Session 1: The Legal Landscape

Speakers:
Laura Gasaway, *University of North Carolina School of Law*[*]
Jane Ginsburg, *Columbia Law School*[**]
Maria Pallante, *U.S. Copyright Office*[***]
Shira Perlmutter, *United States Patent & Trademark Office*[****]
Richard Rudick, *International Publishers Association*[*****]

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June Besek: Good morning everybody, and thanks for coming. I'm June Besek, the Executive Director of the Kernochan Center for Law, Media and the Arts, and we are especially grateful to those of you who planned to come in November, and when that was postponed still came today. We really feel very grateful to you. This symposium is on copyright exceptions for libraries and section 108 reform, and we are doing this in cooperation with the U.S. Copyright Office. I thank Maria, Chris and Karen for all the work that they put into this as well. I want to thank our sponsors—the Harry J. Rudick Fund, the Horace Manges Lecture and Conference Fund and the *Columbia Journal of Law & the Arts*. I want to thank Pippa Loengard for all the work she did putting this together, and Cindy Tangorra—the program coordinator for the Kernochan Center—who has done a terrific job, and also Char and Megan who do our events coordination and who have done a wonderful job in trying to reschedule at the last minute. We're very appreciative of that.

Our first session is the legal landscape. We have five speakers, and we will leave plenty of time at the end for audience questions. I'm going to introduce the first three speakers. Our first speaker is Maria Pallante, the U.S. Register of Copyrights, and she's been the Register since June of 2011. Prior to that, she served as Associate Register and Deputy General Counsel, and for several years, she was legal counsel to the Guggenheim Museums.

Then our second speaker is Shira Perlmutter, who's the Chief Policy Officer and Director for International Affairs at the USPTO. Prior to that, she was the Executive Vice President for Global Legal Policy at the International Federation of the Phonographic Industry (IFPI), and she's also served at the U.S. Copyright Office and at WIPO.

Our third speaker will be Professor Jane Ginsburg, who is the Morton L. Janklow Professor of Literary and Artistic Property Law here at Columbia. She is the author of several books and numerous articles on copyright law. So with that, I'm going to turn it over to Maria.

Maria Pallante: Thank you, June. Good morning, everybody. I, too, want to thank all of you, both the participants and the audience, for coming out in this weather. And a huge thank you to the Kernochan Center at Columbia Law School for organizing this not once, but twice. I want to start by making a rather obvious

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Richard S. Rudick retired as Senior Vice President and General Counsel of John Wiley and Sons in 2004. He has worked in the publishing industry as a lawyer since 1970, with Random House, WW Norton, and Xerox Corporation, before joining Wiley in 1978. Currently he is Vice President and Chair of the Copyright Committee of the International Publishers Association, and is Vice Chairman of the Board of Directors of the Copyright Clearance Center. He received his Law degree from Yale in 1964, and is a graduate of Middlebury College

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statement. When we talk about 108 reform, what we're really doing is affirming the critical importance of libraries and archives and, as you'll hear later today, museums in the copyright system. Without these institutions and the professionals that they employ, scores of creative works would not find an audience. Books, music, letters, films and other essential documents of our civilization would be uncollected or unorganized or both. And people who may not have the means to purchase cultural materials would not be able to fully participate in our democracy. It is because of this centrality to the diffusion of knowledge that libraries and archives currently enjoy an exception in the copyright law. Section 108 is a recognition that regular and frequent reproduction and distribution of creative works is vital to the mission of libraries and archives,[1] vital enough that subjecting these activities to the application and uncertainty of fair use should be unnecessary. Fair use is, of course, a critically important doctrine.[2] Many of you know that the Copyright Office was very centrally involved in the codification of fair use in the 1976 Act. It also played a major role in the codification of section 108. And as you all know, these provisions have lived alongside each other ever since and, in the view of the Copyright Office, should continue to do so.

So today, there is no question that section 108 is woefully out of date. That's not merely, I think, a frustration for libraries, archives and museums, but an actual obstacle to the work of preservation and access. So as we see it in the Office, there are three options. First, keep section 108 as it is, whereby the Office fears that it will become an increasingly useless appendage to the Copyright Act, an exception so narrowly tailored to bygone technologies that it will be functionally irrelevant. Second, repeal section 108, leaving libraries and archives and the activities that they discharge to be governed by fair use. The Office feels that this choice would be unfair to both librarians and archivists, as well as to copyright creators and copyright owners, all of whom should be able to rely upon some concrete, unambiguous exceptions without having to consult an attorney or risk an infringement action every time an archivist makes multiple preservation copies or a librarian copies a fragile book for interlibrary loan. Third, reform section 108 so that it provides a balance, with a certain set of exceptions, updated for the digital era, that allow libraries and archives and museums to make the copies they need and to distribute those copies in ways that do not unduly harm the valid interests of rights holders. Many of you know that from 2005 to 2008, the Copyright Office cosponsored a study group along with the National Digital Information, Infrastructure and Preservation Program at the Library of Congress.[3] The Copyright Office has reviewed the report in great detail, and I reconvened the group last year for a daylong discussion. As the Office formulates legislative proposals on section 108 reform, it is very likely that we will adopt and recommend many of the conclusions of the study group, but we will also address issues that were left unsolved by that group.

1. 17 U.S.C. § 108 (2012).

2. *See* 17 U.S.C. § 107 (2012).

3. SECTION 108 STUDY GRP., THE SECTION 108 STUDY GROUP REPORT (2008), *available at* http://www.section108.gov/docs/Sec108StudyGroupReport.pdf.

Today, we will be talking about section 108 reform both at the macro-level and the micro-level. On the micro-level are the specific exceptions and how they should or shouldn't be amended—for example, the number of copies allowed for preservation and replacement copying, the need for additional exceptions allowing preservation of publicly disseminated works and Internet content, digital distribution of copies made at the user's request, such as for interlibrary loan, and how to best condition the new exceptions so that what is intended as a safe harbor for legitimate, scholarly research and private study does not drown the incentives to create and disseminate new creative works. On the macro-level are the questions of what the ultimate purpose of section 108 should be and how reform of the exceptions for libraries, archives and museums might affect other pending issues, such as the legal framework for mass digitization and for orphan work solutions.

So with that, I just want to say that we are very pleased to have this dialogue today. This is part of our stakeholder outreach, and we have no doubt in the Office that we're going to have much to consider by the end of today. Thank you, and I'd like to turn it over to my colleague, Shira.

Shira Perlmutter: This is obviously a very important issue. As we watch the role of libraries and archives evolve and look to take advantage of the exciting opportunities that digital technology presents, it is critical for us all to be trying to find some solutions. Obviously, it has been a long path to get here. We took the first step with the DMCA Amendments to section 108, but they were just baby steps. And, as Maria was describing, there were several years of intense work by the study group, and it has already been four or five years since the study group's recommendations. So we at the USPTO welcome the Copyright Office's renewal of this project and its attempt to reform section 108. I think this is an important part of what should be an overall effort to look at the Copyright Act as a whole and to decide what elements in it need updating. We are beginning to engage in that process within the administration, as well as in collaboration with the Copyright Office. What I will do in my few minutes is to focus on the international dimensions of the issue. There has been a lot of attention on what exceptions there should be for libraries and archives in the digital age, in countries around the world and also at WIPO.

I will start with a few observations about the relationship between section 108 and fair use as applied to libraries. Now, fair use is a fundamental underpinning of the balance in copyright law.[4] It is a doctrine of great beauty and also great weakness, depending on how you look at it. The beauty is its flexibility, and the fact that it has been able to survive for more than a century in good shape and still apply to every technology that's thrown at it. The weakness is its uncertainty and unpredictability. On the other hand, the value of having a specific exception like section 108 is the fact that it is specific, and it does spell out in detail terms and conditions that people can rely on. As Maria said, they don't need to accept the invitation that fair use proffers to go hire a lawyer to try to determine whether certain conduct is permissible or not. To my mind, what we have in the United

4. *See* 17 U.S.C. § 107 (2012).

States, which is the combination of the specific exception and the flexible general fair use doctrine, is the best of all worlds. If we have both of them, and if we appropriately update the specific exception as technology moves along, we can have the best mix of flexibility and certainty, with room to maneuver for the future while giving people some guidance. And of course that requires that both be properly interpreted, and by "properly interpreted," I mean the specific exception should not rule out the application of fair use in appropriate circumstances. So I would say that both of those elements are critical.

In other countries, they don't have a fair use doctrine the way we do here. Some are beginning to enact fair use exceptions, but they don't have the history and the precedent that we have in the United States. Most countries that deal with libraries and archives in their copyright law do so through a specific exception. But there are a fair number of countries that don't have either a general exception or a specific one, and the latest WIPO study listed twenty-one countries that don't have exceptions addressing libraries and archives.[5] In a number of other countries, there is work ongoing to look at how their laws should be updated in this respect. I had the privilege about two years ago of going to the British Library in London and being taken to see their sound archives, where they had recordings of interviews with famous people, of the sounds made by obscure birds in Latin America—just a phenomenal trove of material. The problem they were experiencing at the time was that under U.K. law, it was not permissible to make a digital copy for preservation purposes. A lot of these recordings were quite old and rare and not likely to survive forever. What we're seeing is, as many countries start to think that they need exceptions for libraries and archives or to update their existing exceptions, some don't have the experience in dealing with new technologies that we have here, so that complicates the task.

At the international level, there is a fair amount of activity. What we do here has a tremendous influence everywhere in the world; regardless of any international discussions at WIPO, our law serves as a model, especially when we deal with new technologies, because they do tend to get developed and adopted here very early, if not first. We were having a discussion in my office the other day about the fact that in China, more than 92% of the patents granted are owned by Chinese nationals, as well as most of the patents litigated. So the patent system in China is very domestic, in a sense, and yet China is always very interested in knowing what the U.S. is doing in our intellectual property laws, including patents as well as copyrights, in large part because we are seen as being at the vanguard of new developments, with a state of the art intellectual property regime.

In addition, there is work ongoing at WIPO in the Standing Committee on Copyright and Related Rights that includes a specific agenda item on exceptions and limitations for libraries and archives. In terms of the timing of that discussion, the next meeting will be in July, where this will be on the agenda. There have been

5. Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WORLD INTELL. PROP. ORG. (Aug. 26, 2008), http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf.

a number of documents already produced that contain various countries' proposals, with thoughts for consideration from some countries and some specific language proposals from others; if you go to the WIPO website you can find all of those documents.[6] The first priority at the moment is a diplomatic conference, scheduled for this June, on exceptions for the visually impaired,[7] and then there's also work ongoing on a proposed treaty for broadcasters. But this is teed up; it is already on the agenda and being discussed as well. Now, one of the questions at WIPO is how to handle the issue of exceptions for libraries and archives. There are a number of countries interested in putting forward another treaty at WIPO in this area, while other countries are talking about looking at this through other techniques, possibly through joint recommendations or through model laws.

One of the aspects that's interesting is that some of the countries that are pushing the hardest for a treaty, as opposed to a model law or recommendation, are countries that don't have any exception for libraries and archives on their books. Some of these countries find that it is easier for them to enact legislation domestically if there's first an international treaty on the issue. This is the exact opposite of the U.S. approach, which is that we don't want treaties that force us to change our domestic law. So it's an interesting dynamic. The other interesting aspect is that by and large, European library associations have been pushing for a treaty, whereas that has not been the approach of the American library sector. From the perspective of the U.S. government, our main concern is to be sure that we can have some influence on the content and get a good result in the WIPO discussions.

At the international level, approaching this issue through a specific exception, as opposed to something that looks like fair use, is much more feasible. Most countries find that a general fair use exception, especially if they're not common law countries that are used to following judicial precedent and interpretation, is a more difficult approach, not necessarily doable or easily adoptable in their legal systems. From our perspective, a specific exception can also provide better security against improper interpretations or abuse in countries that don't have as well developed legal systems or judicial systems. But above all, from our perspective, as we join in the international discussions, we need a state of the art section 108 to be able to play the role we would like to play. That's important for us to be able to continue to act in a leadership role in the international discussions; it's important for rights holders, when U.S. rights holders' works are used abroad, to make sure that they are appropriately treated, and it's useful for the library community globally in developing common policies and approaches to their work. That can facilitate their ability to work together, to lend across borders and to access each other's collections. To conclude, I think it is important to decide, in this country, what we think works best in light of evolving technologies, to keep in

6. *Standing Committee on Copyright and Related Rights*, WORLD INTELL. PROP. ORG., http://www.wipo.int/meetings/en/topic.jsp?group_id=62 (last visited Apr. 21, 2013).

7. *See generally* World Intell. Prop. Org. [WIPO], *Draft Text of an International Instrument/Treaty on Limitations and Exceptions for Visually Impaired Persons/Persons with Print Disabilities*, VIP/DC/3 (Feb. 5, 2013).

mind that this is part of a broader international picture and then to come up with solutions that will allow the U.S. to lead appropriately. Thank you.

Jane Ginsburg: Good morning, and I join in thanking everybody for braving the weather and proving that our Symposium is not, in fact, totally jinxed. I'm going to continue on the international theme, but beyond section 108, to look at some of the developments occurring abroad that address what Maria referred to as the macro-question: not only what section 108 does, but the looming orphan works problem and the even more looming mass digitization problem, both issues which exceed the scope of section 108 but which are clamoring for some kind of resolution. First, with respect to orphan works, I'm going to talk about the directive promulgated by the European Union last fall, and then, with respect to mass digitization, I'm going to talk about a French law that was enacted unanimously—which is quite remarkable for France, or anywhere—last March, and which still awaits its regulatory decree of application. Let's put it this way: the devil is in the details, and when I explain the law you'll see why, and perhaps why we still don't have a decree of application.

Starting, however, with the E.U. orphan works directive, keep in mind the attempts in the U.S. in 2006 and 2008 to have some kind of orphan works measure here. Those will serve as a basis of comparison for the E.U. effort, which is much more circumscribed. Our attempts, at least so far, would have been general with respect to their subject matter and, most notably, would not have been limited to noncommercial users. The U.S. version of orphan works also offered, or endeavored to offer, some level of detail with respect to the diligent search necessary before work could be considered to be an orphan work, and of course that detail turned out to be extraordinarily elusive. The E.U. has gone about it a little bit differently. The directive limits the subject matter of orphan works to books, films, phonograms and broadcasts—in other words, not photographs.[8] And, of course, the gorilla in orphan works is photographs. Photographs are only covered to the extent that they are included within books, but separate photographs are not included.[9] This is all material that is in the collections of public libraries, museums or broadcasting entities, so, again, the universe is further circumscribed and first published in a member state of the European Union, thereby to avoid some of the questions of whether or not this measure complies with international norms. The definition of an orphan work is one for which no rights holder can be found despite a diligent search,[10] but "diligent search" isn't really defined; rather, the task is delegated to member states to develop the contours of what is a diligent search in consultation with representatives of the interested parties. It is key, however, that there be a system for maintaining records of diligent searches and a centralized database that will permit subsequent would-be users of orphan works to consult that database.

Another important feature of the E.U. directive is that the diligent search is

8. Directive 2012/28/EU, 2012 O.J. (L 299/5) art. 1.
9. *See id.*
10. *Id.* art. 2.

undertaken in the country of origin of the work.[11] This is assuming that one can ascertain the country of origin of the work, and if it is considered to be an orphan work in the country of origin, that status will be recognized throughout the European Union. So for all twenty-seven member states, you do a diligent search in the country of origin, and it will be recognized throughout the E.U. The user—remember that the user is a library, museum or public broadcaster—is entitled to make available and reproduce those works, but only for nonprofit purposes. An additional feature, which would be nice to have in our legislation, is that in all instances where the author's name is known, it must be included on all disseminations of the work.

The member states have two years to adopt implementing legislation, and we will see what happens. But with respect to this endeavor—which was not uncontroversial as it was going through, because it is so circumscribed—it is not clear how much good it's going to do, because in many respects the whole orphan works debate has been overtaken by the mass digitization debate. And mass digitization is fundamentally different from orphan works. Orphan works require a diligent search, and as the directive specifies, work by work diligent search. That's a lot of transaction costs and, if you want to make available a large quantity of works, may ultimately be defeating. As we know, in the premier example of (perhaps extralegal) mass digitization, Google did not seek anybody's permission ahead of time and did not undertake any kind of search, diligent or otherwise, in order to ascertain the status of out of print, in-copyright books. [12]

Google Books was controversial not only here, but also in Europe. A number of European countries were distressed, and not only their authors and publishers. At a higher level, they were concerned that Google was taking over their national culture and that they had better be able to do something about that. So the French legislature, in March of last year, enacted a law that was widely perceived as the "anti-Google law," the French answer to Google.[13] This is known as the "law on unavailable books," and it is specifically for mass digitization. The universe of books concerned, to avoid the international problem, is books published in France before 2001. The presumption is that anything since 2001 is already available in digital form. So the legislation applies to a French book published before 2001 and not currently on sale or otherwise available, whether in print or in digital—those out of commerce books. The National Library is appointed to create a database. It is not entirely clear from the text of the law whether the National Library is also appointed to do the digitization; that, I suppose, will also be made clear in the famous, but so far un-promulgated, application decree. The database will consist of all these unavailable books. It can be crowd sourced, so not just the National Library will generate this list, but anybody who thinks that he or she has identified an unavailable book can contribute the listing to this database of unavailable books.

11. *Id.* art. 3.

12. *See, e.g.*, Authors Guild v. Google, 770 F.Supp.2d 666 (S.D.N.Y. 2011).

13. Loi 2012-287 du 1 mars relative à l'exploitation numérique des livres indisponibles du XXe siècle [Law 2012-287 on the Digital Exploitation of Unavailable 20th Century Books], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], March 2, p. 3986.

When that database is published, the authors and publishers will have six months to opt out. If they do not opt out, then a collecting society, created by this law, is appointed to grant, on a nonexclusive basis, the rights to anyone—so it's not limited to noncommercial, and it's not limited to libraries—to make available, to exploit, to publish, to distribute and so forth for five years renewable. The licensee will pay a remuneration to be fixed—that is another one of those details—to the collecting society, and the collecting society is supposed to distribute the proceeds fifty-fifty, at least fifty percent of the proceeds to the authors.

Now, if the authors or publishers opt out, this is where it gets more controversial still. The publisher can opt out, in which case it has two years to exploit the work, and if it doesn't exploit the work, the work goes back into the generally available pool for anybody. The author has more than that six month period to object, but only on moral rights grounds—on the ground that the exploitation of the work will be deleterious to the honor or reputation of the author. I am not sure what that will mean in practice, whether it relates to juvenile works that authors don't want disseminated, or how that will actually work out.

But if the publisher does not opt out in the six month period, this collecting society, before it offers the general license, has to offer the print publisher an exclusive license for ten years, automatically renewable, to exploit the work. This is the part that I find rather curious, because if the publisher never got the digital rights, it doesn't help the publisher to opt out, because the publisher can't publish within two years if the publisher didn't have the digital rights. But instead, the publisher can wait, get the first crack at exclusive digital exploitation of the work, and then proceed without ever having got the digital rights from the authors. This is really quite remarkable. The author can object, but only if the author proves either that the publisher didn't have the print rights—but that's not relevant; what's relevant is the digital rights, not the print rights—or that the author is the only person with the digital rights. This means that, in the case of any ambiguity as to whether the author gave up or didn't give up digital rights, the publisher wins. This is the part that I find, and many people somewhat belatedly discovered, was somewhat regrettable in the law. So we will see what that famous pending application decree does, but I would suggest that the French were in a hurry to come up with an anti-Google law, and they didn't really work it through. That's the nice explanation. The not nice explanation is that this is a cabal of the print publishers to get the digital rights that they never got.

It is now my pleasure, as we turn back to section 108, to introduce the two chairs of the Section 108 Study Group. First, Dick Rudick, who retired in 2004 as the General Counsel of John Wiley & Sons. He has worked in the publishing industry for more than thirty years, and he is also a former Vice President of the International Publishers Association. Following Dick, Professor Lolly Gasaway, co-chair, will speak. She is the Paul Eaton Distinguished Professor of Law at the University of North Carolina School of Law. She was a law professor and director of the law library for more than twenty years and, from 2006 to 2010, was the Associate Dean for Academic Affairs at the University of North Carolina Law School. Thank you very much.

Richard Rudick: I want to begin by reading to you a quote from Herman Hesse, which I read in the first meeting of the Section 108 Study Group:

> Of the many things which man did not receive as a gift from nature but which he created with his own spirit, the world of books is the greatest. Without the writing of books there is no history, there is no concept of humanity. And if anybody wants to enclose in a small space, in a single house, or a single room, the history of the human spirit and to make it his own, he can only do this in the form of a collection of books.[14]

I have never actually read anything by Herman Hesse. I just know this quote, which I love. That room I think must be a library, and its precious contents are the subject, or should I say the objects, of copyright. And these words, I think, are very relevant to our work today. First, because they remind us of how much libraries and their collections have changed from a collection of books to a vast array of media, much of it born digital, and, very importantly, from a room or a building to interconnected systems spanning a campus or state without physical walls. Second, they remind us that everyone in this room—librarians, teachers, students, scholars, writers, publishers, media producers, people who just read, all of us who have a stake in copyright—lives together in Hesse's wonderful room. That we have a self-interest in collaborating to make that room light, full and spacious. They remind us that our most dangerous enemies are not each other but the philistines, those who do not value the world of books.

The Study Group was convened in 2005 by the Copyright Office and the Library of Congress. I think of it as the brainchild of then Register of Copyrights Marybeth Peters, who for some reason is sitting in the last row. Roughly half of the group came from the library and museum community, half from the content and creative community. We completed our work in three years, by 2008, proving, in the words of Gypsy Rose Lee, that "anything worth doing well is worth doing slowly."[15] Our mission was to reexamine the exceptions and limitations applicable to libraries under section 108—which, I remind you, was written largely to deal with the then exciting new technology of the photocopying machine—and to make balanced recommendations on making those provisions relevant and workable in light of the impact of digital technologies. Equally important, the ways we use those technologies had evolved and matured over the intervening years. Our working style was based on the idea that if people of goodwill, with differing perspectives, could listen to each other and talk to—instead of, as we usually do, at—each other, they could make progress towards agreement on how to fulfill that mission; and the result was a series of recommendations, which Lolly will shortly review, for updated and enhanced exceptions.

The recommendations reflect unanimous consensus on the underlying fundamental principles, which says something about the value of creating an environment which facilitates, and which is specifically designed to facilitate, thoughtful discussion, and it also says something about the commitment and

14. HERMAN HESSE, MY BELIEF: ESSAYS ON LIFE AND ART (1974).
15. MICHELE BROWN, A COLLECTION OF SEXY QUOTES 204 (2006).

sincerity of Lolly's and my colleagues. But our study group's report records not only agreements on fundamental principles, but disagreements based on fundamental tensions. We agreed, quid pro quo, that with updated exceptions would come increased responsibilities, arising from the need to reasonably protect copyright owners from the dangers of potential abuses of the digital world. We agreed on those responsibilities and how they might be implemented in some cases; in others, we did not resolve our differences, and we recorded the disagreements as carefully as the agreements, because they are just as important and because they have to be addressed if we are going to get home.

I'm going to briefly mention a couple of things which Jane has touched on—well, more than touched on—which were not addressed in our recommendations: mass digitization, which we'll get to in session three, and something Jane, I think, mentioned very briefly; and the question of whether exceptions should distinguish between works that are commercially available in the marketplace and those which are not, which could come up in session four.

We decided in 2005, after some discussion, not to address mass digitization, believing, I think reasonably, that the time wasn't right, and I might also add that we didn't think three years was enough to cover everything. It's 2013; the time is certainly right. It's true that section 108 is not the only way or the only place to deal with mass digitization, and maybe it needs to be dealt with in more than one place, but you can't, I think, talk about how you would frame an ideal library privileges section without thinking about mass digitization.

We did discuss whether commercialization or commercial availability should be a benchmark for purposes, or at least for some purposes, of section 108. For reasons which are not entirely clear to me now, we found this very difficult and we took a pass. The parties to what I like to call the "Google Books non-settlement agreement" found this distinction to be a lot less difficult. In fact, content owners, or at least book publishers, seemed to feel comfortable making that distinction. This, together with the developments in Europe that Jane mentioned, suggests that we should really take a look at whether and when commercial availability should be a factor.

I think Maria noted earlier that because section 108 has been out of date for so long, libraries have reasonably come to rely more heavily on fair use under section 107, and of course the question is asked, and will certainly be discussed today: do we need section 108? You know how Maria feels. Members of the Study Group felt the same way. We did address that question and pointed out in the report that a provision so outdated and inadequate as to no longer serve its function invites disrespect for law. One might add that it invites expensive litigation with uncertain results, and one might add also that the doctrine of fair use, as codified in 107, is not well suited to addressing many of content owners' concerns, such as security. Shira Perlmutter mentioned the international considerations.

Finally, and I think this is the most important reason from a practical standpoint, an up-to-date and balanced section 108 would complement the flexibility of 107's fair use provisions and would provide straightforward guidance and clarity in a number of important specific situations. Clarity is the handmaiden of certainty, and

an important function of the law is to provide rules that, if followed, keep us out of trouble. Oliver Wendell Holmes, Jr. once observed that "certainty generally is illusion, and repose is not the destiny of man."[16] I am certain enough that repose is not your destiny and that absolute certainty is generally an illusion, but a level of certainty is a prerequisite for doing business, whether your business is that of a librarian, teacher, student, publisher, writer or artist, and this was the reason that the Study Group, in its report, urges you to consider the merits of a section 108 for the digital world. That concludes my remarks. Lolly?

Laura (Lolly) Gasaway: Good morning, and thanks to all of you for being here and to Columbia for hosting this symposium. The *Section 108 Study Group Report* really has five types of material, and it is a very long, comprehensive document.[17] The report consists of (1) background material about the legal landscape; (2) recommendations for legislative change; (3) conclusions on other issues; (4) additional issues that were discussed; and (5) bunches of appendices, with statutes and many other kinds of materials. The recommendations are the most important part of the report. The first recommendations deal with what entities are eligible to take advantage of the section 108 exceptions. Currently, it is libraries and archives that meet certain criteria that qualify for the exceptions. The first recommendation was pretty noncontroversial, and that was to include museums in that group of organizations that could take advantage of whatever the exceptions were to be. In order to do that, some additional eligibility requirements were necessary—for example, a public mission, a trained professional staff, offering professional services that are typical for libraries and archives, and a collection that is lawfully acquired or licensed. Another important recommendation was to permit libraries to outsource the covered activities. But in order to do this, there are some important conditions. For example, the contractor must be acting solely as a provider and not for either direct or indirect commercial advantage or benefit to that contractor. The contractor could not retain copies; for example, if the contractor is doing the digitization, it needs to be doing it just for the contracting party. A further requirement is an agreement between the parties that would permit rights holders to obtain redress for infringement by the contractor.

Then the Group began to look at some specific subsections. I am actually going to start with subsection (c), because that is the more common section, even though it is not the next one in order. It is referred to as the "replacement section," and it permits the making of up to three copies to replace a lost, stolen, damaged, deteriorating or obsolete copy. And in the section 108 world, these are called "triggers"—what is the "triggering event"? Subsection (c) applies only to works that are already in the library, archive or museum collection, and the institution must first make a reasonable effort to obtain an unused copy before it is allowed to reproduce the work. The Digital Millennium Copyright Act added the ability to

16. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

17. *See generally* SECTION 108 STUDY GRP., THE SECTION 108 STUDY GROUP REPORT (2008), *available at* http://www.section108.gov/docs/Sec108StudyGroupReport.pdf.

make digital copies, but any digital copy has to be counted in that three maximum and cannot be used outside the physical premises of the library.[18] That is a hard definition if one goes back to what Dick was saying about how libraries are no longer just one physical building, but may be a campus, may be larger, et cetera. So the Section 108 Study Group began to look at this. Here are the recommendations dealing with the replacement section. First of all, change the three-copy limit to "a reasonable number" of copies. The idea is that it may take many copies to get to one usable digital copy. The word "fragile" was added as a trigger. The work may not yet be completely damaged, but it is on its way. The report also recognizes that certain digital copies should be allowed to be used outside the premises of the library, if what is digitized is a replacement that could be used outside the library. This includes DVDs, CDs, et cetera, works that are digital but which have a tangible form. The Group recommends changing the requirement of an unused copy to a usable copy, because today it's much easier to search the used book market than it was in the past. Further, what is a fair price would be determined on a case-by-case basis. So, those are the recommendations dealing with the replacement of works.

Subsection (b) is for the preservation of unpublished works, which is primarily of interest to archives and museums, and libraries to some extent, but the published work is a larger issue for most libraries. The current section allows making up to three copies of an unpublished work for preservation and security or for deposit for research in another library or archives. Again, it applies only to works that exist in the collection. And the DMCA also added the ability for copies to be digital copies, but again, its use is restricted to the premises of the library. To me, this has always made more sense because of the author's right of first publication. So, the recommendations for subsection (b) are, again, to change the three copy limit to a reasonable number of copies, to allow deposit of a reasonable number of copies, but to give only the library that owns the original that right to reproduce the work. Further, the deposit recipient can hold the copy and have a copy for use, but does not have the right to reproduce the work. This pretty much tracks what is in the current section but adds digital. And the Study Group would add the same offsite lending changes: if the original work was an unpublished audiovisual work that could be lent outside the institution, then so could the preservation copy made under 108(b).

The next recommendations were to adopt two sections that would add something new to section 108. The first one was dubbed the "preservation-only exception," and it would apply to at-risk published or publicly disseminated digital works. When these digital works are acquired by libraries, they have to be preserved right away. Libraries cannot wait until the works are already damaged or deteriorating, because by then it is too late. They can no longer preserve them at that point. So, there is no requirement of prior loss or destruction and no requirement to search for a usable copy. Typically, one would assume that the preservation would be digital, although there could be a library that would decide

18. *See* Pub. L. No. 105-304, § 404(3)(D), 112 Stat. 2860, 2890 (1998).

to make print copies. Again, a reasonable number of copies to obtain the digital copy that is usable, restricting access to staff necessary to preserve the work, and any preserved copy would be labeled as such, that it is a preserved copy. There were also criteria the institution would have to meet in order to qualify to take advantage of this preservation-only exception. For example, the library would have to maintain preserved copies in a secure, managed, monitored, best practice environment. It would also have to adopt transparent means to audit the practices, have a robust storage system with backup copies, and have standard security. Probably most importantly, the institution must have the ability to fund long-term preservation. But within the recommendation, there is an allowance for smaller institutions with limited resources to deal with digital copies that are unique to their collections.

Dick was saying before the panel began that this second recommendation for an addition to section 108 is his favorite recommendation. Currently, there is nothing in 108 that would allow a library to curate a collection of websites, and yet the Study Group recognized that this is where much of the important material is being maintained. An example might be websites that deal with the weather disasters of 2012–13, and that a library may want to collect these, so if there are future weather disasters, libraries have some of the material available rather than letting the sites disappear from the web. Preserved websites would be limited to publicly available and publicly disseminated online content that is not restricted by any kind of access controls. The recommendation includes a period of embargo—for example, a year or six months—before the library could then make the website available to users remotely. Owners would be able to opt out, but not if the owner is a government or a political website. Further, the library would have to respect robots.txt or other, similar commands. Another important restriction is that preserved content would have to be labeled as such, so that a user would know this is not the current website: for example, "This is a preserved copy of a website as of a particular date."

The Group also had some miscellaneous recommendations that deal with other, more minor provisions in 108; for example, expanding the television news exception that is found in section 108(f)(3) to permit streaming of view-only copies. These would not be downloadable, but view-only copies. A second recommendation is to update the unsupervised reproduction equipment notice in section 108(f)(1) so that the library, archive or museum is not responsible if users use their own personal reproduction equipment, which now includes iPhones and other smart phones, in addition to scanners, et cetera. That notice would say that for copies made by users, making a copy is subject to the copyright law. The final miscellaneous recommendation is to reorganize 108.

The Study Group also has some conclusions on which we did not reach a recommendation but had some agreement. For example, digital copies for users that are obtained from interlibrary loan or direct copies for users. These would be under subsections (d), (e) and (g)(2), for those who are section 108 geeks. Digital distribution would be allowed with sufficient copies to provide a user with a single digital copy, but there would also have to be adequate protection measures in order

to allow that. This is a much more flexible standard than the current 108. Another conclusion, but with no recommendation, is that subsection 108(i) is really problematic, because it limits the section basically to text works, except for preservation and unpublished works and the television news exception. Libraries are increasingly acquiring more multimedia and nontraditional material that have text but which also have other media embedded in them. Subsection (i) needs to be amended so that section 108 is not just a text-based section. Perhaps this subsection should be repealed in part or totally, but any amendment would require also adopting certain conditions to address the problems inherent in reproduction and distribution of these works in order to protect copyright holders.

A number of other issues were discussed on which members of the Study Group did not reach any conclusion. For example, should virtual libraries, archives and museums be eligible for the exceptions? What about performance and display of unlicensed digital works? Licensing was also discussed along with the circumvention of technological protection measures—the section 1201 stuff. Electronic reserves were addressed, but not in detail, along with pre-1972 sound recordings. The Group considered attorneys and costs, aligning section 505 with 504(c), but reached no conclusion. There were many other things considered, such as the 11th Amendment for state institutions. One issue the Group did not address, as Dick said, was the Google Books issue. It was pretty new at that time, and it was always referred to as the three thousand pound elephant in the room. The Study Group did not know what was going to happen with it from 2005 to 2008. It was ongoing, but it was considered outside of the scope of the charge to the Study Group. Those are the recommendations in a quick nutshell. Thank you very much.

QUESTIONS AND ANSWERS

Besek: First, I want to thank all the panelists this morning in the first session, and then I want to open up the floor to questions. Who would like to ask questions?

Stephanie Gross: My name is Stephanie Gross, and I work at Yeshiva University in electronic reserves. I'd like to ask about electronic reserves. You say that you don't have any conclusions, exactly, or nothing is fixed. Where do you see this going, especially in light of Georgia State?[19]

Besek: Is that addressed to anyone in particular?

Gross: Whoever feels that they have enough information to speak.

Gasaway: One of the things with 108 that we really looked at is whether reserves should be a part of 108 and not be a part of 107. We had some discussion but finally determined that we would not make a recommendation to move it, which meant it stayed in 107. Thus, it was outside the purview of our charge, which was to look at 108. Where do I think it's going? Wish I knew. Sorry.

Rudick: Just to add to that, one of the things we decided was that we had limited time. We didn't know we had three years. I think we planned to take one

19. Cambridge Univ. Press v. Becker, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

year. And so we just made a big list of things which were very important. Somebody said, This is part of a need to overhaul our Copyright Act, and 108 isn't the only thing, maybe, that we need to look at. So, in part, it's a question of what's wrong with 108. It's also a question of what's the right place to deal with things. And we just took some things off our list, because we thought, if we're going to get agreement, we need to concentrate on what's absolutely essential. But it's a very good question.

Besek: Other questions? Yes, back there.

Deg Farrelly: Deg Farrelly from Arizona State University. I'm the media librarian there. In addition to this multiyear process of reviewing section 108, there's also been a Mellon grant project to look at videos at risk and make recommendations regarding section 108.[20] To what extent are those recommendations being incorporated into the Study Group's recommendations for section 108? Thank you.

Gasaway: The Section 108 Study Group is disbanded. I mean, we completed our work with the submission of the report. I think the Copyright Office may now combine these things. But the Study Group itself is done.

Rudick: In the Library of Congress, there's the National Digital Information Infrastructure project.[21] But there really is an ongoing program. I mean, this is so complicated, we used to worry about how to preserve paper, which it turns out is relatively simple. And you can argue that legislation is just one of two or three or four different, difficult sets of problems we need to address, but Maria is probably the better person to respond to this.

Pallante: I'll just say, very generally, I appreciate the question, but Lolly beat me to the punch, which is that as fabulous as the Study Group was, they're done now. We're going to draw heavily on the great work that they did and the analysis that they left for us, but the Copyright Office has a much broader purview to look at absolutely everything that could be relevant to amending and updating Title 17 generally. As Dick mentioned, the Library of Congress has an intense interest in video and film archives. There's the pre-1972 study, which nobody has moved on yet and which we published after a year of work. All of these issues relate to preservation, but more specifically to your question, preservation where the works are at risk, and where libraries and archives have lovingly preserved them and may, in fact, have the only extant copy of that work in their collections.

Farrelly: Could you be more specific on the report that you just referred to?

Pallante: I'm sorry, the pre-1972 sound recording report?[22] June is one of the primary authors of the report. At the request of Congress, the Office was asked to do a study of pre-1972 sound recordings, which are not currently subject to federal

20. *See* Submission by Denise Troll Covey on Behalf of Carnegie Mellon University Libraries, SECTION 108 STUDY GRP. (Mar. 7, 2007), http://www.section108.gov/docs/Covey-CarnegieMellonUnivLibes.pdf.

21. *See Digital Preservation*, LIBRARY OF CONGRESS, http://www.loc.gov/library/digitalpreservation.html (last visited Apr. 21, 2013).

22. *See Pre-1972 Sound Recordings: Executive Summary*, UNITED STATES COPYRIGHT OFFICE, http://www.copyright.gov/docs/sound/pre-72-exec-summary.pdf (last visited Apr. 21, 2013).

copyright law, and the general question was, should they be? And the conclusion of the Office—after many hearings, roundtables, its own research, meetings with stakeholders of all kinds—was basically yes they should, because if, to the extent orphan works legislation is passed, 108 is updated, those at-risk recordings—in many instances, they are at risk—would be subject to all the limitations and exceptions going forward as the law develops. It's on our website, copyright.gov.

Besek: Okay, Eric.

Eric Schwartz: Eric Schwartz, from the law firm Mitchell Silberberg. But, to address the question that was asked: I'm also on two advisory panels at the Library of Congress, one on film preservation and one on recorded sound preservation. Worth mentioning is that the Library of Congress, with a wide swath of representative organizations on preservation, libraries, archives and the like, in both film and sound, have done studies on film preservation (in 1993)[23] and on recorded sound preservation a few years ago, with, in both instances, a national plan to address preservation and access issues of multimedia materials, film and sound.[24] The Library's recorded sound preservation national plan, I believe, is supposed to be released next week—several years overdue by the Library, but coming out. And more to the point, the question has been raised many times: why only a study on film preservation, and not also on video and television materials and other media? The Library has done some additional studies, and there is definitely a call to revise the studies, not to limit it just to materials printed on film, and I think that there will be an ongoing future effort on video preservation as well.

Besek: Other questions?

Eric Harbeson: Eric Harbeson, from the University of Colorado at Boulder. Going back to Mr. Rudick's point about where this falls on the legal landscape, I want to ask about at-risk recordings of a different sort, and that's the recordings such as the soundtrack from the movie *Up*, which is currently—last I checked anyway—unavailable in any form that a library can purchase. It is available through iTunes, it is available through Amazon download, but it's not available on CD, and because of the terms of the shrinkwrap license, libraries are unable to acquire them. If you look—last time I checked—on WorldCat, the recording is not in any library. So libraries will not have the last extant copy, because we won't have a copy in the first place. I'm wondering where that falls in the legal landscape. I realize it's kind of complicated.

Gasaway: We really don't know where it falls, and that is a shame, isn't it? But section 108 was not set up as a collection building section; it was really focused on making reproductions and distributions of things that were already in the collection. So maybe that's something that we need to ask Maria for the Office to at least consider. And this isn't the only one; we've heard of older films that cannot be purchased too, so maybe we need to make sure that there is some potential for collection building when things are simply unavailable in formats that

23. *See Film Preservation 1993: A Study of the Current State of American Film Preservation*, LIBRARY OF CONGRESS, *http://www.loc.gov/film/study.html*.

24. *See National Recorded Sound Preservation Study*, LIBRARY OF CONGRESS, http://www.loc.gov/rr/record/nrpb/nrpb-clir.html.

a library can acquire and preserve.

Rudick: Well, there is one exception to the rule that we weren't concerned with collection building, and that's the proposed website exception. I don't know if you consider these websites to be a part of culture, but for better or for worse, I suppose they are. And you know, they change so quickly, and the people who create them have no interest in preserving the old versions. In fact, if you're a politician, maybe you have every interest in destroying the old versions. So that's, I suppose, the one exception to our not focusing on collection building.

Ginsburg: I have a follow up question for Maria, which is that there is a collection building provision—it's library deposit—so can't the Library of Congress demand the soundtrack?

Pallante: The Library of Congress can do that, through legal deposit or mandatory deposit, as we call it. But I think Eric, whom I've met through the pre-1972 discussion—if I could guess your follow up to that remark, it would be, "That's great for the Library of Congress, but there are many archives and libraries across the country that are doing an amazing collecting job and need help." Is that right?

Harbeson: Well, right. Because if the Library of Congress has it and they can preserve it for the future, that's great. But I don't know how well that would play out as far as policy, whether we want the Library of Congress to be the only institution that is preserving an item. I admit, I don't know whether the Library of Congress has gone through that step of demanding a deposit copy of things like the soundtrack to the movie *Up*. One of the problems is—

Pallante: I think if they haven't yet, that they're writing it down now, to do it.

Schwartz: Right, right. That's my best example of a recording at risk, but there are many, many others. Certainly, there is the Oscar winner and there's the Grammy winner that I know of, but there are also a lot of grayer recordings that the Library of Congress may not even have on its radar and may never know to ask for a deposit copy of.

Pallante: Right. So there are tough questions, and I would just say that I think there is some Congressional intent that the Library of Congress be able to do things that others can't do. I understand, on the other side, as I articulated, the concerns of other kinds of archives and libraries that aren't necessarily national institutions, and I would also understand and acknowledge that sometimes the federal institutions aren't the most nimble institutions in terms of being able to implement vision. I think that's why, for example, the Library is very interested in trying to figure out ways to network in the digital age—connect portals and do other things, all of which require a more nimble Copyright Act. And so one thing that I didn't say, but should have said and would like to say in light of Jane's remarks, is that in addition to 108 reform, many of you know that we are also very currently working on orphan works again. I think that good members of Congress would tell you that legislation takes multiple Congresses to enact. And while I've heard quite a lot of feedback about how frustrated people are that we don't yet have orphan works legislation, I don't think we're that off-course in terms of the deliberation on that issue. We just closed the first round of comments on orphan works and mass

digitization, for the first time asking about the framework for mass digitization. For us, and I'm sure for a lot of you, all of these balls in the air connect. The dotted lines are very obvious to us, so 108, and orphans, mass digitization, licensing, collective licensing and fair use are obviously interrelated, and they all form the tapestry that would make for comprehensive updates to Title 17. That's why we're here.

Besek: Other questions? Yes.

Shelly Warwick: Shelly Warwick, Touro College, New York. One of the things I've noticed is that almost all of the requirements for everything are still for onsite use. And I think, in an age where so many scholars now—you know, especially with budgets—do not travel, the ability to access things that could easily be made digitally available or streamed, or also for the sake of handicapped people who have difficulty traveling or getting to sites, it seems to me that it's staying in a very old framework not to allow offsite lending, offsite use, with obviously protections for noncopying. But I think that to stay—it's like making yourself already outdated as you go to revise—is to keep that onsite use requirement in so many of the recommendations.

Besek: I don't know if that was really a question, but thank you. Other questions? Yes?

Dwayne Buttler: I'm Dwayne Buttler, from the University of Louisville. My question is for Maria. We've had a lot of conversations—and I like fair use a lot, so I don't think it's necessarily a request for a lawyer to use it—but I do think there's some necessity for other statutory exceptions, and my question goes back to the point that you've made. I've been on lots of roundtables and things, and I always make the same point, so I'm boring, and the point is, how do we take this whole conversation that we're having today, and really make it that simple thing? I was having my car fixed last week, and my mechanic asked me about copyright law. So how do I make that a simple conversation, that my librarian colleagues can do all the good things that they do, in light of all the conversation that we've had in the first hour? So that's the question for you, how do we move that conversation to the simple framework?

Pallante: That's a huge question. I think it makes me really happy that your car mechanic knows about copyright law. You're reflecting what we all know, and have either said out loud or have thought about kind of intuitively, which is that copyright is no longer a field of law that is reserved to experts for conversation. We need technical experts, because it is a legal framework that we're discussing. But people are interested and frustrated and want clarity and want information, and either they want to be able to do what they want to do without regard for it, or they want to know how to move through the system in a way that is lawful and respectful. And I don't think that we're alone in this challenge; other countries are facing the same thing. We, as a nation, have to figure out a way to make copyright more accessible, and the government certainly has role in that, whether through education, though public offices like we have and the Patent and Trademark Office also has, through curricula possibly, or through unsticking copyright in the marketplace, moving through gridlock, having licensing systems that make more

sense, that are easy. So you know, that's a huge challenge, but you're right to raise it early in the morning.

Besek: What did your mechanic want to know?

Buttler: I think he was curious about the software that's embedded in the black box in the car. So I mentioned the iPad in the Lexus—like, who signed up for that thing?

Besek: Okay, thank you. We're going to cut it off there, sorry, but a lot of the questions are also relevant for the next panel, so there will be another opportunity to ask questions. Thank you.