

America's Cultural Record: A Thing of the Past?

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Abstract

Libraries have long preserved works in their collections to ensure that they remain available for later generation of researchers and scholars. Conservation of the physical artifact of a copyrighted work presents no significant legal impediments, but any preservation that requires making a copy of a copyrighted work may infringe the rights of the copyright holder. Increasingly, libraries are turning to digital preservation both for analog works and naturally to works originally published in digital format. The Copyright Act of 1976 contains three subsections that deal with library preservation, but each has significant requirements libraries must meet and restrictions that may limit the library's making the preserved work available to the public. The law does not serve the public's interest in preservation of the cultural record which should be at least as important as protecting the economic rights of the copyright holder.

Introduction

Preservation of America's cultural record is critical to scholars and researchers, but the American public also should be concerned that it may be lost to posterity. With the longer term of copyright now protecting works for life of the author plus 70 years, or 95 years after date of first publication for works of corporate authorship, copyright law often interferes with a library's ability to preserve a work and grant access to the preserved copy. With few exceptions, Congress seems overwhelmingly persuaded by the economics of copyright ownership as opposed to the public good of ensuring that works are not lost to posterity. In order to grant longer control to the owners of cultural icons such as the Disney characters, which are in little danger of being lost, diluted, etc., have we as a society sacrificed something much more important?

Libraries have been engaged in preservation activities for centuries, ranging from simple cleaning of books or restoring the covers, and now to preserving the content of a work by digital means. Even the binding of journal issues into volumes is a type of preservation, so the matter is near and dear to the hearts of even the most traditional librarian. It is difficult to predict today what copyrighted works will be important for research and scholarship in the next century.

All of these works should be preserved, whether in analog or digital format; even pornography, trash, racist and sexist material will be the subject of someone's future scholarly research. All of it should be preserved.

Preservation and Conservation

Traditional Library Preservation

As repositories of the world's knowledge stored in books, images, motion media and sound recordings, libraries have been in the business of preserving these works from the earliest times. Early scrolls were often stored in linen or leather cases to preserve the integrity of the physical item.¹ Medieval monastic libraries chained incunabula to library shelving as a way to protect the works although such action did little to preserve the bindings. Many of those early works still contain the iron rings that were affixed to the covers of the library.² Early printed books endured similar fates, but the ability to mass produce works made possible by the printing press often meant that a damaged volume could be more easily replaced than conserved, albeit only by incurring another charge for the work.

With the advent of lending libraries, however, library preservation took on a different complexion. The concern was not that the book would be removed from the collection but that the physical condition of the work remain sufficiently stable so that future readers could enjoy the work without undue deterioration of that particular copy. Additionally, manuscripts, incunabula and works published before the 19th century required conservation to ensure that they remained viable as objects or artifacts. Many of these works were printed on unusual media or had bindings that were rare and beautiful. Techniques for preservation varied through the years, but the library's intent always was to ensure that its particular copy of a work remained available for later readers and scholars.

Library preservation generally is comprised of two types of activities, although librarians use the rubric "preservation" to cover both of these. Traditional library preservation is what might be better termed conservation activity, where it is the artifact that is being preserved. One might think of a book as being a work of art and all of that work being conserved: the binding, the lettering on the binding, the

paper, the ink, etc. Only a few works each year can be conserved by any individual library because the work is so laborious and expensive, and many of the works that receive such treatment are in the public domain. Even if they were not, the work is not being reproduced, distributed, etc., so the rights of the copyright holder are not impacted by such conservation activity.

Works in other formats, however, cannot be conserved using such techniques. For example, it is much more difficult to repair a damaged videotape than it is to simply reproduce it. But many videotapes are sold to libraries which contain restrictions such as "for life of this videotape only." Whether such restrictions are valid or not, librarians often believe that they are and do not reproduce the videotape when that copy has become damaged, despite the provisions of section 108(c) of the Copyright Act of 1976,³ which permit reproduction if certain conditions are satisfied.

The second type of preservation involves not conservation of the physical artifact but ensuring that the information the work contains is preserved. The information might be preserved as a facsimile, in microformat or digitally. Today, digital preservation is the easiest and best method from the standpoint of the library. It is the most controversial from the standpoint of the copyright holder who fears widespread distribution, loss of control and reduced profits from such activity.

Preservation Under Section 108

Two recent amendments to the Copyright Act made it clear that, under certain circumstances, libraries may use digital means to preserve an analog work, although use of the digital copy may be fairly restricted. These amendments do not deal with the preservation of works in a library collection originally acquired in digital format, however, and librarians are just beginning to address the preservation of this new elusive and alterable digital knowledge.⁴

The Digital Millennium Copyright Act (DMCA)⁵ amended the two preservation subsections of the Act. Subsection 108(b) deals with the preservation of unpublished material while subsection (c) deals with the preservation of published works. For both of these sections, the library must have owned a copy of the work in its collection before it can take advantage of the exemption provided. For unpublished works, the purposes of the reproduction must be for preservation, security or deposit for research in another library. The purposes of the reproduction for published works must be to replace a lost, damaged, stolen, deteriorating or obsolete copy of a work but only after the library makes a reasonable investigation to determine that an unused copy cannot be obtained at a fair price.

For published works, there are several conditions that must be met before the library may reproduce the work. First, the purpose of the reproduction must be replacement. Second, such replacement is permitted only after the library determines by reasonable investigation that an unused copy may not be obtained at a fair price. This applies to all types of works including audiovisual works. The statute does not define key concepts such as "reasonable investigation" or

"fair price," but the legislative history does provide some guidance on what constitutes a reasonable effort to locate an unused replacement. According to the House Report, "The scope and nature of a reasonable investigation to determine that an unused replacement cannot be found will vary according to the circumstances of a particular situation."⁶ It goes on to state that in the ordinary course of events, a library that seeks to replace a damaged, deteriorating, lost or stolen work would first consult U.S. trade sources such as retail bookstores, wholesalers or jobbers. If that proves unsuccessful, then the library should contact the publisher or author, if known. Lastly, it should contact an authorized reproduction service such as University Microfilms, known as UMI (now ProQuest).⁷

There is no legislative definition of "fair price," but there are two published definitions of fair price, one from a publication of the Association of American Publishers (AAP) and another from the American Library Association (ALA). In 1978, the AAP appeared to posit that a fair price was basically whatever anyone charges the library. It defines as fair price the latest suggested retail price if the work is still available from the publisher. If the work is not so available, the prevailing retail price is the fair price, or, if the library uses an authorized reproducing service, it is the price that service charges.⁸ The ALA publication⁹ uses a three-part definition of fair price. (1) A fair price is the latest retail price, if the work is still available from the publisher. (This conforms with the first part of the AAP definition). (2) The fair price of a reproduction is the cost as close as possible to the manufacturing costs plus royalty payments. (3) The final part of the ALA definition deals with the loss or damage to one volume of a multi-volume set when single volumes are not available for purchase. It states that it could be argued that paying a full set price in order to replace one missing volume from a set is not a fair price.¹⁰

The word "obsolete" was added to this section by the DMCA, and it considerably expands the reproduction that a library may do to replace a work under this exemption. The statute defines an obsolete work thusly "...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."¹¹ Thus, libraries that currently are dealing with deteriorating recordings on wax cylinders, 8-track audiotapes, Beta format videotapes, and the like are permitted to convert the format after conducting the reasonable investigation to determine that an unused replacement cannot be obtained at a fair price. The legislative history indicates that when the only equipment that is available is from a second-hand store, it is not "reasonably available."¹²

For both unpublished and published works, the library may make up to three copies of a work including one in digital format. However, the digital copy may not be used outside the premises of the library or archives. The requirement is logical when the original work is in analog format, but the statute appears to ignore the possibility that the original work that is now damaged or lost may have been acquired in digital format originally. Surely what Congress

actually meant was that if a digital reproduction of an analog work was made available, then it could be used only within the library premises and not on a campus network or the World Wide Web. But what if the original work was a CD-ROM (a digital work), which now is lost and is not available at a fair price? A library may create another CD which also happens to be a digital copy. The original digital work could be used outside the premises of the library and the new one is a facsimile copy, so it is logical that it could be used in the same way, despite the language of the statute. Perhaps what Congress meant to prohibit was placing work on a network so it could be accessed by multiple users simultaneously although that is not the wording of the statute itself.

Preservation Under Section 108(h)

The Copyright Term Extension Act (CTEA) added a new section 108(h) to the Act and it also permits digital preservation and digital copying if certain conditions are met. During the last 20 years of a work's term, section 108(h) permits a library to reproduce, distribute, display or perform a work in either facsimile or digital form, a copy of a work for purposes of preservation, scholarship or research upon determining by reasonable investigation that none of these factors exist: (1) the work is subject to normal commercial exploitation, (2) the work is available at a reasonable price or (3) the copyright owner provides notice that neither of the above conditions exist. Following enactment of this section, the Copyright Office then developed rules by which owners or their agents could file notice that the published work was subject to normal commercial exploitation or could be obtained at a reasonable price.¹³ The published rules are accompanied by a form by which publishers and other copyright owners can file such notice. Strangely, publishers have not taken advantage of the notice provision, so it is difficult for libraries to make the necessary determinations before taking advantage of the exemption.

Subsection (h) is unique, however, in a number of ways. For example, it becomes effective only 50 years after the death of the author, but it is broader than the other preservation subsections in that it permits reproduction for activity other than preservation: scholarship and research are also valid justifications for exercising the exception. Although found in the library exemption, it applies not only to libraries and archives, but also to nonprofit educational institutions. So, for example, for an educational institution, this could entail putting the work into course management software for the use of students in the institution. More importantly, there is no requirement that the library must have owned a copy of the work in order to take advantage of the exception. Neither the words of the statute nor the legislative history refer to prior ownership, and yet to preserve a work, a library would have had to own a copy of the work. Otherwise, when it reproduces the work and adds it to the library's holdings, it is simply collection building, for the purposes of scholarship and research – and virtually any work can be used for these purposes. Publishers can control a library's ability to use this section by saying works

are available at a reasonable price and then producing copies on demand. Thus, so-called orphaned works, i.e., those in which the copyright owner has disappeared, may be all that are actually available for preservation under this subsection plus works in which no one is interested. Unlike digital preservation under (b) and (c), a library apparently may digitize a work and place it on the open web after it has met the required conditions.

In 1987, a study conducted at the American Bookseller's convention indicated that most books published in this country go out of print in approximately three years.¹⁴ Publishers report that slightly more than 91% of all book sales occur within the first year after publication.¹⁵ On the other hand, with the production of books on demand, even out-of-print works can be produced quickly.¹⁶ Is this normal commercial exploitation? It likely means that the only works a copyright owner will not exploit for the entire copyright term will be those unprofitable works which are also likely unpopular – the very works that are of no interest to anyone for preservation, scholarship or research.¹⁷

The final sentence of the exemption provided by the CTEA is puzzling and its meaning is unclear. "The exemption provided by this subsection does not apply to any subsequent uses by users other than that library."¹⁸ Does this mean each institution must conduct its own reasonable investigation about satisfying the conditions? Why would other institutions not simply link to the digital version created by the first library that made the work available under the exemption and avoid this difficulty? Or perhaps the first reproducing library created an analog copy, thus, a second library would need to conduct its own investigation. Was this an attempt to foil other publishers which might take the preserved work from the library's website and republish it assuming that the library's investigation cleared the problems of copyright for the publisher?

Section 108(h) does not include the word "obsolete" in its wording. Should it be imported from section 108(c)? Librarians certainly believe that it should. Suppose that a work was published in a format that is now obsolete, or for which the equipment needed to access it is no longer manufactured but the author has not yet been dead for 50 years? When Congress adopted amendments to the library exemption in the DMCA, it recognized that obsolete formats should permit library copying, just as readily as lost or stolen works. Library associations argued that with regard to the exception during the extended term, libraries or archives should be allowed to use works whose format is passé and for which equipment is not being made.¹⁹ The rule-making of the Copyright Office did not so recognize, however.

What about works that have technological access controls? The anti-circumvention provisions of the Copyright Act²⁰ recognizes exemptions from the provision for purposes such as legitimate encryption research, law enforcement, software compatibility and libraries that are considering purchasing a work. There is no such exemption for section 108(h) preservation.

The wording of subsection (h) also raises a technical issue also. How does it relate to section 108(i)? The other

preservation subsections are exceptions to the limitation in (i) which states that the 108 exemptions do not apply to musical works, sculptural, graphic and pictorial works and audiovisual works except those dealing with the news. Should (h) also apply to any type of work? One can certainly make a strong argument that the reproduction permitted under section 108(h) also should be excluded from the language of subsection (i) as are the other preservation sections. It could be that this will be settled as a technical amendment to the Act because it was simply overlooked in the 1998 Amendment, the primary focus of which was term extension and not subsection (h). But perhaps not.

Conclusion

Despite the 1998 additions to the library exemption, all questions about the preservation literary, cultural and artistic materials have not been answered. Increasingly works that contain important cultural, historical and political information will be made available in video or other format. The need to preserve these is clear. For most works today, libraries are likely to prefer digital reproduction as opposed to facsimile reproduction for the preservation of analog works. Yet, copyright holders remain skeptical about digital preservation and seek to limit the availability of such works by restrictions to in-library use, thus differentiating preservation from access to these materials. Moreover, more and more works are created in the digital format only and preservation of these works presents new copyright issues.

A number of questions remain to be answered in this important area. The answers to these questions will provide research opportunities for scholars for years to come.

- Will copyright interests ultimately trump the societal value in preserving the scholarly, literary and cultural record?
 - As a society can we determine a point at which our interests take precedence over the rights of copyright holders?
 - If so, will society's interest take precedence for all works or only for works that no longer have any commercial value?
 - How will commercial value be determined?
 - How closely related is commercial value to potential market for the work?
 - What impact does the "books on demand" phenomenon have on a determination of commercial value?
 - Will the open archives movement make a significant difference and push copyright holders either to self archive or to work with institutions such as libraries to ensure continued availability of information?
 - Will publishers be willing to collaborate with libraries on major preservation projects for the good of society?
 - What copyright concerns should be addressed in order to facilitate collaborative preservation projects across broad sectors of academia and cultural institutions?
 - Will publishers continue to insist on differentiating between preservation and access to works preserved?
- Should a national repository or a series of regional repositories for the preservation of digital works be designed and promoted?
 - Can government intervention help to ensure that both analog and digital works are preserved, or will the government be a part of the problem by failing to preserve important government data in digital form?
 - Will Congress intervene and recognize the public good of the preservation of these works or continue to let the copyright monopoly run amok with no concern for the public good?

Today we have the ability to solve these problems. The question remains whether we will do so. This issue is one that is of considerable importance to those of us in the academy, but it must also resonate with members of the general public before any real progress is likely. This cultural record provides the raw material for historians, political commentators, legal scholars, cultural studies researchers and those from many other disciplines. Its loss will impact the work of these scholars for years to come. More importantly, once the record is lost it cannot be recovered. It is time for Congress and the courts to consider the public interest in preservation of the record of our society and temper the burgeoning control afforded to copyright holders in the copyright law.

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12. S. Rept. No. 104-190 (1998).

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Biography

Laura N. Gasaway is Director of the Law Library and Professor of Law at the University of North Carolina, Chapel Hill. As a member of the law faculty, she teaches Copyright Law and a Cyberspace Law Seminar. Professor Gasaway has her B.A. and M.L.S. from Texas Woman's University and her J.D. from the University of Houston, She has authored a number of articles and books on copyright and regularly conducts copyright workshops for librarians and college faculty.