

SECTION 108

PAST, PRESENT, & FUTURE

OUTLINE

- Becky Thoms – History and Background of Section 108
- Carla Myers – Section 108 in Libraries Today
- Nate Wise – Recent Legal Cases and Developments; Possible Changes to Section 108
- Wrap-up / Q&A

SECTION 108: DEFINED

- Limitations on exclusive rights of copyright owners; allows for reproduction by libraries and archives
 - Part of Copyright Act of 1976
 - Modified by:
 - Digital Millennium Copyright Act (1998)
 - Sonny Bono Copyright Term Extension Act (1998)

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EXCEPTIONS NOT FOR EVERYONE

- Who qualifies to take advantage of 108?
 - Libraries and archives with collections open to the public or
 - Available to others doing research in a specialized field

GROUND RULES

- By library for library
- By library for user
- By user
- Reproduction/distribution made with no intent for commercial advantage
- Reproduction must include same notice of copyright as original or note of explanation if notice cannot be found
- Libraries are required to inform patrons of copyright law (using specific language from Copyright Office)

PUBLISHED VS. UNPUBLISHED

- 3 copies can be made for purpose of:
replacement of
damaged, deteriorating,
lost, stolen, or obsolete
item
 - Library is compelled to make reasonable effort to determine that a fair price, unused replacement is not available
- 3 copies can be made for purposes of:
preservation; security; or
deposit for research use
in another library or
archive
 - Digital reproduction cannot otherwise be distributed or shared with the public outside library premises

DMCA & SONNY BONO CHANGES

- DMCA
 - Preservation copies 1→3
 - Analog or digital
 - Obsolescence
- Sonny Bono
 - Extended copyright term by 20 years
 - Created exception for library activities in the last 20 years

UTILIZING SECTION 108

Section 108 addresses several important areas of library services, including

- Making copies for patron's private study
- Interlibrary Loan
- Making copies for preservation purposes

MAKING COPIES FOR PATRONS' PRIVATE USE:

- Making copies of rare or unique items
- Copying articles, chapters, or entire works
 1. Have a copyright notice displayed where requests are submitted
 2. Remember the limits of the types of works that can be copied
 3. Perform a search when a significant/entire copy of a work is requested.

SECTION 108 & ILL

- When you're lending items or making copies of works for patrons at other libraries the rules are the same as for private study
- When you're borrowing items for your patrons to use make sure that your borrowing practices are not substituting for a subscription to a periodical or purchase of a work.
 - Track requests and keep your collection development folks apprised of frequently requested items
- CONTU Guidelines, or "Rule of 5" is a guideline, not law!

MAKING COPIES FOR PRESERVATION PURPOSES: APPLICATIONS

- Preserve deteriorating items
- Replacing lost/stolen items or portions of damaged items (e.g. pages from a book, a disc from a DVD/CD set)
- Making copies for security purposes
- Providing copies of rare/unique items to other institutions
- Library digitization projects!!!!
 - Consider published/unpublished rules
 - Can be utilized in conjunction with other exemptions including fair use (17 U.S.C. § 107)
 - Develop a thoughtful, thorough copyright policy for digitization projects

SECTION 108

THE FUTURE

Section 108 Study Group

- The section 108 Study Group, convened by the Library of Congress and the Copyright Office and consisting of several librarians, archivists, curators, and copyright industry representatives, met for two years between 2006 and 2008 to deliberate over needed changes to section 108
- Section 108 Study Group Report
 - practical (although conservative) recommendations for reform
 - 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).

Copyright Office Priorities

Section 108

Mass Digitization Orphan Works

U.S. COPYRIGHT OFFICE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE (2011)

- The report specifically targets addressing section 108 reform
- mass digitization
- orphan works.

Maria Pallante shared her opinion and options for 108 reform:

“First, keep section 108 as it is, whereby the Office fears that it will become an increasingly useless appendage to the Copyright Act, an exception so narrowly tailored to bygone technologies that it will be functionally irrelevant.

Second, repeal section 108, leaving libraries and archives and the activities that they discharge to be governed by fair use. The Office feels that this choice would be unfair to both librarians and archivists, as well as to copyright creators and copyright owners, all of whom should be able to rely upon some concrete, unambiguous exceptions without having to consult an attorney or risk an infringement action every time an archivist makes multiple preservation copies or a librarian copies a fragile book for interlibrary loan.

Third, reform section 108 so that it provides a balance, with a certain set of exceptions, updated for the digital era, that allow libraries and archives and museums to make the copies they need and to distribute those copies in ways that do not unduly harm the valid interests of rights holders.”

Concerns about reforming Section 108

Whenever a copyright law is to be made or altered, then the idiots assemble.

- Mark Twain's Notebook, 1902-1903

Congress of baboons





Reforming Section 108

Society of American Archivists Position on 108 reform:

“Archives and libraries currently are actively engaged in all of these activities [108 Study Group recommendations], 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...increased access to library and archival materials or foster the preservation...unless the amendment goes beyond what the Section 108 Study Group proposed.*”

David Hansen published 5 principles to guide Section 108 reform:

1. *Preserve library access to and the development of other limitations such as fair use;*
2. *Address issues unique to libraries, archives, and other memory institutions;*
3. *Favor simplicity and consistency;*
4. *Reformulate limitations as technology neutral; and*
5. *Embrace flexibility.*



Questions?