

Library Preservation: Changes Incorporated in H.R. 2281 The Digital Millennium Copyright Act of 1998 (PL 105-304)

Section 108 Privileges

Section 108 of the Copyright Act provides for limitations on the exclusive rights of proprietors to permit certain reproduction by libraries and archives. These limitations are separate from the Section 107 fair use privileges, and do not depend on application of the four factors listed as determining whether a use is "fair." Section 108 specifies that it does not affect the right of fair use, and its privileges may or may not go beyond what might otherwise be determined to be fair use.

Because Section 108 privileges are set out in a separate section, they provide predictability for libraries and archives under certain circumstances for preservation, for interlibrary loan, and for immunity from liability for the unsupervised use of on-site reproduction equipment.

Section 108 deals with the right of reproduction for certain library and archival purposes. The right of distribution in Section 108 is limited to interlibrary loan, or to the equivalent of interlibrary loan for a copy of an unpublished work or a replacement preservation copy. Other distribution is limited to what might be permitted under fair use or other provisions of the law. Systematic reproduction or distribution of single or multiple copies is prohibited except for interlibrary arrangements that do not have the effect of substituting for subscription or purchase.

Why Change in Section 108 Was Needed

Previous law allowed libraries and archives, when an unused replacement at a fair price could not be obtained, to make one "facsimile" copy for preservation purposes, such as when paper in books was too brittle for use, or when a phonorecord was damaged by a user. The "one facsimile copy" was interpreted by some to refer only to the print environment, and to potentially restrict preservation in digital form or replacement of digital formats themselves, which quickly become obsolete and readable only by obsolete hardware and software. For some materials and preservation methods, state-of-the-art technique requires an "iron mountain" copy, a master copy, and a use copy, with only the use copy accessible at any one time.

Library groups proposed language in 1997, incorporated in bills introduced by Sen. Ashcroft and Reps. Boucher and Campbell (S. 1146 and H.R. 3048), that would allow libraries and archives to make three copies of endangered materials for preservation purposes, and to use digital and successor technologies for preservation.

Negotiated Changes Incorporated in the Bill

On April 23, 1998, the Senate Judiciary Committee approved revisions to Section 108 that had been negotiated on April 21 in a hastily called session with Senate committee staff and representatives of the Copyright Office, the Association of American Publishers, the American Library Association, and counsel representing several library groups (American Association of Law Libraries, American Library Association, Association of Research Libraries, Medical Library Association, and Special Libraries Association). On April 30, the Committee approved the bill, S. 2037, the Digital Millennium Copyright Act of 1998, with several changes to Section 108 of the Copyright Act. These changes remained in the Senate-passed bill, were also incorporated in the House-passed H.R. 2281, and thus retained in the final House-Senate conference version. Specifically, the revisions are as follows:

- The required notice of copyright on a reproduction or distribution under Section 108 is clarified to include a requirement for a legend stating that the work may be protected by copyright (if no copyright notice can otherwise be found).
- The number of copies or phonorecords that may be made for preservation purposes is increased from one to three (for both published and unpublished works).
- The words "in facsimile form" are deleted, whether referring to published or unpublished works.
- For preservation replacements of unpublished works, "any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives."
- For preservation replacements of published works, "any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy."
- For published works for which an unused replacement at a fair price is not available, an added reason for which reproduction for preservation purposes is allowed is "if the existing format in which the work is stored has become obsolete". A format is "considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."

Impact of Revisions to Section 108

These negotiated revisions update Section 108 in critically needed ways: First, the number of copies that can be made for preservation purposes is increased from one to three. Second, it is absolutely clear that Section 108 applies to digital formats -- through deletion of references to "facsimile form," through specific references to digital formats in subsections referring to preservation of both unpublished and published works, and through the addition of the new concept of preservation because a format has become obsolete (which happens more quickly with digital formats than with any previous formats).

While there are limitations on the distribution of preservation copies in digital formats, these limitations are consistent with the long-standing and continuing prohibition in Section 108 against "systematic reproduction or distribution" except for certain interlibrary arrangements. The limitations on the distribution of preservation copies in digital formats specifically allow for interlibrary loan in the subsections relating to the preservation of both unpublished and published works.