

A Legal Analysis of Making Copyrighted Works Available Online during the Coronavirus Crisis

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The Internet Archive (“IA”) began operation in 1996, at first making archival copies of websites, but soon offering those to the public and then expanding to other copyrighted works including books, sound recordings, audiovisual works, graphic arts (still images), and software, without regard to their copyright status and generally without licenses. It positions itself as an online version of a library and has offered free access to the materials it copies, albeit limiting users to one-for-one use of its copies: one copy may only be used by one account at a time.²

At the time of this writing, efforts to limit the spread of the coronavirus have resulted in “stay at home” orders in over forty states, covering more than ninety percent of the U.S. population.³ Similarly, educational institutions at all levels have closed their physical spaces and are trying to carry on via distance education. For many, including this author, the current

situation was unimaginable only a couple of months ago. By any measure, this is an extreme set of circumstances.

On March 24, 2020, in response to the closures associated with the coronavirus, IA announced its intention to remove all limits on the number of users who could simultaneously access the copies it possess.⁴ It dubbed this decision, its “National Emergency Library” and announced it would operate in this fashion until at least June 30, 2020, even if the U.S. national emergency declaration concludes prior to that date.

Astute readers will quickly wonder about the copyright rights of the authors and publishers of those books and other works. Indeed, authors, publishers, and other professional creators immediately raised objections, pointing out that creators’ already very modest income has dwindled or disappeared

during the coronavirus-related restrictions, given the inability to conduct book readings/signings, concerts, or other live events critical to their livelihood.⁵

IA grounds its legal defense in a document called the “White Paper on Controlled Digital Lending of Library Books” (“CDL”).⁶ This document argues for a “digital first sale doctrine,” an expansion of traditional copyright exceptions.

Advocacy for a digital first sale doctrine is not new. I first encountered the proposal twenty years ago, in the context of my work on the Copyright Office’s “DMCA Section 104 Report.”⁷ That report considered the legal and policy arguments for a digital first sale doctrine and rejected them. I was the primary author of that section of the report. Because the CDL’s analysis of these issues is flawed, I feel compelled to respond.

This is not to suggest that the Copyright Act provides no accommodation to those seeking to engage in distance education. The Technology, Education, and Copyright Harmonization Act of 2002 (“TEACH Act”) was enacted specifically for the purpose of facilitating the use of copyrighted works for good faith distance education. It was my privilege to mediate the negotiations between stakeholders that led to the final text and enactment of that law. While early on some of the safeguards required by that law posed hurdles to compliance for many educational institutions, more modern technology has reduced those barriers significantly. Yet, the TEACH Act receives little or no attention as the supporters of the IA gravitate to another exception in U.S. copyright law, fair use. So I am similarly compelled to write to breathe new life into the law that Congress specifically enacted to address the concerns and goals that IA and its supporters profess.⁸

Part I of this article will review the first sale doctrine and the digital first sale proposal. It will outline why that proposal has been repeatedly rejected by government experts and policy makers. Part II of this article will consider the assertion that

IA’s operation and the digital first sale doctrine are within the fair use defense to copyright infringement. That analysis will demonstrate the many weaknesses of the CDL’s legal analysis, both with regard to IA’s previous operation and even more so now that use of copyrighted works through IA’s platform is virtually unlimited. Part III of this article will consider the existing statutory exceptions to facilitate digital distance education known as the TEACH Act as a more balanced approach to meeting distance education needs during the current crisis. This article will conclude that IA and its supporters are overlooking the established legal norms in an effort that, at least in part, appears intended to use the occasion of a national crisis to advance their copyright policy agenda.

I. The First Sale Doctrine

As discussed in detail in the Copyright Office Report, the first sale doctrine arose in the context of a publisher that purported to restrict the terms on which a purchaser of one of its books could resell that copy. It was conceived as a matter of the common law rules against the restraints on the alienability of property and a limitation to the copyright owner’s right to “vend” under the 1909 Copyright Act.⁹ The first sale doctrine was carried forward into the current law, the 1976 Copyright Act, as a limitation on what is now known as the “distribution” right, but the statutory language no longer focuses on whether a “first sale” has occurred. Rather, the exception codified in Section 109(a) applies to a particular copy if it has been “lawfully made under this title.”¹⁰ I will return to the significance of that language below.

The advent of digital technology raised questions about the application of the first sale doctrine to what became common consumer conduct. Under the first sale doctrine, if I buy a vinyl record or CD and later give it to a friend, that is clearly within the scope of Section 109(a). But if I download a song or album to my computer or smart phone and later transmit it over the internet (e.g., through a peer-to-peer service), then we both have it because my transmission created a new copy (not to

mention several server copies along the way). The first sale doctrine has never permitted unlicensed reproductions, and thus does not permit the transmitted copy.

Recognizing that the letter of the law did not reach what they wanted, some advocates sought an expansion of the first sale doctrine to cover copies sent by digital transmission.¹¹ The precise contours of digital first sale proposals varied somewhat, but they generally envisioned a model in which the sender would accept a loss of access to their copy either by promise, legal obligation, or technological constraint, once they transmitted another copy.

Digital First Sale

The debate over the digital first sale proposal is more than just a legal technicality over the reproduction right. Opponents of such proposals point out that the relative perfection of digital copies, combined with the distribution facilitated by the internet, would produce substantially greater harm to the copyright owner than the existing first sale doctrine.¹²

A dog-eared, coffee-stained copy of a paper book competes with brand new copies only in a secondary market. Purchasers may choose that, knowing they are getting lower quality for a proportionately lower price. Digital copies are indistinguishable—“used” digital copies compete directly with the copyright owner in the primary market. Further, in the pre-digital world, transferring a copy involved identifying someone who wanted a copy of that work and physically conveying it to that person. Online auction sites and instantaneous transmission of digital copies make it easier to identify and deliver a copy to a person who wants it. This translates into substantially greater losses to the copyright owner and fundamentally alters the policy calculus. Thus, the Copyright Office concluded the public good that might be achieved through a digital first sale proposal is more than offset by the harm to the public of the reduced incentive to create and distribute expressive works that is at the heart of the Copyright Act.¹³

More recently, the U.S. Patent and Trademark Office (“USPTO”) in partnership with the National Telecommunications and Information Administration (“NTIA”) reviewed this question once again. They produced a “White Paper” in 2016 in which they concluded, “the risks to copyright owners’ primary markets as described by the Copyright Office in its 2001 Report do not appear to have diminished....”¹⁴ Nor has Congress chosen to act on similar policy requests to expand the first sale doctrine. Thus, the CDL analysis should be read in the context of twenty years of advocacy that failed to convince Congress and three federal agencies.

Lawfully Made Under This Title

Before considering whether an expansion of the law should be condoned to justify the IA’s practices, there is a threshold question of whether the IA’s activities even qualify for the existing statutory exception? As noted above, under the current law, the “first sale” doctrine is only available to those who possess a lawfully made copy. Are the copies on IA’s servers lawfully made?

IA broadly asserts that it obtains copies “through purchase or donation, just like a traditional library.”¹⁵ This seems to mean that in some cases they receive hard copies and scan them to create digital copies, and in other cases they receive new copies of digital files.

The Copyright Act already contains a fulsome set of exceptions specific to libraries and archives, found in Section 108. But it is widely agreed that IA and other “virtual libraries” do not qualify for the provisions of Section 108. In 2005, the Library of Congress and the Copyright Office jointly convened the Section 108 Study Group, a diverse set of experts “from the library, archive, and museum communities; from scholarly communities; from related not-for-profits; from various right holder communities; and from other relevant professional disciplines. Two co-chairs were selected, one from the publishing community and one from the library community.”¹⁶

That group of experts agreed that Section 108 does not cover online-only platforms, “The exceptions are generally understood to include only libraries and archives established as, and operating through, physical premises, including whatever online resources such entities provide.”¹⁷

Failing to qualify for Section 108, and operating outside the scope of Section 109, as discussed above, all that is left for IA is a fair use argument under Section 107. The CDL opinion on which IA rests is, by its own terms, limited to an analysis of “how libraries can lend digital copies of books.” There does not appear to be any analysis of creating the digital copies that form the IA’s collection in the first place. Nor is there case law that supports a finding of fair use for such activity, given that the purpose of making those copies is to make the entire works available to the public without modification or comment. This is thin ice, or perhaps open water given the weakness of IA’s fair use claims for its subsequent distribution of copies, as discussed below.

It also appears that “purchase” and “donation” are not the sole avenues through which IA obtains copies of works. Other statements from IA indicate that IA also works with traditional libraries “to digitize their entire library.”¹⁸

Mass digitization of copyrighted works has been the subject of significant litigation. The Google book-scanning project and related activities of the HathiTrust were found to be fair use, but critical to those rulings was the fact that only short “snippets” of the books were made available to users of the searchable database.¹⁹ Long-running litigation against Georgia State University has produced mixed results, with the 11th Circuit twice (so far) reversing the fair use findings of the district court. That case involves copying of only portions of works for duplication and distribution as part of university “course packs.” But no court has found fair use for what IA is apparently doing: copying verbatim the entire text of copyrightable works and making the entire text available without a license from the copyright owner.²⁰

The absence of precedent for IA’s copying, combined with the breadth of use of the copies they make, suggests there is good reason to believe IA’s copies may not be lawfully made. If so, they would not only fail to qualify for a first sale doctrine of any stripe, they could generate liability for direct infringement.

II. Fair Use Analysis for Distribution by IA

IA and its supporters have abandoned the failed argument that Section 109 should be expanded, and instead are forum-shopping the exact same policy request over to fair use in Section 107. But they fare no better. The same consideration that they could not overcome—the harm to the copyright owner’s market for the work—is pivotal in the fair use analysis. And of the other three factors, only one favors the IA.

Section 107 sets out the minimum four factors any court must evaluate when considering a claim under the affirmative defense of fair use:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. The nature of the copyrighted work;
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. The effect of the use upon the potential market for or value of the copyrighted work.²¹

There is no serious dispute on the application of the first three factors. IA is a non-profit entity and does not charge for its services. It also serves educational purposes, although its use is mixed in that regard, as many of the works it has copied and made available do not have particular pedagogical value. Non-profit uses and, to the extent IA promotes educational uses, are favored under the first factor.

Most if not all of the works IA copies and distributes are creative works at the heart of what copyright protects. That nature weighs against fair use under the second factor. IA by its own admission copies the entirety of all the works it obtains. This clearly weighs against fair use under the third factor.

The CDL asserts, “the third factor should be neutral or weigh in favor of the use because copying the entire work is necessary for the purpose of lending, and controls on reuse effectively place limitations on the ‘amount’ of the work the user obtains access to.”²² That assertion is circular. If every user could dispose of this factor by asserting they “need” to use the entire work, the third factor would be meaningless. Further, the “controls” the CDL discusses do not limit the user to less than the complete copy of the work and so are not relevant to this factor. To the extent they may affect the fourth factor they are discussed below.

Harm to the Market

The reports of the Copyright Office and the USPTO/NTIA lay out the straightforward reality that making the entirety of copyrighted works available online will compete directly with the copyright owners. And even the CDL acknowledges that fair use is disfavored where “the copy brings to the marketplace a competing substitute for the original or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”²³ Nonetheless, the CDL claims the safeguards built into its envisioned operation of an online service prevent market harm beyond what is already accepted under the existing first sale doctrine. The CDL cites no authority for the notion that these limitations prevent or cure the harm to the copyright owner, but I nonetheless evaluate them on their own terms.

Safeguards

The CDL lists six safeguards that it claims limit market harm to the copyright owner. The first two are that copies are acquired

lawfully and not be subject to contrary licensing restrictions. As discussed above, it is dubious that IA is acquiring its copies lawfully. Further, avoiding violating licensing conditions is laudable, but that alone fails to prevent harm to the market for the work. Indeed, a completely unlicensed use is not violating license terms (because there aren’t any), but can be very harmful to the copyright owner.

The second pair of safeguards is that the number of users who can view a work should be limited to the number of physical copies lawfully owned and that each digital copy be available to only one person at a time. These conditions are consistent with and inherent in past “digital first sale” proposals. As such, these “limitations” have already been factored into the evaluation of digital first sale proposals that have been repeatedly rejected. Moreover, now that IA has abandoned all limits on the number of simultaneous users of the copies it possesses, it has gone beyond even the digital first sale proposals and what the CDL purports to defend.

The final pair of safeguards are time limits on access and technological restrictions to prevent further copying and redistribution by the IA’s users. Previously, IA maintained a two-week time limit on access before an individual would have to get back in line to renew access. The CDL offers no analysis or data to indicate that even the initial two weeks of access would not displace sales, while logic dictates the availability of copies for free would harm the market, albeit not as much free availability with no timing restriction. In any event, under IA’s current mode of operation, the two week limit is illusory as a user may simply obtain consecutive sets of two weeks of access. With no limits on the number of users per copy, there is no waiting list and so effectively, no time limits.

IA does appear to use technological measures to inhibit further distribution or other unlicensed uses by IA’s users. While that has merit in preventing further downstream piracy, it

does not address market harm through IA's reproduction and distribution to *its* users, except perhaps to enforce the two-week time limit, back when that was in effect.

IA's use of technological measures in this regard is ironic because if IA's and the CDL's arguments about fair use and digital first sale are correct, then their controls are preventing their users from engaging in the same fair use that IA believes it does. Which goes to the point that if IA's legal arguments were valid, it would authorize under the Copyright Act an essentially limitless stream of unlicensed, unpaid online distribution of copies of copyrighted works.

Indeed, the irony runs deeper still. IA founder Brewster Kahle has been a vocal critic²⁴ of the legal protection against the hacking of technological measures. That IA should now claim legitimacy based in part on the use of such tools arguably crosses the line into hypocrisy.

In sum, the CDL's "safeguards" appear to offer little or no practical reduction in the potential for unlicensed access to entire works to harm the market for those works. Nor is IA operating within even those restrictions. So even by the terms of the CDL, IA is not operating responsibly.

Capitol Records, LLC. v. ReDigi, Inc.²⁵

These issues have been litigated, with a clear and unmistakable holding that the digital first sale model is not fair use. ReDigi purported to operate a digital first sale exchange for sound recordings. On the way to finding that such use did not qualify under Section 107, fair use champion Judge Leval of the Second Circuit wrote:

ReDigi made reproductions of Plaintiffs' works for the purpose of resale in competition with the Plaintiffs' market for the sale of their sound recordings. ReDigi's replicas were sold to the same consumers whose objective in purchasing

was to acquire Plaintiffs' music. It is also of possible relevance that there is a distinction between ReDigi's resales and resales of physical books and records. The digital files resold by ReDigi, although used, do not deteriorate the way printed books and physical records deteriorate. As the district court observed, the principal difference between the "product sold in ReDigi's secondary market" and that sold by Plaintiffs or their licensees in the primary market was its lower price.

Factor Four weighs powerfully against fair use.²⁶

ReDigi was a commercial operation and so it lacked the benefit of the first factor—the lone factor that favors IA. But with regard to the fourth factor, IA may be even worse than ReDigi. IA is similarly offering complete copies of copyrighted works. Unlike ReDigi, which charged for its services, IA offers copies for free, enhancing the appeal of the unauthorized copies over the legitimate ones even further. The CDL was written before the Second Circuit ruled against ReDigi, and does not appear to have been updated to reflect that rejection of its theories.

The IA blog posted in defense of its current operations claims that the ruling in *ReDigi* does not harm its claims and even suggests the ruling somehow supports their arguments.²⁷ IA links to three writings in support of this.

The first²⁸ claims that limits on the numbers of users of copies (which IA has abandoned) will limit harm, and inaptly compares IA's copying and distribution of copies to different users to "format shifting" by the single lawful owner of a copy for their personal use. Beyond this, it quarrels with the basis for finding market harm in the Copyright Office and USPTO/NTIA reports, as well as the *ReDigi* decision in similar ways as the CDL.

The second²⁹ argues that because CDL use is nonprofit, it would be favored more than ReDigi, and also argues that such use is “transformative,”³⁰ even though the *ReDigi* decision held it wasn’t. Both nonprofit use and transformative use address the first fair use factor. As discussed above, I already agree the first factor favors IA. But that doesn’t rescue it from failing all the other factors. In particular, the fourth factor, harm to potential markets and the value of the work, is where making works available at no cost is even worse than what ReDigi did.

The same authors who wrote the CDL memo wrote the third article to which IA points.³¹ Here, they argue that CDL use could be transformative which, again, does not address market harm. Turning to that issue, the authors claim without support that digitizing hard copy books lawfully “replaces the legitimately acquired copy” and that arguments for substitution of sales is unclear because most 20th century books were print-only. This line of reasoning is unsupported in law and ignores the harm to the “potential market” that is explicitly part of the fourth fair use factor.

None of the writings to which IA links add any new arguments or claims that alter the analysis of the Copyright Office, the USPTO and NTIA, or the Second Circuit.

Most recently IA asserts that it is not offering copies of any book published in the last five years, recites usage statistics indicating that most books currently being distributed by IA’s platform were published ten or more years ago, and that usage rates are low and of brief duration.³² While perhaps superficially appealing, these considerations fail to state the full implication of the approach the IA and CDL urge.

The fourth fair use factor is not merely a question of how users of IA’s platform use it. As the CDL itself acknowledges, “The fourth factor analysis looks at ‘not only the...market harm caused by the particular actions of the alleged infringer,’ but also the market

harm that would result from ‘unrestricted and widespread conduct of the [same] sort.’”³³ The digital first sale approach that IA and the CDL assert is fair use would authorize any person in America to set up a website, copy books and other copyrighted works, and make them available to the world for free. Even assuming modest safeguards such as time limits on access and technology to prevent further downstream reproduction and distribution, this would condone an unlimited number of unlicensed copies to compete directly with the copyright owner. Claims that this scenario would not harm the market for and value of copyrighted works are simply not credible.

Other Considerations: Fair Use During a National Crisis

The four fair use factors are the minimum elements a court must consider, but courts are at their liberty to take into account other relevant factors as well. IA has already invoked the extreme circumstances arising from the coronavirus-related closures of libraries and schools as justifying its expanded operations.³⁴ But IA and its supporters might be surprised to learn that historically the United States has repeatedly looked to *strengthen* copyright during national crises, not use them as an excuse to weaken or ignore it.

In 1790, with the fragile new Republic emerging from the failed Articles of Confederation and saddled with debt from the War of Independence and uncertainty about the future of the nation itself, President Washington used the occasion of the first State of the Union Address to call on Congress to enact a federal copyright law.³⁵ Congress did so within months, enacting the Copyright Act of 1790.³⁶

In 1861, Congress was divided at the most fundamental levels. Yet, mere weeks before the first shots were fired at Fort Sumter, Congress took time to provide for fulsome adjudication of intellectual property by enacting express authorization for copyright and patent appeals to be heard by the Supreme Court.³⁷

Perhaps most analogous to the present situation, in the worst depths of the Great Depression Congress dedicated significant time to legislation for the purpose of strengthening copyright. The apex of this effort was in the 74th Congress, when legislation to reduce copyright formalities to facilitate joining the Berne Convention passed the Senate and was the subject of twenty-seven days of hearings in the House of Representatives.³⁸ While the legislation was not enacted at that time, it does not detract from the direction in which Congress sought to move. Rather than looking for ways to give away the works of creators at a time when as much as a quarter of the workforce could not find a job for years, Congress looked to make it easier to secure copyright and to expand protection for works of foreign authors.

Few would suggest the present circumstances are irrelevant to a fair use analysis of IA's operations. But given the weakness and consistent rejection of digital first sale advocacy and the history of American copyright during previous national crises, the IA and its proponents are arguing for a reversal of all prior treatment.

There are other considerations that weigh against fair use as well. For one, the likelihood that some if not many of IA's copies are not lawfully made is a powerful component of the analysis. Further, although libraries' physical spaces are closed, those libraries commonly make available at least some works in their collection online. That still functions.

It is also relevant that authors³⁹ and other creators⁴⁰ have been particularly hard-hit by the coronavirus related measures and are particularly vulnerable at this time to further loss of income. Additionally, publishers⁴¹ have provided increased online access voluntarily to help mitigate the current situation. Finally, IA has made all copies it possesses available to unlimited numbers of users, regardless of which those works offer any relevant pedagogical value. This over-breadth undercuts the urgency of their arguments.

Conclusion

Fair use is a fact-based, case-by-case analysis and one can certainly imagine circumstances in which a fair use claim is more or less compelling. However, writ large the CDL's legal analysis does not withstand scrutiny. And IA's conduct goes beyond what the CDL purports to defend. While there are those inclined to accept the assertions of the CDL and IA uncritically, that does not alter the reality that neither Congress, nor the Copyright Office, nor the USPTO, nor the NTIA, nor any court has ever concluded that a "digital first sale" approach is either fair use or good copyright policy. On the contrary, such arguments have been explicitly rejected time and time again.

I do not question the sincerity of those who believe all works should be made available for free. But that is not the law and for good reason. As members of a society that values the rule of law, they are obligated to consider their actions in light of the law. IA's public statements indicate they have done so, and no matter how zealous they are, or how extensive their campaign to legitimize their actions in the public's eyes, they must recognize that their actions go beyond what has ever been approved. From a legal perspective, the only logic to IA's actions suggests that they imagine few if any judges would dare rule against making works available in this time of crisis. Correspondingly, there is little doubt of a perception that IA is using the coronavirus as a policy tool, and this has fueled resentment among professional creators and copyright owners.

That is precisely why judges and policymakers should keep in mind that a national crisis is precisely the wrong moment to have a thoughtful consideration of the long-term policy consequences from a dramatic and unprecedented shift in the application of the law.

This does not mean, however, that a more responsible approach is not available. Congress acted nearly twenty years ago to provide a specific exception in the Copyright Act to

facilitate the use of copyrighted works via digital distance education.

III. The TEACH Act

The Digital Millennium Copyright Act commissioned a Copyright Office report on digital distance education. That report was issued in May of 1999. It recommended amending the Copyright Act to facilitate such uses.⁴² Subsequent to that report and related congressional hearings, Congress asked the Copyright Office to work with stakeholders to find mutually acceptable statutory language. I was fortunate enough to be tapped by then-Register of Copyrights Marybeth Peters to mediate those discussions. The goals were to produce explicit authority for legitimate educators to replicate the classroom experience online while including safeguards that avoided undue harm to copyright owners and downstream piracy. Happily, the negotiations were successful and yielded the consensus TEACH Act.⁴³

In the early days after the enactment of the TEACH Act, many educational institutions made it known they considered the safeguards impractical, notwithstanding a degree of built-in leniency for what is “feasible” and “reasonable.” The safeguards agreed to in the TEACH Act, in relevant part, include:

- “the transmission is made solely for, and, to the extent technologically feasible, the reception is limited to students officially enrolled in the course”;
- “the transmitting body or institution (i) institutes policies regarding copyright, provides informational materials to faculty, students, and relevant staff members... and provides notice to students that materials used in connection with the course may be subject to copyright protection”;
- “in the case of digital transmissions—applies technological measures that reasonably prevent retention of the work... for longer than the class session and unauthorized further

dissemination of the work... and does not engage in conduct that could reasonably be expected to interfere with technological measures used by copyright owners...”⁴⁴

I do not seek to quarrel with the representations from the past, but I do believe modern technology has caught up with the TEACH Act, making it much easier for institutions to comply with its terms.

Consider, for example, the prevalence of videoconferencing services that are being widely used to continue human interaction during the coronavirus crisis. Those services allow the organizers to limit participation to invited guests, which inherently allows an educator to limit the transmission of copyrighted works via those services to the students officially enrolled in the course.

The requirement to institute policies and provide copyright information and notice is the simplest of matters. It is likely that any responsible educational institution already does these things and has for some time, perhaps even as part of their code of academic conduct.

The requirements to apply technological measures to prevent retention of the work and unauthorized further dissemination have several facets. In my personal experience teaching at the George Washington University Law School, the faculty is provided online tools through the university system to make materials available to their students. Those tools easily allow the professor to apply restrictions on when those materials can be accessed. That is admittedly anecdotal, but also surely not unique.

This requirement also involves technology that “reasonably” prevents students from capturing and further distributing the work is probably the most challenging. That said, the CDL’s proposed “safeguards” include these same requirements. And consistent with that, one of the authors



of the CDL acknowledged in a blog post, “satisfying these requirements may be feasible in large scale systems that already have policies, IT systems, copyright notices, and other requirements set up.”⁴⁵ I agree. I also agree that compliance is likely more difficult for smaller and less sophisticated institutions.

One might imagine that solutions to challenges during a national crisis would involve a multi-pronged approach, taking advantage of every available avenue. It is perhaps telling that rather than pursuing the TEACH Act as an option to mitigate coronavirus-related closures, some of the educational community, including some large, sophisticated universities, are rallying around IA’s nearly unregulated use of copyrighted works.⁴⁶ I presume that the libraries at these institutions are operating within the Section 108 library and archive exceptions. Yet they go out of their way to endorse an institution that is not. No doubt some would prefer a finding of fair use, which entails no obligation to institute reasonable

measures to prevent harm to copyright owners, over the negotiated terms of the TEACH Act.

IV. Conclusion

Copyright issues have long been the subject of heated debates and it seems even a once-in-a-century public health crisis is not enough to put them aside. To be sure, efforts to mitigate the societal effects of coronavirus-related measures are laudable. At the same time, the over-breadth of IA’s efforts combined with its longstanding advocacy for weaker copyright rules have generated skepticism,⁴⁷ particularly among creators and copyright owners whose rights are being “donated” against their will. This paper will not resolve the policy disputes or calm the heated debate. It is my hope that at least this paper will contribute to the ongoing consideration a more thorough legal analysis and invigorate consideration of the TEACH Act as a way in which at least some needs can be met through a more balanced approach.

Endnotes

- 1 I worked at the U.S. Copyright Office in a variety of senior roles from 1999-2010. Presently I am Professorial Lecturer in Law at George Washington University Law School and President & CEO of Sentinel Worldwide, where I represent clients with interests in effective intellectual property protection. This paper is entirely my own authorship, neither requested by nor necessarily reflective of the views of any client or employer. © Steven Tepp 2020, all rights reserved.
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- 7 “DMCA Section 104 Report,” U.S. Copyright Office (2001)(“Copyright Office Report”). Accessed April 15, 2020. <https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>.
- 8 Every country’s copyright law is unique, both in the scope of rights as well as statutory exceptions. Very few countries have a fair use doctrine and while nearly every country has exceptions for educational purposes, the TEACH Act is particular to U.S. law. The analysis in this document is particular to U.S. law. IA makes its copies available worldwide, potentially subjecting it to liability under a variety of foreign laws in which its actions are clearly beyond any recognized exception.
- 9 Copyright Office Report at 19- 21.
- 10 17 U.S.C. §109(a).
- 11 Copyright Office Report at 44-47.
- 12 *Id.*
- 13 *Id.* at 78-101.
- 14 “White Paper on Remixed, First Sale, and Statutory Damages,” The Department of Commerce Internet Policy Task Force at 58 (Jan. 2016).
- 15 “Internet Archive responds: Why we released the National Emergency Library,” Internet Archive. Accessed April 15, 2020. <https://blog.archive.org/2020/03/30/internet-archive-responds-why-we-released-the-national-emergency-library/>.
- 16 “The Section 108 Study Group Report,” An Independent Report sponsored by the United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress at 4 (March, 2008). Accessed April 15, 2020. <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.
- 17 *Id.* at 113.
- 18 “Frequently Asked Questions about the National Emergency Library,” Internet Archive. Accessed April 20, 2020. <https://docs.google.com/document/d/1QjErbouWG7pUlcxPcRk4YEtbYs8ltIVTgLa1DfGh68/edit>.
- 19 The HathiTrust has also announced that it is now making available to all patrons of its member libraries the full text of books it scanned. “HathiTrust Response to Covid-19,” HathiTrust. Accessed April 15, 2020. <https://www.hathitrust.org/covid-19-response>. This not only raises questions similar to those considered in this paper, it arguably re-opens the issues considered in the previous litigation.
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