

## **A Lay Perspective on the Copyright Wars: A Report from the Trenches of the Section 108 Study Group**

**Horace S. Manges Lecture: April 1, 2008**

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It is a deep honor to have been invited to deliver the Horace S. Manges Lecture this year. I value enormously the confidence of Professors Ginsburg and Besek to allow a Columbia colleague from the libraries to step up to the challenge of contributing a perspective on the debates around the current state and future development of copyright on the national and global stages. I employ the metaphors of conflict because I have been involved over a twenty-year period in the extraordinary battles that have come to define the high stakes for the legislative and legal treatment of copyright in an increasingly digital and networked world. I view this history and this present through the prism of a cultural, educational and scholarly organization, the library and archive, seeking to sustain and redefine its relevance and impact. I also observe through the lens of the university, an institution struggling to achieve a balance among its commitments teaching and learning, research and community service, in a financially and politically threatening environment.

I have outlined four basic objectives. First, I will suggest a framework for understanding the heightened attention to copyright in the library and the university. Second, I will describe from my perspective the key developments in copyright that impinge on these interests. Third, I will frame my 108 Study Group experience in the context of these trends. Fourth, I will speculate on the future of copyright hostilities and recommend a strengthening of university and library political resolve and capabilities. In my talks on copyright, I have come to recognize its basic “MEGO” character—“my eyes glaze over.” One has to be creative to sustain audience interest and commitment. I will assume a certain enthusiasm for the topic in the room, as well as a substantial level of copyright literacy to fluency. I also recognize that copyright has become a routine topic for the nation’s newspapers and magazines. It is recognized in the wider public as a new and pressing issue.

David Close, in “The Meaning of Revolution,” notes that “[t]he essential feel of revolution derives from its cataclysmic . . . quality. [It] destroys people’s security and unsettles their convictions.”<sup>1</sup> Thomas Kuhn, in *The Structure of Scientific*

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1. David Close, *The Meaning of Revolution*, in *REVOLUTION: A HISTORY OF THE IDEA* 1, 3 (David Close & Carl Bridges eds., 1985).

*Revolutions*, observes that “the transition from a paradigm in crisis to a new one from which a new tradition . . . can emerge is far from a cumulative process.”<sup>2</sup> And Karl Marx, in his theory of epistemology—his theory of ideas—maintains that ideas do not exist on their own; they are real only when they are translated into action.<sup>3</sup> The university and library communities are increasingly unsettled and insecure. They are confronting critical tipping points in their fundamental natures and societal roles. And they are bubbling with quantitative changes bordering on qualitative shifts.

A few trends will help to establish the context. Universities and libraries are increasingly focused on customization—the ability to respond to individual needs and preferences, to personalize educational and information service experiences. Universities and libraries are committed to openness—general and barrier-free access to information framed by the rhetoric of open source, open standards, open archives and open knowledge. Universities and libraries seek more self-service capability, to replicate the ATM capabilities that eliminate the limitations of time, geography and reliance on expert intervention. Clayton Christiansen comments that one of the litmus tests for truly innovative “disruptive technology” is that it enables a larger population of less skilled people to do the things that historically only an expert could do.<sup>4</sup> Universities and libraries are experiencing a state of mutability—a condition of constant change, of hybrid structures and approaches—where consistency and continuity are incessantly challenged. Universities and libraries are focused on productivity, the efficiency of individual and organizational performance. Similarly, they are increasingly concerned about usability and more interactive and user-driven processes of design and development.

Universities and libraries are confronted by heightened levels of assessment and new accountabilities to user satisfaction, cost effectiveness and impact. They are obsessed with issues of the market, such as the depth and breadth of penetration, diversification and globalization. There is a new philosophy of less strategic planning and more strategic thinking and strategic action, more agility to respond to opportunities quickly, more alignment of resources with priorities. This means a heightened capacity for business planning, for translating vision to action, for moving from concept to product, for thinking about risk capital and sustainability. It also means more focus on competition for people, resources, political attention, rankings and visibility. And finally, universities and libraries are obsessed with resource development, fundraising and grants, tapping new internal and external capacities for funds that leverage assets, and rewarding entrepreneurial, technological and intellectual property transfer capabilities. These key trends set a sufficient framework for understanding the changing academy and its increasingly schizophrenic relationship with copyright policy and practice as both creator and consumer.

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2. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 84 (2d ed. 1970).

3. For a discussion of Marx’s theory, see JOHN TORRANCE, *KARL MARX’S THEORY OF IDEAS* (1995).

4. See Nancy J. Lyons, *The Disruptive Start-Up: Clayton Christensen on How to Compete with the Best*, INC. MAGAZINE, Feb. 1, 2002, at 62.

The library faces a particularly challenging shift in its roles and responsibilities. It remains focused on core services to users: on information acquisition, synthesis, navigation, dissemination, interpretation, understanding and archiving. This commitment to get, organize, find, deliver, answer, educate and preserve are central to the library's intersection with copyright. This also translates into a new responsiveness to user expectations. Users want more and better content and access; they want convenience and the capabilities to do new things. They want control of their content and an infrastructure that supports use. They want to manage their costs and improve individual and organizational productivity.

But as the library expands its suite of activities, its role grows in complexity and ambiguity. The library is an aggressive consumer, negotiating in groups with heightened legal awareness and market power. The library is an aggregator, bringing information of diverse media together from diverse sources. The library is a publisher, participating in the scholarly communication process in partnership with the research and education sectors. The library is an educator, not just in advancing an information literacy agenda, but in the classroom and in the community as a teacher and a full partner in the learning enterprise. The library is a research and development organization, creating new knowledge, serving as a laboratory for experimentation, positioning for federal, foundation and corporate investment, and building a capacity for capital development. The library is an entrepreneur, leveraging the assets of space, content, expertise and traffic to build new customers, markets and resource streams. And the library is a policy advocate, concerned with and active on a wide range of information agendas ranging from privacy, to telecommunications, to intellectual freedom, to appropriations, to government information, to copyright.

Thus, the library's vision will embrace legacy, a responsibility for maintaining centuries of societal records in all formats. It will comprise infrastructure, the essential combination of space, technology, systems and expertise. It will be a repository, guaranteeing the long-term availability and usability of our intellectual and cultural output. It will constitute a portal, serving as a sophisticated and intelligent gateway to expanding multimedia and interactive content and tools. It will engage in an enterprise, taking on a more entrepreneurial capacity for innovation and business development. And the library's vision will be as a public-interest advocate, engaging the political process to promote the needs of the users it serves.

This shift in vision and the concomitant expansion in roles bring the library into a heightened and volatile relationship with copyright. About five years ago, I published an article in *American Libraries*, a professional magazine that reaches about 100,000 librarians worldwide, entitled "Copyright Is Dead . . . Long Live Copyright."<sup>5</sup> I argued that "[t]he American library community is confronted by a copyright axis of evil."<sup>6</sup> Although that gauntlet dates the paper and demonstrates

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5. James G. Neal, *Copyright Is Dead . . . Long Live Copyright*, AMERICAN LIBRARIES, Dec. 2002, at 48.

6. *Id.* at 48.

the will of the editor to draw readers into the article, I cited a combination of developments that I continue to find particularly troubling. These include: the rampant globalization of copyright and the efforts to harmonize laws at the risk of undermining national copyright traditions and advantages; the orgy of new legislation and laws seeking to update copyright and to advance or better protect the interests of various groups; the battery of court decisions at all levels of the judicial system defining copyright through litigation and not through public debate; new copyright imperialism of forced trade agreements imposing conservative features on national copyright law development; the hegemony of licensing, whether negotiated, shrink-wrapped or clicked through, as the means to gain access to electronic information; the pressure to embrace use guidelines to refine copyright compliance, which the library and education communities have so far successfully resisted; and new technological controls that may make it difficult and illegal to access digital information for appropriate purposes.<sup>7</sup> I would add to this list today the rampant debates on our campuses about the ownership of copyright and the review of copyright policies.

The library community brings to these developments a set of principles hammered out over the past decade.<sup>8</sup> They have served as the intellectual base and the action agenda on copyright. They include the following: (1) Copyright law should include provisions for digital works that maintain a balance among the interests of creators, copyright owners and users that is equivalent to that embodied in the current statutes for analog works. (2) Copyright law should foster the maintenance of a viable economic framework of relations between owners and users of copyright. (3) Copyright law should encourage enhanced ease of compliance. (4) Works owned by the U.S. government should be treated as belonging to the public domain, as under current law. (5) Educational institutions should foster a climate of respect for intellectual property rights by providing appropriate information and incentives to members of the community. (6) New rights and protections should be created cautiously and only so far as experience proves necessary to meet the constitutional provision for a limited monopoly.<sup>9</sup>

These basic principles have enabled the library community to respond to the complex issues involved in the adaptation of copyright to a world where information access and services are dominated by digital and networked technologies. Among the pressing questions raised in the library community are: Can digital and network-based distribution and copying be advanced in a balanced way? Can international copyright agreements be developed that do not undermine national legal traditions and values? Can fair use and access prohibitions be sustained compatibly? Can libraries remain free of liability as internet service providers?<sup>10</sup> Will copyright management systems and anti-circumvention

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7. *Id.* at 48-51.

8. See ASSOCIATION OF RESEARCH LIBRARIES, INTELLECTUAL PROPERTY: AN ARL STATEMENT OF PRINCIPLES (1994), available at <http://www.arl.org/sc/authors/ipprinciples/shtml>.

9. *Id.*

10. See 17 U.S.C. § 512 (1999) (creating limitations on liability for providers who have no actual knowledge of infringing activity, quickly disable access to infringing material if it becomes aware of

technologies be flexible enough to enable non-infringing uses?<sup>11</sup> Can terms of copyright protection be structured to maximize commercial exploitation but to also allow access to works that no longer have market value? Will copyright laws support the advancement of learning on the internet? Will the public domain be sustained or further eroded? Will a new protective regime for facts be created? Will the private law of contract effectively supplant copyright as the tool for defining public access to information?<sup>12</sup>

In the context of these principles and questions, the overarching goals of the library community have been severalfold: first, to develop policies for copyright management that enable broad and easy distribution and reuse of materials by students and scholars; second, to foster a competitive and supportive market for scholarly communication and creative work; third, to enable innovative and transformative uses of technology without undermining balance in copyright relationships; and fourth, to support the routine capture, curation and permanent archiving of information regardless of medium. In the context of these goals, the library community has developed a priority tactical plan for 2008—our “troop surge,” if you will—and it includes the following elements: monitoring the impact of the anti-circumvention provisions of the Digital Millennium Copyright Act on the work of libraries, and influencing subsequent rulemaking,<sup>13</sup> protecting, if not promoting, the doctrine of fair use in the digital environment; advancing open access to federally funded research and supporting researcher compliance with the new NIH policy,<sup>14</sup> helping authors to protect their rights by educating them on the

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such content, etc., as a part of the Digital Millennium Copyright Act).

11. See Stefan Bechtold, *Digital Rights Management in the United States and Europe*, 52 AM. J. COMP. L. 323, 360 (2004) (noting that Digital Rights Management technologies fail to recognize the limitations of copyright law and may therefore protect digital content that is not copyrightable); Julie E. Cohen, *Some Reflections on Copyright Management Systems and the Laws Designed to Protect Them*, 12 BERKELEY TECH. L. J. 161, 175 (1997) (“[copyright management systems] that prevent . . . all copying, or all free copying, will almost certainly frustrate some actions that the Copyright Act would permit”).

12. See Robin J. Allan, *After Bridgeman: Copyright, Museums, and Public Domain Works of Art*, 155 U. PA. L. REV. 961, 980-88 (2007) (examining concern that, in the absence of copyright protection for reproductions, museums will rely on restrictive contract arrangements that limit public access); Wendy J. Gordon, *Fair Use: Threat or Threatened?*, 55 CASE W. RES. L. REV. 903, 915 (2005) (“[O]verbroad contract rules and the DMCA are the true threats. They threaten the culturally-viable practices that fair use has historically sheltered.”).

13. See 17 U.S.C. § 1201 (1999) (preventing circumvention of copyright prevention technological measures, with an exception for nonprofit libraries that is applicable only when a work is not reasonably made available in another form).

14. The NIH Public Access Policy was made effective on April 7, 2008:

The Director of the National Institutes of Health shall require that all investigators funded by the NIH submit or have submitted for them to the National Library of Medicine’s PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication, to be made publicly available no later than 12 months after the official date of publication: Provided, That the NIH shall implement the public access policy in a manner consistent with copyright law.

NATIONAL INSTITUTES OF HEALTH, REVISED POLICY ON ENHANCING PUBLIC ACCESS TO ARCHIVED PUBLICATIONS RESULTING FROM NIH-FUNDED RESEARCH (2008), available at <http://grants.nih.gov/grants/guide/notice-files/NOT-OD-08-033.html>.

various agreement options and supporting deposit of works in disciplinary, institutional and personal repositories; expediting university and scholarly society policies to support open access;<sup>15</sup> lobbying for new “orphan works” legislation that will allow abandoned copyrighted works to pass into the public domain, at least for certain uses; exploiting court decisions and corporate negotiations that concern the mass digitization and searchability of copyright works; blocking any efforts to revitalize inappropriate database legislation; researching and educating on the advantages and disadvantages of blanket licenses in support of education and research; and advancing key legislative elements coming out of the report of the 108 Study Group.<sup>16</sup> There is nothing more essential to our ability to serve our users, our students and faculty, and the larger scholarly and learning communities than our success in preserving and extending fair use, in refreshing the exceptions and limitations for libraries and archives, and in retaining effective control of the content created in our communities for appropriate use and distribution across those communities.

The investigations, deliberations and report of the 108 Study Group have constituted an omnibus process for exploring the changing nature of the work of libraries, archives and their users, and the shifting expectations and needs of the content industries. It is important to understand certain basic elements of section 108. That section of the Copyright Code allows libraries and archives to engage in limited and unauthorized reproduction and distribution of copyrighted works.<sup>17</sup> It seeks to balance the public interest in protecting the exclusive rights of creators and publishers against the interests of users and those who provide access to works, like libraries and archives. The exceptions and limitations on exclusive rights do not affect fair use or nullify contractual obligations.<sup>18</sup> These three somewhat simple and obvious statements capture in dramatic fashion the contentious nature of section 108’s library exceptions. Words like “unauthorized,” “against,” “interests,” “nullify,” and “obligations” quickly suggest a sense of division and disagreement.

The 108 Study Group was convened in April 2005 under the auspices of the

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15. Several universities have adopted policies furthering open access goals in recent years. *See, e.g.*, Faculty Council, University of North Carolina at Chapel Hill, Resolution 2005-7 On Faculty Ownership of Research (2005), *available at* <http://www.unc.edu/faculty/faccoun/minutes/M05FC03.htm>; The University of Kansas, Resolution on Access to Scholarly Information (2005), *available at* <https://documents.ku.edu/policies/provost/ScholarlyInformation.htm>; Press Release, Columbia University Libraries, Columbia University Senate Endorses Resolution on Open Access and Scholarly Communication (Apr. 21, 2005), *available at* [http://www.columbia.edu/cu/lweb/news/libraries/2005/2005-04-21.open\\_access.html](http://www.columbia.edu/cu/lweb/news/libraries/2005/2005-04-21.open_access.html). Recently, Harvard University was reported to be the first university to mandate open access to its faculty members’ research publications where faculty members do not opt out of the policy. Lila Guterman, *Celebrations and Tough Questions Follow Harvard’s Move to Open Access*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 29, 2008, at A14.

16. *See* U.S. COPYRIGHT OFFICE AND NATIONAL DIGITAL INFORMATION INFRASTRUCTURE AND PRESERVATION PROGRAM OF THE LIBRARY OF CONGRESS, SECTION 108 STUDY GROUP REPORT 31-94 (2008), *available at* <http://section108.gov/docs/Sec108StudyGroupReport.pdf> (recommending topics ripe for legislative change).

17. 17 U.S.C. § 108 (2005).

18. 17 U.S.C. § 108(f)(4) (2005) (“Nothing in this section . . . in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections.”).

Library of Congress National Digital Information and Infrastructure and Preservation Program (NDIIPP) and the U.S. Copyright Office.<sup>19</sup> It was charged with studying how the exceptions and limitations for libraries and archives codified in section 108 may need to be changed due to the impact of digital technologies and in response to developments in practices since section 108 was introduced in the 1976 Copyright Act.<sup>20</sup> The Study Group also faced the need to resolve problematic ambiguities and identify useful clarifications in the section. It was asked to prepare and submit a report by early 2007. But what was planned as an eighteen to twenty month assignment extended over nearly a three-year period, and the final report has just been released.<sup>21</sup> The membership of the Study Group was diverse and representative of the expertise needed to investigate, debate and report with substance and confidence.<sup>22</sup> The deliberations focused not on the advocacy of particular community interests, but rather on the range of knowledge and experience that the participants brought to the process, and on the importance of advancing the national interest as a group.

Throughout the work of the Study Group, the commitment to civility, mutual learning, understanding and consensus generally held up. Only at two key points in the process did sectarian interests take over and the discussions become contentious. The first was when votes were taken on key areas and members were unclear as to what a vote meant for positions to be advanced in the final report. The deep complexity of the issues and the need for nuanced reporting of their details were clearly evidenced. The second point of dissonance came at the end of the process, when the members debated the selection of areas of agreement that might translate into a legislative agenda and how to present them. It was my sense that the common view was that high level consensus needed to be underpinned by detailed vetting of the issues.

A reading of the final report will demonstrate that few recommendations came forward without outstanding concerns that will require resolution in the legislative process. This is not surprising when one reviews the membership that sat around the 108 table for nearly three years.<sup>23</sup> The user community included academic, public and medical library, archives and museum representatives. Industry participants came from news publishers, the film and music industries, the photographer community, commercial, scholarly and university press publishers, the software industry and electronic content aggregators. Law school and foundation representatives also participated. Process, copyright and drafting experts assisted over the life of the project. The data gathering by the Study Group and the opportunities for community input were exemplary. The investigation was

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19. See Press Release, Library of Congress, Section 108 Study Group Convenes to Discuss Exceptions to Copyright Law for Libraries and Archives (May 13, 2005), available at <http://www.loc.gov/today/pr/2005/05-121.html>.

20. *Id.*

21. SECTION 108 STUDY GROUP REPORT, *supra* note 16.

22. The Committee's nineteen members included professionals from academia, library groups, publishing companies and a variety of other areas. See Members of the Section 108 Study Group, <http://www.section108.gov/members.html> (last visited Nov. 17, 2008).

23. See *id.*

supported by excellent reports prepared by the NDIIPP and Copyright Office staffs, work groups established from the members of the Study Group, outside experts in such areas as preservation of digital sound and video, digital rights management technologies and unpublished works, written input from hundreds of individuals and groups, and testimony and discussions at roundtable sessions held around the country.

The foreplay which led to the adoption of section 108 as part of the new copyright law in 1976 is a remarkable history of side agreements, legal challenges, guidelines and best practices, extended industry investigations and grand compromises. Section 108 reflects a progressive outrage over the expanding availability and performance of duplication technologies and library practices. It was a response to legal judgments that progressively refined the practices that could be advanced under the defense of fair use. The Study Group Report provides a detailed history of the conditions and rationale that led to section 108. It also presents a prospective agenda to Congress and predicts the types of arguments and counterarguments that will be advanced in support of and against change to this area.

The findings and recommendations of the Study Group are presented in three sections in the final report. (1) Recommendations for legislative action advance issues for which the Study Group agreed that a legislative solution was appropriate, but—and I emphasize but—legislative action is only upon the recommended resolution of a host of outstanding issues. (2) There were a few topics that the Study Group researched and debated at length, but nothing specific was settled upon. In other words, there were fundamental disagreements that Congress must face if it is to take action. (3) Finally, there were several issues addressed for which there was no consensus or interest in advancing the issue for legislative action. Allow me to highlight these three areas of the Study Group outcomes to illustrate some key points and to suggest some prospective next steps.

Let me start with the third and perhaps simplest category: additional issues without recommendations. This is a curious and somewhat random array of contentious topics. It includes such questions as: Should virtual libraries and archives, i.e. organizations that do not operate through physical premises, be eligible for section 108 exceptions? Decision: it is a premature issue because there are no sufficiently good examples to demonstrate a need.<sup>24</sup> Should user access, including display and performance, to unlicensed digital works lawfully acquired be allowed? Decision: there was no agreement and no action.<sup>25</sup> Are there circumstances when a provision of section 108 should apply notwithstanding the terms of a license or other contract? Decision: there was disagreement as to whether preservation and replacement exceptions should trump contrary terms in non-negotiable agreements, and thus no action was recommended.<sup>26</sup>

At its core, licensing is a legal matter, defining through contract the terms of use

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24. SECTION 108 STUDY GROUP REPORT, *supra* note 16, at 113.

25. *Id.* at 117.

26. *Id.* at 120.

and the cost of access. But licensing is also an economic issue. It reflects not only the price paid, but also the costs of negotiating, managing and supporting the license. It is a political issue, driven by the legal and legislative changes that threaten the application of fair use to digital information. It is a psychological issue, dependent on personal and organizational strength, will, commitment, durability and patience to achieve favorable contract terms. It is a social issue, in that the cost and quality of access and use is often determined by the ability to pay and the skills of negotiation. We face an information divide heaped on top of a digital divide, alongside the creation of classes of users driven by licensing terms.

Should libraries be able to circumvent technological protection measures that control access to a work for purposes of exercising section 108 exceptions, particularly for preservation and replacement copying? Decision: preservation by libraries is good; but there was no agreement on whether this should be enabled, because such action may conflict with the DMCA.<sup>27</sup> Should an exception be included for the reproduction of copyrighted works for use as reserve academic course material, including electronic copies? Decision: an agreement not to recommend changes at this time.<sup>28</sup> Libraries currently use permissions and fair use in such situations, and probably do not want to change such practices. Meanwhile, publishers investigate individual institutions and support more systematic guidelines in this area. Should a provision be added to section 108 to permit exceptions for pre-1972 U.S. sound recordings? Decision: it would be useful to have such a preservation provision, but there is first a need to address the underlying right to pre-1972 sound recordings in the Copyright Code.<sup>29</sup>

The next layer of findings addresses areas where legislation may be needed, but for which there was not a specific recommendation or agreement. First, should the law allow for digital technology measures to be enabled despite the exception for interlibrary loan? The Study Group could not agree as to the levels and types of protections to apply to a work that is delivered electronically so as to deter its unauthorized reproduction or distribution.<sup>30</sup> Second, should the exclusion of musical, pictorial, graphic, sculptural, motion picture and other audiovisual works be eliminated from the exception for copies for users? An agreement could not be reached as to the nature of the risks to the markets for such works and the conditions that would need to be added, although such concepts of embedded works were generally supported for the interlibrary loan exceptions.<sup>31</sup>

The bulk of the Study Group deliberations focused on areas where legislative change was endorsed—the areas of eligibility, preservation and replacement. The inclusion of museums was strongly endorsed. Additional minimal eligibility requirements were recommended, such as having a public service mission, trained staff and lawfully acquired collections. It was agreed that libraries, archives and museums (LAMs) should be authorized to outsource to contractors some of the

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27. *Id.* at 123.

28. *Id.* at 128.

29. *Id.* at 129.

30. *Id.* at 98.

31. *Id.* at 106.

activities performed under section 108 exceptions, as long as certain requirements are imposed on the outsourcing company by contract.<sup>32</sup> The three copy limit for replacement purposes should change to a limited number of copies based on what is reasonably necessary, reflecting the realities of working with digital technologies.<sup>33</sup> “Fragile” should be added as a condition for replacement, recognizing that some mediums are easily destroyed and cannot be handled without risk.<sup>34</sup> The requirement of investigation of new copy availability in the market for replacement should be mitigated by requiring only that it be a usable copy at a fair price, and in some cases this can be a licensed copy.<sup>35</sup> The Study Group supported an ability to lend a digital replacement copy of a work offsite in the same physical digital medium, assuming appropriate technological protection measures.<sup>36</sup> The preservation of unpublished works was actively debated, and similar agreement was reached as to the handling of both analog and digital works to have a reasonable number of copies for preservation and security purposes, for deposit in other institutions, and for off-site lending.<sup>37</sup>

Perhaps the most important new provisions address the preservation of publicly disseminated works and the preservation of publicly available online content, i.e. web sites and web documents. It was agreed that an exception should be added to permit qualifying LAMs to make copies to create and maintain a preservation copy of any at-risk published or other publicly disseminated work in the collections.<sup>38</sup> These issues were extensively debated, including such details as access to the preservation copies; the characteristics and qualities of the LAM qualifications, including level of ability to control access to the preservation copies; and an open and transparent auditing process. Similarly, it was agreed that an exception should be added to permit qualifying LAMs to “capture and reproduce publicly available online content for preservation purposes.”<sup>39</sup> Again, issues were actively raised, including the definition of “publicly available,” on premises versus remote access, the ability of rights holders to opt out, the handling of government and political websites, and labeling of the archived copy. An important provision was proposed to allow the transmission of television news by streaming to other section 108 eligible LAMs.<sup>40</sup> The Study Group also recommended that LAMs be relieved of liability for use of unsupervised reproducing equipment by users if they post notices in public areas stating that the making of a copy may be subject to penalties under copyright law.<sup>41</sup>

I have skimmed across a high level summary of what the section 108 Study Group discussed and advanced over a three year period. But the story is far deeper

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32. *Id.* at 39.

33. *Id.* at 52.

34. *Id.*

35. *Id.*

36. *Id.*

37. *See, e.g., id.* at 61-68.

38. *Id.* at 69.

39. *Id.* at 80.

40. *Id.* at 88.

41. *Id.* at 91.

and the prospective debates as this report is advanced to the legislative arena are far more ominous. Several world-views were ousted in the process, and it is just as important to identify and catalog these themes as it is to make any real changes to section 108. The market for copyrighted works is shifting dramatically as business models for rights holders are expanding to embrace both legacy publications and new forms of content. Will the legal standard for exceptions hold up as we recalibrate the notion of beneficial and reasonable uses without undue harm to the owner? Can we continue to meet the requirements of the Berne Convention, which mandates that “[limited] reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”?<sup>42</sup> Will international requirements undermine our ability to advance the section 108 proposals? It is noteworthy that WIPO is investigating and debating the purpose and nature of exceptions more generally. A study documenting exceptions for libraries in national copyright laws is nearing completion.<sup>43</sup> Some have also called for an international protocol for limitations and exceptions, framed as mandatory or permissible elements, so as to create consistency and stability within the global copyright system.<sup>44</sup> The international debate, particularly in the WIPO and WTO, is heating up, and the library community is jumping on board this effort to build a harmonized strategy for exceptions.

Can we forge a section 108 that will remain responsive to and supportive of new technologies? Can we be tolerant of a lower level of specificity and a higher level of ambiguity in its provisions so as to increase its adaptability, not just to current, but to future, technologies? Should LAMs be allowed to implement expanded exceptions for the preservation of works not subject to commercial exploitation? This is a very difficult area in the face of so-called “long tail” markets and the reinvigoration of works through digitization, as well as the author’s right to control whether, how, when and in what format a work is made available to the public.<sup>45</sup> How does the inability of rights holders to sue state-operated LAMs for money damages, under the provision of sovereign immunity, exacerbate the controversy over exceptions and limit the ability to achieve more liberal provisions?<sup>46</sup> Is there a category of materials that is increasingly at risk because of our legal definitions of “published” and “unpublished”?<sup>47</sup> Is distribution “in copies” sufficient, or is a new

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42. Berne Convention for the Protection of Literary and Artistic Works art. 9(2), Sept. 28, 1979, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221, available at [http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs\\_wo001.pdf](http://www.wipo.int/export/sites/www/treaties/en/ip/berne/pdf/trtdocs_wo001.pdf).

43. World Intellectual Property Organization [WIPO], Standing Committee on Copyright and Related Rights, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, WIPO Doc. SCCR/17/2 (Aug. 26, 2008) (prepared by Kenneth Crews), at [http://www.wipo.int/edocs/mdocs/sccr/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/sccr/en/sccr_17/sccr_17_2.pdf).

44. See P. BERNT HUGENHOLTZ & RUTH L. OKEDI, CONCEIVING AN INTERNATIONAL INSTRUMENT ON LIMITATIONS AND EXCEPTIONS TO COPYRIGHT 4-5, 43 (2008), available at [http://www.ivir.nl/publications/hughenoltz/limitations\\_exceptions\\_copyright.pdf](http://www.ivir.nl/publications/hughenoltz/limitations_exceptions_copyright.pdf).

45. SECTION 108 STUDY GROUP REPORT, *supra* note 16, at 29-30.

46. *Id.* at 30.

47. *Id.* at 47-48 (“Under the Copyright Act, a *published* work is one that has been distributed in material copies . . . the distribution must be ‘to the public’ . . . [and] the distribution must involve the

framework of “made available to the public” needed, so as to protect, in particular, at risk multimedia and broadcast works?<sup>48</sup>

Perhaps the greatest debates of the section 108 Study Group revolved around the fundamental purpose of copyright.<sup>49</sup> The need to protect the rights holders’ economic interest in their works was constantly juxtaposed against the LAMs’ investments in space, people, technology and expertise, in order to select, obtain, organize, service, deliver and preserve a work. Only when LAMs make these expenditures can education and scholarship, the benefits to the individual user, proceed. Without LAM investment, the economic interests of the rights holder would not be realized. Is progress achieved through incentives or through exploitation? We have seen that there are some fundamental tensions for the future development of copyright. Is it primarily a natural property right? A tool for encouraging innovation? A system of public welfare? A strategy for maximizing public access to enable exploitation and promote new works? An anachronistic legal concept rooted in property that does not map easily into a volatile and mutable framework?

Emerson once said that “sometimes a scream is better than a thesis.”<sup>50</sup> The LAM community faces the desperate need to shed its political virginity and get to the front lines of the conflict that lies ahead. Those who oppose exceptions and question the viability of fair use are well-financed, well-organized and politically connected. Under the guise of protecting copyrighted works from the ravages of network piracy and digital abuse, some are committed to undermining a copyright system that has developed over two centuries. The hallmark of that system is balance, its culture is trust, and its target is the public interest that copyright owners and LAMs both serve. Fair use is not civil disobedience. Perhaps, as the Committee for Economic Development noted in 2004, we have reached the limit of legislative and regulatory action in this area and are now undermining, rather than promoting, innovation.<sup>51</sup> Perhaps we need new business models to exploit digital distribution and new economic tools to protect the public domain. Perhaps, as the Computer and Communications Industry Association reported last year, copyright exceptions fuel economic growth and are integral to education and research.<sup>52</sup>

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transfer of ‘material’ copies . . . Section 108 provides separate treatment for published and unpublished works in connection with preservation-related activities, with broader reproduction and distribution privileges for unpublished works than for published works.”)

48. *Id.* at 50 (“In contrast to the term ‘published,’ [which refers to works that have been distributed *in copies*] . . . the term ‘publicly disseminated’ . . . refer[s] to works that have been *made available to the general public* with the authorization of the rights holder by any means . . . This term is intended to cover works transmitted by broadcast, streaming, and other electronic transmission via the Internet, as well as those transferred in hard copies or other ‘material’ copies.” (emphasis added)).

49. *See id.* at 27-28.

50. RALPH WALDO EMERSON, *The Cherokee Letter (Apr. 23, 1838)*, in 4 JOURNALS OF RALPH WALDO EMERSON 426, 427 (Edward Waldo Emerson & Waldo Emerson Forbes eds., 1910).

51. DIGITAL CONNECTIONS COUNCIL, COMMITTEE FOR ECONOMIC DEVELOPMENT, PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 2 (2004), available at [http://www.ced.org/docs/report/report\\_dcc.pdf](http://www.ced.org/docs/report/report_dcc.pdf).

52. THOMAS ROGERS, ANDREW SZAMOSSZEGI & CAPITOL TRADE, INC., COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, FAIR USE IN THE U.S. ECONOMY: ECONOMIC

What is the LAM action agenda on copyright? I would suggest the following priorities for arming this community for the war it must fight to protect the public interest: (1) be knowledgeable resources for their communities and sources of accurate and current information about copyright; (2) aggressively advocate through political action; (3) educate users to respect copyright and to practice responsible use of copyrighted works; (4) exploit fair use and exceptions to copyright to the extent possible by taking responsible risks; (5) document the impact of changes in copyright laws on their ability to serve users; (6) effectively negotiate licenses to achieve terms that advance, rather than erode, fair use and exceptions; (7) use economic clout to influence the information marketplace; (8) use community clout to influence the legislative and political process; (9) actively promote open models of information access and the creation of a commons for scholarly, educational and creative works; and (10) forge powerful and creative partnerships to advance the political agenda.

As I reflect on my twenty years of involvement in the library offensive on copyright, during which my combative posture has waxed and waned, I wonder if we did justice to the opportunity presented by the section 108 Study Group. Were we bold enough? Did we miss the opportunity to rethink the nature and purposes of exceptions? Or did we retreat into impotent models and structures, and the comfort of disagreeing camps and trite propaganda? Will Rogers once noted, “[E]very war has been preceded by a peace conference. That’s what always starts the new war.”<sup>53</sup> The section 108 Study Group was born in wisdom and inspiration, but may have passed over to process and politics. Now we can recognize the opportunity it presents to fight with a new vision for copyright law and to re-strike its balance in favor of the public interest.

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CONTRIBUTION OF INDUSTRIES RELYING ON FAIR USE 6, 39 tbl.1 (2007), available at <http://www.cciinet.org/artmanager/uploads/1/FairUseStudy-Sep12.pdf>.

53. WILL ROGERS, ROGERS PRAISES SPIRIT OF TULSA (1923), reprinted in 1 WILL ROGERS’ WEEKLY ARTICLES 94, 97 (James M. Smallwood & Steven R. Gragert eds., Okla. Univ. Press 1980).

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