



Preserving Copyrighted Video: the Video At Risk project

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

Funded by the Andrew W. Mellon Foundation

<https://tisch.nyu.edu/cinema-studies/miap/research-outreach/research/video-at-risk.html>
<https://archive.org/details/video-at-risk-section-108-guidelines-2013>

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Video At Risk: Strategies for Preserving Commercial Video Collections in Libraries ⁽¹⁾

- © Guidelines were part of a broader Mellon-funded project that included technical guidelines for preservation reformatting
 - <https://tisch.nyu.edu/cinema-studies/miap/research-outreach/research/video-at-risk.html>
- 2013 Copyright Guidelines (today's Talk) developed by NYU in consultation with both a copyright attorney and with the broader library community

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Video At Risk: Strategies for Preserving Commercial Video Collections in Libraries ⁽²⁾

- Commercially distributed videos in academic libraries
 - Previous study found that large number of these were out-of-print
- Focus on VHS format, but mostly applicable to other video formats
 - DVDs and Blu-Rays are an exception due to anti-circumvention rules
- Focus on § 108(c) and not § 107
- **Drafted and circulated White Paper**, then brought together library collection mgrs and legal consuls-

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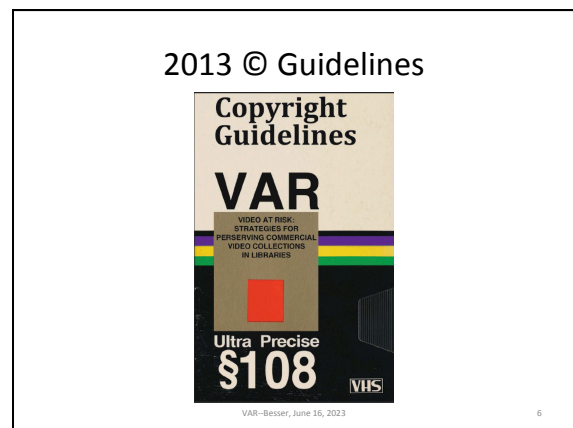
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Questions to Legal Counsels-

- Already have written policy?
 - 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?

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Section 108(c)

(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.

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A Basic Problem

- To invoke making a copy under Section 108(c), the work must already be deteriorating (“damaged, deteriorating, lost or stolen”). For digital or video works, that’s already too late! (*damage might render them unplayable*)

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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.

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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 (2013) available, however soon-to-be-obsolete:
 - VHS, compact audiocassette
- The following can be considered currently (2013) available:
 - Beta SP, DVD, LP, MiniDV, Blu-Ray

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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 awry 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. (Streaming services such as Kanopy)
- Special Editions, Restorations, etc. may be deemed not adequate replacements due to changes in content and form.

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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.

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*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.

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

- Consult commonly-known 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.

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*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 need to be “new, unused.”

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One other © issue for Videos

2006 Section 1201 Rule-Making

- Allows for “[a]udiovisual works included in the educational library of a college or university’s film or media studies department, when circumvention is accomplished for the purpose of making compilations of portions of those works for educational use in the classroom by media studies or film professors.”
 - Lets us break locks on DVDs for media studies classes
- extended further in 2012

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the Video At Risk project**

- <http://besser.tsoa.nyu.edu/howard/Talks/>
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