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This study examines the preservation practices of academic law libraries and argues that the survey results illustrate the growing gap between current preservation practices and new technology. The introduction to the study discusses challenges for libraries and cultural institutions in the digital age. In the second section, the paper analyzes U.S. copyright law and the effect of recent amendments on library preservation activities. The third section reports the results of a preservation practices survey. In the fourth section, the paper explores options for future law library preservation including institutional repositories and collaborative preservation efforts. The paper concludes that a new approach to scholarship and preservation is necessary to ensure that future generations have access to historically important legal literature.

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21ST CENTURY PRESERVATION CHALLENGES
FOR LAW LIBRARIES

by
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TABLE OF CONTENTS

I.	Introduction	3
II.	Preservation and Copyright Law	6
III.	Survey Findings	15
IV.	The Future of Law Library Preservation	26
V.	Conclusion	32
	Appendix A: Preservation Practices Survey	35
	Appendix B: Preservation Practices Survey with Response Statistics	37

I. INTRODUCTION

At the beginning of the twenty-first century, libraries face unprecedented challenges imposed by the onslaught of digital information. Historically, American libraries and cultural institutions have assumed the enormous burden of preserving the nation's memory – its cultural, historical, and political record.¹ Digital technology has dramatically altered traditional views of both presentation and preservation of information. Librarians face a barrage of criticism based on inaccurate public perception of libraries and their roles as information providers.

Libraries must compete with the Internet for patrons. Academic libraries have been hit hard by the Internet which continues to expand at an exponential rate. As Internet search engines began to rise in popularity, major universities reported a twenty percent drop in circulation.² Google currently searches more than four billion Web pages.³ One writer claims, “Google is the first [search engine] to become a utility, a basic piece of societal infrastructure like the power grid, sewer lines and the Internet itself.”⁴ By some estimates, more than seven million new Web pages are born each day while the life span of a Web page averages only forty-four days.⁵

¹ Laura N. Gasaway, *America's Cultural Record: A Thing of the Past?*, 40 HOUS. L. REV. 645, 643-671 (2003).

² Joel Achenbach, *Search for Tomorrow: We Wanted Answers, and Google Really Clicked. What's Next?* WASHINGTON POST, Feb. 15, 2004, at D01.

³ Google home page, at <http://www.google.com>. (last visited March 1, 2004).

⁴ Achenbach at D01.

⁵ Peter Lyman, *Archiving the World Wide Web*, PRESERVING OUR DIGITAL HERITAGE: PLAN FOR THE NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM: APPENDICES, Oct. 2002, <http://www.digitalpreservation.gov/>, Su Doc LC 1.57:2003007619/APP, at 53.

In his book, *The Future of the Past*, Alexander Stille cites the experience of the National Archives and Records Administration as a cautionary tale.⁶ Stille describes a 1996 National Archives survey that estimated the archives' collection of microfilm, photographs, videos, and audio material would take about 120 years to transfer to a stable format.⁷ Stille argues, "Decisions about what to keep and what to discard will be made by default, as large portions will simply deteriorate beyond the point of viability."⁸ Ironically, many items in the archives are saved only because of researcher requests thus prompting the creation of a preservation copy. According to Stille, "One of the great ironies of the information age is that, while the late twentieth century will undoubtedly have recorded more data than any other period in history, it will also almost certainly have lost more information than any previous era."⁹ With the arrival of "born-digital" format -- documents originating in digital format -- librarians face the complex task of preserving scholarship in a new medium while continuing to fight the age-old battle for preservation and conservation of print works.

This study examines the preservation practices of academic law libraries and argues that the survey results illustrate the growing gap between current preservation practices and new technology. The introduction to the study discusses challenges for libraries and cultural institutions in the digital age. In the second section, the paper analyzes U.S. copyright law and the effect of recent amendments on library preservation activities. The third section reports the results of a preservation practices survey. In the fourth section, the paper explores options for future law library preservation including

⁶ Alexander Stille. *Are We Losing Our Memory? or The Museum of Obsolete Technology*. in THE FUTURE OF THE PAST 299 (2002).

⁷ Stille at 300.

⁸ *Id.*

⁹ *Id.*

institutional repositories and collaborative preservation efforts. The paper concludes that a new approach to scholarship and preservation is necessary to ensure that future generations have access to historically important legal literature.

II. PRESERVATION AND COPYRIGHT LAW

The Copyright clause of the U. S. Constitution empowers Congress “to promote the Progress of Science and the useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and discoveries.”¹⁰ Copyright law protects the creative efforts and economic concerns of copyright holders but also recognizes the importance of public access to copyrighted material. As information goes digital, this balancing act is continuously being tested.

Over the last 200 years, Congress has made substantial changes in copyright law to reflect new technology. Responding to advances in technology, Congress passed the Copyright Act of 1976 to govern all works created on or after January 1, 1978.¹¹ The statute contains broadly defined categories of copyrightable subject matter. The statute’s three requirements for copyright registration are originality, authorship, and fixation. The general statement of copyrightable subject matter includes “works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹² This statement easily encompasses digital works; the broad definitions of the Copyright Act clearly leave room for progress and new inventions. This language adheres to the constitutional mandate. In 1991, Justice Sandra Day O’Connor wrote in *Feist Publications v. Rural Telephone Service*:¹³

¹⁰ U.S. CONST. art. 1, §8, cl. 8.

¹¹ 17 U.S.C. §§101-1332 (2000).

¹² *Id.* §102(a).

¹³ 499 U.S. 340, 349 (1991).

The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.' To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art.

Copyright protection entitles the copyright holder to a bundle of exclusive rights. These include the right to reproduce, distribute, perform, and display the work as well as the right to prepare derivative works.¹⁴ Registration with the U. S. Copyright Office provides prima facie evidence of ownership and permits the owner to collect statutory damages and attorneys' fees in a successful suit for infringement.¹⁵ Lawsuits are challenging the boundaries of copyright infringement and fair use. Courts must now confront the dilemma of creating legal boundaries for the Internet – an inherently chaotic environment.

Two important amendments to the Copyright Act of 1976 have impacted library preservation activities. The Digital Millennium Copyright Act (DMCA),¹⁶ and the Sonny Bono Copyright Term Extension Act (CTEA) were passed by Congress in 1998.¹⁷ The most important provisions for libraries are codified in Section 108 of the Copyright Act.¹⁸

A. SECTION 108

Under § 108, qualifying libraries and archives gain some important use and preservation rights.¹⁹ In order to qualify for the §108 exemptions, a library must make its collection available to the public or, alternatively, to both affiliated and unaffiliated

¹⁴ 17 U.S.C. §501(a)-(b).

¹⁵ *Id.* §412.

¹⁶ Digital Millennium Copyright Act, Pub.L. No. 105-304, 112 Stat. 2860 (1998).

¹⁷ Sonny Bono Copyright Term Extension Act, Pub L. No. 105-298, 112 Stat. 2827 (1998).

¹⁸ 17 U.S.C. § 108

¹⁹ 17 U.S.C. § 108(a).

researchers working in a specific field of study.²⁰ Additionally, the reproduction must not be for commercial use, and must include the copyright notice that appears on the work.²¹ Under §108(a)(3), if the work to be reproduced does not contain a copyright notice, the library or archive must include a “legend stating that the work may be protected by copyright.”²²

1. Section 108(b) - Unpublished works

Section 108(b) applies to analog and digital reproduction of unpublished works. Under this section, a library or archives may make three copies of an unpublished work presently in its collection. To qualify for this exemption, the purpose for reproduction is limited to preservation, security or deposit. The statute further limits the library’s right to use a copy of an unpublished work if that reproduction is in digital format. Digital copies produced under this section are only available for on-premise use. Section 108(b) states:

The rights of reproduction and distribution under this section apply to three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if—

- (1) the copy or phonorecord reproduced is currently in the collections of the library or archives; and
- (2) any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.²³

While this exemption increases the number of copies a library may reproduce, the statute actually restricts the use of digital format copies to on-premises use.²⁴ This distinction

²⁰ §108(a)(2).

²¹ §108(a)(1); §108(a)(3).

²² § 108(a)(3).

²³ § 108(b).

²⁴ *Id.* Prior to the DMCA, a library could make only one facsimile copy of an unpublished work.

between analog and digital works clearly favors traditional libraries over virtual libraries. As digital collections expand, § 108(b) may prove too restrictive.

2. Section 108(c) – Published Works

For published works, the DMCA added an exemption allowing libraries and archives to replace works previously existing in their collections. Like §108(b), the new §108(c) contains an on-premises limitation for digital copies. This section requires a library to first conduct a reasonable investigation in an attempt to replace works that are obsolete, lost, stolen, damaged or deteriorating.

The right of reproduction under this section 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.

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.²⁵

The DMCA added the word “obsolete” to the original §108(c), but the statute makes it clear that this language refers to the machine used to view or render the item. The statute uses the words “reasonable effort” but does not define the term. “Reasonable effort”

²⁵ 17 U.S.C. §108(c).

applies only to the search for a replacement. Legislative history indicates that this does not extend to searching for machines in secondhand stores.²⁶

3. Section 108(h) – Reproduction of Works in the Final Twenty Years of the Copyright Term

The Copyright Term Extension Act (CTEA) added twenty years to the term of copyrights under the Copyright Act of 1976 and applied retroactively to all works still under copyright. CTEA also added a new Section 108(h) to the Copyright Act. This section sets forth specific conditions that allow libraries, archives, and non-profit educational institutions to reproduce a copyrighted work during the twenty year copyright term extension. For works in their final twenty years of copyright protection, libraries must investigate to determine whether three conditions exist. If any of the three statutory conditions are met, then the work may not be reproduced. Section 108(h) states:

(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.

²⁶ S. REP. No. 105-190, 62 (1998).

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.²⁷

Unlike the legislative history for the §108(c) term “reasonable effort,” congressional reports for §108(h) do not define “reasonable investigation.” There is also no explanation of “normal commercial exploitation” in comparison with the legislative history for §108(c) and the “commercial marketplace.” The only explanation in the legislative history states that the exemption favors library users by allowing “access to published works that are not commercially exploited or otherwise reasonably available during the extended term.”²⁸

Some scholars question whether §108 is a technologically neutral section that adheres to the mandate of the Copyright Act.²⁹ Since there has been no litigation on §108(h), libraries must make reasonable assumptions about reproduction and be cautious about access to digital copies of original analog works. The statute does not address access restrictions for digital reproductions of works originally acquired in digital format, but many scholars argue that the logical conclusion is to allow libraries to provide the same access to the copy.³⁰

B. FAIR USE

One of the most contentious debates involving copyright and digital technology centers on the judicially-created doctrine of fair use.³¹ Libraries, universities and archives depend on this doctrine for the right to reproduce and distribute material free or

²⁷ 17 U.S.C. § 108(h).

²⁸ H.R. REP. NO. 105-452 (1998).

²⁹ Tomas A. Lipinski, *Librarian's Guide to Copyright for Shared and Networked Resources*, LIBRARY TECHNOLOGY REPORTS, Jan.-Feb. 2002, at 23.

³⁰ See GASAWAY *supra*, note 1, at 656-657.

³¹ The fair use doctrine was codified by the Copyright Act of 1976 at 17 U.S.C. §107.

for a small fee.³² The Internet tests the accepted boundaries of fair use, and certainly those limits must be expanded to meet the reality of usage in the online world. Some of the DMCA provisions are controversial; many educators and librarians feel that the law will inhibit fair use on the Internet.³³

Under the Copyright Act of 1976, the doctrine of fair use allows unauthorized use of copyrighted material where such use is fair as a matter of public policy.³⁴ The statute provides that “fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research is not an infringement of the copyright.”³⁵ Under the Act, courts must consider four factors in deciding a fair use case: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality used; and (4) effect on the potential market for or value of the work.³⁶ Courts are directed to make individual fair use determinations and analyze the four factors as they apply to each case.

Within the examination of each factor, courts consider a number of issues. For the first factor, courts ask whether the use is commercial or non-commercial. Although the Supreme Court has tested the fair use issue in many cases, a definitive statement on commercial use has not been adopted. In *Campbell v. Acuff-Rose Music*,³⁷ the Court said a commercial recording that parodied a copyrighted song might be fair use despite the

³² Barbara Hoffman, *A Picture is Worth a Thousand Words: Copyright and the Use of Image Archives and Collections for Research, Teaching, and Scholarship in the Digital Age*, in *GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION, AND SOCIETY* 395, 403 (Laura N. Gasaway, ed., 1997).

³³ Anna Wilde Matthews, *Librarians on the Warpath, Fine Print: How the Web Yanked Obscure U.S. Agency Into Legal Limelight, Copyright Office Finds Itself At Center of Tug-of-War Over Digital Protections*, WALL ST. J., Jun. 14, 2000, at A1.

³⁴ 17 U.S.C. §107.

³⁵ *Id.*

³⁶ *Id.* (1)-(4).

³⁷ 510 U.S. 569 (1994).

fact that the use was commercial. In other words, a commercial purpose would not prohibit a finding of fair use.³⁸ Courts also consider whether the use is transformative or merely a repackaging of the original copyrighted material that will steal its market share. According to Professor Raymond T. Nimmer, U.S. law does not treat all business uses for business advantage as commercial uses. Rather, the law focuses on whether the user sells the copies for profit. “Thus, copying that enables the user to discover technology that it then applies to its own products is *not* commercial use if the products do not copy expression from the first work.”³⁹

With regard to the second factor – nature of the work – unpublished works have greater protection than published works.⁴⁰ Works of entertainment and creative works have a higher level of protection from fair use than factual works. Courts examine the original work, recognizing “that some works are closer to the core of intended copyright protection than others.”⁴¹ Some works have greater fair use rights than others – scientific works for example.⁴²

Under the third factor, the court must ask whether the qualitative part of the work was used. If the “heart of the work” was copied, then a finding of fair use is unlikely. The quantity copied will also be influential in determining harm; a finding of fair use is more likely when the amount copied is small in comparison to the work as a whole.

Finally, the market effect factor recognizes the copyright holder’s right to take advantage of potential markets for her work. In *Campbell v. Acuff-Rose Music*,⁴³ the

³⁸ *Id.*

³⁹ Raymond T. Nimmer, INFORMATION LAW, §4.09[3] (West Group 1996). (emphasis in original).

⁴⁰ See *Harper & Row Publishers, Inc. v. The Nation Enters.*, 471 U.S. 539 (1985).

⁴¹ *Campbell*, 510 U.S. at 586.

⁴² *American Geophysical Union v. Texaco, Inc.*, 802 F. Supp 1 (S.D.N.Y 1992).

⁴³ 510 U.S. 569 (1994).

Supreme Court said that all the fair use factors are of equal weight and that determinations of fair use must fit the objectives of the Copyright Act.⁴⁴ This case marked a shift in the Court's view of the market effect factor. Previously, in *Harper & Row Publishers v. The Nation Enters.*,⁴⁵ the Court found this factor to be the most important one.

The copyright fair use defense has an uncertain constitutional future. According to Professor Jacqueline Lipton, "the legal status of fair use and the scope of the fair use defense might be clarified for the digital age if Congress amends the DMCA so that copyright holders are not permitted to deny access to fair users."⁴⁶ According to Lipton, congressional intent supports this idea. The DMCA includes a provision stating that DMCA does not affect fair use rights.⁴⁷

⁴⁴ *Id.* at 578.

⁴⁵ *Harper & Row*, 471 U.S. 539 (1985).

⁴⁶ Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA L. REV. 159, 135-194 (2004).

⁴⁷ Lipton at 159, (Footnote 127 citing 17 U.S.C. §1201(c)(1) for congressional intent).

III. SURVEY FINDINGS

A. Methodology

This study was designed to examine the preservation practices of academic law libraries in the United States. The project also explored the impact of new provisions of the Copyright Act on law libraries. The project included a written survey of academic law libraries. Following approval by the University of North Carolina at Chapel Hill Academic Affairs Institutional Review Board, the survey, consent form, and introduction to the survey were sent via email. The survey request was sent by email to American Bar Association accredited law school libraries via the library directors' listserv. Survey questions were in the form of an attachment to the email message. The introduction to the survey asked the law library directors to choose the most appropriate librarian to answer the survey. Participants returned answers to survey questions via email. Respondents included library directors, associate directors, and librarians whose job responsibilities include reference, preservation, acquisitions, and collection development.

B. Findings

1. Survey Question One

The first survey question requested a description of library preservation and conservation programs. Twenty-seven out of twenty-eight respondents reported some

preservation and/or conservation activities. Of those, only four libraries have formal preservation programs.

Very few libraries reported digital preservation projects. Two libraries are currently conducting pilot projects on small sets of local material. One librarian described a pilot project “to digitize and mark-up a single volume of the law school’s newspaper while we explore funding opportunities for other digitization projects. We also occasionally archive born-digital documents, mostly those found on federal government Web sites that are deemed preservation-worthy by our documents librarian.” Another library is also pursuing a newspaper digital preservation project.

Currently, most libraries report dependence on microform to preserve historical legal information, particularly primary materials. One respondent said, “with over 300,000 volume equivalents in microform, much of our investment in conservation is through acquisitions of material in these formats.”

2. Survey Question Two

The second survey question requested information about library preservation policies. Very few of the libraries surveyed have a formal written preservation policy or long-term plan for preservation. Responses to question number two indicate some interest in developing such policies as well as informal plans for specific preservation projects.⁴⁸ One first tier school noted, “We do not have our own written plan, yet. However, we did have a formal preservation assessment done by the Conservation Center for Art and Historic Artifacts last year, which will eventually serve as source for our

⁴⁸ Appendix B.

written plan.”⁴⁹ A fourth tier school is also developing a preservation plan. “Our library is currently in the process of revision of our collection development policy and developing our Special collections policies and procedures.

Condition/preservation/retention aspects are a consideration in both.” Another library focused on staffing changes as an impetus for preservation planning. “We have had strategies in our strategic plan. We do not have a written policy that covers all issues. Again, this is something that we will be addressing as we consider this responsibility in light of new personnel.” Other libraries have preservation programs in place without written policies. One respondent commented, “we do not have a written policy or plan. For the past several years, we have added one component to our preservation program every year.”

Only three libraries responding to this survey have written preservation policies. All of these schools are ranked in the first tier. One respondent said, “The stated priorities for the program are maintenance, conservation and replacement/reformatting.” Another library reported that the current preservation policy is outdated and is currently being revised to include more specific policies for digital materials.

3. Survey Question Three

Question number three requested information about library staffing for preservation activities. Of the twenty-eight libraries responding to the survey, only one employs a full-time preservationist. Eleven libraries reported that other staff members including librarians and technical assistants have part-time responsibility for preservation.

⁴⁹ Law school rankings from U.S. NEWS & WORLD REPORT AMERICA’S BEST GRADUATE SCHOOLS 2004.

The remaining libraries noted conservation or preservation activities in response to other survey questions, but responded “no” to question number three.

Of the eleven libraries reporting shared responsibility for preservation and conservation activities, one reported that the head of Technical Services oversees preservation. One library stated that two collections assistants and the head of Collection Services are responsible for coordination of preservation activities. Only one library reported that the librarian in charge of circulation services handles preservation. Another library hires preservation staff on a per project basis. According to one library, a full time staff member acts as the library’s preservationist as part of other duties that include cataloging, circulation, and binding.

4. Survey Questions Four & Five

The responses to questions four and five generally combined the two questions. Most respondents used question five to report both usage of different preservation formats and their problems with each format.

Microform is the most common preservation format reported in this survey. Many libraries noted problems with their microfiche and microfilm collections. According to one librarian, “the microfiche that we received as part of the library depository program is not very sturdy.” Space, appropriate storage, and mechanical problems with readers were reported by most libraries. “We did not anticipate the volume of material we should have in microformats, and we do not have one functional space large enough to hold the material and the machinery to use it.” According to one librarian, “we find fiche very labor intensive. We store each piece individually in

envelopes and they rarely come to use that way. In addition, we stamp/write the call number and location on each envelope.”

Patron complaints and access issues also cause concern in some libraries. “The only issue with microform preservation for us is that microforms are much more difficult to use than print materials and receive less use as a result.” “Nobody likes to use microform...” Newer law schools have some unique challenges to face with preservation. One law school reported: “Over half of our collection is on microformat since our law school was only recently established in the mid-1970s. Our patrons are not fond of microformat; however, this has improved since we purchased a digital reader printer.” Only one respondent noted physical condition and atmospheric conditions in the library as a concern. “Some older microfiche has curled; less with better air conditioning.” Finally, a first tier school noted, “microfilm is preferred for preservation because of its longevity, the ability to store a secure copy, and the ability to produce copies easily for other libraries.”

Few libraries own a significant number of CD-ROMs, and do not favor that format for preservation. “For the most part, CD-ROMs have to be installed for the patron and are not networked.” Others noted patrons’ preference for other formats. “Nobody likes to use microform or CD-ROM, although for old and little-used materials they understand why we only collect in those formats” Other respondents commented that patrons prefer web-based sources to CD-ROM.

Some respondents used question number five to express concerns about digital preservation. “Paper or digital copies are preferred by the users, but both present issues for longevity and security.” “Digital preservation has its own issues in terms of perpetual

access, especially with a commercial vendor and refreshing technological platforms, if we do the digitization in house. We are still addressing the issues involved in digital preservation.”

For libraries already attempting their own digital preservation projects, the issues are more clearly defined. “Both of our digitizing projects presented problems. [One] project had the problems of working with a consortium; conforming to certain protocols, using certain naming conventions, etc. It also left us with a database that had an almost unusable interface.” The second project presented different problems. “We kept having to redo work because of upgrades or changes in equipment and/or software, the OCR and clean up process was far more time consuming than anyone originally estimated, and we are faced with having to move and update the web interface for the image database whenever there is a major change (usually an improvement) in software or hardware.”

5. Survey Question Six

As shown in the responses to question number six, budget is a major impediment to preservation activities in most law libraries.⁵⁰ Ninety-three percent of libraries reported budget concerns. Many respondents stressed the lack of funds for “staff, equipment, software and the expertise required for the new digital programs.” One librarian from a fourth tier law school commented that the biggest obstacle to preservation vs. conservation is “no budget (or hope for a budget) to use preservation techniques other than allowing our bindery to provide minimal help.” From a first tier law school: “The major obstacle to preservation for this library is the budget. We are able to budget just a limited amount each year for preservation purposes.” A second tier

⁵⁰ Appendix B.

school reported that preservation would require outside funding. “We currently do not have the funds to hire new staff for preservation projects, train current staff to perform preservation activities, or purchase equipment and supplies toward developing an in-house preservation program. With outside funding, it may be conceivable to out-source a project or participate in consortial projects.”

While staffing, technology, and space constraints were mentioned less frequently than budget, these issues pose major problems for some libraries. “Currently there are too many other projects with a higher priority to devote enough time to this type of program within our staffing levels. Level of interest in this area by current staff is also low.” The most common theme for staffing issues was the haphazard approach to preservation and conservation. Reported problems included staff turnover, training in conservation techniques, and time constraints.

Another reported obstacle to preservation is the technology gap. Responses included: “We do not adopt a technology until we feel it is stable. For example, we never invested in CDs.” Another library reported, “we wonder how much longer microfiche reader/printers will still be made, now that banks are moving into digital storage of checks; we avoided CD-ROMs because this seemed like an immature technology, and it seems to be dying rather than maturing”

6. Survey Question Seven

The results for this question indicated that libraries have carefully considered individual preservation priorities. Almost all the responses contained specific titles and items of local interest. Eleven libraries (five public and six private) gave priority to state

primary legal materials. Rare books/collections were listed by fourteen libraries, but of those, nine were private law school libraries. Special collections, including sets of materials unique to the library, were listed by six libraries. Six libraries listed law school publications as their priority.

7. Survey Question Eight

The responses to this question show that very few libraries have actually preserved items in digital format. Among the libraries reporting conversion of analog materials to digital format, only three included detailed accounts of the process of digitization including creation of metadata. For the libraries reporting digitization projects with consortia, more detailed explanations of their responses may be needed to determine the full extent of their digital preservation activities.

8. Survey Question Nine

Survey question number nine elicited the strongest reactions from respondents.⁵¹ Eighty percent of libraries reported concerns about digital preservation as a viable long term solution for law libraries. General comments about digital preservation included: “Information in digital format raises as many issues as it solves,” and “I am unconvinced that digital formats are of preservation quality.” Another librarian commented, “As a former preservation administrator, I would not want to spend scarce resources on a process that does not at this time have a long life.”

Many librarians expressed deep concern about access issues. “We are wary about private sector buying up digital content, paper disappearing, and being held hostage to the

⁵¹ Appendix B.

private sector's pricing and access models." Another respondent commented, "We also believe there should be some law libraries that agree to maintain the print versions of federal and state materials."

Other librarians mentioned the uncertainty of changing technology and the lack of uniform standards for digital information. "I have been around long enough to wonder about how we might access information stored on 5 ¼ floppies, Bernouli boxes and Betamax tapes." Another respondent discussed the "eventual obsolescence of digital technology and need for a 'museum of technologies' to ensure continuing access and use of digitized materials. Will future staff have to be trained to maintain and troubleshoot a never-ending continuum of out-of-date technologies?"

Some respondents focused on the lack of uniform standards for digital preservation. One librarian argued, ". . . standards must be adopted by an international group like ISO to make sure we will always be able to access the materials in the future." Another respondent commented, "There is currently a lack of uniform standards for digital technologies, making it difficult to plan for resource and space allocations or make decisions about methods and equipment."

As in other questions, librarians repeatedly mentioned cost of preservation as a deciding factor. Present costs represented a primary consideration, but many respondents also mentioned the unpredictability of future spending on maintenance and equipment to support digitally preserved information. One library offered a valuable example of this dilemma:

Digitizing is very time consuming. It involves much more than just turning images and text into electronic format. Metadata and some kind of structured database, as well as some type of system for web delivery must be developed to make the text or images

useable. This can be amazingly costly. We calculated that adding the rest of the [state] Session Laws to our collection would cost about \$1,000,000.00 if done in house or over \$600,000.00, if sent to a vendor.

Another part of the budget equation is the exorbitant cost of digital information purchased or licensed through commercial vendors. One librarian noted that publishers “digitally remaster the information and offer it for sale, thus requiring libraries to repurchase what they already hold.”

Finally, many survey respondents confirmed the current distrust of exclusive use of digital preservation. Primary sources are of particular importance to law librarians. Academic law libraries have high patron demand for primary legal materials. Since primary legal sources represent a vital part of legal scholarship, these sources must be preserved. Scholars and librarians continue to argue that any digital preservation of primary sources must include maintenance and repair of the original print version. “We feel strongly that a research library like this one is obliged to keep a paper copy of as much as possible, particularly primary material (text of the law) and major scholarly commentary and description.”

In spite of the overwhelming number of negative responses to digital preservation, 54% of respondents also included some positive comments with qualifications. “We believe digital preservation is a good solution as long as we can guarantee permanent access.” Another librarian added, “I think this is a good long term solution provided that the resulting product is affordable and also guaranteed as a medium that will be readable (accessible) for future generations.”

9. Survey Questions Ten, Eleven, and Twelve

Three survey questions tested libraries' use of the new exemptions under Section 108 of the Copyright Act. Each question included an explanation of the statutory section.

a. Section 108(b) – Unpublished Works

Five libraries (18%) reported using this exemption to create copies of unpublished works in their collections. Twenty-two libraries (79%) have not used the exemption, and one library did not respond.

b. Section 108(c) – Published Works

This replacement exemption received the highest number of positive responses for the copyright related questions. Sixteen libraries (57%) have created replacement copies of published works in their collections. Twelve libraries (43%) have not used this exemption.

c. Section 108(h) – Fifty years after author's death

Ten libraries (36%) reported using the CTEA last twenty years exemption. Seventeen libraries (61%) have not used this provision for copying materials from their collections. One library did not respond to this question.

10. Survey Question Thirteen

None of the libraries surveyed have contributed to the Library of Congress American Memory Historical Project.

IV. THE FUTURE OF LAW LIBRARY PRESERVATION

A major impediment for individual libraries considering digital preservation projects is money. Ninety-three percent of libraries surveyed in this study reported budget problems and concerns about the costs of preservation. In 1997, the National Archives and Records Administration estimated the cost of maintaining digital images for the first ten years of a project at 50 to 100% of the initial investment; this estimate does not include IT infrastructure costs.⁵² A 1996 report estimated libraries would spend sixteen times more money maintaining and providing access to digital files.⁵³ Earlier studies indicated that initiating, staffing, and maintaining a digital preservation program could cost almost five times the initial investment in the first ten years.⁵⁴ Most law libraries will have to seek opportunities for collaboration and cooperation through consortia, professional organizations, and repositories at the state and national level.

As the survey results indicate, law librarians have serious concerns about digital preservation. Yet, law libraries need to develop and support a national preservation agenda. According to Robert Oakley, Director of the Law Library at Georgetown University, “in law, unlike some other disciplines, the edge has been taken off the crisis, as we have made significant progress toward the preservation of our basic literature.”⁵⁵ In spite of this progress, Oakley argues that the next step is the creation of a national

⁵² Steve Puglia, *The Costs of Digital Imaging Projects*, in RLG DIGI NEWS, Oct. 15, 1999, vol. 3, no. 5, n.p. The author works for NARA.

⁵³ Charles Lowry and Denise Troll, *Virtual Library Project*, *NASIG Proceedings: Tradition, Technology, and Transformation*, SERIALS LIBRARIAN, Part 1, Vol. 28, nos.1/2, 1996.

⁵⁴ PUGLIA, *supra* note 52. Citing a 1991 EPA study on the Superfund Document Management System concept.

⁵⁵ Robert L. Oakley, *Unfinished Business*, AALL SPECTRUM, May 2001, at 19.

preservation plan and calls on law librarians to actively support that plan.⁵⁶ Currently, several initiatives show promise for preserving legal materials without creating an additional burden on libraries with limited funds or staff resources to support individual in-house preservation projects.

For law libraries, the American Association of Law Libraries (AALL) has created the Legal Information Preservation Alliance (LIPA), a working group composed of AALL-member libraries. LIPA is working to create a preservation agenda for AALL. Currently, LIPA is composed of twenty AALL-member libraries that have contributed or pledged monetary support.⁵⁷ While LIPA represents an important step forward in the creation of a national preservation agenda for academic law libraries, some libraries will be unable to participate fully in this process because budget constraints will not permit continuing support of LIPA.

A. The Library of Congress

For law libraries, the Library of Congress is perfectly positioned to be a partner and an institutional repository in the fight to preserve legal information. Legislation passed by Congress in December 2000, created The National Digital Information Infrastructure and Preservation Program (NDIIPP) giving the Library of Congress the lead in a nationwide plan to preserve digital information.⁵⁸ The legislation appropriated \$100 million including an initial \$25 million for the planning phase of the NDIIPP; matching private funds of \$75 million will be added to the appropriation. Per the congressional mandate, the Library of Congress must begin to capture digital content of

⁵⁶ Oakley at 19.

⁵⁷ American Association of Law Libraries Web site, at <http://www.aallnet.org/committee/lipa/> (last visited April 3, 2004).

⁵⁸ LIBRARY OF CONGRESS, PRESERVING OUR DIGITAL HERITAGE: PLAN FOR THE NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM, Oct. 2002.

historical and cultural significance including web-based and multi-media information.⁵⁹

According to the Plan for the National Digital Information Infrastructure and Preservation Program:

. . . [P]reservation is not merely storage. The goal of preservation is to maintain an information asset so that it is readily accessible for use, no matter what format it was originally in and ensuring that it is authentic and reliable by preventing such things as tampering, accidental corruption of files, media degradation, and losses through software and hardware obsolescence. This mandates active, not passive, management of content and thus involves a large number of actors to work collaboratively toward the common goal of preserving digital heritage.⁶⁰

American Memory, Meeting of Frontiers, and Global Legal Information Network (GLIN) are among the model digital programs the Library of Congress created to share collections through library partnerships in the United States and internationally.

The American Memory Historical Collections are part of the National Digital Library Program, a public-private partnership that is part of the Library of Congress. American Memory is an online resource that currently contains more than seven million items of historical and cultural significance, primarily digitized documents, photographs, sound recordings, and motion pictures from the Library of Congress Americana collection.⁶¹ Digital legal materials include Congressional documents from 1774 to 1873 contributed by the Law Library of Congress.

⁵⁹ Plan for the NDIIPP at 5.

⁶⁰ *Id.* at 21.

⁶¹ American Memory Historical Collection from the Library of Congress Website, at <http://memory.loc.gov/>. (last visited March 10, 2004).

The Global Legal Information Network (GLIN) is a project of the Law Library of Congress.⁶² Member countries contribute original, official texts including laws and legal writings. The Library of Congress houses the server and maintains the database. Currently, only organizations with GLIN membership may view full-text information, but guests may search the database for citations and summaries.⁶³

B. Preservation and Access

The primary patron group for academic law libraries, law students and faculty, continue to demand sources in print format. Many law reviews require students cite checking articles to go to the original print sources even though the sources are readily available in digital format. According to Abby Smith, “early indications are that, rather than decreasing the demand to consult originals, wide dissemination of digital surrogates has created fresh demand for use of primary sources in their original media.”⁶⁴ Distrust of digital information is a concern for academic law libraries as they consider preservation questions. Smith adds, “not all recorded information will survive, and we will never be able to predict accurately which information will be in demand by scholars in the future.”⁶⁵

In this study, law librarians reported concerns about the stability and future accessibility of digital information. While they overwhelmingly supported the preservation goals central to digitization, they remained skeptical about the process.

⁶² GLOBAL LEGAL INFORMATION NETWORK, at <http://www.loc.gov/law/glin/index.html>. (last visited April 2, 2004).

⁶³ *Id.*

⁶⁴ Abby Smith, THE FUTURE OF THE PAST: PRESERVATION IN AMERICAN RESEARCH LIBRARIES, (Council on Library and Information Resources, 1999) at 1.

⁶⁵ SMITH at 2.

Recently, scholars have discussed the idea of institutional guarantees for digital preservation. A 2003 article in *Communications of the ACM* entitled “Trust in the Preservation of Digital Information” addresses the issue of digital preservation from a different perspective. The authors claim that an institutional guarantee will increase the level of trust in digital information.⁶⁶ They describe the results of their survey in which 86% of respondents said they would keep paper documents even if they had an electronic version of the same documents.⁶⁷ As an example of the confidence created by an institutional guarantee, the authors cite the Federal Reserve System and its role in increasing trust of electronic representations of currency.⁶⁸ While the authors do not mention the Library of Congress, there is no doubt that the Library of Congress is already increasing trust and reliance on digital information through the NDIIPP and nationally recognized digitization projects. As a national repository, the Library of Congress is taking steps toward preserving important cultural and legal information, and the NDIIPP directs the Library to consult with federal agencies, research libraries and educational institutions to plan for the future of digital preservation.

Some important preservation and digitization projects have saved significant amounts of legal information from deterioration or obliteration. Commercial publishers are also working to preserve important legal information. Congressional Information Service has preserved almost all United States Congressional information. William S. Hein & Co. has preserved law journals and treatises in microfilm and online. Commercial sources are often expensive.

⁶⁶ Peter E. Hart and Ziming Liu, *Trust in the Preservation of Digital Information*, COMMUNICATIONS OF THE ACM, vol. 46, no. 6, 93 – 97 (2003).

⁶⁷ HART & LIU at 93.

⁶⁸ *Id.* at 95.

Unfortunately, dependence on commercial publishers for large quantities of legal information may actually harm library preservation activities. Licensing of digital information has become so prevalent that many libraries have no choice but to accept non-negotiated licenses. Libraries with smaller budgets and few resources may not be able to afford print sources, and must accept restrictive licenses for their digital information. Since academic law libraries depend heavily on Westlaw and LexisNexis to serve their primary patron base, licensing issues will continue to be a major concern for the future. As technology evolves, libraries may become more dependent on a shrinking number of commercial publishers. As publishing companies are consumed by global conglomerates, access to copyrighted material may become more restrictive.

Alternative sources for preservation quality copies of legal materials are growing in popularity. The Law Library Microform Consortium (LLMC), a non-profit law library cooperative, has filmed more than 94,000 volumes and 7,100 titles. The cooperative's mission is to preserve legal titles and government information in a relatively inexpensive, space-saving format. Member libraries typically donate or lend materials to LLMC for filming. In 1995, LLMC charged \$1.50 per fiche or approximately 1.5 cents per page. Institutional libraries that purchase from LLMC automatically become member libraries. LLMC has recently introduced a new digital library; the Consortium plans to make its entire collection available to subscribers online.⁶⁹

⁶⁹ Law Library Microfilm Consortium Web site, at <http://www.llmc.com/> (last visited April 3, 2004).

V. CONCLUSION

Traditional notions of library preservation and conservation cannot encompass the reality of digital preservation. Results of the survey support this premise. The vast majority of law libraries are not equipped to handle the enormous burden of digital preservation for documents in all formats. Abby Smith argues that: “digital preservation . . . requires regular – almost constant – intervention and cannot be accomplished by librarians alone.”⁷⁰

Academic law libraries are perfectly positioned to revolutionize traditional ideas about scholarship. Smith advocates a new model for scholarship and encourages the academic community to take a proactive role in educating members about the importance of good stewardship of information.⁷¹ This holistic view of scholarship requires individual scholars to take responsibility for their own publications instead of leaving libraries to bear the burdens of storage, access, and preservation. Many academics are beginning to recognize that new models of scholarship will only improve their intellectual environments and the longevity of their work. In the humanities, some scholars are calling for preservation and new access models at the institutional level. “As we think through the revolution in electronic communication, we need to create new models for researchers to work across disciplinary boundaries, making use of databases

⁷⁰ Abby Smith, *Digital Preservation: An Individual Responsibility for Communal Scholarship*, EDUCAUSE REVIEW, May/June 2003, 10.

⁷¹ SMITH at 11.

and resources that no one scholar, or department, can maintain.”⁷² This communal scholarship model is a great fit for law libraries. For example, Duke University Law School has introduced a “Public Law and Legal Theory Working Papers Series” that includes links to full-text versions of articles.⁷³ Librarians have a wonderful history of teamwork and collaboration both inside individual libraries and within the larger library community. Using the established network of librarians, librarians may find this new responsibility for information creation and preservation easier to manage.

While encouraging new scholarship models promotes improved preservation practices for the future, law librarians must focus on practical solutions to current preservation problems. Published in May 2003, the LIPA Conference Report suggests that sustaining a national preservation agenda will require the creation of a consortium. The Conference Report also discusses plans to create a steering committee. LIPA also recently hired a part-time coordinator for preservation projects.⁷⁴ AALL is taking the initiative for law library preservation activities at the national level, but individual law libraries should share resources through regional cooperatives with goals similar to LIPA. At the regional level, AALL chapters may play an important role in educating librarians and promoting preservation of regionally significant legal materials.

Local materials are often ignored by commercial publishers, but these materials are vitally important for law libraries seeking to provide permanent access to a broad range of legal information. A consortium similar in scope to the Triangle Research

⁷² Cathy N. Davidson and David Theo Goldberg. *A Manifesto for the Humanities in a Technological Age*, THE CHRONICLE OF HIGHER EDUCATION, Feb. 13, 2004, at B9.

⁷³ Duke University Law School Web site, at <http://www.law.duke.edu/fac/workingpapers.html>. (last visited April 7, 2004).

⁷⁴ *Preserving Legal Information for the 21st Century: Toward a National Agenda*, LIPA CONFERENCE REPORT, May 2003, at 10.

Libraries Network (TRLN) in North Carolina could assist member libraries with preservation planning and implementation. Developing institutional inventories of at-risk materials may promote common agendas among libraries in the same geographic area.

At the beginning of the 21st century, library preservation reflects the vision of librarians who fought to prevent the disintegration of books and recognized the importance of microform preservation. As technology evolves, librarians must continue the tradition of preserving and ensuring access to important legal information in all formats.

Appendix A

Preservation Practices Survey

1. Describe your library's preservation and/or conservation program(s). If your library does not have a formal program, describe individual preservation efforts.
2. Does your library have a written preservation policy or long-term plan for preservation? Please describe.
3. Does your library employ a full or part-time preservationist or staff of preservationists? Briefly describe job responsibilities.
4. What forms of preservation has your library used?
 - Microfiche
 - Microfilm
 - CD-ROM
 - Digital
 - Other, please explain
5. What problems have you encountered with each of the types of preservation your library has used?
6. What are the major obstacles to preservation for your library (budget, physical space, changing technology, etc.)?
7. List three titles or groups of materials that have a high priority for future preservation in your library.
8. List three titles your library has preserved in digital format.
9. What is your opinion of digital preservation as a long-term preservation solution for law libraries?
10. The Digital Millennium Copyright Act amended Section 108(b) of the Copyright Act to allow libraries to make three copies of an **unpublished** work in its collection for

purposes of preservation, security, or deposit for research in another library. A digital copy may not be used outside the library. Has your library made copies of works under this exemption?

11. Under the new Section 108(c) of the Copyright Act, a library may reproduce a **published** work in its collection that is damaged, deteriorating, lost or stolen, or in obsolete format. Has your library made copies of works under this exemption?

12. During the last twenty years of a published work's copyright term, the new Section 108(h) of the Copyright Act allows a library to "reproduce, distribute, display, or perform" a copy of that work in facsimile or digital form for preservation, scholarship or research purposes. Has your library made copies of works under this exemption?

13. Has your library contributed materials to the Library of Congress American Memory project? <http://memory.loc.gov/> List examples of these contributions.

Appendix B

Preservation Practices Survey Response Statistics

Total Responses

Public	11 (39%)
Private	17 (61%)
TOTAL	28

Responses by *U.S. News* Ranking (2004)

1 st Tier	13 (47%)
2 nd Tier	6 (21%)
3 rd Tier	3 (11%)
4 th Tier	6 (21%)

1. Describe your library's preservation and/or conservation program(s). If your library does not have a formal program, describe individual preservation efforts.

2. Does your library have a written preservation policy or long-term plan for preservation? Please describe.

	Public	Private	TOTAL
YES	2	1	3 (11%)
NO	9	16	25 (89%)

3. Does your library employ a full or part-time preservationist or staff of preservationists? Briefly describe job responsibilities.

	Public	Private	TOTAL
YES	0	1	1 (4%)
Other Staff with Part-time Preservation Duties	6	5	11 (39%)

4. What forms of preservation has your library used?

Microfiche

Microfilm

CD-ROM
 Digital
 Other, please explain

5. What problems have you encountered with each of the types of preservation your library has used?

6. What are the major obstacles to preservation for your library (budget, physical space, changing technology, etc.)?

	Public	Private	Total
BUDGET	10 (36%)	16 (57%)	26 (93%)
TECHNOLOGY	1 (4%)	9 (32%)	10 (36%)
SPACE	3 (11%)	6 (21%)	9 (32%)
STAFF	4 (14%)	5(18%)	9 (32%)

7. List three titles or groups of materials that have a high priority for future preservation in your library.

8. List three titles your library has preserved in digital format.

9. What is your opinion of digital preservation as a long-term preservation solution for law libraries?

10. The Digital Millennium Copyright Act amended Section 108(b) of the Copyright Act to allow libraries to make three copies of an **unpublished** work in its collection for purposes of preservation, security, or deposit for research in another library. A digital copy may not be used outside the library. Has your library made copies of works under this exemption?

	Public	Private	Total
YES	1	4	5 (18%)
NO	10	12	22 (79%)
N/A		1	1

11. Under the new Section 108(c) of the Copyright Act, a library may reproduce a **published** work in its collection that is damaged, deteriorating, lost or stolen, or in obsolete format. Has your library made copies of works under this exemption?

	Public	Private	Total
YES	6	10	16 (57%)
NO	5	7	12 (43%)
N/A			0

12. During the last twenty years of a published work's copyright term, the new Section 108(h) of the Copyright Act allows a library to "reproduce, distribute, display, or perform" a copy of that work in facsimile or digital form for preservation, scholarship or research purposes. Has your library made copies of works under this exemption?

	Public	Private	Total
YES	3	7	10 (36%)
NO	8	9	17 (61%)
N/A		1	1

13. Has your library contributed materials to the Library of Congress American Memory project? <http://memory.loc.gov/> List examples of these contributions.

YES	0
NO	28 (100%)