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Section 108 Revision: Nothing New Under the Sun

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Abstract

Section 108 of the Copyright Act lays out a series of specific protections for reproduction and distribution of copyrighted works by libraries and archives. Disagreement has always been associated with Section 108 as it strikes a balance between the needs of libraries and the market prerogatives of copyright holders, especially publishers. It is also part of a larger balance in the Copyright Act between specific exceptions and flexible users' rights embodied in Section 107, which covers fair use. In the summer of 2016, the Copyright Office announced it was putting the finishing touches on a substantial rewrite of Section 108. To inform discussion of Section 108 revision, this article explores the history of Section 108 and of proposed Section 108 revisions, arguing that Section 108 has served libraries well in its current form, and that "reform" in the current political climate is unlikely to yield any worthwhile improvements to the statute. Instead, history shows that any revision process is likely to be a vehicle for restricting the activities of libraries and raising the cost of access to information. Libraries should maintain the position that has guided them for more than half a century: vigilant defense of fair use and skepticism of negotiated specific exceptions. As this piece went to press, the Copyright Office released its draft rewrite of the law, and a brief appendix reflects on how the draft stands up to the concerns we raise.

Introduction: Why Are We Talking About Section 108?

Section 108 of the Copyright Act lays out a series of specific protections for reproduction and distribution of copyrighted works by libraries and archives. A long and detailed provision, it allows libraries to make reproductions for library users, for preservation and replacement, and for other purposes. The statute specifies how many copies may be made, of what kinds of materials, and under what circumstances for each purpose. Section 108 was first codified in the 1976 Copyright Act, alongside Section 107, the fair use right.[1] Until that time, libraries had relied entirely (if not always self-consciously) on the judge-made doctrine of fair use to protect their activities. The 1976 Act presented a stark choice: continue to rely completely on fair use, or seek specific protection in a separate provision. After nearly two decades of debate, Congress ultimately chose both.

An air of controversy has always been associated with Section 108, also known as "the library exception." It was controversial when first proposed in 1961 by the Copyright Register Abraham L. Kaminstein, and continued to be so up until the passage of the Copyright Act of 1976. The technological villain at the time was the photocopy machine, and publishers feared that with copying power, librarians would run amok and compete with publishers. Section 108 "could have been a potential nightmare for book and journal publishing" (Adler, 2006, p. 1) if librarians embarked on a campaign of photocopying sufficiently robust to undermine publishers' traditional markets. They did not, and Section 108 survived alongside fair use, but the legal provisions that govern library copying continue to fascinate some copyrightholders,

1. Fair use is a flexible exception that evolved from more than a century of judge-made law. When a use is fair, it is not an infringement of copyright, even if it involves the copyrightholder's exclusive rights. Fair use is applied on a case-by-case basis by weighing four statutory factors: the purpose of the use; the nature of the work(s) used; the amount used; and the effect of the use on the value or market for the work used. These factors are considered together in light of the purpose of the copyright law—to promote cultural flourishing. Fair use typically favors uses that advance that purpose, by creating new meaning, new insights, new aesthetics, or otherwise adding to the culture, without intruding on the ordinary market for the work used.

who see an opportunity to constrict the activities of libraries, apparently fearing that libraries would overuse the exceptions.

Just one month after then-Register of Copyrights Maria Pallante called for "The Next Great Copyright Act" in a lecture delivered at Columbia Law School (Pallante, 2013), Chairman Robert Goodlatte announced the U.S. House Judiciary Committee's intent to conduct a comprehensive review of the copyright law, including Section 108. The Register's speech was the blueprint for House Judiciary Committee review. To help frame discussions for the copyright review, the U.S. Copyright Office conducted several policy studies, prepared reports, and held public roundtables. Two issues studied by the Copyright Office—mass digitization and orphan works—implicated Section 108 (U.S. Copyright Office [USCO], 2015). In the summer of 2016, the Copyright Office called for stakeholders to request in-person, closed-door meetings in Washington D.C. to discuss a number of discrete issues. The Copyright Office announced it was putting the finishing touches on Section 108 legislation it had already drafted, but that had not yet seen the light of day.

As this article went to press, nearly one year later, a draft has emerged from the Copyright Office as a result of those meetings. (We discuss this draft in a postscript to this article.) The House Judiciary Committee has begun issuing proposals after its relatively brief review of the law, focusing for now on the location and authority of the Copyright Office and the Register of Copyrights.

Section 108 could easily be the subject of future proposals, however. To inform future discussion of Section 108 revision, this article will explore the history of Section 108 and proposed Section 108 revisions, arguing that Section 108 has served libraries well in its current form, and that "reform" in the current political climate is unlikely to yield any worthwhile improvements to the statute. Instead, history shows that any revision process is likely to be a vehicle for restricting the activities of libraries, in particular, by removing the fair use savings clause from Section 108 (§108 (f)(4)). Libraries should maintain the position that has guided them for more than half a century: vigilant defense of fair use and skepticism of negotiated specific exceptions.

The History of Section 108: Library Copying, Fair Use, and Beyond

The 1976 Act Revision and Drafting Process

If history is any indication, comprehensive copyright reform

will be a multi-year challenge. Rewriting the copyright law for the 1976 Act required a 20-year process of reports, hearings, and draft legislation. The process began in 1955, when the Copyright Office commissioned 35 policy reports through 1961 in preparation for Congressional review. Two early reports focused on fair use and on a library photocopying exception, and included recommendations for Congress. Borge Varmer's 1959 Photoduplication of Copyrighted Material by Libraries report included two recommendations—statutory inclusion of a library reproduction exception separate from the doctrine of fair use (which was not codified at the time), or a working arrangement in the "nature of a code of practice" determined by an agreement among libraries, publishers, authors, and other groups (Varmer, 1960, p. 66). The Varmer study's broad outline of an exception for making copies for users (based on past practice and the laws of several foreign countries) is remarkably close to what was ultimately codified at Section 108(d) and (e):

> [T]hat photocopying be limited to nonprofit institutions; that only one photocopy be supplied to any one individual or organization; that in the case of periodicals photocopies be limited to one or two articles from any issue; that in the case of other works, photocopies be limited to a reasonable portion of the work (though no mathematical formula would seem to be feasible), except that a photocopy of an entire work might be permitted where it is not available from the publisher (Varmer, 1960, p. 63).

Copying for preservation and replacement of out-of-print works is treated much more briefly, but generally endorsed.

By this time, photocopying by libraries was already considered fair use in some circumstances. The key debate was whether to include fair use and a specific exception for library photocopying in the statute, or one but not the other. Varmer's report warned that a specific exception that defines precisely under what circumstances libraries can make copies "is likely to prove too complex and too restrictive from the standpoint of libraries and researchers." Citing technological change, Varmer observed that "a considerable degree of flexibility seems desirable," and worried that "[a] statutory prescription in precise detail may well become outmoded in a relatively short time" (Varmer, 1960, pp. 65–66). Five of the seven comments filed by interest groups in response to Varmer's report opposed a specific exception (Rasenberger & Weston, 2005). Chris Weston and Mary Rasenberger report that opposition to a statutory solution would predominate in both the library

and owner communities until the late 1960s.These issues plagued the copyright study groups, publishers, librarians, authors, and several others (including the typesetters) up to the final drafting of the Copyright Act of 1976.

In 1961 Register of Copyrights Abraham L. Kaminstein introduced a report on copyright reform which recommended a statutory provision for library reproduction (USCO, 1961). To rely solely on fair use to make photocopying decisions was thought to be too uncertain. The library associations initially opposed the exception, arguing that it was too specific and not flexible enough to stand the test of time and technological advancement. Other stakeholder opinion was mixed. The photocopying exception was dropped, but remained a topic of discussion.

In 1963, Edward Freehafer, chair of the Libraries Committee on Fair Use and Photocopying— a library coalition that included both the American Library Association (ALA) and the Association of Research Libraries (ARL)—supported a fair use solution for library photocopying: "The matter might be better dealt with as an aspect of fair use rather than by Statute in order to give it maximum flexibility as demands and needs and methods of duplications come before us in the future" (House Judiciary Committee [HJC], 1963, p. 34). Horace S. Manges, speaking on behalf of the American Book Publishers Council, said their "reaction was violent. There is nothing we disagree with more completely" (HJC, 1963, p. 35). Irwin Karp, representing the Authors League of America, agreed, focusing on what he believed to be a misunderstanding of copyright law in general. Karp did not "think that the copyright law and that copyright were intended as some reward, a limited reward, with all sorts of exceptions carved around the edges" (HJC, 1963, p. 36).

In his statement, Karp alleged that the ALA had already published a statement at their June 1963 convention "that it will be library policy to fill an order for a single photocopy of any published work or any part thereof" (HJC, 1963, p. 36) even though Section 108 had not been finalized in statute, drawing the ire of some rightsholders who were not consulted. By 1965, Section 108 was back in the draft legislation, and its relationship to fair use continued to be debated.

Consensus between publishers and librarians seemed to grow more elusive as time went on, even though a number of attempts for reconciliation were made. Library groups reversed their stance on specific exceptions due in part to this breakdown in relations with rightsholder groups. Citing deep divisions over the scope of fair use and

resulting risk of litigation, the Joint Libraries Committee on Copyright sought specific protection for library activities in the form of broad permission to make copies for users so long as the copying was not for commercial advantage (Rasenberger & Weston, 2005). Publisher and author groups balked. In his report, Register David Ladd lamented "the disappointing lack of successful discussions among the parties" following numerous meetings to reach "voluntary agreements" including a last ditch effort in the form of a "Conference on the Resolution of Copyright Issues" arranged by the Copyright Office and the National Commission of Libraries and Information Science in 1974 (USCO, 1983, p. 138).

In 1973, while the fair use and library photocopying debate continued in Congress and at the Copyright Office public meetings, the courts took up the issue in *Williams & Wilkins Co. v. United States* (Williams & Wilkins Co. v. United States, 1972). Williams & Wilkins, a publisher of scientific journals, sued the National Institutes of Health (NIH) and the National Library of Medicine (NLM) for their practice of making copies for researchers. The NIH provided single copies of journal articles for its own researchers while NLM provided a single photocopy of a journal article to participating libraries at the request of their library users. After a commissioner in the Federal Court of Claims issued an opinion siding with the publishers, the full court reheard and reversed the opinion, ruling that the practice was a fair use. In his dissent, Judge Nichols complained that "however hedged the decision will be read, that a copyrightholder has no rights a library is bound to respect. We are making the Dred Scott decision of copyright law" (Williams & Wilkins Co. v. United States, 1973, at 1387).

In its en banc decision, the Court of Claims noted that "since Congress has, up to now, left the problem of photocopying untouched by express provisions and only doubtfully covered to any extent by the generalizations of Section 1 of the Copyright Act, in evaluating 'fair use' the court gives the benefit of the doubt — until the Congress acts more specifically — to science and the libraries, rather than to the publisher and the copyright owner" (Williams & Wilkins Co. v. United States, 1973, at 1361). The court further justified its favoring libraries by reference to the evidence in the case, "[T]he record here shows that medical science will be seriously hurt if the photocopying practiced by the involved agencies is stopped and, conversely, the record fails to show that plaintiff or other such publishers will be substantially injured" (Williams & Wilkins Co. v. United States, 1973, at 1359).

The decision had an impact on the copyright revision process, and may have been a catalyst to the ultimate inclusion of both fair use and the library exception in the final version of the Copyright Act of 1976 (USCO & National Digital Information Infrastructure and Preservation Program [NDIIPP], 2008). Publisher and library groups filed amicus briefs on both sides of the case, and their antagonism in court stiffened their resolve against compromise in the legislative arena for the duration of the litigation. The ruling was later affirmed by an evenly-divided U.S. Supreme Court (Williams & Wilkins Co. v. United States, 1975), but the tie vote meant that no opinion was issued and the result had no precedential effect on future cases.

Once *Williams & Wilkins* was decided, however, the groups returned to the negotiating table to iron out remaining issues. Congress finally passed the comprehensive revision bill in 1976, including both specific protections for library copying in Section 108 and a newly-codified fair use doctrine at section 107. A savings clause at Section 108(f)(4) provided libraries reassurance that "nothing in this section…in any way affects the right of fair use as provided by section 107" (USCO, 2016c, p. 31).

The First Section 108 Study

The Copyright Act of 1976 included Section 108(i), which required that the Register of Copyrights conduct a five-year study of the effectiveness of Section 108. The Register was asked to address "the extent to which this section has achieved the intended statutory balancing of the rights of creators and the needs of users. The report should also describe any problems that may have arisen and present legislative or other recommendations if warranted." (U.S. House of Representatives, 1976, p. 78). Meetings with stakeholders and regional hearings were held and a national statistical study proposed. King Research, Inc. led the study that included two rounds of extensive surveys, 150 site visits to libraries to monitor photocopying, and 2000 individual user questionnaires (King Research, Inc., 1977). Publishers were asked to supply numbers of new journals published, the number of journals that ceased publication, membership to Copyright Clearing Center (CCC), and more. The King Research study was extensive, and results indicated that publishers' concerns of missed sales were unfounded and that Section 108 struck the right balance for rightsholders and the libraries (USCO, 1983).

Nonetheless, and despite data proving otherwise, Register Ladd's final report to Congress said that there existed "credible evi-

dence" that balance was *not* reached. No additional evidence was provided to validate this statement other than the presumption that CCC royalties should be higher. The ALA suggested that royalty payments were low because most of the copying fell squarely in line with Section 108. The ALA questioned the Register's report, saying that it was based on "the erroneous assumption that user rights under the law are an 'encroachment' on author and copyright owner rights" (Marshall, 1983, p. 173). Ladd cited problems with library users who made photocopies for purposes other than education and research. He suggested that libraries take more responsibility and monitor the use of photocopy machines because librarians "failed to comport with the behavior intended by Congress" (USCO, 1983, p. 93). Moreover, Ladd's report suggested that permissible copying was defined primarily by Section 108, that fair use would be available only "[o]n certain infrequent occasions," and "not on a broad and recurring basis once the copying permitted by Section 108 has occurred" (USCO, 1983, p. 96). The House Judiciary Committee accepted the report but did not follow up with any action. The Authors Guild invoked the Register's Report nearly three decades later in its lawsuit against the HathiTrust and some of its member libraries, citing it for the proposition that mass digitization for search was "outside the plausible readings of the [108] provision" (Authors Guild, Inc. v. HathiTrust, 2012, Document 55, p. 11) and so should not be favored by fair use.

A second review of Section 108 resulted in a 1988 report recommending that a study of the effects of new technology be commissioned. It also suggested that future reviews be conducted every ten years, instead of every five (USCO, 1988). Neither occurred and the study requirement was deleted from the statute in 1992.

The Section 108 Study Group

In 2005, the Copyright Office and the National Digital Information Infrastructure and Preservation Program (NDIIPP) of the Library of Congress sponsored a study on Section 108 and appointed stakeholders representing rightsholders, librarians, archivists, and academics to review Section 108, taking into consideration the digital environment. The Section 108 Study Group members were asked to put their institutional or industry viewpoints aside and engage in an "independent discussion," (USCO & NDIIPP, 2008, p. 4), an ultimately-failed attempt to circumvent divergent opinions likely to occur. The notion that members of the Study Group were independent, and did not speak for the organizations that employed them, remained a talking point throughout the study. In reality, it is likely that consensus was difficult

to achieve in part because individual participants genuinely shared in the interests of the groups from which they were drawn.

The Study Group held bi-monthly meetings for nearly three years, from 2005 to 2008. The meetings were closed to allow the members to "speak freely without concern for the views of their respective communities" (USCO & NDIIPP, 2008, p. 4). Members were asked to keep their deliberations confidential, but it's unlikely this ground rule was ever fully followed. Two rounds of public comments and three roundtables were held but their impact on the Study Group's work is not known.

The public comments are useful, however, in providing a sense of what the positions of powerful industry groups would be if legislation to amend Section 108 were introduced today. A quick perusal of the Section 108 Study Group website collecting these public comments should give libraries pause. (USCO, 2017a). Individual publishers, their trade associations, and other rightsholder groups repeatedly cautioned against expanding libraries' rights under Section 108, warning that it would intrude on their burgeoning efforts to develop digital products and services.

Instead, they proposed stringent new reporting requirements, burdensome searches for commercial availability, and the use of digital locks to control access and use, strictures that would curtail existing rights and render any new rights for libraries dead on arrival. Rightsholders even called into question existing protections in Section 108 for interlibrary loan and making limited copies for users, suggesting that market solutions have rendered them unnecessary, or worse, inconsistent with U.S. treaty obligations. Whatever the conclusions of the Study Group, the comments of the commercial sector foretell a grim struggle to retain existing provisions should congressional revision discussions ever begin in earnest.

A final report was issued in March 2008, nearly one year later than initially planned, reflecting the complexity of the issues and the divergent policy positions of the members. Consensus was reached on four legislative recommendations: the inclusion of museums in Section 108, a break from the three-copy limit for both replacement and preservation to "reasonably necessary" copies, the right to preserve copies that are at-risk but not yet damaged, and that Section 108 exceptions apply to contractors who may perform some library activities. Importantly these consensus decisions were "conditioned on satisfactory resolution of related outstanding issues" (USCO & NDIIPP, 2008, p. 2).

As with the photocopy machine, publishers were concerned about the ease of making and distributing copies using computers and the internet in ways that they believed posed a threat to the marketplace. The use of technological protection measures and the security of copies were also issues, as well as public access to Section 108 copies. Rasenberger, who convened the Study Group meetings on behalf of the Copyright Office and NDIIPP, later reflected that she could not say that the Group had been "super successful" (Rasenberger, 2013). The Study Group differed on fundamental issues such as the purpose of the copyright law, so there was little common ground from which to build consensus. Participants from the library community have cited the process as a cautionary tale about the limited upside and substantial risk of negotiating with rightsholders who hold such radically different views about the purpose and ideal shape of copyright law.

The Libraries' Study of Section 108

The ALA and ARL conducted their own study of Section 108 beginning in 2005. Rasenberger, the Copyright Office staffer who facilitated the work of the Section 108 Study Group, led off the first convening with a presentation on the NDIIPP program. In her statements Rasenberger gave a review of the purpose of the study. In 2000, Congress made a special appropriation of $100 million dollars to the Library of Congress for the development of a national program to ensure access to digital information, including born-digital resources, for future generations.

Rasenberger said that the success of the NDIIPP program, and all preservation efforts, was a catalyst for changing Section 108. A NDIIPP Master Findings report indicated that copyright was one of the principal hurdles facing the preservation community (Rasenberger & LeFurgy, 2005). Digital preservation implicated the reproduction right but Section 108 did not necessarily provide a provision for such library activities. Fair use, licensing, and a broad reading of Section 108(b) and (c) were currently used to justify digitization. Goals for digital preservation partnerships with the Library of Congress included education, best practices, and sustainability.

In its white paper on Section 108, ALA and ARL "recommended caution in revising Section 108":

> When Congress considers whether changes are necessary, we note that experience has shown that flexibility in copyright law is critical, especially in a time of rapid technological and organizational change. Rigidity in the law could inadvertently limit

> innovation and inhibit the ability of libraries to design new services, serve users, or work with new digital media and formats. Technological innovation is driving changes in institutional roles and the development of new practices and standards. Given the pace and breadth of change and what is at stake, we believe that the best approach is to reaffirm the fundamental rights and responsibilities of libraries to preserve and provide access to the evolving cultural and intellectual record and to provide a legal environment that enables the development of professional and institutional practices necessary to accomplish this mission on behalf of society. Indeed, we need to move away from technology-specific constructs, such as counting the number of copies (an artifact of microform technology), and instead address purpose and results in technology-independent ways (ALA & ARL, 2006, p. 2).

The ALA and ARL also advised that preservation without access to digitized materials was inconsistent with library missions and difficult to justify to administrators and funders, that website archiving was a fair use, and that the use of technological protection measures that "deny or deter the exercise of rights granted by copyright law would be inappropriate, and indeed conflict with the professional values of librarians" (ALA & ARL, 2006, p. 5). The library associations emphasized that the objective of the Section 108 Study Group was clear—revisions to Section 108 should only be made to better meet the needs of libraries and archives in the digital environment. If NDIIPP and other preservation efforts were hampered by a lack of clarity regarding copyright law, then it was common sense to only make changes that enabled libraries to meet their missions in the digital environment. Otherwise, leave Section 108 alone (ALA & ARL, 2006).

The Summer 2016 NOI: A Moving Train or a Dead Horse?

After roughly eight years of relative quiet (punctuated by two one-day meetings, described below), Section 108 reform came yawning abruptly back to life on June 7, 2016, with the Copyright Office's release of a Notice of Inquiry (NOI) titled "Draft Revision of the Library and Archives Exceptions in US Copyright Law." The NOI "invit[ed] interested parties to discuss potential revisions relating to the library and archives exceptions" so that the Office could "finalize its legislative recommendation" regarding reform of the provision (USCO, 2016a, p. 36594). This section explores the substance of the NOI, public reactions

from libraries and others, the politics of the closed-door meetings, and the limited information released about them.

The 2016 NOI

Government agency NOIs often use persuasive storytelling to show that agency action (a new rule, a deeper study, a legislative recommendation) is required. The 2016 NOI on Section 108 is no exception. It begins with a brief history of the origins of Section 108 in the Copyright Act of 1976, observing that the provision was "designed to address the prevalent use of print-based analog technology occurring at the time of enactment" of the 1976 Copyright Act. The NOI then argues that the provision has become "stuck in time" due to the lack of substantial updates to address digital technology (USCO, 2016a, p. 36595). The version of history in the NOI consists of a chain events showing unbroken momentum toward revision, culminating in the NOI, with occasional dissent from library organizations.

The NOI's story starts in earnest with the creation of the Section 108 Study Group, whose deliberations and conclusions we've summarized (and criticized) above. It then moves forward through time, highlighting events showing continued interest in revision. Two such events are Copyright Office-sponsored meetings convened after the Study Group report was published in 2008: a closed-door reconvening of some of the Study Group participants held in 2012 in Washington, D.C., and a one-day conference at Columbia Law School's Kernochan Center for Law, Media, and the Arts in 2013. These events offer limited insight into continued interest in revision, however, and limited guidance as to what form, if any, revision should take.

Of the 2012 reconvening, the NOI says "Most Study Group members agreed that updating Section 108 remained a worthwhile goal" (USCO, 2016a, p. 36597). Remember, however, that the 2008 consensus between publishers and other rightsholders and some members of the library community was already partial and fragile. Of the group's 19 members, only six were affiliated with libraries or library organizations, and one (Robert Oakley of the Georgetown University Law Library) had passed away in the meantime. "Most" of the group could agree that changing the law was still worthwhile four years later even if no librarian thought so. Also remember that copyright holders have consistently favored changes to Section 108 to *further constrain* library activities like interlibrary loan and making copies for users. "Most" of the group may well have agreed that *shrinking* Section 108 protection for libraries was still a worthwhile goal. That kind of momentum would of course give libraries pause. The meeting was completely private, so

there is no record of the substance of the discussions other than the broad summary in the NOI.

The NOI mentions that some members of the Group (presumably the library or higher education representatives) advocated in 2012 for stronger exceptions than were in the Study Group report, and that members of the group were split on the implications of increased library reliance on fair use. By that time the Authors Guild had filed suit against HathiTrust and a group of its library members, and several rightsholder groups argued that libraries had "gone too far" in reliance on fair use (Authors Guild, 2011). Library groups, on the other hand, had seen several high-profile court victories involving fair use and were feeling more confident than ever that courts would adopt their view of the law. The library and copyright holder factions were now in a combative posture, just as they had been during the *Williams & Wilkins* litigation. Consensus across Study Group participants in that context seems unlikely.

The February 2013 meeting at the Kernochan Center was even less indicative of consensus or momentum for revision. Indeed, it was dominated by discussion of issues not covered by Section 108 but hotly litigated under fair use. Participants from libraries and library groups consistently disagreed with those from the commercial sector about the necessity and scope of reforms to the statute. This disagreement was grounded partly in a broader disagreement about the scope and availability of fair use protection for activities not protected by Section 108. Paul Aiken, president of the Authors Guild at the time, explained that his group had a "keen interest" in mass digitization, a non-Section 108 activity the Guild claimed was infringing (Aiken, 2013). Indeed, just months after the Kernochan meeting, Rasenberger, the lead staffer from the Copyright Office who helped organize the Section 108 Study Group, filed an amicus brief in the HathiTrust case on behalf of the Association of American Publishers (Price, 2013). That brief argued, among other things, that the scope of fair use should be limited by Section 108, exactly the position libraries feared would animate copyright holders in any revision process. A unanimous panel of the Second Circuit Court of Appeals rejected that view the following year, holding library digitization for search, preservation, and accessibility was a fair use and that Section 108 placed no limitations on that right (Authors Guild, Inc. v. HathiTrust, 2014).

The discussion at Columbia was not only contentious, but also relatively brief and hardly representative of the variety and depth of interests at stake. While there were plenty of interested people in the audience, there were only four panels of four or five participants each

who were allowed to speak at any length. Participants were not always representatives of large groups—indeed, most panels included individual librarians or lawyers in private practice, who could speak only for themselves. The subject matter of some of the panels was impossibly broad—"Section 108 Issues Other Than Mass Digitization," for example, would seem to cover basically all of the existing statute, which does not currently address mass digitization. That discussion lasted just 90 minutes and featured only four panelists. Mass digitization, which had not been discussed by the Study Group, had become sufficiently pressing in the meantime due to the Google Books project that it got its own inconclusive 90-minute panel. Video of the other Symposium panels further confirms that the NOI's description of the event as a "valuable and comprehensive adjunct" (USCO 2016, 36597) to the Study Group report is optimistic at best.

The last major event discussed in the NOI is a hearing on Preservation and Reuse of Copyrighted Works before the House Judiciary Committee in 2014 (HJC, 2014). One panelist, James G. Neal (then-Vice President for Information Services and University Librarian at Columbia University), who had been a member of the Section 108 Study Group, testified that Section 108 revision was neither practical nor desirable. Library associations endorsed Neal's testimony (Library Copyright Alliance [LCA], 2014). Gregory Lukow, the Chief of the Packard Campus for Audio Visual Conservation, Library of Congress, called for reform to permit broader audiovisual preservation. Study Group co-chair Richard Rudick, a publishing industry attorney, argued that reform to Section 108 could bring clarity to libraries and copyright owners about permitted library copying. Rudick had made the same argument at the Kernochan Center event, prior to the HathiTrust's vindication in the courts.

Based on this ambivalent record of discussions partially favoring revision, which was driven primarily by the Copyright Office and from which library groups and representatives had distanced themselves at every stage and with increasing vigor, then-Register of Copyrights Pallante announced in 2015 that "the Office has concluded that Section 108 must be completely overhauled" (USCO, 2016a, p. 36597).

After a brief detour into international law (mostly to note that some other countries—all of whom lack fair use—are considering updates to their laws' library provisions to accommodate digital technology), the NOI turned to an argument that library groups' core concern about Section 108 revision—that it will undermine fair use—is novel and misplaced. The NOI claimed that "since the enactment of the Copyright Act of 1976, the views of the library and archives commu-

nity regarding Section 108 have become less uniform and more complicated, particularly as courts have supported newer applications of the fair use doctrine" (USCO, 2016a, p. 36598).

In fact, as the history above shows, the library and education communities have had the same fundamental ambivalence toward specific exceptions since at least the 1950s: if such exceptions are sufficiently clear and simple, they can provide a useful safe haven, but if too specific they may not be sufficiently flexible to keep pace with technological change, and could undermine library recourse to fair use. Libraries have also consistently resisted rightsholder attempts to increase licensing revenue by placing untenable limits on library and user rights. These concerns had been validated by a series of bad deals negotiated with rightsholders since the 1976 Act, some of which had become law (discussed at length below), as well as aggressive rightsholder litigation followed by judicial vindication.

The NOI notes, helpfully, that the savings clause in the current Section 108(f)(4), "Nothing in this section…in any way affects the right of fair use," clearly preserves fair use, and that fair use should of course continue to be available to libraries. It also notes, accurately, that the "lingering debate" is "about how sections 108 and 107 (the fair use provision) will operate together in the future." A footnote quotes Rudick, again warning that "reliance on section 107 for purposes that go far beyond those originally conceived or imagined invites, as we have seen, expensive litigation with uncertain results" (USCO, 2016a, p. 36598).

Rudick's warning actually gives libraries three good reasons to keep their distance from Section 108 revision. First, the litigation to which Rudick alluded was later shown to be a prudent risk that vindicated libraries' centrist views and cleared the way for a new age of "non-consumptive research" (Butler, 2017). Libraries should not regret wisely choosing to take a reasonable stand for their rights. Second, Rudick's suggestion that libraries ought to confine themselves to "safe" activities described in a specific provision is precisely what has always given libraries pause about rightsholder enthusiasm for Section 108. Safe harbors can be very useful, but library mission will suffer if libraries never do more than the bare minimum of permitted activities in support of research and teaching. Third, Rudick's suggestion that mass digitization "go[es] far beyond" the "original" or "imagined" purposes of fair use reveals the chasm that separates libraries and publishers (and other rightsholders) on the issue of fair use, and by extension the nature and purpose of copyright (USCO, 2016a, p. 36598). Libraries rightly saw the HathiTrust project as consistent with a deep line of fair use case law on search engines, as well as very clear legislative history

on accessibility and preservation, and the courts agreed. Libraries have little reason to compromise with a radically different view that has so far been discredited in the courts.

With this story in place, the NOI turned to a series of subjects it is investigating in connection with its own drafting process. The questions asked in the NOI suggest the Copyright Office's planned revisions are either modest, unnecessary, or potentially harmful to libraries. The NOI sought feedback on ten areas of revision (USCO, 2016a, p. 36599):

- *Defining the class of institutions that would qualify for Section 108 protection*. The lack of a statutory definition of "library" is a longstanding source of anxiety for copyright holders, but has never been a challenge for libraries. This change would surely narrow the class of covered institutions, placing vital entities like the Internet Archive or the Digital Public Library of America at risk. Amending the statute to freeze in place the definition of "library" circa 2017 seems inconsistent with the Copyright Office's stated goal of freeing the law from outdated assumptions.

- *A new exemption for archiving materials posted to the internet, with an opt-out mechanism. T*his is already a widely-practiced fair use, with flexible norms likely to better accommodate technological shifts than a specific provision (ARL, 2012). In particular, the Copyright Office's proposal of an opt-out mechanism would allow website owners to block efforts to document history.[2]

- *Whether to expand the rights covered by Section 108 beyond reproduction and distribution, to include public performance and display.* This would be a nice expansion, as media consumption on the internet (such as streaming video) can implicate the latter rights, but on what terms? The devil would be in the details. And again, fair use best practices are already working to provide libraries with confidence they need to make lawful performances and displays.

2. A powerful example is described in Lapowsky (2017). If web archiving were treated as a Section 108-only activity, subject to publisher opt out, then the President could bring copyright infringement lawsuits against the Internet Archive and Google for maintaining copies of his campaign website.

- *Whether to change the number of preservation copies permitted, and perhaps replace the current quantitative limit with a limit based on purpose.* The current statute includes a three-copy limit on copies made for preservation or replacement. Libraries already rely on fair use to do more where appropriate, however, and any negotiation over expanding this aspect of the right is sure to require caveats and concessions elsewhere.

- *The level of access a library may provide to preservation copies made under the statute. A*gain, the current law includes a damaging limitation on public access to digital copies made for preservation—thanks to the most recent revision to Section 108, made as part of the Digital Millennium Copyright Act. Doing away with this unnecessary limit would be good, all else equal, but all else is never equal. Copyright holders insisted on these limits in the last round of Section 108 revision and are unlikely to acquiesce in changes without deep concessions elsewhere.

- *Unambiguously permitting digital document delivery, subject to new limitations.* The bargain here, again, is certainty in exchange for less flexibility. Institutions already use digital delivery to facilitate interlibrary loan and other copying for users under the current statute and fair use. The only people who think this is controversial, in our experience, are publishers. Librarians are comfortable with fair use and the existing Section 108.

- *Overriding contractual provisions inconsistent with Section 108 protections.* This is something libraries have sought for decades, but that copyright holders have rejected with equal determination. The NOI seeks comment (from copyright holders, presumably) on the possible implications of such an override for "business relationships" between vendors and libraries. We are confident that they heard an earful, as licensing is now the predominant way of selling content to libraries.

- *"Outsourcing" protected activities to private vendors or other third parties.* Again, this is something many libraries already do, and the alleged uncertainty here is promulgated primarily by copyright holders, not libraries.

- *Use of technical protection measures (TPMs, also known as DRM or digital locks).* This is a perennial favorite of rightsholder

groups, who imagine that requiring libraries to include such measures, or not to alter the ones vendors use, will somehow protect them against piracy. Experience over the two decades since the passage of the Digital Millennium Copyright Act, which added new legal protections for DRM, shows that determined pirates will always win these arms races, while good faith actors like libraries bear the cost. Library groups have made clear that they will not support further expansion of legal requirements to use TPMs that block lawful uses.

- *Use of an administrative rulemaking process rather than statutory language to develop the details of library rights.* Again, experience with the Digital Millennium Copyright Act is instructive, as the triennial rulemaking run by the Copyright Office has been a cumbersome and often frustrating process for libraries. It requires extraordinary expenditure of time and effort by libraries to secure relatively modest rights. Adding such a process to Section 108 would make the law substantially worse.

The slight nature of the improvements on offer in the NOI, together with the substantial risk of curtailing library rights, confirmed and strengthened many librarians' conviction that revising the statute was not going to lead to positive outcomes for libraries.

Meetings and Reactions to the NOI

Shortly after the NOI was issued, library groups and individual institutions and librarians expressed concern about the possibility of a lengthy, needless revision process. The Library Copyright Alliance (LCA), which consists of the ALA, the ARL, and the Association of College and Research Libraries, issued a strong statement reiterating its opposition to Section 108 revision and raising concerns about the lack of transparency in the Copyright Office's proposed meeting process (LCA, 2016). The Society of American Archivists argued that "now is not an appropriate time to rewrite or amend Section 108" (SAA, 2016). The Internet Archive asked why the Copyright Office was intent on revision when libraries had decided collectively that they opposed it (Bailey, 2016). The ALA's District Dispatch blog raised further concerns about the closed-door nature of the meetings (Russell, 2016). A group of Virginia university libraries sent a letter to the leaders of the House Judiciary Committee to urge caution in discussing changes to Section 108 (Farish, 2016). Nevertheless, the closed-door meetings took place.

The Copyright Office reported that "nearly 40" meetings were held, mostly in-person at the Copyright Office in Washington, D.C., though some participants chose to meet by telephone (USCO, 2016b). The meetings were private and off-the-record, so the public must rely on summaries issued by the Copyright Office to get an idea of what was said to the Copyright Office during these meetings. Groups and individuals did not have an opportunity to see or respond to the arguments or assertions of other participants in the process before the Copyright Office formulated its final recommendation. We have no idea which policy positions or suggestions were made in the meetings or by whom, nor is there a public record against which to judge any future characterization of these conversations by the Copyright Office. Perhaps most importantly, libraries lack a clear sense of the concerns expressed or policies recommended by copyright holders, information that would be extremely useful in determining whether and how to engage with any future legislative process.

What we do know is who participated, thanks to a list made public by the Copyright Office in response to concerns about transparency (USCO, 2016b). Of the 52 participants (some meetings included multiple groups or individuals, since there were fewer than 40 meetings), 21 were organizations or individuals associated with rights holder interests, from the Motion Picture Association of America to Study Group co-chair Rudick. The remaining 31 were associated with libraries and educational institutions and groups.

One notable thing about these meetings is that, like every discussion of copyright and libraries since 2005, they were surely colored by the history of litigation that grew out of the Google Books project. Many of the participants on both sides had either been parties to the litigation or else had filed amicus briefs and participated vigorously in the public discussion that surrounded the cases. It is not clear, for example, that the Science Fiction and Fantasy Writers of America would have participated in a proceeding about library exceptions in copyright if they had not spent years embroiled in a fight against book digitization by Google and its library partners (Strauss, 2009). They certainly had not been represented in the original Study Group process. For some rightsholders and associations, this proceeding may have been an opportunity to relitigate before the Copyright Office disputes where courts had sided with libraries.

The authors of this article each participated in meetings as part of this process, and can provide some limited insight into what our

meetings looked like.[3] Several attorneys from the Copyright Office attended, including Weston, who, along with Rasenberger, was part of the Copyright Office legal team that supported the Section 108 Study Group. While we were free to raise and discuss any issue we liked, the Copyright Office staff were focused on moving methodically through the questions in the NOI, described above. We raised some of our core concerns (described in more detail below) about the risks associated with starting a negotiation process that involves copyright holders with vastly different views from libraries, but the Copyright Office attorneys argued that what could happen in a future political process was not their concern. They were focused on writing a new Section 108 that balanced the interests of libraries, library patrons, and rightsholders in their view; they would not consider the risk that subsequent legislative negotiations would alter that balance. As we note in our postscript, however, they did include in their final recommendation document a warning to the legislature that any rewrite of Section 108 that excluded a fair use savings clause would be a mistake (USCO, 2017b).

The Case Against Revision

While the foregoing narrative has included asides and observations drawn from history about the downsides of revision, this section will lay out the core case for leaving Section 108 alone. It begins with a description of the advantages of the status quo, including salutary developments around fair use and copyright remedies. Then it highlights the risks in embarking on a process of legislative revision, both the inherent risks and the risks unique to this issue and this moment in time.

So Much Winning, We're Getting Tired of Winning

The last few decades have seen a series of technological, cultural, and legal developments favoring libraries. While the current copyright system is of course still a source of substantial challenges to library mission, the safety valves favoring libraries have come into clearer focus and prudent risk taking by leaders in the library community has helped establish powerful legal precedents in their favor. The principal developments favoring libraries are: the development of new technological tools that enable new forms of preservation, research, and access; the shift toward risk management thinking among librar-

3. The ARL's Director of Public Policy Initiatives, Krista Cox, wrote about her meeting; see Cox (2016).

ians and library leaders; the judicial embrace of broad fair use rights and the development of corresponding best practices; high-profile library victories in fair use litigation; and judicial recognition of important limits on remedies in copyright cases.

Technology has enabled powerful new forms of research, preservation, and access. Text and data mining may be the most well known, in part because it is at the center of the litigation described below. Searching across the full text of millions of volumes takes the card catalog into the 21st century, and more advanced forms of text processing can discover facts and support hypotheses that were scarcely imagined just a few decades ago. Equally important, however, is the development of technologies for archiving the web, for secure preservation of digital objects, and for efficient and high-quality digital scanning and processing of texts and other artifacts. This technology has empowered libraries and their users without harm to copyright holders, and library use of these technologies has not been unduly constrained by copyright.

Libraries have been able to take greater advantage of new technology thanks in part to a wider embrace of risk-management thinking. Leaders in the library community have helped educate librarians about ways to manage and even embrace the inevitable risk and uncertainty associated with working with copyrighted material (Smith, 2012). They have also begun to see the "mission risk" associated with foregoing activities that would advance mission. By identifying particularly high- and low-risk items, providing easy channels of communication for sharing and addressing concerns without resort to litigation, and taking steps to limit the possible downsides if litigation does arise, libraries are increasingly in the business of wise acquisition of risk, rather than freezing in the face of uncertainty.

One source of libraries' courage is a string of judicial victories establishing library-friendly precedent regarding both fair use and remedies. On the fair use side, readers of this article will surely be familiar with the Google Books saga, which was described briefly in the post-2008 history above. Libraries around the country partnered with Google to embark on a massive book-scanning project, creating a digital corpus of millions of volumes reflecting the collections of the most prestigious research libraries in the world. Libraries formed a new entity, the HathiTrust, to steward their copies of this collective collection (together with digitized materials from other efforts). Authors' and publishers' groups brought lawsuits against Google and, eventually, against the HathiTrust and several of its library members, arguing

they had engaged in massive copyright infringement. Two panels of the Court of Appeals for the Second Circuit sided with Google and the libraries, holding that digitization, search, preservation, and accessibility projects were all covered by fair use.

Copying millions of in-copyright works to make a search index, and displaying portions or versions of those works as search results, had already been found to be fair use by multiple courts by the time Google and HathiTrust applied that logic to books (Sag, 2009). These opinions are grounded in an approach to fair use that was already well established by the time the Google Books project commenced. Beginning with the Supreme Court's 1994 decision in *Campbell v. Acuff-Rose*, courts shifted their focus from market concerns to cultural ones (Netanel, 2011). Now they ask first whether putative fair uses are "transformative," a term of art coined by Judge Pierre N. Leval in a law review article a few years before the *Campbell* case was decided (Leval, 1990). Unlike the previous approach, which had focused on the alleged market harm to the copyright holder, transformative use shifted the focus to the user and the cultural meaning and value of her use. A work is transformative if it uses existing copyrighted materials for a new purpose, creating new meaning, insight, or aesthetics, rather than merely providing the public with a substitute for lawful access. Because the user's purpose (relative to the purpose of the original copyright holder) is at the core of the fair use determination, the user is in a much better position to evaluate the strength of her fair use argument than she was under the previous, market-centered orientation.

Adding to this momentum is the growing body of fair use best practices codes and statements. Developed by researchers at American University in collaboration with a variety of communities, these statements apply the logic of transformative use to specific practice contexts, finding consensus among professionals around core situations where fair use can be applied (Aufderheide & Jaszi, 2010). The statements are typically developed in close collaboration with members of the relevant practice community, based on interviews and small group discussions among a diverse range of members of that community, then vetted by a panel of legal experts to ensure the community's consensus is consistent with legal norms.

The *Code of Best Practices in Fair Use for Academic and Research Libraries,* sponsored by the ARL and endorsed by the ALA and several other major library groups, addresses eight common scenarios where libraries can apply fair use (ARL, 2012). Key for this discussion, the *Code* includes guidance on preservation and archiving of web materials as well as preservation of works stored in fragile or near-obsolete for-

mats, and creation of online exhibits, three areas where libraries have sometimes worried that Section 108 is not sufficient to protect current practice. With the *Code* in hand, libraries are better equipped to take advantage of their fair use rights as well as Section 108, just as the savings clause at Section 108(f)(4) envisions.

Another trend that should give libraries courage is the way courts have shown that they will take other legislative expressions of favor into account as they evaluate fair use claims. The first statutory factor that courts consider in weighing a fair use claim is the purpose of the user. Jonathan Band has shown that the first factor should favor "'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" (Band, 2011, p. 453). The Second Circuit did exactly this in its HathiTrust opinion, citing the variety of legal protections for disabled persons, including Section 121 of the Copyright Act, as evidence of a general legislative intent to foster such access, weighing the first fair use factor in favor of HathiTrust as a result (Authors Guild, Inc. v. HathiTrust, 2014). The consequence for Section 108 should be clear: uses for preservation or user study that somehow fall just outside of Section 108 (the creation of more than three preservation copies, for example) should find favor under fair use.

Court decisions on remedies have also given libraries cause for optimism about their rights, as they limit the downside risk of fair use. In *eBay v. MercExchange*, the Supreme Court clarified that intellectual property owners are not entitled to an automatic injunction against alleged infringers, a power that had given rightsholders substantial leverage against users. (eBay v. MercExchange, 2006). Now courts perform the standard balancing test to determine whether to order an alleged infringer to cease its activities. In two cases involving public universities, courts have affirmed that state sovereign immunity protects public institutions against all damages in copyright lawsuits (Cambridge University Press v. Becker, 2016; Association for Information Media and Equipment v. Regents of the University of California, 2012). (The issue has been appealed twice in the *Cambridge University Press v. Becker* case, which is still ongoing, but as of this writing the district court's award of fees has not been overturned.) In *Association for Information Media and Equipment*, the court also applied the qualified immunity doctrine, which bars liability for government employees where the federal or statutory right allegedly violated is not "clearly established." (Association for Information Media and Equipment v. Regents of the University of California, 2012). Where there is a plausible fair use argu-

ment supporting a use (e.g., ripping and streaming DVDs for educational purposes), a court can find that the statutory right against use is therefore not clearly established and qualified immunity for state actors applies. For public institutions and their employees, these opinions substantially lower the stakes of making good faith fair uses. Private institutions and their employees have similar protection thanks to a provision in the Copyright Act of 1976, codified at 17 U.S.C. 504(c), which requires courts to remit (i.e., cancel or bar) statutory damages against them whenever they have a reasonable good faith belief that their use was a fair use. Given that the actual damages from academic uses are likely to be small, and the statutory damages provided for in the Copyright Act are notoriously high, protection against statutory damages should give would-be fair users substantial comfort.

A final aspect of the legal landscape favoring libraries that is not as widely discussed or appreciated is the fee-shifting provision in the Copyright Act. In the landmark case of *Fogerty v. Fantasy, Inc*., the Supreme Court explained that defendants who prevail in lawsuits should have an opportunity to recover their attorneys' fees and costs from plaintiffs (Fogerty v. Fantasy, Inc., 1994). The court subsequently affirmed this aspect of the law in *Kirtsaeng v. Wiley* (Kirtsaeng v. Wiley & Sons Inc., 2016). Courts balance a collection of factors to determine whether to award fees to defendants, and it is not certain that a defendant will win fees even when she prevails, but the possibility of being liable for a library's fees as well as her own may help deter some would-be plaintiffs from bringing a costly lawsuit. Libraries can certainly remind potential litigants of this downside risk, and point to cases like *Brownmark Films v. Comedy Partners* and *Cambridge University Press v. Becker*, where substantial attorneys' fees were awarded to defendants whose fair use claims won in court. (Gardner, 2011; Burtle, n.d.).

Why Not Ask for More?

So, libraries are not in dire need of new protections for their core mission activities. Technology is creating new opportunities, fair use is up to the task, the courts are getting it right, the risks of uncertainty are lower than ever, and library leaders are taking an enlightened approach to what little risk remains. Still, things could always be better. Clear statutory protection would be even better than robust fair use, because it would eliminate what little doubt remains about whether these activities are lawful. Seeking statutory clarification and even expansion would make perfect sense if there were not a substantial downside risk to entering a legislative negotiation around library rights.

Unfortunately the downsides of negotiation are clear and the danger to libraries is substantial.

The risk associated with these negotiations arises primarily from the way that Congress conducts copyright revision, and indeed the very nature of Congress itself. Calls for revision grounded in arguments about the purposes of copyright or the public interest "assume that Congress is in the business of devising wise solutions to copyright dilemmas, based solely on considerations of good public policy," but in reality, "Congress is an intensely political body, loathe to impose one-sided losses on legitimate interest groups" (Olson, 1988, p. 110–11). Examining a series of changes to the law in the 1980s, Timothy Olson shows how this deep fact about Congress consistently shapes copyright legislation. He concludes, "Changes in the Copyright Act have almost always been enacted with the consent of all 'respectable' interest groups that would be affected by the change." Every revision that Olson examined fell into one of three categories: "(1) technical changes that did little net harm to any interest group, (2) provisions attacking "pirates" (or other entities lacking political resources), and (3) substantive changes to which all respectable interest groups had consented" (Olson, 1988, p. 111). Jessica Litman's comprehensive look at the history of the 1976 Copyright Act similarly concludes that "the substantive content of the statute emerged as a series of interrelated and dependent compromises among industries with differing interests in copyright" (Litman, 1987, p. 857).

Section 108 revision is unlikely to favor libraries if it follows this pattern. This is because several 'respectable' interest groups have opinions about revision that are diametrically opposed to library interests. To see this, one need only peruse the public docket of comments submitted to the Section 108 Study Group (USCO, 2017a). Major industry groups like the Association of American Publishers, as well as individual companies like John Wiley & Sons, Inc., and the Copyright Clearance Center, submitted comments favoring *constriction* of library rights under Section 108, citing, for example, new electronic licensing platforms that provide "market-based solutions" to the needs served by inter-library loan. Roy Kaufman, then a lawyer for the publisher John Wiley & Sons, Inc., argued, "even the current exception for library deliveries is often not justified and therefore should not be automatically extended. Now that there is a market supplying them, the lost sale of an individual article must be considered as a lost sale" (Kaufman, 2007). Kaufman is now a Managing Director at the Copyright Clearance Center (CCC), and is still a frequent participant in copyright policy debates. Given the CCC's interest in expanding its licensing market,

they are unlikely to acquiesce to any expansion of library rights in Section 108 without some corresponding constriction elsewhere. The CCC funded half of the lawsuit against Georgia State University over its fair use policies, and has advocated in that litigation for a set of bright line rules to constrain library and higher education fair use. In addition to the risk to fair use, there are new regulatory burdens in the offing, as any expansion of library rights, industry representatives have argued, should be conditioned on "concurrent new responsibilities" such as record-keeping or the use of technological protection measures (Adler, 2006).

In the intervening decade these industries have only become more animated by concern over fair use "expansion" and library "encroachment" on their market prerogatives. Their recent legislative victory securing a landslide vote in favor of removing the Register of Copyrights from appointment by the Librarian of Congress suggests the copyright industries are still quite capable of achieving their legislative agenda, even over library objections (Parisi, 2017). Maria Pallante, the former Register of Copyrights whose departure led to expressions of admiration and concern from the Chairman and Ranking Member of the House Judiciary Committee, is now the President and CEO of the Association of American Publishers (AAP) (HJC, 2017; AAP, ca. 2017). The AAP has been a major antagonist to library interests in copyright policy, consistently bemoaning the scope of fair use in case law. Its public testimony on fair use in higher education suggested a Copyright Office study to explore, inter alia, "what additional scope, *if any*, Congress may have left for a fair use claim to address uses that are implicated by such limitations or exceptions but fall outside of their specific terms" (Adler, 2014; emphasis added).

The Technology, Education and Copyright Harmonization (TEACH) Act provides another cautionary tale for those who would seek legislative help for library uses. Passed in 2002, TEACH was meant to enable distance education by providing a companion to Section 110(1), which permits the performance of audio and video works in face-to-face teaching. However, unlike the traditional exception for classroom teaching, Section 110(2) was passed in the age of rights-holder angst about online file sharing. The resulting difference in the provisions is striking. Section 110(1) is just 84 words long and covers any in-class performance, whether by students or faculty, so long as a lawfully-made copy is used. Section 110(2) is nearly five times as long, carves out a variety of works in addition to piratical copies, and places substantial new obligations on faculty and institutions to use and respect technological measures to prevent further copying and reuse. As

a result, many institutions don't even try to take advantage of TEACH, preferring to rely on flexible fair use instead.

The legislative process is not the only place where library rights may be at risk in any revision process. As Register Ladd's extraordinary 1983 Section 108 Report shows, the Register and the Copyright Office are not always sympathetic to library arguments, and have often given more credence to the arguments made by rightsholder groups. Despite an empirical study by neutral experts that showed libraries were operating within the law and had not affected publisher profits, Ladd's report sided with publishers and the CCC, treating their concerns and prerogatives as more persuasive than established facts. This sympathetic alignment with copyright holders, and corresponding tone deafness to library concerns, is not necessarily surprising.

Despite their administrative position inside the Library of Congress, staff attorneys at the Copyright Office are much more likely to be familiar with the world of law school and private law practice than the world of libraries and education. Leadership in the Copyright Office is consistently drawn from, and returns to, the ranks of law firms and trade associations representing major copyright industries. The libraries with which Copyright Office staff are likely to be most familiar, law libraries at private firms and in law schools, do not have the same needs as school, and particularly academic, libraries to preserve, replace, and make fair use copies to improve access and services. Copyright Office staff are also unfamiliar with the needs of faculty, the research process, and the new and exciting opportunities to advance knowledge in the digital environment that often come directly from the faculty. They are not closely acquainted with new pedagogies or the latest research on how students learn. This is not because they refuse to understand; it is just that in their current roles they are attorneys, and in their previous (and future) roles they typically represent the interests of private companies and industry groups that rely on strong copyright protection. Sympathy for copyright holders has affected the majority of the Copyright Office's policy recommendations, whether they involve libraries, schools, technology companies, or consumers (Rose, Clough, & Panjwani, 2016). This track record should give libraries pause; if the 1976 Act process is a model, Copyright Office reports or proposals could drive the discussion.

Finally, and most importantly, any change to Section 108 could put fair use at risk. The Authors Guild and the AAP, two of the most powerful interest groups in this context, have argued in court that Section 108 *already* limits the fair use rights of libraries, notwithstanding the savings clause at Section 108(f)(4) (Price, 2013). Thankfully the

courts rejected these extraordinary arguments, but a comprehensive rewrite of Section 108, like that envisioned by the Copyright Office, would provide an opportunity to remove or revise the savings clause. A Congress keen to find "middle ground" may be receptive to such a proposal, as it would "balance out" any perceived injury to the copyright industries as a result of any new or expanded rights for libraries. Opposing revision and withholding consent to any negotiated agreement is likely the best way for libraries to prevent erosion of their rights.

Conclusion

When Congress struck a compromise position in the 1976 Copyright Act, adopting both a specific exception for libraries at Section 108 and an open-ended fair use right that could benefit libraries and others in Section 107, it created a framework that has worked exceedingly well for libraries. Clear and specific protection in Section 108 for core library functions like preservation and user copying give libraries the highest level of confidence in carrying out these activities, while flexible fair use ensures that libraries can explore new practices and build incrementally on existing programs. The controversy that erupts around every attempt to re-calibrate this balance is testimony to how difficult it is to achieve. Our survey of the history of Section 108 and of copyright revision generally suggests that any new revision of Section 108 could very easily tip the scales against libraries. Libraries and their associations and allies are wise to keep their distance.

Postscript

Just as this article was going to press, the U.S. Copyright Office released a discussion document on Section 108 "in an effort to facilitate final resolution of this important topic" (USCO, 2017b, p. 1). The Copyright Office characterizes its goal as updating Section 108 to address digital works and digital transmissions, and the document includes model legislation that amends and reorganizes the provision along many of the lines proposed in the 2016 NOI. The document recommends some of the few consensus reforms proposed by the Section 108 Study Group in 2008, including adding museums as a beneficiary of the exception. Importantly, the new draft also includes the current fair use savings clause, calling it "essential" and "an important safety valve…available to libraries and archives in situations not addressed

by the text of Section 108" (USCO, 2017b, pp. 46, 16). The Copyright Office seems to have heard libraries' concerns about the importance of fair use, and in case there was any doubt, makes its proposal entirely contingent on the retention of the savings clause: "the Office would not recommend any legislation that did not include the fair use savings clause" (USCO, 2017b, p. 16).

At the same time, the model bill makes many arguably needless concessions to entertainment industry anxieties about digital distribution. For example, while the proposal does away with the current law's silly (and universally ignored) limitation to only three copies of a work for preservation purposes, it adds a new requirement that only a single copy of a preserved unpublished work be made available to the public for research purposes, with time-limited access and "digital security measures" in place to ensure the user doesn't retain a copy (USCO, 2017b, p. 30). The vast majority of unpublished works in library special collections were never intended for commercial exploitation, and will never be exploited commercially. The risk of harm to the incentives copyright is supposed to protect, namely the incentive to publish your own work for commercial profit, simply does not exist for most of this category of works.

In addition to the generalized anxiety among copyright holders regarding digital use, the draft bill consigns unpublished material to on-site only use in the name of the outdated notion of a "right of first publication", (USCO, 2017b, p. 24). The document acknowledges that this so-called right is "not one of the exclusive rights set forth in section 106 of the Copyright Act," but allows the "principle" to shape its policy (USCO, 2017b, p. 24 n. 113). In fact, Congress has legislated to reverse the effects of this extra-legal principle in the fair use context, adding language to Section 107 instructing courts that, "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." The publishing industry itself demanded this change to the law in the wake of a series of devastating legal opinions suppressing fair use quotations from unpublished works by J. D. Salinger and L. Ron Hubbard, among others (Miller, 1993). Because of this principle, however, the draft bill consigns to relative obscurity vast swaths of material whose authors will never benefit from this unwanted protection; indeed, most will be harmed by the resulting limits in access to their archives.

Similarly, the Copyright Office requires that preservation copies of "publicly disseminated" works be kept in a dark archive, accessible only to staff. Replacement copies in "non-physical" digital formats (i.e., stored on library servers and hard drives rather than on CD, DVD, or

other storage media) may not be accessed beyond the premises of the library. The new version of Section 108 also includes a nonsensical new requirement that libraries consider the market for used copies as well as new copies before making its own replacement copy of a work in its collection. It is mysterious why the Copyright Act should compel libraries to subsidize secondary markets where, by definition, the copyright holder will not be compensated and has in fact abandoned the marketplace.

In defense of these narrowly-drawn specific exceptions, the Copyright Office touts as a benefit to libraries that they will no longer "hav[e] to engage in a time-consuming fair use analysis each time they want to make more than three copies of a work" (USCO, 2017b, p. 25). In reality, however, this is not how libraries make fair use policy decisions; there is no need to consult a lawyer or weigh the four factors over and over when the analysis is the same every time. Once a library concludes that a fair use analysis supports flexible determinations about how many preservation copies are appropriate, that analysis is codified as policy for librarians to follow. Just as consumers rely on the general proposition that it is fair use to do so every time they record a particular television program to watch it later, libraries can rely on the general proposition that making an appropriate number of copies for preservation purposes is a fair use every time they preserve a particular work. The notion that fair use determinations are onerous and must be re-done from scratch every single time the doctrine is applied is a myth that is belied by practice in every industry that relies on the doctrine, including the entertainment industry.

The LCA issued a statement acknowledging the merit of many of the recommendations, noting that the model statutory language greatly simplifies the existing law, and approving the unambiguous conclusion that the fair use savings clause remain intact (LCA, 2016). Nonetheless, the LCA recommends that the model legislation not be introduced. Most of the activities newly permitted by the model bill are already widely in practice under a fair use rationale, and once legislative debate begins, the bill could easily be amended in ways that make it harmful to libraries. The fair use savings clause, in particular, would be under scrutiny from rights holders who have already articulated their opposition to library activities that go beyond Section 108.

For our part, the authors of this piece are very concerned, as it seems increasingly likely that the House Judiciary Committee will eventually consider copyright "reform" bills (perhaps combined into a single "omnibus" bill), and something based on the model legislation could be in the mix of "reforms" on the table. Higher priority concerns

such as immigration, tax reform, and health care may delay any action for some time, but as long as "reform" of Section 108 is a live issue, libraries' fair use rights are in danger.

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