



Journal of Copyright in Education and Librarianship

JCEL is published by the Kraemer Family Library and the University of Kansas
ISSN 2473-8336 | jcel-pub.org

Volume 1, Issue 1

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Cross, W. (2016). More than a House of Cards: Developing a Firm Foundation for Streaming Media and Consumer-Licensed Content in the Library. *Journal of Copyright in Education and Librarianship*, 1(1), 1-24.

DOI: 10.17161/jcel.v1i1.5919



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CONTRIBUTED PAPER

More than a House of Cards: Developing a Firm Foundation for Streaming Media and Consumer-Licensed Content in the Library

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Introduction

In January of 2015, the Amazon original series *Transparent* made history. Wins at the Golden Globe awards for Best Comedy and Best Actor made the Amazon-created show the first exclusively-online program to win one of the major creative awards. (Birnbaum & Riley, 2015). A critical darling, the story of a transgender woman “coming out late in life and trying to share her authentic self with her dysfunctional family” (Molloy, 2014) struck a chord with audiences and quickly made its way into scholarly discussions and course syllabi. (Parsons, 2015; Robertson, 2016).

Transparent's win was an historical moment, but it was also emblematic of a larger trend in media and culture. As streaming services have become the dominant way that consumers engage with films, television, and video games (Spangler, 2015), companies like Netflix are creating their own programming so they can offer unique content to entice subscribers. Original shows like Netflix' *House of Cards* (Nelson, 2013) and Hulu's *Casual* (Birnbaum, 2015) have been making waves for several years and libraries have been searching for a way to add these materials to their collections. Filmmakers have also begun to embrace independent distribution through a video on demand (VOD) model and game-makers have drawn an increasing amount of their business from digital distribution platforms like Steam.

What these works have in common is that they are available primarily - and increasingly exclusively - through streaming services like Amazon, Hulu, Youtube, and Netflix. A media environment built on the sale of physical artifacts and licensed digital surrogates presented in the context of “purchased” content is transitioning to a model where an increasing amount of high-quality content can only be found in subscription-based services. Unsurprisingly, this change has a significant impact on the entertainment and technology business worlds, but it also creates a significant challenge for higher education. This is particularly true for libraries, which rely on statutory exceptions to

copyright to share and archive content, and to lend new technology in service of their public mission. (Cross, 2012).

These consumer-licensed services not only complicate librarians' ability to rely on traditional copyright exceptions like Sec. 108 for archiving and 110 for instruction, they also come packaged with boilerplate terms that challenge bedrock contract principles for libraries. Since librarians cannot rely on a license that anticipates library use or engage in arms-length negotiation, they must rely on institutional experimentation and risk-assessment, but uncertainty about the law and fear of litigation leave many librarians feeling compelled to work *sub rosa*, keeping their heads down in hopes that they won't be discovered.

In order to develop good practice, librarians must meet these issues head-on. This article will introduce traditional library practice for licensing multimedia content and discuss the way that consumer-licensing and streaming services disrupt that practice. Sections II and III describe the statutory copyright regime designed by Congress to facilitate the socially-valuable work done by libraries and the impact of the move from ownership to licensed content. Collecting multimedia materials has always presented special legal challenges for libraries, particularly as licensed content has replaced the traditional practice of purchasing and circulation based on the first sale doctrine. These issues have grown even more complex as streaming services like Netflix and Amazon and video game downloads through services like Steam have come to dominate the landscape.

Section IV will describe the way that consumer-licensed materials, which not only remove the ownership that undergirds library practice, but also the ability to negotiate for library use, imperil the congressionally-designed balance. This article argues that the ascendant method of consumer-licensed materials may be the final crack in copyright's body of exceptions, reducing library collections to a house of cards ready to tumble.

Section V will present a path forward for libraries to develop robust, cutting-edge collections that reflect a sophisticated understanding of the contractual and copyright issues at play. Despite declarations from some leading lights that "libraries can never stream Netflix films" (Hirtle, 2010) many libraries have initiated programs that leverage these popular services, which are increasingly the only way to acquire award-winning and culturally impactful materials. As more and more content is offered exclusively through these channels, libraries will have to find a way forward or risk abdicating their responsibility to collect these materials.

Copyright and Traditional Library Collections

United States law has always treated libraries as privileged institutions (Cross, 2012 p. 197-203) based on their role in promoting democratic values by lending and preserving materials. (Brief *amici curiae* of ALA, 2012). In particular, there is a long and consistent history of support for library archiving and lending in copyright law. (Rasenberger, 2005).

Under the current Copyright Act, this support is embodied in a series of specific exceptions aimed at librarians and educators cabined in sections 107-110. Each of these exceptions reflects a balance: where able to reasonably do so, libraries lawfully acquire materials and may then circulate, loan, preserve, and share to support teaching, scholarship, and private use. When a work is not reasonably available for sale, available only via obsolete technology, or its use creates minimal market harm, the library is free to archive and share to meet its mission. Each specific exception has grown out of historic recognition of the public value of librarianship and education and is now embodied in explicit statutory language.

General Circulation

For more than a century, the law has recognized a limitation on the copyright monopoly tied to ownership of the physical artifact. Grounded in the civil law concept of “exhaustion” and recognized first by courts in the 1908 case of *Bobbs-Merrill v. Strauss*, the right of first sale reflects both “the law’s historic disfavor of restraints on the alienation of personal property” (Reese, 2003, p. 580) as well as a set of “pragmatic benefits that result from limiting copyright holder control over lawfully acquired copies.” (Perzanowski & Schultz, 2011, p. 893-902).

This emphasis on first sale as a necessary component for libraries to serve as what President Roosevelt called the “great tools of scholarship, the great repositories of culture, the great symbols of the freedom of the mind” (Becker, 2005, p. 49) was recognized by Congress first in the 1909 Copyright Act. In the current 1976 Act it is embodied in Section 109 which states that “Notwithstanding the provisions of section 106(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”

Today Section 109 is the backbone for library lending. As Reese (2002) notes, “the first sale doctrine has been a major bulwark in providing public access by facilitating the existence of used book and record stores, video rental stores, and, perhaps most significantly, public libraries.” (p. 577). This value was reaffirmed by the Supreme Court in the 2013 *Kirtsaeng* case. Evaluating the first sale doctrine’s application to works made internationally, the Supreme Court recognized that first sale is “deeply embedded in the practice” (Id. at 1354) of librarianship and rejected plaintiff Wiley’s proposed interpretation of 109 as not applying to works made internationally in part because it would “shutter libraries.” (Id. at 1386)

In dissent, Justice Ginsburg went further, arguing that whether or not first sale permitted importation by libraries, section 603(a)(3) “is fairly (and best) read as implicitly authorizing lending, in addition to importation . . .” (Id. at fn 22). Ultimately, the Court in *Kirtsaeng* rejected a narrow interpretation of Section 109 in large part because that interpretation would fail to further basic constitutional objectives, in that socially-beneficial organizations like libraries would have to obtain permission before circulating books published abroad. Library circulation remains a central value of libraries, endorsed legislatively and judicially.

Preservation and Access Grounded in the Library

A related exception, described in Section 108, provides libraries the ability to archive and share materials in their collections. Like first sale, these library-specific exceptions have a long history that predates the current statutory language. These activities were endorsed with informal practices codified as the “Gentleman’s Agreement” in the early part of the 20th Century (Hirtle, 2005; Saunders, 1964) and then with several proposed bills culminating in the 1976 Act’s language. (Rasenberger, 2005). Section 108 “represents Congressional recognition that many of the activities of libraries and archives involve reproduction and distribution of copyrighted works.” (Gasaway, 2007). It offers a set of exceptions for preservation and replacement, copies for users including interlibrary loan of materials, and defines librarian liability, including immunity from suit for unsupervised copying equipment. It also offers a specific savings clause that assures librarians that Section 108 does not overshadow their rights to rely on fair use for library activities but does permit them to bind themselves to contractual obligations that limit this use.

Library Use in Support of Instruction

In addition to the library-specific exceptions described above, the Copyright Act also identifies teaching activities as socially-valuable and thus due extra latitude for use of copyrighted works without permission. Section 110 grants an exception for “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.” This face-to-face teaching exception is targeted at instructors and students, but also supports library instruction and other educational uses that rely on materials in a library’s collection. Reflecting the balance described above, it includes a requirement that performance or display of audiovisual works must be made by means of a lawfully made copy. Section 110(1) is a bedrock for face-to-face instruction at all levels and many libraries dedicate substantial collections resources to acquiring materials so that they can be used by instructors for this purpose.

Section 110(2) offers similar latitude for instructors working in the digital and distance classroom. The Technology Education and Copyright Harmonization Act (TEACH Act) provides comparable ability for instructors and students to perform or display works but, in order to “reassure publishers that are concerned about the openness of the online environment, TEACH places several institutional and individual requirements on universities regarding copyright notice and protection. (Cross, 2012 p. 27). These requirements include technical and information duties as well as use of only “lawfully made” copies of the materials being shared. As with 110(1), TEACH is an important support for both library instruction and instructional use of library collections.

Personal Use of Collections for Scholarship and Citizenship

While the exceptions listed above are targeted at an anticipated library or patron use, libraries also use their collections in ways that are socially-valuable but not explicitly anticipated by the statute. In those cases, libraries rely on fair use. Embodied in Section 107, fair use is often called the “exceptional exception” because it is a catch-all for

socially valuable uses not covered by the specific exceptions described in other parts of the Copyright Act.

Like first sale, fair use has a lengthy and robust common law pedigree and was given statutory recognition in the 1976 Copyright Act. Although it remains an “equitable rule of reason,” Section 107 describes four statutory factors to be considered when evaluating a claim of fair use: the purpose and character of the use, the nature of the original work, the amount and substantiality used, and the effect on the market of the original work.

As nonprofit institutions that serve the public good, libraries make many uses that fit comfortably under the aegis of fair use (Cross 2012 p. 17; Gerhardt & Wessel 2010) and scholars such as Laura Gasaway have argued persuasively that, despite the fact that fair use is procedurally raised as a defense, it functions as a “user’s right” that protects and empowers libraries and their patrons. (Gasaway 2000, p. 120). Indeed, Section 108’s savings clause explicitly ties fair use to the work done by libraries and highlights the importance of fair use to their socially-valuable work.

In recent years, libraries’ reliance on fair use has increased significantly, based in part on Section 108’s technical language, which explicitly permits standard library practices with print sources, but can feel ill-fitted or confusing when applied to digital materials. As library practice has moved beyond the safe harbor of 108, several rightsholder groups have sued individual libraries for digitizing materials to support accessibility, creating searchable databases to increase discoverability, and sharing electronic reserve readings with students enrolled in a particular course. In each case, the library has prevailed, and a growing body of law is coming into focus describing the privileged nature of library use.

Licensed Collections: Fault Lines Appearing

The first major cracks in the foundation of copyright law that protects libraries’ ability to serve society were the result of a move towards licensed content in the digital environment. Replacing physical artifacts that libraries purchase with licensed bits created a strain in the early and mid- 2000s that remains today. Surveying the landscape in 2005, Laurence Lessig described the traditional, library-supported “architecture of access:”

Decades before the Supreme Court decided *Bobbs-Merrill* and Congress codified its holding in the Copyright Act of 1909, libraries were lending books to patrons who were using them to learn and to make their own contributions to building and maintaining a ‘free culture.’ This freedom gave us something real. It gave us the freedom to research, regardless of our wealth; the freedom to read, widely and technically, beyond our means. It was a way to assure that all of our culture was available and reachable - not just that part that happens to be profitable to stock. The architecture of access that we have in real space created an important and valuable balance between the part of culture that is effectively and meaningfully regulated by copyright and the part of culture that is not. The world of our real-space past was a world in which copyright intruded only rarely, and when it did, its relationship to the objectives of copyright was relatively clear. (Lessig 2005, p. 27).

Unfortunately, in the digital environment copyright law is a constant presence and the balance between library purchase and wide, socially-valuable sharing has been skewed. In an environment where libraries have no physical object held in a particular space, each of the exceptions described above has been diluted or completely washed away.

General Circulation and Use of Licensed Materials

The move away from purchase of physical objects most obviously impacts libraries' ability to circulate under first sale and to make fair use of content that cannot be accessed as a result of digital rights management (DRM) technologies. Concern over the "digital first sale" question goes back at least to the 1995 Information Infrastructure Task Force (Lehman, 1995; Hess, 2013) and numerous scholars have written about the dangers of removing first sale from the copyright ecosystem. (Cross 2012; Spratt, 2008; Feiler 2012). In particular, scholars have confronted the challenges posed by libraries seeking to collect ebooks (McKenzie 2013) and music acquired from services like iTunes. (Pessach 2008).

Despite ample scholarly attention and several examples of Congressional action to update section 109 in support of legacy content business interests, (McKenzie, 2013, p. 62; Rothchild, 2004, p. 13-14) the government has rejected both major opportunities to restore the balance that currently skews against libraries and users.

The Digital Millennium Copyright Act and Subsequent Rulemaking

The most significant Congressional consideration of copyright in the digital environment is arguably the Digital Millennium Copyright Act (DMCA). The DMCA is a wide-ranging law designed to bring copyright into the 21st century and implement several international treaties. Significantly, Section 1201 of the Act includes a bar on circumvention of digital rights management (DRM) technologies. Section 1201's limits on circumvention was intended as a safeguard to reassure rightsholders "haunted by the online-piracy culture unleashed by Napster . . ." (Serra, 2013 p. 1801; Litman, 2001) When it was passed, politicians expressed an intention that section 1201 should not harm educational and library use, noting that "throughout our history, the ability of individual members of the public to access and use copyrighted materials has been a vital factor in the advancement of America's economic dynamism, social development, and educational achievement. (H.R. Rep. No. 105-551, 1998, p. 35). Indeed, so many publicly spoke out against the dangers of creating a "pay-per-use society" that copyright expert David Nimmer (2000) acerbically noted that their "solicitude for fair use in the digital environment exceeded support for mother's apple pie." (Id. p. 428).

Unfortunately, judicial decisions holding that Section 1201 prohibits circumvention even for lawful use, most notably *Universal v. Remierdes* which held that 1201 eclipsed fair use provisions of the copyright act, have removed the formidable copyright infrastructure that supported traditional library practice. Today, libraries cannot avail themselves of Congressionally-sanctioned copyright exceptions because DRM creates technical boundaries that cannot lawfully be circumvented even for lawful purposes. As a result, "stewardship of information, which has historically been accomplished via the library's

preservation function of archiving, is no longer possible.” (Cichoki, 2008, p. 41; Bartow, 2003).

In recognition of the nascent online ecosystem and the danger posed by limits on circumvention to first sale and fair use, Congress included in the text of the DCMA a required review of its effects on copyright law. (DMCA Sec. 104). Congress ordered the Copyright Office to produce a report on the issue (Friedman, 2010, p. 637-649) which concluded that it “had not heard convincing evidence of present-day problems.” (McKenzie, 2013, p. 61). Since then, only a handful of bills have been introduced addressing the issue of digital first sale, and none have gained serious traction. (Serra, 2013, p. 1782-1784).

Congress did create one “failsafe mechanism” for the socially-valuable uses made by libraries: the triennial rulemaking proceedings which charge the Copyright Office to generate a set of recommendations for three-year exceptions to the anticircumvention provision. Put into effect by the Librarian of Congress, these exemptions permit circumvention for narrow classes of use, to be reviewed every three years. In 2016, some exceptions have been recognized that are adjacent to the library use described in this article including preserving abandoned video games, ripping Blu Ray/DVD for remixes, and jailbreaking phones, tablets, and similar devices.

Unfortunately, two decades after its passage, the rulemaking procedures have proved to be unduly burdensome, repetitive, narrow, long, and overly complex. (Koberidze, 2015, p. 216-217). These difficulties have blunted the effectiveness of the exemptions, leaving Section 1201 as the “digital oil” to fair use’s water. (Sharp, 2002, p. 39). Ultimately, Congress ultimately took a “wait and see” approach and librarians and users have been waiting ever since.

Judicial Analysis

The courts have also considered the issue of digital first sale and library use in several cases such as *Vernor v. Autodesk*, *UMG Recordings, Inc. v. Augusto*, and most recently in the infringement case against ReDigi, an online marketplace that utilized technology that “gives digital goods ‘physicality,’ [thereby] bringing the familiar process of selling a physical good (CD, vinyl, book, etc.) into the digital age.” (ReDiGi Website). Unlike earlier services like Bopaboo which relied on a user agreement requiring consumers to delete their digital files after selling them (Sandoval, 2008), Redigi used a verification engine that scanned metadata to confirm that a copy was lawfully acquired and then hosted the file in the cloud so that its “atomic transaction technology” could “migrat[e] a user’s file, packet by packet[,] analogous to a train,” without copying it.”(Id.). Redigi argued that its technology enabled “space shifting” of content analogous to the “time shifting” done by Sony’s Betamax technology with live television in *Sony v Universal*. Unfortunately, the court did not agree.

Because ReDiGi’s service maintained a “one-in-one-out” balance that ultimately added no new copies to the marketplace, they argued that the reproduction right was not implicated. In the end, however, “[t]he court did not care whether ReDiGi characterize it

as a transfer, migration, or pilgrimage because “[i]t is simply impossible that the same 'material object' can be transferred over the Internet.” (Huguenin-Love, 2014, p. 1). “Simply put,” the court concluded, “it is the creation of a *new* material object and not an *additional* material object that defines the reproduction right.” (ReDiGi, p. 650). The ReDiGi case remains latest major judicial discussion of digital first sale and leaves libraries and their users without a clear pathway to circulating digital materials as they have done with physical collection for more than a century under first sale.

Library Use of Licensed Works

The move to digital materials similarly harms the ability for libraries to do the work anticipated (and explicitly sanctioned) by Section 108. (Cichocki, 2008, p. 39-41). Because section 108(f)(4) makes the exception subject to contractual language, licenses override the basic protections required for the access and preservation expected of libraries and libraries are unable to meet their “most basic functions” (Id.) including preservation, making copies for patrons’ private study, and interlibrary loan. This results both from libraries’ vulnerability to the terms of specific licenses - which can be thoughtfully negotiated to preserve “traditional library values” (Jones, 2013, p. 460; Cross, 2012) - but also from the fundamentally ephemeral nature of digital content, which can disappear with the flip of a switch.

Of equal concern, “[t]he current language of Section 108 is woefully insufficient to describe the actual process of digitization” and “the terminology of ‘in the library’ is now vague.” (Nolan, 2012, p. 483). The lacuna created by the 1201 is matched by the generally incoherency of print-based language in the digital age (Rasenberger, 2010, p. 18).

In 2005 the Library of Congress brought together a group of experts from libraries and the content industry charged “to conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of the changes wrought by digital media.” (Gasaway, 2007, p. 1333). Mary Rassenberger, a member of the 108 Study Group expressed the mission of the Study Group plainly: “The provisions just don't work in today's environment. So, let's update them, but let's find a way to do it that works for everyone.” (Rassenberger, 2010, p. 16).

The Study Group, comprised of lawyers, librarians, and experts from the private sector, “examined these issues from all sides, gathering information from experts and practitioners in the field in addition to content providers” (Gasaway, 2007, p. 1343). and released a report in 2008. The Report (2008) included three major sections: a set of concrete Recommendations for Legislative Change, a set of Conclusions on Other Issues where the group was not able to agree on the details of what legislation would look like, and a section of Additional issues where it was agreed that there was no change needed at the time. Laura Gasaway, a Co-Chair of the Study Group identifies four major topics of agreement (2007): eligibility, preservation and replacement, copies for users, and a set of miscellaneous issues.

Despite some frustrations with a small group of outlier participants who used the unanimous consensus decision-making model to scuttle many otherwise-popular proposals, the Report was thoughtful, detailed, and offered commonsense suggestion for concrete improvements in Section 108. Unfortunately, those recommendations have not been taken up by Congress, and seem unlikely to be adopted in the near term. (Rasenberger, 2010, p. 16). Without an updated 108, digital first sale, or the ability to rely on fair use for materials protected by DRM, librarians have been flying blind on many issues central to library work and increasingly into the web of licenses that control digital materials.

Consumer-Licensed Collections: A House of Cards

As discussed above, the move to a regime of licensed digital content wrapped in DRM that cannot be circumvented even for lawful purposes has moved legal analysis - and thus library practice - away from the copyright realm, where it is privileged based on public policy and centuries of precedent. Instead, collections today exist in the realm of contracts, where scarce resources leave libraries vulnerable to for-profit actors. (Klinefelter, 2001, p. 176) Describing the “dire consequences” of this move, Cichoki (2008, p. 48-49) notes that:

[L]ibraries depend on the statutory exemptions provided for in sections 107 and 108 of the Copyright Act in order to provide their most basic functions of preserving, replacing, reproducing and lending copyrighted works. DRM, however, does not articulate copyright law; rather, it expresses the rights agreed to by licensing arrangements between content owners and content licensees. If the license and the subsequent DRM applied to the license prohibit copying or printing . . . then both lawful uses and the ability of libraries to preserve access and archive content are eliminated notwithstanding the exemptions provided in copyright law.”

The dangers of this move have been documented by numerous scholars who have expressed variations of the concern that, if these trends continue “the local library simply becomes a web interface for shuttling its patrons off to a for-profit entity that has itself licensed access to content from copyright owners.” (Id. at 40; Farb, 2006). A more recent development in licensed technology darkens this gloomy projection even further.

Rise of Streaming Content and the Consumer-Licensed model

Increasingly, libraries have begun to collect materials that not only cannot be purchased, but are also not available for institutional or library licensing. This has corresponded with the rise in libraries collecting popular materials (Dimmock, 2007) but also in the rise of streaming services that offer an “all-you-can-eat” model, rather than item-by-item purchases of the type used in services like iTunes or most ebook platforms. (DeCesare, 2014, p. 33-39).

Collecting these popular materials is increasingly “essential to university-level classes” (King, 2014, p. 293) and for attracting patrons into the library. (Nagy, 2011, p. 8-10). Scholars like King have also demonstrated how popular materials have proved themselves as educational tools: “Film studies and media arts have become important disciplines over the past several decades; failing to provide for these classes would lead

to the evisceration of important academic disciplines. Furthermore, the nature of contemporary university education requires robust access to nonprint popular culture items. Interdisciplinary programs such as gender, area, and ethnic studies and are almost unimaginable without access to these sorts of materials.” (King, 2014, p. 293).

Streaming itself is also extremely attractive to libraries, as “a response to the changing physical needs of libraries” (Dewan, 2010, p. 44-64) and the flexible, “just in time” approach libraries are taking to collections. (Price & McDonald, 2009; Gilbertson, McKee, & Salsbury, 2014). As King notes, “[u]niversity administrations are looking for lower levels of financial commitment, and favoring expenditures that allow for maximum flexibility. (Parallels can be seen with the erosion of tenure and the preference for adjunct labor.) This mindset favors the rental of information rather than its purchase.” (King, 2014, p. 293).

Most significantly, from a collections standpoint, increasing investment in original programming by streaming services like Netflix is leaving libraries with no other way to acquire important content. (Id.). As services that were once intermediaries increasingly focus on creating content to drive consumers to their services, (McIntyre, 2014, p. 43-59) the traditional alternative to streaming – purchase of a physical version – is no longer available. For now, many libraries are strategically leveraging streaming services to inform collection decisions (Healy, 2010, p. 402-411) but as these services move away from offering any physical alternative, libraries will be left with no way to collect without signing up with these services.

A similar set of pressures exists in another popular area of collection: video games. Libraries have been collecting games since at least the 1800s (Nicholson, 2013, p. 341-361) and video games since they became available to the general public, (DeCandido, 1990) but in recent years, libraries have committed to deep, sophisticated game collections on par with other multimedia materials. (Laskowski & Ward, 2009; Tappeiner & Lyons, 2008). These efforts are often led by public libraries interested in the benefits of a robust collection of popular materials (Senft, 2012; Hallman, 2008) but academic libraries are also collecting games as a vehicle for supporting instructional design, (Schiller, 2008) digital literacy, and the academic work done in media studies, interdisciplinary studies, and game design similar to those discussed above for films.

Like films and television shows, however, video games are increasingly available through digital distribution platforms like Steam.com (Webster, 2011; Walker, 2012). or simply hosted server-side. Services like Steam, which makes up roughly 70% of the \$4 billion US market for downloaded PC games, (Chiang, 2011) are quickly replacing even the disc-based software of a generation ago. Steam offers a particularly compelling case study since it operates as something like a monopoly in the industry (McIntyre, 2014, p. 43-59; Smith, 2010) and has been criticized by both free software advocates (Stallman, 2013) and consumer-protection groups (Savage, 2015) for bad actions. Nevertheless, just as libraries must find a way to collect Netflix’ and Amazon’s streaming-only programs, it would be difficult to build a credible games collection without content from services like Steam.

Legal Challenges with Consumer-Licensed Collections

For a library concerned about cost and space, and hoping to provide access to a vast library of popular materials, “a Netflix subscription seems like the perfect solution.” (Harris, 2010, p. 212). Unfortunately, these services come packaged with all of the baggage of licensing described in Section III as well as an entirely new set of unsettled legal questions. As King notes, “[s]treaming video is an ultraconvenient consumer-oriented product [but] when one starts thinking about commerce and copyright, the disadvantages become clearer. That is, technology gives with one hand, while American legal and commercial structures take away with the other.” (King, 2014).

Like other digital content, streaming services such as Netflix are licensed, rather than owned, and come wrapped in DRM technology. Unlike ebooks or songs from iTunes, however, licenses for these services are presented as non-negotiable, standard-form contracts directed at consumers; they do not contemplate library lending, and in fact, generally limit the service and content to “personal and non-commercial use.” (Hansen, 2011, p. 24-25). Because they are not drafted with library use in mind and cannot be negotiated, they also contain boilerplate language such as indemnification and choice of law provisions that public institutions are generally barred from accepting. This, in turn, raises the specter of unauthorized - and thus unlawful - use that would foreclose reliance on section 110 for instructional use.

Libraries have developed expertise in negotiating licenses and numerous proposals have been offered for strategic licensing that preserves access (Cichocki, 2007) or more generally supports the values libraries represent. (Cross, 2012, p. 195-217). For academic journals, ebook vendors, and even services like iTunes this is a viable and promising strategy. For consumer-focused services like Netflix it has thus far been a nonstarter.

As scholars such as King note, libraries simply do not have the market clout to compel “any for-profit service that seeks primarily to serve a consumer market” to offer packages that include “the stable, reliable inventory of films that university faculty and students require.” (King, 2014, p. 293). In a 2011 article David Hansen put a fine point on the issue: “As the world of licensed electronic content grows, it is unlikely that libraries will represent a large enough segment of the customer population to warrant special attention from publishers in all areas, and without that attention, there is no ‘playing defense’ or ‘playing offense.’ There is no game at all.” (Hansen, 2011, p. 24-25).

Solutions

Libraries have been wrestling with services like Netflix for more than a half-decade (Kaya, 2010) but the legal issues described above remain murky, at best. Noted legal scholars such as Peter Hirtle have argued that Netflix’ terms of use simply make library use impossible. (Hirtle, 2010). Others have expressed confusion about “grey areas” (Zax, 2010) and a few seem to suggest that libraries have at least tacit permission based on private statements from company representatives and a general failure to police behavior. (Stephens, 2010). As a result, “[t]he quality of the Netflix’s service has created an unusual situation in which some libraries now implement the service as a just in case collection supplement, in direct violation of the company’s license.” (Healey, 2010, p.

402-411). Faced with the shaky stack of legal rules, exceptions, terms, and conditions, too many librarians find themselves paralyzed, unable to make any move for fear of bringing down the entire structure on their head.

Statutory Solutions Are Unlikely to Arrive (and That's a Good Thing!)

In one sense, the simplest solution to this issue would be to update Sections 107-110 to permit library use in line with historical practice. There is wide agreement that the 1976 Act is woefully out of date. Indeed, even as the 1976 Act went into effect in the early 1980s, contemporary observers noted that the Act was “a good 1950 copyright law” but that “some of its inadequacies are already becoming apparent, and no prophet is needed to foretell the need for substantial restructuring of our copyright system before the end of [the 20th] century.” (Ringer, 1981, p. 4). Two decades after that projected future deadline, Congress has made only minor adjustments or technical corrections, (Pallante, 2013, p. 319-320) mostly to address concerns about piracy or otherwise increase the scope and strength of rightsholder controls.

Maria Pallante, the current Registrar of the Copyright Office has spoken widely about the “wear and tear of the statute” (Id. at 322) and proposed a “Next Great Copyright Act” to address this issue. An optimistic approach to the issues described here would be a rebuild of the infrastructure supporting librarianship. After all, library practice has deep grounding in both common law and previous statutes and many of the concerns dismissed by the 2001 Copyright Office Report have come to pass.

The 2001 Report dismissed digital first sale based on the unavailability of “forward-and-delete” technology of exactly the kind offered by Redigi. The Report also echoed Congressional statements about the value of library use and explicitly recognized the validity of concerns about the impact of removing first sale from library practice, discussing a series of concerns raised by library associations including interlibrary loans, off-site accessibility, archiving/preservation, availability of works, and use of donated copies. Although the Report opted not to address those issues in 2001 it did express the expectation that “the marketplace will respond to the various concerns of customers in the library community” and recognized that “these issues may require further consideration at some point in the future.”

In 2016, the marketplace has responded primarily by foreclosing greater and greater portions of mainstream culture from library collection and curation. As such, it may be tempting to imagine that Congress might live up to this promise “to ensure the continuation of library functions that are critical to our national interest.” (Report). Indeed, scholars have put forward numerous proposals ranging from simple updates to statutory language (Pavel, 2009) to more ambitious ideas like a mechanical library license (Richardson, 2014) state law solution, (Hansen, 2012) or an administrative agency “designed specifically for defining and regulating educational fair uses of copyrighted material.” (Simon, 2009, p. 453).

These proposals are varied, thoughtful, and tremendously unlikely to be passed into law as written. While Register Maria Pallante has argued that an overhaul of the law is

needed, many librarians are wary that regulatory capture of the Office (Public Knowledge, 2016; Litman, 2001) and the outsized influence of rightsholder groups (Yu, 2005, p. 658-661) would poison the process, as they did with the DMCA and Section 108 Study Group in 2005. (Samuelson, 2013).

Indeed, in the summer of 2016 the Copyright Office solicited comments for a revised Section 108, but most comments reflected the Association of Research Libraries' concern that "the inherent risks in reforming Section 108 are unlikely to outweigh what may be modest benefits in an update to a section of the copyright act that is actually working." (Cox, 2016) Copyright attorney Jonathan Band puts finer point on the issue: "even if the Office somehow manages to produce a streamlined and comprehensible proposal, the rightsholders can be expected to insist on changes to eliminate possible abuse that will inevitably make the proposal more complex." (Band, 2016). Libraries have been waiting for two decades for Congress to fix the mess created by the Digital Millennium Copyright Act, and they are likely to have a much longer wait for updated legislation that truly opens up access.

Only Library Action Can Restore Library Values

In the marketplace, streaming services are aware of library interest in their content and seem to have adopted a policy of benign neglect. A recent statement from Netflix is emblematic of this attitude: "We just don't want to be pursuing libraries. We appreciate libraries and we value them, but we expect that they follow the terms of agreement." (Kaya, 2010). Libraries are such a small user group that streaming services are neither interested in bringing lawsuits nor offering negotiated library licenses.

This leaves libraries looking to collect consumer-licensed materials trapped in a vicious circle. With no clear avenue to license content, many libraries are unwilling to engage with the services, and those that are willing often feel compelled to do so quietly. In turn, this lack of visible engagement sustains the sense that the library market is small enough to ignore, so no institutional license option is created. Since no one is at the table, no one will come to the table.

Libraries' should take the first step by entering the market. To do so with confidence, however, their behavior must be grounded in the legal principles discussed in Section II. For each of these four areas of librarianship they should look to the guiding principle of library practice embodied in the language of the current statutory exceptions. By following these practices - enabling personal use, avoiding commercial advantage, offering lawfully-made materials, and facilitating uses that are likely to be fair such as teaching, scholarship, research, and especially transformative uses - libraries can meet their mission in a way that honors the core legal principles that have always supported librarianship in service of society.

General Circulation for Personal Use

As discussed above, circulation of library materials for personal use is at the core of the common law tradition and statutory language empowering libraries. Even before the first sale doctrine was judicially recognized, there was no serious question that libraries were

permitted to lend to patrons copies of printed books that they acquired. (Gasaway, 2010, p. 425; Lessig, 2005). The explicit value of first sale as a tool for libraries was also ratified by the Supreme Court in the *Kirtsaeng* case. In light of these assurances, libraries should read ambiguous “personal use” language in licenses for consumer-licensed products broadly, to encompass standard library lending. Lending devices such as a Roku loaded with a Netflix subscription or a Playstation with games downloaded from Steam for personal use should be understood as within the purview of the license libraries acquire, even when that license does not explicitly permit library circulation.

Preservation and Access that Does Not Create Commercial Advantage

Similarly, the preservation and access principles described in Section 108 predate explicit statutory language, so sections where ambiguity about library use exists should be read to permit this type of use, especially when it does not create a commercial advantage. Preservation of materials like abandoned games has already been recognized with an exemption to 1201 and libraries should be empowered to preserve obsolete media acquired through consumer-licensed services such as the notorious *Silent Hills PT* (“playable teaser”) that was removed from the Playstation Store and became so rare that individual consoles loaded with the downloaded game were selling for \$1,800 shortly after it was removed. (Makuch, 2015).

Interlibrary loan raises more complex technical and legal issues but libraries should certainly be able to avail themselves of the protections from liability for unattended copying equipment and reliance on fair use that make Section 108 such an important tool for library practice around new and evolving technology. Armed with these protections and guidance from the 108 Study Group – which has as much legal force as the often-cited Classroom Copying Guidelines – librarians can begin to develop practices for preservation and access.

Use of Lawfully Made Materials in Instruction

Use of library materials in face-to-face and distance instruction is easily accommodated by a reading of the “lawfully made” language in Section 110(1) and (2) that recognizes the core values of copyright. A licensed copy of a streaming service like Netflix should be understood as “lawfully made” for performance and display in a classroom just as a DVD borrowed from a library’s collection would be.

Indeed, the Supreme Court in *Kirtsaeng* explicitly noted that “we normally presume that the words ‘lawfully made under this title’ carry the same meaning when they appear in different but related sections.” Justice Breyer, for the Court, concludes that “lawfully made” should be understood as “met the requirements of American copyright law” and points explicitly to users “who are not owners of a copy, but mere possessors who ‘lawfully obtained’ a copy.” “A copy may be ‘lawfully made under this title,’” he concludes, “when the copy, say of a phonorecord, comes into its owner's possession through use of a compulsory license.” Applying the same reading of “lawfully made” to a consumer-licensed video or game, makes it clear that use of consumer-licensed services is permitted by the language of the statute, as well as the history and policy of copyright law.

Fair Use as Support for Library Action

Scholars such as Brandon Butler (2015) and Jonathan Band (2011) have argued that fair use, particularly when it is transformative, can fill many of the gaps created by the Copyright Act's increasingly outdated language. Band's seminal work on the "gravitational pull" (Id.) of copyright exceptions makes this argument clear. Fair use, he argues, provides powerful support for "the 'near-misses,' the situations where a defendant engaged in the sort of activity permitted by Congress in a specific exception, but ultimately did not qualify for the exception for a narrow technical reason."

Librarians relying on the exceptions embodied in Sections 108-110 to share consumer-licensed materials are a perfect example of these "near misses." They are doing the sort of work libraries have always been empowered to do by the law and by tradition and practice. The fact that the terminology in the statute is outdated or that an ambiguous license could be read to limit use should not be an impediment to this practice, particularly since fair use is a constitutional imperative (Burk & Cohen, 2011; Lange & Anderson, 2011) designed to support exactly these moments of transition and uncertainty.

Reliance on fair use is also a boon for libraries in the event that a service like Netflix or a rightsholder of specific media threatens litigation. Section 504(c)(2) of the Copyright Act remits statutory damages, removing the major fuel for copyright lawsuits. Public institutions can also avail themselves of sovereign immunity to all damages, as Georgia State University did when they electronic reserves policy was challenged in *Cambridge University Press v. Patton*, leaving them free of the financial concerns that keep so many libraries from aggressively acting.

With these financial pressures reduced or removed, libraries can engage with consumer-licensed services confidently. If services like Netflix continue to ignore the library market then libraries can meet their mission on their own terms. If these services do take notice and reach out, then librarians can begin the negotiations they are prepared to do and develop new models and services. Either way, the Gordian knot of inattention and fear will be cut so libraries can move forward.

Conclusion

"The Kindle [ereader] has no application for public libraries." (Hartman, 2008)

Written less than a decade ago, this prediction sounds, in 2016, either hopelessly naïve, or dispiritingly prescient. Consumer-licensed materials are the "new normal" for books, television, film, video games, and whatever new medium emerges next. Librarians face a stark choice when evaluating these materials: either find a way to collect these materials in a deliberate manner or abdicate their historical duty to their patrons and to society. Moving forward requires returning to the legal foundation upon which libraries have been built over the past century. This foundation, which was laid decades before the current copyright act, is still strong. It can still support libraries' role as "essential to a functioning democracy . . . which extends the franchise, the right to petition, and the right to advocate." (Laughin, 2010, p. 21).

A common metaphor suggests that fair use is like a muscle – use it and it gets stronger, ignore it and it will atrophy. (Aufderheide & Jazsi, 2011). The same is true for the edifice of library copyright exceptions: use it often and it remains a sturdy citadel that defends librarianship against all comers. Abandon it, and it falls into disuse. Unlike an atrophied muscle, however, years of neglect have not weakened this foundation. In the move to licensing, librarians have been forced out of this space, but it still stands, buttressed by the common law traditions, the text of the copyright act, and many judicial rulings. Librarians seeking a safe space to experiment with new models in this environment of legal and technical uncertainty would be wise to build their base here.

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17 U.S.C. 108

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