Library Reproduction Rights for Preservation and Replacement in the Digital Era: An Author's Perspective on Section 108

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Roberta Rosenthal Kwall

Section 108 of the 1976 Copyright Act delineates limitations on exclusive rights pertaining to reproduction by libraries and archives.\(^1\) Although undoubtedly this statutory provision is of immense interest to certain groups, overall it is not a focal area for the vast majority of those who think and write about copyright law.\(^2\) As a general matter, § 108(a) provides that no copyright infringement occurs when a library or archive reproduces or distributes a single copy or phonorecord of a work, subject to certain conditions. These conditions are that the work must be reproduced without any purpose of obtaining direct or indirect commercial advantage from the copy; the collections of the entity making the reproduction must be open to the public or otherwise available to specialized researchers; and the work that is reproduced or distributed must include a copyright notice or a legend stating that the work may be protected by copyright, even if no copyright notice is present on the reproduced copy.

Subsections (b) and (c) of § 108 provide additional authorizations for library reproductions in certain contexts, also subject to specified conditions.\(^3\) Subsection


\(^2\) Section 108 has generated only a handful of cases. To date, none of the cases contain a detailed analysis of the provision and most provide just a brief explanation of the provision. See, e.g., Hotaling v. Church of Jesus Christ of Latter-Day Saints, 118 F.3d 199 (4th Cir. 1997) (in copyright infringement action against church for adding materials to its library collection and making copies for branch libraries, court declined to rule on the applicability of § 108(c)); Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 931 (2d Cir. 1995) (noting that “the very fact that Congress restricted the rights of libraries to make copies implicitly suggests that Congress views journal publishers as possessing the right to restrict photocopying); Pac. and S. Co., Inc. v. Duncan, 744 F.2d 1490, 1494 n.6 (11th Cir. 1984) (stating that although defendant organization that videotapes television news programs and sells the tapes analogizes itself to an archive, it does not come within the scope of § 108); Atari, Inc. v. JS & A Group, Inc., 597 F. Supp. 5, 10 n.2 (N.D. Ill. 1983) (declining to rule on the applicability of §108(c)). For a full treatment of the history of this provision and an analysis of its subsections, see Mary Rasenberger & Chris Weston, Overview of the Libraries and Archives Exception in the Copyright Act: Background, History, and Meaning (Apr. 14, 2005), http://www.loc.gov/section108/docs/108_background_paper.doc [hereinafter Overview].

\(^3\) Throughout this commentary, the term “library” will be used to refer to both libraries and
(b) deals with unpublished works that are duplicated “solely for purposes of preservation and security or for deposit for research use in another [qualifying] library or archives.”4 It permits the duplication of three copies or phonorecords as long as the work “reproduced is currently in the collections of the library or archives.”5 This provision was intended to apply to “an archival collection of original manuscripts, papers, and the like, most of which are unpublished, and for which a rigorous preservation regime serves the needs of archives and scholars.”6 Subsection (c) addresses the reproduction of published works “duplicated solely for the purpose of replacement.”7 It also allows for the reproduction of three copies if the library or archive making the copy has determined “after a reasonable effort” that “an unused replacement cannot be obtained at a fair price.”8 This subsection was intended to ensure that items in a library collection are preserved in a usable form despite external factors such as time and technology that are beyond an institution’s control.9 As originally enacted, both §§ 108(b) and (c) allowed for reproduction of only one copy, but the limit was raised to three in 1998 by the Digital Millennium Copyright Act (DMCA).10 The DMCA also gave libraries the ability to make digital reproductions for preservation and replacement. By virtue of these DMCA amendments, both §§ (b) and (c) maintain an additional caveat by providing that “any such copy or phonorecord that is reproduced in digital format” must not be “made available to the public in that format outside the premises of the library or archives.”11

The purpose of this Commentary is to establish that §§ 108(b) and (c) are in need of revision for three reasons. First, they draw an unnecessary distinction between unpublished and published works. Second, by limiting the availability of reproduction rights in digital format to no more than three copies and to recipients within the physical premises of the library, they fail to take into account the realities of the digital era. Finally, by omitting attribution and other integrity safeguards on reproduced works, they fail to include requirements embodying vital authorship norms.

11. 17 U.S.C. §§ 108 (b)(2) and (c)(2). Although subsection (c) does not expressly provide libraries with the right to distribute the copies reproduced, “it . . . nevertheless implie[s] that the library will retain the same rights of distribution to the copy as it [had] to the original version of the work (under the first sale doctrine), since the purpose of the provision is to permit continued access to the work.” Overview, supra note 2, at 27. For an exploration of the copyright issues facing libraries seeking to preserve works in analog and digital format, see Laura N. Gasaway, America’s Cultural Record: A Thing of the Past?, 40 HOUS. L. REV. 643 (2003).
I. LEGAL DISTINCTIONS BASED ON PUBLICATION STATUS

Under the 1909 Copyright Act, federal copyright protection was available for works from the time of publication, and the state common law regime typically protected unpublished works.\textsuperscript{12} If the work was published without the proper notice, copyright protection was forfeited.\textsuperscript{13} The 1976 Act reduced the significance of formalities such as publication with the requisite notice.\textsuperscript{14} Under the 1976 Act, a work receives protection as soon as it is created, regardless of whether it bears a copyright notice.\textsuperscript{15} Moreover, the notice requirements were liberalized, especially with respect to the measures an author can take to rescue her copyright even after publication without notice.\textsuperscript{16} By extending copyright protection to unpublished works, the 1976 Act embodies a significant change over the prior law.\textsuperscript{17}

As a general matter, part of the reason Congress felt the need to de-emphasize certain formalities for copyright protection stemmed from a prevalent sentiment that the United States should become a member of the Berne Convention.\textsuperscript{18} Berne is an international copyright treaty that espouses the view that copyright formalities should not be required in order for a work to receive protection. Many of the provisions of the 1909 Act were inconsistent with Berne and precluded the United States’ potential adherence to the treaty. The other reason for the declining focus on copyright formalities was undoubtedly a response to certain real-world consequences. Compliance with formalities as a prerequisite for protection is far more problematic for copyright owners than for trademark owners and inventors. Unlike trademark holders who are typically in business and therefore presumably have attorneys, or inventors who have already invested considerable financial resources in their inventions (and for whom attorney’s or agent’s fees are commonplace), authors and artists often stereotypically work in garrets and receive little compensation for their labors. Without counsel, authors and artists frequently lost their rights inadvertently. By providing protection for authors and artists from the moment of creation rather than upon publication with notice, the 1976 Act

\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} See infra note 20. Publication is defined in § 101 of the 1976 Act as “the distribution of copies or phonorecords of a work to the public by sale or other transfer of ownership, or by rental, lease or lending.” The statute also provides, however, that “[a] public performance or display of a work does not of itself constitute publication.”
\textsuperscript{17} See Dreyfuss & Kwall, supra note 12, at 213. Effectively, this aspect of the 1976 Act abolished the notion of state common law copyright, although state protections are still available for some types of works of authorship that are not fixed in a tangible medium of expression. One example is performance art, a genre of visual art that is not confined by the canvas and instead interacts directly with the viewer and the exhibition space. See Roberta Rosenthal Kwall, Copyright and the Moral Right: Is an American Marriage Possible?, 38 Vand. L. Rev. 1, 75 (1985).
reduces this risk of loss. The declining importance of copyright formalities is even more apparent in certain amendments to the 1976 Act after the United States joined the Berne Convention in 1988.

Thus, although publication with a copyright notice can be beneficial to the extent that it provides psychological comfort to the author, publication with notice is not currently required in order for an author to obtain copyright protection in the United States. Still, the published status of a work has been at issue in certain doctrinal applications, most notably the fair use doctrine. In Harper & Row, Publishers v. Nation Enterprises, the Supreme Court held that the unauthorized use of quotations from Gerald Ford’s unpublished manuscript did not constitute fair use. In that case, Time Magazine contracted with Harper & Row and Reader’s Digest for the exclusive right to print prepublication excerpts of Gerald Ford’s unpublished autobiography. An editor of The Nation Magazine obtained a copy of the Ford manuscript and produced an article scooping one scheduled to appear in Time. Between three hundred and four hundred words of the article, roughly thirteen percent, consisted of direct quotations from the unpublished manuscript and a large portion of the article contained paraphrases of passages in the manuscript. Consequently, Time cancelled its agreement, refusing to pay the balance due under its contract with the plaintiffs, and the plaintiffs sued The Nation for copyright infringement.

Reversing the Second Circuit, the Court held that The Nation’s use was not fair. A predominant theme in the opinion is the importance of the first publication right as a critical factor militating against fair use. Given that The Nation’s “intended purpose” was to scoop the Time article and supplant “the copyright holder’s commercially valuable right of first publication,” the Court believed fair use was inappropriate despite The Nation’s use of the material for news reporting. A particularly ambiguous statement in the Harper & Row decision is the observation that “the scope of fair use is narrower with respect to

19. See Dreyfuss & Kwall, supra note 12, at 214.
20. Under the 1976 Copyright Act, works that were publicly distributed without a copyright notice after January 1, 1978 (the Act’s effective date), but prior to March 1, 1989 (the effective date of Berne), were subject to having this omission cured if the copyright owner registered the work within five years and made a reasonable effort to add notice to copies distributed to the public in the United States after discovery of the omission. 17 U.S.C. § 405(a) (as amended by the Berne Convention Implementation Act of 1988). Post-Berne, however, the affixation of a notice of copyright is voluntary, and the omission of such notice on publicly distributed copies does not transfer the work to the public domain. See Bridge Publ’ns, Inc. v. F.A.C.T.NET, Inc., 183 F.R.D. 254, 262 (D. Colo. 1998).
23. Id.
24. Id. at 568.
unpublished works.\footnote{Id. at 564.} Interpreting the Court’s statement in a later decision, the Second Circuit reasoned, “This could mean either that the circumstances in which copying will be found to be fair use are fewer in number for unpublished works than for published works or that the amount of copyrighted material that may be copied as fair use is a lesser quantity for unpublished works than for published works.”\footnote{Salinger v. Random House, Inc., 811 F.2d 90, 97 (2d Cir. 1987) (concluding that “[n]arrower ‘scope’ seems to refer to the diminished likelihood that copying will be fair use when the copyrighted material is unpublished”).} Following \textit{Harper & Row}, several courts refused to find in favor of fair use in circumstances involving an unpublished copyrighted work.\footnote{See, e.g., New Era Publ’ns Int’l, ApS v. Henry Holt & Co., Inc., 873 F.2d 576 (2d Cir. 1989) (concluding that the biography of Church of Scientology’s founder is not within the scope of fair use based in part on its use of unpublished materials); \textit{Salinger}, 811 F.2d at 100 (issuing a preliminary injunction against publication of biography of author in which biographer used author’s unpublished letters).} In 1992, Congress added the following final sentence to § 107’s codification of the fair use doctrine: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”\footnote{17 U.S.C. § 107 (2000).} The Committee Report to this amendment suggests reaffirmance of \textit{Harper & Row}’s rule that the unpublished nature of a work is a “key” but not “necessarily determinative” factor prohibiting fair use.\footnote{H.R. REP. NO. 102-836, at 5 (1992).} Still, the ambiguity noted in \textit{Harper & Row} is not clarified by either the new amendment to § 107 or the relevant legislative history.\footnote{See Lynn Miller, \textit{Fair Use, Biographers, and Unpublished Works: Life After H.R. 4412}, 40 J. COPYRIGHT SOC’Y U.S.A. 349, 394-95 (1993).}

The fair use doctrine arguably should be applied more narrowly where the work is unpublished because unauthorized uses of an unpublished work impact more significantly the economic value of the copyright. Also, allowing a liberal application of fair use for unpublished works might encourage premature publishing and result in a decline in perfected works. There is also the danger of public exposure to a distorted version of the copyrighted work before the public has seen the actual work itself.\footnote{See William Fisher, \textit{Reconstructing the Fair Use Doctrine}, 101 HARV. L. REV. 1659, 1674-75 (1988). On the other hand, it seems entirely appropriate to apply the fair use doctrine more liberally when the copyrighted work is used to report facts, even if the copyrighted work is unpublished. \textit{Cf. Salinger}, 811 F.2d at 96 (“The biographer who copies only facts incurs no risk of an injunction; he has not taken copyrighted material.”).}

The publication-status factor developed in the fair use context can be used to analyze whether the distinction regarding published and unpublished works maintained in § 108 should be retained. As discussed, § 108(b) allows duplication and distribution of unpublished works solely for preservation, security or deposit for research in another institution, whereas § 108(c) permits reproduction of published works for purposes of replacing a damaged, lost or stolen work, or a
work whose existing format has become obsolete.\textsuperscript{32} Significantly, the distinction drawn by the statute with respect to published and unpublished works was made initially in a 1966 Report by the House Judiciary Committee on the revision of the copyright law. This report incorporated a provision on the reproduction of works in archival collections that had been urged the prior year by the General Services Administration, historians, archivists and educators, and thus represents “the first iteration of the current section 108.”\textsuperscript{33} This provision provided that it is not copyright infringement “for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collections in facsimile copies or phonorecords for purposes of preservation and security or for deposit for research use in any other such institution.”\textsuperscript{34} There was “little or no opposition” to this provision according to the explanation in the Report.\textsuperscript{35} The 1967-68 copyright revision bill contained the same provision on preservation of unpublished works and the relevant hearings did not produce any significant discussion regarding this provision.\textsuperscript{36}

In the 1960s, when the governing 1909 Copyright Act drew a distinction in terms of protection for published and unpublished works, it made sense to separate these categories of works for purposes of delineating the rights of institutions with custody of unpublished works. Today, however, the need for disparate treatment has been reduced, if not entirely eliminated, by the 1976 Act’s coverage of both published and unpublished works, and the development of the fair use doctrine with respect to unpublished works specifically.

Section 108 can be simplified by combining subsections (b) and (c) into one provision addressing all copyrighted works, regardless of their publication status. This subsection might allow libraries to reproduce and distribute works for preservation and security, for deposit for research use in another library, and for replacement of a copy that is damaged, deteriorating, lost, stolen or obsolete. Combining the preservation and replacement subsections will not, however, address all of the issues likely to arise in practice. Among the types of unpublished works that libraries typically receive are letters, particularly those donated by recipients (rather than authors), manuscripts of literary works, diaries and scrapbooks. In the case of unpublished works that are one-of-a-kind, it is simply not feasible to duplicate a work that has been lost, stolen or perhaps even damaged beyond recognition. Issues of replacement are not likely to arise with respect to

\textsuperscript{32} Section 108(c) provides that “a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.”

\textsuperscript{33} \textit{Overview, supra} note 2, at 15.

\textsuperscript{34} H.R. REP. NO. 89-2237, at 5 (1966) (emphasis added).

\textsuperscript{35} \textit{Id. at 66-67}. The explanation further states that the provision would not permit archives to make machine-readable copies, distribute these copies to either scholars or the public, or override prior contractual arrangements. \textit{Id.}

\textsuperscript{36} See \textit{Overview, supra} note 2, at 15.
such unpublished works. Moreover, according to the statute, replacement occurs only for published works where a library first tries to purchase an unused copy at a fair price. On the other hand, if a work is considered obsolete inasmuch as the equipment needed to perceive it is no longer manufactured or no longer reasonably available in the commercial marketplace, then either published or unpublished works should be able to be reproduced in digital format. Libraries do, in fact, have unpublished works stored on Beta format videotapes, slides and other audiovisual materials that need to be transferred to a format that can now be widely used given contemporary available technologies. So although typically there is no replacement need for most unpublished works, such a need can arise if the format in which the work is held becomes obsolete. The statute should be revised to clarify that such unpublished works can be both preserved and replaced.

Moreover, the statute is facially unclear as to whether the concept of preservation requires that a work be reproduced in exactly the same format as the original. If it is the case that a reproduced copy for preservation must be in the same format as the original, then it would seem that the permission to reproduce the work in a digital format contained in § 108(b)(2) would apply only to works that the libraries originally received in digital format. This interpretation, however, contravenes the original intent of the changes effected by the DMCA, the point of which was to allow libraries to convert an analog work to a digital copy in lieu of a facsimile, as was required prior to the DMCA’s amendments. The concept of replacement, on the other hand, seems broader in scope than preservation, thus suggesting that even though the exact format of a work may be different from the original, reproduction is sanctioned if the content is the same. Given the duplication possibilities in the digital age, clarification of these points also is in order.

In the digital era, it makes sense to allow libraries to reproduce unpublished works in a different medium, including digital format, for the sake of both preserving and replacing the original content of the work. Given the increasing likelihood that libraries will receive unpublished material in digital form, the risk of more widespread circulation of unpublished works presented by digital mediums will need to be addressed in any event. Therefore, the preservation/replacement distinction for unpublished and published works seems outmoded in today’s digital environment.

As noted in Harper, a fundamental concern with respect to unpublished works is the possibility of usurping the copyright owner’s right of first publication. It is true that to the extent libraries are able to exercise broader preservation and replacement rights to unpublished works, particularly in digital mediums, there is a risk that these works will either become published for the first time by virtue of the...

38. See Gasaway, supra note 11, at 655-57.
39. Id. at 650 (noting that the DMCA amendments “do not deal with the preservation of works in a library collection originally acquired in digital format”).
40. Id. at 644 (“[I]ncreasingly, the works acquired by libraries are in digital format.”).
exercise of these rights or their initial reproduction will facilitate unauthorized
publication by a downstream party. Thus, the possibility that unpublished works
can be available in a digital format does pose a threat to the right of first
publication, regardless of where the digitized version is accessed.

The appropriate balance for § 108 nonetheless can be achieved by further
consideration of what underlies the concern for the right of first publication. As
suggested earlier, the right of first publication has two components. One is an
economic focus that views the initial ability to publish a work as an important
component of the financial reward driving copyright. In fact, the Senate Report for
the DMCA accompanying §§ 108(b)(2) and (c)(2), which contains caveats that the
availability of digital reproductions of covered works must be limited to the
library’s physical premises, states that these limitations were intended “to limit the
risk of digital copies of a work entering into widespread circulation and thus
harming the owner’s potential market.” With respect to both unpublished and
published works, the focus should be on whether the institution’s actions in
preserving and replacing the original works negatively impacts the copyright
owner’s economic benefit. The fact that a work is unpublished may increase the
chances of negative economic impact, but as the fair use statute currently provides,
the unpublished status of a work is simply one factor to consider in an overall fair
use analysis.

The second component of the first publication right actually is one that is
outside the scope of copyright law as it has been applied historically in the United
States. To the extent that first publication rights seek to prevent public exposure to
a distorted version of a work, the doctrine’s underlying concern is more akin to
moral rights. Although moral rights are related to copyrights, they represent a
completely distinct theoretical framework and doctrinal structure. For purposes of
this discussion, however, it is important to note that authors of both unpublished as
well as published works have legitimate moral rights concerns that emanate from
their inspirationally-focused motivations for creating those works. As discussed in
Part III, the solution on this score is not to make delineations based on publication
status, but rather to ensure that certain basic integrity protections are codified in
this part of § 108 and apply to both published and unpublished works.

42. Cf. Report of the Register of Copyrights, supra note 6, at 47-48 (“Congress did not
intend subsections 108(d) and (e) to apply to the photocopying and distribution of unpublished works by
libraries or archives for their patrons . . . . Once the copyright owner has made the choice not to publish,
this choice must be honored.”).

43. See supra note 31 and accompanying text.

II. REPRODUCTION REALITIES IN THE DIGITAL ERA

As previously discussed, when § 108(b) was originally enacted as part of the 1976 Copyright Act, libraries and archives had the right to reproduce only one copy of their unpublished works to preserve, secure or deposit the work for research use in another qualifying library. Through the DMCA, this subsection was amended in 1998, to allow for the reproduction of up to three copies. Additionally, this amendment gave libraries permission to make up to three reproductions for replacement purposes under § 108(c). Moreover, recall that although the DMCA permits libraries to reproduce copies or phonorecords in digital format, they are prohibited from making such copies available to the public outside of the library’s physical premises.

Underlying the numerical and physical premises limitations is a clear concern for the market value of unpublished works. As discussed in Part I, this concern about unpublished works has historically centered on the right of first publication. With respect to published works, the real issue is whether the publisher might later wish to introduce a digital version into the market. Without some mechanism to confine the scope of the use of digitized works, there is a significant risk that the copyright owner’s market power with respect to the work will be reduced. For reasons that will be discussed below, however, the constraining mechanisms should focus on downstream reproduction and distribution rather than on access.

With respect to the physical premises restriction, a somewhat comparable situation is raised by § 109(c) of the Copyright Act—which provides a different limitation on a copyright owner’s exclusive rights. This subsection states that the owner of a lawfully made copy of a copyrighted work can publicly display that copy, without the copyright owner’s permission, “either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.” In the digital era, this provision raises questions such as whether the owner of a painting who is not the creator and does not own the copyright to the work can post a picture of the work on the internet without being subjected to liability for copyright infringement. If the picture is posted on the internet, how can further distributions be prevented? Moreover, should it matter whether the picture is being used to sell the item depicted? At least one case has addressed this physically-restrictive use caveat in §109(c).

In Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc., the court held that Video Pipeline, a video clip compiler, committed copyright infringement by using scenes from movies provided by the copyright owner to create its own movie previews for commercial use on the internet. These previews could be accessed

45. S. REP. NO. 105-90, at 61. See supra text accompanying note 10.
46. 17 U.S.C. § 108(c). In addition, the DMCA permitted libraries to make a digital copy to replace a copy of a work in an obsolete medium. See Overview, supra note 2, at 27; S. REP. NO. 105-90, at 62.
47. See supra note 11 and accompanying text.
48. See Gasaway, supra note 11, at 656.
on the websites of Video Pipeline’s retailer licensees so that retail customers of the licensees could view them while browsing the licensees’ websites. The district court held that this activity constituted copyright infringement despite the retailer’s right to display under § 106(5). In so ruling, the district court observed, “Congress could have said that the transmission of copyrighted images to customers at a distant point of sale by electronic means is within the zone of use permitted by § 109(c), but it has not done so.”

There are similarities between §§ 108(b) and (c) and § 109(c) of the statute. All of these provisions incorporate a use caveat that is physically restrictive. As the Video Pipeline case suggests, such use restrictions potentially raise problematic access issues in the digital era when users can readily enjoy access to works in distant locations.

The continuation of the reproduction limit of three copies also is problematic in the digital era. For example, it may take up to twenty copies to make just one digital copy of a webpage. In contrast, § 108(f)(3) provides that libraries can reproduce and distribute, for the purpose of lending, a limited number of copies and excerpts of an audiovisual news program. The rationale for this distinction, and the selection of the arbitrary limit of three copies in § 108(b) and (c), is “not fully explained.”

The following observations were made on this score in the Overview of the Libraries and Archives Exception in the Copyright Act, prepared in conjunction with the assessment of this provision of the Copyright Act by the § 108 Study Group:

The 1995 National Information Infrastructure Task Force Report—which was a foundational document for the DMCA drafters—did recommend an allowance of “three copies of works in digital form,” “to accommodate the reality of the computerized library.” But the three-copy limit more closely tracks the pre-digital (e.g., microform) preservation standard of an “iron mountain” copy, a master copy, and a use copy, than it does the realities of digital preservation (in that digital copies are highly unstable and cannot be simply made once and for all and stored away). The DMCA Senate report does not explicitly link the three-copy expansion to the allowance of digital preservation copies, nor does it refer to the microform standard.

Overall, §§ 108 (b) and (c) would be vastly improved by allowing the reproduction of a “limited number” of copies for preservation and replacement, consistent with § 108(f)(3), and by eliminating the physical premises restriction, at least for library personnel and their primary user group. In the context of an academic library, this group would include students, staff, faculty and verified scholars doing research in a specialized field. Of course, in the context of a public library, the primary user group would, in effect, be unlimited. Still, technology and appropriate digital rights management could enable libraries to afford their primary user groups the ability to access the works from distant locations while precluding

51. Id. at 335.
54. Id. (footnotes omitted).
their unauthorized reproduction. In addition, as part of the terms of obtaining access to a particular work, libraries also could require agreements from their primary user groups that they would not publish, reproduce, or grant others access to the work. Further, with respect to unpublished works, although widespread digital access to such works may constitute publication as a technical matter, appropriate reproduction and use restrictions will prevent encroachments into the copyright owner’s market power. As discussed in Part I, the threat of a negative impact on the copyright owner’s potential market is what drives the concern with first publication rights from an economic perspective. If this concern is addressed through appropriate safeguards, a technical publication of a work should be allowed as a result of broader access to it in a digitized format by a library’s primary user group.

Moreover, the elimination of these specific restrictions will not necessarily result in interference with the copyright owners’ economic interests if the parameters of allowable conduct are determined by the fair use doctrine. In fact, § 108(f)(4) explicitly states that nothing in § 108 “affects the right of fair use as provided by section 107.” Therefore, the specific parameters of the application of §§ 108(b) and (c) should be left to courts to decide pursuant to fair use.

Historically, the application of the fair use doctrine to library reproduction rights has been a contested issue. This is not surprising, considering the vastly different perspectives maintained by libraries, on the one hand, and copyright owners, on the other:

55. Several projects currently are underway to create a digital rights management system for use in libraries. See, for example, the Federated Digital Rights Management Project as reported in D-Lib Magazine. Mairéad Martin, Federated Digital Rights Management: A Proposed DRM Solution for Research and Education, D-LIB MAGAZINE, July/Aug. 2002, available at http://www.dlib.org/dlib/july02/martin/07martin.html. Moreover, the American Library Association (ALA) has identified the need for new and robust DRM solutions to further the goal of greater accessibility, but at the same time ensure sufficient protection for intellectual property. Due to a complex set of requirements, such as the need for solutions to apply to both digital and analog content, the ALA has not adopted a particular technology. Instead, the ALA has created a “consortium of librarians, information technologists, copyright law experts and public interest groups” to draft guidelines which will form the basis of an acceptable DRM solution. Am. Library Ass’n, DRM: Statement of Library and Higher Educ. Concerns (Apr. 2003), available at http://www.ala.org/ala/washoff/WOissues/copyrightb/digitalrights/digitalrightsmangement.htm.

56. Professor Gasaway notes that problems also arise with § 108(c) when the original work is in a digital format, such as a CD-ROM, and it becomes lost or is otherwise unavailable at a fair price. In such instances, although the original work was not subject to the statute’s numerical and physical use restrictions, the replacement version may well fall under the terms of the statute. Gasaway, supra note 11, at 656-57.

57. 17 U.S.C. § 108(f)(4) (2000). This subsection also provides that § 108 is subject to “any contractual obligations assumed at any time by the library. . . when it obtained a copy or phonorecord of a work in its collections.” This caveat regarding contracts “ensures that libraries honor those who donate works with the understanding that they will not be reproduced.” Overview, supra note 2, at 31 (citing H.R. REP. NO. 94-1476, at 77 (1976)). The Overview also observes that this subsection “makes clear that nothing in section 108 frees libraries from contracts, including license agreements that they have entered into with rights-holders that prohibit or restrict reproduction, distribution, or the exercise of any other right.” Overview, supra note 2, at 31.
Libraries and archives place primary importance on the value of providing access to their patrons, viewing copyright issues through the lens of the public’s need for uninhibited information flow in order to fully participate in creative, intellectual and political life. Rights-holders, on the other hand, emphasize the value of exclusive rights for creators, recognizing that without incentives and compensation to creators and their publishers, the amount and quality of creative and intellectual works available to the public will be severely diminished.  

A 1961 Report issued by the Register of Copyrights provided specific recommendations and proposed statutory language governing library photocopying, the need for which was justified based on the uncertainty of fair use limits. Interestingly, both the Author’s League and library representatives opposed the codification of rules and preferred an approach based on the then common-law fair use doctrine, although for different reasons. During subsequent copyright revision bills, the issue of whether library photocopying should be codified as fair use was also vigorously debated, and the economic impact of library photocopying was the focus of much of the discussion. By 1967, however, the Joint Libraries Committee on Copyright showed a change of heart regarding the desirability of codifying a provision pertaining to library copying because it feared that sole reliance on fair use would leave libraries vulnerable to constant litigation. The basic elements of § 108 grew out of a bill reported out of the Subcommittee on Patents, Trademarks, and Copyrights in December 1969.  

Of course, the 1976 Act also codified the fair use provision in § 107 of the statute. This fair use doctrine was already well established by the judiciary at the time of its codification in § 107, but since its enactment, this provision has been the subject of scores of decisions. The beauty of the fair use doctrine is its ability to resolve new factual situations due to its inherent flexibility. On the other hand, the ad hoc nature of the doctrine’s application often makes it difficult to afford guidance to future litigants. Still, fair use remains the most appropriate mechanism for resolving issues such as the appropriate parameters of library reproduction for

58. Overview, supra note 2, at 1. 
59. Id. at 12. 
60. Id. at 12-13. Despite their agreement to have a resolution based on common law fair use principles, their reasons differed substantially. The Author’s League believed “the Register’s proposal was a ‘grave threat to the fundamental right to print and publish copies.’” Id. at 13 (quoting Copyright Law Revision Part 2: Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Printed for the Use of the House Comm. On the Judiciary, 88th Cong. 256 (1963) (written statement of the Author’s League of America, Feb. 23, 1962). On the other hand, library representatives argued that codification was dangerous because it “would freeze what was allowable at the very moment that technology is advancing.” Id. at 13 (quoting Copyright Law Revision Part 2, supra, at 34 (statement of William H. Hogeland, Jr., Joint Libraries Comm. on Fair Use in Photocopying, Sept. 14, 1961). According to the Overview, “[w]hat the libraries advocated was allowable under fair use (specifically, ‘fill[ing] orders for single copies of any published work or any part thereof’ as an ‘extension of normal and traditional library service’) went far beyond what publishers and authors found acceptable.” Id. at 13 (quoting Copyright Law Revision Part 2, supra, at 34 (statement of Edward G. Freehafer, Director, New York Public Library, Sept. 14, 1961). 
61. See Overview, supra note 2, at 14. 
62. See id. at 16. 
63. See id. at 17. See also S. 543, 91st Cong. § 108 (as passed by S. Print Comm., Dec. 10, 1969).
preservation and replacement purposes in the digital age. Although there is no reason to second-guess Congress’ initial decision to make it permissible for libraries to copy for preservation and replacement purposes, Congress should be encouraged to legislate the specifics of this exemption with a light hand. Reliance on the flexibility of the fair use doctrine, as opposed to codification of arbitrary restrictions on libraries’ conduct, is a preferable solution in an era when technological changes inevitably render codified limitations suspect in a short time. Moreover, the particular limitations discussed herein—the number of permissible copies and the public availability of the digitally reproduced works—relate directly to the question of whether the copying will negatively impact the potential market for the work, a matter at the heart of any fair use determination. 64

III. MAINTAINING AUTHORS’ INTEGRITY INTERESTS

The first two Parts of this Commentary address limitations with respect to library copying for preservation and replacement purposes that impact the copyright owner’s market power. These discussions conclude that Congress should avoid enacting certain specific restrictions in favor of a more fluid approach. In contrast, for reasons that follow, with respect to the subject of authors’ moral rights, § 108 should incorporate certain specific provisions assuring authors’ attribution and integrity interests.

By and large, copyright law in the United States creates economic incentives almost exclusively. With the exception of limited protection for certain types of visual art codified in the Visual Artists Rights Act, 65 American copyright law does not afford moral rights to authors. The rights protected under copyright law include the economic rights to reproduce, distribute, publicly perform and display, and the right to make a derivative work based on the original. 66 The Copyright Act does not include an author’s ability to compel attribution for her work within the rights specifically enumerated. Nor does it mandate that the copyright owner, if this is someone other than the author, must preserve the artistic vision of the original work in reproductions, distributions or displays. In contrast, in many other countries, authors’ rights laws incorporate moral rights protections that emphasize the importance of respect for the author’s message as it is embodied in the author’s tangible artistic product. The most prominent components of moral rights laws are

64. According to the Supreme Court, the fair use factor involving “the effect of the use upon the potential market for or value of the copyrighted work” is “undoubtedly the single most important element of fair use.” Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985). See also 4 MELVILLE NIMMER AND DAVID NIMMER, NIMMER ON COPYRIGHTS § 13.05[A][4] (2002) (stating that this factor is “the most important and indeed [the] central fair use factor”).

Interestingly, only one reported decision has involved library photocopying and fair use. In Williams & Wilkins Co. v. United States, the National Library of Medicine’s extensive photocopying of plaintiffs’ journals was sustained by the Court of Claims as within the scope of fair use. 487 F.2d 1345 (Cl. Ct. 1973). On petition, the Supreme Court’s split decision, although affirming the Court of Claims’ decision, was devoid of precedential value. Williams & Wilkins, 420 U.S. 376 (1975). See Overview, supra note 2, at 17-20 for a detailed treatment of the litigation.


first, the right of attribution, and second, the right of integrity.

The right of attribution safeguards the author’s ability to be recognized as the creator of her work, and prevents others from being falsely designated as the author. Consider the situation in *Bastiste v. Island Records, Inc.*, in which the plaintiff songwriters’ work was digitally sampled by the defendant and then included in one of the defendant’s albums without appropriate attribution. The defendant record company had secured permission to use the plaintiffs’ song from the assignee of the plaintiffs’ copyright. Copyright law here was of no use to the plaintiffs since no infringement had occurred as a result of the valid assignment. Given the absence of a specific right of attribution in the statute, the plaintiffs were out of luck.

The right of integrity guarantees that the author’s work truly represents her creative personality and is free of distortions that misrepresent her creative expression. So when an author assigns to another party the rights to reproduce the work, and the reproduction contains elements that distort or mutilate the work, a violation of the right occurs. In the context of § 108(c), for example, suppose that a library makes a digital reproduction of a rare work of art and, in the author’s view, the lighting is such that it mutes the vibrant colors contained in the original. This situation might give rise to a violation of the right of integrity if protections for such a right existed in the United States.

The laws governing authors’ rights in the United States, and legal scholarship as a whole, do not pay sufficient attention to the non-economic or inspirational motivations for creativity. Elsewhere, I have developed a theory of creative enterprise called the intrinsic dimension of creativity that emphasizes that creativity is spurred largely by incentives that are non-economic in nature. The incentives about which I am speaking are grounded in inspirational or spiritual motivations. I use the terms “inspirational” and “spiritual” as short-hand designations for the type of relationship an author maintains with her creations. This relationship does not emphasize artistic creation for the sake of reaping economic reward. Instead, it is a relationship characterized by a simultaneous sense of self-connectedness to the work, and distance or self-transcendence with respect to the work. In other words, this type of relationship is grounded in an innate creative quality that requires the author to infuse herself into her work, while simultaneously maintaining the appropriate distance and perspective so that the work can emerge.

Wendy Gordon has remarked that “[c]ommon observation suggests that intrinsic motivations tend to produce better work, at least in the highly skilled vocations, than extrinsic motivations.” For example, renowned social psychologist Teresa Amabile’s work focuses on the intrinsic motivation principle as a cornerstone of

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67. 179 F.3d 217 (5th Cir. 1999).
69. Id.
the social psychology of human creativity. Amabile defines intrinsic motivation as “any motivation that arises from the individual’s positive reaction to qualities of the task itself,” as opposed to extrinsic motivation which “arises from sources outside of the task itself,” such as “expected evaluation [and] contracted-for-reward.”

Intuitively, we know this to be true, and history supports the importance of non-economic motivations for creation. The innate nature of the urge to create is suggested by the multitude of works by authors who lack any expectation or hope of remuneration. A perspective grounded in inspirational motivations emphasizes creativity as fulfilling an inalienable responsibility to others as well as to the author’s own substantive personality. This paramount responsibility drives the intrinsic dimension of innovation.

Moreover, an inspirationally driven explanation of creativity seeks to unify the intrinsic drive to create and its external embodiment, so that the external is understood as a reflection of the author’s inner cognitive processes:

This explanation, by emphasizing the intrinsic process of creativity, recognizes that the value of expression derives from the effort to communicate as much as from the tangible result. This intrinsic dimension of creativity is not necessarily concerned with the commodity’s ultimate economic worth but instead values the commodity as a reflection of its creator and an embodiment of the creator’s message and the work’s intended meaning. According to this perspective, the commodity that embodies the author’s work serves as a testament to the author’s beliefs and inspirational motivations.

Thus, inspirational motivations for human creative enterprise reflect important foundational norms in our society that should be considered more fully in our dialogue on authors’ rights. Philosophers have emphasized that as a behavioral category, authorial dignity can be realized only in the tangible commodities through which the author’s inner personality expresses itself. Under this view, authorial dignity cannot be assessed absent the author’s externalized message, but the message cannot be understood without reference to the author’s intrinsic motivations for creation. Thus, appropriate regard for the external embodiment of an author’s work as the means through which his message and intended meaning is communicated to the public facilitates the acquisition of authorial dignity. Moreover, a legal system concerned with safeguarding authorial dignity is designed to ensure that the author’s choice of signature and presentation will be respected to the fullest possible extent.

The moral rights of attribution and integrity comport with a shared sense of

71. TERA M. AMABILE, CREATIVITY IN CONTEXT 115 (1996).
72. For a more complete treatment of this issue, see Kwall, Inspiration and Innovation, supra note 68.
73. Id. at IIC.
74. Id.
76. Kwall, Inspiration and Innovation, supra note 68, at IIC.
authorship norms in our culture. The story of Jerry Zar, the retired dean of the Northern Illinois University graduate school, illustrates this point. Zar authored a poem about “spell-check” that has been distributed widely on the internet without attribution. Zar has observed: “As it gets around the internet, it gets modified... People stick in words that are not exactly homonyms, and this bothers me. They should keep it pristine in my view.” Zar enjoys the fact that people love his poem, and he only seeks correct replication and attribution.

In revising § 108, Congress has an opportunity to incorporate foundational authorship norms and provide support for authors’ dignity interests by inserting some important moral rights protections into the subsections on reproductions for preservation and replacement. As discussed in Part I, the theory supporting moral rights protections applies to authors of both published and unpublished works. Indeed, the inspirational motivations for human creativity do not necessarily demand publication or commodification of one’s works. Therefore, the following recommendations should apply to all works protected by copyright that are subject to reproduction under the existing §§ 108(b) and (c).

Initially, libraries should be required to provide appropriate attribution for any works reproduced for the purposes currently contemplated by these subsections. On a theoretical level, an author’s choice of attribution plays a central role in communicating the meaning of an author’s work, and thus is a vital component of authorship dignity. Moreover, attribution is perhaps the most widely endorsed and least controversial aspect of moral rights. Unlike the right of integrity, the right of attribution does not preclude the actual use of an author’s work in any particular manner. It simply requires that the user, in this case the libraries reproducing the works at issue, attribute authorship to the original author of any work protected by copyright.

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77. According to an article in the Chicago Tribune, hundreds of Web sites feature Zar’s poem, most without attribution, a few showing attribution to someone else, and many that have “warped his words.” Mary Schmich, Anonymous Steps Forward for Attribution, CHI. TRIB., Mar. 5, 2004, § 2, at 1.

78. Id.

79. For example, virtually all authors participating in Stanford Law School’s Creative Commons Project require attribution of their work. Anupam Chander & Madhavi Sunder, The Romance of the Public Domain, 92 CAL. L. REV. 1331, 1361 (2004). See also Gasaway, supra note 11, at 669 (discussing the Budapest Open Access Initiative which “posits that the only constraint on reproduction and distribution of [covered] scholarly works should be the author’s control over the right to be properly acknowledged and cited”); see also Budapest Open Access Initiative, at http://www.soros.org/openaccess/.

80. Elsewhere, I have suggested that as a general matter, moral rights protections should be confined to the life of the author in light of the personal nature of these protections. See Kwall, Inspiration and Innovation, supra note 68. A more limited duration is appropriate if the subject of moral rights were to be considered legislatively from the ground up and applied in a broader context. Here, however, the focus is on adding some limited moral rights protections to the copyright law and therefore, it makes sense to keep the suggestions simple by providing that the attribution and integrity interests suggested herein apply to any work reproduced that is still subject to copyright protection.
their work and to prevent false designations of authorship.\footnote{81} On a practical level, providing attribution will be relatively simple. Section 108(a)(3) of the statute already requires that the reproduction or distribution of a covered work include a copyright notice, or a “legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced.”\footnote{82} For works whose authors are known by a library, it would be a relatively simple matter to attribute authorship of the work along with the copyright notice.

With respect to the right of integrity, I suspect that library reproductions for the purposes covered by §§ 108(b) and (c) will not ordinarily entail distortions or mutilations of the reproduced works because a library’s very objectives in reproducing these works require exact duplication. Nonetheless, it is possible for situations to arise in which a work has been altered in a way the author might find objectionable, particularly in the context of a digital reproduction. For example, recall the example discussed earlier in connection with the right of integrity involving the digital reproduction of the rare work of art whose coloring lost its vibrancy in the reproduction process. To provide protection for authors’ integrity interests in such circumstances, libraries also should be required to include in the copyright notice or legend a disclaimer that although care has been taken to reproduce the work in its exact original format, unintended differences may exist. Such a disclaimer is especially important for reproductions of art works and other one-of-a-kind materials.

Moreover, requiring attribution and a disclaimer as to the reproduction’s accuracy promotes public interest in knowing the original source of a work and understanding the work in the context of the author’s original message, objectives that should appeal to libraries, given the importance they attach to the public’s need for uninhibited information. Although compliance with these requirements should not place an undue burden on the institutional operations of libraries, the legislative codification of these requirements would represent a significant step forward in explicitly recognizing authors’ personal interests in their works and the inspirational motivations spurring human creativity. It is particularly necessary that the United States consider ways to incorporate measures designed to protect authors’ attribution and integrity rights in the digital era since these rights can be violated with unprecedented ease and the results can be disseminated to countless recipients with the mere press of a key. Further, by recognizing enhanced protection for authors’ rights, such an amendment to § 108 would foster our conformity with global norms regarding moral rights, thus providing authors in the United States with a minimal degree of the type of protections their counterparts enjoy internationally.

\footnote{82} 17 U.S.C. § 108(a)(3) (2000). The DMCA allowed libraries to state in a legend that the work “may” be protected.
CONCLUSION

Although the 1976 Act embodies numerous compromises reflecting the positions of various special interests groups, it is significant that authors have not been as visibly represented in the discourse as one would expect. The § 108 Study Group, appointed by the Copyright Office and the National Digital Information Infrastructure, is charged with the responsibility of making recommendations regarding the future direction of this narrow, but vitally important, provision of the 1976 Act. The Study Group is to be commended for its desire to spur a dialogue that includes all whose interests are impacted by copyright law, including authors. As this Commentary shows, it is possible to revise § 108 to effect some groundbreaking changes that can recognize authors’ moral rights interests while at the same time ensuring greater access to protected works.

83. See Jessica Litman, Copyright Noncompliance (Or Why We Can’t “Just Say Yes” to Licensing), 29 N.Y.U. J. INT’L L. & POL. 237, 241 (1996-97) (discussing the formation of copyright law by all the experts—“the entities whose businesses involved printing, reprinting, publishing, and vending”).

84. See generally Roberta Rosenthal Kwall, “Author-Stories”: Narrative’s Implications for Moral Rights and Copyright’s Joint Authorship Doctrine, 75 S. CAL. L. REV. 1 (2001). See also Gasaway, supra note 11, at 644 (“Fewer and fewer authors and creators own their own copyrights today; thus, it is publishers and media companies that benefit from changes in the law.”).