



21 August 2017

TO: RAILS Board of Directors

FROM: Veronda Pitchford

**SUBJECT: Board Development: Library ebook copyright reform
Copyright Act - Section 108 – library exception**

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. For example, libraries may photocopy journal articles, book chapters, etc. and send these copies to other libraries through interlibrary loan.

Full text of copyright act: <https://www.copyright.gov/title17/92chap1.html#108>

Over the past three years, Congress, the Department of Commerce, and the Copyright Office have all begun investigating the need to “reform” the current Copyright Act in the face of rapidly evolving technology. The Library of Congress has initiated a Notice of Inquiry in June of 2016 seeking public input regarding whether and how Section 108, the “library and archives exceptions,” should be amended to accommodate modern technology.

The role of libraries as stewards of our cultural heritage is more important than ever in the digital world, where our society is at great risk of suffering cultural amnesia. When a printed publication goes out of print, copies continue to be available to the public through libraries. When an e-publication ceases to be published, licensed copies often disappear, forever. Libraries must have the option to “own,” or possess, copies of e-publications in perpetuity and to make them available to the public.

Maintaining the constitutional balance in copyright law is absolutely imperative if libraries are to continue in their role as stewards of the public good. The move from ownership to licensing affects the ability of libraries to serve the American public and threatens the public good.

Furthermore, because e-publications are typically made available through the proprietary platforms of one or very few vendors, the public risks losing access to those e-publications should the vendor remove them from its catalog or even when a library ceases doing

business with that vendor. Absent library ownership of copies, libraries and the general public—current and future—have no assurance that any given work will continue to be available/accessible at all, or that a given version of a work will not simply disappear.

Current law could not and did not anticipate the rise of digital information and the business models, including licensing of e-publications, that have developed with it. The pertinent provisions of the Copyright Act are based on the assumption that the acquirer of a copy of a work acquires ownership of that copy, e.g., when a library or an individual pays for a hard-copy book, the purchaser becomes the owner of that copy. However, the vast majority of e-publications are available only through licensing mechanisms, in which the acquirer of a copy acquires only a limited right to access and use the copy but does not own the copy. Because licensing is a matter of private negotiations between private parties (such as an econtent distribution company and publisher), current law is inadequate to protect the public good in licensing situations. Where e-publications are concerned, licensing terms severely threaten the ability of libraries and museums to continue serving as stewards of the public good.

The terms of the specific license applicable to any given “purchase” of an e-publication determine if the e-publication can be “rented” only for a limited number of months or checkouts, or for as long as the e-publication can be accessed on the original vendor’s platform, or whether the e-publication may be transferred to the platform of another approved third-party vendor.

For the past ten years, libraries have spent millions of dollars annually on licenses that allow library users to access content that can be taken away or made inaccessible. In most cases, licensing terms presented to libraries are non-negotiable. The only choices a library has are to accept the licensing terms or to not provide their public users with access to that content; either we accept a license that restricts the public’s rights under the law, or we do not acquire the works, which then prevents the public from having access at all.

To be clear, libraries do not take issue with the licensing model for purchasing e-publications; rather, our concerns are with (1) licensing as the sole method for purchasing e-publications and (2) the resulting loss of statutory protections of the public’s ability to access and use protected works that are applicable in ownership situations. We do not oppose licensing per se. But we do wish to ensure that libraries, and through them, their users—the public—have both increased statutory protection in the context of licensing and/or greater options in licensing terms/approaches than are now available.

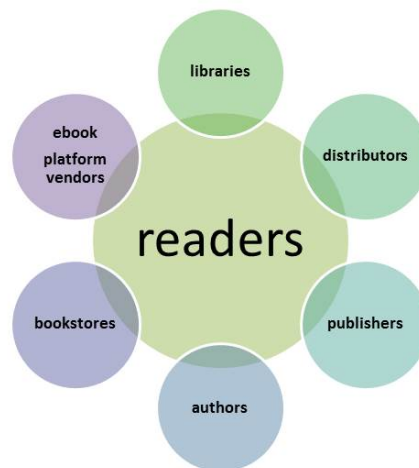
The letter of the law must be amended to ensure that the spirit of the law is protected in the digital environment. The purpose of statutory exceptions to a copyright owner’s rights and statutory fair use is to ensure that the constitutionally required balance continues. The move from ownership to licensing in the digital arena gravely threatens this balance, as the most fundamental statutory exceptions for libraries, Sections 108 and 109, simply do not

accommodate the licensing context, and Section 107 (fair use) is often overwritten in licenses that are not truly negotiable.

Interested parties must work together to ensure that, without treading upon the fundamental right to contract around the law, the fundamental protections afforded by the law to users continue in a licensing environment.

The RAILS econtent strategy seeks do to this through experimentation and innovation with partners across the reading ecosystem for continuous improvement of the reader's econtent experience in the areas of access, content and experience to further solidify the library role as a key purveyor of econtent for the public (be they in an academic, public or school environment).

reading ecosystem



Resources

United States Copyright act (including the full text section 108)
<https://www.copyright.gov/title17/92chap1.html#108>

Section 108 Spinner
Visual “fun” way to understand Section 108 basics
librarycopyright.net/resources/spinner/

Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law
<https://www.federalregister.gov/documents/2016/06/07/2016-13426/section-108-draft-revision-of-the-library-and-archives-exceptions-in-us-copyright-law>