

NewsBreak: Section 108 Study Group Releases Report
By George H. Pike*

Over the last three years, a panel of government, academic and information industry experts have been studying the copyright challenges faced by libraries and archives in managing and preserving digital content. On March 31, 2008 the panel, which had been convened by the U.S. Copyright Office as the [Section 108 Study Group](#), released its [report](#) recommending an extensive series of changes to Section 108 of the U.S. Copyright Act.

Section 108 was created as part of the [Copyright Act of 1976](#) and provides limited copyright exemptions for libraries and archives. Lawmakers recognized the role that libraries and archives played in the management and promotion of copyrighted works, as well as the role of researchers in using copyrighted works to develop new knowledge. Section 108 allows libraries to make limited copies of works for individual patrons, for interlibrary loan purposes, and for archiving and preservation without infringing on the owners's copyrights.

While it has been amended periodically over the last 30 years, Section 108 is very complicated and does not adequately address issues like archiving of Web content, preservation of both analog and digital works, and digital delivery of copies. The Study Group was convened to explore these challenges, and make recommendations to the U.S. Copyright Office for changes.

The role of libraries and archives in preserving knowledge as the foundation of new learning was at the forefront of the Study Group's recommendations. Several of its recommendations were focused on strengthening and adding flexibility to preservation, archiving, and replacement activities.

One proposal would eliminate the three copy limit on duplication for replacement and preservation purposes. It was pointed out that digital duplication actually involves multiple copies, including temporary copies made during transfer processes as well copies made during technology upgrades. Changing the language to "limited number of copies as reasonably necessary" will permit more digital preservation. The same recommendation also clarifies that the digital preservation rules would apply to both published and unpublished works.

The current Section 108 only recognizes "published" and "unpublished" works. The Study Group identified a new category of "publicly disseminated" works. This includes copyrighted works that are transmitted by broadcast, online streaming or other electronic transmission. With more content being publically disseminated in digital form, particularly streamed materials, podcasts, and the like, the Study Group recommended changes to Section 108 to allow libraries and archives to make "a preservation copy of any at-risk" publically disseminated work.

This new exemption would be quite limited. First, it would only apply to "at-risk" works. These are broadly defined as materials which are unique or rare, or materials that may be lost due to an unstable or ephemeral format or medium. At-risk works would also not be commercially available or be commercial works that the rights holder is not preserving. In addition, only libraries and archives that have comprehensive preservation programs would be allowed to make

and preserve these copies. Finally, access to these preservation copies would be restricted, they would not become part of a library's general collection.

While one of the great benefits of the Internet is the ease and speed to which new content can be added, one of the Internet's challenges is that content is also constantly disappearing. A 2005 study indicated that as many as 46% of Internet resources cited in scholarly papers were not available two to eight years later. In light of this, the Study Group proposed a new exemption to permit the capture and preservation of publically available online content. The exemption would allow these resources to be accessible to users for "purposes of private study, scholarship, or research." The captured content would be initially available only within the library or archives, but would later be available remotely.

Again, this would not be an unlimited exemption. Only publicly accessible content could be captured. Content that required any type of registration, password or other type of user action could not be captured. Content rights holders could also opt-out of having their content captured, or allow it to be captured but not made available to remote users. Finally, libraries and archives would be required to label their captured content and avoid engaging in activities that could harm the value of the content to its owner.

The Study Group struggled with digital inter-library loan and patron copying issues. While they were unable to agree on specific recommendations, they did outline a series of conclusions that support digital ILL in principal. Among their conclusions were that digital ILL needed to remain mediated by the library or archives. Patrons must request ILL services through their home library, not by direct request to the lending library. Libraries needed to take steps to limit the end user from further distributing the requested item, through DRM or other means.

The Study Group was unable to agree, however, on whether Section 108 would "trump" a license or contract term prohibiting duplication for archiving, preservation or ILL purposes. There was some sympathy for allowing Section 108 to trump a non-negotiated license—like a shrink-wrap or click-wrap agreement—but others felt that general principals of contract law should apply.

Because Section 108 includes references to the "physical premises" of a library, the Study Group addressed, but was also unable to agree on whether Section 108 should apply to "virtual libraries." Some members of the Group felt that the physical premises requirement was a proxy for accountability to the rights holder, whereas others felt that Section 108's eligibility requirements were restrictive enough to provide the accountability for those that qualified.

The Study Group had other recommendations as well, including expanding Section 108 to include museums, as well as outside contractors. They also recommend extending the protection from liability for patron use of photocopiers to include patron use of personal devices like handheld scanners.

The Study Group's recommendations are only advisory. It will be up to the U.S. Copyright Office to evaluate the recommendations and propose legislative changes, then up to Congress to enact those changes. The Report is available online at: <http://www.section108.gov/>

*George H. Pike is the Director of the Barco Law Library and Assistant Professor of Law, University of Pittsburgh School of Law.

Copyright 2008, George H. Pike

This text is the author's final manuscript as submitted for publication. The completed article was published on April 10, 2008 as a *NewsBreak* on www.infotoday.com. It is available online at: <http://newsbreaks.infotoday.com/NewsBreaks/Section--Study-Group-Releases-Report-48703.asp>. This article is posted with permission of the author and *Information Today*.