



COMMENTS OF THE LIBRARY COPYRIGHT ALLIANCE ON THE PROVISIONAL WORKING DOCUMENT CONTAINING COMMENTS ON AND TEXTUAL SUGGESTIONS TOWARDS AN APPROPRIATE INTERNATIONAL LEGAL INSTRUMENT (IN WHATEVER FORM) ON LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES

The Library Copyright Alliance (LCA) consists of three major library associations – the American Library Association (ALA), the Association of Research Libraries (ARL), and the Association of College and Research Libraries (ACRL) – which collectively represent over 100,000 libraries of all kinds in the United States and Canada employing over 350,000 librarians and other personnel. In particular, LCA is grateful for the document presented in SCCR 23 by the United States on Objectives and Principles for Exceptions and Limitations for Libraries and Archives, SCCR/23/4. Below, LCA provides comments on the topics addressed in SCCR/23/8 Prov., dated May 25, 2012. SCCR/23/4 reaches some, but not all, of the topics discussed in SCCR/23/8 Prov. LCA believes that the scope of SCC/23/4 should be broadened to cover all the library mission critical topics addressed in SCCR/23/8 Prov.

General Comment

At the outset of any discussion of copyright exceptions and limitations relating to libraries and archives, it is important to stress the enormous investment libraries make in the acquisition of books and other materials. Every year, U.S. libraries spend over \$2.5 billion purchasing copyrighted works. Specifically, in 2010, U.S. academic libraries purchased over 27 million books and other paper materials and 12.8 million phonorecords and audiovisual materials at a cost of almost \$724 million.¹ In 2008, U.S. public school media centers acquired 45 million books and 2.5 million phonorecords and copies of audiovisual materials for \$593 million.² In 2009, U.S. public libraries purchased an estimated 77 million works or all types at a cost of \$1.31 billion.³

In addition to the \$2.5 billion U.S. libraries spend purchasing books and other

¹ National Center for Education Statistics, U.S. Department of Education, *Academic Libraries: 2010: First Look* 9, 13 (2011).

² National Center for Educational Statistics, U.S. Department of Education, *Characteristics of Public and Bureau of Indian Education Elementary and Secondary School Library Media Centers in the United States: Results From the 2007–08 Schools and Staffing Survey* 6 (2009).

³ Institute of Museum and Library Services, *Public Libraries Survey Fiscal Year 2009* 129 (2011).

materials, U.S. libraries expend over \$1.2 billion on licensing electronic journals and databases. U.S. libraries are publishers' largest customers in the United States. Thus, copyright exceptions for libraries are not a matter of free riding by libraries. Rather, copyright exceptions allow the public to benefit from the investment it makes through libraries.

Furthermore, we wish to draw attention to the July 3, 2012 announcement by the Office of the U.S. Trade Representative concerning copyright exceptions and limitations in the context of the Trans-Pacific Partnership agreement. The USTR stated that

the balance of rights and exceptions and limitations achieved in U.S. law provides diverse benefits for large and small businesses, consumers, authors, artists, and workers in the information, entertainment, and technology sectors. A robust copyright framework ensures that authors and creators are respected, investments (both intellectual and financial) are promoted, that limitations and exceptions provide an appropriate balance, and that enforcement measures are effective.

An important part of the copyright ecosystem is the limitations or exceptions placed on the exercise of exclusive rights in certain circumstances. In the United States, for example, consumers and businesses rely on a range of exceptions and limitations, such as fair use, in their businesses and daily lives.

After this introduction, the USTR declared that

[f]or the first time in any U.S. trade agreement, the United States is proposing a new provision, consistent with the internationally-recognized "3-step test," that will obligate Parties to seek to achieve an appropriate balance in their copyright systems in providing copyright exceptions and limitations for purposes such as criticism, comment, news reporting, teaching, scholarship, and research. These principles are critical aspects of the U.S. copyright system, and appear in both our law and jurisprudence. The balance sought by the U.S. TPP proposal recognizes and promotes respect for the important interests of individuals, businesses, and institutions who rely on appropriate exceptions and limitations in the TPP region.

We believe that these principles should inform the discussion of limitations and exceptions for libraries at WIPO. (SCCR/23/4 "encourage[s] Member States to adopt exceptions and limitations in their national laws that facilitate the public service role of libraries and archives, maintaining a balance between the rights of authors and the larger public interest, particularly education, research, and access to information.")

1. Preservation

- **WIPO should support broad, easy-to-implement exceptions for the purpose of preservation.**

As the ARL Code of Best Practices in Fair Use for Academic and Research

Libraries (which has been endorsed by ALA and ACRL) states,

Preservation is a core function of academic and research libraries. It involves not only rescuing items from physical decay, but also coping with the rapid pace of change in media formats and reading technologies. Even when libraries retain the originals of preserved items, digital surrogates can spare the original items the wear and tear that access necessarily inflicts. Section 108 of the Copyright Act authorizes some preservation activities, but does not address some of today's most pressing needs: the preemptive preservation of physical materials that have not yet begun to deteriorate but are critically at risk of doing so, and the transfer to new formats of materials whose original formats (such as VHS magnetic tape) are not yet obsolete (as the term is narrowly defined in section 108(c)) but have become increasingly difficult for contemporary users to consult.⁴

After legal analysis, the Code expresses the principle that “[i]t is fair use to make digital copies of collection items that are likely to deteriorate, or that exist only in difficult-to-access formats, for purposes of preservation, and to make those copies available as surrogates for fragile or otherwise inaccessible materials.”⁵

The combination of a specific exception setting forth the circumstances when preservation is always permitted, with a flexible, open ended fair use privilege, is an effective legal approach for ensuring that libraries and archives have the ability to engage in preservation efforts during a period of rapid technological change.

Notwithstanding the existence of such a combined approach in the United States, a recent study by ARL and the American University indicated that many librarians “reported that their preservation decisions were shaped dramatically by concerns about copyright.”⁶ “Interviewees told disturbing stories of rooms full of aging film and videotapes that they were neither preserving digitally nor making available, due to legal uncertainty.”⁷ “Interviewees also expressed concerns as to how to collect and preserve ephemeral online and other digital materials.... Many interviewees expressed a professional responsibility to ensure these materials are available for future scholars, and were interested in capturing and collecting online and digital materials for that purpose, but reported being discouraged by a host of copyright concerns.”⁸

⁴ Association of Research Libraries, *Code of Best Practices for Academic and Research Libraries* 17 (2012)(ARL Code).

⁵ *Id.* at 18.

⁶ Patricia Aufderheide, Brandon Butler, & Peter Jaszi, *Fair Use Challenges in Academic and Research Libraries* 13 (2010) available at www.arl.org/bm~doc/arl_csm_fairusereport.pdf.

⁷ *Id.* at 14.

⁸ *Id.* While *Fair Use Challenges* highlights the uncertainty experienced by librarians in 2010, it is worth noting that since its release in January, the *Code of Best Practices* has

The fact that preservation decisions have been shaped by copyright concerns should be troubling to anyone concerned about cultural heritage. It should be deeply troubling to authors and artists, because their cultural heritage is a major source of inspiration for their creativity, and because the long-term survival of their own work likely depends on the diligent efforts of conservators at libraries and archives.

It also should be noted that a consortium of U.S. research libraries, the HathiTrust, has been sued by the Authors Guild for maintaining a digital library of books. One of the primary functions of this digital library is preservation.

(SCCR/23/4 addresses preservation.)

2. Right of Reproduction and Safeguarding Copies

- **WIPO should support the right of libraries to make reproductions necessary to fulfill their noncommercial educational mission.**

Libraries make reproductions in a wide variety of circumstances beyond preservation. Section 108(b), for example, permits libraries to reproduce an unpublished work for deposit for research use in another library. Section 108(d) allows a library to reproduce an article, or a small part of another work, if the copy becomes the property of the user who requested the copy. Section 108(e) likewise allows a library to reproduce an entire work for a requesting user if a copy of the work cannot be obtained at a fair price. Section 107 specifically refers to uses for purposes such as “teaching, (including multiple classroom use), scholarship, or research...” These copies often are made by libraries or by library users. Additionally, libraries make copies in accessible formats for the print disabled pursuant to Section 121.

One category of reproduction (and distribution) by libraries that some publishers have opposed is electronic reserves. Three publishers sued Georgia State University for its electronic reserves policy, under which its library uploaded supplemental readings to a secure website from which it could be downloaded by students enrolled in the course for which the reading had been assigned. The court ruled that the policy was not per se unlawful. Moreover, after a trial at which the publishers presented evidence concerning 99 allegedly infringing excerpts, the court found that only five excerpts exceeded fair use.⁹

Publishers have similarly objected to libraries using digital technology to perform other basic functions. For example, some publishers claim that libraries may not transmit electronically copies made under Section 108(d) or (e). Instead, the publishers believe that the libraries must mail photocopies to the requesting library.

already begun to help libraries better understand and employ their fair use rights in this area.

⁹ See also ARL Code at 13-15.

(SCCR/23/4 addresses the right of reproduction in the context of support for research and human development.)

3. Legal Deposit

- **WIPO should support legal deposit.**

Legal deposit is one of the primary mechanisms by which the Library of Congress has become one of the world's largest and most comprehensive libraries. Legal deposit ensures the creation of a documentary record of a nation's cultural history and ultimately enables freedom to information. Legal deposit should apply to all formats of copyrighted works.

(SCCR/23/4 addresses legal deposit.)

4. Library Lending

- **WIPO should clearly express opposition to the adoption of a “public lending right” by countries that have not yet enacted one. A public lending right is a tax on libraries, and thus harms the public interest by limiting its access to information.**

Notwithstanding the spread of digital technology, millions of Americans check out books and other materials from libraries. The collections of the over 9,225 public libraries in the country contain 934.8 million materials of which 88.3 percent are printed materials, 5.7 percent are audio materials, 5.4 percent are video materials, and 1.6 percent are e-books.¹⁰ For these materials, there were a total of 2.241 billion circulation transactions in 2009. Per capita circulation grew by 1 percent between 2000 and 2007.¹¹

The collections of 81,920 public school media centers contain 959 million books and 42.6 million phonorecords and audiovisual materials.¹² These materials were checked out 2.05 billion times during the 2007–08 school year.¹³

The collections of 3,689 academic libraries include 1.07 billion copies of printed materials, as well as 112 million phonorecords and audiovisual materials and 158 million

¹⁰ Institute of Museum and Library Services, *Public Libraries Survey Fiscal Year 2009* 10 (2010).

¹¹ *Id.* at 6.

¹² National Center for Educational Statistics, U.S. Department of Education, *Characteristics of Public and Bureau of Indian Education Elementary and Secondary School Library Media Centers in the United States: Results From the 2007–08 Schools and Staffing Survey 9* (2009).

¹³ *Id.* at 14.

e-books.¹⁴ There were a total of 176 million circulation transactions for these materials in 2010.¹⁵

- **WIPO should articulate strong support for the concept of the exhaustion of the distribution right upon the first sale of a copy.**

There are several threats to the “first sale” doctrine in the United States with respect to libraries. First, several courts have understood the first sale doctrine to apply only to copies manufactured in the United States. (This issue is now before the U.S. Supreme Court in *John Wiley & Sons v. Kirtsaeng*.) This interpretation could threaten the ability of U.S. libraries to lend books printed overseas. Cumulatively, U.S. libraries hold an estimated 200 million copies of foreign published books.¹⁶

But the number of foreign manufactured books in U.S. libraries could be far larger than 200 million. Even if a book was published by a U.S. publisher, a copy of that book may not have actually been printed in the United States. Publishing and printing are separate industries. Most U.S. publishing houses do not own their own printing presses; they outsource the printing to independent printing companies. Increasingly, these printing companies are located offshore, where labor costs are lower. Chinese companies, for example, often advertise printing costs up to 30 percent to 50 percent lower than U.S. printing firms. Offshore printers have increased in quality in recent years, and Internet connectivity makes job submission and management easier.¹⁷ In a 2006 survey of book publishers, 42 percent said that they had worked with an overseas print provider in the previous twelve months.¹⁸ A 2006 survey of printing firms indicated that a third had lost a domestic printing job to a foreign competitor within the previous year.¹⁹ 47 percent of those competitors were in China; 16 percent in Mexico, and 12 percent in Canada. Price was the major competitive factor in 88 percent of these lost jobs. In a 2007 survey of printers, 56 percent of respondents reported that a customer

¹⁴ National Center for Education Statistics, U.S. Department of Education, *Academic Libraries: 2010 First Look* (2011).

¹⁵ *Id.* at 4.

¹⁶ Posting of Ed O’Neill to Metalogue: New Directions in Cataloguing and Metadata From Around the World, <http://community.oclc.org/metalogue/> (June 24, 2010, 8:29 AM).

¹⁷ Press Release, Strategies for Management, Offshore Printing Gaining New Ground; Newly Published Study Analyzes the U.S. Printing Industry’s Growing Competition from Print Imports (May 20, 2010) *available at* <http://haoodnla.com/article/lxy09211696y9j01/516024>.

¹⁸ Press Release, TrendWatch Graphic Arts, TWGA Study Evaluates Impact of Overseas Printing On Domestic Printing Industry (August 29, 2006) *available at* http://www.labelsandlabeling.com/news/twga_study_evaluates_impact_of_overseas_print.

¹⁹ Ronnie H. Davis, *Printers’ Perspectives on Global Opportunities and Threats, Economic & Print Market Flash Report*, November 15, 2006, *available at* <http://www.printnys.org/21>.

had purchased print from an offshore competitor within the previous twelve months.²⁰ Comparison of tariff and publishing industry statistics for 2010 indicates that more than a third of the books sold in the United States were printed abroad.²¹

Further complicating matters is that a U.S. printer that wins a contract from a U.S. publisher may subcontract the job to a foreign printer. Additionally, large U.S. printing companies own overseas printing facilities.²² Thus, a book published by a U.S. publisher that hired a U.S. printer may actually have been printed abroad. Unless a copy of a book specifically states on its copyright page that it was printed in the United States, a library has no practical way to learn where the book was printed.²³

A second problem for libraries with respect to first sale is that publishers are increasingly “licensing” copies rather than selling them. Courts have found that the first sale doctrine does not apply to licensed copies. *See, e.g., Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010). This issue is discussed in greater detail in section 10 below.

(SCCR/23/4 does not directly address library lending or exhaustion.)

5. Parallel Importations

- **WIPO should support exceptions for parallel importation by libraries.**

17 U.S.C. § 602(a)(3)(C) provides libraries with an exception from the importation right. This exception provides that the Section 602(a) prohibition on importation does not apply to

²⁰ Ronnie H. Davis, *Printer Perspectives on Global Competition and Postage Rate Increase, Economic & Print Market Flash Report*, June 4, 2007, available at <http://efiles.printing.org/eweb/docs/Econ/2007.06.04.FlashReport.pdf>.

²¹ *See* Harmonized Tariff Schedule of the United States § 4901 (Almost 920 million books 2010 imports); Press Release, Book Industry Study Group, New Publishing Industry Survey Details Strong Three Year Growth in Net Revenue, Units (Aug. 9, 2011) (Available at <http://www.bisg.org/news-5-677-press-releasenew-publishing-industry-survey-details-strong-three-year-growth-in-net-revenue-units.php>) (2.57 billion books 2010 total consumption).

²² Erik Cagle, *Overseas Sourcing – China: A Limited Threat, Printing Impressions*, May 2007, available at <http://www.piworld.com/article/chinese-imports-loom-biggest-threat-us-book-printing-54444/1>. The largest U.S. printing company, RR Donnelley, has facilities in 37 other countries. RR Donnelley – Locations, <http://www.rrdonnelley.com/wwwRRD1/AboutUs/Locations/Locations.asp> (last visited June 4, 2012).

²³ Many books do not state any place of manufacture, or list multiple possible places of manufacture. WorldCat, a global catalog of library collections, lists the place of manufacture for less than three percent of the book titles it catalogs. *See* Posting of O’Neill, *supra*. Libraries do not have the resources to contact the publishers of the billions of books in their collections to inquire about place of production.

importation by or for an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending or archival purposes....

However, this exception contains several significant limitations. First, Section 602(a)(3)(C) provides a library with no relief with respect to copies it purchased from a distributor in the United States. Libraries often purchase foreign-published materials from U.S. distributors. In addition, libraries almost always purchase U.S. published materials – which may actually have been manufactured abroad – from U.S. distributors.

Second, although the exception clearly permits a library to *import* five copies for “its library lending or archival purposes,” the exception by its terms does not actually permit the library to *lend* those copies. In other words, Section 602(a)(3)(C) creates an exception to the Section 602(a) importation right, but not explicitly to the entire Section 106(3) distribution right. To be sure, an exception to the distribution right is implied – Congress is permitting the library to import the copies specifically for “library lending ... purposes.” It would make no sense for Congress to allow importation for the purpose of lending, but then not allow the lending itself. Nonetheless, a court might erroneously conclude that Section 602(a)(3)(C) does not explicitly permit the lending of the imported copies.

Third, even if Section 602(a)(3)(C) were correctly construed to permit the lending of the five imported copies, this permission would not apply to audiovisual works. The provision specifically allows a library to import “no more than one copy of an audiovisual work *solely for its archival purposes.*” 17 U.S.C. 602(a)(3)(c)(emphasis added.) U.S. libraries have tens of millions of copies of audiovisual materials, many of which were manufactured outside of the United States.

(SCCR/23/4 does not address parallel imports.)

6. Cross-Border Uses

- **WIPO should support cross-border uses by libraries, particularly interlibrary loan arrangements between libraries in different countries.**

U.S. libraries have long maintained interlibrary loan (ILL) arrangements with non-U.S. libraries, pursuant to both Section 108 and 107. Some publishers have argued that Section 108 does not allow U.S. libraries to fulfill the requests of users of non-U.S. libraries under 17 U.S.C. 108(d) and (e). We believe that U.S. copyright law supports the ability of domestic libraries to participate in ILL arrangements and to send copies of some copyrighted works to foreign libraries, provided the libraries meet the requirements of the law. Fulfilling libraries obtain assurances from international partners by formal representation. For example, most ILL request forms contain a box that requesting libraries check to indicate that their request is in compliance with U.S. Copyright law or

CONTU guidelines. U.S. libraries have no reason to believe foreign partners misrepresent themselves on these forms, which accompany each ILL request. See Brandon Butler, Kenneth Crews, Donna Ferullo, and Kevin Smith, *White Paper on US Law and International ILL* (2011), <http://publications.arl.org/rli275/16>, <http://publications.arl.org/rli275/16>.

(SCCR/23/4 does not address cross-border user.)

7. Orphan Works, Retracted and Withdrawn Works, and Works Out of Commerce

- **WIPO should support exceptions for the use of orphan works.**

The orphan works problem is not exclusively a problem for libraries and archives, and exceptions for libraries and archives covering preservation and distribution would apply to both orphaned and non-orphaned works. Nonetheless, the orphan works problem is particularly acute in the library and archives setting because these institutions possess large numbers of such works in their collections and desire to make many of them accessible. Moreover, even though library exceptions apply to both orphaned and non-orphaned works, libraries should have enhanced flexibilities with respect to orphan works. Congress recognized this in the Shawn Bentley Orphan Works Act, which contained additional protections for nonprofit educational institutions, museums, libraries, archives, and public broadcasting entities. Accordingly, the special interest of libraries and archives in addressing the orphan works problem should be addressed.

Importantly, a solution to the orphan works problem should rely on exceptions and limitations, rather than collective licensing. A collective licensing approach would likely to be too expensive for libraries. Moreover, collective licensing is too cumbersome an approach for allowing the noncommercial use of works with little, if any, commercial value.

It is worth noting in this context that the fair use doctrine already provides libraries with significant flexibility with respect to orphan works.²⁴ 17 U.S.C. § 108(e) also provides libraries with the ability to reproduce and distribute orphan works in certain circumstances.²⁵

(SCCR/23/4 does not address orphan works.)

8. Liability of Libraries and Archives

²⁴ See Jennifer Urban, “How Fair Use Can Help Solve the Orphan Works Problem,” <http://ssrn.com/abstract=2089526>. See also ARL Code at 20 (“The fair use case will be even stronger where items to be digitized consist largely of works, such as personal photographs, correspondence, or ephemera, whose owners are not exploiting the material commercially and likely could not be located to seek permission for new uses.”).

²⁵ See “Lawfulness of HathiTrust’s Use of Orphan Works,” http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf.

- **WIPO should support limitations on remedies against libraries.**

17 U.S.C. §§ 504(c)(2) and 1203(c)(5)(B) limit the statutory damages available against libraries (and librarians) for infringement and circumvention. The section 504(c)(2) limitation on statutory damages, however, is too narrow for the digital age. It applies only to infringement of the reproduction right, not the distribution, public performance, or public display rights. These other rights are implicated by online distributions.

Additionally, while librarians should not necessarily be exempt from all *civil* liability from copyright infringement, it is worth considering whether they should be exempt from *criminal* liability. Libraries and other nonprofit institutions already are exempt from criminal circumvention liability under 17 U.S.C. § 1204(b). Consideration should be given to expanding this exemption to 17 U.S.C. § 506. As we stated in a recent letter to Congress expressing concerns with Title II of the Stop Online Piracy Act (SOPA), in the current environment where libraries are being sued with increasing frequency, “the criminal prosecution of a library for copyright infringement is no longer beyond the realm of possibility.”

(SCCR/23/4 addresses limitations on remedies against libraries.)

9. Technological Measures of Protection

- **WIPO should support broad library exceptions to prohibitions on the circumvention of technological protection measures.**

The prohibition on the circumvention of technological protection measures (TPMs) contained in 17 U.S.C. § 1201 has inhibited libraries and their users from engaging in noninfringing uses of copyrighted works. Section 1201(d) provides a narrow exception for libraries and archives to circumvent TPMs for the purposes of determining whether they want to purchase an item. This is a largely ineffective exception that is far narrower than what libraries need to fulfill their mission in an environment where many copies are subject to TPMs.

The libraries have been very active in the Section 1201 rulemaking process, where they have supported exemptions for the creation of new works such as clip compilations in higher education and access to e-books by the print disabled. The rulemaking process is time-consuming and expensive, in particular because exemptions need to be renewed every three years. Moreover, the exemptions remain narrow. For example, the exemption for the creation of new works applies to higher education but not K-12. Instructors at all levels, however, have a compelling pedagogical need to use clips of films in their classes. Additionally, in the near future, libraries will need to pursue additional exemptions for activities such as the preservation of e-books, sound recordings, and audiovisual works protected by TPMs.

(SCCR/23/4 does not address technological protection measures.)

10. Contracts

- **WIPO should support library exceptions surviving contractual restrictions.**

In paragraph 188 of SCCR/23/8, the United States states that “We must address this area cautiously because we do not want to limit the freedom of libraries to enter into contractual arrangements with suppliers of materials. In general, freedom of parties to enter into contracts is an important principle in U.S. law and we would be very hesitant to consider any international copyright norm that might interfere with this principle.” In large measure because of the enormous consolidation of the academic journal market, the ability of libraries to negotiate effectively with publishers has decreased while prices have increased significantly. Additionally, more journals are distributed in electronic format under licenses that prohibit reproduction for preservation and inter-library lending purposes. Decisions such as *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010), which allow publishers to declare unilaterally that they are “licensing” resources and thereby extinguishing first sale rights, exacerbate the situation.

Because of the encroachment of the private law of contracts on the public law of copyright, LCA members sought to include in the Uniform Computer Information Transactions Act (UCITA) a specific provision invalidating license terms inconsistent with the exceptions provided in the Copyright Act. When the publishers refused to agree to such a provision, LCA members worked successfully with other stakeholders to defeat the adoption of UCITA beyond Maryland and Virginia. It should be noted that the EU Software Directive prohibits the enforcement of license terms that limit exceptions provided under the Directive.

A new problem which may be even more significant is a publisher’s refusal altogether to license materials in electronic form to libraries. Four of the six largest trade publishers, for example, refuse to license many of their e-book titles to Overdrive and other intermediaries, thus preventing public libraries from lending their titles in e-book form. This refusal to license raises very serious public policy question concerning equal access to information in our society.

In sum, if statutory exceptions for libraries can be easily waived by contract, this entire exercise has very limited utility.

(SCCR/23/4 does not address contractual restrictions on library exceptions.)

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