LIBRARY COPYRIGHT REFORM STATEMENT ABOUT EBOOKS

Introduction

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. Most recently, the Library of Congress has initiated a Notice of Inquiry seeking public input regarding whether and how Section 108, the "library and archives exceptions," should be amended to accommodate modern technology.

This Statement presents considerations the signatories of the Statement (libraries, library associations, publishers, and other entities) believe are imperative to maintaining the constitutional purpose of copyright law in the face of contemplating statutory changes to address modern technology, specifically the move from ownership of copyright-protected works to licensing. Our goals are as follows:

1. To emphasize and remind all parties of the need to focus on the purpose of copyright law as stated in the Constitution: to encourage the expansion of knowledge for the public good.[1]
2. To emphasize and remind all parties that the Constitution empowers Congress to achieve this purpose specifically by maintaining a balance between granting exclusive rights to creators and placing limitations on those rights.
3. To point out how libraries, the public good, and the law's purpose are adversely affected by the current Act, in light of its silence on modern digital formats and the issues raised by the move to licensing.
4. To point out that the issues/challenges presented by the Copyright Office cannot be adequately addressed simply by amending Section 108.
5. To send a very clear message that the signatories and the greater library community embrace their responsibility to work with copyright owners to ensure that any statutory changes maintain the constitutional balance and do not inhibit/harm/undermine the public good.

Throughout the history of the United States, and even long prior to 1776, American libraries have served as stewards of the public good. They do this in many ways;

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[1] See, e.g., 1 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.03[A](2001) ("the primary purpose of copyright is not to reward the author, but is rather to secure 'the general benefits derived by the public from the labors of authors," quoting Fox Film Corp. v. Doyal, 286 U.S. 123, 127, (1932)).

most pertinent to this Statement, that includes providing access to the public a wealth of resources well beyond what any one person would otherwise be able to access, and preserving our cultural heritage by protecting the records of our history. 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 purpose of this Statement is to elucidate the threats to the public good created by the move from ownership to licensing by explaining how the move is affecting the ability of libraries to serve the American public.

Licensing Compared to Ownership

Copyright law promotes the public good through protecting the rights of both content creators (§106) and content users (§§107, 108, 109, 110). 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, 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, the undersigned 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.

Amending Copyright Law to Protect the Balance When Licensing

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.

Section 109: The Problem of Perpetual Access and Use

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."[2] 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.

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,[3] or that a given version of a work will not simply disappear.

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[2] See, e.g., Abby Smith Rumsey. When We Are No More: How Digital Memory Is Shaping Our Future. New York: Bloomsbury Press, 2016; Lila Bailey, "How Copyright Law is Promoting Cultural Amnesia," *Copyright & New Media Law* 20:2 (2016): 1.

[3] Brad Stone, *Amazon Erases Orwell Books from Kindle*, N.Y. TIMES, July 17, 2009, available at www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0.

Section 108: Modernizing "the Library Exceptions"

In Section 108, Congress recognizes the important role libraries play in promoting the constitutional purpose of copyright law. Section 108 is intended to work in conjunction with the fair use doctrine by authorizing certain practices which may not qualify as fair use. These exceptions for libraries and archives were key to Congress's establishing the necessary balance between the rights of copyright owners and information users in the pre-e-publication world. The letter of the law of the current Section 108 undermines meeting the spirit of that provision in a licensed environment.

Section 107: The Problem of Licensing Around Fair Use

Fair use evolved out of the court-recognized need for a "safety net" in copyright law, a tool that would allow certain uses of protected works that do not fall under a statutory exception when doing so is in the interest of the public good. It is a fundamental tool in protecting the constitutional balance of the law by allowing such uses when doing so goes further towards meeting the goal and purpose of copyright law than would not allowing them. Throughout its history, the extremely subjective nature of fair use has steadfastly been maintained by both the courts and Congress, to ensure that the "safety net" remains flexible enough to be applied to any new situation or technology that might arise.

Yet licenses commonly prevent the application of fair use, most often by prohibiting uses that could constitute fair use without providing the caveat that such prohibitions do not apply to fair uses. It is imperative to maintaining the constitutional balance of copyright that interested parties find a way, without undermining the right to contract, to amend the statute to ensure that licensed digital content purchased by libraries may continue to be made available to and used by the public in accordance with fair use.

Conclusion

For both policy reasons and to provide the perspective of the damage created to the public good by our current situation, it is imperative that the industries represented by the signatories be fully represented in discussions about reforming copyright law and any efforts to do so.

Knowledge cannot be expanded for the public good when the copyright holder can turn off access based on licensing terms that undermine the public's rights under the law to use protected works. The Constitution directs Congress to maintain a balance between the exclusive rights granted to copyright holders and limitations on those rights. This balance has been lost in the context of licensing e-publications. Congress needs to act to re-establish this balance, and libraries must be included in the process.