

# Copyright Guidelines

# VAR

VIDEO AT RISK:  
STRATEGIES FOR  
PRESERVING COMMERCIAL  
VIDEO COLLECTIONS  
IN LIBRARIES



Ultra Precise

**\$108**

**VHS**

# “VIDEO AT RISK: STRATEGIES FOR PRESERVING COMMERCIAL VIDEO COLLECTIONS IN LIBRARIES”

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SECTION 108 GUIDELINES  
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[http://www.nyu.edu/tisch/preservation/research/video-risk/VideoAtRisk\\_SECTION108\\_Guidelines\\_2013.pdf](http://www.nyu.edu/tisch/preservation/research/video-risk/VideoAtRisk_SECTION108_Guidelines_2013.pdf)

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## INTRODUCTION

These guidelines seek to clarify exemptions for copying audiovisual works under Section 108(c) of the United States Copyright Act and thereby enhance the ability of librarians to preserve their video collections. They provide guidance for interpreting and applying the specific language of 108(c), clarifying definitions of “damaged,” “deteriorating,” “replacement copies,” “reasonable effort,” “fair price,” “obsolete,” “public,” “circulate,” and others, in a useful eight guideline overview. These guidelines do not purport to present a comprehensive analysis or conclusions as to the scope of copying or otherwise using audiovisual works under Section 107 of the Copyright Act, i.e. fair use, which in some cases may also support reproduction reformatting.<sup>1</sup> Ultimately, reproduction reformatting decisions require an individual and fact-specific evaluation on the part of individual librarians and institutions, but these guidelines seek to better inform these decision-making processes.

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<sup>1</sup> Compare CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 17 (Association of Research Libraries, Jan. 2012), available at <http://www.arl.org/pp/ppcopyright/codefairuse/>). See also 17 U.S.C. § 108(f)(4) (2012) (“[Nothing in this section] in any way affects the right of fair use as provided by Section 107”).

## **HOW THIS DOCUMENT WAS CREATED**

These guidelines were developed as part of the Andrew W. Mellon Foundation-funded “Video At Risk: Strategies for Preserving Commercial Video Collections in Libraries” (VAR) project, undertaken by New York University; the University of California, Berkeley; and, Loyola University, New Orleans.

Legal counsel was retained to produce a Memorandum outlining libraries’ legal position when reformatting unique, aging, out-of-print, and/or irreplaceable video titles from circulating VHS collections. VAR gathered institutional input on the Memorandum from project partners and from library members of the American Library Association’s (ALA) Video Round Table (VRT) working subgroup, culminating in the VAR project forum held at NYU in the fall of 2010. A guiding factor throughout this feedback process was to address specific requests for clarification related to best practices for everyday managers of media collections. Additional rounds of feedback were solicited from the wider library community during 2011 and 2012. Guided by these drafts, VAR project members at NYU culled core concepts and analyses from counsel’s Memorandum and present them as the ‘guidelines’ below.

## **SECTION 108**

It is the opinion of the project that the U.S. Copyright Act, most specifically pursuant to §108(c)<sup>2</sup> as presently enacted, permits the reproduction reformatting libraries propose to undertake, subject to the guidelines set forth below.<sup>3</sup>

### **LIBRARY EXEMPTIONS UNDER §108**

The most relevant subsection of §108 reads as follows:

(c) the right of reproduction under this section [i.e., §108] applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen, or if the existing format in which the work is stored has become obsolete, if –

(1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

(2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

For purposes of this subsection, a format shall 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.

This language establishes some clear parameters for libraries' reproduction reformatting, but it also raises a number of definitional questions, few of which are fully resolved by the text of the statute. The guidelines below flesh out of several of these questions based on detailed examples from extant case law and legal statutes.

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<sup>2</sup> 17 U.S.C. § 108(c) (2012).

<sup>3</sup> Moreover, if §108 were deemed not to apply to preservation reformatting, the majority of the activities described herein would very likely be defensible as fair use under 17 U.S.C. § 107. The failure of a library to meet the requirements of §108 in no way impairs its ability to assert fair use as a separate defense. (See § 108(f)(4) (“[Nothing in this section] in any way affects the right of fair use as provided by section 107); see also *The Authors Guild, Inc. v. HathiTrust*, 11 CV 6351 (HB), slip op. at 12-13 (S.D.N.Y. Oct. 10, 2012) (noting “the clear language that Section 108 provides rights to libraries in addition to fair-use rights that might be available,” and that “fair use does not undermine Section 108, but rather supplements it”). ...”)

**Guideline 1:****WHEN IS A COPY OF A WORK “DAMAGED, DETERIORATING, LOST, OR STOLEN”?****DESCRIPTION:**

In order to qualify for copying under §108(c), a work must be either: (a) “damaged, deteriorating, lost or stolen”; or, (b) stored in an “obsolete” format. The terms “lost” and “stolen” are fairly self-explanatory; however, the terms “damaged” and “deteriorating” are subjective and more difficult to define.

**Damage and deterioration factors**

While some may argue that it is impossible to contend that an entire class of media is “deteriorating,” a wide body of scholarship demonstrates the particular susceptibility of magnetic tape formats to physical deterioration over time. Many factors can influence deterioration and degradation of magnetic tape media including, but not limited to: age; storage conditions over time (including: temperature and relative humidity, and fluctuations thereof; cleanliness; quality of tape pack); quality of original tape stock manufacturing processes; quality of original tape duplication processes; care and handling; condition of physical carrier or case; and, quality of playback conditions (i.e. VCR quality and condition), among others. These factors can all lead to preservation decay issues such as, but not limited to: uneven tape transport, tape sticking, magnetic binder shedding, and magnetic tape layer separation.<sup>4</sup> While no detailed definitions of “deteriorating” or “damaged” are provided for in §108(c), a work can be said to be “deteriorating” or “damaged” if it cannot be viewed in substantially its original condition, e.g. if there is visible and/or otherwise perceivable deterioration of the video signal, such as:

- noticeable visual dropout (i.e. ‘snow’);
- noticeable audio dropout;
- noticeable repeated disruptions in the video RF signal;
- color loss or alteration (chrominance or luminance); or
- other degradation or distortion of the content that would impair viewing thereof.<sup>5</sup>

<sup>4</sup> See PETER Z. ADELSTEIN, *IPI MEDIA STORAGE QUICK REFERENCE 7* (2d ed., Rochester: Image Permanence Institute 2009).

<sup>5</sup> The Section 108 Study Group Report concluded that §108(c) as currently written may not clearly authorize the making of copies of at-risk works before they exhibit “detectable deterioration.” (The Section 108 Study Group Report (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> [hereinafter “108 Report”]). The 108 Report proposed an amendment to §108(c) that would permit the making of preservation copies even before such “detectable deterioration” became evident (id. at vi-vii), but that amendment is still just a proposal. Unless and until the statute is amended, the most prudent course would be to assume that a copy of a work is not “deteriorating” or “damaged” if it can still be viewed in substantially its original condition. However, libraries should bear in mind that Fair Use may serve as an additional legal basis for the preservation reformatting of works that are not yet “damaged” or “deteriorating” within the meaning of §108(c), but are at risk of becoming so. (See 17 U.S.C. §§ 107, 108(f))

Currently, there are no established standard metrics for quantifying such deterioration.

### **Storage factors**

Given their demonstrable limited lifespan, magnetic tape formats like VHS tape can be said to be “deteriorating” from the moment they are made, even without damage, but §108(c) probably does not intend the term so broadly. Based on studies employing extensive age-acceleration metrics, the International Standards Organization recommends ideal storage conditions for polyester magnetic tape, dependent on the relationship between temperature and relative humidity (RH), which should not exceed 73°F for 20% RH and should not exceed 52°F for 50% RH.<sup>6</sup> While it is recognized that circulating VHS videotape collections will only, in the most exceptional institutional situations, have historically met these recommended storage conditions, §108 likely does not conceive regular room temperature storage alone as a factor establishing deterioration.

### **Internal library condition assessments**

The purpose of §108(c) is to allow libraries to replace copies that are becoming unusable, thus, where copies are still performing as designed and intended, the statutory justification for invoking §108(c) is more difficult to assert. Therefore, to maximize the chances that §108(c) would apply, libraries may be well advised to review the holdings they seek to digitize and give priority to those likely to exhibit the greatest degree of visible or audible deterioration when played. These are the works with the strongest claim to §108(c) protection.

The process of deterioration is very context-dependent, and reviewing tapes on an item level for visible deterioration is extremely time-consuming. Accordingly, studying and quantifying how various factors (e.g., age, circulation statistics) correlate to the degree of deterioration of VHS tapes could help to establish a more systematic review process. From the perspective of protecting themselves against the unintended loss corollary to such deterioration, libraries could review holdings by prioritizing deterioration assessments based on easily determinable characteristics such as age, non-replaceability, and circulation statistics. Whatever system of review is employed (e.g. spot-checking or item-by-item review), libraries’ efforts to identify the deterioration of videotape materials prior to digitization should be fully documented as they take place.

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(4); see also CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 17 (Association of Research Libraries, Jan. 2012), available at <http://www.arl.org/pp/ppcopyright/codefairuse/>).

<sup>6</sup> See ISO 18934 IMAGING MATERIALS—MULTIPLE MEDIA ARCHIVES—STORAGE ENVIRONMENT (1st ed., Geneva: International Organization for Standardization 2006).

**PRINCIPLES:**

A work can be considered “damaged” or “deteriorating” under §108(c) if it exhibits visible and/or quantifiable deterioration of the tape or video signal that impairs viewing, such as:

- noticeable visual dropout (i.e. ‘snow’);
- noticeable audio dropout;
- noticeable repeated disruptions in the video RF signal;
- color loss or alteration (chrominance or luminance); or
- other perceivable degradation or distortion of the content

Libraries may be well advised to regularly review their holdings and determine which items exhibit the greatest degree of damage and/or deterioration according to these criteria. Age and circulation statistics may help to prioritize such a review process.

“Lost” or “stolen” are otherwise self-explanatory, however circumstances concerning “lost” or “stolen” material should be fully documented in writing.

- The SAFEST legal position on deterioration is to wait until there is perceptible loss before making the §108(c) preservation copy.

- The NEXT SAFEST legal position is to wait until such loss is imminent, as determined by a formal documented and quantifiable metric (such as dropout statistics tied to circulation statistics), but before the perceptible loss has begun.

- A LESS SAFE legal position is to make copies in advance of imminent loss, as this is not clearly supported by §108(c). In certain cases, such “preemptive preservation” may be supportable under §107, Fair Use. If relying on Fair Use, the library should conduct a separate legal analysis of the applicability of §107.

**LIMITATIONS:**

It is not a safe legal position to make preemptive copies as soon as a new, unused VHS item is acquired, because presumably there are still other unused copies available in the marketplace at that time. No matter how quickly a tape may be expected to deteriorate, libraries cannot rely on §108(c) if unused copies remain available at a fair price.<sup>7</sup>

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<sup>7</sup> Again, the library should bear in mind that §107 could provide a basis for making such a copy even if §108(c)(2) does not apply in a particular situation. (See 17 U.S.C. §107, §108(f)(4).)



**Guideline 2:****WHEN IS A FORMAT “OBSOLETE”?**

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**DESCRIPTION:**

To qualify for copying under §108(c), a work that is neither “damaged, deteriorating, lost, [nor] stolen” must be stored on a format that, “has become obsolete,” i.e., “the machine or device necessary to render [the work] perceptible” is no longer manufactured or reasonably available in the commercial marketplace.”<sup>8</sup>

Currently, no professional grade VHS players are being manufactured. However, so long as new, reasonably high quality consumer grade DVD/VHS combination players are still advertised for sale in the commercial marketplace at a reasonable cost, 108(c)’s definition of ‘obsolete’ likely will not extend to VHS. Until playback capability is only available via second-hand video tape recorders, the VHS format cannot safely be considered “obsolete” for §108(c) purposes, even though it has been thoroughly eclipsed in the marketplace by digital technology. (However, it may be argued that such players, which downgrade the higher resolution of S-VHS signals, make that format “obsolete” by these criteria.)

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8 17 U.S.C. §108(c). The concept of an “obsolete” storage medium appeared as part of the 1998 Digital Millennium Copyright Act amendments to §108. (Digital Millennium Copyright Act, H.R. 2281, 105th Cong. (1998).) The DMCA Report notes that “if the needed machine or device can only be purchased in second-hand stores, it should not be considered ‘reasonably available.’” (S. REP. NO. 105-190, at 48 (1998) [hereinafter “DMCA Report”].)

**PRINCIPLES:**

A work or format is “obsolete” when it is no longer manufactured, or new playback equipment for that format can no longer be obtained in the commercial market at a fair price.<sup>9</sup>

According to this principle:

- The following non-exhaustive list of formats can be considered obsolete:

2" Quadruplex videotape	Hi-8 videotape
1" Type A videotape	M format
1" Type B videotape	M II format
1" Type C videotape	S-VHS
all ½" open-reel videotape formats	LaserDisc
¾" U-matic videotape	wire recordings
Betamax videotape	MiniDisc
8mm videotape (aka "Video8")	

- The following non-exhaustive list of formats can be considered available:

Beta SP videotape	MiniDV
DVD	Blu-Ray
LP	

- The following non-exhaustive list of formats can be considered currently available, however soon-to-be-obsolete:

VHS  
compact audiocassette  
HD-DVD

**LIMITATIONS:**

Despite the fact that dedicated VHS players are no longer manufactured, VHS likely does not qualify as “obsolete” within the meaning of §108(c) so long as combination DVD/VHS players are advertised for sale in the commercial marketplace. It is important to note that VHS’ qualification as not “obsolete” under this logic is very likely to become null in the near future, further broadening the potential for invocation of §108(c) to make replacement copies.

<sup>9</sup> NB: For brevity’s sake and other reasons, discussion of film format obsolescence is not included here.

## Guideline 3

**WHAT CONSTITUTES A “REPLACEMENT”?****DESCRIPTION:**

Under §108(c) a suitable “replacement” is a copy that can serve the same educational and scholarly purposes as the original, meaning it contains materially the same content and is equally easy for patrons to access and use.<sup>10</sup> Before libraries engage in any reproduction reformatting copying under §108(c), they must first determine that such a suitable and “unused replacement cannot be obtained at a fair price.” Media and technology format shifts, unauthorized copies, and versioning, all prompt the need for clarification as to which new, unused copies available for purchase in the marketplace can be deemed eligible as a “replacement.”

**Duplication vs. replication in DVD replacement copies**

A standard DVD containing the same content as an original VHS would almost certainly qualify as a replacement for that VHS tape, no matter whether the DVD was mass-produced and distributed, or burned on-demand by a distributor or other rights holder.

**Region-restriction in DVD replacement copies**

Region-restricted DVDs that cannot be played on the library’s standard equipment without circumventing access controls, however, would not likely be deemed a replacement. Libraries run less legal risk by copying their existing VHS under §108(c) – assuming its other requirements were satisfied – than by purchasing a restricted DVD that would necessitate circumventing an access control in order to reproduce it. Libraries may well determine that, in order to avoid violating circumvention prohibitions set forth in the DMCA, DVDs with region-restrictions do not qualify as replacements.

The important issue is the degree to which a particular region-restricted copy poses a meaningful obstacle to a library’s ability to make effective use of such a copy. Presumably, many region-restricted copies can be played without difficulty on compatible players, computer DVD-ROM drives, and other “relatively inexpensive options” available to the library.<sup>11</sup> To the extent they cannot, however, such options are unlikely to qualify as “replacements” for libraries’ existing copies.

10 Although the text of §108(c) does not explicitly define the term, “replacement,” from the context it is clear that the “replacement” copy contemplated by Congress one that can serve the same educational and scholarly purposes as the lost, stolen, or deteriorating original. (See S. REP. NO. 105-190 (1998); H.R. REP. NO. 105-796 (1998).) It is unclear whether any licensed on-line delivery of a title is fully a ‘replacement’ for a tangible copy; inter alia, such on-line delivery is not subject to the first-sale doctrine under §109(a). However, the references to ‘replacement copy’ throughout this document should not be read to exclude the possibility of on-line delivery serving as a ‘replacement’ under §108(c).

11 MARYBETH PETERS, RECOMMENDATION OF THE REGISTER OF COPYRIGHTS IN RM 2002-4, October 27, 2003.

### Replacement copies not “lawfully made”

Copies sold by third parties that are not lawfully made (whether ‘pirated’ or otherwise unlicensed or unauthorized<sup>12</sup>) cannot be lawfully loaned out or otherwise distributed by libraries.<sup>13</sup> Therefore, although it is not an infringement for a library to purchase copies not lawfully-made, these copies do not fulfill the libraries’ purposes of serving its patrons and are less preferable as a “replacement” than a library-made §108(c) reproduction copy.

### Subscription or rental services offering online replacement copies

Other questionable “replacements” might include online access to films, e.g. via subscription databases or transaction-based rentals. Because these forms of access do not necessarily provide libraries with a functional “replacement” for a hard copy of the original work, and because a long-term reliance on subscription or rental access might also run afoul of the “fair price” condition in §108(c), the mere availability of such services is not likely to qualify as an adequate “replacement” under §108(c). Replacement copies must meet the perpetual access needs of institutions, and vendors offering online subscription-style replacements must be willing to sell, or perpetually license, such replacements to an institution or library.

### Core attributes essential to the original copy, unavailable in replacement copies

A copy of a different version of the work may or may not qualify as a proper “replacement” of a library VHS, depending on the degree to which it could serve the same scholarly or educational purpose as the original. One example concerns the issue of ‘pan and scan’ materials on VHS: new, commercially-available editions of that same content are not in the pan-and-scan format, and thus would not be suitable replacements for film scholars who specifically wished to analyze vintage pan-and-scan techniques. If the materials are truly used for that purpose, and not simply for studying the general contents of the underlying film, a §108(c) copy of the pan-and-scan version should be permissible. Another example concerns authorial revision of the original work, in subsequent commercially-available editions (e.g. the addition of CGI content to George Lucas’ *Star Wars*, the digital removal of guns in scenes of Steven Spielberg’s *E.T.*, and, the ubiquitous ‘Director’s Cut’). Repeated versioning of a work under the auspices of ‘restoration’ (removing flicker, adjusting colors and saturation, and modifying soundtracks—all common in re-releases) provides a third example of alteration to the original work which may privilege §108(c) reproduction of the original copy over

<sup>12</sup> Under the recent ruling of *Omega S.A. v. Costco Wholesale Corporation* (541 F.3d 982 (9th Cir. 2008), aff’d, 131 S. Ct. 565 (2010)), foreign-made copies would not be considered “lawfully made under this title” within the meaning of 17 U.S.C. §109(a). To the extent that this would impair a library’s ability to circulate or otherwise distribute such copies, they likewise would be unlikely to qualify as suitable replacements under §108(c).

<sup>13</sup> See 17 U.S.C. §109(a).

purchase of different subsequent versions available in the marketplace. In such instances, only a copy made under §108(c) can represent the work in its original form.

### **Using third party copies to create a copy under §108(c)**

Reproduction copies of “lost” or “stolen” works under §108(c) can be created through borrowing those belonging to another institution or individual.<sup>14</sup>

Additionally, although a third party copy that is not lawfully-made cannot itself be legally loaned or circulated, this does not preclude the possibility that libraries could use said copy as a source to make a legitimate reproduction under §108(c), provided the other statutory conditions are met. This second copy, when created, would properly be deemed “lawfully made under this title” (because §108(c) authorizes it) and could therefore be distributed, even if the source copy could not be.

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14 The relationship between §108(c) reproductions, on the one hand, and copies made and distributed through interlibrary loan (“ILL”) procedures under §108(g)(2), on the other hand, is not explicitly spelled out in the statute, but the text and structure of §108 appear to authorize the making of §108(c) copies from items borrowed under ILL. Section 108(g) (2) says that reproducing copyrighted works for purposes of ILL is permissible if it does not have as its “purpose or effect, that the library or archives receiving such [ILL] copies for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.” Section 108(c), of course, only becomes applicable once it has been determined that no subscription to or purchase of the subject work is available in the marketplace at a fair price. Therefore, a legitimate §108(c) copy could never violate the limitations on ILL transactions because such a copy would never be a “substitute” for subscription or purchase. It should be noted, however, that the library seeking to invoke §108(c) can only do so to “replace” endangered materials, so such materials must either be, or have once been, in the copying library’s collection. In other words, a library could not safely borrow an item through ILL and copy it under §108(c) if that library had never owned its own copy of that item.

**PRINCIPLES:**

A replacement copy must be new, and unused. Used copies do not qualify as replacement copies under §108(c).

It can be ascertained from §108(c) that a replacement is a copy of a work that serves the same educational and scholarly purposes as the “damaged, deteriorating, lost or stolen” original, if:

- Said replacement copy contains the same content; and,
- Said replacement copy is equally accessible for use.

Notwithstanding,

- If region-restriction encryption on replacement copies purchased in the marketplace pose playback operability problems with extant library equipment, and required deciphering playback equipment is not “relatively inexpensive,” copying under §108(c) is a preferred practice to purchasing encrypted replacement copies.

- If there is any question as to the legality or provenance regarding a replacement copy, a library should prefer to make a copy of the original work under §108(c) rather than circulate a copy potentially not lawfully-made.

- Replacement copies of a work containing altered content modifications shall not be seen as preferred replacements, when compared to a copy of the original copy of a work under §108(c).

- Subscription or rental-based services offering online replacement copies for a term-period shall not be seen as preferred replacements, when compared to a copy of the original copy of a work under §108(c).

- Online replacements of a work sold without a perpetual license for access to that work, should not be seen as an available replacement.

**LIMITATIONS:**

Not applicable.

**Guideline 4**

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**CAN REPLACEMENT COPIES MADE UNDER §108(c) BE DIGITAL?****DESCRIPTION:**

§108(c) specifically provides for the making of digital copies of at-risk works, albeit limiting their public distribution.<sup>15</sup>

**PRINCIPLES:**

Copies of a work made under §108(c) may be either analog or digital.

**LIMITATIONS:**

§108(c) limits the public distribution of digital copies as discussed in Guideline 5, below.

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<sup>15</sup> This provision was added to the law in 1998 as part of the Digital Millennium Copyright Act, which the enacting Congress intended to allow libraries and archives “to take advantage of digital technologies when engaging in specified preservation activities.” (DMCA Report at 47-48 (amended §108(c) “permits such copies to be made in digital as well as analog formats”).) Prior to the 1998 amendment, §108(c) had only allowed for copies in “facsimile form.”

## Guideline 5

# CAN REPLACEMENT COPIES MADE UNDER §108(c) BE CIRCULATED?

### DESCRIPTION:

#### Distribution of copies made under §108(c)

The current text of §108(c) contemplates that copies made under its authority may be circulated to the same extent that the original materials were, unless those copies are in digital format.<sup>16</sup> Digital copies may not be “made available to the public in that format outside the premises of the library” lawfully holding them. This does not mean, however, that a digital §108(c) copy cannot be made available to a faculty member or other designated patron for off-premises use, such as personal study or classroom viewing.

#### Making §108(c) available to the “public”

The statute prohibits making such copies available “to the public,” but copyright law has never provided that any and all gatherings of persons are “the public.”<sup>17</sup>

16 The explicit text of §108(c) only governs the “right of reproduction” under §108, unlike other subsections of §108 which reach both “reproduction and distribution” by libraries. (See 17 U.S.C. §§ 108(b), (d), (e)). Further, although the term “distribute” is not defined in the Copyright Act, at least one Circuit court has held that merely including a work in a library’s collection and offering it to the public constitutes “distribution.” (See *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997)) (“proving the libraries held unauthorized copies in their collections, where they were available to the public, is sufficient to establish distribution within the meaning of the statute.”) However, in light of language elsewhere in subsection §108(c), it does not seem that §108(c) exists solely to make safety copies of works for the library’s own internal purposes. Most significantly, §108(c)(2) places a restriction on the circulation of digital copies to the public “outside the premises of the library or archives,” which would be superfluous if all patron access were forbidden under an expansive *Hotaling*-like reading of “distribution.” Further, the text also speaks of the permitted copies being “duplicated solely for the purpose of replacement” of an unusable copy, if a “replacement” cannot be commercially obtained, indicating that the purpose of the subsection is to allow libraries to replace copies in their collections. If the copy being replaced was a circulating copy, the newly-made replacement for that copy should logically be a circulating copy as well, limited only by the express language of §108(c)(2), i.e., that digital replacement copies cannot be made accessible to the public beyond the premises of the library lawfully holding such digital copies.

17 The issue has arisen most often in connection with determining whether a particular circulation of a work was sufficiently unrestricted to amount to a “general publication,” because under pre-Berne copyright law, such circulation of such a work without proper copyright notice could throw the work into the public domain. Where the audience having access to a work comprises a limited group, the courts have considered whether the author imposed implied or express restrictions as to the identity of the group or the purpose for those within the group could use the material at issue. Where there are no such restrictions, the work is a “general publication.” (See *Acad. of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d 1446 (9th Cir. 1991) (“general publication occurs when a work is made available to members of the public regardless of who they are or what



Therefore, though some may argue otherwise, §108(c) should not be read as a total ban on off-premises use of digital copies—instead, just a ban on making such copies available “to the public” off-premises. For example, students in a class, watching a digital §108(c) copy of a film their professor obtained from the library, would not likely be considered “the public” for statutory purposes, nor would the showing of the film be considered a “making available” of that digital copy to anyone, let alone the “public.”<sup>18</sup>

they will do with it”). Where the group is found to have been restricted as to identity and purpose, however, the publication is said to be “limited” and does not vitiate the copyright.

In the 1976 Act, Congress defined the “public” as “a substantial number of persons outside of a normal circle of a family and its social acquaintances,” (see 17 U.S.C. §101 (definition of “publicly”)) who are under no implied or express restriction with respect to disclosure of the work. (H.R. Rep. 94-1476, 94th Cong. 2d Sess. 138 (1976).) The question is always one of the actual circumstances under which the work was distributed — to whom and for what purpose. Certainly it would be difficult to argue that all patrons of the library fall within the charmed, non-public “normal circle,” because §108 itself requires that the library be “open to the public” in order to invoke the statutory protections at all. But some subset of the total patron population could qualify as such a restricted group, and as to that group the library could make digital copies of works available off-premises without violating §108(c). The legislative history of the Copyright Act offers perhaps the only significant elaboration on the statutory term “public” when it states that “routine meetings of businesses and governmental personnel would be excluded because they do not represent the gathering of a ‘substantial number of persons.’” (H.R. Rep. No. 1476, 94th Cong. 2d Sess. at 64.) *Cellco Partnership d/b/a Verizon Wireless* (663 F. Supp. 2d 363 (S.D.N.Y. 2009)) adds some discussion of what constitutes a “normal circle,” but does not offer a precise numerical definition. (See *id.* at 374-75.) This ruling dealt with whether the sounding of a cell phone ringtone when a user receives a call is a “public” performance of the music in that ringtone, and essentially found that the number of family and acquaintances who could hear one’s cell phone ring under ordinary conditions would be a “normal circle” — as a pragmatic matter, this may be comparable to the “business meeting” example given in the legislative history. The court explicitly “assumes without deciding” that a user’s playing of a ringtone outside of a “normal circle” would be a performance to the public. (*Id.* at 378 n. 23.)

Nimmer similarly proposes that the “normal circle of a family” language in §101 should be read to include “invited guests” among the permissible audience for a non-public performance or display. (DAVID NIMMER, *NIMMER ON COPYRIGHT* §8.14[C].) These remarks from the enacting Congress and the leading copyright treatise are clearly helpful, but beyond these general principles, the law offers no specific guidance.

Under the 1909 Act, it was held that a classroom full of students could be sufficiently large and unrestricted to constitute the “public,” for purposes of performances and displays. (*Encyclopedia v. Crooks*, 558 F. Supp. 1247 (W.D.N.Y. 1983).) This conclusion is probably consistent with the current Act, in light of the recent amendments to §110 in the TEACH Act, which restricts the performances and displays an “accredited nonprofit educational institution” may transmit as part of its “systematic mediated instructional activities.” (See 17 U.S.C. §110(2).) Obviously, if any transmission to the students of a class were always non-“public” by definition, there would be no need for the limited TEACH Act exemptions.

18 See *Bantley v. Northwood School of Taxidermy* (No. 00-236J (W.D. Pa. Nov. 7, 2002) (slip op.)) (students in a class may be sufficiently limited such that they are not the “public”). In *Bantley*, the court found no general publication of a taxidermy school manual because the work was not made public without restrictions as to the identity of the recipients or to the permissible uses of the work. The plaintiff had distributed the manual to 106 students over the course of nine years and had not offered the manual for sale to the public. Students were told that the manual could not be reproduced or distributed for sale.

Off-premises uses of digital copies may in some cases also be supportable under a separate analysis of fair use undertaken by the library.

The smaller the number of faculty members and other designated parties with off-premises clearance, and the more tightly restricted such users are as to the purpose for which they may use the digital copies, the safer is the library's position. Such limitations and restrictions should be set forth in writing and consistently applied by library personnel. The library's risk would increase to the extent that personnel from other institutions were permitted to make off-premises use of the library's digital copies. Such non-institutional users could in theory be part of a sufficiently restricted group, but the larger and broader the group, the more likely it is to be considered "public."

To be clear, the above analysis of "making available" relates only to §108(c) (3) and libraries' right under that section to make a tangible digital copy available off-premises.<sup>19</sup> The statute does not speak in terms of making a work available by download or streaming.

Moreover, because the new copies are to be "replacement" copies, the original circulating materials should perhaps be withdrawn from circulation after the §108(c) copies are made, so that libraries' total number of circulating copies does not increase.<sup>20</sup>

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Furthermore, the enrollment form that students were required to sign notified them that trade secrets would be disclosed during the course. Thus, the circulation of the work was not held to be "to the public."

The facts would be even more favorable to libraries under this scenario than they were in *Bantley*, because no hard copies are being "made available" to students at all. The professor takes the copy off-premises, but neither s/he nor the library "make it available." The professor's showing of the film would still presumably have to qualify as an exempt performance under §110, or as fair use under §107, but the library would not run afoul of §108(c) by allowing a digital copy to be used for such a non-public, off-premises purpose.

19 See §108(c)(3), requiring that, "any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy." The statutory focus on physical copies is further evident in the provision limiting the number of copies that may be made, and in the reference to the physical premises of the institution. Under certain circumstances, an off-premises stream or download might constitute a fair use or fall within §110(2), but it would not fall comfortably within §108(c).

20 See NIMMER ON COPYRIGHT, §8.03[E][1]. Otherwise, the net effect of the reproductions would be not merely to preserve the library's collection, but actually to enlarge it, without compensation to the copyright owner. It would therefore be safer for the library to retire or destroy its old, deteriorating copies once replacement copies have been made. If there are elements of the work that are not accurately captured by the new copy, storage of the original copy in a controlled environment designed to slow deterioration would be easy to justify as a fair use, if indeed it even violated any of the copyright holder's rights under §106.

**PRINCIPLES:**

If the work being replaced by the creation of a §108(c) copy is originally a circulating copy, then the replacement for that copy should be a circulating copy as well.

Analog copies may be circulated to the same extent as original materials.

Digital copies may be circulated insofar as circulation does not involve making the digital copy available to the public outside the premises of the library.

**LIMITATIONS:**

§108(c) does not provide for making digital copies available electronically, such as by downloading or streaming. A library may conduct a separate analysis to determine whether electronic distribution may be authorized under §107 in certain cases. By definition, there is no functioning market for purchasing a 108(c) title, and given the centrality of the market harm analysis in fair use, a finding of fair use could be entirely consistent with existing case law. The non-profit, educational, scholarly and research purposes of any such use would further strengthen the argument in favor of fair use, under 107(1), as would the use of a portion of the work reasonably necessary to the scholarly or research purpose, under 107(3); this could be the entire work, if the entire work were the subject of commentary and study. Moreover, all else being equal, fair use would be more readily found for factual works than for more creative works, under 107(2). Because fair use is so highly fact-specific it is difficult to generalize beyond these broad outlines, but current law certainly would not preclude a finding of fair use in a case involving electronic distribution of 108(c) copies, particularly in a closed, access-controlled environment. Congress recognized film preservation as a paradigm case of fair use in the legislative history of the Copyright Act, and the public benefit of preserving films would be lost if the films, once preserved, could not be made accessible to scholars and researchers.<sup>21</sup>

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21 See H.R. Rep. 94-1476 at 73, under the heading “Reproduction and uses for other purposes,” which states:

“A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. Aside from the deplorable fact that in a great many cases the only existing copy of a film has been deliberately destroyed, those that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of ‘fair use.’”

## Guideline 6

# IN LOCATING A REPLACEMENT COPY, WHAT QUALIFIES AS “REASONABLE EFFORT”?

### DESCRIPTION:

The text of §108(c) does not offer any guidance as to the terms “reasonable effort,” although it is at least clear that the replacement copy must be “unused.”<sup>22</sup> The legislative history of the 1976 Copyright Act recognized that, “[t]he scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.”<sup>23</sup>

### Replacement searching

To comply with Congressional intent under §108(c), libraries should ideally take all of the following steps:

- Consult “commonly-known trade sources in the United States,” which may include Amazon.com, IMDB and internet search engines, such as Google; consult the records of the Copyright Office to determine if the author’s address is listed in the registration certificate for the work (assuming the work was registered);<sup>24</sup>
- Consult the “publisher” (which would be the distributor, in the case of a commercially-produced audiovisual work).

Regardless of whether the work is registered with the Copyright Office, the library should contact the author and publisher/distributor, if they can be found, even in cases where neither party is technically the copyright holder.<sup>25</sup>

<sup>22</sup> See DMCA Report at 48 (statute should “not result in the suppression of ongoing commercial offerings of works in still usable formats”).

<sup>23</sup> H. Rep. 94-1476, 94th Cong., 2d Sess.

<sup>24</sup> The records of the Copyright Office can be checked on-line ([www.copyright.gov](http://www.copyright.gov)) for all works registered on or after Jan. 1, 1978. Because VHS tape was not introduced to consumers until late 1976, registration details for the vast majority of born-VHS titles would be accessible on-line. For VHS tapes that are themselves copies of older, pre-VHS content (such as films or TV programs), a manual check of Copyright Office records would be necessary, at least until the Copyright Office completes digitizing and posting all its earlier registration records. Such checking would likely be cost-prohibitive, and would arguably be more effort than a “reasonable” search would require under the circumstances. It could be extremely useful for the Library to keep careful track of all its efforts to contact copyright owners, both for pre- and post-1978 works, to determine how often or seldom copyright owners are actually able to lead the library to an unused copy of the work at issue. If the answer is effectively “never,” this could be useful evidence for a court to consider if the issue were ever to arise in litigation.

Also, bear in mind that when the above-quoted legislative history was written in 1976, researchers did not have recourse to the Internet. Today, a court would certainly expect a thorough Internet search to be part of the examination of “commonly-known trade sources” which Congress did prescribe.

When a particular defunct distributor or producer accounts for a large number of titles, additional investigation into the fate of that distributor (such as checking corporate filings with the Secretary of State in the relevant state) might well be warranted.

### **Documenting replacement research**

The library’s efforts to locate the copyright owner and/or obtain a replacement copy should be fully documented as they are taking place. Each call, letter or email should be logged, as well as a list of the sources consulted. This information can and should be shared with other Libraries to avoid unnecessary duplication of effort, but under the statute the duty of “reasonable effort” remains with the library making the §108(c) copy. Therefore, the library should satisfy itself that reliance on another institution’s information is “reasonable” under the circumstances, which could entail a review of the other institution’s documentation of the efforts it took to locate a replacement copy, or at least a review of the other institution’s overall process for doing so, if a record-by-record review proves too burdensome to be “reasonable.”

It is important to bear in mind that the term “reasonable” means different things in different circumstances. A library is not a Hollywood studio seeking re-make rights in an old property; it is simply trying to determine whether an unused copy, in a suitable “replacement” format, is available in the marketplace at a fair price.

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25 See NIMMER at 8.03[E][1], n.63.3, n.63.4. These suggestions seem to be in keeping with the spirit of the provision, which is to determine whether a reasonable means exists for obtaining a replacement for a deteriorating work. Congress has broadly determined that such means should be tried first, and only if they are unavailing should a library make §108(c) copies.

**PRINCIPLES:**

“Reasonable efforts” in obtaining replacement copies will differ between institutions and be subject to their resources.

Attempts to inquire about purchasing new, unused, replacement copies should involve both a query of commonly-known trade sources for audiovisual material, and a query of the work’s original distributor. Online research through library community list-servs such as Video-Lib should also comprise such replacement research.

Libraries should document their research in searching for replacements (e.g. sources consulted, time spent, results garnered).

**LIMITATIONS:**

Not applicable.

**ENHANCEMENTS:**

Inter-library sharing of availability information for audiovisual works would be of invaluable assistance, given limited resources.

The SAFEST position would be to include the Copyright Office records that cannot be searched electronically (i.e., pre-1978 registrations).

**Guideline 7**

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**IN LOCATING A REPLACEMENT COPY, WHAT QUALIFIES AS A “FAIR PRICE”?****DESCRIPTION:**

The legislative history for §108(c) does not express a view on this question. Because the copy is to be “unused” however, the price should presumably be something at or near the retail price of the work when new. Publications such as the *Media Review Digest* may prove valuable resources for researching original pricing. Any additional collector’s-item value that the work may have accrued by reason of its scarcity should not necessarily be deemed “fair” just because there is a market participant willing to pay it.<sup>26</sup> The copyright owner, of course, derives no benefit from an after-market sale at an inflated price.

As with deterioration details and the availability of replacements, the library’s efforts to identify a “fair” price at which a replacement item can be obtained should be fully and contemporaneously documented.

**PRINCIPLES:**

An unused replacement copy should presumably be at or near the retail price of the work when new.

**LIMITATIONS:**

Not applicable.

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<sup>26</sup> See NIMMER at §8.03[E][1]. The policy behind §108(c) is to “strike the appropriate balance, permitting the use of digital technology by libraries and archives while guarding against the potential harm to the copyright owner’s market,” 1998 DMCA Report, at 48.

**Guideline 8****ADDITIONAL CONSIDERATIONS AND ‘BEST PRACTICES’**

In addition to the statutory interpretation issues discussed above, libraries may wish to consider implementing some or all of the “best practices” identified by the Section 108 Working Group in connection with its proposed statutory amendment regarding “pro-active” preservation copying.<sup>27</sup> These best practices primarily concern the storage of the material once it has been digitized. They are consistent with the broad purpose of §108 insofar as they ensure that the digitized copies will be accessible to patrons going forward, and that they will not proliferate in a way that could unduly impair the copyright holder’s market. As identified by the Study Group, they are:

- (a) A robust storage system with backup and recovery services;
- (b) A standard means of verifying the integrity of incoming and outgoing files, and for continuing integrity checks;
- (c) The ability to assess and record the format, provenance, intellectual property rights, and other significant properties of the information to be preserved;
- (d) Unique and persistent naming of information objects so that they can be easily identified and located;
- (e) A standard security apparatus to control authorized access to the preservation copies; and,
- (f) The ability to store digital files in formats that can be easily transferred and used should the library or archives of record need to change.

The Study Group further recommends that the preservation efforts of a library or archives be transparent, adequately funded, and the subject of a succession plan for the preservation copies, in the event that the duplicating library ceases to exist or can no longer adequately manage its collections.

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<sup>27</sup> Section 108 Report at 69-70.







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NEW YORK UNIVERSITY  
LIBRARIES



TAPE RECORDING TIME

SP	2 HOURS
LP	4 HOURS
EP	6 HOURS



**VHS**

MADE IN USA