January 25, 2018

The Honorable Charles E. Grassley
Chairman, Committee on the Judiciary
United States Senate
Washington DC, 20510

The Honorable Dianne Feinstein
Ranking Member, Committee on the Judiciary
United States Senate
Washington DC, 20510

Dear Chairman Grassley and Ranking Member Feinstein:

This letter is sent on behalf of the Section of Intellectual Property Law of the American Bar Association (the “Section”) to express its views on revising 17 U.S.C. § 108, which provides certain limited exceptions to copyright liability for libraries and archives (“Section 108”). These views have not been submitted to the American Bar Association’s House of Delegates or Board of Governors, and should not be considered as views of the Association.

For over a decade, the copyright community (including copyright holders, libraries and archives, and user groups) has been engaged in conversations regarding the state of Section 108. On March 31, 2008, an independent study group sponsored by the U.S. Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress (the “Section 108 Study Group”) released a report containing consensus recommendations to revise Section 108. Those recommendations were discussed and considered by the copyright community, including during the Committee’s copyright review hearings. On September 1, 2017, the Copyright Office released a new report titled “Section 108 of Title 17: A Discussion Document of the Register of Copyrights.” The Report contained updates since the Section 108 Study Group report, as well as proposed revisions to the text of Section 108.

The Section agrees with the Copyright Office’s conclusion that Section 108 is in need of revision. Since its initial drafting, changes in technology and the practices of libraries and archives, as well as the needs of their patrons, have rendered Section 108’s language largely out-of-date. As a result, large libraries and archives are increasingly relying on the fair use doctrine to permit greater use of their resources. Given its fact-specific nature, however, fair use is difficult to predict and impossible to rely on with confidence, particularly for those institutions that have limited legal counsel, financial ability, or capacity. Erring on the side of caution, many institutions (particularly smaller libraries and archives) are making fewer materials available to their patrons than they otherwise would as they continue to rely on the current version of Section 108.
Furthermore, the Copyright Office’s various studies and reports confirm that libraries’ current practices do not conform to the statute, which was written based on practices from decades ago. To preserve the rule of law, it is important to replace a statute that largely has become irrelevant with one that is useful and effective given the realities of modern library practices. To ensure that Section 108 remains useful, it is critical that the statute be revised to provide practical, clear guidelines that better comports with institutions’ needs.

The Section largely supports the suggestions in the Copyright Office’s 2017 Report. Specifically, we agree that the statute should contain more detailed eligibility requirements, such as having a public service mission, providing library and archiving services, retaining professional library staff, and possessing a collection comprising lawfully acquired and/or licensed materials. We also agree that the statute should permit institutions to make as many preservation copies “as reasonably necessary” to further their public-service goals and allow them to outsource the creation of such copies, subject to certain limitations. The Section further supports expanding Section 108 to include museums alongside libraries and archives as eligible institutions.

The Section, however, also has additional recommendations should legislation to update Section 108 be proposed. First, we have previously recommended that the Copyright Office be given rulemaking authority to determine the eligibility requirements for section 108, as well as the scope of its exceptions. The Model Statutory Language does not address this. Given many eligible institutions’ responsiveness to, and reliance upon, technology, we support including a provision that would grant the Copyright Office sufficient rulemaking authority to adapt Section 108 to changing circumstances. Second, the Copyright Office rejected the idea that institutions should be required to maintain physical premises open to the public to qualify for Section 108’s exceptions. The Section, however, feels that such a requirement should be imposed. Given the magnitude and variety of online platforms today, the Section feels that a physical premises requirement would appropriately limit Section 108’s scope to actual libraries, archives, and museums and better ensure that institutions are able to police their patrons’ access to, and interaction with, their collections in a way that balancing the rights of copyright holders and patrons.

Accordingly, the Section supports the Copyright Office’s Model Statutory Language, but urges Congress to consider the further provisions proposed above. Revising Section 108 will bring necessary and positive change to the copyright system by better serving its goal of maintaining a broad public discourse. We thank you for your time and attention, and hope this matter will be taken up by Congress in the near future. We would be happy to be involved in future discussions as this conversation continues.

Very truly yours,

Scott F. Partridge
Chair
American Bar Association
Section of Intellectual Property Law