

Video At Risk: Strategies for Preserving Commercial Video Collections in Research Libraries

A partnership between New York University, UC-Berkeley, &
Loyola University-New Orleans

Funded by the Andrew W. Mellon Foundation

<http://www.nyu.edu/tisch/preservation/research/video-risk/>

VAR-Besser, Nov 2, 2012

1

Intellectual Property & §108(c) Guidelines

VAR-Besser, Nov 2, 2012

2

Background

- Previous NYU study indicated that a significant portion of the circulating commercial video collection was both out-of-print, and held by few libraries
- Focus on 108 exceptions, not 107

VAR-Besser, Nov 2, 2012

3

A Basic Problem

- To invoke Section 108(c) copying, the work must already be deteriorating (“damaged, deteriorating, lost or stolen”). For digital or video works, that’s already too late!

VAR-Besser, Nov 2, 2012

4

IP Issues Work Plan

- Identify basic Section 108 issues
- Hire legal counsel to write White Paper analyzing what can and can’t be done for video collectns under 108
- Circulate White Paper among video collectn mgrs and university legal counsels-
- Bring together video collectn mgrs and conservators to meet in a forum w/legal consul
- Legal counsel revises White Paper
- We create Section 108 Guidelines for reformatting created specifically for video collectn mgrs, including consideration of risks

VAR-Besser, Nov 2, 2012

5

Questions to Video Collection Managers

- Does your institution already have, in-place, a written policy with regards to re-formatting circulating video collections? If so, how does the ‘VAR Draft White Paper’ compare, in terms of both risk tolerance and comprehensiveness?
- Does your institution’s legal counsel feel that this document is something which could be formally adopted as library policy? Why, or why not?
- What specific areas and topics would you like to see developed further, or scaled back? Are there specific changes or amendments that you would like to see made?

VAR-Besser, Nov 2, 2012

6

Questions to Legal Counsels

- Does your institution already have, in-place, a written policy with regards to re-formatting circulating video collections? If so, how does the 'VAR Draft White Paper' compare, in terms of both risk tolerance and comprehensiveness?
- Do you feel that this document is something which could be formally adopted as library policy, by library legal counsel? Why, or why not?
- What specific areas and topics would you like to see developed further, or scaled back? Are there specific changes or amendments that you would like to see made?
- In light of recent court rulings on "first sale" doctrine, what specific impacts do you foresee *Wiley v. Kirtsaeng* having on libraries' rights to reformat foreign-manufactured video materials, and circulate them, under Section 108? Furthermore, what steps might be taken in future drafts of this White Paper to mitigate institutional risk, for those institutions engaging in this practice?

VAR-Besser, Nov 2, 2012 7

IP Issues Work Plan

- Identify basic Section 108 issues
- Hire legal counsel to write White Paper analyzing what can and can't be done for video collectns under 108
- Circulate White Paper among video collectn mgrs and university legal counsels
- **Bring together video collectn mgrs and conservators to meet in a forum w/legal consul-**
- Legal counsel revises White Paper
- We create Section 108 Guidelines for reformatting created specifically for video collectn mgrs, including consideration of risks-

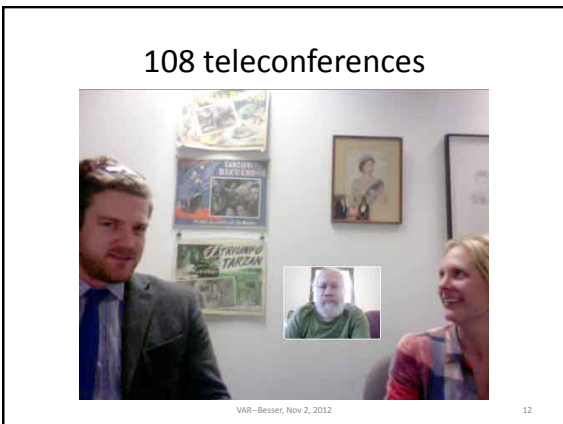
VAR-Besser, Nov 2, 2012 8



IP Issues Work Plan

- Identify basic Section 108 issues
- Hire legal counsel to write White Paper analyzing what can and can't be done for video collectns under 108
- Circulate White Paper among video collectn mgrs and university legal counsels
- Bring together video collectn mgrs and conservators to meet in a forum w/legal consul
- **Legal counsel revises White Paper**
- **We create Section 108 Guidelines for reformatting created specifically for video collectn mgrs, including consideration of risks-**

VAR-Besser, Nov 2, 2012 11



Section 108 Guideline 1:**When is a copy of a work “Damaged, Deteriorating, Lost, or Stolen”?**

- With no standard metrics for “damaged” or “deteriorating”, signal problems such as: visual dropout, audio dropout, other distortion, should be seen as acceptable justification. Damage to physical carrier is a less safe rationale.
- While safest to wait until “damage” or “deterioration” is perceptible, libraries may decide to make §108(c) copies when such harm is imminent.
- Preemptive creation of copies to avert “damage” or “deterioration” to original may be prudent under rights guaranteed by §107.
- In the case of “lost” or “stolen” copies, borrowed copies may be used to facilitate the creation of §108(c) copies.

VAR–Besser, Nov 2, 2012

13

Section 108 Guideline 2:**When is a format “obsolete”?**

- 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.
- 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 can be considered currently available:
 - Beta SP, DVD, LP, MiniDV, Blu-Ray.
- The following can be considered currently available, however soon-to-be-obsolete:
 - VHS, compact audiocassette

VAR–Besser, Nov 2, 2012

14

Section 108 Guideline 3:**What constitutes a “replacement”?**

- A “replacement” is a copy that can serve the same educational and scholarly purposes as the original: materially the same content, and equally easy for patrons to access and use.
- Burned-on-demand copies are as valid as “replacements” as those mass-produced.
- Region-restricted formats may make §108(c)-made copies a safer strategy, in lieu of running afry of DMCA anti-circumvention prohibition.
- Circulating bootlegged copies is less safe than creating §108(c)-made copies.
- Subscriptions must be perpetually-guaranteed, otherwise they do not serve the same functionality of the original.
- Special Editions, Restorations, etc. may be deemed not adequate replacements due to changes in content and form.

VAR–Besser, Nov 2, 2012

15

Section 108 Guideline 4:**Can copies made under §108(c) be digital?**

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

VAR–Besser, Nov 2, 2012

16

Section 108 Guideline 5:**Can copies made under §108(c) be circulated?**

- 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.

VAR–Besser, Nov 2, 2012

17

Section 108 Guideline 6:**In locating a “replacement” copy, what qualifies as “reasonable effort”?**

- Consult commonly-know trade sources in the United States: IMDB, Amazon.com, web search engine.
- “Reasonable effort” means different things in different circumstances.
- Documenting all replacement research will ensure more proof of due diligence, in case of any litigation, than not.

VAR–Besser, Nov 2, 2012

18

Section 108 Guideline 7:

***In locating a “replacement” copy,
what qualifies as “fair price”?***

- An unused replacement copy should presumably be at, or near, the retail price of the work when new
- Any additional collector’s-item value 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.
- Remember that “replacement” copies available in the marketplace must be “new, unused.”

VAR–Besser, Nov 2, 2012

19

Further Issues to Explore

- Expand and hone the due diligence search for Orphan works; develop metrics of success for various methods/procedures

VAR–Besser, Nov 2, 2012

20

**Video At Risk
Howard Besser, NYU**

- <http://besser.tsoa.nyu.edu/howard/Talks/>
- <http://www.nyu.edu/tisch/preservation/research/video-risk/>

VAR–Besser, Nov 2, 2012

21