July 7, 2016

Letter from the University of Massachusetts Amherst Libraries to U.S. Copyright Office Re: Section 108

Gerald (Jay) Schafer, University of Massachusetts - Amherst
Laura Quilter

Available at: https://works.bepress.com/laura_quilter/50/
July 7, 2016

Maria Pallante  
Register of Copyrights  
U.S. Copyright Office  
101 Independence Avenue, S.E.  
Washington, D.C. 20559-6000

RE: Section 108

Dear Ms. Pallante,

The University of Massachusetts Amherst has carefully considered the opportunity to schedule an in-person meeting with the Copyright Office regarding Section 108, the copyright provision providing critical legal safeguards for the daily activities of libraries and archives. Our copyright attorney/librarian Laura Quilter has requested a meeting, but we feel it is important to go “on the record” regarding our concerns about this closed process, which precludes the participation of the vast majority of libraries and librarians.

INAPPROPRIATE PROCESS

We are frankly dismayed at the Office’s exclusive closed-door approach to this important provision. Libraries and educational institutions “promote the Progress of Science and useful Arts” in every aspect of our work, and do so by relying, daily, on the protections within Section 108.

We are also particularly disappointed by the reference to “finaliz[ing] its legislative recommendation”, with no other public process since the failed Section 108 Study Group, which wrapped up years before the current copyright review process in Congress.

While the Copyright Office’s June 7, 2016, notice suggests an interest in hearing from libraries, by its very nature, the process you have established will prevent school librarians, public librarians, and most academic librarians from participating. Libraries collectively serve scores of millions of patrons, have invested billions of dollars in collections, and are a key partner in major economic sectors, including higher education, K-12 education, small businesses, even tourism. Virtually none of these nonprofit, budget-strapped institutions have the resources to monitor the Federal Register for relevant legislative developments, much less the expertise, staff time, and budget to schedule on short notice a staffer to fly to Washington D.C. UMass is one of only a scant few dozen libraries, all major research institutions, which have library attorneys on staff tasked with monitoring policy and law.

This process of inviting interested participants to come to the Copyright Office for exclusive closed-door meetings thus excludes the very people that rely on Section 108 daily and can best speak to this Section. And in so doing, it lends support to the critique that the Copyright Office is primarily interested in serving the commercial copyright industries, at the expense of both the nonprofit copyright industry within higher education and the user groups represented by libraries. Unlike libraries, commercial copyright industries have DC-based lobbyists, or can arrange for policy staff to fly to D.C. for exclusive meetings at the drop of a hat. The appearance of industry insiders negotiating privately with the Copyright Office to write the rules for libraries does not suggest a robust democratic process that will result in balanced or successful legislation.
If the Copyright Office wishes to honestly engage in dialog with librarians about Section 108, then it should be through an **official, transparent, public comment process**, as is conventional. Libraries and industry groups should submit written comments, and make their case, publicly, to the American people. Libraries also need to be able to respond to the written comments of other parties, to correct misstatements and misunderstandings. Written comments are also much more likely to capture the actual uses of practicing librarians—the interlibrary loan librarians, the special collections librarians and archivists, the book repair staff.

At a minimum, we strongly urge you to publicly disclose all parties you meet with, and the recommendations and opinions expressed. Recording these meetings would not be beyond the current technological capacity of the Office, and would enable fact checking and remedy the appearance of industry insiders

**Section 108 Comments**

In the interests of transparency, we detail here the conversation we hope to have in a subsequent “closed-door” telephone conference call. We plan to detail the ways in which academic libraries and others use, daily, Section 108. We would be happy to have members of Massachusetts’ congressional delegation, cc’d on this letter, join our call to better understand our concerns.

- We support the academic authors in higher education through interlibrary lending (108(d) and (e). Public library patrons and school libraries likewise rely on the interlibrary lending to support their patrons, effectively partnering with academic institutions to support learning at all levels of our society. The existing record-keeping provisions strikes an appropriate balance, allowing libraries to effectively build collections through purchasing oft-requested materials while leveraging resources to share less-frequently needed works, while appropriately placing the record-keeping burden on the borrower/requester not the lender/provider.

- We support the research needs of our patrons by preserving and ensuring access to collections using Section 108(b), (c), and (f)(3).

- Section 108(f)(1) and (2) are critical exceptions allowing every library, every day, to support patrons doing research on non-circulating and inaccessible materials. They are crafted to allow us to provide full access to our collections, while recognizing the need of libraries to preserve intellectual freedom, and fulfill our traditional role within copyright of educating users.

- The safe harbor provisions are properly construed with the fair use savings clause in 108(f)(4) to provide both certainty with respect to particular, key activities (such as interlibrary lending and preservation), while providing libraries breathing room to carefully approach new technologies and situations, such as archiving born-digital content.

We will try to clear up the misconception that Section 108 is “out of date”. Section 108 is, actually, refreshingly not technologically specific and, by comparison with the technological mandates in Section 110(b) or Section 1201, has aged well. It is no accident that libraries have not called for revising Section 108: **Practicing librarians feel that Section 108 serves us well as-is, and is not in need of revision.**

While we do not need feel the need to “revise” Section 108 to better perform any of the authorized library services, we acknowledge that certain expansions of Section 108 would be beneficial. Unfortunately, any useful expansions of Section 108 would be unlikely to achieve consensus, as demonstrated by the failure of the Section 108 Study Group’s efforts in 2008 to come to consensus even on that most basic public service, preservation.
The single most useful addition to Section 108 would follow the United Kingdom’s 2014 legislation, protecting library exceptions from contractual modification. Such legislation should protect libraries’ rights to make interlibrary loans, preservation copies, and fair uses of works notwithstanding contractual provisions to the contrary. Similarly, the addition of “museums” to the institutions eligible for Section 108 might provide some welcome certainty to the members of our sister institutions; but they would find it a poor bargain if critical flexibility was eliminated or burdensome, institutions were exposed to secondary liability, or if redundant record-keeping requirements were imposed.

Finally, we will provide suggestions to the Copyright Office about how best to support librarians to effectively use Section 108 (as well as Section 110 and Section 107). We note that one of the Copyright Office’s interests in pursuing Section 108 revision is “to provide better clarity for libraries, archives, and museums.” (http://copyright.gov/policy/section108/) Section 108 is relatively clear as it is, but one would never know it by using Copyright Office’s primary publication on Section 108, “Circular 21.” As noted in the text of the document itself, Circular 21 is basically a partial legislative history, rather than a useful reference. It thus stands in contrast to the majority of other Circulars, even those treating much more complex subjects, such as Circular 15A on “Duration of Copyright.” A cleaner Circular 21 should simply lay out the text of Section 108, with relevant definitions and explanations of terms of art, rather than detail its lengthy legislative history. Simply revising Circular 21 to eliminate the unnecessary, lengthy, and confusing legislative history would be more useful and provide more “clarity” to practicing librarians than any revision of Section 108.

In closing, we would like to reiterate our concern with the fundamental nature of this process. While we will endeavor to explain the ordinary uses of these provisions in libraries of all sorts, we feel an open, transparent process with a low barrier to entry would be much more inclusive and appropriate, and would better serve the public interest in understanding copyright law. We hope that the Copyright Office reconsider its approach in future studies, and makes the public disclosures needed to restore some faith in the current inquiry.

Thank you for your attention. We look forward to explaining these points in more detail.

Sincerely,

Jay Schafer
Director of Libraries

c: Elizabeth Warren, Senator, U.S. Senate
    Ed Markey, U.S. Senate
    Jim McGovern, Representative, District 2, U.S. House of Representatives
    Bob Goodlatte, Chair, U.S. House of Representatives Committee on the Judiciary
    John Conyers, Ranking Member, U.S. House of Representatives Committee on the Judiciary
    Karen Bass, Member, U.S. House of Representatives Committee on the Judiciary
    Judy Chu, Member, U.S. House of Representatives Committee on the Judiciary
    Darrell Issa, Member, U.S. House of Representatives Committee on the Judiciary
    Zoe Lofgren, Member, U.S. House of Representatives Committee on the Judiciary
    Scott Peters, Member, U.S. House of Representatives Committee on the Judiciary
    Mimi Walters, Member, U.S. House of Representatives Committee on the Judiciary
    Carla D. Hayden, Nominee, Librarian of Congress