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LIBRARY OF CONGRESS

U.S. Copyright Office

[Docket No. 2016-4]

Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of inquiry.

SUMMARY: The United States Copyright Office is inviting interested parties to discuss potential revisions relating to the library and archives exceptions in the Copyright Act, 17 U.S.C. 108, in furtherance of the Copyright Office's policy work in this area over the past ten years and as part of the current copyright review process in Congress. The Copyright Office has led and participated in major discussions on potential changes to section 108 since 2005, with the goal of updating the provisions to better reflect the facts, practices, and principles of the digital age and to provide greater clarity for libraries, archives, and museums. To finalize its legislative recommendation, the Copyright Office seeks further input from the public on several remaining issues, including, especially, provisions concerning copies for users, security measures, public access, and third-party outsourcing. The Copyright Office therefore invites interested parties to schedule meetings in Washington, DC to take place during late June through July 2016, using the meeting request form referenced below.

DATES: Written meeting requests must be received no later than 11:59 p.m. Eastern Time on [INSERT DATE 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Please fill out the meeting request form found at www.copyright.gov/policy/section108, being sure to indicate which topics you would like to discuss. Meetings will be held at the U.S. Copyright Office, 101 Independence Ave. SE (Madison Building, Library of Congress), Washington, DC 20540, or as necessary, by phone.

FOR FURTHER INFORMATION CONTACT: Chris Weston, Attorney-Advisor, Office of the General Counsel, cwes@loc.gov, 202-707-8380; Emily Lanza, Counsel, Office of Policy and International Affairs, emla@loc.gov, 202-707-1027; or Aurelia J. Schultz, Counsel, Office of Policy and International Affairs, aschu@loc.gov, 202-707-1027.

SUPPLEMENTARY INFORMATION:

I. Background

Congress enacted section 108 of title 17 in 1976, authorizing libraries and archives to reproduce and distribute certain copyrighted works on a limited basis for the purposes of preservation, replacement, and research, placing these excepted activities outside the scope of exclusive rights set forth in section 106.¹ Before 1976, these institutions relied on a combination of common law and professional practices to help determine the scope of permissible activities under the law, including non-binding agreements between libraries and publishers.² As libraries and archives increasingly

¹ See H.R. REP. NO. 94-1476, at 74–79 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5688–92.

² See REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) 14 (1983) (discussion of the “Gentlemen’s Agreement” of 1935, a voluntary agreement negotiated between publishers and libraries that set a standard of acceptable conduct for reproduction of copyrighted materials by libraries).

employed photocopying in the 1950s and 1960s,³ however, Congress began to explore the need for clearer guidance for all involved. In 1966, the House Judiciary Committee noted that past efforts to come to a reasonable arrangement on library photocopying had failed and urged “all concerned to resume their efforts to reach an accommodation under which the needs of scholarship and the rights of authors would both be respected.”⁴

Several years later, the Senate Judiciary Committee also noted photocopying’s role in the “evolution in the functioning and services of libraries” and the need for Congress to respond to these changes in technology with a statutory exception.⁵

Crafting an appropriate statutory exception for libraries and archives was part of a larger revision process undertaken and enacted by Congress as part of the 1976 Copyright Act. A key characteristic of section 108 is that it provides specific exceptions pertaining to frequent library and archives activities, such as preservation copying and making and distributing copies for users, but does not preclude these institutions from relying upon the more general fair use exception of section 107 as well. In fact, Congress enacted an express savings clause for fair use, thereby ensuring that courts could look to both provisions.⁶

As demonstrated by its focus on photocopying, section 108 was designed to address the prevalent use of print-based analog technology occurring at the time of

³ A 1959 copyright study prepared at the request of Congress noted that the “various methods of photocopying have become indispensable to persons engaged in research and scholarship, and to libraries that provide research material in their collections to such persons.” BORGE VARMER, U.S. COPYRIGHT OFFICE AT THE LIBRARY OF CONGRESS, STUDY NO. 15: PHOTODUPLICATION OF COPYRIGHT MATERIAL BY LIBRARIES, at 49 (1959), *reprinted in* STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., COPYRIGHT LAW REVISION: STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS OF THE COMM. ON THE JUDICIARY, UNITED STATES SENATE: STUDIES 14–16 (Comm. Print 1960).

⁴ H.R. REP. NO. 89-2237, at 65 (1966).

⁵ S. REP. NO. 93-983, at 123 (1974).

⁶ 17 U.S.C. 108(f)(4) (“Nothing in this section . . . in any way affects the right of fair use as provided by section 107 . . .”).

enactment. Despite some minor adjustments in the Digital Millennium Copyright Act of 1998,⁷ which partially took account of digital reproduction capabilities, the exceptions in section 108 therefore are stuck in time. They did not anticipate and no longer address the ways in which copyrighted works are created, distributed, preserved, and accessed in the twenty-first century.⁸ Additionally, over time the structure and wording of section 108 have proven to be difficult to implement for both lawyer and layperson. Ultimately, section 108 “embodies some now-outmoded assumptions about technology, behavior, professional practices, and business models”⁹ that require revision and updating.

The key aspects of section 108 and the policy work conducted to date are summarized below.

A. *Overview of Section 108*

Section 108 applies only to libraries and archives (terms that are not defined) that are either open to the general public or to unaffiliated researchers in the relevant specialized field.¹⁰ Activities covered by the section cannot be undertaken for “any purpose of direct or indirect commercial advantage,”¹¹ and copies must contain the copyright notice as it appears on the source copy, or if there is no such notice, bear a legend stating that the work may be protected by copyright.¹²

⁷ Digital Millennium Copyright Act, Pub. L. No. 105-304, § 404, 112 Stat. 2860, 2889 (1998) (expanding the number of copies and phonorecords permitted for purposes of preservation and security, for deposit for research use in another library or archives, and for replacement, from one to three; and restricting digital copies and phonorecords to the premises of the library or archives).

⁸ SECTION 108 STUDY GROUP, THE SECTION 108 STUDY GROUP REPORT i (2008), www.section108.gov/docs/Sec108StudyGroupReport.pdf (“STUDY GROUP REPORT”).

⁹ *Id.*

¹⁰ 17 U.S.C. 108(a)(2).

¹¹ *Id.* at 108(a)(1).

¹² *Id.* at 108(a)(3).

Section 108 includes two provisions for libraries and archives to make reproductions in order to maintain the works in their collections; these provisions apply to all categories of copyrighted works. The first such provision allows a library or archives to reproduce three copies of an *unpublished* work in its collections for purposes of preservation, security, or deposit for research in another eligible institution.¹³ Digital copies made under this provision cannot be made available to the public outside the premises of the library or archives.¹⁴ The second maintenance exception allows the reproduction of three copies of a *published* work for replacement purposes, but only if the source copy of the work is “damaged, deteriorating, lost, or stolen” or the copy is stored in an obsolete format, and the library or archives cannot locate an unused copy of the work at a fair price after a reasonable effort to do so.¹⁵ The replacement exception contains the same restriction prohibiting distribution of digital copies outside the premises of the library or archives.¹⁶

Section 108 also contains a set of provisions concerning the reproduction and distribution of materials in an eligible institution’s collections for users, either upon direct request or as part of interlibrary loan. These exceptions do not apply to musical works; pictorial, graphic, or sculptural works (other than illustrations or similar adjuncts to literary works); and most audiovisual works, including motion pictures.¹⁷ Libraries and archives may reproduce and distribute for a user one copy of an article or contribution to

¹³ *Id.* at 108(b).

¹⁴ *Id.* at 108(b)(2).

¹⁵ *Id.* at 108(c).

¹⁶ *Id.* at 108(c)(2).

¹⁷ *Id.* at 108(i).

a collection, or a small part of a larger work.¹⁸ They may also reproduce and distribute entire or substantial portions of works for users, but only if a reasonable investigation shows that a copy is not otherwise obtainable at a fair price.¹⁹ Additionally, section 108 states that, in making and distributing copies for users, a library or archives may not engage in “related or concerted reproduction or distribution of multiple copies” of the same material,²⁰ and that, when making interlibrary loan copies, an institution cannot “do so in such aggregate quantities as to substitute for a subscription to or purchase of such a work.”²¹

In addition to its provisions governing internal maintenance copies and reproduction and distribution of copies for users, section 108 also provides libraries and archives with a safe harbor from liability for the unsupervised use of its on-premises reproducing equipment, provided that they post notices stating that making copies may be subject to copyright law.²² Another provision gives libraries and archives the ability to reproduce, distribute, display, or perform any work in its last 20 years of copyright protection for preservation, scholarship, or research, provided the work is not being commercially exploited by its owner.²³

¹⁸ *Id.* at 108(d).

¹⁹ *Id.* at 108(e).

²⁰ *Id.* at 108(g)(1).

²¹ *Id.* at 108(g)(2). Initial guidance as to the practical limits indicated by this phrase was provided by the National Commission on New Technological Uses of Copyrighted Works (CONTU), which in 1976 formulated guidelines for how many copies of a particular article or periodical could be made for interlibrary loan purposes without risking market substitution. H.R. REP. NO. 94-1733, at 72–73 (1976) (Conf. Rep.), *as reprinted in* 1976 U.S.C.C.A.N. 5809, 5813–14. Congress, while incorporating the CONTU guidelines into the Conference Committee Report to the Copyright Act of 1976, cautioned that they would require “continuous reevaluation and adjustment.” *Id.* at 71.

²² 17 U.S.C. 108(f)(1).

²³ *Id.* at 108(h).

Finally, subsection (f)(4) of section 108 contains two provisions that govern the exceptions' overall applicability. It first states that nothing in section 108 "in any way affects the right of fair use as provided by section 107."²⁴ Subsection (f)(4) also provides that any contractual obligation assumed by a library or archives upon obtaining a work for its collections supersedes the institution's privileges under section 108.²⁵

B. Revision Work to Date

As Congress has reviewed the copyright law in recent years, the Copyright Office has noted consistently that exceptions and limitations are critical to the digital economy and must be calibrated by Congress as carefully and deliberatively as provisions governing exclusive rights or enforcement. Section 108, in particular, has been a long-standing focus of the Copyright Office because, properly updated, it can provide professionals in libraries, archives, and museums with greater legal certainty regarding the permissibility of certain core activities.

In 2005, the Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress sponsored and administered an independent study group charged with producing a report and set of recommendations on potential improvements to section 108. The study group members included distinguished and experienced librarians, copyright owners, archivists, academics, and other memory institution specialists and copyright lawyers.²⁶ The "Section 108 Study Group"²⁷ made note of a number of ways in which digital technologies have impacted copyright law,

²⁴ *Id.* at 108(f)(4).

²⁵ *Id.*

²⁶ See MEMBERS OF THE SECTION 108 STUDY GROUP, <http://www.section108.gov/members.html> (last visited May 25, 2016).

²⁷ Referred to as the Study Group in this notice.

including “(1) opportunities for new revenue sources derived from new distribution methods, (2) increased risks of lost revenue and control from unauthorized copying and distribution, (3) essential changes in the operations of libraries and archives, [and] (4) changing expectations of users and the uses made possible by new technologies.”²⁸ Over the course of nearly three years, the Study Group engaged in analysis, review, and discussion of the best ways in which to update section 108 to address the digital age.

The Study Group issued its report in March 2008, calling for an extensive revision to update section 108.²⁹ The report also pointed out several areas where section 108 required amendment but where the members of the Study Group could not agree on a solution.³⁰ The Study Group unanimously recommended revising section 108 in nine separate areas, plus a general recommendation for re-organizing the section’s provisions. Among the more significant recommendations were to:

- Allow museums to be eligible along with libraries and archives.³¹
- Add new eligibility criteria, such as having a public service mission, employing a professional staff, and providing professional services.³²
- Allow libraries and archives to outsource some of the activities permitted by section 108 to third parties, under certain conditions.³³
- Replace the three-copy limits in the preservation, security, deposit for research, and replacement provisions with conceptual limits allowing a limited number of copies as reasonably necessary for the given purpose.³⁴

²⁸ STUDY GROUP REPORT at 28.

²⁹ *Id.* at iii.

³⁰ *Id.* at 95–112.

³¹ *Id.* at 31–33.

³² *Id.* at 34–38.

³³ *Id.* at 39–42.

- Revise the prohibition on making digital preservation and replacement copies publicly available off-premises, so that it does not apply when the source and the new copy are in physical formats, such as CDs or DVDs.³⁵
- Allow specially qualified institutions to preemptively reproduce publicly disseminated works at special risk of loss for preservation purposes only, with limited access to the copies.³⁶
- Create a new provision for the capture, reproduction, and limited re-distribution of “publicly available online content,” *e.g.*, websites and other works freely available on the internet.³⁷ Rights-holders would be allowed to opt out of having their content captured or re-distributed.³⁸
- Apply the safe harbor from liability for copies made on unsupervised reproduction equipment to user-owned, portable equipment, as well as equipment residing on the library’s or archives’ premises.³⁹

The Study Group also made note of several areas of section 108 that all members agreed required revision, but could not come to a unanimous decision on what the revision should look like.⁴⁰ The issues identified by the Study Group in this section of the Report concerned copies made at the request of users, specifically:

³⁴ *Id.* at 52–54, 61–65.

³⁵ *Id.* at 52, 57, 61, 66.

³⁶ *Id.* at 69–79. The Report also recommended replacing the published/unpublished distinction with the more practical publicly disseminated/not publicly disseminated binary, wherein works made available to the public, but not via distribution of material copies (as is required for publication), would fall into the publicly disseminated category. *See id.* at 47–51.

³⁷ *Id.* at 80–87.

³⁸ *Id.* at 85–87.

³⁹ *Id.* at 91–92.

⁴⁰ *Id.* at 95–112. Additionally, a third section of the Report discussed issues that some, but not all, of the Study Group members thought merited statutory revision, including whether to allow certain exceptions to override contrary contractual agreements. *Id.* at 113–124.

- The need to replace the single-copy limit with a “flexible standard more appropriate to the nature of digital materials.”⁴¹
- Explicitly permitting electronic delivery of copies for users under certain conditions.⁴²
- Allowing copies for users to be made of musical works; pictorial, graphic, or sculptural works; and motion pictures and other audiovisual works, under conditions that limit the risk of market substitution.⁴³

Following the issuance of the Study Group’s report, the Copyright Office, led by the then-Register of Copyrights, comprehensively reviewed the underlying analyses of the Study Group and examined a number of questions left unresolved due to lack of consensus amongst disparate Study Group members. On April 5, 2012, the current Register and senior staff met with Study Group members to review the 2008 report and discuss subsequent developments. Most Study Group members agreed that updating section 108 remained a worthwhile goal, and some suggested that the Report did not go far enough, particularly in recommending changes to the provisions regarding copies for users. Additionally, several members described an increasing practice of librarians and archivists more frequently relying upon fair use as the legal basis for their activities, making section 108 more urgent or less urgent as a revision matter, depending on one’s perspective.

In February 2013, the Copyright Office co-sponsored with Columbia Law School a public conference on section 108, entitled “Copyright Exceptions for Libraries in the

⁴¹ *Id.* at 98–101.

⁴² *Id.* at 98, 101–103.

⁴³ *Id.* at 106–112.

Digital Age: Section 108 Reform.” The all-day conference served as a valuable and comprehensive adjunct to the Study Group Report. Among other issues, it addressed such topics as the current landscape of similar exceptions in the United States and internationally, the recommendations of the Study Group, what changes should be made to section 108 in terms of its scope, and whether and how mass digitization by libraries and archives should be permitted.⁴⁴

More recently, section 108, along with the issues of orphan works and mass digitization, was the subject of a hearing on “Preservation and Reuse of Copyrighted Works” held by the House Subcommittee on Courts, Intellectual Property, and the Internet on April 2, 2014.⁴⁵ At the hearing, there was disagreement among the six witnesses over whether or not section 108 reform is advisable as a legal matter or possible as a practical matter. One librarian-member of the Section 108 Study Group told Congress that the existing framework does not require amendment⁴⁶ and anticipated great difficulty in translating the Study Group’s (limited) recommendations into effective legislation.⁴⁷ However, the co-chair of the Section 108 Study Group, the former general counsel to a book publisher, advocated for revisions, emphasizing the clarity that a “workable, up-to-date and balanced” section 108 could bring to both libraries and

⁴⁴ See *Symposium Issue: Section 108 Reform*, 36 COLUM. J.L. & ARTS 527 (2013); the program and videos of the program are available at *Section 108 Reform*, KERNOCHAN CTR. FOR LAW, MEDIA, AND THE ARTS, <http://web.law.columbia.edu/kernochan/symposia/section-108-reform> (last visited May 10, 2016).

⁴⁵ *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014); the official transcript of the hearing is available at <https://judiciary.house.gov/wp-content/uploads/2016/02/113-88-87423.pdf>.

⁴⁶ *Id.* at 32 (testimony of James G. Neal, Vice President for Information Services and University Librarian, Columbia University) (“[T]he existing statutory framework, which combines the specific library exceptions in section 108 with the flexible fair use right, works well for libraries and does not require amendment.”).

⁴⁷ *Id.* at 42 (statement of James G. Neal, Vice President for Information Services and University Librarian, Columbia University) (noting, for example the difficulty of resolving issues as simple as “. . . how museums should be defined, and the need to define libraries and archives, currently undefined in Section 108.”).

copyright owners “in specific situations.”⁴⁸ Another witness, an audiovisual conservation expert at the Library of Congress, testified that it is important to “[m]odernize Sec[ti]on 108 so that the Library of Congress can fulfill its mission to preserve audiovisual and other materials,”⁴⁹ and recommended specific changes to the preservation, replacement, copies for users, and other provisions.⁵⁰

Most recently, in her April 29, 2015, testimony to the House Judiciary Committee regarding the universe of copyright policy issues, the Register of Copyrights stated that section 108 is among the matters ready for Congressional consideration.⁵¹ “Based on the entirety of the record to date,” the Register explained,

the Office has concluded that Section 108 must be completely overhauled. One enduring complaint is that it is difficult to understand and needlessly convoluted in its organization. The Office agrees that the provisions should be comprehensive and should be related logically to one another, and we are currently preparing a discussion draft. This draft will also introduce several substantive changes, in part based upon the recommendations of the Study Group’s 2008 report. It will address museums, preservation exceptions and the importance of “web harvesting” activities.⁵²

C. *The International Perspective*

⁴⁸ *Id.* at 30 (statement of Richard S. Rudick, Co-Chair, Section 108 Study Group).

⁴⁹ *Id.* at 11 (statement of Gregory Lukow, Chief, Packard Campus for Audio Visual Conservation, Library of Congress).

⁵⁰ *Id.* at 15–18 (for example, “[r]evis[e] subsections 108(b) and (c), which govern the reproduction of unpublished and published works, to allow for the use of current technology and best practices in the preservation of film, video, and sound recordings”).

⁵¹ *Register’s Perspective on Copyright Review: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 5 (2015) (testimony of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (“[L]ibrary exceptions or the exceptions for persons who are blind or visually impaired . . . are outdated to the point of being obsolete . . . [; these outdated exceptions] do not serve the public interest, and it is our view that it is untenable to leave them in their current state.”).

⁵² *Id.* at 20–21 (statement of Maria A. Pallante, Register of Copyrights and Director, U.S. Copyright Office) (citations omitted).

Many other countries have recognized the global significance of copying and preservation exceptions for libraries and archives and are also reviewing their relevant exceptions at this time. As of June 2015, 156 World Intellectual Property Organization (WIPO) member states had at least one statutory library exception, addressing issues such as making copies of works for readers, researchers, and other library users as well as copies for preservation.⁵³ The most recent WIPO study on copyright limitations and exceptions for libraries and archives observed that “exceptions for libraries and archives are fundamental to the structure of copyright law throughout the world, and that the exceptions play an important role in facilitating library services and serving the social objective of copyright law.”⁵⁴

Some countries have also recently considered updating and amending their statutory library exceptions to address the digital landscape. For example, Canada in 2012 amended its copyright statute to permit libraries, archives, and museums to provide digital copies of certain works to persons requesting the copies through another institution.⁵⁵ Similarly, the European Union has stated that in 2016 it would examine legislative proposals that would allow cultural heritage institutions to use digital technologies for preservation.⁵⁶

For many years, WIPO has considered a treaty proposal on copyright limitations and exceptions for libraries and archives that would mandate a right of preservation for library and archival materials, enabling these institutions to reproduce for preservation

⁵³ Kenneth D. Crews, WIPO Study on Copyright Limitations and Exceptions for Libraries and Archives, WIPO Doc. SCCR/30/3, at 6 (June 10, 2015).

⁵⁴ *Id.*

⁵⁵ Copyright Act, R.S.C. 1985, c C-42, ss. 5.02, 30.2 (Can.).

⁵⁶ European Commission Press Release MEMO/15/6262, Making EU copyright rules fit for the digital age — Questions & Answers (Dec. 9, 2015), http://europa.eu/rapid/press-release_MEMO-15-6262_en.htm.

purposes as many copies of works that are needed in accordance with best professional practices.⁵⁷ Advocating a more “soft law” approach, the United States government instead has encouraged member states to adopt national statutory library exceptions that are consistent with their current international obligations⁵⁸ and that further the broad objectives of preservation and public service.⁵⁹

II. Revision of Section 108—Current Discussion Draft Proposals

The Copyright Office notes that, since the enactment of the Copyright Act of 1976, the views of the library and archives community regarding section 108 have become less uniform and more complicated, particularly as courts have supported newer applications of the fair use doctrine vis-à-vis a number of digitization and access activities. Indeed, fair use clearly supports a wider range of reproduction activities than it did when section 108 was first codified.⁶⁰ The ever-evolving nature of the law is instructive and important. Among other things, it underscores the advisability of

⁵⁷ See The Case for a Treaty on Exceptions and Limitations for Libraries and Archives: Background Paper by IFLA, ICA, EIFL and INNOVARTE, WIPO Doc. SCCR/23/3 (Nov. 15, 2011).

⁵⁸ Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works provides that signatory countries may permit the reproduction of works “in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.” Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221. The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty apply the same standard outlined in Article 9(2) of the Berne Convention for all rights granted under those treaties. WIPO Copyright Treaty art. 10(2), Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65 (1997); WIPO Performances and Phonograms Treaty art. 16(2), Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76 (1997).

⁵⁹ Objectives and Principles for Exceptions and Limitations for Libraries and Archives, WIPO Doc. SCCR/26/8 (Jan. 10, 2014).

⁶⁰ See, e.g., *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015), *cert. denied*, 136 S.Ct. 1658 (mem.) (2016); *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); see also LIBRARY COPYRIGHT ALLIANCE, BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY: RECOMMENDATIONS OF THE LIBRARY COPYRIGHT ALLIANCE ON COPYRIGHT REFORM 4 (May 8, 2015), <http://www.librarycopyrightalliance.org/storage/documents/lca-copyright-reform-amendments.pdf> (“[A]s the recent decision in *Authors Guild v. HathiTrust* . . . makes clear, fair use supplements Section 108 and thus provides a sufficient mechanism for updating it when necessary.”).

allowing section 108 and section 107 to co-exist, while ensuring that each provision is positioned for the future, free from the analog restrictions of a bygone era.

As noted by the Study Group, updating section 108 would provide libraries and archives with a clear and unequivocal basis for their digital preservation, distribution, and other activities, notwithstanding that some of these activities may also be permissible under fair use.⁶¹ Congress specifically drafted section 108 to include a fair use savings clause in acknowledgement of the importance of fair use, noting in the 1976 Act’s legislative history that “[n]o provision of section 108 is intended to take away any rights existing under the fair use doctrine.”⁶² Indeed, almost forty years later, the Chair of the House Judiciary Committee has recognized that a specific, and separate, library exception is still an important supplement to fair use because “fair use is not always easy to determine, even to those with large legal budgets[, and t]hose with smaller legal budgets or a simple desire to focus their limited resources on preservation may prefer to have better statutory guidance than exists today.”⁶³ In fact, there is no reasonable question that the fair use doctrine should or will continue to be available to libraries and archives as an essential provision and planning tool, or that section 108 has proved valuable and should continue to set forth a list of excepted activities for the benefit of library

⁶¹ See STUDY GROUP REPORT at 21-22; see also 17 U.S.C. § 108(f)(4); *HathiTrust*, 755 F.3d at 94 n.4 (“[W]e do not construe § 108 as foreclosing our analysis of the libraries’ activities under fair use.”).

⁶² H.R. REP. NO. 94-1476, at 74 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5687–88; see also S. REP. NO. 91-1219, at 6 (1970) (“The rights given to the libraries and archives by this provision of the bill are in addition to those granted under the fair-use doctrine.”). Further, the court in *HathiTrust* expressly rejected plaintiffs’ argument that fair use did not apply to the activities at issue in the case because section 108 alone governs reproduction of copyrighted works by libraries and archives, finding that because “section 108 also includes a ‘savings clause’ . . . we do not construe § 108 as foreclosing our analysis of the Libraries’ activities under fair use . . .” *HathiTrust*, 755 F.3d at 94 n.4.

⁶³ *Preservation and Reuse of Copyrighted Works: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 6 (2014) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary).

professionals. If there is a lingering debate, it is more accurately about whether these excepted activities should be updated for the digital age or left in their increasingly irrelevant state, a question that is less about the importance of providing clear guidance to library, archives, and museum professionals and more about how sections 108 and 107 will operate together in the future.⁶⁴

As a matter of public policy, the Copyright Office agrees with the House Chairman and the Study Group and observes further that maintaining provisions drafted in, and applicable primarily to, the analog era is antithetical to the purpose of a well-functioning copyright law. More specifically, the Copyright Office agrees in principle with and plans to incorporate many of the Study Group's recommendations, including:

- Adding museums as eligible institutions.
- Expanding the preservation, security, and deposit for research exceptions to include published/publicly disseminated works.
- Creating a new exception to permit the reproduction and distribution of publicly available internet content for preservation and research purposes, with an opt-out provision.
- Allowing the outsourcing of certain section 108 activities to third-party contractors.

⁶⁴ See, e.g., *id.* at 26 (testimony of Richard S. Rudick, Co-Chair, Section 108 Study Group) (noting that “reliance on section 107 for purposes that go far beyond those originally conceived or imagined invites, as we have seen, expensive litigation with uncertain results.”); see also *The Scope of Fair Use: Hearing Before the Subcomm. on Courts, Intellectual Prop., & the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7 (2014) (testimony of Peter Jaszi, Professor, Faculty Director, Glushko-Samuelson Intellectual Property Clinic, Washington College of Law, American University) (noting that specific exceptions like those found in section 108 can be highly valuable to particular groups of users even in static form because, “even though never comprehensive and often not up to date,” they are supplemented by fair use).

- Removing or revising the three-copy limitation for preservation and security, deposit for research, and replacement copies.

Finally, as noted above, it is widely known that section 108 suffers from fundamental problems with organization and clarity, hampering the practical ability of librarians and archivists to utilize the exceptions. In fact, while the Study Group suggested reorganizing section 108 rather than re-drafting it,⁶⁵ the Copyright Office believes that redrafting is the better approach.

III. Subjects of Public Inquiry

The Copyright Office invites interested parties to schedule a time to provide in-person input on the specific subjects below. Note that while the Copyright Office will provide a comprehensive recommendation to Congress, we are only revisiting a select number of discrete issues at this time. A party choosing to respond to this notice of inquiry need not plan to address every subject listed, but the Copyright Office requests that each responding party clearly identify each subject that it plans to discuss.

Eligibility

1. The attributes that an institution should possess in order to be eligible for the section 108 exceptions, and how to prescribe and/or regulate them.

Rights Affected

2. Limiting section 108 to reproduction and distribution activities, or extending it to permit public performance and display as well.

Copies for Preservation, Security, Deposit in Another Institution, and Replacement

⁶⁵ STUDY GROUP REPORT at 93-94.

3. Restricting the number of preservation and security copies of a given work, either with a specific numerical limit, as with the current three-copy rule, or with a conceptual limit, such as the amount reasonably necessary for each permitted purpose.

4. The level of public access that a receiving institution can provide with respect to copies of both publicly disseminated and non-publicly disseminated works deposited with it for research purposes.

Copies for Users

5. Conditioning the unambiguous allowance of direct digital distribution of copies of portions of a work or entire works to requesting users, and whether any such conditions should be statutory or arrived at through a rulemaking process.

Preservation of Internet Content

6. Conditioning the distribution and making available of publicly available internet content captured and reproduced by an eligible institution.

Relation to Contractual Obligations

7. How privileging some of the section 108 exceptions over conflicting contractual terms would affect business relationships between rights-holders and libraries, archives, and museums.

Outsourcing

8. What activities (*e.g.*, digitization, preservation, interlibrary loan) to allow to be outsourced to third-party contractors, and the conditioning of this outsourcing.

Other

9. Whether the conditions to any of the section 108 exceptions would be better as regulations that are the product of notice-and-comment rulemaking or as statutory text.

10. Whether and how the use of technical protection measures by eligible institutions should apply to section 108 activities.

11. Any pertinent issues not referenced above that the Copyright Office should consider in relation to revising section 108.

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