LCA Statement on Copyright Office Discussion Document on Section 108 of Title 17

The Library Copyright Alliance1 (“LCA”) has carefully reviewed the Copyright Office’s recently released Discussion Document on section 108 of Title 17 of the U.S. Code. LCA thanks the Office for the significant thought and effort it has devoted to this endeavor and its serious attempt to balance the interests of libraries, rightsholders and users.

Many of the Document’s recommendations have merit in that they update section 108’s provisions to reflect the nature of digital technology. In addition, the Document’s model statutory language is much better organized than section 108 as now written, and much easier to understand.

Most significantly, the Document unambiguously recognizes the complementary roles of fair use and section 108 in ensuring libraries’ ability to fulfill their important public service mission. Specifically, LCA particularly appreciates the Copyright Office’s clear statements in the Document that it:

• “... feels strongly that the fair use savings clause must remain in section 108 regardless of any other amendments that may be found necessary;”
• recognizes “Congress’s intent to maintain both section 108 and fair use as tools for libraries and archives,” and “the use and acceptance of this principle by eligible institutions, copyright owners, users, and the courts...;”
• acknowledges that “a revised section 108 cannot address every situation in which public policy would deem it reasonable for a library or archives to reproduce or distribute a copy of a work without first attempting to seek permission;”
• identifies web harvesting and electronic reserves as areas “where fair use must continue to govern;” and
• categorically concludes that “it is essential that the fair use savings clause stay in section 108.”

Nevertheless, LCA continues to believe that it is unnecessary for Congress to embark on a legislative process to update section 108 for two principal reasons:

• The Document’s proposed amendments, while salutary, would not allow libraries to perform any lawful activity in which they are not already engaging under the fair use right codified in section 107. In other words, the proposed amendments merely ratify the status quo as well-defined by considerable existing fair use case law. LCA acknowledges that there could be theoretical value in such ratification. We do not believe, however, that such speculative benefit justifies the reality that actual legislative debate over the final statutory form of any updated section 108 inevitably will be highly contentious.
Moreover, it is far from certain that the final amendments enacted by Congress would remotely resemble the Copyright Office’s carefully drafted model statutory language. Indeed, certain rightsholder organizations have explicitly and consistently articulated their opposition to section 108’s fair use savings clause. Thus, it is entirely possible that the political process could produce an “updated” section 108 that would leave libraries worse off than they are today, notwithstanding the Copyright Office’s well-intentioned objective of providing libraries, archives and museums with a “robust, comprehensible, and balanced safe harbor in order to fulfill their missions” in the digital age.

For these reasons, LCA believes that libraries and the public at large—including creators—would be better served if Congress focused its attention on other sections of the Copyright Act in much greater need of reform, most notably section 504(c)(2) concerning statutory damages.

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1 LCA consists of three major library associations in the United States: the American Library Association, the Association of College and Research Libraries and the Association of Research Libraries. These associations represent over 100,000 libraries in the United States employing more than 350,000 librarians and other personnel. An estimated 200 million Americans use these libraries over two billion times each year. These libraries spend over $4 billion annually acquiring books and other copyrighted material.