

FAIR USE IS NOT CIVIL DISOBEDIENCE

REPORT ON LIBRARY EXCEPTIONS
FROM THE FRONT LINES OF THE 108 STUDY GROUP

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COPYRIGHT BASICS

- Exclusive Rights
- Broad Exemptions (Fair Use)
- Specific Exceptions/Limitations
- Fixed
- Infringement
- Originality
- Works for Hire
- Public Domain

COPYRIGHT OWNERSHIP

Exclusive rights of:

- Reproduction
- Distribution
- Adaptation
- Public Performance
- Public Display

DEFINING FAIR USE

- What is the purpose or character of the use?
- What is the nature of the work that is copyrighted?
- What is the volume of use?
- What is the impact on the market?

KEY COPYRIGHT DEVELOPMENTS

- International Agreements
- Laws and Legislation
- Court Cases
- Trade Agreements
- Licensing Arrangements
- Use Guidelines
- Technological Controls/Digital Rights Management
- Ownership Of Copyright

COPYRIGHT IN U.S.

KEY LEGISLATIVE AND LEGAL ARENAS FOR LIBRARIES

- Orphan Works
- Digital Fair Use
- Broadcast Flag
- Electronic Reserves
- Peer-to-Peer File Sharing
- Open Access to Government Funded Research
- Section 108 Study Group

SECTION 108 STUDY GROUP

- What Is Section 108?
- Why Was the Study Group Formed?
- What Are the Exceptions and Limitations Under Review?
- What Are the Findings and Recommendations?
- What Are the Next Steps In the Process?

WHAT IS SECTION 108?

- Allows libraries and archives to engage in the limited and unauthorized reproduction and distribution of copyrighted works.
- Balances in the public interest the exclusive rights of creators and publishers against the interests of users and others who provide access to works.
- Limitations on exclusive rights does not affect fair use or nullify contractual obligations.

WHAT IS THE SECTION 108 STUDY GROUP

- Convened in April 2005 Under Sponsorship of:
Library of Congress National Digital Information
Infrastructure and Preservation Program
U.S. Copyright Office
- Study How Exceptions and Limitations May Need
Amendments Under Impact of Digital Technologies
- Identify Problematic Ambiguities and Need for Clarity
in Current Section 108
- Submit Findings and Recommendations to Librarian of Congress
by Early 2007

SECTION 108 STUDY GROUP MEMBERSHIP

- University Law Schools
- Book Publishers
- Media Companies
- Software Companies
- National Libraries
- University Presses
- Electronic Publishers
- Scholarly Journals
- University Libraries
- American Library Association
- Archivists
- Museums
- Photographers
- Music Industry
- Film Industry
- News Publishers
- Foundations
- Library of Congress

SECTION 108 STUDY GROUP PROCESS

- Meeting for Three Years
- Investigations/White Papers
- Expert Consultation
- Roundtables
- Written Testimonies

WHERE DOES SECTION 108 FIT INTO AMERICAN COPYRIGHT LAW?

- COPYRIGHT ACT OF 1909
- GENTLEMEN'S AGREEMENT (1935)
- REPRODUCTION OF MATERIALS CODE (1941)
- PERIOD OF STUDY AND DRAFT LEGISLATION
- WILLIAMS AND WILKENS CASE
- COPYRIGHT ACT OF 1976
- DIGITAL MILLENNIUM COPYRIGHT ACT (1998)
- COPYRIGHT TERM EXTENSION ACT (1998)

WHAT IS INCLUDED IN SECTION 108?

- General Conditions for Exceptions/Eligibility
- Exceptions for Preservation and Replacement
- Exceptions for Patron Research/Copies for Users
- Exceptions for Newscasts
- Published and Unpublished Works

FINDINGS AND RECOMMENDATIONS

- High Level Agreement → Legislative Solution
- High Level Disagreement → Maybe Legislative Solution
- No Consensus or Interest → Don't Touch

ISSUES WITH AGREEMENT BUT THE DETAILS

- Eligibility of Museums
- Outsourcing
- Three-Copy Limit
- Fragility and Replacement
- New Copy and/or Usable or Licensed Copy
- Lending of Digital Replacement Copy

ISSUES WITH AGREEMENT BUT THE DETAILS

- Preservation of Publicly Disseminated Works
- Preservation of Publicly Available Online Content
- Transmission of Television News by Streaming
- Unsupervised Reproduction Equipment

ISSUES WITHOUT AGREEMENT

- Digital Technologies and Interlibrary Loan
- Exclusion of Graphical and Audio-Visual Works from Copies for Users

ISSUES WITHOUT RECOMMENDATION

- Virtual Libraries and Archives
- License and Contract Relation to 108
- Circumvention of TPM's
- Electronic Course Reserves
- Exception for pre-1972 U.S. Sound Recordings

SOME STUMBLING BLOCKS

- Lack of Consensus on Guiding Principles
- Lack of Agreement on Rationales/Interpretations of the Law
- Rapid Changes in Technologies
- Where/What Is the Public Interest?
- Commercial Exploitation/New Markets
- International Copyright Requirements

CONCERNS OF RIGHTS HOLDERS

- Business Erosion
- Loss of Control
- Erosion of Exclusive Rights
- Libraries with Special Digitization Rights
- Need to Protect Against Abuses
- Unintended/Unpredictable Consequences
- Sovereign Immunity

CONCERNS OF LAMs

- Law Out of Sync With Technology and User Expectations
- Adequate Remedies for Violations in Place
- Licensing Dominating Access to Electronic Resources
- Imposition of TPMs A Chilling Effect
- Recognition of LAM Economic Contribution
- Unique and Rare Materials Being Lost

THE GOALS OF THE LIBRARY COMMUNITY

Develop policies for intellectual property management which enable broad and easy distribution and reuse of materials by scholars and students and which

Foster a competitive and supportive market for scholarly communication and creative work.

NEXT STEPS

- Librarian of Congress and Copyright Office Take Over
- New Round of Roundtables and Public Comment
- Legislative Proposals
- Congressional Hearings
- Political Process
- Implementation of Changes In Law
- Implementation in LAMs/The Details

IN CONCLUSION

- Were we bold enough? Did we miss the opportunity to rethink the nature and purpose of exceptions?
- Did we retreat into impotent models and structures, and the comfort of disagreeing camps? Did we pass over to process and politics?
- Should we have refused to engage, not willing to open up 108 for debate and change?
- Are we ready for the “hard ball” offensive that will be required to protect and advance our interests?

SOME REFLECTIONS

- “Sometimes a scream is better than a thesis.”
(Emerson)
- “If a lot of cures are suggested for a disease, it means that the disease is incurable.” (Chekhov)
- “Every war has been preceded by a peace conference. That’s what always starts the new war.” (Will Rogers)
- “Fair use is not civil disobedience.” (Jim Neal)