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Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship

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Mr. Cross describes the privileged nature of libraries in copyright law and the way that the recent trend toward licensing content undermines that position. In response, he proposes aggressive licensing and library use guided by the public library ethos, the core set of beliefs and practices that justify libraries' privileged position.

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Introduction

¶1 Digital media present both opportunities and challenges for libraries. New technology makes traditional library functions such as cataloging and reference services easier to offer and more sophisticated than at any time in the past. At the same time, these new practices raise practical and legal issues that can challenge librarians to adapt their traditional roles to new contexts. As this process occurs, it is important for librarians to remain cognizant and respectful of the special character of their work, a respect embodied by what Laura Gasaway has called the “public library ethos.”¹

¶2 This ethos, which informs library practices, reflects the special nature of the library in American law and culture that engenders the privileged position of libraries in the law, particularly in copyright law. Changes in technology, however, often lead to changes in library practice that in turn produce pressures on the legal status of libraries and the public library ethos itself.

¶3 A recent example of these pressures can be seen in the practice of some libraries, which have begun to use subscription DVD services like Netflix to buttress

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1. Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 120 (2000).

their film collections.² This practice enables the library to offer a robust collection of DVDs as well as a significant collection of on-demand streaming media without purchasing hundreds of films, many of which are of limited or short-term interest.³ Unfortunately, Netflix offers only personal use licenses and no site licenses, so this practice seems to run afoul of the terms of service and may create substantial liability for these institutions.⁴

¶4 Libraries are beginning to embrace a similar model of content acquisition for e-books, licensing digital content rather than purchasing a physical object. There is an ongoing discussion among libraries about how this nascent model should operate,⁵ but, despite many disagreements and uncertainties, as well as recent evidence that students are ambivalent about e-books and e-textbooks,⁶ library adoption of e-books is proceeding.

¶5 These issues came to a head in the spring of 2011, when HarperCollins, a major publisher of e-books, announced that circulation of new e-book titles acquired by libraries would be “capped” at twenty-six, and then the books would expire.⁷ Despite the publisher’s claims that this expiration reflected the rate of decay in physical copies, librarians have expressed outrage at this unilateral revision to the traditional practice of library lending.⁸ The American Library Association (ALA) released an official statement criticizing the policy⁹ and has created two task forces to address the issue.¹⁰

2. Travis Kaya, *Academic Libraries Add Netflix Subscriptions*, WIRED CAMPUS (Sept. 18, 2010), <http://chronicle.com/blogs/wiredcampus/academic-libraries-add-netflix-subscriptions/27018>.

3. See Kent Anderson, *Libraries and Netflix—Questionable Borrowing Practices from People Who Know from Borrowing*, THE SCHOLARLY KITCHEN (Sept. 23, 2010), <http://scholarlykitchen.sspnet.org/2010/09/23/libraries-and-netflix-do-the-risks-of-abusing-rentals-outweigh-the-benefits>.

4. See *Terms of Use: Limitations on Use*, NETFLIX, <https://account.netflix.com/TermsOfUse#limitations> (last visited Jan. 9, 2012) (“[T]he Netflix service, and any content viewed through our service, are for your personal and non-commercial use only . . .”).

5. See, e.g., Jennifer Howard, *Librarians Puzzle over E-Books They May Buy but Not Truly Own*, CHRON. HIGHER EDUC., May 20, 2011, at A24; Jennifer Howard, *E-Books: What a Librarian Wants*, PAGEVIEW (Sept. 8, 2010), <http://chronicle.com/blogs/pageview/e-books-what-a-librarian-wants/26777>.

6. Andrea Foster, *Survey Finds That Only Half of College Students Use E-Books*, WIRED CAMPUS (June 24, 2008), <http://chronicle.com/blogs/wiredcampus/survey-finds-that-only-half-of-college-students-use-e-books/4045>; Jeffrey R. Young, *Students Remain Reluctant to Try E-Textbooks*, *Survey Finds*, WIRED CAMPUS (Oct. 26, 2010), <http://chronicle.com/blogs/wiredcampus/students-remain-reluctant-to-try-e-textbooks-survey-finds/27866>.

7. Josh Hadro, *HarperCollins Puts 26 Loan Cap on Ebook Circulations*, LIBRARY JOURNAL.COM (Feb. 25, 2011), http://www.libraryjournal.com/lj/home/889452-264/harpercollins_caps_loans_on_ebook.html.csp.

8. One library posted video of the HarperCollins books in their collection after circulating twenty-six times that were still in excellent condition. Cory Doctorow, *How a HarperCollins Library Book Looks After 26 Checkouts (Pretty Good!)*, BOINGBOING (Mar. 3, 2011, 8:24 A.M.), <http://www.boingboing.net/2011/03/03/how-a-harpercollins.html>. This claim also ignores the sophisticated preservation tools and techniques that librarians have developed through centuries of professional practice.

9. Press Release, Am. Library Ass’n, *Restrictions on Library E-Book Lending Threaten Access to Information* (Mar. 14, 2011), <http://ala.org/news/pr?id=6517>.

10. *American Library Association Tackles New Challenges in the E-Environment*, DISTRICT DISPATCH (Mar. 8, 2011), <http://www.districtdispatch.org/2011/03/american-library-association-tackles-new-challenges-in-the-e-environment/>.

¶6 These new models of content acquisition are only the latest examples of a larger trend toward licensing rather than purchasing content, particularly digital content that has no physical artifact for the library to possess. This content-licensing model has significant implications for library practice and patron service. As Anne Klinefelter has written: “[T]he copyright and related law of electronic resources is complicating and even compromising some traditional library services.”¹¹ Digital services such as streaming video and e-books are undeniably attractive, but their adoption has major consequences for libraries and for the social and civic benefits libraries provide.

¶7 This article examines the legal landscape under which libraries operate and how that landscape is being transformed by the move to licensed digital content. It begins with an overview of the current situation, describing the library as an institution that is privileged by the law and discussing the way libraries interact with the copyright law’s fair use provisions, the “library exception,” the first sale doctrine, and the educational exceptions. Next, it describes how each of these copyright provisions has been affected by libraries’ use of licensed digital content.

¶8 The adoption of a licensing model does significant harm to libraries and their patrons, reducing or even obliterating libraries’ ability to carry out their traditional mission. As illustrated by the changed application of library rights under 17 U.S.C. §§ 107–110, libraries are licensing themselves out of their established role. Reconsidering library practice in light of the public library ethos can put libraries back on the right track. After proposing a set of best practices for libraries licensing digital content in light of Gasaway’s four-part public library ethos, the article concludes by evaluating practices for streaming movies through a Netflix-like model and making text available through e-book models as illustrations of these best practices in action.

Libraries and Copyright

Libraries as Privileged Institutions

¶9 At least since Thomas Jefferson inaugurated the Library of Congress two centuries ago, American law has given special recognition to libraries in light of the unique role that they play in the accumulation, curation, and dissemination of America’s intellectual and cultural materials.¹² President John F. Kennedy described the special nature of educational institutions such as libraries in a 1963 special address to Congress:

The doors . . . to the library . . . lead to the richest treasures of our open society; to the power of knowledge—to the training and skills necessary for productive employment—to the wisdom, the ideals, and the culture which enrich life—and to the creative, self-disciplined understanding of society needed for good citizenship in today’s changing and challenging world.¹³

11. Anne Klinefelter, *Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services*, 19 LEGAL REFERENCE SERVICES Q., nos. 3/4, 2001, at 175, 176.

12. See *Jefferson’s Legacy: A Brief History of the Library of Congress*, LIBRARY OF CONG. (Mar. 30, 2006), <http://www.loc.gov/loc/legacy/loc.html>.

13. Special Address to the Congress on Education, PUB. PAPERS 105, 105 (Jan. 29, 1963).

¶10 The Supreme Court has recognized this special role in numerous cases. For example, in *Board of Education v. Pico*¹⁴ the Court identified school libraries as “the principal locus of [First Amendment] freedoms,”¹⁵ a place available to those seeking “self-education and individual enrichment.”¹⁶ Academic and public libraries serve a related function, and even private libraries that support corporations, law firms, or researchers provide enrichment and education that benefit all citizens with better-informed business, legal services, and research, promoting “the progress of science and useful arts.”¹⁷

¶11 Beyond self-improvement, libraries are understood to be a powerful engine for the social and civic advancement of the nation as a whole. As one court wrote, libraries are “a vital institution in the continuing American struggle to create a society rich in freedom and variety of thought, broad in its understanding of diverse views and cultures and justifiably proud of its democratic institutions.”¹⁸ In short, libraries enable self-improvement and societal advancement, and the legal structures relating to libraries recognize this special role.

¶12 Librarians take this role extremely seriously. Laura Gasaway has described the way librarians understand their role as the “public library ethos.”¹⁹ She identifies four core values that make up this ethos: connecting people to ideas, offering “unfettered access to recorded knowledge,” encouraging “[l]earning in all its contexts,” and the “preservation of the human record.”²⁰ Taken together, these could be described broadly as bringing “information to the people.”²¹ As Gasaway writes, “libraries are a shared intellectual resource maintained at public expense to provide resources that will be shared.”²² These values have developed over the course of many years²³ and interact significantly with copyright law. As noted, the law recognizes these values and, in the copyright context, these special exceptions are contained in sections 107–110 of the Copyright Act.

Section 107: Fair Use

¶13 Fair use is one of the most important aspects of copyright law for library practice, but also one of the most daunting for librarians to employ. A general

14. 457 U.S. 853 (1982).

15. *Id.* at 868–69.

16. *Id.* at 869.

17. U.S. CONST. art. I, § 8. Libraries in for-profit corporations and law firms are distinct in important ways. Their interrelationship with for-profit organizations often has an effect on their practice, and copyright law recognizes these differences. Some exceptions, such as the TEACH Act (discussed *infra* ¶¶ 27–32), are simply not available, and in cases where these libraries avail themselves of fair use, their claims may be substantially weakened by changes in the purpose and character of their use. Nevertheless, their core mission as libraries still relates to providing information in support of creative, often civic-minded expression. As such, the public library ethos may still be an important aspect of their practice as they make copyright and licensing decisions to support library users.

18. *Bicknell v. Vergennes Union High Sch. Bd. of Dirs.*, 475 F. Supp. 615, 619 (D. Vt. 1979), *aff'd* 638 F.2d 438 (2d Cir. 1980).

19. Gasaway, *supra* note 1, at 120.

20. *Id.* at 124.

21. *Id.* at 121.

22. *Id.*

23. For an overview of the historical development of this ethos, see *id.* at 126–31.

defense to a charge of unauthorized use based on the benefit to society balanced against minimal harm done to the rights holder, fair use is deliberately open-ended to accommodate use in a variety of contexts.

¶14 Ann Bartow has described fair use as “an elastic and evolving concept that perplexes even those charged with applying the doctrine.”²⁴ Kenneth Crews has called it simultaneously the most important and most misunderstood aspect of copyright law.²⁵ Fair use is deliberately amorphous and undefined because it must be malleable and flexible. It has been called the “safety valve” of copyright,²⁶ and many scholars have argued that the protections of fair use are necessary to keep copyright’s content-based restrictions of expression from running afoul of the First Amendment.²⁷

¶15 Originally established in the common law,²⁸ fair use was codified by the 1976 Copyright Act.²⁹ Although it remains an “equitable rule of reason,”³⁰ the statute provides four factors for consideration:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.³¹

¶16 Fair use is not a checklist where all factors must be met, nor is it a vote where the majority wins. Indeed, the statute indicates that these factors are not exclusive—other factors can be and have been included in a fair use analysis.³² As Deborah Gerhardt and Madelyn Wessel observe, fair use is complex and multifaceted, requiring analysis of legal, factual, and policy considerations.³³

24. Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 28 (2003).

25. See KENNETH D. CREWS, *COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS* 39–40 (2d ed. 2006).

26. E.g., John Schulman, *Fair Use and the Revision of the Copyright Act*, 53 IOWA L. REV. 832, 832 (1968).

27. See, e.g., DAVID L. LANGE & H. JEFFERSON POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 46–54 (2009); NEIL WEINSTOCK NETANEL, *COPYRIGHT’S PARADOX* 190–93 (2008).

28. See *Folsom v. Marsh*, 9 F. Cas. 342, 349 (C.C.D. Mass. 1841) (No. 4901); *Lawrence v. Dana*, 15 F. Cas. 26, 58 (C.C.D. Mass. 1869) (No. 8136). See also Daniel E. Abrams, Comment, *Personal Video Recorders, Emerging Technology and the Threat to Antiquate the Fair Use Doctrine*, 15 ALB. L.J. SCI. & TECH. 127, 130 (2004) (“The doctrine has existed in common law for some time as an equitable defense designed to ‘avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster’”) (quoting 4 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 13.05 (1998)).

29. Pub. L. No. 94-553, § 107, 90 Stat. 2541, 2546 (1976).

30. H.R. Rep. No. 94-1476, at 65 (1976). But see Pierre N. Leval, *Nimmer Lecture: Fair Use Rescued*, 44 UCLA L. REV. 1449, 1456–58 (1997) (attacking what he describes as the “‘Equitable Rule of Reason’ canard”).

31. 17 U.S.C. § 107 (2006).

32. Joseph J. Raffetto, *Defining Fair Use in the Digital Era*, 15 U. BALT. INTELL. PROP. L.J. 77, 80–81 (2006); William C. Walker, Jr., *Fair Use: The Adjustable Tool for Maintaining Copyright Equilibrium*, 43 LA. L. REV. 735, 742 (1982–1983).

33. Deborah Gerhardt & Madelyn Wessel, *Fair Use and Fairness on Campus*, 11 N.C. J.L. & TECH. 461, 484 (2010) (“[F]air use analysis is not easy. It is not neat. It is not clear. It requires a vigilant eye over current legal decisions and factual, case-by-case, intensive review of factors that sometimes conflict.” (footnotes omitted)).

¶17 An examination of these factors indicates how library use often fits comfortably under the aegis of fair use. As nonprofit, educational institutions, most libraries begin fair use analysis on a firm footing. The first factor, purpose and character of the use, almost always favors libraries' educational, generally nonprofit use. The fourth factor, effect on the market, is a point of contention for many stakeholders. Publishers often characterize any library use as a "lost sale," but librarians may counter that the library purchase mitigates this harm, particularly where a use falls below the threshold amount where a user would have purchased an entire work. Factors two and three, the nature of the work and the amount and substantiality used, are more case-specific, but most library practice is targeted to the type and amounts appropriate to the library's or patron's need. As Gerhardt and Wessel note, "When the first and fourth fair use factors favor a finding of fair use, as they will in many educational contexts, a finding of fair use is nearly assured."³⁴

¶18 Gasaway describes how librarians interpret fair use in light of the public library ethos as a "user's right" that goes beyond being a legal defense; rather, it is a tool to protect and empower individuals and libraries.³⁵ This perspective is buttressed by the Copyright Act's special protection from statutory damages, remitting damages in situations where librarians "believed and had reasonable grounds for believing" that their use was fair.³⁶ Fair use is at the heart of library operations, and its factors are designed to privilege the sort of use that makes up core library functions.

Section 108: The Library Exception

¶19 Section 108 of the copyright law, colloquially referred to as the "library exception," permits libraries to reproduce copyrighted works without permission in some situations.³⁷ For example, under certain circumstances library and archival staff can make copies for preservation,³⁸ to replace damaged or stolen works,³⁹ and to reproduce published works in the last twenty years of their copyright protection.⁴⁰

¶20 Librarians can also make copies for a library user, reproducing single articles for private, noncommercial use by patrons and reproducing an entire work where a replacement copy cannot be found for a fair price.⁴¹ Finally, section 108 permits lending of reproductions of copyrighted works to users in other libraries for private, noncommercial use.⁴²

¶21 The library exception codifies libraries' central role in preserving and curating information. This is particularly important because information is stored

34. *Id.* at 499 (citing Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 584 (2008)).

35. Gasaway, *supra* note 1, at 123 (citing 17 U.S.C. § 108(f)(4) (2006): "nothing shall affect the right of fair use . . .").

36. 17 U.S.C. § 504(c)(2) (2006).

37. *Id.* § 108.

38. *Id.* § 108(b).

39. *Id.* § 108(c).

40. *Id.* § 108(h).

41. *Id.* § 108(e).

42. *Id.* § 108(a), (d).

in media that are constantly deteriorating.⁴³ Physical artifacts ranging from books to CDs to films decay or become worn, and libraries do substantial work preserving and repairing them. Digital media present different challenges but can be substantially more costly to preserve than traditional media.⁴⁴ Section 108 is expressly designed to support library practice, and without the section 108 exceptions, libraries would be unable to do their job, and many of the artifacts of recorded knowledge would simply be lost.⁴⁵

Section 109: First Sale

¶22 The first sale doctrine has been present in American copyright law since its inception in the common law⁴⁶ and has been included in both twentieth-century copyright statutes.⁴⁷ It is also at the heart of libraries' day-to-day operations. It provides libraries, and anyone who owns a particular copy of a copyrighted work, with an exception to the copyright holder's exclusive rights. Anyone who purchases or lawfully acquires a copy of a work can dispose of that copy however they wish under section 109(a).⁴⁸ This permits owners to sell, give away, or lend their copies of a work.

¶23 There are several limitations to section 109(a). First, section 109 protects only distribution; it gives libraries no right to reproduce, publicly perform, or adapt a copyrighted work without authorization.⁴⁹ Section 109(a) also limits protection to the specific copy of the work, the physical artifact itself. It grants no protection to distribution of the underlying content.⁵⁰ Similarly, works that are transferred by rental, lease, or lending for direct or indirect commercial purposes also fall outside of the scope of 109(a).⁵¹ Section 109 permits owners to display a legally acquired copy, provided that, for images, only one image is displayed at a time in the same place that the artifact itself is held.⁵²

43. ROBERT L. OAKLEY, COPYRIGHT AND PRESERVATION 1 (1990), available at <http://www.eric.ed.gov/PDFS/ED328263.pdf> ("Virtually every medium of expression is threatened today by the natural forces of deterioration.").

44. See generally Margaret Hedstrom, *Digital Preservation: A Time Bomb for Digital Libraries*, 31 COMPUTERS & HUMAN. 189 (1998).

45. See generally Laura N. Gasaway, *America's Cultural Record: A Thing of the Past?*, 40 Hous. L. REV. 643 (2003).

46. See, e.g., *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908) (holding that the copyright owner's right to "vend" his book did not give the copyright owner the right to restrict future retail sales of the book or the right to require that the book be sold at a certain price per copy).

47. Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075, 1084; Copyright Act of 1976, Pub. L. No. 94-553, § 109, 90 Stat. 2541, 2548.

48. 17 U.S.C. § 109(a) (2006).

49. See Keith Kupferschmid, *Lost in Cyberspace: The Digital Demise of the First Sale Doctrine*, 16 J. MARSHALL J. COMPUTER & INFO. L. 825, 832-35 (1998).

50. See 17 U.S.C. § 202 (2006) (stating that when a party transfers ownership of a material object in which a copyrighted work is fixed, such transfer does not transfer any rights in the copyrighted work itself).

51. For a discussion of the development of the "rental right," see Kupferschmid, *supra* note 49, at 833-35.

52. 17 U.S.C. § 109(c).

¶24 Section 109 is vital for at least two reasons. First, it permits libraries to lend items to users, facilitating the “sharing” function at the heart of libraries’ mission. This maximizes the efficiencies of shared copies as well as making it economically feasible for libraries to offer patrons access to works for free, providing information to poor citizens who would otherwise be unable to access it and reap the personal and social benefits of better-informed citizenship.

¶25 Section 109 is equally vital to the library’s function of preserving information and artifacts. Along with museums, libraries are one of the few public organizations that make sure that works that are less popular or are no longer being commercialized do not fade away into the dust of history.

Section 110: Education and Streaming

¶26 Finally, section 110 governs nonprofit educational performances and displays. Libraries interact less directly with section 110, but the section still plays an important role in the educational mission of libraries. Section 110 contains two subsections governing physical and digital instruction respectively. Section 110(1) permits public performances and displays of a work by instructors or students in the course of face-to-face teaching activities in a nonprofit educational institution.⁵³ This is tangentially related to core library activities, but is used when libraries offer programming or instruction or when, at the request of a faculty member, for example, they show films in the library for a class and the library becomes the “classroom” for that purpose.

¶27 Section 110(2), the Technology, Education and Copyright Harmonization (TEACH) Act, deals with instruction in the online environment.⁵⁴ To reassure publishers that are concerned about the openness of the online environment, TEACH places several institutional and individual requirements on universities regarding copyright notice and protection. These institutional requirements include limiting TEACH’s application exclusively to “government or accredited educational institutions.”⁵⁵ In order to qualify for TEACH, these institutions must create and display an institutional copyright policy, publish copyright information, and offer a specific notice to students regarding the copyright status of materials being performed or displayed.⁵⁶ These requirements are generally common sense and impose no serious barriers to streaming video in a reasonable fashion.

¶28 TEACH also creates a set of technological requirements designed to ensure that the “classroom” nature of the online space is retained in the open environment of the web. These include limiting access to enrolled students and the establishment of technological measures that reasonably prevent retention or further dissemination of materials.⁵⁷ As with the institutional requirements, these do not place undue strain on an institution that wishes to offer streaming video. Password protection fulfills the limited access requirement, and the act of streaming functionally limits retention and further dissemination.

53. *Id.* § 110(1).

54. *Id.* § 110(2).

55. *Id.*

56. *Id.* § 110(2)(D)(i).

57. *Id.* § 110(2)(D)(ii).

¶29 The third set of TEACH requirements places restrictions on the practice of instruction. Unlike the institutional and technical requirements, which primarily implicate the institution's policies and online architecture, these requirements necessitate cooperation between the institution and the individual instructor. Instructors must provide specific oversight, that is, items posted or streamed must be "at the direction of or under the supervision of the instructor." Further, the materials must be "an integral part of a class session" and "directly related and of material assistance to the teaching content."⁵⁸

¶30 Although aimed primarily at instructors, TEACH has important implications for the ways that libraries make information available. As Kenneth Crews writes,

Nothing in the TEACH Act mentions duties of librarians, but the growth and complexity of distance education throughout the country have escalated the need for innovative library services. Fundamentally, librarians have a mission centered on the management and dissemination of information resources. Distance education is simply another form of exactly that pursuit.⁵⁹

TEACH can be seen as creating a new avenue by which to share information through streaming. It also creates new opportunities and obligations when providing information in the digital environment.

¶31 One important limitation of TEACH is that, like 17 U.S.C. § 110(1), it only covers performance and display of works. For example, under TEACH, a video clip could be streamed but an article could not be posted, since that would be a distribution, rather than a display. Nonetheless, TEACH remains an important part of the infrastructure of library practice, facilitating instruction and reference activities.

¶32 Section 110(4) comes into play for libraries making noncommercial, non-public performances of nondramatic literary or musical works. Designed to permit limited "performances" such as poetry readings or musical performances, section 110(4) allows libraries to enhance their programming and community activities.

Consequences of Licensing

From Rights of Ownership to Terms of Service

¶33 Libraries have undergone a major shift in collection development practice in the last twenty years, moving a substantial amount of their collections budgets from purchasing content to licensing it. One study indicates that from 1994 to 2005 the use of licensing agreements rose by 600%.⁶⁰ The consequences of licensing are important and far-reaching. Most obviously, licensing content removes library ownership from the legal equation, and this has both legal and practical consequences.

58. *Id.* § 110(2)(A).

59. KENNETH D. CREWS, *NEW COPYRIGHT LAW FOR DISTANCE EDUCATION: THE MEANING AND IMPORTANCE OF THE TEACH ACT 10* (rev. Sept. 2002), available at <http://web2.ala.org/ala/aboutala/offices/oitp/publications/issuebriefs/Teach%20Act%20Summary.pdf>.

60. Sharon Farb, *Libraries, Licensing and the Challenge of Stewardship*, 11 *FIRST MONDAY*, no. 7 (2006), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1364/1283>.

¶34 Practically speaking, of course, licensed digital content is not physically stored in the library. This has an enormous effect on the day-to-day use of material, particularly in the context of uses that are legally uncertain but may be subject to fair use. Possession of the physical artifact permits librarians, rather than content holders, to make copyright determinations, since they have the item in-hand to use, copy, or circulate.

¶35 License terms restrict librarians' ability to make copyright determinations, and in fact, these terms are often coded into the digital material. As a result, in cases of contested use or legal gray areas such as fair use, where a librarian could decide for himself to lend or copy a physical object, the digital version most often forecloses this option entirely. Coupled with the Digital Millennium Copyright Act's prohibition on measures to circumvent technological restrictions,⁶¹ the computer code of digital objects can override the rights of libraries that may be permitted by the Copyright Act.⁶²

¶36 Licensing also transforms a one-time purchase cost into a recurring one that, if not paid in perpetuity, may cause materials to disappear from the collection altogether.⁶³ Further, the terms are often difficult to negotiate, particularly where a single publisher has a stranglehold on a journal or set of materials that is central to a library's mission or critical for the work of patrons. This often leads to publishers' "bundling" multiple works into a package that libraries must take or leave.⁶⁴ Negotiating is made even more difficult for libraries because of limitations imposed by publishers against disclosure of pricing and terms. These nondisclosure clauses "allow publishers unilateral control over communication about the purchase or the terms of use of the product,"⁶⁵ often forcing librarians to negotiate without crucial information about peer institutions and the market for works.

¶37 Even when licenses are purchased, technical difficulties beyond the library's control may make a work unavailable. Because online journals are hosted on publishers' servers, anytime the publisher has technical issues libraries and patrons may lose all access to the licensed content. Unlike a proprietary online database, physical books never "go down."

¶38 Beyond the pragmatic considerations of physical possession, the move to licensed digital content has important ramifications for the legal strictures that control libraries' ability to operate in harmony with their ethos. Bartow argues that this move to licensed digital content has allowed publishers to "restructure their relationship with libraries and to force abandonment of all pre-existing norms in the new distribution mediums."⁶⁶ Each of the copyright exceptions available to libraries is affected negatively by this restructured relationship.

61. Digital Millennium Copyright Act, 17 U.S.C. § 1201(a)(1)(A) (2006).

62. See generally LAWRENCE LESSIG, *CODE: VERSION 2.0* (2006).

63. Ann Bartow, *Some Peer-to-Peer, Democratically, and Voluntarily-Produced Thoughts*, 5 J. ON TELECOMM. & HIGH TECH. L. 449, 464–65 (2007) (reviewing YOCHAI BENKLER, *THE WEALTH OF NETWORKS* (2006)).

64. See, e.g., Karla Hahn, *The State of the Large Publisher Bundle: Findings from an ARL Member Survey*, ARL, no. 245, Apr. 2006, at 1, 1, available at <http://www.arl.org/bm~doc/arlbr245>.

65. Farb, *supra* note 60.

66. Bartow, *supra* note 24, at 78.

Section 107: Fair Use

¶39 In Gerhardt and Wessel's investigation of the state of fair use on campus,⁶⁷ the authors observe that evaluating fair use is one of the most complex legal decisions librarians must make and that this complexity often leads large institutions simply to decline to exercise their fair use rights at all.⁶⁸

¶40 These complexities are multiplied exponentially in the digital environment, because there is less established law and practice on which to rely and because new uses appear frequently. Large institutions are naturally risk averse, and fair use provides no certain answers as to what uses are permitted,⁶⁹ so many institutions are extremely reluctant to assert their fair use rights except in the most cut-and-dried circumstances.

¶41 Even more problematic is that licenses often remove fair use from the equation altogether. More than a decade ago scholars expressed concern that a licensing regime "could be developed so that it disallows any free use of copyrighted works, even uses that qualify as fair use."⁷⁰ A recent study of library licensing practices concluded that roughly a quarter of licenses have made this fear a reality, expressly prohibiting fair use by the terms of the license.⁷¹

¶42 As the copyright statute makes clear, contracts such as the licenses that libraries sign trump copyright exceptions, leaving libraries without the fair use "balancing test" between owners and users.⁷² The unique nature of fair use as copyright's "safety valve" might suggest that completely removing fair use would violate the First Amendment.⁷³ By locking up expression, copyright is naturally in constant tension with the guarantees of the First Amendment, which regards content-based prohibitions on expression as presumptively unconstitutional.⁷⁴ The Supreme Court has concluded that copyright is saved by the flexibility of fair use, which

67. Gerhardt & Wessel, *supra* note 33.

68. *Id.* at 465 ("When answers are not clear and potential liability is thought to be significant, saying 'no' to a proposed use is often considered the safest course. The legal risks may be perceived as especially threatening at institutions with limited resources. In seeking clarity and avoiding risk, the temptation can be strong to act as if fair use does not exist and to shift campus copyright policy to a safe zone based on blanket licenses, fees, and permissions, even when law would not require these actions.").

69. Lawrence Lessig's infamous quip that fair use amounts to little more than "the right to hire a lawyer," LAWRENCE LESSIG, *FREE CULTURE* 187 (2004), expresses an important truth, but this gallows humor also indicates the fatalistic outlook many users have toward a right that should be central to copyright analysis in the context of library use.

70. Glen M. Secor, *Fair Use in a Pay-per-Use World*, 21 *LIBR. ACQUISITIONS: PRAC. & THEORY* 53, 58 (1997).

71. Farb, *supra* note 60, at fig.2.

72. 17 U.S.C. § 108(f)(4) (2006). See also Elizabeth M.N. Morris, *Will Shrinkwrap Suffocate Fair Use?*, 23 *SANTA CLARA COMPUTER & HIGH TECH. L.J.* 237, 241 (2006–2007).

73. See Dan L. Burk & Julie E. Cohen, *Fair Use Infrastructure for Rights Management Systems*, 15 *HARV. J.L. & TECH.* 41, 43 (2001); see also David Lange & Jennifer Lange Anderson, *Copyright, Fair Use and Transformative Critical Appropriation* 134–35 (Nov. 2001), available at <http://www.law.duke.edu/pd/papers/langeand.pdf> (stating that in a competition between copyright and First Amendment rights, copyright must lose).

74. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46–47 (1986) ("[R]egulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment.").

permits the unfettered, socially valuable expression necessary for the marketplace of ideas to function.⁷⁵ As such, a regime that removes fair use from the equation closes off this “safety valve” and might put too much pressure on free expression, unconstitutionally violating the guarantees of the First Amendment.

¶43 So far this argument is untested by the courts, and its prospects are not promising in the context of contract law. There are several cases holding that First Amendment freedoms can be waived by contracts such as government service⁷⁶ and press confidentiality agreements.⁷⁷ The chances of a court’s invalidating a negotiated license based on violation of the First Amendment are extremely slim.

Section 108: The Library Exception

¶44 The problems discussed regarding fair use loom even larger in the section 108 context. Where fair use is expressly removed by a quarter of licenses, the right to archive is removed by more than half of the library licenses surveyed by Farb.⁷⁸ Even in cases where a license does not foreclose section 108 copying, many of the section 108 protections are blunted in the digital environment.⁷⁹ These problematic areas include difficulties with defining what constitutes a “copy,” as well as the nature of lending “reproductions” in section 108(d) and (e).

¶45 These problems have been identified and discussed by the Section 108 Study Group that has worked to understand and address these problems. In a 2007 article describing her experience in the study group, Laura Gasaway identifies four areas where section 108 challenges library practice in the digital realm: institutional eligibility, preservation and replacement, digital copies for users, and specific practice issues.⁸⁰ Gasaway proposes solutions based on the work of the study group, but they have not yet been adopted. At present, a host of issues remain unresolved, and even areas that might be promising exist at the whim of rights holders who license content to libraries.

Section 109: First Sale

¶46 Even without express licensing language, first sale simply does not apply to licensing regimes where there is no “sale,” but only licensed use.⁸¹ As R. Anthony Reese notes, the first sale doctrine serves several important interests, particularly in

75. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 220 (2003) (fair use is a “traditional First Amendment safeguard[.]” which “affords considerable ‘latitude for scholarship and comment,’ and even for parody.” (citations omitted) (quoting *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 560 (1985))).

76. See *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972) (holding that a former CIA employee could be required to submit material to the agency for approval prior to publication under the terms of a signed secrecy agreement).

77. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670 (1991) (holding that enforcement of general rules of promissory estoppel does not violate the First Amendment). See also G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433, 479–82 (1993).

78. Farb, *supra* note 60, at fig.2.

79. See, e.g., Roberta Rosenthal Kwall, *Library Reproduction Rights for Preservation and Replacement in the Digital Era: An Author’s Perspective on § 108*, 29 COLUM. J.L. & ARTS 343 (2006).

80. Laura N. Gasaway, *Amending the Copyright Act for Libraries and Society: The Section 108 Study Group*, 70 ALB. L. REV. 1331, 1339–44 (2007).

81. See Kupferschmid, *supra* note 49; Charles A. Masango, *The Future of the First Sale Doctrine with the Advent of Licenses to Govern Access to Digital Content*, 7 S. AFR. J. INFO. & COMM. 64 (2006).

the context of library use, all of which are lost when works are licensed digitally rather than purchased. First sale enables libraries to offer works to patrons at minimal cost as well as providing out-of-print works and works withdrawn by the publisher, and to preserve rare works, but all of these functions are threatened if the first sale exception is not available.⁸²

¶47 One author goes further, arguing that this change effectively creates an entirely new right for publishers: the “right to control access.”⁸³ Some scholars have argued that the first sale doctrine could be updated or reinterpreted to accommodate the library’s special function,⁸⁴ but so far such proposals have not led to any official action. In the present environment, licensed digital items simply do not qualify as works libraries own, and libraries therefore have no recourse to section 109’s first sale provision.

Section 110: Streaming Under TEACH

¶48 The TEACH Act is limited by licensing in several important ways. At the selection level, TEACH’s requirement that only legally obtained copies be used may preclude the use of items that are licensed but not owned. Indeed, collection development decisions are fundamentally complicated by the uncertain nature of licensed materials. Librarians relying on TEACH to stream their audio and visual collections may also be frustrated by licenses that limit TEACH-based activities by contract or through technological locks on use and copying.

¶49 Many librarians rely on TEACH when they engage in online instruction using materials in the library’s collection.⁸⁵ When using licensed materials, however, librarians may be uncertain whether those library materials qualify as “lawfully made or acquired”—as mandated by the TEACH Act⁸⁶—if they are working with patrons not covered by their license. As with the rights discussed above, of course, explicit language in the license may further restrict the librarian’s activities, particularly in the online context.

Restoring the Public Library Ethos

¶50 Licensing as it is currently practiced significantly harms, and in some cases completely dismantles, the copyright infrastructure designed to support the societally valuable work libraries perform. In the long run, lawmakers and judges

82. See R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 644–50 (2003).

83. Eric Matthew Hinkes, *Access Controls in the Digital Era and the Fair Use/First Sale Doctrines*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 685 (2006–2007).

84. See, e.g., Victor F. Calaba, *Quibbles ’n Bits: Making a Digital First Sale Doctrine Feasible*, 9 MICH. TELECOMM. TECH. L. REV. 1 (2002); Henry Sprott Long III, Comment, *Reconsidering the “Balance” of the “Digital First Sale” Debate: Re-Examining the Case for a Statutory Digital First Sale Doctrine to Facilitate Second-Hand Digital Media Markets*, 59 ALA. L. REV. 1183 (2008).

85. See Kate Irwin, Note, *Copyright Law—Librarians Who TEACH: Expanding the Distance Education Rights of Libraries by Applying the Technology Education and Copyright Harmonization Act of 2002*, 29 W. NEW ENG. L. REV. 875 (2007).

86. 17 U.S.C. 110(2) (2006).

evaluating library use must confront this problem, but there is no indication that change is imminent. Indeed, the recent trend has been in the other direction, with rights holders carving out greater and greater limitations through aggressive practice⁸⁷ and targeted lobbying.⁸⁸

¶51 Libraries and librarians are unlikely to acquire the wealth or clout to challenge seriously the tens of millions of dollars annually spent⁸⁹ by the content industry bending Congress's ear.⁹⁰ Librarians can, however, begin aggressively to assert their rights in ways that respect the law but that also recognize the privileged nature of library activities.

¶52 Aggressive decision-making not only allows librarians to better serve their patrons, it has important doctrinal consequences as well. In copyright law, established norms have a positive effect on the law itself. This is especially true for licensing, where library practice leads to what copyright scholar James Gibson calls "doctrinal feedback."⁹¹ Because the scope of copyright and particularly of fair use can be ambiguous, and many libraries are risk averse in the face of potential litigation, they often seek licenses in cases where no license is needed or where liability is unlikely to exist.

This practice of unneeded licensing feeds back into doctrine because of one final uncontroversial premise: the fair use defense looks to the existence *vel non* of a licensing market when defining the reach of the copyright entitlement. The result is a steady, incremental, and unintended expansion of copyright, caused by nothing more than ambiguous doctrine and prudent behavior on the part of copyright users.⁹²

¶53 In response to this tide of doctrinal feedback, librarians need to reclaim their rights. To do this safely and credibly, however, library practice must be grounded in the public library ethos that justifies libraries' privileged position.⁹³ This ethos has four central components: the connection of people to ideas, unfet-

87. See, e.g., Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 658–61 (2005) (discussing the Recording Industry Association of America's (RIAA) series of lawsuits against file-sharing services despite their use for non-infringing purposes).

88. See Lewis Kurlantzick & Jacqueline E. Pennino, *The Audio Home Recording Act of 1992 and the Formation of Copyright Policy*, 45 J. COPYRIGHT SOC'Y U.S.A. 497, 499–500 (1998) (describing the lobbying efforts of the industry and RIAA to form copyright legislation in the face of opposition from the consumer electronics industry).

89. In 2009 the RIAA alone spent \$17.5 million, and over the past decade the RIAA's lobbying efforts totaled more than \$90 million. Mike Masnick, *RIAA Spent \$90 Million in Lobbying the US in the Past Decade*, TECHDIRT (Jan. 7, 2011, 1:04 A.M.), <http://www.techdirt.com/articles/20110106/15414312556/riaa-spent-90-million-lobbying-us-past-decade.shtml>.

90. See Aaron M. Bailey, Comment, *A Nation of Felons? Napster, the NET Act, and the Criminal Prosecution of File-Sharing*, 50 AM. U.L. REV. 473, 485 n.71 (2000) (citing Kurlantzick & Pennino, *supra* note 88, at 499–500); Brett J. Miller, Comment, *The War Against Free Music: How the RIAA Should Stop Worrying and Learn to Love the MP3*, 82 U. DET. MERCY L. REV. 303, 325 (2005) (discussing the "brobdingnagian amount of money the RIAA spends lobbying Congress each year").

91. James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 885 (2007).

92. *Id.* at 887.

93. See Gasaway, *supra* note 1. Certainly this is not the only articulation of core library values. Gasaway's "public library ethos," however, offers a set of values specifically for addressing the copyright issues "dealing with making works and information available to users." *Id.* at 121 n.22.

tered access to information, support for learning in all its contexts, and preservation of the human record.

Connection of People to Ideas

¶54 The first principle of the public library ethos is the idea of libraries as institutions devoted to connecting people to ideas. Grounded in the library's role as a source of individual education and personal growth, this is, according to Gasaway, the most important core value of bringing "information to the people."⁹⁴

¶55 This value implicates libraries as the source of informational artifacts as well as educational programming and reference services in support of the public good. Significantly, despite the ways that the Copyright Act often distinguishes between nonprofit libraries and truly "educational institutions" such as universities,⁹⁵ librarians generally do not make this distinction between purely educational institutions and libraries that work to educate all citizens whether or not they are enrolled in a specific course of study. The functions of academic and school libraries are deeply intermingled with academic institutions. Public libraries have been described as "the people's university,"⁹⁶ and librarians often regard library space as an extension of the classroom.

¶56 This value has been expressed broadly in almost every statement of purpose and values generated by library organizations. The ALA's Core Values of Librarianship, for example, assert that libraries are an "essential public good and are fundamental institutions in democratic societies."⁹⁷ The Association of Research Libraries' (ARL) Intellectual Property Statement of Principles similarly states that copyright exists "for the public good."⁹⁸

¶57 All of the section 107–110 rights, as well as the shared mission of libraries and the Copyright Clause, are involved. Like libraries, copyright law itself exists ultimately to benefit the public, not to reward authors or support business models.⁹⁹ This shared purpose drives the special status of libraries and should guide library practice.

¶58 In the licensing context, this value should lead librarians to make sure that they retain their traditional ability to serve all patrons, not only those registered for a specific class or doing "official" business. Library ethos and copyright law both emphasize the duty to provide information for education and personal growth of "the People" in the grand republican sense.

94. *Id.* at 121–22.

95. *Id.* at 121.

96. Kathleen Blake Yancey, *The "People's University": Our (New) Public Libraries as Sites of Lifelong Learning*, CHANGE, Mar.–Apr. 2005, at 12.

97. *Core Values of Librarianship*, AM. LIBRARY ASS'N. (adopted June 2004), <http://www.ala.org/offices/oif/statementspols/corevaluesstatement/corevalues>.

98. *Intellectual Property: An ARL Statement of Principles*, ASS'N OF RESEARCH LIBRARIES (adopted May 1994), <http://www.arl.org/sc/authors/ipprinciples.shtml>.

99. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

Unfettered Access to Recorded Knowledge, Information, and Creative Works

¶59 The second principle of the public library ethos centers on access to information. The First Amendment and copyright both focus on protecting and incentivizing the creation and dissemination of information. Libraries make this theory a reality by making the product of creation available to all citizens.

¶60 To fulfill this function, libraries must acquire and make information available inexpensively, broadly, and in as many forms and formats as possible. Libraries work to remove barriers of cost, space, prejudice, and culture so that the greatest number of people have the greatest access to as much good information as possible. This means making works available for a minimal cost, offering a variety and diversity of methods for accessing the works, and providing the works in a way that diverse patrons are comfortable using. Gasaway notes in particular the importance of the right to browse and search large bodies of information,¹⁰⁰ an ability significantly improved by digital search functions but often immediately disabled by restrictive terms of use.

¶61 This principle of access has been expressed in most library statements of purpose as well. ALA's Core Values of Librarianship state that "[a]ll information resources that are provided directly or indirectly by the library, regardless of technology, format, or methods of delivery, should be readily, equally, and equitably accessible to all library users."¹⁰¹ The ARL's Statement of Principles highlights the value of access and the danger of its disappearance: "Each year, millions of researchers, students, and members of the public benefit from access to library collections . . . [t]he loss of these provisions in the emerging information infrastructure would greatly harm scholarship, teaching, and the operations of a free society."¹⁰²

¶62 This principle ties into much of copyright law, particularly fair use and the value of the public domain.¹⁰³ As new technology comes to the fore in library practice, TEACH also plays an important role in online instruction and reference. Copyright law and library practice also intersect, not always comfortably, in the question of how much access is permitted. For librarians, the principle of access is a principle of *unfettered* access. Librarians want to give their patrons full access to use materials when, where, and how they want, and once the library has paid the content owner, this is what librarians expect.

¶63 In licensing, however, this is hardly the norm. Licensing slices "access" along numerous lines and restricts patrons from accessing content except at the prescribed time or in the prescribed manner. Even "open" licenses can still restrict access.¹⁰⁴ This is a problem for the access principle today, and as technology enables

100. Gasaway, *supra* note 1, at 122.

101. *Core Values of Librarianship*, *supra* note 97.

102. *Intellectual Property: An ARL Statement of Principles*, *supra* note 98.

103. Gerhardt & Wessel, *supra* note 33, at 482 ("the societal benefits that justify a regime of copyright require that 'individuals learn from those [copyrighted] works, and [l]earning requires access to the work in which the ideas to be learned are embodied'") (quoting Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use—Analyzing the Google Litigation to Unleash Developing Countries*, 10 TUL. J. TECH. & INTELL. PROP. 1, 11 (2007)).

104. See Brad Frazer, *Open Source Is Not Public Domain: Evolving Licensing Philosophies*, 45 IDAHO L. REV. 349 (2009).

even more sophisticated forms of access, increasing the number of people who can take advantage of the services in libraries, these problems can be expected to increase.

¶64 Librarians can address some of these issues through savvy licensing.¹⁰⁵ This means crafting agreements that permit access at all times regardless of place. A license should also permit diverse patrons to translate or alter materials to ensure greater access to non-English speakers, the disabled, and others for whom traditional access is insufficient.

Learning in All Its Contexts

¶65 The third principle of the public library ethos deals with the civic nature of libraries. The learning enabled by library practice not only serves the individual, it also helps patrons better themselves and engage thoughtfully in the democratic process.

¶66 Libraries offer materials and instruction in a variety of contexts, from teaching technical skills and practical job-hunting techniques to inculcating “professional” middle-class values and practices.¹⁰⁶ For this reason, libraries have played a vital role in social mobility and the integration of marginalized populations into mainstream society.

¶67 Libraries also provide free information on social and political issues that informs interested citizens on the issues of the day. They have been described as “a mighty resource in the free marketplace of ideas.”¹⁰⁷ Amateur inventors, pro se litigants, aspiring writers, and patrons looking for the latest popular novel all rely on the library to help them understand the world around them and prepare for the future. Statements of purpose uniformly express this function. The ALA notes that “A democracy presupposes an informed citizenry. [Therefore], the publicly supported library provides free and equal access to information for all people of the community the library serves.”¹⁰⁸

¶68 This principle, which Gasaway describes as a “shared intellectual resource,”¹⁰⁹ drives libraries to emphasize users’ rights such as fair use and to push to offer information from many perspectives, including the perspectives of multiple authors and the resources of multiple companies and rights holders.

¶69 In the context of licensing, this principle should encourage librarians to ensure they can offer complete material that meets both the practical and abstract needs of their patrons. One article has proposed a new theory in contract law well suited to this issue: “public interest unconscionability.”¹¹⁰ This theory would

105. See, e.g., Kristen M. Cichocki, *Unlocking the Future of Public Libraries: Digital Licensing That Preserves Access*, 16 U. BALT. INTELL. PROP. L.J. 29 (2007–2008).

106. See Elaine Fain, *Books for New Citizens: Public Libraries and Americanization Programs, 1900–1925*, in *THE QUEST FOR SOCIAL JUSTICE* 255 (Ralph M. Aderman ed., 1983) (examining public library services for immigrants in the early twentieth century).

107. *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976).

108. *Core Values of Librarianship*, *supra* note 97.

109. Gasaway, *supra* note 1, at 121.

110. J.H. Reichman & Jonathan A. Franklin, *Privately Legislated Intellectual Property Rights: Reconciling Freedom of Contract with Public Good Uses of Information*, 147 U. PA. L. REV. 875, 929 (1999).

“empower courts to control non-negotiable terms concerning access to, and use of, computerized information that either party—licensors or licensees—seek to impose on the other without any true manifestation of assent.”¹¹¹ Breaking new legal ground of this sort is intriguing but, as with the proposed First Amendment limitation on licenses that remove fair use discussed above, unlikely to emerge as a real solution in the near term. Instead, librarians must license and act to protect this right to the best of their ability.

Preservation of the Human Record

¶70 The fourth principle of the public library ethos is less focused on users’ rights and more focused on historical and societal memory and reflection. Libraries seek out and collect works based on quality and value for their patrons. Libraries also support scholarly publishing by purchasing these works. Indeed, many university presses could not function if university libraries did not buy their scholarly monographs.¹¹²

¶71 Libraries also curate these collections, preserving aging items, maintaining digital files, and making sure that works stored in obsolete technological formats are not lost. This work entails evaluating materials for quality in light of new developments in the relevant fields and organizing materials so they can be effectively searched and retrieved.

¶72 Once again, mainstream library organizations have emphasized this principle in their statements of purpose. The ALA, for example, has stated that “[t]he Association supports the preservation of information published in all media and formats. The association affirms that the preservation of information resources is central to libraries and librarianship.”¹¹³ Obviously, this principle is closely tied to the section 108 exceptions as well as to section 109’s first sale provisions. Retention and analysis tend to be fairly straightforward in copyright terms, but the copying and updating necessary to keep a collection ahead of technological obsolescence and physical or digital decay can be problematic.

¶73 Licensing generally makes this even more problematic because retention itself is often prohibited. A licensed work, after all, is made available rather than acquired. As such, licensed collections can disappear due to technological malfunctions, nonpayment of fees, or decisions by the content owner. Similarly, the organization and curation that libraries do to maximize the value of a collection may be impeded by restrictions on use.

¶74 In response, librarians should fight for licenses that at least permit backup copies in case technological problems make legally obtained works unavailable. The larger issue of long-term preservation may require partnerships between

111. *Id.* at 929.

112. Alfred L. Brophy, *Mrs. Lincoln’s Lawyer’s Cat: The Future of Legal Scholarship*, 39 CONN. L. REV. CONNTEMPLATIONS 11, 19 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=997845 (“[I]n these days of drastically reduced library budgets and of shrinking subsidies from universities for their presses, the economics of publishing are really beginning to hurt opportunities for publishing scholarly monographs . . .”).

113. *Core Values of Librarianship*, *supra* note 97.

authors, publishers, and librarians. New models of practice such as institutional repositories are promising,¹¹⁴ but as yet far from ready to meet these challenges.¹¹⁵

The Public Library Ethos in Practice: Streaming Video and E-Books

¶75 Generally the purpose of streaming is to provide access beyond the walls of the library, so access is based on relationship or user status, rather than physical location. This is in line with most licenses as well as the boundaries established by TEACH and by fair use's preference for limited distribution.

Movies

¶76 Several libraries have begun using commercial services such as Netflix to offer streaming media and have written openly about this practice as a new model for librarianship.¹¹⁶ Despite the fact that legal scholars uniformly agree that this practice violates the Netflix terms of service,¹¹⁷ libraries seem to be responding to patron demand in this way either intentionally or based on misunderstanding or ignorance of the law. Librarians have described the way that services such as Netflix create new expectations that carry over to library services. Netflix and similar movie services create demand for services that are "personal, easy, fast, and very convenient for users."¹¹⁸

¶77 Streaming is currently done in a variety of ways, and practices differ significantly from library to library. Some libraries offer streaming video only to computers within the library or to those verified as part of the institution's network, such as with password protection. Others stream more widely, to all computers where the user can be authenticated with a password or student identification number.

¶78 As streaming continues to be offered, the public library ethos should guide libraries' response to these "transformative, if disruptive, technologies."¹¹⁹ Until Netflix or a competitor adopts some form of institutional license, libraries cannot use that service, but patron demands can be expected to drive libraries to offer streaming video in some form. Streaming as part of education and instruction should be guided by TEACH and fair use, but using streaming video to support the general collection will require some licensing, whether that comes from a Netflix site license or another service altogether.

114. On institutional repositories in general, see, e.g., RAYM CROW, THE CASE FOR INSTITUTIONAL REPOSITORIES: A SPARC POSITION PAPER (2006), available at <http://scholarship.utm.edu/20>; Clifford A. Lynch, *Institutional Repositories: Essential Infrastructure for Scholarship in the Digital Age*, 3 PORTAL: LIBR. & ACADEMY 327 (2003).

115. See, e.g., Dorothea Salo, *Innkeeper at the Roach Motel*, 57 LIBR. TRENDS 98 (2008).

116. See, e.g., Ciara Healy, *Netflix in an Academic Library: A Personal Case Study*, 58 LIBR. TRENDS 402 (2010).

117. See, e.g., Peter Hirtle, *Using Netflix in a Library*, LIBRARYLAW BLOG (Sept. 18, 2010), <http://blog.librarylaw.com/librarylaw/2010/09/using-netflix-in-a-library.html>.

118. Lori Bowen Ayre, *Library Delivery 2.0: Delivering Library Materials in the Age of Netflix*, LIBR. PHIL. & PRAC., Nov. 2006, at 1, <http://digitalcommons.unl.edu/libphilprac/124>.

119. Beth Posner, *Library Resource Sharing in the Early Age of Google*, LIBR. PHIL. & PRAC., June 2007, at 9, <http://digitalcommons.unl.edu/libphilprac/123>.

¶79 As libraries negotiate this proposed license and establish best practices, they should be guided by the public library ethos to help ensure that their rules and practices are consistent with libraries' highest values as socially valuable actors deserving of their privileged position in copyright law. For example, librarians can serve the value of connecting people to information by streaming to ensure general, rather than limited, access. Streaming that serves broad republican aims of bringing information to the people means licensing that permits this. Streaming also supports aggressive application of fair use when deciding where and how to stream in harmony with the points of confluence of library practice and the Copyright Clause, both of which are dedicated to promoting expression and innovation.

¶80 The value of unfettered access, the second aspect of the public library ethos, is served when libraries stream in ways that allow all patrons to view and use films regardless of limitations based on language, location, or disability. A library could work explicitly to license that right, but where a license is silent, aggressive application of TEACH and fair use, both of which expressly favor streaming media as the preferred method of sharing, can also restore this value.

¶81 Libraries can support the third value, learning in all of its contexts, by streaming content that provides a "shared intellectual resource" for the civic aspects of citizenship. Licenses that recognize that value may be useful, but this is another area where removing contractual roadblocks may be sufficient to permit aggressive fair use by libraries.

¶82 Finally, the library's role in preserving the human record must be honored. Streaming content is, by its nature, short term, but licenses can be designed that permit backup copies to fill in when the system goes down or when third-party disputes over content make work unavailable.¹²⁰ Long-term issues with preservation must be addressed as well, although they are beyond the scope of library practice since streamed films are designed to be temporary.

E-Books

¶83 E-books are becoming an increasingly important part of library collections. Although the 2009 Ithaka survey of faculty reported that "despite the arrival of devices like the Amazon Kindle . . . e-books have remained marginal to scholars,"¹²¹ more than thirty percent of respondents reported that e-books will be important in their professional lives in five years.¹²² Numerous libraries have piloted e-book programs,¹²³ and librarians have done significant research on service models in the digital environment¹²⁴ and on patron demands.¹²⁵

120. See, e.g., Ben Fritz, *Warner Extends Delay on DVDs; Netflix Will Observe a 56-Day Wait Before Renting Discs; Redbox Says It Will Reject It*, L.A. TIMES, Jan. 7, 2012, at B1.

121. ROGER C. SCHONFELD, *FACULTY SURVEY 2009: KEY STRATEGIC INSIGHTS FOR LIBRARIES, PUBLISHERS AND SOCIETIES* 23 (2010), available at <http://www.ithaka.org/ithaka-s-r/research/faculty-surveys-2000-2009/Faculty%20Study%202009.pdf>.

122. *Id.*

123. See, e.g., Dennis Dillon, *E-Books: The University of Texas Experience, Part 1*, 19 LIBR. HI TECH 113 (2001); Marc Langston, *The California State University E-Book Pilot Project: Implications for Cooperative Collection Development*, 27 LIBR. COLLECTIONS, ACQUISITIONS, & TECH. SERVS. 19 (2003).

124. See, e.g., Ronald Jantz, *E-Books and New Library Service Models: An Analysis of the Impact of E-Book Technology on Academic Libraries*, 20 INFO. TECH. & LIBR. 104 (2001).

125. See, e.g., Wendy Allen Shelburne, *E-Book Usage in an Academic Library: User Attitudes and Behaviors*, 33 LIBR. COLLECTIONS, ACQUISITIONS, & TECH. SERVS. 59 (2009).

¶84 So far, patrons in academic libraries have not yet widely embraced e-books.¹²⁶ This reflects some patron frustration, particularly with format issues,¹²⁷ and the fact that e-books have generally included significant digital rights management (DRM)¹²⁸ restrictions that cripple the uses that patrons expect.¹²⁹ Nevertheless, e-books appear to be a new medium that is gaining traction.¹³⁰

¶85 Though the practice of lending e-books is currently in its infancy, some common procedures have begun to develop. Most libraries lend a digital copy online that replicates the qualities of a physical book. A patron downloads the copy to his computer, e-reader, or other device, and that copy cannot be shared or moved to another device while the patron has it. At the end of the prescribed borrowing period, the copy automatically disappears from the user's device. Libraries themselves buy multiple "copies" of the work, so that only as many patrons can use the work at a time as the library has purchased copies.

¶86 Rebecca Tushnet discusses this replication of the physical-book model as an important disconnect between libraries, patrons, and publishers. She argues that publishers in this arena have failed to do what Netflix has done in the past few years: offer service that exceeds the value of physical copies. "The real problem [with e-books]," Tushnet writes, "is that [the publisher's] argument [for DRM] is like telling a doctor that disease and death are part of the human condition and therefore to be replicated, not reduced, by any new treatments. Permanence is the point and deterioration is the enemy."¹³¹

¶87 Recent efforts to recognize this issue and improve the experience of using e-books may be more successful. Recently, e-books have been designed to interface digitally with libraries, available to "check out" online and disappearing from the e-reader once the e-book is due. Some universities have begun replacing physical textbooks with digital versions,¹³² arguably the best candidate for e-book deployment. The rise of popular e-readers such as Amazon's Kindle and Barnes & Noble's Nook may also offer users a model that showcases the value of e-books. Amazon in particular has released applications for the Kindle to mimic library lending functions, suggesting that technology may help bridge the divide between publishers and patrons.¹³³

126. See Alanna Jenkins, *What Is Inhibiting the Proliferation of E-Books in the Academic Library?*, 1 SCROLL 1 (2008), <http://fdt.library.utoronto.ca/index.php/fdt/article/view/4905>; Sarah Thomson & Steve Sharp, *E-Books in Academic Libraries: Lessons Learned and New Challenges*, 22 SERIALS 136 (2009).

127. Tushar Rae, *E-Books' Varied Formats Make Citations a Mess for Scholars*, CHRON. HIGHER EDUC. (Feb. 6, 2011), <http://chronicle.com/article/E-Books-Varied-Formats-Make/126246>.

128. For a definition and discussion of DRM, see Kristin Brown, Comment, *Digital Rights Management: Trafficking in Technology That Can Be Used to Circumvent the Intellectual Property Clause*, 40 HOUS. L. REV. 803, 816 (2003).

129. Jenkins, *supra* note 126, at 3.

130. See, e.g., Steve Kastenbaum, *Ebook Lending: Libraries Go Digital*, CNN.COM (Oct. 26, 2011), <http://www.cnn.com/2011/10/26/living/digital-libraries/index.html>.

131. Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 1023 (2006).

132. Jeffrey R. Young, *To Save Students Money, Colleges May Force a Switch to E-Textbooks*, CHRON. HIGHER EDUC. (Oct. 24, 2010), <http://chronicle.com/article/The-End-of-the-Textbook-as-We/125044>.

133. See Steven Matthews, *Stepping Stone in E-Book Lending?*, SLAW (Nov. 4, 2010), <http://www.slaw.ca/2010/11/04/stepping-stone-in-e-book-lending>.

¶88 Libraries have started to lend e-readers loaded with books, and, as is the case with Netflix, the practice is currently outpacing legal agreements, placing libraries on uncertain, perhaps even perilous, legal footing. Licenses must be developed and best practices must emerge to govern this activity. As with streaming media, however, librarians must develop their efforts to incorporate e-books around the public library ethos.

¶89 First, library values related to connecting people to ideas should be retained with provisions for the educational and developmental needs of patrons. This may mean strategic licensing, particularly with vendors targeting the academic market.

¶90 Second, unfettered access to recorded knowledge, information, and creative works must be protected. Rebecca Tushnet's discussion about replicating the flaws of physical documents is especially germane here. Library practice should push the access principle but should also be tailored to the specific issues of e-books. Unlike streaming movies, e-books are aimed at providing individual access rather than ongoing availability. Because of this, issues center around formats, translations, and accommodations for differently abled patrons, such as the recent exemption given for circumvention by visually impaired users to enable read-aloud and specialized format functionality.¹³⁴

¶91 Activities that protect learning in all its contexts, the third value of the public library ethos, must also be protected. This civic value implicates licensing in ways similar to those for streaming media. The controversy over third-party monitoring raises privacy concerns that run throughout the shared nature of licensed content.¹³⁵

¶92 Finally, the fourth value, preservation of the human record, must also be guarded with particular vigilance, given recent bad actions. The ironic case of Amazon's removing George Orwell's *1984* after customers had purchased it indicates the particular difficulties of preservation in the context of e-books.¹³⁶ As long as libraries are piggybacking on generally available technology, they will struggle to curate works properly. As e-book vendors begin to offer specialized library versions, licenses must find a way to protect these values, either within individual libraries or collectively across consortia and the profession.

134. Exemption to Prohibition on Circumvention, 37 C.F.R. § 201.40(a) (2010) ("The prohibition against circumvention of technological measures that control access to copyrighted works set forth in 17 U.S.C. 1201(a)(1)(A) shall not apply to . . . [l]iterary works distributed in ebook format when all existing ebook editions of the work . . . contain access controls that prevent the enabling either of the book's read-aloud function or of screen readers that render the text into a specialized format.").

135. See, e.g., Mike Masnick, *Amazon Spying on Your Ebook Highlighting*, TECHDIRT (May 11, 2010, 2:53 P.M.), <http://www.techdirt.com/articles/20100511/1018059377.shtml>.

136. Ken Fisher, *Why Amazon Went Big Brother on Some Kindle E-Books*, ARS TECHNICA (July 17, 2009), <http://arstechnica.com/tech-policy/news/2009/07/amazon-sold-pirated-books-raided-some-kindles.ars>.

Conclusion

¶93 Fair use is like a muscle:¹³⁷ if not used it atrophies, but when vigorously exercised it grows more powerful. James Gibson's discussion of doctrinal feedback¹³⁸ suggests the ways that copyright law for library practice follows a similar principle of use-it-or-lose-it. After a decade of atrophy, library copyright is inert and flabby. Librarians need to flex these muscles for the good of the profession and society as a whole, but they must do so responsibly.

¶94 Negotiating license agreements in harmony with the public library ethos can help to ensure that core library values are not lost in the digital environment. Designing practice based on the public library ethos can empower librarians to aggressively assert their rights in a way that maximizes the public values at the heart of copyright law. By focusing on the shared mission of library practice and the Copyright Clause, librarians can make decisions that honor both values as well as reinvigorating libraries' rights and their place at the heart of American intellectual and cultural life.

137. PATRICIA AUFDERHEIDE & PETER JASZI, UNTOLD STORIES: CREATIVE CONSEQUENCES OF THE RIGHTS CLEARANCE CULTURE FOR DOCUMENTARY FILMMAKERS 28 (2004), available at http://centerfor-socialmedia.org/sites/default/files/UNTOLDSTORIES_Report.pdf.

138. Gibson, *supra* note 91.

