



LIBRARY COPYRIGHT ALLIANCE STATEMENT ON COPYRIGHT REFORM

In the wake of Judge Chin’s rejection of the Google Books Settlement, there has been a renewed interest in legislative solutions to a variety of copyright issues affecting libraries, including those implicating the mass digitization of books, the use of orphan works, and the modernization of 17 U.S.C. § 108 (particularly preservation). The Library Copyright Alliance, comprised of the American Library Association (ALA), the Association of College and Research Libraries (ACRL) and the Association of Research Libraries (ARL), has several general comments on possible efforts to address these issues via legislation.

First, members of the Library Copyright Alliance (LCA) have long advocated and actively worked for positive change to copyright law in support of access to and preservation of the cultural record. Despite these efforts, Congress and the affected stakeholders have been unable to reach consensus on these issues for many reasons: the issues are complex, there are many stakeholders; their interests diverge significantly; and some oppose any change to the status quo. Accordingly, it is important to recognize that achieving a legislative solution to any of these issues will be difficult, if not impossible.

Second, the orphan works bill passed by the Senate in the 110th Congress would have provided little practical relief to libraries with respect to large scale digitization projects. As the legislation progressed from the U.S. Copyright Office’s original proposal in January 2006 to the bill passed by the Senate in September 2008, it became significantly less helpful to libraries. Thus, S. 2913 as passed by the Senate should not represent the starting point for discussion of orphan works legislation, at least with

respect to libraries. Instead, orphan works legislation for libraries should begin with a clean slate.

Third, the fair use rulings over the past twenty-five years indicate that courts probably would permit, pursuant to 17 U.S.C. §107, library-initiated projects involving mass digitization, the use of orphan works, and large-scale preservation.¹ Additionally, 17 U.S.C. §504(c)(2) requires a court to remit statutory damages when a library or archives had reasonable grounds for believing that its use was fair. The recent fair use decisions, combined with the limitations on remedies in section 504(c)(2), suggest that libraries could undertake large scale digitization, orphan works, and preservation projects with increased confidence that they would not incur significant liability for copyright damages.

Because of the favorable treatment such activities likely would receive in the courts under sections 107 and 504(c)(2), libraries would support an effort to amend the Copyright Act to benefit libraries only if it offered significant benefits over the status quo. To do so, a proposal must contain at least the following features:

- The non-commercial use (i.e., reproduction, distribution, public performance, public display, or preparation of a derivative work) by a nonprofit library or archives of a work when it possesses a copy of that work in its collection:
 - would not be subject to statutory damages;

¹ These rulings include: *Sony v. Universal*, 464 U.S. 417 (1984); *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994); *Sega v. Accolade*, 977 F.2d 1510 (9th Cir. 1992); *Atari v. Nintendo*, 975 F.2d 832 (Fed. Cir. 1992); *Sony v. Connectix*, 203 F.3d 596 (9th Cir. 2000); *Kelly v. Arriba Soft*, 336 F.3d 811 (9th Cir. 2003); *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006); *Blanch v. Koons*, 467 F.3d 244 (2d Cir. 2006); *Perfect 10 v. Amazon.com*, 508 F.3d 1146 (9th Cir. 2007); *A.V. v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009). For a discussion of the relevance of these decisions to libraries and educational institutions, see Jonathan Band, *Educational Fair Use Today*, <http://www.arl.org/bm~doc/educationalfairusetoday.pdf>, December 2007.

- would not be subject to actual damages if the use ceases when the library or archives receives an objection from the copyright owner of the work;
and
- would be subject to injunctive relief only to the extent that the use continues after the library or archives receives an objection from the copyright owner of the work.
- This limitation on remedies would apply to the employees of the library or archives, as well as to a consortium that includes the library or archives.
- Copyright owner objections would have no effect on a library's rights under fair use.

The premise behind this proposal is that the possibility of statutory damages deters libraries from engaging in uses that likely qualify as fair uses or that copyright owners would not oppose if they could be identified, located, and asked. Eliminating the possibility of statutory damages will encourage libraries to make these appropriate uses. At the same time, the continuing possibility of take-down or actual damages, combined with libraries' high visibility, will require libraries to exercise appropriate restraint that respects the legitimate interests of copyright owners.

May 16, 2011