

# ESSAY

## AMERICA'S CULTURAL RECORD: A THING OF THE PAST?

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## I. INTRODUCTION

The preservation of cultural, political, and literary works and artifacts should be of considerable concern to the American public. A number of forces have combined to create a threat to the continued preservation of this record of our society. These include: (1) Research libraries across the country are filled with so-called "brittle books" which are deteriorating at an alarming rate. (2) Funding to institutions that preserve these works has been seriously reduced. (3) The federal government has ordered the removal of many previously maintained records from government Web sites, and the current administration has curtailed the declassification program for many others, making these works unavailable to the public.<sup>1</sup> (4) The longer term of copyright means that no published works will enter the public domain before the end of 2018. (5) Modern digital technology makes it much easier to digitize the information contained in these works as a method of preservation rather than conserving the artifact in which the information appears. (6) Digital preservation of analog works is more efficient and cheaper than conservation, and it provides increased search capabilities. (7) Many copyright owners have been hostile to the idea of library preservation of their works, even in microform. (8) The copyright holder community views programs aimed at preservation with suspicion because of the systematic nature and scope of such programs. (9) Copyright owners are more concerned about digital preservation because it has the potential to provide greater access to the work than conservation of the analog artifact and could result in total loss of control. (10) Increasingly, the works acquired by libraries are in digital format, and publishers and producers are attaching access controls to works that impair a library's ability to preserve these works. (11) Restrictive license agreements for digital works may prevent retention of the work after the license expires and preclude the ability to preserve the work even though the library has paid for it. (12) Concentration of publishing activities into a small number of conglomerates and the elimination of many publishing houses gives the larger entities increased market power and the ability to influence legislation. (13) Fewer and fewer authors and creators own their own copyrights today; thus, it is publishers and media companies that benefit from changes in the law. (14) There is little guidance in the law for preservation of works

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1. See Memorandum from Thomas M. Susman on Removal or Destruction of Federal Depository Library Documents, to Prudence Adler, Association of Research Libraries (Mar. 13, 2002), available at <http://www.arl.org/info/frn/gov/Susman.html>.

that are originally in digital form. Although many of these forces are outside the copyright arena, others squarely conflict with copyright holders and their rights and interests.

This Essay focuses on preservation of this record and considers whether the commercial interests of copyright proprietors should prevail over the long-term preservation of the nation's scholarly, cultural, and political history. The public's interest has not been well presented or represented, although library, archives, and museum associations have tried to make the case for preservation because of its very importance to society. Copyright law plays an important role in this debate, sometimes furthering the ability of a library to preserve a work and sometimes hindering it. In discussing the problems with archiving the Web, Berkeley Professor of Information Management and Systems, Peter Lyman, said:

In the past, important parts of our cultural heritage have been lost because they were not archived—in part because past generations did not, or could not, recognize their historic value. This is a *cultural* problem. In addition, past generations did not address the *technical* problem of preserving storage media—nitrate film, videotape, vinyl recordings—or the equipment to play them. They did not solve the *economic* problem of finding a business model to support new media archives, for in times of innovation the focus is on building new markets and better technologies. Finally, they did not solve the *legal* problem of creating laws and agreements to protect copyrighted material yet at the same time allow for its archival preservation.<sup>2</sup>

Libraries have long been involved in preserving the world's scholarly record. There are two types of preservation in which libraries are engaged; "preservation" is the general term used to denote both of these. The first type of activity under the rubric of preservation more accurately is referred to as conservation, which is the restoration and preservation of the physical object. The second type of preservation aims only to ensure that the information the work contains is preserved as opposed to the artifact. Conservation of the physical artifact presents no copyright issues in the analog world because the activities involved include restoring, stabilizing, and maintaining the integrity of the original binding, stabilization of the acid content of the paper, and the like. Some works, however, are not sufficiently valuable to qualify for expensive restoration work to

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2. Peter Lyman, *Archiving the World Wide Web*, at <http://www.clir.org/pubs/reports/pub106/web.html> (last visited July 24, 2003).

the artifact itself, while the information that the work contains is worthy of preservation. This latter type of preservation conflicts with copyright law even for analog materials, because preservation of the information requires reproducing it, almost always into another format. For digital works, both conservation and preservation may engender copyright concerns. For example, conserving a digital work could require circumvention of technological access controls or restoration of date-expiring content in order to preserve the artifact. Preservation of digital information requires reproduction of the work and raises a number of copyright concerns.

### COPYRIGHT ISSUES FOR CONSERVATION & PRESERVATION

TYPE OF WORK	CONSERVATION	MICROFILM PRESERVATION	DIGITAL PRESERVATION
Analog	No copyright issue	Yes, reproduction & multiple copying	Yes, reproduction, multiple copying, & distribution
Digital	Yes, license agreement provisions & circumvention of technological protections	N/A	Yes, reproduction, multiple copying, distribution, & license agreements

#### *A. Libraries as Preservers of Copyrighted Works*

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.<sup>3</sup> Early 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 work to ensure that they

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3. Ellen N. Brundige, *The Library of Alexandria*, at <http://www.perseus.tufts.edu/GreekScience/Students/Ellen/Museum.html> (last visited July 7, 2003).

were not removed from the library.<sup>4</sup> Early printed books endured similar fates; however, the ability to mass produce works, which the printing press made possible, often meant that a damaged volume could more easily be replaced than conserved, albeit only by incurring another charge for the work.

With the advent of lending libraries, library preservation took on a different complexion. The concern was not that the book would be removed from the collection, but rather, that the physical condition of the work would remain sufficiently stable so that readers could enjoy the work without undue deterioration of that particular copy. Additionally, many manuscripts, incunabula, and works published before the nineteenth 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 was always to ensure that the work remained available for later readers and scholars. Libraries have played a critical role in the preservation of the world's knowledge and in making it accessible.

Most of the works that qualified for preservation were rare, or, at a minimum, scarce. One method of preservation that was widely used from the 1920s to the 1970s was microfilming, usually done on cellulose-based film. Then, it was discovered that such microfilm developed what is referred to as "the vinegar syndrome" or the "measles," when spots obscure much of the preserved text and images. So, many early microfilm projects had to be repeated and the film reproduced in a more durable medium.<sup>5</sup> In the 1970s, librarians realized that many of the works printed in the nineteenth and early twentieth centuries were printed on acidic paper that was deteriorating at an alarming rate. It was clear that only wide scale preservation could ensure that these brittle books would last into the next century. A 1987 study concluded that there were approximately 305 million volumes in United States research libraries of which one-quarter (76 million) were currently at risk.<sup>6</sup> Not all of these

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4. See Matt T. Roberts & Don Etherington, *Bookbinding and the Conservation of Books: A Dictionary of Descriptive Terminology* (1982), available at <http://palimpsest.stanford.edu/don/don.html> (last changed Mar. 11, 2001).

5. See OCLC, Preservation Resources, *Preserving Microfilm*, at <http://www.oclc.org/oclc/promo/presres/9138.htm> (last visited July 2, 2003).

6. Robert L. Oakley, *Copyright and Preservation: A Serious Problem in Need of a Thoughtful Solution* (Sept. 1990), available at <http://www.clir.org/pubs/reports/oakley/> (discussing the Brittle Books Program, Commission on Preservation and Access, June 1988).

books were unique titles, and the Commission on Preservation and Access estimated that between 3.3 and 10 million volumes needed to be saved. At the lower 3.3 million number, the cost was estimated at \$82 per volume for microfilm preservation.<sup>7</sup>

Microfilming is one of the oldest established methods of preservation; it is defined as follows: “the process of reproducing, in reduced size, the intellectual content of library and archival materials on film. . . . Through the process, a master negative (or camera negative) is produced; from this negative, a printing negative is generated from which service (or use) copies are created.”<sup>8</sup> Libraries tend to use microfilm preservation when the anticipated use of the work is low and when durable, readable content is needed. This technique has typically been used for materials such as telephone books, government reports, and company reports, among others. But microfiche is currently being replaced by CD-ROMs and digital preservation.<sup>9</sup> As with other types of preservation, reproduction is required to create the film or fiche and results in making one to three copies, but it also offers many advantages ranging from cost effectiveness to resource sharing. Moreover, it has stood the test of time as a preservation method. The biggest disadvantage of microfilm presentation is that few users really enjoy using either microfilm or fiche; almost all prefer hard copy to microformat.<sup>10</sup>

By the late twentieth century, preservation techniques had improved and many academic libraries hired professional preservationists and installed preservation laboratories. The advent of digital technology offered improved methods, but not conservation. A digitized work could be stored on a computer and could actually be used to replace the original deteriorating work. In addition, digital versions offered increased searching capability, the potential for multiple simultaneous users, and the ability to print or download “perfect copies.”

Although microfilming of copyrighted works presented copyright issues, the shorter term of copyright that existed prior to the 1976 Copyright Act meant that the majority of the works preserved in this format had already entered the public domain. Thus, there were few copyright issues associated with such preservation programs. Sometimes a publisher would reissue a

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7. *Id.*

8. Association for Research Libraries, *Library Preservation: An Administrative Briefing*, at <http://www.georgesoeete.net/preservation.htm> (last visited July 7, 2003) [hereinafter ARL Administrative Briefing].

9. *Id.*

10. *Id.*

work in microformat and would claim copyright in that work, although in reality, only the new material added was eligible for copyright protection. In other instances, copyright was claimed in the microform set as a collected work or compilation.

*B. Importance of Preservation to the Scholarly Community*

Virtually every medium of expression is threatened today by the natural forces of deterioration. The destruction of works recorded on paper, film, photographic prints, paint on canvas, phonorecords, video and audio tapes, and even optical and digital disks is proceeding at a pace that threatens to destroy most of the artistic and intellectual works of the past century and a half.<sup>11</sup>

The scholarly record of what has gone before is critical to the academy and should be critical to society in general. However, the academic, research, and scholarly community is frequently enticed by the new and the forward looking, but ignores the past. "In the academic community, it is far easier to create than to transform; easier to introduce new networking capabilities, electronic mail, and sophisticated retrieval mechanisms than to link those capacities in a meaningful manner to the information habits of working scholars, whose inquiries span decades, disciplines, and formats."<sup>12</sup>

Copyright issues involved in library preservation are significant. The longer term of copyright, life of the author plus seventy years, means that only works published in the United States prior to 1923 are clearly in the public domain, but many of the works produced from 1923 to 1964 are still under copyright and will continue to be protected at least until the end of 2018. Many of these materials are in desperate need of preservation if they are to continue to be viable for use by library patrons in the future. Some of them will be preserved using traditional techniques that conserve the physical object, i.e., the copy of the work that the library owns. This could range from a simple laminating of the paper covers of a book all the way to full-blown restoration of the binding and each page of the work. Increasingly, however, libraries seek to use digital means to preserve these works and make them available to their users.

Because digital preservation collides with the rights of the copyright owner, libraries have been forced to reevaluate their

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11. Oakley, *supra* note 6.

12. Patricia Battin, *Access to Scholarly Materials*, American Council of Learned Societies, Occasional Paper No. 14 (1990), at <http://www.acls.org/op14battin.htm>.

preservations programs. Two recent amendments to the Copyright Act of 1976 make it clear that, under certain circumstances, libraries may use digital means to preserve an analog work. Thus, use of the digital copy may be fairly restricted. Those amendments do not deal with the preservation of works in a library collection originally acquired in digital format; however, librarians are just beginning to address the preservation of this “new elusive and alterable digital knowledge.”<sup>13</sup>

Libraries that sought permission to preserve copyrighted works through various reproduction technologies have not had much success. Publishers, especially journal publishers, are especially difficult to locate. One of the most difficult problems encountered by the Library of Congress in its American Memory Project (AMP)<sup>14</sup> has been copyright permission. In fact, AMP has digitized only public domain works or those for which it can obtain permission. Even earlier, libraries encountered difficulties with permissions for microfilm preservation projects, which is why so many of these projects involve only public domain works.<sup>15</sup>

This Essay discusses portions of the Digital Millennium Copyright Act<sup>16</sup> (DMCA) and the Sonny Bono Copyright Term Extension Act<sup>17</sup> (CTEA) as they amend § 108 of the Copyright Act of 1976 and their impact on the preservation of analog works. It next addresses the preservation of digital works and concludes with an examination of the use of open archives and institutional repositories as a method to preserve and make accessible works produced within an academic institution.

## II. THE LIBRARY EXEMPTION

Section 108 of the Copyright Act of 1976 (“Copyright Act”) permits reproduction and distribution of works by libraries and archives that meet certain criteria and under particular conditions. Section 108(a) establishes the criteria that a library or archives must meet in order to qualify for the entire library exemption and details one limitation: a library may make only

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13. REDMOND KATHLEEN MOLZ & PHYLLIS DAIN, CIVIC SPACE/CYBERSPACE: THE AMERICAN PUBLIC LIBRARY IN THE INFORMATION AGE 187 (1999).

14. See *American Memory: Historical Collections for the National Digital Library*, Library of Congress, at <http://www.memory.loc.gov/ammem/amhome.html> (last modified Feb. 21, 2003).

15. See Oakley, *supra* note 6.

16. Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 5, 17, 28, and 35 U.S.C.).

17. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified in scattered sections of 17 U.S.C.).



single copies of works except for preservation purposes, for which, under certain conditions, the library may make up to three copies.<sup>18</sup>

The first of the three criteria a library must meet in order to qualify for the library exemption is that the reproduction and distribution of the copyrighted work, performed by the library, must be made without direct or indirect commercial advantage.<sup>19</sup> The precise meaning of the phrase “without direct or indirect commercial advantage” is not clear. The matter has never been litigated, and the legislative history of the statute sheds little light on the issue. Publishers and other copyright holders appear to maintain that if the library is in a profit-seeking entity, it cannot meet this requirement.<sup>20</sup> The language of the statute makes it clear that it is the reproduction itself that may not be for direct or indirect commercial advantage, that is, sold for a profit. There is additional support for this position in the legislative history of § 108(g)(1); the House Report that accompanied the Act stated that even a library in a for-profit entity may reproduce an article for a user as long as the request is an isolated and spontaneous one.<sup>21</sup> Later amendments to other sections of the Copyright Act all seem to insert the words “nonprofit” before library rather than relying on the § 108(a) definition of libraries that qualify for the exemption. This may be evidence that legislators, at least after the passage of the 1976 Act, now believe that exemptions for libraries outside of § 108 must apply only to the nonprofit sector.

The second requirement a library must meet to qualify for the exemption is that its collection must be open to the public or to nonaffiliated researchers doing research in a specialized field.<sup>22</sup> This criteria may be more easily met by libraries in nonprofit educational institutions, research organizations, and public libraries as opposed to profit-seeking entities. Other entities not open to the public may meet this criteria if the library collection is open by appointment for qualified users, such as researchers. Libraries that are not open to any outside or unaffiliated users are unable to qualify under this criteria.<sup>23</sup>

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18. 17 U.S.C. § 108(a) (2000).

19. *Id.* § 108(a)(1).

20. These are usually referred to as for-profit libraries even though the libraries themselves are not profit centers.

21. H.R. REP. NO. 94-1476 (1975), *reprinted in* 17 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 75 (1977) [hereinafter HOUSE REPORT].

22. 17 U.S.C. § 108(a)(2).

23. One could argue that a library not open to outside users but which would lend any of its published materials through interlibrary loan meets this criteria; the matter,

The final criteria a library must satisfy in order to take advantage of the exemption is that it must place a notice of copyright on the reproductions made under § 108.<sup>24</sup> The reason for this requirement is so that the recipient of the copy will be alerted to the fact that the work is copyrighted. The DMCA amended § 108(a)(3) which now reads: “the reproduction or distribution of the work includes a notice of copyright that appears on the copy . . . that is reproduced . . . or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy . . . that is reproduced.”<sup>25</sup> For years, many libraries had simply stamped copies with “Notice, this work may be protected by copyright”; this is no longer an option. Now, the library must include the actual notice that appears on the work. The legislative history of the DMCA states that the goal of this particular amendment was not to increase the burden on libraries, but that has not been the end result.<sup>26</sup> What librarians had actually sought was an amendment that would alleviate the burden of including a notice of copyright when the copyright holder failed to do so.

### III. PRESERVATION UNDER § 108 GENERALLY

The original § 108 contained two sections that relate to preservation: § 108(b), which is a true preservation section, and § 108(c), which is a replacement section for lost, damaged, deteriorating, or stolen materials. Under these provisions, libraries were permitted to reproduce a work “in facsimile form” for preservation or replacement purposes if certain conditions were met. Whether a digital facsimile qualified as a facsimile under the statute was debated by both librarians and copyright owners, but there has been no litigation dealing with these preservation sections. One could argue that a scanned image of a page, in which the image is an exact reproduction of a page, is a facsimile because it looks exactly like the original page. On the other hand, digital copies that are not a reproduction of the page clearly would not be facsimile copies.

The DMCA settles this disagreement and expands the preservation and replacement exemptions in several ways. First, no longer is the library limited to making only one preservation

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however, has not been litigated, nor is there any legislative history to support such an argument. The net effect is the same; the materials that comprise the library’s collection of published works is available to users, albeit outside the facilities of that library.

24. 17 U.S.C. § 108(a)(3).

25. *Id.*

26. *See* S. REP. NO. 105-190, at 6 (1998) [hereinafter SENATE REPORT].

copy of a work. Now it may make three copies, which complies with national microform standards—further evidence that the DMCA applies to more than digital works. “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.”<sup>27</sup> Second, the word “facsimile” was omitted, and third, the statute specifically permits the copy to be in digital format.<sup>28</sup> While these three changes broaden the preservation exemptions for libraries, there are also new limitations. One problem any library preservation program encounters is the § 108(g)(1) prohibition against systematic copying. A strong fair use argument could be made even if the reproduction is systematic when the purpose is preservation and the requirements of 108(b) or (c) have been met. However, the matter is far from clear.

The CTEA added a new section, 108(h), dealing with preservation, but it is not completely limited to preservation. These three additions to the library exemption are extremely important to libraries and to the preservation of the cultural and historical record of this country.

*A. Section 108(b): Preservation of Unpublished Works*

Under the original statute, § 108(b) permitted a library to reproduce one copy of an unpublished work in its collection for preservation, security, or deposit for research in another library. Now the DMCA allows the library or archives to make up to three copies. If the copy that is reproduced is in digital format, then that copy may not be “made available to the public in that format outside the premises of the library.”<sup>29</sup> This may actually narrow the exemption granted prior to 1998 even though a library may now make a digital copy for on-premises use. The amendment assumes that the library places the copy on an intranet or records the work on a CD or other digital medium, the use of which will be restricted to the library premises. But because the library may also make two analog copies, it could make those copies and then lend them outside the premises.

Prior to the 1998 amendment, a library that reproduced an

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27. American Library Association Washington Office, *Library Preservation: Changes Incorporated in H.R. 2281: The Digital Millennium Copyright Act of 1998 (PL 105-304)* (Nov. 1998), at [http://www.ala.org/Content/NavigationMenu/Our\\_Association/Offices/ALA\\_Washington/Issues2/Copyright1/DMCA\\_The\\_Digital\\_Millennium\\_Copyright\\_Act/preservation.pdf](http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/ALA_Washington/Issues2/Copyright1/DMCA_The_Digital_Millennium_Copyright_Act/preservation.pdf) [hereinafter ALA Preservation].

28. See 17 U.S.C. § 108(b)–(c).

29. *Id.*

unpublished work under § 108(b) could treat the reproduction just as it did the original work. It could, for example, lend the reproduction to users or provide it through interlibrary loan. The new language is much more restrictive because it means that if the work is preserved in digital format, the digital copy may not be used outside the library buildings. Library associations have posited that although the amendment limits the use of digital preservation copies to the physical premises of the library, it is consistent with the § 108(g) prohibition against systematic reproduction and distribution except for interlibrary loan.<sup>30</sup> Moreover, although the legislative history of the Copyright Act is silent as to the right of first publication, the restrictions under § 108(b) are consistent with the right that gives the author or other copyright owner the right of first publication for life of the author plus seventy years.<sup>31</sup>

Digital versions of analog works are defined as: “electronic photographs scanned from original documents. A digital image can accurately render the information, layout, and presentation of the original, including typefaces, annotations, and illustrations.”<sup>32</sup> Some digital versions of analog works are stored in ASCII<sup>33</sup> files, which lack search and manipulation capability, while other digital versions are created by optical character recognition (OCR) programs, which do permit digitally imaged text to be searched and manipulated.<sup>34</sup> For this reason, libraries and archives are beginning to use and urge others to use OCR imaging for preservation. In addition, users find it much easier to use digitally imaged files than microforms.

#### *B. Section 108(c): Replacement of Published Works*

Under the original version of § 108(c) of the 1976 Act, a library could reproduce a published lost, damaged, stolen, or deteriorating work after the library made a reasonable effort to obtain an unused copy at a fair price. Because § 108(c) is technically a replacement section, obviously the work must have existed in the library’s collection before the library can rely on the exemption to reproduce the work.

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30. ALA Preservation, *supra* note 27.

31. See *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555–60 (1985).

32. ARL Administrative Briefing, *supra* note 8 (citing the Cornell University Library, at [www.library.cornell.edu/preservation/conservation.html](http://www.library.cornell.edu/preservation/conservation.html)).

33. American Standard Code for Information Interchange is a code of numerical representations of characters that was developed by the American National Standards Institute in 1963 and finalized in 1968.

34. ARL Administrative Briefing, *supra* note 8.

Libraries and archives are permitted to reproduce a work that has become lost, damaged, stolen, deteriorating, or obsolete, 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. A library is not required to search the used book or videotape market in order to locate a replacement volume or item. The statute does not define key concepts such as "reasonable investigation" or "fair price," but the legislative history of the Copyright Act does provide some guidance as to what constitutes a reasonable effort to locate an unused replacement. According to the House Report, "[t]he 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."<sup>35</sup> 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 United States trade sources such as retail bookstores, wholesalers, or jobbers.<sup>36</sup> If that proves unsuccessful, then the library should contact the publisher or author, if known.<sup>37</sup> Lastly, it should contact an authorized reproduction service<sup>38</sup> such as University Microfilms, formerly known as UMI (now ProQuest).

There is no legislative definition of "fair price," but there are two published definitions of the term. One comes from a publication of the Association of American Publishers (AAP) and the other 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 defined fair price as the latest suggested retail price if the work is still available from the publisher.<sup>39</sup> 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.<sup>40</sup> The ALA publication uses a three-part definition of fair price.<sup>41</sup> First, a fair price is the latest retail price, if the work is still available from the publisher.<sup>42</sup> This conforms with the first part of the AAP definition. Second, the fair price of a reproduction is the cost as

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35. HOUSE REPORT, *supra* note 21, at 76.

36. *See id.*

37. *Id.*

38. *Id.*

39. Association of American Publishers, *Photocopying by Academic, Public, and Non-Profit Research Libraries* 14 (1978).

40. *Id.*

41. *See* American Library Association and National Education Association, *THE COPYRIGHT PRIMER FOR LIBRARIANS AND EDUCATORS* (2d ed. 1995).

42. *Id.* at 27.

close as possible to the manufacturing costs plus royalty payments.<sup>43</sup> The third 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.<sup>44</sup>

The statute's legislative history offers no solution to situations in which the stolen or damaged material does not comprise an entire volume but instead is only an article or two missing from a bound periodical volume. Surely, in this situation the librarian should be able to make a reasoned judgment about how much investigation to do and could determine that there is no fair price to replace the article missing from a bound volume. Most librarians in this situation would then simply reproduce the article and insert the photocopy into the bound volume.

There are two important additions to subsection (c) made by the DMCA. The first mirrors that found in § 108(b) and permits a library to make up to three copies of a work after an unsuccessful, reasonable effort to purchase an unused copy at a fair price. If a digital copy is made, that copy may not be made available to the public in that format outside the premises of the library. Under this subsection, it is not the right of first publication that is at issue, because these are published works. The problem may be that making a digital copy available outside the library would not comply with the § 108(g)(1) prohibition against systematic copying. An additional concern may also have been that a library that places a digital version of a work on the Web is actually republishing the copyrighted work without consent of the owner of the copyright. 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 Congress meant this restriction to apply to works originally acquired in analog format and intended that digital reproductions of such works 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

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43. *Id.*

44. *Id.* This is a very logical interpretation of fair price, because few libraries could afford to purchase a second copy of an entire set of books in order to replace a single damaged volume.

premises of the library and the new one is a facsimile copy, so it is logical that it also should be able to be used in the same way, despite the language of the statute.

The second DMCA amendment to § 108(c), in addition to applying to lost, damaged, stolen, or deteriorating works, added the language “or if the existing format in which the work is stored has become obsolete.”<sup>45</sup> The amendment then explains that a format may be 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.”<sup>46</sup> This is a great help for libraries that currently are dealing with deteriorating recordings on wax cylinders, 8-track audiotapes, Beta format videotapes, and the like. The legislative history indicates that when the only available equipment is from a second-hand store, it is not “reasonably available.”<sup>47</sup> If the equipment is still produced but is extremely expensive, a library may be able to argue that such equipment is no longer *reasonably* available in the commercial marketplace and thus reproduce the work under this amendment.

*C. Section 108(h): Reproduction During Last Twenty Years of the Term*

Section 108(h) was added to the Act by the CTEA.<sup>48</sup> This section permits a library, archives, or a nonprofit educational institution, during the final twenty years of a published work's copyright term, to reproduce, distribute, display, or perform in either facsimile or digital form, a copy of a work for purposes of preservation, scholarship, or research. In order to do this, however, the library must determine by reasonable investigation that none of the following factors exist: (1) The work is subject to normal commercial exploitation. (2) A copy can be obtained at a reasonable price.<sup>49</sup> (3) The copyright owner provides notice that either of the above conditions apply according to regulations promulgated by the Register of Copyrights.<sup>50</sup> Further, the exemption provided by this subsection does not apply to any

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45. 17 U.S.C. § 108(c) (2000).

46. *Id.*

47. SENATE REPORT, *supra* note 26, at 62.

48. The amendment also renumbered the old § 108(h) to § 108(i).

49. One might question why this section uses the term “reasonable” price rather than a “fair” price as is used in § 108(c). There may be a difference, but perhaps this was sloppy drafting.

50. 17 U.S.C. § 108(h)(2).

subsequent uses by users other than that library.<sup>51</sup> 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.<sup>52</sup> The published rules are accompanied by a form by which publishers and other copyright owners can file such notice

There is little legislative history for this portion of the CTEA; the Senate Report refers to competing concerns of institutions that depend on legal but noncommercial use of a copyrighted works, especially preservation activities of libraries and archives as contrasted with the concerns of copyright owners. The balance struck permits preservation, even by digital means, but only under certain conditions and if the requirements are met.<sup>53</sup> There is no definition of important terms such as "reasonable investigation" or "normal commercial exploitation." Perhaps the definition of reasonable investigation for § 108(c) from the House Report that accompanied the Act should be used.<sup>54</sup> For this subsection, however, a reasonable investigation would likely require checking with the Copyright Office to determine whether a publisher or other copyright holder had completed the relevant forms available on the Copyright Office Web site and filed notice.<sup>55</sup> The following information is required to be completed on the notice: (1) title of the work, or if there is no title, a brief description of the work; (2) name of the author or authors; (3) type of work, that is, the category such as literary work, etc.; (4) edition; (5) year of first publication; (6) year the work first secured federal copyright through publication with notice or registration as an unpublished work; (7) copyright registration and renewal numbers; (8) name of the copyright owner; (9) contact or entity that the Copyright Office should contact concerning the notice; and (10) the person or entity that libraries and archives may contact concerning the work's normal commercial exploitation or availability at a reasonable price.<sup>56</sup>

There is little help, even in the rules, for determining the reasonable price of a work to be reproduced under this section. According to the Copyright Office, documentation of reasonable price may include both the original copyright registration number of the work and any additional information concerning

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51. *Id.* § 108(h)(3).

52. 37 C.F.R. § 201.39 (2002).

53. The majority of the debate concerned term extension and the Fairness in Music Licensing Act portion of the CTEA. *See* 144 Cong. Rec. H9946, 105th Cong. (1998).

54. Refer to text accompanying note 35 *supra*.

55. *See* U.S. Copyright Office Web site, at <http://lcweb.loc.gov/copyright>.

56. *Id.*



the work's normal commercial exploitation or availability at a reasonable price.<sup>57</sup> Despite the rule-making activity of the Copyright Office and the posting of the forms on its Web site, not a single notice had been filed by a publisher or other copyright owner as of April 20, 2003. The necessity for a library to satisfy the § 108(h) requirements and the failure of copyright owners to provide notice to simplify the process may mean that few libraries actually avail themselves of the exemption.

During the rule-making period, library associations testified that the Copyright Office would serve as the single most important resource for libraries in conducting their reasonable investigations to determine if the conditions specified in § 108(h) exist. Further, they urged the Office to make notices available on its Web site so that the information would be retrievable by libraries conducting such investigations.<sup>58</sup> The associations expressed concern about whether the owner of the copyright in a collective work is in a position to respond to some of the necessary information required for the notice. For example, how will such an owner know whether an individual contribution to the collective work is subject to normal commercial exploitation or whether copies may be purchased at a reasonable price? "Libraries and archives should not be required to purchase a copy of a collective work to enjoy the privileges of using an individual contribution."<sup>59</sup> Library associations testified that if a copyright owner cannot make a copy of a work available either directly or through an agent, then the presumption should be that libraries can take advantage of the exemption.<sup>60</sup> "For example, it would be a perversion of the exemption if a copy of a work exists only in a library, but the owner, who does not have [a] physical copy, nevertheless declares it is subject to normal commercial exploitation or can be obtained at a reasonable price."<sup>61</sup> Because the Copyright Office does not necessarily retain deposit copies, it is likely that only academic or research libraries will have the only or one of a very few remaining copies of many of these works.

Under § 108(c), a library's reasonable investigation to

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57. 37 C.F.R. § 201.39.

58. In the Matter of Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price, Before the Copyright Office Library of Congress, Comments of Library Associations on Notice to Libraries and Archives (Feb. 16, 1999), at <http://www.arl.org/info/frn/copy/comments.html>.

59. *Id.*

60. *Id.*

61. *Id.* Publishers frequently borrow copies of their works from libraries in order to reprint or even republish the work.

determine whether a copy is available at a fair price applies only to unused copies. Section 108(h) is silent as to whether a library or archives must seek even a used copy prior to taking advantage of the exemption. Because the copyright owner receives royalties only on the first sale of a work, the second-hand or resale market provides no way to calculate a “reasonable price.”<sup>62</sup> Library associations stated that, “[o]nly if the owner is actually marketing a work it physically possesses, or recently placed sufficient numbers of copies into commerce, could the owner accurately declare that the statutory test has been met.”<sup>63</sup>

Even outdated formats of a work may have an impact on what constitutes a reasonable price. Library associations argued that the § 108(c) definition of an obsolete work should be imported into the notice provisions under § 108(h).

It stands to reason that if the only accessible copies of a work are in outmoded formats, then the work cannot be considered subject to normal commercial exploitation and unless equipment is being manufactured and sold at fair price, the library or archive will be unable to use the work on a reasonably priced basis.<sup>64</sup>

It appears that § 108(h) applies to “orphaned” works when the publisher has disappeared and no one has an interest in further commercial exploitation. In 1987, a study conducted at the American Bookseller’s convention indicated that most books published in the United States go out of print in approximately three years.<sup>65</sup> Publishers report that slightly more than ninety-one percent of all book sales occur within the first year after publication.<sup>66</sup> On the other hand, with the production of books on demand, even out-of-print works can be produced quickly.<sup>67</sup> 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.<sup>68</sup>

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62. *Id.*

63. *Id.*

64. *Id.*

65. Oakley, *supra* note 6. The mean number of months a book remains in print was reported to be 43.07 but that included “classics,” textbooks, and reference materials that basically never go out of print. Of the total, about forty percent indicated a life expectancy of between 31.6 and 41.4 months. *Id.* at n.191.

66. *Id.*

67. Mary Minow, *Library Digitization Projects and Copyright* (June 28, 2002), at <http://www.llrx.com/features/digitization.htm>.

68. Victor F. Calaba, *Quibbles 'N Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. & TECH. L. REV. 1, 25 (2002).

Subsection 108(h) is broader than 108(c) because it is not solely a replacement section. There is apparently no requirement that the work reproduced currently be in the collection of the library, nonprofit educational institution, or archives at the time of reproduction. Normally § 108 reproduction is limited to works currently in the collection except for providing copies to users through interlibrary loan. Is this what Congress intended? Because preservation is not the only recognized purpose for such reproduction under § 108(h) but also scholarship or research, presumably this subsection can serve as a collection building section, at least for those works that meet the requirements of § 108(h). To preserve the work, however, it must have existed in the collection, but for scholarship and research, prior ownership of the work may not be required. Perhaps this is because the only works for which this exemption applies are those for which the author died in 1952 or earlier, and their very age gives libraries an exemption for reproduction for purposes other than preservation.

The work may be reproduced in either digital or analog format, but here the library is not permitted to make up to three copies, but instead “a copy.” In all likelihood, a library is much more likely to produce a digital copy of such a work rather than an analog copy after it has satisfied the requirements of the section because the work obviously would be sufficiently important to that library or it would not have engaged in the time-consuming reasonable investigation process. If the library makes a digital copy, there is no restriction that it be used only within the premises of the library. Thus, the library may put the work on the Internet and apparently share it with the world.

What about works that have technological access controls? 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 been dead for fifty 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 and 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.<sup>69</sup> The rule did not so recognize, however.

The addition of § 108(h) also raises a technical question

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69. Refer to text accompanying note 64 *supra* (stating that if the copy of a work is in an outmoded format, then the work may not be useable on a reasonably priced basis).

about the operation of the entire library exemption. Section 108(i) states that the exemption does not apply to the following: (1) a musical work; (2) a sculptural, graphic, or pictorial work; or (3) an audiovisual work other than one dealing with the news.<sup>70</sup> Section 108(i) then states two exceptions to this restriction on the library exemption, one of which relates to preservation. The 108(i) restriction does not apply to the preservation subsections (b) and (c).<sup>71</sup> Thus, libraries may treat pictorial, musical, or audiovisual works just as they treat other library materials for purposes of preservation. The statute is silent, however, as to whether 108(h) is also exempted. So, during the final two decades of a copyright term for a motion picture, photograph, etc., may a library exercise the § 108(h) exception? Would Congress not have added (h) to the limitations found in (i) if it intended to do so? Maybe, or perhaps it was an oversight or the result of less than careful drafting.

#### IV. PRESERVATION OF DIGITAL WORKS

Libraries view as one of their missions the preservation of the world's knowledge and cultural artifacts. The library exemption, as amended, deals fairly well with preserving materials that were not originally in digital format. Preserving electronic information is more problematic, however, and many digital works simply are not being preserved either by the publisher or by third parties such as libraries. Even when a library executes a license agreement that gives users access to a work, the library may not have the right to preserve it. Accordingly, there is great concern about the impact of this on the cultural record and what material will be available to researchers in the future.<sup>72</sup>

What is digital preservation? It may be defined as "the series of managed activities necessary to ensure continued access to and preservation of digital materials."<sup>73</sup> To this end, the goal of many digital preservation projects is "to maintain the ability to display, retrieve, and use digital collections in the face of rapidly changing technological and organizational infrastructures and

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70. 17 U.S.C. § 108(i) (2000).

71. *Id.*

72. See NATIONAL RESEARCH COUNCIL, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 9–10, 206–10 (2000).

73. Stephen Chapman, What is Digital Preservation?, OCLC Speakers' Papers (2001), at <http://www.oclc.org/education/conferences/presentations/2001/preservation/chapman.htm>.

elements.”<sup>74</sup> Three components have been identified for digital preservation projects: (1) preservation of the material or its contents in lieu of the original object; (2) preservation of the apparatus needed to locate, retrieve, and represent the material; and (3) a knowledgeable community of users.<sup>75</sup> In the twenty-first century, it is not only the preservation of the storage medium, but more importantly, the assurance of access that is critical to libraries.<sup>76</sup> “As is the case with other modern formats, digital files require a more complex apparatus to be usable: they must be usable to machines and to people. This is the reason that digital preservation models require so much metadata: one set accommodates machines, the other is for people.”<sup>77</sup>

Conservation of the digital artifact will be useless unless the equipment that permits the work to be viewed or heard continues to be available and viable. The reason that libraries conduct both conservation and preservation activities is to ensure that the work is available to future generations, so unless the institution can provide access to the work, there is little reason to preserve it. Thus, libraries are less likely to conserve digital artifacts than to preserve in latter-developed formats the information the works contain.

Because digital works are mostly licensed to libraries and other users, there really is no mechanism for preservation. Libraries are concerned because licensed works do not provide a permanent copy for the institution for either access or preservation. If either party terminates the license agreement, the library is left with nothing. By contrast, when purchasing a subscription to a print journal, which also could cease publication, the library still possesses the volumes covered by the subscription period. This is not true for licensed digital works. Libraries are beginning to negotiate to retain the electronic product at the end of the license period, but this may prove difficult as technology changes over time. The library may be able to retain the work in electronic format, but it may not be able to access the work and use it if the equipment or format has become obsolete. Even if the library acquires the right to convert the work to newer platforms, it may just not be worth the effort to accomplish the conversion, especially for highly technical and scholarly works with a limited audience.

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74. Cornell University Library/Research Department, *Moving Theory into Practice: Digital Image Tutorial* (2002–2003), at <http://www.library.cornell.edu/preservation/tutorial/preservation-01.html>.

75. Chapman, *supra* note 73.

76. Battin, *supra* note 12.

77. Chapman, *supra* note 73.

Although consideration of preserving the digital record of the United States is rather new, technology offers the means of not only preservation, but access. Preservation of digital works requires reproduction which may conflict with the rights of the copyright holder even before access to the work is provided. Offering access to such works may impact not only the reproduction and distribution rights but also the rights of public display or performance depending on the type of work involved. There are also serious problems with archiving digital works, not the least of which is the previously mentioned technological obsolescence. Moreover, the owners of copyright in digital works are so concerned about the ease of copying digital works that they are finding new ways to restrict access to these works. For example, suppose that a library has acquired a work on DVD and fifteen years later, it has begun to deteriorate. The library first tries to purchase an unused copy but finds that it is no longer available. Now the library is faced with a dilemma—let the DVD continue to deteriorate to the point that it becomes totally unusable, or circumvent the technological control and reproduce the work. The latter option clearly violates the § 1201 anticircumvention provision. Which goal should take precedence? Preservation or the inviolability of the copyright holder's access controls?

If preservation is to be done in a serious and organized manner, an infrastructure must be developed to support such activities. Naturally, this will also require financial resources to support the infrastructure. The problems are such that there are few organized projects.<sup>78</sup> There are some universities that are working by agreement with particular publishers to archive their digital works.<sup>79</sup> The Online Computer Library Center (OCLC) and the Research Libraries Group (RLG) have created the Task Force on Archiving of Digital Information ("Task Force") to address a wide range of these concerns ranging from integrity of digital information to access.<sup>80</sup> The study conducted by the Task Force produced a number of interesting conclusions: (1) those who create, provide, and own digital information must provide the first line of defense against the loss of such information;

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78. See The Commission on Preservation and Access & The Research Libraries Group, Inc., *Preserving Digital Information: Report of the Task Force on Archiving of Digital Information*, at <http://www.rlg.org/ArchTF/tfadi.index.htm> (May 1, 1996) [hereinafter Commission Report].

79. See *Yale and Elsevier Science Plan E-Journal Archive*, Yale University Library (Feb. 23, 2001), at <http://www.library.yale.edu/~llicense/ListArchives/0102/msg00078.html>.

80. Commission Report, *supra* note 78.

(2) digital preservation will require a large infrastructure significant enough to support a distributed digital archives system; (3) such a system of digital archives will require a number of trusted organizations that are capable of storing, migrating, and providing access to digital collections; (4) a certification process to facilitate the needed climate of trust is essential; and (5) “[c]ertified digital archives must have the right and duty to exercise an aggressive rescue function as a fail-safe mechanism for preserving valuable digital information that is in jeopardy of destruction, neglect or abandonment by its current custodian.”<sup>81</sup>

The preservation of information resources is so central to libraries and librarianship that the American Library Association published a policy on preservation based on its goal of “ensuring that every person has access to information at the time needed and in a useable format.”<sup>82</sup> The ALA believes that the preservation of library resources protects the public’s right to the free flow of information as embodied in the First Amendment to the Constitution and the Library Bill of Rights. It has encouraged publishers to provide libraries metadata that will facilitate the life cycle management of works in digital formats. More importantly, it has urged publishers to deposit digital works in repositories that provide for the long-term storage, access, and usability of the digital content.<sup>83</sup> The ALA will work with the publishers of digital works to develop guidelines on the preservation of digital information to help ensure that such information will not be lost when publishers can no longer retain and disseminate it.<sup>84</sup> Thus, collaboration is an important strategy for dealing with copyright concerns. Unfortunately, it is unlikely to work for materials published by smaller and less organized publishers.

One way to ensure that important digital works are preserved is to create a national digital library to act as a clearinghouse and coordinator of projects aimed at the preservation of digital works. More importantly, it could serve as the long-term storage and access facility for these works. This would place the responsibility for this important task in a single organization and would permit specialized staff to develop true expertise in maintaining these materials and making them

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81. *Id.*

82. American Library Association, *American Library Association Preservation Policy* (2001), at [http://www.ala.org/Content/ContentGroups/ALCTS1/Publications10/Web\\_Publications/Preservation3/ALA\\_Preservation\\_Policy/ALA\\_Preservation\\_Policy.htm](http://www.ala.org/Content/ContentGroups/ALCTS1/Publications10/Web_Publications/Preservation3/ALA_Preservation_Policy/ALA_Preservation_Policy.htm).

83. *Id.*

84. *Id.*

available to the public upon request. The national digital repository could be a federal government entity or it could be one created and maintained by a coalition of research libraries. There are many benefits a single repository would offer in addition to expert staff. For example, the single repository model could centralize the retention and maintenance of the equipment for accessing and storing various digital formats that would result in a huge cost savings to libraries across the country. Another benefit is standardization: the repository would develop all of the standards for storage and access of those works. Moreover, users of these digital works would have one central place to go on the Web to access these works.

There are, however, some difficulties with a single repository model. The main benefit of the World Wide Web is that distributed information can be brought together in the virtual world, which is already happening on a monumental level. Even if the single repository model were adopted, there would need to be some system for the replication of the contents of the repository at various remote locations, much as is done with the Internet Domain Name System's thirteen root servers. Replication ensures that the data continues to be available even if the central repository is experiencing difficulties.<sup>85</sup> Because of the need for replication, a series of regional repositories to store and provide access to preserved digital content might be preferable to one national digital repository.

#### V. PRESERVATION OF OTHER LIBRARY ARTIFACTS

There are a variety of other preservation issues for libraries that relate to copyright. For example, many libraries make backup copies of audiovisual works because of the fragility of the medium. If the use copy becomes damaged, then the library reproduces another use copy from the backup or master copy. Libraries engaged in this type of "before the loss" preservation believe that the library paid for one "use" copy of the work, and all it is doing is ensuring that it always has a use copy in circulation. The impact of this activity on copyright holders is clear, and it is widely practiced in all types of libraries.

The preservation of motion pictures is also a serious issue. It is estimated that one half of all of the feature films produced in this country before 1950 no longer exists. This is due in large

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85. For a description of replication, see *Oracle 9i Replication: An Oracle White Paper*, Oracle (June 2001), available at [http://otn.oracle.com/products/dataint/pdf/oracle9i\\_replication\\_twp.pdf](http://otn.oracle.com/products/dataint/pdf/oracle9i_replication_twp.pdf). The Author thanks Professor Greg R. Vetter of the University of Houston Law Center for bringing this to her attention.



part to the fact that they were stored on nitrate cellulose film, which is not only very flammable but also gradually turns into dust. Other films from the 1950s have faded due to the color process used. Film preservation groups preserve films by copying them to another medium or restoring them to the original version. The cost is quite high, approximately \$3.00 per foot of film for nitrate preservation.<sup>86</sup> For moving images, digital preservation is becoming much more common also,<sup>87</sup> and this requires reproduction of the work. Should the film producer's copyright interest be permitted to override the public's interest in films as a historical record?

Another preservation issue affects one-of-a-kind items held by libraries and archives in their archival collections. Librarians have often misunderstood the difference in owning the physical object versus owning the copyright in unpublished works. Libraries have behaved as if they own the rights and thus have controlled not only access to the object but also the use one could make of the works.<sup>88</sup> Sections 108(b) and (c) provide the ability to preserve the work but do not answer all of the copyright questions involved.

## VI. INSTITUTIONAL REPOSITORIES

An alternative to the traditional library preservation of scholarly material within academia is the establishment of institutional repositories which are defined as "digital collections capturing and preserving the intellectual output of a single or multi-university community."<sup>89</sup> Individuals within the institution produce working papers, technical reports, and other forms of scholarly work which may or may not be published, but in the prepublication stage, the work has considerable value to other faculty members and researchers as well as to the institution. In fact, institutional repositories can serve as a complement to traditional methods of scholarly communications.<sup>90</sup> More

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86. The Film Foundation, *Facts about Film Preservation*, at <http://www.film-foundation.org/facts.cfm> (2002).

87. See Howard Besser, *Digital Preservation of Moving Image Material?*, UCLA Graduate School of Education & Information Studies (Mar. 2001), available at <http://www.gseis.ucla.edu/~howard/Papers/amia-longevity.html>.

88. See Laura N. Gasaway, *Copyright Ownership and the Impact on Academic Libraries*, DEPAUL-LCA J. ART & ENT. L. & POL'Y (forthcoming 2003).

89. Richard K. Johnson, *Institutional Repositories: Partnering with Faculty to Enhance Scholarly Communication*, D-LIB MAGAZINE, Nov. 2002, at <http://www.dlib.org/dlib/november02/johnson/11johnson.html>.

90. Raym Crow, *The Case for Institutional Repositories: A SPARC Position Paper*, at <http://www.arl.org/sparc/IR/ir.html> (n.d.).

important in certain disciplines such as science and technology, these works are sometimes referred to as “grey literature” because they are difficult to locate and hard to manage and preserve.<sup>91</sup> Faculty members at academic institutions all over the world are posting their research online, most often on their own Web sites, but there are also departmental Web sites and disciplinary repositories. Researchers want to share the results of their work and many believe that making their work available online is the best way to expand exposure to their work<sup>92</sup> and to stimulate conversation and discussion about their work by others in their discipline. There are also benefits to the college or university in creating such repositories. “Institutional repositories, by capturing, preserving, and disseminating a university’s collective intellectual capital, serve as meaningful indicators of an institution’s academic quality.”<sup>93</sup> An institutional repository is primarily a digital archive of faculty works, but it could also include works by researchers, staff, and even students.

An institutional repository can contain several types of material, such as: (1) teaching materials including syllabi, examinations, or other materials that the faculty or department wished to preserve; (2) student works such as papers, projects, and electronic portfolios; (3) works about the institution such as annual reports, histories, planning documents; (4) computer programs; (5) data sets; and (6) visual works such as video recordings, photographs, and art works. In other words, virtually any digital work that a university wants to preserve and make available can be placed in the institutional repository.<sup>94</sup>

A library’s role in creating and maintaining such a repository certainly is more than custodial and evinces a desire to help mold the future of scholarly communications from traditionally published works to more dynamic works. This is an expansion of the traditional role of libraries, but university and college libraries are uniquely qualified to manage these new tasks.<sup>95</sup> Faculty will likely dedicate themselves to the content layer of the repository but someone has to manage the technical and organization aspect, and that will likely be the university library.<sup>96</sup> Libraries can be expected to: (1) provide document preparation expertise which will include document format control

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91. Roy Tennant, *Digital Libraries: Institutional Repositories*, LIBR. J. 28, 28 (Sept. 15, 2002).

92. See Johnson, *supra* note 89.

93. *Id.*

94. *Id.*

95. See Crow, *supra* note 90.

96. *Id.*

and archival standards, etc.; (2) help and encourage authors to contribute their research to the repository; (3) provide expertise to increase access to and usability of the data such as metadata tagging, authority controls, and the other content management requirements;<sup>97</sup> and (4) establish guidelines for the campus community on what works should be deposited and how to accomplish this. Certainly, the individual authors would own the copyright in their individual contributions to the repository, but the collective work or database would surely possess sufficient originality to qualify for copyright protection on its own. Thus, preservation of works in the repository could be ensured by the institution without permission from the copyright holder.

The open archives movement offers another possibility for preservation of and access to digital works. An example of this is the Budapest Open Access Initiative (BOAI) which represents a statement of principle, strategy, and commitment. Signatories to BOAI include hundreds of individuals and organizations worldwide “who represent researchers, universities, laboratories, libraries, foundations, journals, publishers, learned societies, and kindred open-access initiatives.”<sup>98</sup> BOAI states that those works “scholars give to the world without expectation of payment” should be freely accessible online without cost to the user.<sup>99</sup> It further posits that the only constraint on reproduction and distribution of these scholarly works should be the author’s control over the right to be properly acknowledged and cited.<sup>100</sup>

BOAI proposes that two strategies be followed. The first is called “self archiving” which acknowledges that scholars need tools and assistance to deposit refereed articles in open electronic archives. Second, alternative journals would be launched that are committed to open access.<sup>101</sup> Interestingly, for self archiving, Stephen Harnad, the key founder of the BOAI, encourages scholars to make earlier versions of their works available. This suggestion assumes that the penultimate version and not the final copy edited version by the journal publisher may be placed in open access with impunity without permission from publishers who likely hold copyright on the article. Clearly, preservation of these works and access is assured as long as the scholar continues to make the work available. But this is not necessarily

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97. *Id.*

98. Budapest Open Access Initiative, at <http://www.soros.org/openaccess/> (Feb. 14, 2002).

99. *Id.*

100. *Id.*

101. Funding for the BOAI comes from the Open Society Institute funded by philanthropist George Soros. *Id.*

long-term storage, preservation, or access. Therefore, it is difficult to think of BOAI as true preservation.

## VII. CONCLUSION

This Essay illustrates the difficult copyright issues faced by libraries and archives that seek to preserve works both in analog and digital format. Moreover, preservation is useless without continuing access to this material. Clearly, less is known about preservation of digital works, and libraries are struggling with how to handle preservation technologically but also with the copyright issues. Perhaps this is natural, especially because the preservation of digital works is such a new issue for libraries and for copyright holders, many of whom do not see the value or importance of preserving the digital works in which they hold copyright. This Essay likely has raised as many questions as it has answered.

The good news is that for copyright teachers with an interest in libraries, there is no dearth of topics for further exploration, research, and scholarship. Among these topics are important questions concerning preservation:

1. Will copyright interests ultimately trump the societal value in preserving the scholarly, literary, and cultural record?
2. As a society can we determine a point at which society's interest takes precedence over the rights of copyright holders?<sup>102</sup>
3. If so, will society's interest take precedence for all works or only for works that no longer have any commercial value?
4. How will commercial value be determined?
5. How closely related is commercial value to the potential market for the work?
6. What impact does the "books on demand" phenomenon have on a determination of commercial value?
7. 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?
8. Will publishers be willing to work with libraries on major preservation projects for the good of society?
9. What copyright concerns should be addressed in order to

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102. Two recent articles propose that courts should consider time, i.e., age of the work, as a part of any fair use analysis and grant greater fair use rights for older works. See Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775, 775 (2003); Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 409-10 (2002). The length of time since a work was produced would be one of the fair use factors.

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facilitate collaborative preservation projects?

10. Should a national repository or a series of regional repositories for the preservation of digital works be designed and promoted?

11. 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?

The preservation of the scholarly, research, and cultural record is critical to a wide range of researchers. This 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.