

## **Limitations on Copyright Owners for Libraries and Archives: Points of Contention and Agreement in an Examination of Section 108\***

**By Kathleen B. Saylor**

### **Abstract:**

Since the first federal copyright law of 1790, copyright in the United States has evolved dramatically, with the Copyright Acts of 1909 and 1976, the Digital Millennium Copyright Act (DMCA), and the Copyright Term Extension Act (CETA). Section 108 was first enacted in 1976 as part of the revised Copyright Act, and was amended by the the DMCA and CETA. This subsection of copyright law allows libraries and archives to make reproductions, under certain conditions, of copyrighted material without obtaining permissions. Thirteen years followed a 1992 study of the efficacy of Section 108. The Section 108 Study Group then was commissioned, with the task of evaluating the state of Section 108 in today's digital era and making recommendations based on their findings. The discussion prompted by the Study Group's research revealed predictable points of contention, but also areas of agreement, between copyright holders and the libraries and archives seeking exceptions to the copyright owners' rights.

### **Section 108: A Brief Introduction to Copyright**

The United States has a long tradition of protecting the intellectual property rights of its creators, the first federal copyright law being enacted in May 1790.<sup>1</sup> Article 1, Section 8, Clause 8 of the US Constitution made clear that Congress would have the authority "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"<sup>2</sup>. By providing creators with exclusive rights, it was hoped that these incentives would increase the publication and distribution of intellectual works and contribute to the growth of the national economy.

US Copyright law has seen limitations placed on those exclusive rights since then: from the US Copyright Act of 1909, the voluntary 'Gentlemen's Agreement' of 1935 (which was the first time the issues of library duplication and fair use were taken into consideration) and the US Copyright Act of 1976.

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<sup>1</sup> "United States Copyright Office: A Brief Introduction and History," Circular 1a, *US Copyright Office*, August 2009, <http://www.copyright.gov/circs/circ1a.html>

<sup>2</sup> "US Constitution", *Law Revision Counsel of the U.S. House of Representatives*, updated September 2004, <http://www.house.gov/house/Constitution/Constitution.html>

Several court cases preceding the Copyright Act of 1976, such as the Williams & Wilkins case of 1972<sup>3</sup>, gave rise to suggestions of amendments to be made to the new bill. One of the many addenda to the new bill included Section 108, which allows libraries and archives to make reproductions (under certain conditions) of copyrighted material without obtaining permissions, and the National Commission on New Technological Uses of Copyrighted Works (CONTU)<sup>4</sup>, which would be established to address the many new technological concerns.

With the explosion of new technology, libraries have developed new and more effective means of serving their patrons as well as new expectations in regards to copyright law. For libraries, new “digital technology represent[ed] a significantly better method of preservation, improved ways to deliver copies of reproduced works to users at their request and enhanced ability to search and use these copies”<sup>5</sup>. On the other hand, copyright holders viewed this new digital technology as means “to create new and enhanced products for new markets... [and also] to count uses of the works and the methods by which to restrict uses through technological controls”.<sup>6</sup>

### Section 108: What it means to copyright holders

The two major differences which divide creators and libraries are their differing goals – which are articulated by Mary Rasenberger and Chris Weston in their “Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning”:

- Libraries and archives place a primary importance on the value of providing access of works to their patrons, viewing copyright issues through the lens of the public’s need for uninhibited information flow in order to fully participate in creative, intellectual, and political life.<sup>7</sup>

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<sup>3</sup> In 1972, a case was brought before the US Court of Claims in which Williams & Wilkins (a publisher) sued the National Library of Medicine and the National Institutes of Health for unsanctioned copying of Williams & Wilkins’ journals for library staff and other researchers. Originally, the ruling was in favor of the plaintiff, which astounded the library community “as it essentially put single-copy photo duplication of articles outside the bounds of fair use”. Soon after the proceedings, a bill calling for revisions to copyright law was introduced. Information from Mary Rasenberger and Chris Weston “Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning,” 14 April 2005, <http://section108.gov/papers.html> pg 16

<sup>4</sup> The National Commission on New Technological Uses of Copyrighted Works (CONTU) was established by Congress, and between 1975 and 1978, the Commission collected and provided data on computers and copy machines to Congress which, in turn, provided the foundation for how the 1976 legislation would deal with these new technologies. CONTU issued its Final Report in 1978, and it “provided not only the justification for Congress’s amending of Sections 101 and 117 of the Copyright Act of 1976 to address computer software, but also discussed the protection of databases and other collections of information and the use of technology such as photocopiers.” For more information see “The Final Report on the National Commission on New Technological Uses of Copyrighted Works: Introduction to the Online Version” by Lee A. Hollaar, 28 September 2003, <http://digital-law-online.info/CONTU/contu1.html>

<sup>5</sup> Laura N. Gasaway, “Amending the Copyright Act for libraries and society: the Section 108 Study Group,” *Albany Law Review*, 22 September 2007, <http://www.highbeam.com/doc/1G1-173970981.html>

<sup>6</sup> Laura N. Gasaway, “Amending the Copyright Act for libraries and society: the Section 108 Study Group,” *Albany Law Review*, 22 September 2007, <http://www.highbeam.com/doc/1G1-173970981.html>

<sup>7</sup> Mary Rasenberger and Chris Weston “Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning,” 14 April 2005, <http://section108.gov/papers.html> pg. 1

- Copyright holders emphasize the value of exclusive rights for creators, recognizing that without incentives and compensation to creators and their publishers, the amount and quality of creative and intellectual works available to the public will be severely diminished.<sup>8</sup>

The copyright reform of 1976 helped to clarify what libraries are permitted to do with copyrighted works as a result of the addition of Section 108; it allowed libraries (and archives) to engage in unauthorized – albeit limited – reproduction and distribution of copyrighted works. Today however, the problems facing rights holders, libraries and archives are not restricted to the sharing of photocopies but sharing digital copies over the Internet as well. It has been argued that Section 108 is no longer adequate to deal with the new and exponential possibilities afforded by digital technology today.

Section 108 was first enacted in 1976 as part of the revised Copyright Act, but then, it gained several amendments in 1998 with the Digital Millennium Copyright Act (DMCA)<sup>9</sup> and the Copyright Term Extension Act (CTEA)<sup>10</sup>.

### **Section 108: The Section 108 Study Group**

When it was ratified in 1976, the US Copyright Act included a requirement known as subsection 108(i). Subsection 108(i) required the Copyright Office to issue a report in 1983 – and every subsequent five year period – in order to determine whether or not Section 108 had succeeded in finding a balance between copyright holders and libraries, and if not, to make suggestions as to future alterations. By 1992, the requirement was removed from the bill upon recommendation by the Copyright Office<sup>11</sup>. The next comprehensive report was not commissioned for another thirteen years.

Convened in 2005, a select committee of copyright experts including intellectual property experts, lawyers, representatives from the publishing industry, and library directors was selected by the National

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<sup>8</sup> Ibid.

<sup>9</sup> Signed into law in October of 1998, the Digital Millennium Copyright Act (DMCA) criminalized bypassing digital rights management (DRM) technology in most cases, as well as the production and distribution of tools allowing one to bypass DRM. To ensure the new law would not severely restrict legal uses of copyrighted works not requiring the direct consent of the copyright owner, the law requires the U.S. Copyright Office to conduct a Triennial Review of exceptions to be granted. In each Review, the Copyright Office has approved several limited exceptions to anti-circumvention law. The DMCA also increased the penalties for online copyright infringement. In regards to Section 108, the DMCA inserted more provisions for libraries, granting more protection from copyright infringement, particularly in regards to digital copying. For the text of the Digital Millennium Copyright Act, see: <http://www.copyright.gov/legislation/pl105-304.pdf>. For the text of Section 108, see:

<http://www.copyright.gov/title17/92chap1.html#108>

<sup>10</sup> The Copyright Term Extension Act (CTEA) of 1998 extended copyright terms in the United States by 20 years.

When ratified in 1976, copyright lasted for the duration of the author's life, plus 50 years – 75 years for a work of corporate authorship. The CTEA extended this to the author's, plus 70 years – 120 years after creation or 95 years after publication for works of corporate authorship. CTEA also added an extra 20 years of protection for works that were published before 1978. For the text of the Copyright Term Extension Act, see:

<http://www.copyright.gov/legislation/s505.pdf>

<sup>11</sup> The Copyright Office suggested that the Section 108(i) reports should be expanded “to encompass a study on the effects of new technology on the Section 108 balance” and if that were not possible, that “the five-year reporting process be either discontinued, or modified to require reports every ten years”. For more information, see “Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning,” by Mary Rasenberger and Chris Weston. 14 April 2005, <http://section108.gov/papers.html> pg. 20

Digital Information Infrastructure and Preservation Program (NDIIPP) and by the U.S. Copyright Office. The purpose of this study group was to examine copyright law and updating it for the digital age. The Section 108 Study Group was to “prepare findings and make recommendations to the Librarian of Congress by mid-2006 for possible alterations to the law that would reflect current technologies. This effort will seek to strike the appropriate balance between copyright holders and libraries and archives in a manner that best serves the public interest”.<sup>12</sup> The public interest refers, not only to the consumer public, but to copyright holders as well as libraries and archives.

One facet of the Section 108 study group’s research consists of a collection of public responses from various affected industries including: Alan Adler of the Association of American Publishers, Inc.; Kenneth Crews of Indiana University School of Law-Indianapolis and the IUPUI Copyright Management Center; the American Library Association and Association of Research Libraries; Elizabeth Adkins of the Society for American Archivists; Mark Seeley of the International Association of Scientific, Technical & Medical Publishers; Keith Kupferschmid of the Software & Information Industry Association; and Victor Perlman from the American Society of Media Photographers, Inc.<sup>13</sup>

Several concerns held by copyright holders have been voiced from these various public comments:

- Alan Adler of the American Association of Publishers (AAP) comments that “the digital environment has changed the marketplace... particularly due to the fact that the digital environment has created the potential for libraries to facilitate digital copy access, distribution and delivery for users in ways that will directly compete with publishers, or will, at a minimum, pose the risk of market-harming unauthorized access, reproduction and distribution of publishers’ works in the absence of appropriate preventive safeguards”.<sup>14</sup>
- Keith Kupferschmid of the Software and Information Industry Association (SIIA) seconded the concern over potential market harm and also remarked the concern of a “potential broadening of the section 108 exception in a way that makes it easier for individuals to infringe copyrighted works”.<sup>15</sup>
- Victor Perlman of the American Society of Media Publishers (ASMP) tempered these worries by saying that “if digital copying and distribution of photographs are to be allowed, they must be accompanied by safeguards that are in proportion to the substantial risks entailed,”<sup>16</sup> those risks being rampant infringement.

By the time the Study Group produced their comprehensive report on March 31, 2008, they had produced a large number of suggestions based on their research and the comments submitted by the public. Predicated on this material, The Executive Report contained several recommendations on new

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<sup>12</sup> The Section 108 Study Group and its full list of members: <http://www.section108.gov>

<sup>13</sup> For a complete list of public responses to the Study Group’s Federal Register, see: <http://section108.gov/comments.html>

<sup>14</sup> Allan Adler, “Written Comments Concerning the Section 108 Study Group On Copyright Exceptions for Libraries and Archives,” *Association of American Publishers (AAP)*, 16 March 2007, <http://section108.gov/docs/Adler-AAP.pdf> pg. 6

<sup>15</sup> Keith Kupferschmid, “Written Comments Relating to the Copyright Office’s 108 Study Group Copyright Exceptions for Libraries and Archives,” *Software & Information Industry Association (SIIA)*, 16 March 2007, <http://section108.gov/docs/Kupferschmid-SIIA.pdf> pg. 2

<sup>16</sup> Victor S. Perlman, “Written Comments in Response to §108 Study Group Request,” *American Society of Media Photographers (ASMP)*, 1 February 2007, <http://section108.gov/docs/Perlman-ASMP.pdf> pg. 3

ways to amend copyright law and address how libraries, archives and museums deal with copyrighted materials in fulfilling their missions within a digital environment<sup>17</sup>.

### Section 108: The explosion of digital media

One major concern of copyright holders regarding Section 108 is the production and circulation of digitized copies of copyrighted works. As has been mentioned already by the AAP, digital technologies have drastically altered the modus operandi of the intellectual property market. This, in turn, has prompted the need to explore how these technologies affect the creation, dissemination, and preservation of intellectual property, particularly when discussing any alteration of Section 108.

Kenneth D. Crews<sup>18</sup>, of the Indiana University School of Law-Indianapolis and the IUPUI Copyright Management Center, wrote in his letter to the study group that Section 108 “was intended to be flexible and adaptable to new technologies [and] what might be described as a ‘technologically neutral’ or even ‘technologically expansive’”.<sup>19</sup> He goes on to posit that for “Congress to revise the statute with that objective is not only unnecessary, but also hazardous,”<sup>20</sup> citing the ever-changing, ever-progressing state of technology.

It is important to remember that the Copyright Act of 1976 was enacted in the pre-digital era; works at that time existed primarily in analog or hard-copy format. Though some would have been aware of the possibilities afforded by technology, the advancements which have since taken place and that will take place in the future could hardly have been predicted.

Today, most copyrighted works can be found in digital format: CDs, DVDs, computer software, e-books, television, mixed media, graphic art, etc. There are also “large quantities of “born digital” works”<sup>21</sup> being produced – these are works that exist only in the digital format and, in some ways, are more fragile than analog and hard-copy works.

Digital works require a more intensive, long-term technique in preservation, and they are more prone to imperceptible deterioration. For example, though acid paper deteriorates under certain conditions, one is physically able to view the progress of the deterioration and take measures to preserve the copy for as long as possible or make copies where need be. With digital works, it is nearly impossible to observe the deterioration of data in digital format, and by the time the deterioration is found, the platform technology may have become unavailable. It could be as simple as unknown damage to a USB stick

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<sup>17</sup> National Digital Information Infrastructure and Preservation Program (NDIIPP): The mission of the National Digital Information Infrastructure and Preservation Program is to develop a national strategy to collect, preserve and make available significant digital content, especially information that is created in digital form only, for current and future generations. NDIIPP is based on an understanding that digital stewardship on a national scale depends on public and private communities working together. The Library has built a preservation network of over 130 partners from across the nation to tackle the challenge, and is working with them on a variety of initiatives. For More information see: <http://www.digitalpreservation.gov/library/>

<sup>18</sup> Kenneth Crews currently serves as Director of Columbia’s new Copyright Advisory Office, was a member of the Munich Intellectual Property Law Center, and is the author of *Copyright Law for Librarians and Educators* and *Fair Use and Higher Education: Are Guidelines the Answer?* For a more detailed biography, see: <http://copyright.columbia.edu/copyright/about/director-and-staff/>

<sup>19</sup> Kenneth D. Crews, “Section 108 Study Group,” *Indiana University School of Law-Indianapolis and the IUPUI Copyright Management Center*, 16 March 2007 <http://section108.gov/docs/Crews-IndianaUniv.pdf> pg. 3

<sup>20</sup> Ibid.

<sup>21</sup> “Study Group Issues Report Recommending Changes in Copyright Law to Reflect Digital Technologies,” *News Releases*, Library of Congress, March 31, 2008 <http://www.loc.gov/today/pr/2008/08-063.html>

which erases the data stored on that platform. This is, granted, an issue with the platform and not the data deteriorating. However, with digital works, the reliability of the platform is necessary to the accessing of that data.

This leads into another concern about altering Section 108. If the exponential rate of technological development is any indication, digital platforms which support particular forms will become obsolete (i.e. Atari vs. Wii, Betamax tapes vs. Blue-ray discs, and cassette tapes vs. mp3s). When taking this all into consideration, Crews' line of reasoning is understandable.

However, some believe that Section 108 (as it stands today) is too broad or too ambiguous to address many of the issues which are unique to digital media. The International Association of Scientific, Technical & Medical Publishers (STM) wrote in its comment to the Study Group that "certain clarifications and modest improvements would produce greater certainty for publishers and librarians, and thus ensure that market-based approaches to underlying concerns can thrive".<sup>22</sup>

One major cause of contention over Section 108 is the copying of digital materials by libraries, both for preservation and for use by library patrons. There has been a push in some sectors to alter the Section 108 language which currently allows for a specific number of copies to be made of a work, under certain conditions, for a work owned by the library.

One reasoning is that digitally formatted works require 'incidental or transient copies' when making *one useable* copy, and often this process is time consuming and expensive. Elizabeth Adkins of the Society of American Archivists (SAA) explains that "archivists often wish to make several digital versions for specific uses; such as a high quality master for preservation, and lower-resolution copies to use when transmission time is a factor".<sup>23</sup> The SIIA agrees to a point by indicating the need for language clarifying the use of these 'incidental or transient copies' and cites the DMCA and TEACH<sup>24</sup> Acts as examples<sup>25</sup>.

Another area of concern is the duplication of digital or online journals, particularly for inter-library loan (ILL) use. Oftentimes a library will purchase licenses for certain material, much as one would purchase a magazine subscription. However, problems arise when libraries utilize this licensed content for inter-library loan. It is possible that one library may rely on the subscriptions of other libraries to forgo the purchasing of their own license.

The greatest fear of publishers – many of whom are small, non-profit, academic organizations whose main source of revenue is the library sphere – is best articulated by a statement made by the SIIA:

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<sup>22</sup> Mark Seeley, "Comment on US copyright law dealing with library and archival exceptions, Section 108, and Study Group on such exceptions," *International Association of Scientific, Technical & Medical Publishers (STM)*, 13 February 2007, <http://section108.gov/docs/STM.pdf> pg. 6

<sup>23</sup> Elizabeth Adkins, "Response by the Society of American Archivists to the Notice of Inquiry Concerning Section 108 Study Group: Copyright Exceptions for Libraries and Archives," *Federal Register*: December 4, 2006 (Vol. 71, No. 232) pages 70434-70440," *Society of American Archivists (SAA)*, 16 March 2007, <http://section108.gov/docs/Adkins-SAA.pdf> pg. 2

<sup>24</sup>"The TEACH Act facilitates and enables the performance and display of copyrighted materials for distance education by accredited, non-profit educational institutions (and some government entities) that meet the TEACH Act's qualifying requirements. Its primary purpose is to balance the needs of distance learners and educators with the rights of copyright holders". For more information, see the fact sheet from the CCC, available here: <http://www.copyright.com/media/pdfs/CR-Teach-Act.pdf>

<sup>25</sup> Keith Kupferschmid, "Written Comments Relating to the Copyright Office's 108 Study Group Copyright Exceptions for Libraries and Archives," *Software & Information Industry Association (SIIA)*, 16 March 2007, <http://section108.gov/docs/Kupferschmid-SIIA.pdf> pgs. 3-4

Allowing a library or archive to provide copies of articles or portions of works under subsection (d) without first determining whether others are already making these items available has and will continue to harm publishers and aggregators by putting them in direct competition with libraries and archives who provide these same items for free. Libraries and archives should not be allowed to compete with the many publishers and aggregator services already in the marketplace, and more that will be entering the market as demand grows.<sup>26</sup>

However, this is not to say that the need for libraries has become obsolete. In fact, SIIA goes on to recognize budgetary issues inherent in requiring such technology and recommends solutions which might be made to accommodate these new restrictions. The recommendation of a central repository of funds is an interesting suggestion, but one that would require much more discussion and deliberation than has yet been applied.

### Section 108: Possible Market Solutions?

In the era of digital technology, new marketing models have been developed that provide tools for both licensors and licensees to make accessing copyright information easier. Some of the current business models include the Copyright Clearance Center (CCC)<sup>27</sup>, The Automated Content Access Protocol (ACAP)<sup>28</sup>, and The PLUS Coalition<sup>29</sup>. These systems provide some means of lessening the confusion as to where a library or other potential user of a copyrighted work might be able to arrange permission of use.

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<sup>26</sup> Keith Kupferschmid, "Written Comments Relating to the Copyright Office's 108 Study Group Copyright Exceptions for Libraries and Archives," *Software & Information Industry Association (SIIA)*, 16 March 2007, <http://section108.gov/docs/Kupferschmid-SIIA.pdf> pg. 7

<sup>27</sup> The Copyright Clearance Center (CCC) represents thousands of authors, publishers and creators and licenses the rights to millions of books, journals, newspapers, websites, ebooks, images, blogs, etc. More than 20 million people at organizations, academic institutions, and corporations around the world rely on CCC's annual licenses and pay-per-use services to share information with confidence. According to the website, over the last 15 years CCC has distributed more than \$1 billion in royalties to rightsholders. In testimony on the given by Jerry DeWitt, a librarian at the Carle Foundation Hospital, DeWitt explains that "the biggest benefit of the Annual Copyright License is the free flow of information. People can feel comfortable about sharing information—they know it's legal. In addition, it shows what kind of organization Carle is. We respect the rights of others the same way we want our intellectual property rights respected". Quote taken from:

<http://www.copyright.com/viewPage.do?pageCode=au1-n>

<sup>28</sup> The Automated Content Access Protocol (ACAP) is a non-commercial, open, global system that provides copyright holders with the necessary tools with which enables them to communicate their personal copyright terms and conditions online and in such a way that can be read, understood and interpreted by the machines that "crawl" and index their content. ACAP is designed to ensure that anyone (including those who publish content on the web, search engines, and other online "aggregators") can access and understand the terms and conditions of a work's access and re-use requirements. In other words, the goal of ACAP is to make copyright work on the web. To visit ACAP's website, see: <http://the-acap.org/>

<sup>29</sup> The PLUS (Picture Licensing Universal System) Coalition is another non-profit initiative that is working to simplify and make possible the communication and management image rights. PLUS networks a system of standards that makes it easier to communicate, understand and manage image rights in all countries. To access PLUS's website, see: <http://www.useplus.com/index.asp>.

Seeley and STM recognize the difficulties inherent in “distinguishing properly between ILL as an exception under US copyright law for particular purposes” as well as “document delivery activities which should be governed by voluntary licensing direct from rights-holders or through organizations such as the CCC or document delivery services authorized by rights-holders,”<sup>30</sup> and suggests that organizations like the CCC (and others that have been mentioned) can provide some part of a solution.

The use of the PLUS Coalition might also assist in regards to visual media. Elizabeth Adkins of the SAA articulates that “archives maintain and preserve large collections of non-textual work: posters, architectural drawings, musical recordings, photographs, moving images, and more... [and] need to have clear permission to be able to duplicate these types of materials for [their] users”<sup>31</sup>. ASMP, AAP, and other organizations echo the sentiments which would provide these non-text-based works coverage under Section 108.

Other market tools that can help protect copyrights and still provide libraries with the tools to achieve their mission are DRM (Digital Rights Management) technologies. As noted by Keith Kupferschmid and SIIA, “there are numerous excellent technologies available in the marketplace that can enforce restrictions that control access, copying, and distribution,”<sup>32</sup> technologies which would allow libraries and archives to distribute the material without fear of user infringement. The SIIA goes on to explain that “DRM technologies that limit further distribution of digital copies would not put users at any disadvantage compared to their ability to use analog copies of library material today”<sup>33</sup>. In theory, DRM technologies would fix a work in a certain form so that it could be distributed as a one-for-one, digital ‘rental’ copy.

Libraries do have some concern as to how DRM technologies would affect the ability of libraries or archives to preserve digital material. Adkins writes that DRM technologies should be “implemented with extreme care, since click-through licenses and DRM can prohibit lawful actions unnecessarily”<sup>34</sup>, referring to preservation needs. Adkins additionally cautions against “requiring repositories to implement technical options” as they “could greatly increase costs of reproduction, effectively prohibiting small repositories from providing digital copies for patron request”.<sup>35</sup>

## Section 108: Room for Agreement

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<sup>30</sup> Mark Seeley, “Comment on US copyright law dealing with library and archival exceptions, Section 108, and Study Group on such exceptions,” *International Association of Scientific, Technical & Medical Publishers (STM)*, 13 February 2007, <http://section108.gov/docs/STM.pdf> pg. 6

<sup>31</sup> Elizabeth Adkins, “Response by the Society of American Archivists to the Notice of Inquiry Concerning Section 108 Study Group: Copyright Exceptions for Libraries and Archives,” *Federal Register*: December 4, 2006 (Vol. 71, No. 232) pages 70434-70440,” *Society of American Archivists (SAA)*, 16 March 2007, <http://section108.gov/docs/Adkins-SAA.pdf> pg. 5

<sup>32</sup> Keith Kupferschmid, “Written Comments Relating to the Copyright Office’s 108 Study Group Copyright Exceptions for Libraries and Archives,” *Software & Information Industry Association (SIIA)*, 16 March 2007, <http://section108.gov/docs/Kupferschmid-SIIA.pdf> pg. 5

<sup>33</sup> Ibid.

<sup>34</sup> Elizabeth Adkins, “Response by the Society of American Archivists to the Notice of Inquiry Concerning Section 108 Study Group: Copyright Exceptions for Libraries and Archives,” *Federal Register*: December 4, 2006 (Vol. 71, No. 232) pages 70434-70440,” *Society of American Archivists (SAA)*, 16 March 2007, <http://section108.gov/docs/Adkins-SAA.pdf> pg. 3

<sup>35</sup> Ibid.

As has been noted earlier, despite some disagreement between various interested parties, several points of agreement have been established throughout the Section 108 Study Group process. Some of these agreements include the following:

- Museums should be eligible under Section 108.

The Study Group found in general favor of museums being added to the language of Section 108. Particularly when it comes to visual images, Perlman explains how “the collections of photographs in both museums and archives contain substantial numbers of images for which there is no information as to the photographer, the copyright owner or how the institution obtained or received the image”.<sup>36</sup> In this case, allowing museums the benefits of protection under Section 108 could also benefit an industry which might not have access to all of this orphaned material.

- New technologies might provide a way for libraries and archives to disseminate their collections more securely, but these measures should be made under extensive consideration.

DRM technologies are routinely used by libraries to regulate the dissemination of their digital collections. In one example, a patron can play the content as many times as he or she wants during the digital “lending” period, after which the content times out, just as a patron must return an item to the library at the end of the lending period. With DRM technologies, a patron can access a work at will but may not be able to copy the work. In such cases, DRM technologies allow a library or archive to continue to provide their patrons with digital information. However, in cases where a library or archive needs to preserve a digital work which includes DRM technologies, it becomes an issue should the institution need to circumvent those restrictions in order to preserve the material. To paraphrase the sentiments articulated by Perlman, if digital copying and distribution is to be allowed, it must be accompanied by safeguards that are in proportion to the substantial risks entailed<sup>37</sup>.

As for market models such as the CCC, PLUS Coalition, and ACAP, these licensing organizations such as these could be used to provide copyright information on obscure material and provide reasonable access to such material at a fair price.

- Copying for preservation purposes (including proactive preservation – before damage) is within the scope of a library or archives purview.

Many published works, particularly those in digital form, are at risk of loss if copies are not made before harm occurs. Such an exception would permit a library or archives (qualified under the proposed exception) to make a limited number of copies as reasonably necessary to create and maintain a preservation copy of any at-risk published or other publicly disseminated work in its collections has warrant. Seeley believes “that the ‘single copy’ restriction can be relaxed to accommodate the making of a digital copy from an analog original,”<sup>38</sup> and Perlman understands that “such copying might provide some relief for the problem currently faced by photographers of digital images that are created and/or

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<sup>36</sup> Victor S. Perlman, “Written Comments in Response to §108 Study Group Request,” *American Society of Media Photographers (ASMP)*, 1 February 2007, <http://section108.gov/docs/Perlman-ASMP.pdf> pg. 2

<sup>37</sup> Victor S. Perlman, “Written Comments in Response to §108 Study Group Request,” *American Society of Media Photographers (ASMP)*, 1 February 2007, <http://section108.gov/docs/Perlman-ASMP.pdf> pg. 3

<sup>38</sup> Mark Seeley, “Comment on US copyright law dealing with library and archival exceptions, Section 108, and Study Group on such exceptions,” *International Association of Scientific, Technical & Medical Publishers (STM)*, 13 February 2007, <http://section108.gov/docs/STM.pdf> pg. 8

stored in formats that become obsolete, unsupported or otherwise problematic”<sup>39</sup>. However, there is a need for clarification between preservation and dissemination in regards to a library or archives’ copying permissions.

- There is a need for reorganization and clarification of Section 108.

Copyright law can be difficult to understand for those who are not familiar with legislative language. Many librarians and archivists have never received formal education about copyright and are therefore unclear as to what provisions have been made specifically for libraries and archives. By restructuring Section 108, it is thought that provisions and exceptions might be more understandable. The Section 108 Study Group provided these suggestions: “Section 108 should be reorganized in the following sequence so that they read in a more logical fashion, i.e. (1) eligibility for and other qualifications to the exceptions, (2) preservation and replacement activities, (3) copies for users, and (4) miscellaneous provisions”<sup>40</sup>.

### **Section 108: A Brief Summary**

The discussion prompted by the Study Group’s research discovered a number of areas of both contention and agreement between copyright holders and libraries and archives. With new technologies developing every day, it is not difficult to understand the hesitation to make any drastic changes without an in-depth analysis into the situation and concerned parties. Though not always in agreement, it is important to appreciate the positives stemming from the dialogue fostered by the Study group concerning section 108. One can hope that a continued interest in the topic will spark more discussion and solutions in the future.

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<sup>39</sup> Quote continued: “Such problems often occur because of the abandonment of old technologies by the manufacturers of digital cameras, combined with their refusal to allow others access to the digital technologies that they choose to abandon. Naturally, to be of any benefit to the photographers and copyright owners, they would need to be entitled to access to the preservation copies”. Victor S. Perlman, “Written Comments in Response to §108 Study Group Request,” *American Society of Media Photographers (ASMP)*, 1 February 2007, <http://section108.gov/docs/Perlman-ASMP.pdf> pg. 2

<sup>40</sup> Section 108 Study Group, “Executive Summary”, <http://section108.gov/docs/Sec108ExecSum.pdf>