

This is a Word document that allows users to type into the spaces below. The comment may be single-spaced, but should be in at least 12-point type. The italicized instructions on this template may be deleted.

UNITED STATES COPYRIGHT OFFICE



Long Comment Regarding a Proposed Exemption Under 17 U.S.C. § 1201

Please submit a separate comment for each proposed class.

NOTE: This form must be used in all three rounds of comments by all commenters not submitting short-form comments directly through regulations.gov, whether the commenter is supporting, opposing, or merely providing pertinent information about a proposed exemption.

When commenting on a proposed expansion to an existing exemption, you should focus your comments only on those issues relevant to the proposed expansion.

[] Check here if multimedia evidence is being provided in connection with this comment

Commenters can provide relevant multimedia evidence to support their arguments. Please note that such evidence must be separately submitted in conformity with the Office’s instructions for submitting multimedia evidence, available on the Copyright Office website at <https://www.copyright.gov/1201/2021>.

ITEM A. COMMENTER INFORMATION

Library Copyright Alliance
Jonathan Band, Counsel
21 Dupont Circle, Suite 800
Washington, DC 20006
301-770-0822
jband@policybandwidth.com

ITEM B. PROPOSED CLASS ADDRESSED

Proposed Class 5: Audiovisual Works—Preservation

Reply of the Library Copyright Alliance to Oppositions to Proposed Class 5 Petition

In its Class 5 petition, the Library Copyright Alliance (“LCA”) requested an exemption to permit libraries, archives, and museums to circumvent the technological protections measures on DVDs and Blu-ray discs for the preservation of motion pictures stored on those media. LCA took great care to bifurcate its petition. It stated that the discussion in its Class 5 long comments focused on an exemption for on-premises uses of the preserved copies, as in 17 U.S.C. §§ 108(b) and (c) and the existing video game and software preservation exemptions. It noted, however, that the petitions for Proposed Classes 14a and 14b sought expansion of the videogame and software exemptions to off-premises uses. LCA requested that if the Register were to

Privacy Act Advisory Statement: Required by the Privacy Act of 1974 (P.L. 93-579)
The authority for requesting this information is 17 U.S.C. §§ 1201(a)(1) and 705. Furnishing the requested information is voluntary. The principal use of the requested information is publication on the Copyright Office Web site and use by Copyright Office staff for purposes of the rulemaking proceeding conducted under 17 U.S.C. § 1201(a)(1). NOTE: No other advisory statement will be given in connection with this submission. Please keep this statement and refer to it if we communicate with you regarding this submission.

recommend the granting of the petitions for Proposed Classes 14a and 14b, the motion picture preservation exemption should also be expanded to include off-premises uses, particularly for educational uses.

LCA devoted a sum total of two sentences in its comments to off-premises uses. Nonetheless, the oppositions of both the Joint Creators and Copyright Owners (“JCCO”) and the DVD Copy Control Association and the Advanced Access Content System Licensing Administrator (“CCA”) primarily challenged off-premises access. JCCO “read[] between the lines” that LCA sought an exemption to engage in “space shifting and format shifting by large institutions in the name of individual consumers, most of whom just want to watch movies and TV shows.” JCCO Opposition at 6. For its part, CCA described LCA’s petition as “overreaching in the latest effort in the on-going dialogue between rightsholders and libraries over server copies.” CCA Opposition at 2.

To the contrary, LCA’s petition is simply intended to promote the preservation of motion pictures for use by scholars and students. These students include the next generation of filmmakers. Rather than cast aspersions and discern secret motives, JCCO and CCA should applaud our efforts to preserve for posterity the creations of the people they represent.

In this reply, LCA once again will focus on on-premises uses. But first, two quick comments concerning off-premises access. First, many library buildings have now been closed for almost twelve months due to the COVID-19 pandemic. Important research has been interrupted because of the inaccessibility of motion pictures. Second, off-premises access could be afforded to authorized students and researchers without the motion pictures being available to the general public for entertainment purposes. Thus, libraries could provide off-premises access to preserved motion pictures without harming streaming services.

JCCO indicated that it could accept a motion picture preservation exemption that “included all the limitations that are present in Section 108 and other Section 1201 exemptions related to preservation.” JCCO Opposition at 2.¹ Given this important acknowledgement, the central question now is how frame the motion picture preservation exemption relative to the software exemption and section 108.

Preventative Preservation

JCCO asserted that “preventative preservation” should not be allowed. Significantly, the software exemption does allow preventative preservation. The software exemption applies to the “lawful preservation of a computer program,” *i.e.*, whatever is permitted under section 107 or

¹ Likewise, CCA viewed as “reasonable” a petition that was focused on circumventing “certain titles of motion pictures that would qualify for a Section 108 replacement copy if proponents demonstrated that the titles they were seeking to preserve were indeed distributed on CSS-protected DVDs....” CCA Opposition at 22-23.

108. The software exemption is not limited to copies that are “damaged, deteriorating, lost, or stolen;” nor should the proposed motion picture exemption.

JCCO stated that the Copyright Office “strayed a bit from Section 108 in 2015 and again in 2018” when it concluded that some preservation activities were likely fair uses under section 107. Presumably that “straying” included preventative preservation for copies not yet damaged, deteriorating, lost, or stolen. JCCO did not provide a policy reason why a motion picture exemption should not allow preventative preservation. Obviously, the objective of preservation is better achieved if the preservation occurs before the copy of the motion picture is damaged or deteriorating. Data lost to disc rot cannot be retrieved. 17 U.S.C. § 108(c) seems to contemplate a library reproducing a copy borrowed from another library once its own copy is damaged or lost, but disc rot is likely to affect all discs of a certain vintage.

In any event, the issue of purely preventative preservation is somewhat academic in this context. A large percentage of the discs owned by libraries have some disc rot, and virtually all will eventually. CCA concedes that the last span of a DVD is 20 years, CCA Opposition at 5-6, and many of the discs in library collections were manufactured prior to 2000. As a practical matter, virtually every disc a library would seek to preserve is “at risk” and would already have begun to deteriorate.²

Availability of Replacements

LCA agrees with JCCO and CCA that the motion picture exemption should apply only to motion pictures no longer commercially available. The disagreement concerns what constitutes commercial unavailability. LCA believes that the motion picture exemption should apply when an unused physical copy of a title cannot be obtained at a fair price. CCA and JCCO appear to believe, in contrast, that an exemption should apply only when a title is not available in any form, including by streaming.

In section 108(c)(1), the commercial unavailability test is satisfied if a library, “after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.” In the context of the entire subsection, it is clear that the “unused replacement” needs to be a copy, *i.e.*, a material object in which a work is fixed, not just a license to stream a work. A license to stream a work is not a “replacement” for a physical copy.

Moreover, streaming services such as Netflix, Amazon Prime, Vimeo, and Criterion Channel make their content available only for personal use, and thus a library would breach the terms of service if it were to make the streaming service available on the library premises.³ The

² JCCO endorsed the view articulated in the Section 108 Study Group Report and the Section 108 Discussion Document that “lawful preservation copying be limited to ‘at risk’ works and done only by eligible institutions.” JCCO Opposition at 4.

³ These services’ terms of use similarly prohibit downloading by libraries.

terms of service may include other restrictions, such as prohibiting reproduction for any purpose, thereby limiting quotations and other fair uses. These services refuse to negotiate with libraries to amend the terms of service, perhaps because that would be beyond the scope of their license from the rights holders.

Services such as Swank and Kanopy do stream motion pictures to libraries and educational institutions, but their catalogues do not include many of the motion picture titles in research library collections. For example, these streaming services could meet only an estimated 40 percent of Columbia University's research and curricular needs, while the University's DVD collection could meet nearly 100 percent of these needs. Similarly, more than 90 percent of BYU's collection of DVD and Blu-ray discs is unavailable for streaming through Swank Digital Campus. BYU Long Comment in Support of Class 1 Exemption at 24. Moreover, these services' licenses prohibit any downloading, including for commentary or criticism. Accordingly, such streams are of little use for serious research purposes.⁴

Additionally, streaming services come and go, as do the titles they make available. The need for preserved motion pictures, by contrast, is perpetual. A scholar might need the motion picture in 25 years. While a streaming service might offer the title now, it might not offer it in 25 years, at which point all the data on the disc in the library's collection would rotted away. Further, supplementary materials available on a DVD or Blu-ray disc often are not available from the streaming services, even if the primary motion picture is.

In one respect, though, the section 108(c)(1) test is too restrictive. As LCA stated in its petition, on occasion all the discs manufactured for a certain title have similar production flaws leading to accelerated disc rot in all the discs. This means that an unused copy is no better than the copy the library has in its collection, and the library should be able to make a preservation copy before the disc deteriorates even further. In the motion picture exemption, the commercial unavailability test should be worded "after a reasonable effort, determined that an unused **and undamaged** replacement cannot be obtained at a fair price."⁵

⁴ The CCA opposition quoted the testimonials several librarians provided to Swank's service. These librarians, James Conley, Monique Louise Threatt, Rhonda Rosen, and Susan Albrecht, offer the following response: "While Swank does provide value for our students and faculty, our views as cited in the opposition are taken out of context. The availability of a streaming license through Swank does nothing to further the objectives of library preservation. We believe strongly that libraries need the proposed exemption to preserve DVDs in their collections."

⁵ Unused DVDs could be 20 years old, and could be experiencing disc rot. An unused 20-year old DVD typically is in much worse condition than an unused 20-year old hardback book. For example, *Wag the Dog* (New Line/Warner Brothers) was originally released on DVD in 1998, and reissued in 2005. Amazon lists new copies, but they are either at least 15 or 23 years old.

The most recent release of Spike Lee's *She's Gotta Have It* (MGM) is at least 13 years old.

Accordingly, a library should be permitted to make a preservation copy of motion picture in its collection if an unused and undamaged physical copy of the title cannot be purchased at a fair price, even if that title is available on a streaming service at that particular point in time.

The test for commercial unavailability in the software exemption, “no longer reasonably available in the commercial marketplace,” is less appropriate for the motion picture exemption than the section 108(c)(1) test. Although the software exemption phrase comes from section 108(c), it is part of that subsection’s definition of an obsolete format. Mindful of JCCO’s admonition to avoid “false equivalency” between motion pictures and old software, JCCO Opposition at 2, the question here is not whether the motion picture is obsolete, but whether an unused and undamaged replacement copy is reasonably available to libraries.

If the Copyright Office does decide to recommend employment of the software exemption test, the test should specify that it applies to motion pictures “no long available in the commercial marketplace **to libraries, archives, and museums**” to reflect the reality that most streaming services refuse to license their content for library uses.⁶

Server Copies

CCA argued at length that libraries may make preservation copies only on discs, and not on computer servers. CCA Opposition at 4-8. However, CCA later stated that libraries currently may “preserve these copies of film to a hard drive, if the movie is performed on-premises to one user at a time.” *Id.* at 22. LCA interprets the opposition to server copies as applying only in the context of off-premises uses, and that CCA does not oppose server copies when libraries provide on-premises access. This is consistent with the software exemption, which permits the making of server copies, in accordance with the Acting Register’s awareness that “modern digital preservation practices” require the making of server copies. 2018 Recommendation at 237.

The Seriousness of the Problem

CCA asserts that “there is no chance that these motion pictures will be lost, like abandoned video games, as rightsholders are exploiting these works and providing libraries with offerings that accomplish the desired activities.” CCA Opposition at 29. The history of motion

The most recent pressing of *Farewell Concubine* (Miramax) is 10 years old. The most recent pressing of *Bulworth* (20th Century Fox) is 18 years old. The most recent U.S. version of *The Sweet Hereafter* (New Line/Warner Brothers) dates from 1998.

⁶ Further refinement of the meaning of the software exemption standard is not necessary. This would provide libraries with a degree of needed flexibility. For example, if the copyright owner of a particular title has a track record of periodically withholding a title from streaming services, it may be appropriate for a library to make a preservation copy of the DVD in its possession even though that title is available for streaming at precisely that point in time. Such title is not “reasonably available.”

pictures suggests otherwise. Ninety percent of all American silent films and 50 percent of American sound films made before 1950 have disintegrated. Nat'l Film Pres. Bd., *A Study of the Current State of American Film Preservation* (1993). Many of the older films that have survived have experienced color fading and the “vinegar syndrome”--an irreversible film base decay. *Id.*

Many of the DVD titles, and some of the Blu-ray titles, in libraries' collections are out of print, presumably because of low consumer demand.⁷ While streaming platforms have extended the commercial life of many titles, they will not continue to stream titles for which there is very low consumer demand. At that point, those titles may become lost. Moreover, none of the platforms have all the titles libraries need. Most of the platforms refuse to deal with libraries, and the few that do refuse to provide researchers with the ability to make quotations for commentary or criticism.

The discs in the collections of U.S. libraries are rotting away. For many of the motion pictures on these discs, there are no replacement copies available to libraries. The motion pictures on many of these discs are protected by CSS or AACS. Libraries must be permitted to circumvent these TPMs in order to preserve the precious content on the discs for future generations of creators, researchers, and students.

Consistent with the foregoing, we propose the following language for the Class 5 exemption. We have provided on-premises and off-premises alternatives, depending on how this issue is treated in the context of Class 14.

(i) Motion pictures (including television shows and videos), as defined in 17 U.S.C. § 101, where the motion picture is lawfully acquired on a DVD protected by the Content Scramble System, or on a Blu-ray disc protected by the Advanced Access Content System, solely for the purpose of lawful preservation of the motion picture, by an eligible library, archives, or museum, where:

(A) such activity is carried out without any purpose of direct or indirect commercial advantage;

(B) the eligible institution, after a reasonable effort, determined that an unused and undamaged replacement copy cannot be obtained at a fair price; and

[(C) the preservation copy is not distributed or made available outside of the physical premises of the eligible library, archives, or museum.]

or

[(C) the preservation copy is only distributed or made available outside of the physical premises of the eligible library, archives, or museum where the library, archives, or museum has had no notice that the copy would be used for any purpose other than private study, scholarship, or research.]

⁷ Contrary to CCA's suggestion, many of these discs are protected by CSS or AACS.

(ii) For purposes of the exemption in paragraph (i) of this section, a library, archives, or museum is considered “eligible” if—

(A) The collections of the library, archives, or museum are open to the public and/or are routinely made available to researchers who are not affiliated with the library, archives, or museum;

(B) The library, archives, or museum has a public service mission;

(C) The library, archives, or museum's trained staff or volunteers provide professional services normally associated with libraries, archives, or museums;

(D) The collections of the library, archives, or museum are composed of lawfully acquired and/or licensed materials; and

(E) The library, archives, or museum implements reasonable digital security measures as appropriate for the activities permitted by this paragraph.