August 29, 2016

Hon. Maria A. Pallante
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue, S.E.
Washington, DC 20559


Dear Register Pallante:

I write to express the views of the American Bar Association Section of Intellectual Property Law (“the Section”) on the limitations on exclusive rights related to reproduction by libraries and archives embodied in 17 U.S.C. § 108 (“Section 108”). As you may know, in July 2016, members of the Section met with the Copyright Office’s staff as part of the above-referenced notice of inquiry.

Today, I write to address certain matters raised during the conversation with the Office’s staff, but on which our members were unable to speak at that time on the Section’s behalf. Specifically, this letter expresses the Section’s support for certain recommendations set forth in the March 2008 report of the Section 108 Study Group (the “Report”), as well as additional recommendations concerning 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.

First, as an initial matter, the Section applauds the Report’s consensus-based recommendations. The Section has monitored the conversation concerning Section 108 over the past ten years and believes the time is ripe to implement the recommendations.

Second, in a slight departure from the Report’s recommendations, the Section believes continuing changes in technology and preservation practices make it important for the Copyright Office to receive sufficient rulemaking authority to adapt Section 108 to changing circumstances, rather than implementing
the Study Group’s recommendations as legislation. As you may know, in the context of the copyright review hearings before the House of Representatives Committee on the Judiciary, the Section has supported greater rulemaking authority for the Copyright Office, and the Section believes doing so with regard to library and archive exceptions will be particularly beneficial. While Section 108 was drafted when microfiche was the leading technology for preserving certain types of works, library and archive preservation has changed and improved radically over the years. Similarly, preservation practices and the needs of library and archive patrons have changed as well. Because of these advances and the stagnant text of Section 108, the library and archive exceptions are so out-of-date that they risk becoming meaningless, resulting in some libraries and archives increasingly relying on the fair use doctrine to permit greater use of their resources. As the Section has recognized, however, today, the outcomes of fair use cases are difficult to predict and the doctrine is impossible to rely on with confidence.

Accordingly, the Section supports granting the Copyright Office greater rulemaking authority to identify exceptions to copyright infringement for qualifying institutions given existing technology and preservation practices. Of course, Congress should provide the Office with meaningful guidance in making those determinations, and in that regard, the Section supports a standard whereby qualifying institutions may make copies of copyrighted works reasonably necessary to accomplish the goal of preservation and in keeping with the best preservation practices of the time, but will not harm the market for copyrighted works.

As part of the rulemaking process, the Office should consider whether qualified institutions should be limited in their distribution of copies of material to patrons within their geographic or subject matter scope, thereby allaying the concern that public libraries would provide copies directly to individuals outside their geographic area, or research libraries would provide copies directly to individuals who do not qualify as researchers, both of which would harm the market for copyrighted works and twist the intended benefits of providing limitations to libraries and archives in the first place. A more nuanced, rulemaking-based approach will allow the calibration of these exceptions to the workable definitions already implemented by publishers and libraries that define appropriate user communities for libraries and archives and allow for the continued modification of those definitions in the future based on changing technology and practices. Similarly, Copyright Office regulations should require qualified institutions appropriately to mark copies of copyrighted works provided to their patrons. This will ensure those works can be tracked if they circulate online among individuals other than qualified users of such institutions, as well as the Office’s ability to adjust its rulemakings accordingly. Finally, the Section recommends empowering the Copyright Office to require libraries and archives to employ technological protection measures when providing copies of works from their collections to users to ensure that the users do not use the access provided by libraries and archives to infringe.

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1 While the Section appreciates concerns raised with regard to the Section 1201 rulemaking procedures, it envisions a Section 108 rulemaking more akin to rulemakings for the Office’s registration practices, which do not require repeated renewal.
Third, the Section supports the Report’s recommendation that the definition of qualifying institutions be revised. As an initial matter, museums—which share libraries’ and archives’ mission of collecting and preserving material of cultural and scientific importance—should similarly qualify for Section 108’s exceptions.

In addition, institutions should receive clear guidance on the qualifications for Section 108’s limitations as there are no shortage of institutions and organizations using the monikers of “libraries” and “archives” that may not necessarily be the intended beneficiaries of Section 108 (e.g., entities with no physical collections or professional staff and that do not engage in preservation, but rather distribute unlawful copies of copyrighted material). For Section 108 to be useful, these new institutions must know whether they will qualify or not. In terms of specific eligibility requirements, the Section supports the Report’s recommended “functional eligibility criteria,” which would delineate the attributes of traditional or other professional libraries and archives. The Section, however, also would require qualified institutions to be nonprofit organizations (as defined in the U.S. Internal Revenue Code) or government organizations. While the Section recognizes there are some libraries and archives in for-profit entities serving roles similar to those of a non-profit library, the Section believes such libraries and archives will be better able to remunerate copyright holders for the use of their works and, thus, do not need the benefits of Section 108 to the same degree as other institutions. In addition, by tying eligibility to nonprofit status, it will be easier to determine whether institutions purporting to provide library and archive services actually qualify under Section 108.

Finally, one issue that has been raised with regard to the Section 108 exceptions is whether qualified institutions should be permitted to outsource the reproduction or preservation of copyrighted works consistent with the statute. As in some circumstances outsourcing is the only way to make preservation feasible, the Section supports permitting qualified institutions to work with third parties, provided the reproductions are requested by a qualified institution and returned to the institution, and the third parties do not retain copies of the work or do anything other than make the requested reproduction. Moreover, the qualifying institutions should be required to ensure copyright holders are able to obtain redress from the third parties to remedy any copyright infringement resulting from the third parties’ conduct.

Very truly yours,

Donna P. Suchy
Section Chair
American Bar Association
Section of Intellectual Property Law