17 USC 108(h): The “Last Twenty Years” Exception

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When people think about exceptions to copyright, they usually remember fair use, but there are a variety of other exceptions built into the law that don't get as much attention. In fact, one statute, 17 USC § 108, provides a number of exceptions specifically for libraries.¹ In this paper, I will address one of 108’s lesser-used provisions and the value it may hold for libraries and archives: 108(h).

108(h) permits libraries and similar memory institutions to “reproduce, distribute, display, or perform” works that are in the last 20 years of their copyright lives, subject to certain conditions. As such, this statute may provide an avenue for academic libraries like ours to create things like digital collections of older, out-of-print materials, and make them available online for researchers. However, most libraries haven’t taken advantage of this statute, yet, in part because of confusion over the meaning of these conditions. So, the rest of this paper will breakdown 108(h) and try to make sense of its requirements.

Here is the text of 108(h):

108(h)

(1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

(2) No reproduction, distribution, display, or performance is authorized under this subsection if—

(A) the work is subject to normal commercial exploitation;

(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

So what does that mean? Let’s cut through the legalese and figure out what this statue says.

First, only libraries and archives or similar nonprofit institutions can use 108(h). UNT clearly has no problem meeting this requirement. However, someone can’t create a for-profit company like a Netflix for old books and use 108(h) to avoid copyright problems.

Second, 108(h) only allows copying for preservation, research, or scholarship. Since this is exactly the kind of work that academic libraries like ours conduct and support, this also is easy to satisfy. But again, Netflix for old books is still not ok under 108(h).

Third, 108(h) only applies to published works. Copyright defines “publication” slightly different from its conventional meaning. For example, it is broader than just commercial publication. Instead, “publication” means something closer to “intentionally released by the author to the public.” So, libraries and archives probably can’t use this section to digitize and make available an author’s private letters, because those wouldn’t fall under our definition for “published.”

Fourth, as I briefly mentioned above, 108(h) only applies to works that are in the last 20 years of their copyrights. This is where things get a little confusing, because copyright duration requires us to think about two different laws: The current law — the “1976 Act” — and the old law — the “1909 Act.” Under the 1976 Act, copyrights for most works created since 1978 (the year the 1976 Act went into effect) last for 70 years after the author dies, or: Life of the Author+70. So, if an author wrote a book in 1997, published it in 1998, and died in 2000, the copyright to that book would expire at the end of the year in 2070 (2000+70=2070). In contrast, under the 1909 Act, copyrights for most works created between 1923 and 1977 lasts for 95 years after the publication date, or: Publication date+95. So, if an author wrote a book in 1974, published it in 1975, and died in 1976, that copyright would also expire at the end of 2070 (1975+95=2070). Most works published before 1923 are in the public domain, and not the subject of 108(h).

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3 See [https://www.copyright.gov/help/faq/faq-definitions.html](https://www.copyright.gov/help/faq/faq-definitions.html)
4 17 USC § 305 tells us that “All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.”
5 Not all works obey these rules. For a comprehensive breakdown of copyright duration, see [https://copyright.cornell.edu/publicdomain](https://copyright.cornell.edu/publicdomain).
Considering these rules on copyright duration, libraries have to wait at least until 2028 before they can possibly make anything under the 1976 Act available using 108(h) (1978+70-20=2048). What’s more, we don’t know when most works under the current law will be in their last 20 years, because we don’t know how long their authors will live. However, because the copyright duration for works created under the 1909 Act depends on publication dates instead of the lives of the authors, we know exactly when they will expire: 95 years after they were published. This means that works published between 1923 and 1942 are all in their last 20 years right now (1923+95-20=1998; 1942+95-20=2017)!

Nevertheless, just because a work like *The Great Gatsby*, which Fitzgerald published in 1925, is in the last 20 years of its copyright life (2025 + 95 = 2020), libraries can’t automatically use 108(h) to digitize and distribute it. The law says that libraries must, after a “reasonable investigation,” find that: 1. the work isn’t “subject to normal commercial exploitation”; 2. the work isn’t available at a “reasonable price”; or 3. the copyright owner didn’t give notice about 1 and/or 2 to the copyright office.

Unfortunately, the law isn’t clear about what “subject to normal commercial exploitation,” a “reasonable investigation,” or a “reasonable price” means. In a recent, unpublished study, Professor Elizabeth Townsend Gard tried to answer these questions. Because Congress used words like “normal” and “reasonable”, it probably expected us to think of them as we ordinarily would.

Let’s take a closer look at the three requirements for a work to fall under 108(h). First, the work can’t be for sale through normal commercial channels (retail, online sales, direct sales from the publisher or author, used vendors or marketplaces), so it isn’t “subject to normal commercial exploitation.” This probably includes secondary market used sales like on Alibris, but probably not the sale of copies made without permission of the copyright holder. This makes sense. One reason we protect copyright is to give authors a degree of control over their works and to enable them to earn a profit. If a book is available for purchase, then a library doesn’t need to make it available in this way, because the author already has. 108(h) allows libraries to provide access to copyright protected books that would otherwise be unavailable.

Second, the book can’t be available – new or used – at a price that would be normal in the market for that kind of work. So, if the only copy in the market is unusually expensive, to

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the point where it sticks out as abnormal, then it’s not available at a “reasonable price,” and you probably satisfy the second criteria.

Third, you have to spend time looking a copy, but not an unreasonable amount of time. That is, you don’t have to turn over every stone, but you certainly need to do your due diligence in conducting a “reasonable investigation”. Did you check several of the most common places to find these sorts of books? Did you put effort into your search? If you honestly tried to find something but couldn’t, then you probably satisfy this criteria as well.

Putting this all together, 108(h) allows libraries to copy, distribute, and display works that have been forgotten to time — that is, things like out-of-print books that the copyright holders don’t care enough about any more to try to make money from. These are exactly the kinds of things that fill library shelves, going largely unused, and could be much more valuable if they were available more widely in digital form. From old books, to old newspapers, to old pictures, libraries may be able to use 108(h) to digitize and make them available to the public.

Maybe, then, libraries should start targeting parts of their collections that are in their last 20 copyright years for digitization projects. In fact, this is exactly what the Internet Archive is doing with its “Sonny Bono Memorial Collection”, a collection of out-of-print books that “anyone can download, read, and enjoy.” Using 108(h), the Internet Archive plans make 10,000+ old books available to anyone with an internet connection. Wow!

Still, since 108(h)’s exact requirements are still a bit unclear, it makes sense to proceed with caution before embarking on some last 20 years projects. The Copyright Office recently released a Discussion Document to propose possible changes to 17 USC 108. While its suggestions don’t address 108(h) much, perhaps this document will lead to conversations where we will learn more. Moreover, now that the Internet Archive is leading the 108(h) charge, perhaps we’ll find out what “normal commercial exploration” and “reasonable investigation” really mean, and libraries can embrace this exception to copyright without worrying about getting into legal trouble. At this point, it’s probably smartest to watch what happens with 108(h), and if this section appears to live up to its promises, then we can start using it to make parts of our collections more widely available.

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7 See https://archive.org/details/last20

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