective means of controlling off-site use of digital content so that the use parallels that of analog media? If a limit on simultaneous users is required for off-site access to unlicensed material, what should that number be? Should only one user be permitted at a time for each legally acquired copy? Do effective technologies exist to enforce such limits?

Remote access should *not* be restricted to a limited number of simultaneous users. There is no reason to require use of digital media to parallel use of analog media or to treat legitimate members of the user community differently depending on whether they are inside or outside of the library or archive. We should be focusing on how to leverage the capabilities of the technology in support of teaching, learning, and research while minimizing the risks to copyright holders. Requiring one “legally acquired copy” of a digital work for each simultaneous user is technologically unwarranted and fiscally irresponsible.

Libraries and archives can only make and provide access to a replacement copy if no unused copy of the work is available at a fair price. If the work is still available in the marketplace at a fair price, the library or archive will purchase the item because (a) it’s the law, (b) it is cheaper and easier to purchase the work than to make a preservation or replacement copy of the work, and (c) the purchased (unused) item is likely to be of higher quality than a preservation or replacement copy of a deteriorated, fragile (heavily used) work. If, on the other hand, the work is *not* available in the marketplace at a fair or reasonable price, what is the risk to copyright holders in these circumstances that would warrant restricting access to a legally made replacement copy to a limited number of legitimate, simultaneous users, regardless of the location of the users?

There are currently no readily available, effective, affordable technologies to enforce access restriction to a limited number of simultaneous users. Requiring libraries and archives to implement such technology would be prohibitively expensive and discriminatory. Not all eligible institutions have the programming expertise onboard to do the work. Access to licensed content is seldom restricted to a designated number of simultaneous users, and when it is, the vendor implements the technology that monitors the number of users and applies the restriction. The cost and complexity of implementing the technology are not the onus of the licensing library.

- Should the use of technological access controls by libraries and archives be required in connection with any off-site access to such materials?

Authentication and authorization should be sufficient to determine whether a user is a legitimate member of the user community with permission to access the material remotely.

**Priority #2: (C) Proposal for a new exception for preservation-only (restricted access) copying**

- Given the characteristics of digital media, are there compelling reasons to create a new exception that would permit a select group of qualifying libraries and archives to make copies of “at risk” published works in their collections solely for purposes of preserving those works, without having to meet the other requirements of subsection 108(c)? Does the inherent instability of all or some digital materials necessitate up-front preservation activities, prior to deterioration or loss of content?

Waiting until digital materials are damaged, deteriorated (corrupted), lost/stolen, or inaccessible (e.g., obsolete format) is too late to preserve them. This is a sufficiently compelling reason to create a new exception that would allow libraries and archives to make up-front preservation copies of digital materials. However, the right to *reproduce* (copy) digital materials for preservation purposes is not enough. Preservation must entail the right to *migrate* the materials to new formats and platforms over time. Preservation copies must be accessible, even if they are not accessed. Enacting legislation that enables digital bits to be reproduced, refreshed and saved over time, but that prohibits the work required to be able to render those bits for use does not constitute a viable preservation strategy.

- How could one craft such an exception to protect against its abuse or misuse? How could rights holders be assured that these “preservation” copies would not serve simply as additional copies available in the library or archives’ collections? How could rights-holders be assured that the institutions making and maintaining the copies would maintain sufficient control over them?

Just as current legislation specifies that digital reproductions or replacements are not to be available to the public outside the premises of the library or archives, new legislation should specify that these preservation copies are not to be available for access inside or outside of the premises. Providing access to these preservation copies would constitute infringement. Preservation-only copies do not become (or enable the creation of) access copies unless or until another exception applies. Properly secured, preservation-only copies pose no risks to rights holders. In fact, preservation-only copies protect the existence and integrity of the rights holders’ work.

- Should the exception only apply to a defined subset of copyrighted works, such as those that are “at risk”? If so, how should “at risk” (or a similar concept) be defined? Should the exception be applicable only to digital materials? Are there circumstances where such an exception might also be justified for making digital preservation copies of “at risk” analog materials, such as fragile tape, that are at risk of near-term deterioration? If so, should the same or different conditions apply?

The exception should apply to all digital works (because they are inherently fragile and unstable) and to fragile or rare analog works. Though that might sound overly broad, in practice libraries and archives will only make preservation copies of works that they deem to be strategically important or sufficiently valuable to warrant the investment of their limited resources. Even if libraries were legally allowed to make preservation copies of all the reel-to-reel tapes, films, vinyl records, and VHS tapes that are no longer available in the marketplace, they would not have the human and financial resources to do it. Libraries and archives should be allowed to preserve important materials in their collections and trusted to make responsible assessments of when these materials are at risk.

- Should the copies made under the exception be maintained in restricted archives and kept out of circulation unless or until another exception applies? Should eligible institutions be required to establish their ability and commitment to retain materials in restricted (or “dark”) archives?

Yes, access to preservation-only copies should be restricted to those responsible for ensuring their security and integrity. Preservation-only copies should not become accessible to the user community (i.e., moved out of the restricted archive) unless or until another exception applies. Requiring libraries and archives “to establish their ability and commitment” to create and maintain a restricted digital archive when there is no identified method for them to establish their ability and commitment would be an ambiguity in the law likely to interfere with the legitimate exercise of the preservation-only exception.

- Should only certain trusted preservation institutions be permitted to take advantage of such an exception? If so, how would it be determined whether any particular library or archives qualifies for the exception? Should eligibility be determined solely by adherence to certain statutory criteria? Or should eligibility be based on reference to an external set of best practices or a standards-setting or certification body? Should institutions be permitted to self-qualify or should there be some sort of accreditation, certification or audit process? If the latter, who would be responsible for determining eligibility? What are the existing models for third party qualification or certification? How would continuing compliance be monitored? How would those failing to continue to meet the qualifications be disqualified? What would happen to the preservation copies in the collections of an institution that has been disqualified? Further, should qualified institutions be authorized to make copies for other libraries or archives that can show they have met the conditions for making copies under subsections 108(c) or (h)?

The preservation-only exception should apply to *all* libraries and archives. All qualify because of their shared mission to preserve and provide access to the intellectual, social and cultural record. Currently there are no mechanisms for accrediting, certifying or auditing the preservation practices of libraries or archives. Furthermore, best practices and standards for digital preservation will change over time. While we labor to reach consensus on the many questions raised regarding qualification, certification, monitoring, disqualification, etc., important materials are at risk and nothing can legally be done to preserve them. The problem we are grappling with is real and urgent. Passing legislation that relies on non-existent procedures or entities will not solve it.

Thank you for considering our request to participate in the section 108 roundtable discussion.

Sincerely,

Denise Troll Covey  
Principal Librarian for Special Projects