



BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY

**RECOMMENDATIONS OF THE LIBRARY COPYRIGHT ALLIANCE ON
COPYRIGHT REFORM**

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association, the Association of College and Research Libraries, and the Association of Research Libraries—that collectively represent over 100,000 libraries in the United States employing over 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries more than two billion times each year.

LCA has actively participated in the Committee’s Copyright Review. LCA witnesses testified at two hearings, and LCA submitted [statements](#) for the record of eight additional hearings. Here we provide a summary of our recommendations for amendments to Title 17 that would enable libraries to better perform their missions. We also identify certain issues that Congress should not address in its copyright reform efforts. The statements LCA submitted to the Committee discuss these positions in much greater detail.

I. ISSUES CONGRESS SHOULD ADDRESS

A. Statutory Damages.

When Congress enacted the statutory damages framework in 17 U.S.C. §504(c)(2), it recognized “the special situation of teachers, librarians, archivists, and public broadcasters, and the nonprofit institutions of which they are a part,”¹ where the threat of statutory damages could deter lawful activities that involve the use of works. Accordingly, Congress required a court to remit statutory damages when a library, archives, educational institution, or public broadcasting entity believed and had reasonable grounds for believing that its use of a copyrighted work was a fair use. The

¹ H.R. Rep. No. 1476, 94th Cong. 2d Sess. 163 (1976).

plaintiff bears the burden of proving that such entities did not act in good faith. However, this safe harbor applies to libraries, archives, and educational institutions only with respect to their infringement of the reproduction right. This means that the safe harbor does not apply to a library's infringement of the performance, display, distribution, or derivative work rights. As a result, the safe harbor provides little benefit, particularly for Internet uses that involve the performance or display of a work on a website. The safe harbor needs to be updated to reflect the digital era. It should apply whenever the entity had a reasonable belief that any type of use of any type of work was non-infringing. It also should be expanded to include museums. For these entities to perform their critical public service missions in the 21st Century, the safe harbor must be amended to apply to innocent infringement by these entities of all exclusive rights with respect to all kinds of works.

B. Section 1201.

The fact that every three years the blind need to expend scarce resources to petition the Librarian of Congress to renew their exemption—or that libraries and educators have to seek renewal of the film clip exemption every three years—demonstrates a fundamental flaw in section 1201. That flaw is that section 1201 could be interpreted to prohibit the circumvention of a technological protection measure even for the purpose of engaging in a lawful use of a work. Congress should adopt the approach proposed by the Technology Unlocking Act of 2015, H.R. 1587, attaching liability to circumvention only if it enables infringement.

The Section 1201 rulemaking should be broadened to apply to sections 1201(a)(2) and (b), i.e., to the development and distribution of circumvention tools. Further, the Copyright Office's requirement that an exemption be renewed *de novo* every three years is enormously burdensome. Accordingly, when a person seeks renewal of an exemption granted in the previous rulemaking cycle, the burden should be on those opposed to renewal to demonstrate why the exemption should not be renewed or should be modified in some manner. (This approach is proposed in the Breaking Down Barriers to Innovation Act of 2015, S. 990, H.R. 1883.) Moreover, if a second renewal is granted, the exemption should become permanent.

Additionally, the final rulemaking authority should be shifted from the Librarian of Congress to the Assistant Secretary for Communications and Information of the Department of Commerce. Currently, the Librarian issues the exemptions on the recommendation of the Register of Copyrights, who must consult with the Assistant Secretary. This process should be reversed, with the Assistant Secretary making final determinations after consulting with the Register of Copyrights. Neither the Copyright Office nor the Librarian of Congress has any special expertise to evaluate the adverse effects of a circumvention prohibition. This is particularly true in the case of software. An ever-increasing range of products incorporates software that regulates the interaction of the components of the product, and the interaction between the product and other products and networks. By prohibiting the circumvention of technological measures that control access to software, section 1201 directly implicates the competitive conditions in large segments of our economy. The conflicts over “jailbreaking,” cell phone unlocking, replacement toner cartridges, and universal garage door opener remote controls are only the beginning. The Internet of Things envisions a world where the software in devices from pacemakers to refrigerators to cars are monitored and controlled over telecommunications networks. The National Telecommunications and Information Administration (NTIA) is much better situated than the Copyright Office and the Library of Congress to evaluate the adverse impact of restricting competition in such a networked world.

C. Preemption of contractual provisions limiting copyright exceptions.

An increasing proportion of library acquisitions are digital resources. Indeed, many research libraries spend well over 65% of their acquisition budgets on electronic resources. These licenses often contain terms that restrict fair use, first sale, and other user rights under the Copyright Act. Congress should adopt restrictions on the enforcement of contractual terms that attempt to limit the ability of libraries to use exceptions in the Copyright Act such as first sale, fair use or interlibrary loan under Section 108.

D. People With Disabilities.

Section 121, the Chafee Amendment, currently allows authorized entities to make accessible format copies for people with print disabilities. Section 121 should be

broadened to allow the making of copies accessible to people with any type of disability, *e.g.*, captioned copies of audiovisual works for people with hearing disabilities. However, we do not believe that it is necessary to amend Section 121 for purposes of ratifying the Marrakesh Treaty.

E. Misuse

The penalties for making misrepresentations in takedown notices under Section 512 should be increased so as to create a more meaningful deterrent to abuse of the notice and takedown system. Additionally, the doctrine of copyright misuse should be codified.

II. ISSUES CONGRESS SHOULD NOT ADDRESS

A. Section 108

In her recent [testimony](#) before the Committee, Register of Copyrights Maria Pallante proposed updating Section 108, which contains exceptions for libraries and archives. We oppose an effort to overhaul Section 108 for four reasons. First, although Section 108 may reflect a pre-digital environment, it is not obsolete. It provides libraries and archives with important certainty with respect to the activities it covers. Second, as the recent decision in *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), makes clear, fair use supplements Section 108 and thus provides a sufficient mechanism for updating it when necessary.² For example, fair use provides a sufficient basis for website archiving. Third, amending Section 108 could have the effect of limiting what libraries do today. Again using website archiving as an example, the Library of Congress's Section 108 Study Group proposed a complex regulatory scheme for website archiving, an activity already routinely performed by libraries as well as commercial search engines. Indeed, some rights holders see the updating of Section 108 as an opportunity to repeal the fair use safe harbor in Section 108(f)(4) and restrict the availability of fair use to libraries. Fourth, based on the highly contentious and protracted deliberations of the Section 108 Study Group, it is clear that any legislative process concerning Section 108 would be equally contentious and would demand many library resources just to maintain the status quo, let alone improve the situation of libraries. A Section 108 reform process would consume significant Congressional resources as well. Accordingly, we urge the

² Because of the importance of fair use to libraries and the public at large, LCA welcomes the Copyright Office's creation and posting of the U.S. Copyright Office Fair Use Index.

Committee to leave Section 108 as is.

B. Orphan Works

LCA strongly supported orphan works legislation in the 109th and 110th Congress. However, significant changes in the copyright landscape since then convince us that libraries no longer need legislative reform in order to make appropriate use of the orphan works. First, fair use is less uncertain. The courts have issued a series of expansive fair use decisions that have clarified its scope, including the Second Circuit's decision in *Authors Guild v. HathiTrust*. Additionally, the application of fair use to orphan works has been clarified through the [Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and Other Memory Institutions](#). Second, the Supreme Court's decision in *eBay v. MercExchange*, 547 U.S. 388 (2006), makes injunctions for use of orphan works less likely. Third, mass digitization is much more common. The leading search engines, operated by two of the world's most profitable companies, routinely cache billions of web pages without the copyright owners' permission. This industry practice has faced absolutely no legal challenge in the United States since the fair use decision in *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007). Gatekeepers understand that a court would favorably evaluate a non-profit library's fair use defense in the context of this industry practice.

Moreover, the Copyright Office's recent inquiry concerning orphan works revealed that profound disagreement remains about the issue. The significant [diversity of opinion](#) expressed in the inquiry indicates that it will be extremely difficult to forge a consensus approach to orphan works. There is less agreement now than in 2006, when the Copyright Office completed its previous report on orphan works, both on the existence of a problem and the best approach to solve it. The hostility exhibited during the inquiry by some rights holders to users in general, and libraries in particular, suggests that any legislative process concerning orphan works is bound to fail.

In the event that the Committee decides to pursue orphan works legislation, we strongly urge that the bill that passed the Senate in the 110th Congress, S. 2913, *not* be used as the starting point. During the course of the 109th and 110th Congresses, the orphan works legislation became increasingly complex and convoluted. If Congress were simply to pick up S. 2913 where it left off, the legislation would become even more

complex and convoluted as stakeholders battled over precisely what would constitute a reasonably diligent search. Rather than start with the 20-page S. 2913, Congress should consider a simple one sentence amendment to 17 U.S.C. § 504(c)(2) that grants courts the discretion to reduce or remit statutory damages if the user conducted a reasonably diligent search prior to the use. Because courts would just have the discretion to reduce statutory damages, but would not be required to do so, there would be no need to define what constitutes a reasonably diligent search. That determination would be left to the court.

To be sure, some users would prefer greater certainty concerning what steps they would need to take to fall within the bill’s safe harbor. And some rights holders would prefer the same procedural certainty to prevent possible abuse. However, the enormous variety of potential works, uses, and users means that greater certainty could be achieved only if the legislation were highly technical and prescriptive. Fashioning such legislation (or implementing regulations) would take years and consume enormous resources, and in the end it might not provide better results than the one sentence solution proposed above.

C. Mass Digitization

Register Pallante identified mass digitization as a policy issue that warrants near-term study and analysis. She stated that “while fair use may provide some support for limited mass digitization projects,” access to the digitized works “will likely be extremely circumscribed.” Accordingly, she proposed “a voluntary ‘pilot program’ in the form of an extended collective license that would enable full-text access to certain works for research and educational purposes under a specific framework set forth by the Copyright Office....”

The Register understated the degree to which fair use can facilitate full-text access to copyrighted works. Under the *HathiTrust* decision, providing access to accessible format copies for people who are print disabled is clearly fair use. The reasoning of *HathiTrust* indicates that fair use would permit providing accessible formats to people with other disabilities, for example, a captioned film to people with hearing disabilities.

Moreover, the *HathiTrust* court’s endorsement of the “functional transformation” approach (i.e., a use is transformative if the work is used for a significantly different purpose from its original market purpose), combined with its discounting of lost revenue

from such transformative uses, provides a library with a solid basis for providing full-text access to its digitized copies of out of print materials when the purpose of providing the access is clearly different from the author's original market purpose. For example, providing full-text access to digitized copies of many materials in special collections and archives is very likely protected by fair use because the research purpose of the access typically is different from the author's purpose in creating the works at issue. Additionally, many classes of materials have time-limited markets. If that period has long since expired, the original market for that work no longer exists and subsequent uses would likely be considered fair and not a market substitution for the original work.

Furthermore, it is not clear precisely what the Register meant when she referred to a "voluntary" extended collective license. The entire point of an extended collective license is that applies to absent rights holders, *i.e.*, rights holders that have not affirmatively opted into the collective license. In other words, ECLs by definition aren't voluntary. To be sure, an ECL could allow a rights holder to opt out, but unless it does, its rights are managed by a collective rights organization (CRO). CROs have a [long history](#) of corruption, mismanagement, confiscation of funds, and lack of transparency that has deprived artists of the revenues they earned. At the same time, CROs have often aggressively sought fees to which they were not legally entitled or in a manner that discredited the copyright system. While properly regulated CROs in some circumstances may enhance efficiency and advance the interests of rights holders and users, the Committee should be aware of CROs' mixed history as it considers the appropriateness of CROs as a possible solution to copyright problems in general and obstacles relating to mass digitization in particular. Finally, it should be noted that at the roundtable the Copyright Office held concerning mass digitization, there was [general agreement](#) that ECL would not be an effective solution to issues relating to mass digitization, even if limited only to books.

We appreciate the opportunity the Committee has given us to provide our views throughout its Copyright Review process, and long forward to working with the Committee as it continues its important work in this area.

May 8, 2015