Copyright and Video in Libraries

Preserving VHS content for the future

Sarah E. McCleskey
Head of Access Services
Hofstra University Library
sarah.e.mccleskey@hofstra.edu
Does anyone still use VHS?

- VHS holdings of most academic libraries still give DVD holdings a run for their money in terms of size and usage.
Not available at any price

- When VHS content can be replaced with a DVD, (or perhaps in the future another usable, non-obsolete, non-deteriorating, physical* format), everything is cool (at least in terms of copyright).

- What can a library do when that VHS content is unavailable for replacement in the commercial marketplace?

- Example from Hofstra: VHS with highest usage over past 10 years: “Anthropology on Trial” with 67 circs since 2007. It was acquired in 1989 … How many uses did it have between then and 2006?

* Do you think the availability of a streaming file counts? We should discuss!
17 U.S. Code § 108 - Limitations on exclusive rights: Reproduction by libraries and archives

- Non-profit libraries and archives may duplicate content that is lost, damaged, stolen, deteriorating, or in an obsolete format.
- A reasonable search must be conducted to determine that an unused copy of the title is not available at a fair price.
- Lost, damaged, stolen ... it’s pretty clear what those terms mean.

But what about those other two ... ???
Obsolete? What does that even mean?

- § 108 (c) qualifier: “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.”

- Look what I found on amazon for $99.99:

Funai Corp. DV220FX5 Dual Deck DVD and VHS Player

But note: It’s unlikely that companies will continue manufacturing these machines forever. Who knows how long they will continue? They could cease manufacture in 5 years ... or tomorrow!
Next up: Deteriorating?

In 2013, Walter Forsberg wrote in his somewhat epic blog post A Declaration of VHS Independence, “it is near-incontrovertible that VHS tapes are deteriorating from the perspective of human-perceptible visual and audio quality and ... from those perspectives when assessed using laboratory-measurable original manufacturer quality control metrics such as dropout counts, signal-to-noise ratios, and frequency response.” Media Preservation blog, Indiana University Bloomington.


Section §108 says that you must conduct a reasonable search to determine that an unused copy of the title is not available at a fair price.*

Common elements of a reasonable search:
- Original distributor’s website (and contacting original distributor about status)
- Worldcat (looking for evidence of a DVD release, copyright owner, distributor)
- Online retail sites (amazon.com, amazon.co.uk, moviesunlimited.com, etc.)
- Google/search engine of your choice (title, director’s name, distributor, etc.)
- VideoLib (film/video professional listserv)

*What exactly is a “copy?” Does a different edited version count? What about a new restoration, or a CGI-revamped director’s cut? If you’re interested in trying to figure out what a “copy” means, go down the internet rabbit hole searching for the original, unaltered version of Star Wars from 1977!
Investigating your § 108 preservation decision (if you’re really, really into it!)

- IMDB.com for key names; IMDBpro for production companies and distributor contact information
- For Public Television productions, original PBS station may have information
- Auction sites (ebay.com) for evidence of a DVD release (beware of bootlegs)
- Business search through original distributor’s Secretary of State website (for example, http://kepler.sos.ca.gov/) for contact information and to see if the business is still, well, in business …
- NEW! Try the Section 108 Due Diligence Project. Did you see deg farrelly’s poster session about it yesterday??
Keeping Up With The Kar Documentation

- I recommend using a handy fillable PDF created by Chris Lewis (American University). Email me if you want a blank copy.
Best Practices for Cataloging a § 108 copy

- Document in the OCLC and local catalog record. This assists others who are investigating and documenting a § 108 decision.
- This example offers clues but does not explicitly state that a § 108 copy was made:

  University, Miss. : University of Mississippi Media Production Services [publisher]

  DVD transfer from ¾ inch videocassette
Recorded in August, 2010 for archival purposes in compliance with section 108 of the U.S. Copyright Act.
Originally issued as a videocassette in 1970. Recorded as a DVD in March 2014 for archival purposes in compliance with section 108 of the U.S. Copyright Act.
VHS to DVD transfer. / Originally published by New Day Films on VHS in 1986. / Preservation copy of out of release and deteriorating videotape made under protection of Section 108 C of the U.S. Copyright.  This item is restricted from use by the public outside of the library.
§ 108: The fine print*

*or, what did “restricted from use by the public outside of the library” mean???

- § 108 (c)(2) says that any such copy that is reproduced in digital format may not be made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.*

- Is this open to interpretation? Who is “the public?” What are the “premises?”

- In May 2005, the Copyright Office convened a §108 Study Group to make recommendations to the Librarian of Congress for possible alterations to § 108 that would reflect current technologies.

- In March 2008, the §108 Study Group recommended (among other things) that “The prohibition on off-site lending of digital replacement copies should be modified so that if the library’s or archives’ original copy of a work ... can lawfully be lent off-site, then it may also lend for off-site use any replacement copy reproduced in the same or equivalent physical digital medium.”

*that part about the “public” and the “premises” was added in 1998 as part of the DMCA.
The upshot?

- In about 2011, the Register of Copyrights “prioritized” resolving issues related to § 108. (See Priorities and Special Projects 2011-2013).
- On its “Revising § 108” web page (last updated in February, 2013) the Copyright Office outlined plans to formulate a discussion document and preliminary recommendations on amending § 108. They stated that “the Office will engage with stakeholders through a variety of meetings and public discussions.”
- NEW! Copyright office notice published in Federal Register today calling for input on a revision of 108. As Kenny Crews said, “This is gonna be good!”

Best Practices for Making a § 108 copy available for use ... relying on § 107!!

- § 107 outlines the “fair use” doctrine.
- This document was devised specifically by and for the academic and research library community, and it enhances the ability of librarians to rely on fair use by documenting the considered views of the library community about best practices.
- Professor Peter Jaszi (American University Washington College of Law), one of the co-facilitators of this document, has said “The flexibility of fair use can lead users to wish for clearer rules or brighter lines. But the flexibility of fair use is its strength.” "Fair Use Today," Code of Best Practices in Fair Use for the Visual Arts, College Art Association, 2015, p. 14).
The Code of Best Practices addresses preservation and access

- **PRINCIPLE**
  - It is fair use to make digital copies of collection items that are likely to deteriorate, or that exist only in difficult-to-access formats, for purposes of preservation, and to make those copies available as surrogates for fragile or otherwise inaccessible materials.

- **LIMITATION**
  - Libraries should not provide access to or circulate original and preservation copies simultaneously.
  - Off-premises access to preservation copies circulated as substitutes for original copies should be limited to authenticated members of a library’s patron community, e.g., students, faculty, staff, affiliated scholars, and other accredited users.

(Above are excerpts from the Code, p. 18.)
Wrapping it all up with some more questions!

- What about making that § 108 content available via a streaming server?
  - What does the TEACH Act say about that? What about fair use?
- Would you lend that § 108 copy through Interlibrary Loan?
- Do you have a mechanism in place for a rights holder to contact your library if/when that § 108 content becomes commercially available?
- How will you prioritize content for § 108 preservation?
- How will you pay for the preservation copying?
- Can you outsource digitization to a commercial company once you’ve made the § 108 decision?
- Other questions??
Thank you!