

# COPYRIGHT REFORM PRINCIPLES FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS

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## ABSTRACT

U.S. libraries, archives, and other memory institutions are stewards of some of the largest collections of copyrighted content in the world. These institutions hold billions of works, the vast majority of which have been created in the last century and are thus subject to copyright protection. This Article is about how these institutions interact with the copyright system and, in particular, how reforming section 108 of the Copyright Act—limitations on copyright for library and archive uses—can help these organizations in their efforts to preserve and make their collections more available to the world.

This Article examines the situations in which section 108 works, where it fails, and where libraries rely on other tools, such as fair use, for preserving, archiving, and distributing works. Understanding section 108 in this context helps to clarify its intended purpose and, in turn, principles for reform. Over the last several decades, it has become clear that policymakers and librarians view section 108's principal purpose as providing a useful, clear, and unambiguous exception that practicing librarians can employ to make decisions about the use of copyrighted works in situations that frequently recur in libraries, supplementary to decisions made under other limitations such as fair use. So far, section 108 has largely failed to fulfill that purpose. This Article identifies five long-term principles that help explain why section 108 has failed in certain respects and can help guide reform efforts to make section 108 more useful in the future.

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### I. INTRODUCTION

In 1945, MIT engineering professor Vannevar Bush published an article—now required reading for students of library and information science—titled *As We May Think*.<sup>1</sup> In it, Bush described, with remarkable prescience, the development of technology capable of compressing and storing vast amounts of information: “The *Encyclopaedia Britannica*,” he predicted, “could be reduced to the volume of a matchbox. A library of a million volumes could be compressed into one end of a desk.”<sup>2</sup> While Bush is praised for his foresight, he was wrong about key technical details; his system was predicated on massive enhancements to microfilm, which each of us would pore over at our desks through a machine he dubbed the “Memex.”<sup>3</sup>

*As We May Think* illustrates a familiar concern for copyright policymakers: how to facilitate innovation when the specific technology

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1. Vannevar Bush, *As We May Think*, THE ATLANTIC MONTHLY (July 1, 1945), available at <http://www.theatlantic.com/magazine/archive/1945/07/as-we-may-think/303881/>.

2. *Id.*

3. *Id.* For a fascinating review of how Bush’s *As We May Think* vision took shape, see *The Brown/MIT Vannevar Bush Symposium*, Oct. 12–13, 1995, MEMEX AND BEYOND WEBSITE, [http://cs.brown.edu/memex/Bush\\_Symposium.html](http://cs.brown.edu/memex/Bush_Symposium.html) (last visited May 1, 2014).

directing innovation is unpredictable.<sup>4</sup> If recent copyright litigation teaches anything, it is that the technical details, of course, do matter.<sup>5</sup> These cases also illustrate the difficulty of balancing creator and user rights to promote creativity and innovation. Libraries that navigate the technical complexities of section 108 of the Copyright Act—“Limitations on exclusive rights: Reproduction by libraries and archives”—are particularly well acquainted with these challenges.<sup>6</sup> Drafted in the photocopier era, section 108 has long been targeted for updates to bring it, and the libraries that rely upon it, into the digital age.<sup>7</sup>

This Article is about how to reform section 108. It does so making three assumptions. The first is that section 108 is a small, integrated part of the current copyright system; therefore reform to section 108 will occur within the context of a larger set of copyright reform efforts that seek to update the Act as a whole.<sup>8</sup> The second is that the reform process will be lengthy and

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4. See Fred von Lohmann, *Fair Use as Innovation Policy*, 23 BERKELEY TECH. L.J. 829 (2008) (explaining how fair use has and can continue to mediate that balance); Dotan Oliar, *The Copyright-Innovation Tradeoff: Property Rules, Liability Rules, and Intentional Infliction of Harm*, 64 STAN. L. REV. 951 (2012) (approaching the question by assessing optimal investment in innovative technology versus optimal investment in creating new content); Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345 (2004) (discussing how to calibrate this balance with respect to file sharing systems and accompanying widespread online infringement).

5. See, e.g., *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640, 645–56 (S.D.N.Y. 2013).

6. The Copyright Act, 17 U.S.C. § 102 (2012).

7. Even upon its enactment, Congress expressed some concern that section 108 might not meet its intended goals. It directed the Copyright Office, at five-year intervals, to “submit to Congress a report setting forth 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.” *Id.* § 108(i) (1988) (repealed by Pub. L. No. 102–307, § 301, 106 Stat. 264 (1992)); see also SECTION 108 STUDY GROUP REPORT (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>; Laura N. Gasaway, *Amending the Copyright Act for Libraries and Society: The Section 108 Study Group*, 70 ALA. L. REV. 1331 (2007); Mary Rasenberger, *Copyright Issues and Section 108 Reform*, 34 COLUM. J.L. & ARTS 15 (2010).

8. Speakers at the symposium from which this Article originated explored a significant number of these issues. See *The Next Great Copyright Act—18th Annual BCLT/BTLJ Symposium*, BERKELEY LAW (April 3–4, 2014), <http://www.law.berkeley.edu/16296.htm>. Other recent efforts to catalog and offer options for reform include: Pamela Samuelson & Members of the CPP, *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1 (2010); Pan C. Lee et al., *Introduction to the Copyright Reform Act*, PUBLICKNOWLEDGE.ORG, (Feb. 13, 2010), <https://www.publicknowledge.org/pdf/cra-introduction-02132010.pdf>. See generally WILLIAM PATRY, *HOW TO FIX COPYRIGHT* (2011) (exploring a number of different options for copyright reform); Pamela Samuelson, *Is Copyright Reform Possible?*, 126 HARV. L. REV. 740 (2013) (book review).

deliberate, both for section 108 and more generally.<sup>9</sup> The third is that legislative copyright revision is potentially risky for all stakeholders. Given the highly charged environment in which Copyright Act revision discussion exists,<sup>10</sup> the political wrangling required to pass a bill on this subject may result in a section 108 that is less useful than it is now. The history of section 108 illustrates that even well-meaning amendments, such as those made in the late 1990s to explicitly include “digital copies” under section 108 coverage and expand library use of works in their last twenty years of protection, can become bloated over the course of bill negotiations with administratively difficult safeguards that make the amendments unhelpful at best and make section 108 less useful than it was before at worst.

In light of those assumptions, this Article identifies a framework for section 108 reform that can help guide its development into an integrated part of the Copyright Act. This framework is not about specific textual modifications to the Act, though it does suggest a handful of changes.<sup>11</sup> Rather, this framework discusses the long-term purpose of section 108 and several principles for reform that are based on a broad view of how libraries operate within the copyright system to make both routine uses and innovative new uses of copyrighted works.

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9. We have already completed year one of a deliberate congressional review of the copyright system. *See* Press Release, House Judiciary Comm., Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), <http://judiciary.house.gov/index.cfm/2013/4/chairmangoodlatteannouncescomprehensivereviewofcopyrightlaw/>. The committee held eight hearings in its first year. As a point of reference, the 1976 Act revision process started in earnest a full twenty years prior to its passage with the publication of a series of studies on copyright revision by the U.S. Copyright Office. *See Copyright Law Revision Studies*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/history/studies.html> (last visited May 2, 2014).

10. Whether this is a new phenomenon or a longstanding challenge is a matter of perspective. One can observe, however, that former Register of Copyrights Barbara Ringer expressed similar concerns when she spoke these wise words over 40 years ago in the lead up to the passage of the 1976 Act:

[C]hanging any law is never an easy matter, and the case of copyright is made much more difficult by the religious fervor and theological arguments thrown at each other by the contending parties. The personal anger, the emotion, the presentation of viewpoints in stark black-and-white terms, are quite different in degree and character from what one might find in disputes over, say, admiralty or insurance law.

BARBARA A. RINGER, *THE DEMONOLOGY OF COPYRIGHT* 5 (1974), *available at* [http://www.copyright.gov/history/demonology\\_of\\_copyright.pdf](http://www.copyright.gov/history/demonology_of_copyright.pdf).

11. *See infra* Part III. These specific changes, informed by the principles identified below, largely align with specific proposals leveled by others, such as the Section 108 Study Group.

Part II of this Article examines how libraries use section 108 today and how section 108 and library practice fit within the overall copyright system. This Part explains why libraries find section 108 inadequate for many modern applications, primarily in the digital realm. It also explains why, while section 108 is useful in some situations, section 108 has never been the primary tool for either routine library uses of copyrighted works or for making new, innovative library and archive uses of copyrighted works.

Part III (reform principles) applies the lesson from Part II. It demonstrates that section 108 has been asked, but has failed, to provide library-like institutions with a useful, clear, and unambiguous exception that practicing librarians can employ to make decisions about the use of copyrighted works in recurring library situations. To address this problem, Part III proposes long-term reform principles that are complimentary to, and not a replacement for, other limitations and exceptions such as fair use. In short form, these principles are:

1. *Preserve library access to and the development of other limitations such as fair use* to secure the many routine and new uses of copyrighted works that are essential for current and future library services;
2. *Address issues unique to libraries, archives, and other memory institutions* to sharpen the focus of section 108 and allow development of issues common to all users—e.g., digital first sale—to go on undistorted;
3. *Favor simplicity and consistency* to allow practicing librarians to interpret and use section 108 without the need for outside legal advice;
4. *Reformulate limitations as technology neutral* to maintain section 108's continued validity in the face of inevitable new technology; and
5. *Embrace flexibility* to allow section 108 to adapt to changing circumstances while maintaining useful high-level guidelines about library practice.

As explained throughout this paper and especially in Part III, certain section 108 provisions have adhered to these principles with good results. In instances where section 108 has strayed from these principles, it has stumbled.

## II. LIBRARIES IN THE COPYRIGHT SYSTEM

This Part explains how section 108 works, the situations in which section 108 is useful for libraries, and the situations in which it fails, including specific references to the principles noted above. It also identifies some of the other limitations and exceptions that libraries often look to under the Copyright Act. The Copyright Act has remarkable solicitude for library and archive uses of copyrighted works. Sections 107 (fair use), 108 (limitations

for libraries and archives), 109 (first sale), 110 (face-to-face instruction and teaching), 121 (copies for print disabled users), 504(c)(2) (limitations on remedies for good faith asserters of fair use), and 602(a)(3)(C) (exception to import restrictions for library lending and archival purposes) are among the specific statutory exceptions designed to facilitate the types of uses that allow libraries to fulfill their missions. This substantial set of library protections is not surprising; Congress has clearly recognized that the constitutional purpose of copyright, to promote the “Progress of Science and the useful Arts,”<sup>12</sup> is furthered by library functions supporting research, scholarship, teaching, and learning.<sup>13</sup>

Indeed, even without legislative copyright reform, a steady stream of new technology has transformed the vision articulated in *As We May Think* into reality in the library:<sup>14</sup> the “microform revolution” that began in the 1940s,<sup>15</sup> the Xerox 914 in 1959,<sup>16</sup> magnetic tape storage systems in the 1960s and 1970s,<sup>17</sup> desktop computing in the 1980s, and the World Wide Web in the 1990s.<sup>18</sup> Today, the vast majority of new content purchased by large U.S. libraries is delivered to users electronically. In 2012, U.S. academic libraries alone spent an estimated \$1.6 billion on electronic resources access (both licensed and purchased), comprising nearly sixty percent of their materials expenditures for the year.<sup>19</sup>

12. U.S. CONST. art. I, § 8, cl. 8.

13. See Elizabeth A. Hadzima et al., *How Flexibility Supports the Goals of Copyright: Fair Use and the U.S. Library Experience*, LIBRARY COPYRIGHT ALLIANCE 1–5 (2013), <http://www.librarycopyrightalliance.org/bm~doc/lca-flex-library-experience-15feb13.pdf> (describing the role of libraries in the United States with reference to copyright).

14. Throughout this Article, I frequently use “libraries” as shorthand for nonprofit libraries, archives, museums, and other memory institutions, which typically have as two of their main goals to preserve and make available their collections to users. I mean to distinguish these services as a large and important subset of information-providing services generally. See Michael Buckland, *What Kind of Science Can Information Science Be?*, 63 J. AM. SOC’Y INFO. SCI. & TECH. 1, 2 (2012). I recognize that these institutions have several important differences. When differences matter for copyright purposes, I point them out.

15. See generally MICHAEL R. GABRIEL & DOROTHY P. LADD, *THE MICROFORM REVOLUTION IN LIBRARIES* (1980) (discussing the technical development of micro-formats and their adoption by libraries).

16. See generally *REPROGRAPHY AND COPYRIGHT LAW* (Lowell H. Hattery & George P. Bush eds., 1964) (discussing the development and widespread use of photocopiers).

17. See generally GEORGE P. BUSH, *TECHNOLOGY AND COPYRIGHT* (1972) (reviewing literature and summarizing these developments).

18. See generally *GROWING PAINS: ADAPTING COPYRIGHT FOR LIBRARIES, EDUCATION, AND SOCIETY* (Laura N. Gasaway ed., 1997) (addressing copyright and changing technology in the library context).

19. See NAT’L CENT. FOR EDUC. STATISTICS & U.S. DEPT. EDUCATION, *ACADEMIC LIBRARIES 2012: FIRST LOOK 12* (2014), available at <http://nces.ed.gov/pubs2014/2014038.pdf>.

Libraries have also digitized millions of items from their print collections for online access at tremendous cost: HathiTrust and the Digital Public Library of America are two highly visible examples.<sup>20</sup> Both are built upon the efforts of a great number of small and large libraries from across the United States.<sup>21</sup> Like most of the library community,<sup>22</sup> both organizations have been cautious in their approach to copyrighted works.<sup>23</sup> And while libraries and copyright holders have, for the most part,<sup>24</sup> agreed about digital preservation for copyrighted works,<sup>25</sup> agreement on access to these materials remains

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20. HATHITRUST, <http://www.hathitrust.org/> (last visited Apr. 23, 2014); DPLA, <http://dp.la/> (last visited Apr. 23, 2014).

21. See, e.g., *HathiTrust Newsletter*, HATHITRUST.ORG (Mar. 2014), [http://www.hathitrust.org/updates\\_march2014/](http://www.hathitrust.org/updates_march2014/) (listing the twenty-nine research libraries that have contributed content to HathiTrust); *Hubs*, DPLA, <http://dp.la/info/about/hubs/> (last visited Apr. 30, 2014) (describing the vast number of libraries that have contributed content through DPLA “Service Hubs” and “Content Hubs”). See also *IMLS Digital Collections and Content*, IMLS DCC, <http://imlsdcc.grainger.uiuc.edu/> (last visited May 2, 2014) (listing 1,231,917 digital items in 1739 collections from 1494 different institutions across the United States).

22. See, e.g., ASS’N OF RESEARCH LIBRARIES, FAIR USE CHALLENGES IN ACADEMIC AND RESEARCH LIBRARIES 5–6 (2010), available at [http://www.arl.org/storage/documents/publications/arl\\_csm\\_fairusereport.pdf](http://www.arl.org/storage/documents/publications/arl_csm_fairusereport.pdf); Kevin L. Smith, *Copyright Risk Management: Principles and Strategies for Large-Scale Digitization Projects in Special Collections*, 17 RESEARCH LIBRARY ISSUES (June 2012), available at <http://publications.arl.org/2ds1pl.pdf> (outlining a strategy for managing risk).

23. See *Copyright*, HATHITRUST, <http://www.hathitrust.org/copyright/> (last visited May 2, 2014). The HathiTrust has played a very visible role as defendant in a major copyright lawsuit brought by the Authors Guild. See *Authors Guild, Inc. v. HathiTrust*, No. 12-4547-cv, slip op. at 1 (2d Cir. June 10, 2014). The HathiTrust uses litigated in that case, however, were not markedly more aggressive with respect to copyright than others in the community. See, e.g., PRUDENCE ADLER ET AL., ASS’N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (2012), available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf> (identifying library community developed best practices in fair use related to several uses that are similar to HathiTrust’s, such as reproducing materials for disabled users and the development of databases to facilitate non-consumptive uses such as text mining).

24. The Authors Guild, for example, has taken the position that even library digital preservation without access constitutes copyright infringement that, it believes, is beyond the scope of fair use or other limitations and exceptions such as section 108. See *Brief of Appellant, Authors Guild, Inc. v. HathiTrust*, No. 12-4547-cv, slip op. at 31 (2d Cir. Feb. 25, 2013). The Second Circuit refrained from ruling on the legality of preservation for replacement purposes because it was unclear on appeal whether plaintiffs had standing to bring such a claim. See *Authors Guild, Inc., No. 12-4547-cv*, slip op. at 31–32.

25. Librarians as a community have expressed considerable agreement about the appropriateness of digital preservation practices. See *CODE OF BEST PRACTICES IN FAIR USE OF ORPHAN WORKS BY LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS*, Principle 1 (forthcoming 2014) (explaining that, within the library community, there was a high level of comfort with the idea that fair use supports digital preservation without any reservations).

elusive.<sup>26</sup> Thus, HathiTrust, for example, maintains a digital collection of several million volumes, but only around thirty-four percent are fully available online, all of which are in the public domain.<sup>27</sup> To return again to Vannevar Bush's 1945 article: "one needs not only to make and store a record but also be able to consult it . . . Even the modern great library is not generally consulted; it is nibbled by a few."<sup>28</sup> The great modern library of today has the technological opportunity and the goal of both preserving and providing "democratic access" to its collections.<sup>29</sup> With that goal in mind, many libraries are beginning to explore how to provide lawful access to copyrighted works online.<sup>30</sup> In large part, these efforts find support in doctrines such as fair use, rather than section 108.

Libraries recognize that settling for online access to only public domain or licensed digital content would exclude the largest part of their collections: works created in the twentieth century, most of which are treated as though protected by copyright (though many may, in fact, be in the public domain).<sup>31</sup>

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26. See Gasaway, *supra* note 7, at 1331 (noting the Study Group's agreement on preservation issues but not on access); Rasenberger, *supra* note 7 (providing more context to the Study Group's agreement on the perseverance issue).

27. *HathiTrust Dates*, HATHITRUST, [http://www.hathitrust.org/visualizations\\_dates](http://www.hathitrust.org/visualizations_dates) (last visited Apr. 30, 2015).

28. Bush, *supra* note 1.

29. See Matt Enis, *Q&A: Dan Cohen on His Role as the Founding Executive Director of DPLA*, LIBRARY J. (Mar. 12, 2013), <http://www.thedigitalshift.com/2013/03/digital-libraries/qa-dan-cohen-on-his-role-as-the-founding-executive-director-of-dpla/>; Megan Geuss, *Exercises in Democracy: Building a Digital Public Library*, ARSTECHNICA.COM (Mar. 6, 2012), <http://arstechnica.com/information-technology/2012/05/exercises-in-democracy-building-a-digital-public-library/>.

30. See Geoffrey A. Fowler, *Libraries Have a Novel Idea*, WALL ST. J. (June 29, 2010), <http://online.wsj.com/news/articles/SB10001424052748703279704575335193054884632/> (describing the Internet Archive's ebook lending model that relies on copyright's first sale doctrine); Katie Fortney, *Braving the Present: Experience and Copyright Risk Assessment for Digitizing Recent Historical Collections*, 2013 ACRL PROCEEDINGS 84 (2013), available at [http://www.ala.org/acrl/sites/ala.org.acrl/files/content/conferences/confsandpreconfs/2013/papers/Fortney\\_Braving.pdf](http://www.ala.org/acrl/sites/ala.org.acrl/files/content/conferences/confsandpreconfs/2013/papers/Fortney_Braving.pdf) (explaining how the University of Santa Cruz moved forward with providing full online access to over 23,000 potentially in-copyright items in its Grateful Dead Archive under an assertion of fair use); Maggie Dickson, *Due Diligence, Futile Effort: Copyright and the Digitization of the Thomas E. Watson Papers*, 73 AM. ARCHIVIST 626, 636 (2010), available at <http://archivists.metapress.com/content/16rh811120280434/> (explaining how, after an extensive but ultimately unsuccessful search for copyright owners for thousands of works in a digital collection, the library decided to make the collection available online under the auspices of fair use).

31. Copyright status determinations are relatively straightforward for works published in the United States before 1923: all are in the public domain. See 17 U.S.C. § 304 (2012). But public domain determinations can be difficult and require extensive research for unpublished works, works published in the United States from 1923 to 1989, foreign published works after 1923, and a broad group of sound recordings. See Peter B. Hirtle, *Copyright Term and the Public Domain in the United States*, <http://copyright.cornell.edu/resources/publicdomain.cfm>

Library holdings exploded in size over that time period. As just one data point, WorldCat—a database of bibliographic information based on a subset of the records of over 72,000 libraries worldwide—has records for nearly 303 million unique library bibliographic records (manifestations).<sup>32</sup> Of those, over 225 million are for works created in the last 114 years.<sup>33</sup>

Thus, while copyright is certainly not the only legal obstacle confronting libraries today,<sup>34</sup> given the large number of copyrighted works in library collections and the challenges associated with using them, it is among the most significant. The Sections below explain how section 108 has both helped and failed to help libraries overcome those challenges.

#### A. THE MECHANICS OF SECTION 108

Many commentators have explained at length what section 108 does and how it is meant to function.<sup>35</sup> This Section gives just a brief introduction.

Section 108 applies to a narrow set of preservation and lending activities in which libraries and archives frequently engage. Through the application of several rules, stipulations, and exceptions to those stipulations, section 108 carves out a complex but workable framework for library reproduction and distribution of copyrighted works in a variety of common archival and lending situations.<sup>36</sup> Section 108 can be thought of as having four main parts:

1. eligibility;

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(last updated Jan. 1, 2014). Some libraries have begun to tackle the public domain status determinations for these categories of works. See *Copyright Review Management System*, UNIV. OF MICH. LIBRARY, <http://www.lib.umich.edu/copyright-review-management-system-impl-national-leadership-grant/> (last updated Mar. 17, 2013).

32. See OCLC, ANNUAL REPORT 2012–2013, at 14 (2013), available at <http://www.oclc.org/content/dam/oclc/publications/AnnualReports/2013/2013.pdf>.

33. See IFLA STUDY GROUP ON THE FUNCTIONAL REQUIREMENTS FOR BIBLIOGRAPHIC RECORDS, FUNCTIONAL REQUIREMENTS FOR BIBLIOGRAPHIC RECORDS: FINAL REPORT (2009), available at <http://www.ifla.org/publications/functional-requirements-for-bibliographic-records/>.

34. See, e.g., Laura Clark Brown & Nancy Kaiser, *Opening Archives on the Recent American Past: Reconciling the Ethics of Access and the Ethics of Privacy*, in *DOING RECENT HISTORY: ON PRIVACY, COPYRIGHT, VIDEO GAMES, INSTITUTIONAL REVIEW BOARDS, ACTIVIST SCHOLARSHIP, AND HISTORY THAT TALKS BACK* 59 (Claire Bond Potter & Renee C. Romano eds., 2012); see also *Legal and Ethical Implications of Large-Scale Manuscript Digitization Symposium*, UNC LIBRARIES (Feb. 12, 2009), <http://www2.lib.unc.edu/mss/archivalmassdigitization/index.html?section=publications>.

35. See, e.g., Gasaway, *supra* note 7 (explaining the section in detail and offering ideas about reform); *Unsupervised Copying Equipment*, COPYRIGHT ADVISORY OFFICE, COLUMBIA UNIVERSITY LIBRARIES, <http://copyright.columbia.edu/copyright/libraries-and-copyright/> (last updated July 30, 2009) (outlining Section 108 applications for libraries); *Copyright Crash Course*, UNIVERSITY OF TEXAS LIBRARIES, <http://copyright.lib.utexas.edu/l-intro.html> (last visited Apr. 30, 2014) (serving as a guide to fair use and Section 108 for libraries).

36. 17 U.S.C. § 108 (2012).

2. archival uses;
3. lending and user-request uses; and
4. additional limitations and enhancements.

*Eligibility:* Not every organization that calls itself a library or archive qualifies for protection under section 108. Section 108(a) states that eligibility extends only to a “library or archive”<sup>37</sup> that makes a single copy of a work that, so long as that library is (1) open to the public, or at least researchers in the field,<sup>38</sup> and that (2) copies are made without direct or indirect commercial advantage, and (3) copies include a notice about copyright protection.<sup>39</sup> Thus, for example, a commercial-news clipping service and a for-profit database of newspaper articles are ineligible for section 108’s protections.<sup>40</sup>

*Archival uses:* Section 108(b) and (c) allows eligible libraries to make up to three copies of a work for preservation and replacement purposes.<sup>41</sup> For preservation of unpublished works, section 108(b) allows for the reproduction and distribution of three copies if it is (1) “solely for purposes of preservation and security or for deposit for research use in another library,”<sup>42</sup> and (2) only if the copy is currently in the collections of the reproducing library.<sup>43</sup> An amendment accompanying the Digital Millennium Copyright Act (“DMCA”) in 1998 modified this section by allowing digital formats, albeit with several important limitations.<sup>44</sup> The amendment eliminated language regarding copies made “in facsimile form,” and added language providing that to qualify under the section digital formats may be used but must not be “otherwise distributed in that format and . . . not made available to the public outside of the premises of the library or archives.”<sup>45</sup>

37. *Id.* Aside from the characteristics laid out in section 108(a), the Act does not define what constitutes a “library” or “archive.”

38. *Id.* Rights under section 108 apply equally to copies and phonorecords. *See id.* § 101 (defining those terms).

39. *Id.* § 108(a).

40. *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 503 n.12 (2001) (for-profit subscription electronic database not eligible for section 108 protection); Pac. & S. Co. v. Duncan, 572 F. Supp. 1186, 1195 n.8 (N.D. Ga. 1983), *rev’d on other grounds*, 744 F.2d 1490, 1495 n.6 (11th Cir. 1984) (commercial TV news clip service was not eligible under section 108(a)).

41. 17 U.S.C. § 108(b)–(c) (2012).

42. *Id.* § 108(b).

43. *Id.* § 108(b)(1).

44. Digital Millennium Copyright Act, § 404(2), Pub. L. No. 105–304, 112 Stat. 2829 (1998).

45. *See id.* at 2890. The DMCA also increased the numbers of copies permissible under section 108(b) and (c); the previous text provided for only one copy under each of these sections. That number was increased to three copies. 17 U.S.C. § 108(b)(2) (2012).

Section 108(c) covers published works, allowing libraries to make three replacement copies of published works that are damaged, deteriorating, lost or stolen, or are in obsolete formats.<sup>46</sup> A format is considered “obsolete” if “the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”<sup>47</sup> Like section 108(b), section 108(c) stipulates that reproductions in digital formats may not be made available to the public outside the premises of the library or archives. Section 108(c) also stipulates that copies can only be made if, “after a reasonable effort,” the library or archive determines that an unused replacement copy cannot be obtained at a fair price.<sup>48</sup>

*Copies for users:* Section 108(d) and (e) allows libraries and archives to make copies for users. Section 108(d) permits the copying of an article or small excerpts of a copyrighted work.<sup>49</sup> It has three main stipulations:

1. the copy must become the property of the user,<sup>50</sup>
2. the library has no notice that the copy will be used for anything other than private study, scholarship, or research,<sup>51</sup> and
3. the library displays prominently a copyright notice.<sup>52</sup>

Section 108(e) allows for reproduction and distribution of an entire work, rather than just an excerpt or article, at the request of a user.<sup>53</sup> The three section 108(d) stipulations also apply here, but section 108(e) also requires that libraries or archives “first determine, on the basis of a reasonable investigation,” that a copy cannot be obtained at a “fair price.”<sup>54</sup>

*Additional limitations and enhancements—subsections (f), (g), (h) and (i):* Section 108(f) contains four important interpretive guidelines, which state that nothing in section 108 (1) shall be construed to impose liability on a library for the unsupervised use of reproduction equipment located on its premises so long as that equipment has a notice about copyright law; (2) excuses a requesting user from his or her own downstream uses; (3) limits the reproduction and distribution of an audiovisual news program (the so-called “Vanderbilt Television News Archive” exception); and finally—and most

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46. 17 U.S.C. § 108(c) (2012).

47. *Id.*

48. *Id.* § 108(c)(1).

49. *Id.* § 108(d).

50. *Id.* § 108(d)(1).

51. *Id.*

52. *Id.*

53. *Id.* § 108(e).

54. *Id.* Unlike section 108(c), section 108(e) does not state that the reasonable replacement be unused.

importantly—(4) affects the right of fair use as provided in section 107 or any contractual obligations the library assumes.<sup>55</sup>

Section 108(g) places some boundaries on section 108 copying. It limits the rights granted in section 108 to isolated and unrelated copying of a single work on different occasions.<sup>56</sup> Subsection (g)(1) adds a caveat about library knowledge—§ 108 is inapplicable if the library “is aware or has substantial reason to believe” that it is engaging in concerted reproduction of the same material, whether made at once or over a period of time, or made to one or multiple users.<sup>57</sup>

Subsection (g)(2) goes further—it states that section 108 is inapplicable if the library engages in systematic reproduction or distribution of copies under section 108(d) (copies or articles and excerpts made at the request of a user) without regard to whether the library had knowledge that it was doing so.<sup>58</sup> Subsection (g)(2) also makes clear that this limitation does not prevent a library from engaging in interlibrary loan arrangements whereby copies are made and sent to requesting libraries, so long as the interlibrary loan arrangement does not act as a substitute for a library subscription.<sup>59</sup> The National Conference on New Technological Uses of Copyrighted Works (“CONTU”),<sup>60</sup> established in 1978, attempted to define this interlibrary loan “no substitution” proviso by imposing a numerical rule: the so-called “rule of five.” The rule states that an interlibrary loan arrangement would have the effect of substitution when a library fills requests, in a given calendar year, for more than five copies of articles published within the last five years in a given periodical,<sup>61</sup> and no more than six copies of articles, chapters, or other small portions from any other type of work (e.g., a book) while that work is still

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55. *Id.* § 108(f).

56. *Id.* § 108(g).

57. *Id.*

58. *Id.* § 108(g)(2).

59. *Id.*

60. See *Final Report of the National Commission on New Technological Uses of Copyrighted Works*, DIGITAL LAW ONLINE, <http://digital-law-online.info/CONTU/PDF/index.html> (last updated Sept. 28, 2003).

61. CONTU explicitly declined to address articles that were published more than five years prior to the requesting date. See *Final Report of the National Commission on New Technological Uses of Copyrighted Works*, DIGITAL LAW ONLINE 55, 59 <http://digital-law-online.info/CONTU/PDF/Chapter4.pdf> (last updated Sept. 28, 2003) (“These guidelines specifically shall not apply, directly or indirectly, to any request of a requesting entity for a copy or copies of an article or articles published in any issue of a periodical, the publication date of which is more than five years prior to the date when the request is made.”).

protected by copyright.<sup>62</sup> While CONTU does not have the force of law, libraries have tended to follow its guidance.<sup>63</sup>

In contrast, section 108(h) attempts to expand library copying rights. When copyright terms were extended by twenty years through the 1998 Copyright Term Extension Act, Congress also added section 108(h). Section 108(h) allows libraries to make broad use of all types of copyrighted works for preservation, research, or scholarship, if that work is in its last twenty years of copyright protection.<sup>64</sup> Subsection (h) has two important stipulations:

1. section 108(h) does not apply if, after “reasonable investigation,” the work is found to be subject to normal commercial exploitation, is available at a reasonable price, or if the owner has provided notice to the Copyright Office that either of the preceding two conditions apply and
2. section 108(h) does not apply to uses by subsequent users.<sup>65</sup>

Finally, section 108(i) limits the types of works where section 108 applies. It provides that, except for the preservation and archiving provisions (§ 108 (b)–(c), (h)), none of the section 108 rights extend to musical works; pictorial, graphic, or sculptural works; or audiovisual works (except news).<sup>66</sup>

#### B. LIBRARIAN AND POLICYMAKERS’ APPROACHES TO SECTION 108

The paragraphs above describe a statute that gives libraries several important avenues for making clear-cut decisions about using copyrighted works. Section 108 also contains several significant provisions that are ambiguous, inconsistent, and overly restrictive when applied to modern library uses. The Sections below summarize how librarians and policymakers have approached these challenges under section 108 and how they have proposed reforms to section 108.

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62. *See id.*

63. *See* CHRISTINE FRUIN, ASS’N SOUTHEASTERN RESEARCH LIBRARIES, THE IMPACT OF COPYRIGHT ON THE RESOURCE SHARING PRACTICES OF ASERL LIBRARIES (2014), available at [http://www.aserl.org/wp-content/uploads/2014/05/Resource-Sharing-Practices-of-ASERL-Libraries\\_FINAL.pdf](http://www.aserl.org/wp-content/uploads/2014/05/Resource-Sharing-Practices-of-ASERL-Libraries_FINAL.pdf) (reporting on a survey of research library members about adherence to CONTU guidelines, among other things).

64. 17 U.S.C. § 108(h) (2012).

65. *Id.*

66. *Id.* § 108(i).

1. *The Judicial and Legislative Approach to Section 108*

It is worth noting first that, although the relationship between libraries and content holders has sometimes been described as “acrimonious,”<sup>67</sup> most serious questions about the applicability of section 108 to modern library uses have not been raised by copyright owners—at least not in litigation. Since the Copyright Act became effective in 1978, copyright holders have brought only a handful of cases against libraries,<sup>68</sup> with only a small subset approaching the subject matter of section 108. Westlaw reports only thirty opinions actually citing to section 108.<sup>69</sup> Of those, only two, *Authors Guild, Inc. v. HathiTrust* and *Ass’n of American Medical Colleges v. Carey*, have interpreted section 108 in a lawsuit involving a nonprofit library or archive.<sup>70</sup> While a handful of other cases have raised questions under section 108, such as who is eligible under section 108(a),<sup>71</sup> and the sort of factual evidence

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67. See generally Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115 (2000) (describing the internal and external conflict between libraries and publishers).

68. See, e.g., *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (addressing whether listing work in library catalog constituted “public distribution” under section 106(3)).

69. These cases and short summaries are listed in a table available at <http://drhansen.web.unc.edu/library-copyright-materials/section-108/section-108-cases/>. As of this writing, West’s KeyCite report lists thirty-nine cases. Three of those cases were published before the 1976 revision and so reference the previous section 108 under the 1909 Act, which addressed importation of copyrighted works. Another three are briefs submitted in cases and not the reported decisions themselves. Finally, another four are misquotes (e.g., an intended citation to section 108 of the Bankruptcy code, in title 11). This list does not necessarily capture every section 108 case; it likely excludes early unpublished decisions. See Deborah J. Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 71 (2001).

70. See *Authors Guild, Inc. v. HathiTrust*, No. 12-4547-cv, slip op. at 13 n.4 (2d Cir. 2014) (“[In light of the §108(f) savings clause], we do not construe section 108 as foreclosing our analysis of the Libraries’ activities under fair use, and we proceed with that analysis.”). The only other case is *Ass’n of American Medical Colleges v. Carey*, 728 F. Supp. 873 (N.D.N.Y. 1990) [hereinafter AAMC], *rev’d sub nom. Ass’n of Am. Med. Colls. V. Cuomo*, 928 F.2d 519 (2d Cir. 1991). The AAMC court dealt with the New York “Truth in Testing Act” that required testing organizations—in this case, the creators of the Medical College Admission Test (“MCAT”)—to disclose unpublished tests and make them available for use by the State Education Department, which the state had designated in its own law as an archive eligible under section 108(a). The AAMC court held that section 108 was not a defense for the state archive because, it concluded, “this exception would only apply to unpublished works which are properly in the possession of the archive in the first place.” *Id.* at 889.

71. See *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 503 n.12 (2001) (questioning whether publishers’ databases were “libraries” and pointing out that publishers’ databases do not fall within the section 108 “special authorizations”); *Pac. & S. Co. v. Duncan*, 572 F. Supp. 1186, 1195 n.8 (N.D. Ga. 1983), *rev’d on other grounds*, 744 F.2d 1490, 1495 n.6 (11th Cir. 1984) (commercial TV news clip service was not eligible under 108(a)); *Am. Geophysical Union v.*

required to satisfy section 108 requirements generally,<sup>72</sup> these cases have largely declined to interpret section 108. The vast majority of cases citing section 108 have done so merely for the proposition that it is in fact part of the Copyright Act and could potentially be raised, in appropriate circumstances, as a defense.<sup>73</sup> This is not to say that library practice under

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Texaco Inc., 802 F. Supp. 1, 3 (S.D.N.Y. 1992) (explaining that Texaco's article photocopying activities were not eligible for protection under section 108 primarily because they were done "solely for commercial advantage"), *aff'd*, 60 F.3d 913 (2d Cir. 1994).

72. Elsevier, Inc. v. Comprehensive Microfilm & Scanning Servs., Inc., 107 U.S.P.Q.2d 1056, 1064–67 (M.D. Penn. 2013) (questioning whether the "library fair use exception under Section 108" would apply to defendant Comprehensive Microfilm, who had a business relationship with a nonprofit library, but declining to answer the question on summary judgment without further factual inquiry).

73. See John Wiley & Sons, Inc., v. Kirtsaeng, 654 F.3d 210, 221 (2d Cir. 2011) (noting that section 108 is a limitation on copyright owners' rights), *rev'd on other grounds*, 133 S. Ct. 1351 (2013); Seoul Broad. Sys. Int'l, Inc. v. Sang, 754 F. Supp. 2d 564, 566 (E.D.N.Y. 2010) (misquoting section 501, but correctly noting that section 501, which includes a private cause of action for infringement, encompasses consideration of rights and limitations, including sections 106–122); Golan v. Gonzales, 501 F.3d 1179, 1195 (10th Cir. 2007) (quoting Eldred v. Ashcroft, 537 U.S. 186, 220 (2003), for the proposition that 108(h) exists and is considered an additional First Amendment safeguard), *aff'd sub nom.* Golan v. Holder, 132 S. Ct. 873 (2012); Milne *ex rel.* Coyne v. Stephen Slesinger, Inc., 430 F.3d 1036, 1038 (9th Cir. 2005) (noting that the Sonny Bono Copyright Term Extension Act amended section 108 along with other sections of the Act); Hotaling v. Church of Jesus Christ of the Latter-Day Saints, 118 F.3d 199, 204 (4th Cir. 1997) (noting that section 108 might be a viable defense in suit against a church library, but because it was not raised at the district court, it would not be addressed on appeal); Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 917 (2d Cir. 1994) (arguing that because section 108 exists but only applies in a narrow set of circumstances regarding photocopying, that fact implicitly suggests that Congress thought publishers should possess a general right to exploit the photocopying market); Richard Anderson Photography v. Brown, 852 F.2d 114, 119 (4th Cir. 1988) (comparing language under section 108 to various other sections to illustrate that Congress was not clear in their attempts to abrogate state sovereign immunity under the Act); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 267 (5th Cir. 1988) (contrasting section 117 limitations for copying computer programs to the "detailed restrictions on copying as . . . in Sections 108 and 112"); Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963, 967 (9th Cir. 1981) (citing section 108 limits on applicability to audiovisual works as evidence that "Congress has shown 'special solicitude for audiovisual works'" more generally and so that fact should be considered in the fair use analysis), *rev'd*, 464 U.S. 417 (1984); Penguin Grp. (USA) v. Am. Buddha, No. 13-cv-00497-HU, 2013 WL 6385916, at \*4 (D. Or. Dec. 16, 2013) (noting that §108 was one of the defenses raised on an unrelated motion regarding venue); Larson v. Warner Bros. Entm't Inc., No. 2:04-cv-08776-ODW(RZx), 2013 WL 1688199, at \*2 (C.D. Cal. Apr. 18, 2013) (noting that the Sonny Bono Copyright Term Extension Act amended section 108 along with other sections of the Act); Bridge Publ'ns Inc. v. F.A.C.T.Net, Inc., 183 F.R.D. 254, 257 (D. Colo. 1998) (noting that defendant raised a section 108 defense, but finding it unnecessary to reach that issue on motion for summary judgment); Coll. Entrance Examination Bd. v. Pataki, 889 F. Supp. 554, 558 (N.D.N.Y. 1995) (state law designed a state archive to qualify as an eligible archive under section 108); Coll. Entrance Examination Bd. v. Cuomo, 788 F. Supp. 134, 137 n.2 (N.D.N.Y. 1992) (state law designed a state archive to qualify as an eligible archive under section 108); United States

section 108 is not a concern for copyright owners; instead, the lack of cases on point may reflect the other significant obstacles to bringing and winning a lawsuit against most libraries.<sup>74</sup> Whatever the reason, the lack of cases illustrates that the concerns of copyright owners have not been serious enough to overcome those common litigation obstacles to bring a lawsuit.

For its part, Congress has not exhibited much concern about section 108 either. Section 108 has been amended five times since it was first enacted in 1976.<sup>75</sup> The first two amendments were minor revisions. In 1992, Congress

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v. Moran, 757 F. Supp. 1046, 1051 (D. Neb. 1991) (noting that section 108 exists and might be relevant with respect to criminal copyright defendant's assertion about his belief about the lawfulness of his conduct, though section 108 clearly did not apply in that case); T.B. Harms Co. v. Jem Records, Inc., 655 F. Supp. 1575, 1578 (D.N.J. 1987) (quoting the entirety of section 602, which cross references section 108, but not discussing or analyzing section 108); Atari, Inc. v. JS & A Grp., Inc., 597 F. Supp. 5, 10 (N.D. Ill. 1983) (noting for comparison that section 108, like section 117, allows for archival copying); Copyright Clearance Ctr., Inc. v. Comm'r, 79 T.C. 793, 802 (1982) (reviewing the history of the 1976 Act and section 108, in explaining why the Copyright Clearance Center was created); Universal City Studios, Inc. v. Sony Corp. of Am., 480 F. Supp. 429, 454 n.4 (C.D. Cal. 1979) (quoting commentator who points out that section 108 is an example of a statute that recognizes that the application of certain new technology for research and education uses should sometimes be permitted), *aff'd*, 464 U.S. 417 (1984); Encyclopaedia Britannica Educ. Corp. v. Crooks, 447 F. Supp. 243, 250 n.8 (W.D.N.Y. 1978) (reviewing recent changes in the Copyright Act on request for preliminary relief in video recording case and explaining, in the context of a fair use assessment, that the section 108 news archiving provisions were a Congressional response to the courts' request for clarity on that subject).

74. There are a many reasons why bringing suit against a library is not appealing for potential plaintiffs. In addition to the defenses against infringement themselves (which include section 108, fair use, first sale, and potentially others), libraries are generally insulated from high statutory damage awards under section 504(c)(2). In addition, the largest libraries at state institutions are protected against any prospective monetary awards by the sovereign immunity doctrine. *See, e.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (holding that Congress cannot validly abrogate state sovereign immunity under the IP clause); Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga., 633 F.3d 1297, 1315 (11th Cir. 2011) ("Congress may not abrogate the States' sovereign immunity pursuant to the Copyright and Patent Clause; therefore, NABP cannot rely on that clause to support its claim for damages . . ."). There are also more practical reasons as well: federal litigation is expensive; making out a prima facie case of infringement is difficult—especially when challenging library projects that involve large numbers of works—because one must prove ownership of every work; and the optics of suing a highly-visible institution that serves the public are not appealing from a public-relations standpoint. *See, e.g.*, Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) (failing to succeed on fifteen of the seventy-five claimed infringements in that case for failure to prove ownership).

75. For two extremely helpful articles on the development of section 108 and the legal regime that proceeded it, see Peter B. Hirtle, *Research, Libraries, and Fair Use: the Gentleman's Agreement of 1935*, 53 J. COPYRIGHT SOC'Y U.S.A. 545 (2006); MARY RASENBERGER & CHRIS WESTON, OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT: BACKGROUND, HISTORY AND MEANING (2005), available at [http://www.section108.gov/docs/108BACKGROUND.PAPER\(final\).pdf](http://www.section108.gov/docs/108BACKGROUND.PAPER(final).pdf).

eliminated the requirement that the Register of Copyrights provide regular reports, at five year intervals, on the extent to which section 108 has achieved its intended result.<sup>76</sup> The second was a technical amendment in 1997.<sup>77</sup> While this amendment is perhaps not an entirely fair illustration of Congress's level of interest in section 108, it is worth noting that Congress let "fair price" under section 108(e) exist officially as "pair price" for the first twenty years of the statute's existence until this amendment.

The third, fourth, and fifth amendments made several substantive changes to section 108. In 1998, through the DMCA, Congress altered subsections 108(b) and (c) to address digital uses. The amendment eliminated language regarding copies made in "facsimile form,"<sup>78</sup> and added language stipulating that section 108(b) and (c) applied only to copies made in digital formats that are not made available "to the public outside of the premises of the library."<sup>79</sup> This same amendment also allowed libraries to make replacement copies of works in "obsolete" formats.<sup>80</sup>

In the fourth amendment, as a concession for extending copyright protection for an additional twenty years under the Sonny Bono Copyright Term Extension Act of 1998, Congress added the current subsection (h), which allows libraries to make broad use of works that are determined to be in their last twenty years of protection.<sup>81</sup> Congress amended section 108 for a

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76. See Pub. L. No. 102-307, § 301, 106 Stat. 272 (1992). After the Register's first two reports, in 1983 and 1988, the Register recommended that the provision be either expanded so that the report requirements should either be expanded to consider new technological developments, or it should be delayed or eliminated altogether. See REPORT OF THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. § 108) 129 (Second Report, Jan. 1988).

77. The amendment corrected subsection 108(e). See Pub. L. No. 105-80, § 12(a)(4), 111 Stat. 1534 (1997).

78. The "facsimile form" language was thought to restrict reproduction in certain formats not encompassing digital reproductions. See, e.g., Information Infrastructure Task Force, White Paper: Intellectual Property and the National Information Infrastructure 85-86 (Sept. 1995) ("However, the copy or phonorecord must be in 'facsimile form.' A library may 'make photocopies of manuscripts by microfilm or electrostatic process, but [may] not reproduce the work in 'machine readable' language for storage in an information retrieval system.' Thus, the exemption does not appear to allow for preservation in electronic or digital form.") (quoting H.R. REP. NO. 94-1476, at 75 (1976)). Of course, this assertion was never tested in court, and similar white paper assertions about the inapplicability of copyright's limiting doctrines in the digital environment were met with considerable skepticism. See, e.g., Peter Jaszi, *Taking the White Paper Seriously*, excerpted from a presentation to the National Advisory Council (1996), reprinted in ASS'N OF RESEARCH LIBRARIES, COPYRIGHT AND THE NII: RESOURCES FOR THE LIBRARY AND EDUCATION COMMUNITY 67 (May 1996).

79. 17 U.S.C. § 108(b)-(c) (2012); Pub. L. No. 105-298, § 104, 112 Stat. 2829 (1998).

80. *Id.*

81. 17 U.S.C. § 108(h) (2012); Pub. L. No. 105-304, § 404, 112 Stat. 2889 (1998).

fifth and final time in 2005, changing §108(i) (limiting §108 applicability to certain types of works) to make clear that the section 108(h) addition from 1998 applied broadly to all types of copyrighted works.<sup>82</sup>

2. *Library and Academic Approaches to Section 108*

In contrast to the relative legislative and judicial inattention, librarians, academics, and policy advisors have significantly contributed to the public's understanding how section 108 works, how to interpret it, and how to make it better.<sup>83</sup> These reviews have two common threads. The first emphasizes that it is critically important to make library collections and services available in digital form. The rationale for this emphasis is varied: for preservation and promotion of culture, enhanced research opportunities, promotion of innovation, and “democratization of access,” along with administrative goals, such as freeing libraries from the often costly physical storage constraints associated with aging library buildings.<sup>84</sup> The second common thread is that section 108 does not provide adequate means to achieve broad digital preservation and access to library collections. In light of these deficiencies, proposals for reform have largely focused on identifying the wide variety of specific current library uses that section 108 does not reach and proposing specific textual changes to the Act to address some of those uses.

More recently, the section 108 Study Group, convened by the Library of Congress and the Copyright Office and consisting of several librarians, archivists, curators, and copyright industry representatives,<sup>85</sup> met for two years between 2006 and 2008 to deliberate over needed changes to section 108. They ultimately produced the “Section 108 Study Group Report,” which identified several sensible, if conservative, points on which section 108 should be revised.<sup>86</sup> The group also made several additional recommendations—many about access to copyrighted works—for which the diverse group was ultimately unable to come to consensus.<sup>87</sup>

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82. *Id.*

83. These reviews themselves, where useful, are cited throughout this paper. To give a sense of the sheer volume of the academic writing on this subject, Westlaw's KeyCite shows 621 law review articles citing to section 108. A search of Library, Information Science, and Technology Abstracts and Library Literature & Information Science database for “Section 108” returns ninety-four results.

84. See ROGER C. SCHONFELD, *JSTOR: A HISTORY* 9–11, 368–70 (2003) (discussing how the goal of saving space was a major factor in the development of JSTOR, a large online database of academic journals).

85. See *About the Section 108 Study Group*, SECTION 108 STUDY GROUP, <http://www.section108.gov/study.html> (last visited August 16, 2014).

86. SECTION 108 STUDY GROUP REPORT, *supra* note 7, at 31–131 (2008).

87. *Id.* at 113–31.

More recently, in 2013 Columbia University's Kernochan Center for Law, Media, and the Arts jointly sponsored, with the U.S. Copyright Office, a day-long symposium titled "Copyright Exceptions for Libraries in the Digital Age: Section 108 Reform."<sup>88</sup> Speakers reviewed the overall legal landscape, the areas where section 108 already applies, its potential expansion to reach mass digitization, and the basic conditions that might be imposed on library digitizing, maintaining, and making available copyrighted works.<sup>89</sup> The proceedings, published as a symposium issue of the Columbia Journal of Law and the Arts, are a transcript of the day's thoughtful discussions.<sup>90</sup>

The U.S. Patent and Trademark Office has also targeted section 108 as a possible area for reform. In December of 2013, it produced a green paper about copyright policy in the digital economy.<sup>91</sup> The paper took specific aim at updating section 108 in light of changes in technology, referencing the recommendations of the Section 108 Study Group.<sup>92</sup>

Finally, and perhaps most importantly, the Copyright Office has undertaken its own review of section 108. In 2011 the Office issued a report on its priorities and projects for the next several years.<sup>93</sup> The report specifically targets addressing section 108 reform as well as mass digitization and orphan works.<sup>94</sup> While it has not yet released any recommendations about section 108, the Copyright Office was a joint sponsor for the Columbia symposium, where some of its staff shared their views. In her keynote address, Register of Copyrights Maria Pallante helpfully explained her thoughts about options for section 108 reform:

First, keep section 108 as it is, whereby the Office fears that it will become an increasingly useless appendage to the Copyright Act, an exception so narrowly tailored to bygone technologies that it will be functionally irrelevant. Second, repeal section 108, leaving libraries and archives and the activities that they discharge to be governed by fair use. The Office feels that this choice would be

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88. *Symposium, Section 108 Reform*, KERNOCHAN CTR. FOR LAW, MEDIA, AND THE ARTS, <http://web.law.columbia.edu/kernochan/symposia/section-108-reform> (last visited Apr. 30, 2014).

89. *Id.*

90. *See* Symposium, *Section 108 Reform*, 36 COLUM. J.L. & ARTS 527 (2013).

91. *See generally* DEP'T OF COMM., U.S. PATENT & TRADEMARK OFFICE, COPYRIGHT POLICY, CREATIVITY, AND INNOVATION IN THE DIGITAL ECONOMY (2013), *available at* <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>.

92. *Id.* at 23.

93. *See generally* U.S. COPYRIGHT OFFICE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE (2011), *available at* <http://www.copyright.gov/docs/priorities.pdf>.

94. *Id.* at 5–8.

unfair to both librarians and archivists, as well as to copyright creators and copyright owners, all of whom should be able to rely upon some concrete, unambiguous exceptions without having to consult an attorney or risk an infringement action every time an archivist makes multiple preservation copies or a librarian copies a fragile book for interlibrary loan. Third, reform section 108 so that it provides a balance, with a certain set of exceptions, updated for the digital era, that allow libraries and archives and museums to make the copies they need and to distribute those copies in ways that do not unduly harm the valid interests of rights holders.<sup>95</sup>

Register Pallante fairly categorizes the available possibilities for moving forward. Her remarks also make explicit several fundamental statements about what section 108 is expected to achieve, all of which are largely in line with assumptions in earlier reviews such as the Section 108 Study Group Report. These expectations about section 108's purpose should drive efforts for reform.

#### C. SECTION 108 IN PRACTICE: THE GOOD AND THE BAD

The two Subsections below highlight the areas of practice in which section 108 performs well and where it fails. The good applications illustrate well the wisdom of fidelity to the overall purpose of section 108 in specific provisions, as well as the value of the five principles articulated at the outset of this article, to

1. preserve library access to and the development of other limitations such as fair use,
2. address issues unique to libraries, archives, and other memory institutions;
3. favor simplicity and consistency;
4. reformulate limitations as technology neutral; and
5. embrace flexibility.

The areas where section 108 fails tends to illustrate the pitfalls of straying from that purpose and those principles.

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95. Maria Pallante, *Session 1: The Legal Landscape*, 36 COLUM. J. L. & ARTS 527 (2013).

1. *Areas Where Section 108 Performs Well*

The primary virtue of section 108 as it exists today is that it adds a modicum of certainty for libraries that seek to make various recurrent uses of copyrighted works that are necessary for day-to-day operations.<sup>96</sup>

Section 108 gives relatively clear guidance about making individual, physical copies at the request of a user—including for interlibrary loan. This is no small part of current library practice: from 2012 to 2013, the Online Computer Library Center (“OCLC”) reported that its members conducted over 8.9 million interlibrary loan transactions.<sup>97</sup> Subsections 108(d), (e), (g), and (f) work together to address an issue that is largely unique to libraries and archives in a simple and consistent way, while preserving access to other limitations, such as fair use, for cases when libraries need it. These provisions are largely technology neutral (though certain wording makes application to digital works somewhat awkward, but not impossible, as noted below).

These provisions also serve as good examples of embracing flexibility while still providing high-level guidance. For interlibrary loan, the section 108(g) CONTU guidelines have long stood as a guidepost for libraries seeking to assess the appropriateness of their practices under that section. Through a combination of technology and library policy, libraries are also beginning to apply section 108(e) more consistently by standardizing how the library fulfills its obligation to “first determine, on the basis of a reasonable investigation,” that a copy cannot be obtained at a “fair price” before making a copy of an entire work.<sup>98</sup>

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96. See Melissa A. Brown, *Copyright Exceptions for Libraries in the Digital Age: U.S. Copyright Office Considers Reform of Section 108 (highlights from symposium)*, 74 COLL. & RES. LIBR. NEWS 199, 199–200 (2013), available at <http://crln.acrl.org/content/74/4/199.full.pdf+html> (“[A] key virtue of 108 is its potential to provide clear and specific guidance to practitioners on certain library activities, complementing and potentially reinforcing the flexible (some may add unpredictable) and fact-specific nature of fair use.”); *Section 108—Libraries and Archives*, UNIV. OF MICH. LIBRARY, <http://www.lib.umich.edu/copyright/section-108> (last visited May 3, 2014) (“Section 108 gives us some important flexibility as a library. For example, we can help you to borrow works from other libraries through interlibrary loan. For items we are unable to borrow, we can often get you portions of those works. For works in our collection, we can also provide copies of limited portions of those works - or we can get our copy of that work into your hands in most cases. These are important services we provide as your library in support of education, research, and scholarship.”).

97. See OCLC, ANNUAL REPORT 2012–2013, at 5 (2013), available at <http://www.oclc.org/content/dam/oclc/publications/AnnualReports/2013/2013.pdf>.

98. 17 U.S.C. § 108(e) (2012); see *GIST for ILLiad*, GETTING IT SYSTEM TOOLKIT, <http://www.gistlibrary.org/illiad/> (last visited May 3, 2014) (system for tying together interlibrary loan systems and acquisition/purchasing, to make decisions about commercial availability).

Other subsections that have adhered, at least in part, to these same principles, such as sections 108(b) (preservation of unpublished works) and 108(c) (replacement copies of published works), have proven useful for small-scale projects using traditional print collections. Aside from the initial analysis required to determine whether a given work was published,<sup>99</sup> applying section 108(b) can be straightforward, at least for physical copies.

Section 108(c) is more complex in that it requires libraries to (1) make a “reasonable effort” to determine if an unused copy is available, and (2) for copies of works in obsolete formats, address that statutory definition of obsolescence: where the machine necessary for displaying the copy is no longer manufactured or reasonably available in the commercial marketplace.<sup>100</sup> But even with that complexity, section 108(c) is flexible enough that libraries have room to develop tools to help interpret it, like section 108(e) and section 108(g), in light of current practices. For example, in 2012 the “Video at Risk” project (a joint effort of the libraries at NYU, UC Berkeley, and Loyola University New Orleans) published a document titled “Video at Risk: Strategies for Preserving Commercial Video Collections in Libraries: Section 108 Guidelines.”<sup>101</sup> That document “seek[s] to clarify exemptions for copyright audiovisual works under Section 108(c)”<sup>102</sup> by offering definitions, examples, and analysis of terms such as “obsolete” and “replacement.”<sup>103</sup>

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99. See Deborah R. Gerhardt, *Using the Publication Doctrine to Free Art and History from Copyright's Bondage*, 61 J. COPYRIGHT SOC'Y U.S.A. (forthcoming 2014) (discussing the variety of standards applied to publication determinations, especially for art, photographs and other historical documents).

100. 17 U.S.C. § 108(c) (2012).

101. See generally VIDEO AT RISK: STRATEGIES FOR PRESERVING COMMERCIAL VIDEO COLLECTIONS IN LIBRARIES: SECTION 108 GUIDELINES (2012), available at [http://www.nyu.edu/tisch/preservation/research/video-risk/VideoAtRisk\\_SECTION108\\_Guidelines\\_2013.pdf](http://www.nyu.edu/tisch/preservation/research/video-risk/VideoAtRisk_SECTION108_Guidelines_2013.pdf).

102. *Id.* at 2.

103. *Id.* at 8, 10. The Video at Risk guidelines and others like them must be used with caution. The guidelines themselves explain: “reproduction and reformatting decisions require an individual and fact-specific evaluation on the part of the individual librarians and institutions, but these guidelines seek to better inform these decision making processes.” *Id.* at 1. Given past experience with CONTU, CONFU, and a whole series of fair use guidelines, users should be vigilant to ensure that these tools for guidance are not transformed into (typically very conservative) statements of the law itself. But even so, these guidelines show that libraries do have viable ways to address some of the more complex parts of section 108, at least where applied in traditional, physical library practice. See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 599 (2001) (analyzing “the origins of [fair use] guidelines, the various governmental documents and court rulings that reference the guidelines, and the substantive content of the

## 2. *Section 108 Problem Areas*

Section 108 has many useful features in its current iteration; but applying section 108 to modern library uses can be an awkward exercise. Section 108 was created in the 1960s and early 1970s, an era when photocopiers were the dominant technology.<sup>104</sup> The networked digital environment in which we now live was on the horizon,<sup>105</sup> but the practical implications—especially for libraries—were not entirely understood. The problem areas identified below, all of which fail to heed the principles identified above, make especially clear section 108’s deficiencies in adapting to these new uses.

To start with, section 108 is not technology neutral. It may not apply to many digital copies or solely digital libraries at all. The Copyright Office has asserted, “Section 108 makes it clear that digital copies may not be given to patrons. Copies must be given to patrons in analog forms—e.g., photocopies.”<sup>106</sup> The Senate Report accompanying the DMCA states that “[a]lthough online interactive digital networks have since given birth to online digital ‘libraries’ and ‘archives’ that exist only in the virtual (rather than physical) sense on websites, bulletin boards and homepages across the Internet, it is not the Committee’s intent that section 108 as revised apply to such collections of information.”<sup>107</sup>

Neither assertion has clear support in the text of the Act. Section 108(a) says nothing about whether a library must exist in brick-and-mortar form. The remainder of section 108 is likewise silent on the issue, though it could be read to imply a physical presence: the archival and preservation subsections, section 108(b) and (c), speak about the “premises of the library,”<sup>108</sup> and the lending to users provisions, section 108(d) and (e), contemplate a prominent display about copyright protection in the “place where orders are accepted.”<sup>109</sup> The combined effect of these statements

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guidelines themselves to demonstrate that in fact the guidelines bear little relationship, if any, to the law of fair use”).

104. See REPROGRAPHY AND COPYRIGHT LAW, *supra* note 16, at 39–58.

105. See, e.g., R. Anthony Reese, *The Public Display Right: The Copyright Act’s Neglected Solution to the Controversy Over RAM “Copies”*, 2001 U. ILL. L. REV. 83, 84 (2001) (describing various parts of the 1976 Act legislative history that illustrate how members of Congress anticipated this technology would develop, with specific reference to the public display right).

106. U.S. COPYRIGHT OFFICE, SECTION 104 REPORT 103 n.315 (2001), *available at* <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.

107. See SEN. REP. NO. 105-190, at 62 (1997). See also SECTION 108 STUDY GROUP REPORT, *supra* note 7, at 17.

108. 17 U.S.C. § 108(b)–(c) (2012).

109. *Id.* § 108(d)–(e).

produces unnecessary confusion for library users about the reach of section 108 to digital uses generally.

The two references that section 108 does make to digital copies are in the section referring to archival works, section 108(b) and (c), which were amended by the DMCA in 1998. Section 108(b) (three preservation copies of unpublished works) states that “any such copy or phonorecord that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.”<sup>110</sup> Likewise, section 108(c) was amended with similar, though slightly different language: “any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.”<sup>111</sup> Under these provisions, library digital preservation copies are of questionable utility; one of the main values of digital copies is the ability use the copies remotely, something largely prohibited under these subsections.

Previously, when both subsections were arguably more flexible and technology neutral, the subsections perhaps permitted digital copying. Before amendment, both subsections stated that libraries could make a copy “in facsimile form.”<sup>112</sup> As some commentators have noted, it is far from clear whether “facsimile form” excluded digital copies to begin with. And even if it did, other provisions—such as section 108(a) (eligibility)—speak plainly in terms of “copies” without reference to format. Kenneth Crews, speaking at the Columbia Section 108 conference, explained: “When Congress added that language about limiting access to the premises of the library, they did so in 1998, in what I saw as a false tradeoff . . . . [D]igital preservation was explicitly allowed under the law already.”<sup>113</sup> Indeed, at the time of passage, the library associations believed that referencing “digital”—even without the “on the premises” limitation—was more harmful than helpful. In a statement submitted to the House Subcommittee controlling the bill, they argued that “[s]uch a change [to include the word “digital”] will perpetuate the anomalous situation of having the preservation subsections refer to specific formats. One of the goals of the 1976 Act was to make it format neutral.”<sup>114</sup>

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110. *Id.* § 108(b)(2).

111. *Id.* § 108(c)(2).

112. Digital Millennium Copyright Act, § 404(2), Pub. L. No. 105–304, 112 Stat. 2829 (1998).

113. Symposium, *Session 4: What Should Be the Conditions on Libraries Digitizing, Maintaining and Making Available Copyrighted Works?*, 36 COLUM. J.L. & ARTS 587, 599 (2013).

114. *NII Copyright Protection Act of 1995: Hearing on H.R. 2441 Before Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 104th Cong. 2d Session (Feb. 8, 1996) (joint statement on behalf of the Am. Assoc. of Law Libraries, the Am. Library Assoc., the Assoc.

That false tradeoff notwithstanding, these provisions do provide for some flexibility, though it is perhaps unintentional. The limitation provides that preservation and replacement copies be “not made available *to the public* in that format outside the premises of the library . . . .”<sup>115</sup> The Act does not define the term “to the public,” either for this section or for the other provisions of the Act (notably, the public distribution right, public performance right, and public display right).<sup>116</sup> Whether a library can serve a discrete user community distinct from the public at large—e.g., faculty and students at a university—remains an open question. The *Video at Risk* guidelines mentioned above explicitly raise this possibility and explain why providing off-premises access to digital copies may be permissible under section 108 in some situations, such as classroom use of preservation copies by faculty for use by students.<sup>117</sup> This position is bolstered by the fact that even if the meaning of “the public” in other sections of the act is more expansive, for section 108 purposes “the public” appears to mean something else. Looking to section 108(a) (eligibility requirements), we see that section 108 distinguishes between libraries that are “open to the public” and libraries that are “available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field,” thus implying that researchers affiliated with the library are not “the public” for purposes of this section.<sup>118</sup>

Even assuming that section 108 covers digital copies and that libraries can provide digital copies to some class of users outside the premises of the library, several aspects of its construction make it difficult to apply given digital library practices. These provisions largely eschew the principles of flexibility, simplicity, and consistency in favor of detailed and, often times, overbearing technical requirements. For example, several provisions require investigation of copyright-relevant information at the item level. While individual items are digitized on small scale, libraries are increasingly approaching digitization projects material on a collection-by-collection

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of Research Libraries, the Med. Library Assoc., & Special Libraries Assoc.) *reprinted in* ASS'N OF RESEARCH LIBRARIES, COPYRIGHT AND THE NII: RESOURCES FOR THE LIBRARY AND EDUCATION COMMUNITY 47, 52 (1996).

115. 17 U.S.C. § 108(b), 108(c) (2012) (emphasis added).

116. *See id.* § 101 (defining “publicly” as including content made available to “the public” but never defining “the public” itself); *see also* David R. Hansen, *The Public Display of Digital Library Collections*, 14 N.C. J.L. & TECH. 145, 157–62 (2012) (discussing the legislative history of the public display right and the failure to define the term “public”).

117. *See* VIDEO AT RISK, *supra* note 101, at 16–17.

118. 17 U.S.C. § 108(a)(2)(i)–(ii) (2012).

basis.<sup>119</sup> Section 108(c) (replacement copies of published works) requires that libraries make a “reasonable effort” to investigate, for each work, whether “an unused replacement copy cannot be obtained at a fair price.”<sup>120</sup> Section 108(e) (copies of entire works made for a user) requires that libraries determine, on the basis of a “reasonable investigation” that a copy of each work cannot be obtained “at a fair price.”<sup>121</sup>

Similarly, section 108(h), which at first glance might appear to be the most helpful for libraries because of its expansive reach that includes reproduction, distribution, performance, and displays for a large group of works, is in fact mired in the same problems. Section 108(h) allows libraries to make use of copyrighted works in the last twenty years of its protection, but only if the library first determines on the basis of a “reasonable investigation” that the work is not “subject to normal commercial exploitation,”<sup>122</sup> cannot be obtained at a “reasonable price,”<sup>123</sup> and has not been the subject of a “Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price,” which are submitted to the Copyright Office on behalf of the copyright owner.<sup>124</sup> These provisions add an unnecessary layer of complexity by using ambiguous and inconsistent terms. While other subsections of section 108 refer to “fair price,” section 108(h) uses the term “reasonable price.” The difference between these terms is unclear. Similarly, section 108(c) and (e) refers to a work’s availability for sale; section 108(h) refers to “normal commercial exploitation.” Again, differentiating between the two is a challenge.

Whatever those terms mean, section 108(h) requires considerable item-level research for works subject to its terms, including its availability, price, a search of copyright office records. Compounding that challenge is the initial investigation required to determine whether a work is in fact in its last twenty years of protection. For many works, this requires an investigation of who authored the work (individually, corporately, or as a work for hire) and the date of the death of the author. Together all of these specific requirements mean that section 108(h) quickly becomes more trouble than it is worth for

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119. See CODE OF BEST PRACTICES IN FAIR USE OF ORPHAN WORKS FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS (forthcoming May 2014).

120. 17 U.S.C. § 108(c)(1) (2012).

121. *Id.* § 108(e).

122. *Id.* § 108(h)(2)(A).

123. *Id.* § 108 (h)(2)(B).

124. *Id.* § 108(h)(2)(C); see also *Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price*, U.S. COPYRIGHT OFFICE <http://www.copyright.gov/docs/nla.html> (last revised Oct. 31, 2013); *Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price*, 37 C.F.R. § 201.39 (2014) (regulation prescribing the form of the notice).

library users, especially given library access to other copyright limitations such as fair use.<sup>125</sup>

Other specific provisions offer complex rigidity that is of questionable value to copyright owners but definite harm to library uses. Section 108(i), for example, contains limitations that make it difficult to apply to modern library uses. Section 108(i) limits the applicability of section 108 copies made for users—copies made under section 108(d) and (e)—to mostly literary works. It provides that “[t]he rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news.”<sup>126</sup> When libraries seek to make use of entire collections that include these types of works along with typical literary works, they only receive partial section 108 protection.

Similarly, the copy limitations—subsections 108(b) and (c), which limit libraries to three copies of a work, and all other subsections, which limit libraries to single copy—are unnecessarily specific and limited, providing little benefit to rightsholders while restricting responsible archival practice. Entire repository networks are built on the principle that decentralized and distributed storage of multiple copies is the most effective way to preserve works digitally. Indeed, one major digital preservation project is named in light of this principle: LOCKSS (Lots of Copies Keeps Stuff Safe) is a major initiative based out of Stanford University that maintains copies for a broad network of participating libraries and publishers.<sup>127</sup> The section 108 numerical limitations do not work well within the context of digital preservation programs.

Finally, section 108 has a number of structural characteristics that make its application in any context, print or digital, difficult for libraries. Section 108(c) (replacement copies of published works), for example, in all of its

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125. To the extent that older works—those in their last twenty years of protection—are orphan works, there are good fair use arguments that support library digitizing and making works available. *See generally* Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L.J. 1379 (2012); CODE OF BEST PRACTICES IN FAIR USE OF ORPHAN WORKS FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS (forthcoming May 2014). Independent of the orphan works analysis, there are good reasons to think that the fair use argument should gain strength as the work ages. *See generally* Justin Hughes, *Fair Use Across Time*, 50 UCLA L. REV. 775 (2003). Even copyright holders seem to find the provision onerous: a search of the Copyright Office catalog indicates that not a single section 108(h) notice to libraries and archives has been filed by copyright holders since the 108(h) scheme was adopted in 1998. *See Search Copyright Information*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/records/index.html> (last visited July 24, 2014).

126. 17 U.S.C. § 108(i) (2012).

127. *Global & Private LOCKSS Networks*, LOCKSS, <http://www.lockss.org/community/networks/> (last visited July 24, 2014).

specificity about the situations in which libraries can make replacement copies, seems to imply that a work must *already* be deteriorating, lost, stolen, or obsolete before section 108(c) copies can be made.<sup>128</sup> Good practice and common sense dictate that copies should be preserved *before* those events occur.

#### D. LIBRARY USES UNDER OTHER LIMITATIONS ON COPYRIGHT

When section 108 was first passed by Congress, there was perhaps a hope or suggestion that it should fully balance the rights of copyright owners and library users.<sup>129</sup> If Congress had constructed section 108 to balance those interests, it would be natural to think that libraries and policy makers view section 108 as the primary means of facilitating library uses of copyrighted works, and resort to other alternative tools, such as fair use, only as a last resort.

But when considering what section 108 actually aims to do in its statutory text, as compared to library practice (even library practice in 1976), it becomes clear that section 108 was never designed to be the primary tool facilitating routine library uses or innovative, new library uses. The idea that libraries rely on provisions other than section 108 is not novel. Any responsible assessment of current library practice under the Copyright Act would at least acknowledge that fair use, the doctrine of first sale, and a whole host of other limitations may apply. What follows is a brief outline of just some of these provisions and a small sample of the ways that libraries use them.

The first and primary exception is fair use, a flexible doctrine that “permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>130</sup> Described as an “equitable rule of reason,”<sup>131</sup> the doctrine asks courts to examine uses of copyrighted works in light of several factors. In its statutory codification, Congress identified four:

1. the purpose and character of the use,

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128. See SECTION 108 STUDY GROUP REPORT, *supra* note 7, at 52. (proposing that “fragile” works be added to the list of characteristics that would allow a section 108(c) replacement copy to be made).

129. See 17 U.S.C. § 108(i) (1988) (requiring the Register of Copyrights to submit a report on “the extent to which [§ 108] has achieved the intended statutory balancing of the rights of creators, and the needs of users”), *repealed by* Copyright Amendment Act of 1992, Pub. L. No. 102-307, § 301, 106 Stat. 264 (1992).

130. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994) (brackets removed) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

131. See H.R. REP. NO. 94-1476, at 65 (1976).

2. the nature of the copyrighted work,
3. the amount and substantiality of the work used, and
4. the effect of the use on the potential market for the work.<sup>132</sup>

Fair use has always supported library use of copyrighted works. Before section 108 was created in the 1976 Act, libraries relied on fair use almost exclusively for making copies. Section 108 drafters acknowledged the importance of fair use for libraries a number of times in both the text of the Act and in its legislative history. Section 108(f)(4) explicitly states that nothing in section 108 “in any way affects the right of fair use as provided by section 107.”<sup>133</sup> Both the district court and the Second Circuit Court of Appeals in *Authors Guild, Inc. v. HathiTrust*, have concluded that this section means that section 108 does not preclude a separate fair use defense.<sup>134</sup> The legislative history of section 108 supports this conclusion. In the House Committee Report accompanying the 1976 Act, drafters explained that the limitations on the types of works covered by section 108, for example, did not preclude a valid assertion of fair use.

“Although [subsection (i)] generally removes musical, graphic, and audiovisual works from the specific exemptions of section 108, it is important to recognize that the doctrine of fair use under section 107 remains fully applicable to the photocopying or other reproduction of such works. In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work. Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.”<sup>135</sup>

In its commentary on section 107 (fair use), the Committee Report reaffirms this position by discussing how fair use is directly applicable to library preservation in the context of deteriorating films. It states, “The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for

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132. 17 U.S.C. § 107 (2012).

133. *Id.* 17 U.S.C. § 108(f).

134. *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 457 (S.D.N.Y. 2012), *aff’d in part*, No. 12-4547-cv, slip op. (2d Cir. June 10, 2014).

135. H.R. REP. NO. 94-1476, at 78–79 (1976).

purposes of archival preservation certainly falls within the scope of ‘fair use.’”<sup>136</sup>

In the few copyright lawsuits that libraries have been forced to defend, fair use has acted as a strong shield. In *Authors Guild, Inc. v. HathiTrust*, for example, the district court was asked to evaluate several library preservation techniques and limited access uses (e.g., making works available to blind and print disabled students). Judge Baer, in deciding the case in favor of the library defendants, concluded: “I cannot imagine a definition of fair use that would not encompass the transformative uses made by Defendants’ [mass digitization project] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the [Americans with Disabilities Act].”<sup>137</sup> Though less effusive in its opinion, the Second Circuit Court of Appeals largely agreed.<sup>138</sup>

Libraries employ fair use for both routine uses and for new, innovative applications that rely on new technology. For example, the Association of Research Libraries’ 2012 *Code of Best Practices in Fair Use for Academic and Research Libraries*,<sup>139</sup> which was developed after extensive consultation with the library community, identified principles for employing fair use in eight common library situations:

1. to support teaching and learning with access to library collections by making course-related content available to enrolled students via digital networks,
2. to use selections of collection materials to increase public awareness and engagement with collections,
3. to preserve at risk or fragile materials,
4. to make digital versions of library special collections electronically available in appropriate circumstances,
5. to reproduce library materials for disabled students and others,
6. to maintain the integrity of works in institutional repositories,
7. to create databases for computer-aided non-consumptive research (e.g., text mining), and

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136. *Id.* at 73.

137. *Authors Guild, Inc.*, 902 F. Supp. 2d at 464.

138. *Authors Guild, Inc. v. HathiTrust*, No. 12-4547-cv, slip. op. at 13–31 (2d Cir. June 10, 2014).

139. ASS’N OF RESEARCH LIBRARIANS, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES (2012), available at <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

8. to collect and make available for scholarly use materials posted online.

The even more recent *Code of Best Practices in Fair Use of Orphan Works for Libraries, Archives, and Other Memory Institutions*, published in 2014, speaks to the application of fair use to preservation and access of library collections that can reasonably be expected to contain significant numbers of orphan works—i.e., copyrighted works whose owners cannot be reasonably located.<sup>140</sup> That document explains the now common situation of library digitization of entire collections for which copyright status and ownership is unclear.

Section 108 does not come close to reaching most of these uses. And while some of these applications are common, everyday applications for which librarians are and have been comfortable making fair use determinations, others—for example, databases that enable text mining—are relatively new innovations that are just beginning to take hold in libraries. Fair use has allowed libraries to adapt their collections and services to these new technologies. Librarians have exhibited considerable agreement about how to apply fair use in such situations.<sup>141</sup> Although fair use is sometimes criticized as being too ambiguous to employ with any precision to these situations, a growing body of research has emerged showing that while fair use is flexible, it is not entirely unpredictable.<sup>142</sup>

Libraries also rely heavily on the “first sale” doctrine, codified as a limitation on copyright in section 109. The statutory text provides that, notwithstanding the public-distribution right awarded to authors in section 106(3), “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”<sup>143</sup> Libraries have for centuries lent

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140. See CODE OF BEST PRACTICES IN FAIR USE OF ORPHAN WORKS FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS (forthcoming 2014).

141. See ASS’N RESEARCH LIBRARIES, *supra* note 139 (discussing the lengthy and involved process behind the development of the community best practices). See also *Code of Best Practices in Fair Use*, ASS’N RESEARCH LIBRARIES, <http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices/> (last visited June 23, 2014) (highlighting librarians who have adopted and applied the code at their institutions).

142. See generally Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537 (2009); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 *U. PA. L. REV.* 549, 574–75 (2008); Matthew Sag, *Predicting Fair Use*, 73 *OHIO ST. L.J.* 47 (2012); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 *LEWIS & CLARK L. REV.* 715 (2011); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *WM. & MARY L. REV.* 1525 (2004).

143. 17 U.S.C. § 109(a) (2012).

copies of works in their collections to their users.<sup>144</sup> First sale and broader principles of exhaustion<sup>145</sup> permit them to do so without infringing the copyright owners' exclusive right of public distribution. Section 108 exceptions to the public distribution right come nowhere near the breadth of the first sale exception for copies of works acquired by libraries through purchase, sale, or gift. And this same basic activity, which is essential to print lending, has been translated online by libraries seeking to lend digital copies to users on their own devices.<sup>146</sup> Whether and how first sale and the broader doctrine of exhaustion apply to digital lending is subject to debate and,<sup>147</sup> at the moment, litigation.<sup>148</sup> But the overall principle, and the flexibility that it affords libraries when combined with fair use, has allowed such experimentation to occur.

Libraries also lean on a number of copyright provisions to make uses of works in situations where rights are not certain or where the application of limitations and exceptions such as fair use are not entirely settled. For those situations, the Copyright Act insulates libraries from risk in a number of ways. The first is not intentionally directed at libraries: pursuant to section 412 of the Act, unregistered works are not eligible for statutory damages, which can be up to \$150,000 per work infringed.<sup>149</sup> A large segment of library collections are unregistered, particularly in special collections. Second, section 504(c)(2) insulates nonprofit libraries from statutory damage awards when making good faith assertions of fair use.<sup>150</sup>

The point of this short review is that libraries regularly and appropriately use other limitations to make use of copyrighted works. Those provisions perform functions independent of section 108, and are often the primary tool that libraries rely upon for both everyday and new, innovative uses.

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144. See FRANCIS WORMALD & C.E. WRIGHT, *THE ENGLISH LIBRARY BEFORE 1700* (1958).

145. See generally Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011) (discussing exhaustion and its pre-first sale origins as a foundational doctrine). Libraries have relied on these broader principles in lending digital copies. See Fowler, *supra* note 30.

146. See Fowler, *supra* note 30.

147. USPTO ROUNDTABLES, [https://www.signup4.net/public/ap.aspx?EID=THE\\_G32E&OID=160](https://www.signup4.net/public/ap.aspx?EID=THE_G32E&OID=160) (last visited August 16, 2014) (opening public discussion on the scope of digital first sale).

148. See generally *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

149. See 17 U.S.C. § 504 (2012); see also Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

150. 17 U.S.C. § 504(c)(2) (2012).

### III. REFORMING SECTION 108

Libraries make a number of important and socially beneficial uses of copyrighted works that fall outside of section 108. Some of those uses are outside section 108 by design. Other uses are the result of a statutory scheme that has failed to keep pace with technology. How library uses fit under these sections is important because it helps further understand the purpose of section 108, something that sometimes falls out of focus when discussing section 108 reform. Even from its beginning, the legislative history of section 108—the committee prints<sup>151</sup> and copyright revision studies<sup>152</sup> specifically—does not clearly indicate a purpose for section 108 other than as a technical solution to a discrete technical development: photoduplication, which had become so prevalent in libraries by 1976 as to justify its own section of the Act. This Article concludes, based on the observations above about how section 108 works in practice, where it fails, and when libraries look to other tools such as fair use, that section 108 has been asked to provide library-like institutions with a useful, clear, and unambiguous exception that practicing librarians can employ to make decisions about the use of copyrighted works in frequently recurrent library situations. Section 108 is meant to be a supplement to, and not a replacement for, the other limitations and exceptions such as fair use.

If one accepts that as a fair statement of purpose, what does that mean for section 108 revision? As currently formulated, section 108 fails that purpose in many ways. Section 108 reform that takes seriously the principles identified below would move section 108 closer to achieving this goal.

#### A. PRINCIPLES FOR REFORM

*Principle 1—Preserve access to, and the development of other limitations such as fair use:* Copyright reforms for libraries should not in any way compromise access to—or the further judicial development of—the full set of limitations and exceptions available under the Copyright Act. Libraries rely on these provisions heavily to engage in many routine activities and to experiment with providing new, innovative services that support library goals of promoting research, scholarship, and learning. No revision to section 108's limited safe harbors would be worth sacrificing access to these other much more fundamental limitations on copyright.

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151. H.R. REP. NO. 94-1476 (1976).

152. SUBCOMM. ON PATENTS, TRADEMARKS, & COPYRIGHTS OF THE S. COMM. OF THE JUDICIARY, 86TH CONG., STUDY NO. 15, PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES 45 (Comm. Print 1960) (author Borge Varmer).

*Principle 2—Address issues unique to libraries and similar institutions:* Section 108 should, to the extent possible, apply to uses that are unique to libraries rather than attempt to tackle issues that are common to all copyright users. Digital lending, for example, is an issue that affects not just libraries but all holders of digital copies of works. Libraries lend, but other organizations and even individual users also seek to transfer digital copies by sale, lending, or gifting. Crafting a specific library exception for digital lending risks sacrificing the focus of section 108 while raising the possibility of distorting the overall development of the law for important uses of copyrighted works more generally.

In terms of what organizations qualify as worthy of protection under the section, the Section 108 Study Group proposed that, as an initial matter, museums are an obvious addition to the list of eligible institutions. The Group also proposed that eligibility in general should be based on whether the organization has a public service mission, has trained staff, provides services normally associated with libraries, and possesses a collection of lawfully acquired works.<sup>153</sup> Whatever the specific formulation, memory institutions and the public at large would be better served by focusing on organizations as defined by their public service purpose and mission rather than their physical characteristics.

*Principle 3—Pursue simplicity:* “It will be of little avail to the people, that the laws are made by men of their own choice, if the law be so voluminous that they cannot be read, or so incoherent that they cannot be understood . . . .”<sup>154</sup> So said James Madison, addressing the “calamitous” effects of unstable and complex laws. This maxim holds especially true for the Copyright Act, which now more than ever affects a broad segment of the public in their everyday lives online,<sup>155</sup> and even more so for limitations such as section 108 that are intended to be used by practicing librarians. Librarians and other memory institution professionals represent a single category of users that has intimate

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153. SECTION 108 STUDY GROUP REPORT, *supra* note 7, at 34–38.

154. THE FEDERALIST NO. 62, at 381 (James Madison or Alexander Hamilton) (Clinton Rossiter ed., 1961)

155. The general point seems to be generally well accepted. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 323 (2013) (“[W]e need a clearer copyright act for a rather simple reason: more and more people are affected by it. . . . [I]f one needs an army of lawyers to understand the basic precepts of the law, then it is time for a new law.”). See also *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 82–83 (2013) (statement of Rep. Blake Farenthold, Member, Subcomm. on Courts, Intellectual Prop., & the Internet), available at [http://judiciary.house.gov/\\_cache/files/c3d4fe7a-6f04-4cf6-8751-2010ecccc1a9/113-31-80976.pdf](http://judiciary.house.gov/_cache/files/c3d4fe7a-6f04-4cf6-8751-2010ecccc1a9/113-31-80976.pdf).

and repeated interactions with copyrighted works as part of their everyday activities.<sup>156</sup> Whatever section 108 looks like in the future, it should not contain the labyrinth of exceptions, stipulations, and exceptions to exceptions that currently haunt potential section 108 library users. If it retains its current basic approach, section 108 could be reduced to three basic parts:

1. general eligibility and effect of section 108,
2. permissible preservation uses, and
3. permissible lending uses.

*Principle 4—Embrace flexibility.* Directly related to simplicity is the need to embrace flexibility. Section 108 can provide clear and unambiguous rules without resorting to explicit specification of every instance for when a provision applies. If provisions are formulated based on their intended effect rather than the means to achieve that effect—for example, allowing any number of replacement copies reasonably necessary to make the work functionally stable and useable—it would allow statutory drafters to give examples of such situations, either in legislative history or in the bill itself. Furthermore, it would allow libraries the flexibility to adapt this provision as library practices change. Likewise, as libraries have done so successfully with fair use and with section 108, documentation of community best practices for more flexible provisions can help users to better understand the provisions and can help rightsholders better grasp how libraries are interpreting and using section 108 in practice.

*Principle 5—Technology neutrality.* One of section 108’s chief failings may be its focus on specific technology. This includes, of course, its explicit reference to digital copies. But it also includes the assumption that the copyrighted works are or will continue to be handled by libraries in a primarily physical context. Reference to library “premises” is just one example. While section 108 is not and probably cannot act as a tool that anticipates new innovative uses of copyrighted works, it should do its best to avoid what is otherwise inevitable obsolescence over the next several years. Section 108 drafters should also be sensitive to how this principle is affected by other parts of the Act. Most section 108 provisions, for example, only allow for library reproductions and distributions. Policymakers should consider how these rights also apply—perhaps with some limitations—to the

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156. See ADLER ET AL., *supra* note 23; JENNIFER URBAN ET AL., REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS 7–8 (2013), available at [http://www.cmsimpact.org/sites/default/files/documents/report\\_on\\_orphan\\_works\\_challenges.pdf](http://www.cmsimpact.org/sites/default/files/documents/report_on_orphan_works_challenges.pdf).

other section 106 rights of public performances or displays so as to adequately cover copies of works made available online.

#### IV. CONCLUSION

Section 108 has played an important role in improving libraries' abilities to use copyrighted works in ways that help them meet their own goals as institutions that promote preservation and access to information and the overall mission of the Copyright Act. However, several aspects of section 108 have impeded its ability to adapt to changing circumstances, making it far less useful for modern library practice, especially digital library practice, than it could be. These aspects of section 108 tend to illustrate a drift in focus from what librarians and policymakers expect section 108 to do: provide a useful, clear, and unambiguous exception that practicing librarians can employ to make decisions about the use of copyrighted works in frequently recurrent library situations, supplementary to decisions made under other limitations such as fair use. This article identifies five principles that help explain how and why certain parts of section 108 drift from this focus and, ultimately, fail. They state that section 108 should (1) preserve library access to and the development of other limitations such as fair use; (2) address issues unique to libraries, archives, and other memory institutions; (3) favor simplicity and consistency; (4) reformulate limitations as technology neutral; and (5) embrace flexibility. These five principles are by no means the complete list of considerations policymakers should take into account when formulating proposals for section 108 reform. But they can, hopefully, help guide a productive conversation about reforming section 108, whenever that conversation is fully opened.