



MEMO TO: IHLS Board of Directors
FROM: Leslie Bednar
DATE: April 20, 2017
RE: Copyright Reform Resolution

With the ever increasing availability and demand of electronic resources there is an evolving publishing industry poised between talent (authors) and consumers (readers). Access to e-resource content—specifically ebooks—is determined by license agreements set by the publisher.

Publisher licenses allow few options, and in the case of libraries the licensing choices include: access for a limited number of checkouts or per title, limited time access to a particular title, access to a title only on the publishers' own platform, or access via a third-party vendors' platform. The challenge for our members (and libraries across the country) is the investment they make in ebooks is not a permanent one. They can lose access to collections if they stop using a particular vendor because license agreements are not purchase agreements. Libraries do not own electronic resources, we "rent" them from content providers.

Current copyright legislation is silent on the matter of electronic resources. Over the past three years, Congress, the Department of Commerce, and the Copyright Office have all begun investigating the need to "reform" the current Copyright Act in the face of rapidly evolving technology. The Library of Congress has initiated a Notice of Inquiry seeking public input regarding whether and how Section 108 of the Copyright Act (also referred to as "library and archives exceptions") should be amended to accommodate modern technology.

Califa (a nonprofit library membership consortium representing 220 libraries in California) is working with libraries, special interest groups and institutions across the county to respond to the Library of Congress through a petition. Other institutions include RAILS (Reaching Across Illinois Library System); Connecticut State Library; State Library of Ohio; Readers First; Wisconsin Public Library Consortium (WPLC); Ocean State Libraries; Massachusetts Library System. The petition is posted online at: https://www.change.org/p/library-copyright-reform-statement-about-ebooks-sign-on?recruiter=621104411&utm_source=share_petition&utm_medium=copylink

The following pages contain additional background information from Califa and the ASCLA Consortial Ebooks Interest Group. (ASCLA is the Association of Specialized and Cooperative Library Agencies and IHLS staff participate in the Ebooks and Physical Delivery interest groups.) The last page is a draft resolution moved to the full board by the Executive Committee. Acceptance of the resolution allows IHLS to sign on to the change.org petition.

Thank you for your consideration.

Ebook Copyright Reform Background Information

Prepared by Califa and the ASCLA Consortial Ebooks Interest Group

BACKGROUND

Throughout the history of the United States, and even long prior to 1776, American libraries have served as stewards of the public good. They do this in many ways, including providing public access to a wealth of resources well beyond what any one person would otherwise be able to access, and preserving our cultural heritage by protecting the records of our history. Maintaining the constitutional balance in copyright law is absolutely imperative if libraries are to continue in their role as stewards of the public good. The move from ownership to licensing affects the ability of libraries to serve the American public and threatens the public good.

Copyright law promotes the public good through protecting the rights of both content creators (§106) and content users (§§107, 108, 109, 110). Current law could not and did not anticipate the rise of digital information and the business models, including licensing of e-publications, that have developed with it. The pertinent provisions of the Copyright Act are based on the assumption that the acquirer of a copy of a work acquires ownership of that copy, e.g., when a library or an individual pays for a hard-copy book, the purchaser becomes the owner of that copy. However, the vast majority of e-publications are available only through licensing mechanisms, in which the acquirer of a copy acquires only a limited right to access and use the copy but does not own the copy. Because licensing is a matter of private negotiations between private parties, current law is inadequate to protect the public good in licensing situations. Where e-publications are concerned, licensing terms severely threaten the ability of libraries and museums to continue serving as stewards of the public good.

The terms of the specific license applicable to any given “purchase” of an e-publication determine if the e-publication can be “rented” only for a limited number of months or checkouts, or for as long as the e-publication can be accessed on the original vendor’s platform, or whether the e-publication may be transferred to the platform of another approved third-party vendor. For the past ten years, libraries have spent millions of dollars annually on licenses that allow library users to access content that can be taken away or made inaccessible. In most cases, licensing terms presented to libraries are non-negotiable. The only choices a library has are to accept the licensing terms or to not provide their public users with access to that content; either we accept a license that restricts the public’s rights under the law, or we do not acquire the works, which then prevents the public from having access at all.

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

The letter of the law must be amended to ensure that the spirit of the law is protected in the digital environment. The purpose of statutory exceptions to a copyright owner's rights and statutory fair use is to ensure that the constitutionally required balance continues. The move from ownership to licensing in the digital arena gravely threatens this balance, as the most fundamental statutory exceptions for libraries, Sections 108 and 109, simply do not accommodate the licensing context, and Section 107 (fair use) is often overwritten in licenses that are not truly negotiable.

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

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

Furthermore, because e-publications are typically made available through the proprietary platforms of one or very few vendors, the public risks losing access to those e-publications should the vendor remove them from its catalog or even when a library ceases doing business with that vendor. Absent library ownership of copies, libraries and the general public—current and future—have no assurance that any given work will continue to be available/accessible at all, or that a given version of a work will not simply disappear.

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

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

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

ENVIRONMENTAL SUSTAINABILITY

No identifiable environmental effects or opportunities associated.

RATIONALE FOR RECOMMENDATION

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

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

ALTERNATIVE ACTIONS CONSIDERED

None

Illinois Heartland Library System
RESOLUTION No. 2017 -- 02

A RESOLUTION TO SUPPORT LIBRARY EBOOK COPYRIGHT REFORM

WHEREAS, the purpose of copyright law as stated in the Constitution is to encourage the expansion of knowledge for the public good; and

WHEREAS, the Constitution empowers Congress to achieve this purpose specifically by maintaining a balance between granting exclusive rights to creators and placing limitations on those rights; and

WHEREAS, libraries, the public good, and the law's purpose are adversely affected by the current Act, in light of its silence on modern digital formats and the issues raised by the move to licensing; and

WHEREAS, the issues and challenges presented by the Copyright Office cannot be adequately addressed simply by amending Section 108; and

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

WHEREAS, the Constitution directs Congress to maintain a balance between the exclusive rights granted to copyright holders and limitations on those rights; and

WHEREAS, this balance has been lost in the context of licensing e-publications.

NOW THEREFORE, BE IT RESOLVED the Illinois Heartland Library System calls on the Library of Congress to reestablish the balance between rights granted to creators and limitations on those rights.

BE IT FURTHER RESOLVED that the Library of Congress ensure that libraries are fully represented in discussions about reforming copyright law.

PASSED BY THE BOARD OF LIBRARY TRUSTEES OF THE ILLINOIS HEARTLAND LIBRARY SYSTEM,
OF MADISON COUNTY, STATE OF ILLINOIS, THIS ____ DAY OF _____, 2017.

President, Illinois Heartland Library Board

(ATTEST)

Secretary