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Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary

United States House of Representatives

113th Congress, 1st Session

May 16, 2013

Distinguished Chairman Goodlatte, Ranking Member Watt and Members of the Subcommittee on Intellectual Property, Competition, and the Internet: Thank you for inviting me to talk to you today about revising the Copyright Act. I am a law librarian and law professor, and I have worked in copyright arena since 1973 focusing on the use of copyrighted works in libraries, archives and educational institutions and the creation of copyrighted works by faculty and employees of these organizations. I was the co-chair of the Section 108 Study Group;[1] a group convened to consider recommend changes to the library and archives exceptions embodied in section 108 of the Copyright Act. I was also a member of the Copyright Principles Project.

Libraries, archives, museums and educational institutions have experienced tremendous changes over the past few decades; they have been active adopters of technology to improve internal processes, to provide increased access to information and to update educational methodology to meet the needs of students today. The digital age has revolutionized these institutions as well as copyrighted works which are increasingly available in digital format. The 1976 Copyright Act was enacted in the very early days of this revolution, and no envisioned creation of the Internet, the importance of digital works and the rise of user generated content. These changes are highlighted in the report of the Copyright Principles Project. For libraries, archives, museums and educational institutions, the ability to rely on digital technologies to perform their traditional functions is crucial. These institutions are also beginning to engage in new activities such as digital preservation and even so-called "mass digitization." The current statute does not deal with any of these issues. At the same time, the creators of copyrighted works must be protected, encouraged and compensated for their works, if they so choose, while making their works available to the public. This means that whatever changes to the copyright statute are adopted must create a balance between creators and users of copyrighted works.

[1] The Section 108 Study Group was created by the U.S. Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress. It issued its report in 2008.

I have thought long and hard about how to solve the problems that libraries, archives, museums and educational institutions encounter in dealing with digital works as copyright owners increasingly attempt to lock down their works with restrictive licensing provisions. For these institutions, just trying to comply with the current complicated statute is expensive and maybe even cost prohibitive. Moreover, today's students and library patrons demand that works be made available in digital format, but the current Copyright Act makes it difficult to provide these copies and still comply with the provisions of section 108. There are three possible ways to ameliorate these problems while still providing necessary protections to copyright owners. (1) Develop a new copyright act that is flexible, less technical and easy for ordinary people to understand, one that is based on underlying principles rather than lobbying efforts that eliminates the difference in the ways different types of works are treated under the statute. An example of such an approach is the Treaty Proposal on Limitations and Exceptions for Libraries and Archives developed jointly by the International Federation of Library Associations, the International Council on Archives, Electronic Information for Libraries and Innovarte, a library non-governmental organization.[2] (2) Repeal section 108 and rely solely on the fair use doctrine to provide these entities with the flexibility they need to fulfill their missions and provide materials to their users, patrons, faculty, staff and students. (3) Revise section 108 of the Act to expand the exceptions to the exclusive rights of the copyright owner to take into account the changes wrought by the digital age in accordance with the Section 108 Study Group Report[3] and update and expand those recommendations.

The first alternative comes from the Copyright Principles Project. The focus would be on providing to users of libraries and archives, visitors at museums and students, faculty and staff of educational institutions the ability to use copyrighted works in a non-commercial manner to provide access to copyrighted works to their users. It would require a flexible statute that is truly technology neutral. The European Treaty Proposal on Limitations and Exceptions for Libraries and Archives[4] includes the ability for libraries and archives to lend tangible copyrighted works to a user or another library; to provide temporary access to copyrighted works in digital format to user or another library for consumptive use; and to provide a copy of a copyrighted work in connection with a user request for the purpose of education, research or private use, provided that the reproduction and supply is in accordance with fair practice. For preservation or replacement, the proposed treaty permits libraries and archives to reproduce works and allows preserved or replacement copies to be used in place of the originals in accordance with fair practice. Another general principle in the proposed treaty is that libraries and archives are permitted to reproduce and make available to the public any work for which the rights holder cannot be identified and located after reasonable inquiry. The treaty proposal deals with digitization only as a preservation matter or to meet the needs of people with disabilities, however.

The second method to solve the statutory copyright problem for these institutions is to repeal the current section 108 and rely entirely on fair use. Fair use may offer much of what these institutions need, but as the Copyright Principles Project noted, the application of fair use is highly technical and often requires interpretation by a copyright lawyer to provide librarians, archivists, museum staff and faculty the answers they need. Many librarians may prefer the fair use solution but there are also significant difficulties with relying on fair use to such an

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[2] *See* http://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/TLIB_v4.3_050712.pdf.

[3] *See* http://www.section108.gov/docs/Sec108StudyGroupReport.pdf.

[4] *See supra* note 2.

extent. For front-line employees of these institutions fair use is too indefinite and fails to provide the immediate guidance they need to answer questions about whether a particular activity is likely to be infringement, particularly when those questions come from a user who wants a quick answer. Further, fair use was never intended to be relied upon so substantially, and it is likely overused today.

The third alternative solution is to amend section 108 to take digital issues into account in a more comprehensive but flexible manner. Clearly, in 1976, section 108 was drafted for the photocopy era; the 1998 amendments improved the statute to permit some digital copying, but they did not really provide what was needed for these institutions to function in a digital world. The Section 108 Study Group, made up of experts from libraries, museums and archives as well as the experts from the copyright content community, spent three years addressing how to amend the library and archives section of the Act. The Study Group Report offered some recommendations and reached other conclusions short of recommendations.[5] But even those recommendations and conclusions are now dated; digital technology as well as library, archives, museum and educational institution practices are simply moving too fast. So, one approach is to enact the changes recommended in the Section 108 Report but also to update them. There are other issues that must be addressed, however, such as orphan works and mass digitization. The need to solve the orphan works problem was highlighted by the Copyright Principles Project. Other organizations and institutions in addition to libraries, archives and museums are interested in large digitization projects, so that the issue might be addressed either within the exceptions for libraries, archives and museums or outside of the section 108 exceptions.

The Section 108 Study Group recommended changes to the existing section 108 to include adding museums to the institutions eligible to take advantage of the exceptions but also with better definitions of libraries, archives and museums that qualify for the exception or by adding additional criteria for qualification such as having a public mission, a trained professional staff and having a lawfully acquired collection. Any amendment should also include the ability for these institutions to outsource covered activities as long as the contractor is acting solely as the provider and cannot retain copies of the works digitized. Further, there would be an agreement between the parties to permit rights holders to obtain redress for infringement by the contractor.

For preservation and replacement, subsections 108 (b)-(c), the current statute permits the making of digital copies, but it restricts the total number of copies to three. Any amendment should change the three copy limitation to a reasonable number of copies in order to provide one usable copy. Statutory change should also provide for refreshing digital copies as needed and upgrading them to new platforms when necessary. Moreover, the Study Group recommended removing the current “premises” requirement in (b) and (c) if the original work that has been preserved or replaced could be used outside the premises of the institution. Two new preservation subsections should be added to the statute according to the Section 108 Study Report. The first would permit up-front preservation of publicly disseminated digital works because once a digital work has begun to deteriorate, it is too late to preserve it. Libraries, archives and museums that undertake such preservation would be required to meet additional criteria such as maintaining preserved copies in a secure, managed, monitored, best practices environment and to adopt transparent means to audit the practices, standard security and a robust storage system with backup copies. The second new recommended preservation subsection would permit the preservation of publicly available websites and online content that

[5] *See supra*, note 3.

is not restricted by access controls. The idea is that this exception would produce a curated collection of websites, available after an embargo period for which copyright owners could opt out, but not if the website is a government or political website. Preserved websites would have to be labeled as such.

The Section 108 Study Report contained other recommendations and conclusions in addition. Although the Group did not agree broadly on providing off-site access to preserved and replacement digital copies and to users who request digital copies under subsections 108(d)-(e), there was agreement that academic institutions with a defined user group (such as students, faculty and students) which have a way to authenticate these users before providing such access could give off-site access to individual, authenticated users without harm to copyright owners. Libraries and other institutions that qualify for the exceptions but which do not have such narrowly defined user groups were more problematic for the Study Group. The ability to provide digital copies to users is a crucial need for the modern era – users are demanding such access, libraries have the ability to provide these copies and to warn users about further distribution of the digital copies. Any amendment to section 108 should provide for off-site access with conditions to prevent further distribution.

For libraries and archives within educational institutions, many of the copyright problems they encounter deal with providing materials for students and faculty for teaching, learning and research. Digital technology has changed the way courses are taught, the way that students learn and how they access and interact with material. Copyright issues for educational institutions can also be dealt with in the three ways described above: from a general principles approach, by reliance on fair use alone, or by specifically amending the exceptions in sections 108 and 110(1)-(2).

Changes to modernize and update the Copyright Act may require society to reevaluate its values: is the primary value of copyright making works available through these important institutions for the purposes of educating the populace, teaching and learning, scholarship, etc., or as stated in the 1790 Copyright Act “the encouragement of learning”? Or is the primary value of copyright maximizing profits for rights holders? Are both of the goals essential to fulfill promotion of the progress of science and the useful arts? How can these competing purposes of copyright law be balanced to provide maximum benefit for society? Balancing these goals will be difficult to accomplish, but it must be done if our society is to flourish and maintain its competitive position in the world.