**Legal issues in "controlled digital lending"/** NISO/ May 2019

Abstract

The copying and distribution of copyrighted content by libraries present complex legal issues, and although there are existing copyright law exceptions for such library activities (primarily in Section 108 of the US Copyright Law), those exceptions have not formally been amended for digital and online uses. The position statement and white paper on controlled digital lending (CDL) published in September 2018 by Kyle Courtney (Harvard) and David Hansen (Duke) is endorsed by a number of libraries, copyright academics, and other organizations such as the Internet Archive, but should be understood to be primarily an advocacy position, relying principally on a "fair use" argument and some risk assessment. While in the past publishers and libraries have worked together on legislative solutions including a working group on Section 108 in the mid-2000's, and on a number of pilot e-book lending projects in 2013 and 2014, there was no such "bipartisan" engagement in developing the CDL proposal, and publishers (the AAP) and authors (the Authors Guild) have noted their opposition and disagreement with the CDL position. I will review the legal issues and discuss alternatives and concerns.

**Full presentation**

Section 108 and 107d (most relevant sections for library copying in US copyright law)

17 USC 107 and 108 have a curious relationship—107 is the general fair use exception and is meant to be a flexible instrument which notes that certain uses of a copyrighted work might not be an infringement for a variety of purposes including scholarship and research, and then sets out the famous four factors (purpose of use; nature of work; amount used; effect on market); but 108 contains specific provisions about library reproductions including those for preservation and archiving, but also permits copying for users at another library (interlibrary loan), which provisions have not been updated significantly since 1976 (minor update 1998). These provisions were amplified by the CONTU Report of that same year that were supported by library, publisher and author organizations, and which sets out the famous "rule of 5" for relatively recent periodical publications (past 5 years, no more than 5 article from single journal). Section 108(f)(4) notes however that nothing in Section 108 limits the "right of fair use" under Section 107.

Why do we have two sections that are possibly relevant to CDL? Simplistically it can be said that 108 is more specific and provides more guidance for library copying, particularly when amplified by CONTU. Section 108 states the overriding principle that the copying should not amount to "concerted reproduction or distribution of multiple copies… [so] as to substitute for a subscription to or purchase of such work". Section 108 helpfully provides protection against legal liability for libraries and their staff in conducting ILL and in providing in-house copying services. Interestingly in the statutory damages provision in Section 504, a nonprofit educational institution or library also receives protection from statutory damages if they had "reasonable grounds" for believing that the requested use was a fair use under Section 107. The drafters of the 1976 Act no doubt understood that the more general flexible approach of fair use might be needed to supplement the more specific provisions of Section 108, given

the length of time between copyright law amendments (Section 108 saw relatively minor modifications in the 1998 DMCA but otherwise is much the same as it was after the 1976 Act).

Analogy re a firm bridge over a river (108) as opposed to looking to find shallows to ford (107)?

The drafters of the CDL position and white paper (see https://controlleddigitallending.org/whitepaper) discuss 107 and fair use, along with the question of "first sale" (codified in Section 109), understood generally to refer to physical goods like a used print book, but do not address Section 108. I don't believe this is because of a fear of complexity, because fair use itself is quite complex, as is made clear in the white paper discussion-- which in the end amounts to a risk assessment for librarians—I believe instead it is because some advocates at the moment believe that the courts will advance fair use positions more quickly and more readily than a negotiated "new deal" or a new Section 108.

Prior review efforts & recommendations

Publishers have participated over the past 15 years in several working groups and pilot projects, working directly with libraries and library organizations, carrying the "bipartisan" work through. In addition, many publishers have developed "interlibrary loan" provisions in licensing arrangements. Several of those working group studies and pilot projects in fact recommended changes in law and licensing practices to permit many of the functions described in the CDL position and paper. Indeed the core recommendation of the Section 108 study group is largely reflected in the CDL position, in linking digital reproduction & delivery to greater technical protection measures to reduce possible unplanned re-distribtuion. The 108 study group would have also added museums and online libraries if they met certain criteria (Section 108 talks about libraries being open to the public or available to affiliated and unaffiliated researchers).

Why hasn't revision of Section 108 occurred? Publishers and author organizations were generally supportive of the changes mentioned (with concerns over effectiveness of TPMs) in the study group recommendations and in the Copyright Office proposals (last noted in 2016). Support from the key US library organizations ARL and the ALA, however, was lukewarm (see https://www.arl.org/storage/documents/publications/section108study-libresponse9nov06.pdf) --- the official view at that time appeared to be that the application of technical protection measures to scanned content or born digital content would not be consistent with library principles of "minimal restrictions consonant with access allowed for the original versions." Of course it is true that any piece of legislation faces many challenges, and copyright law proposals in particular often suffer from the perception that they are perhaps not as urgent as other matters—so there is considerable inertia when it comes to complex intellectual property laws such as our Copyright Act. However inertia can be overcome—we saw this last year with the Music Modernization Act which in the end received considerable support across ideological divides—and legislative proposals would stand a much better chance of passage if there was a strong consensus view that could be expressed to Congress.

The CDL position & white paper

As noted, the September 2018 position statement co-authored by a number of copyright and policy advisers to organizations such as the Internet Archive and the Harvard and Duke university libraries, and the more detailed white paper co-authored by David Hansen (Duke) and Kyle Courtney (Harvard), relies on fair use, first sale and in the end risk assessment. The documents do not discuss Section 108, or the Section 108 Study Group—no mention at all of this section of the Copyright Law. The authors are probably correct that as currently drafted, 108 does not support digital ILL (neither the scanning nor the delivery), yet it seems odd to make no mention of it at all (even by analogy?).

The CDL documents also make a number of factual assumptions or assertions—described as the "20th century book problem"—asserting that many books published that are still in copyright (extending back into the early 20th century) are unavailable, or unavailable in digital form. This question of availability is important in Section 108 analysis, and may be relevant to the fair use Section 107 analysis. The authors cite a number of recent papers about alleged difficulties in clearing rights or identifying copyright owners, particularly for specialized works. On the other hand, the authors do admit in a footnote that at least "some of the most popular, commercially-viable books remain in print and are available in a variety of formats." This is a more important point that needs to be made more forthrightly—in fact the US book publishing industry has been making available book content in electronic format for more than 20 years, and has been engaged in creating a backfile of available e-book content, particularly in the fields of science and medicine. In addition, there are readily available sources of information about rights clearances, including through the Copyright Clearance Center (CCC) (on which I sit as a Board member). Of course it will always be true that more esoteric and more specialized books may be viewed as having a limited market, and may not be kept up to date with respect to rights management and ownership—but the question for the library community will be the extent to which most interlibrary loan requests are actually for materials that are readily available or for which rights can be readily cleared. Very simplistically, if consumers can find information about most books through retail outlet sources such as Amazon, then due diligence (often required in proposed "out of commerce" proposals) for the vast majority of works shouldn't be seen as that difficult.

Book publishers initiated a series of pilot projects 5 to 6 years ago to test the viability of e-book loans under licensing provisions that would have permitted a certain number of "loans" or accesses for a particular work in e-book format, and then calibrated different licensing fees based on the use and popularity of certain works. Publishers have options and alternatives available, including for e-book formats. Science and medical publishers often include digital ILL activities in their institutional licenses. The availability of these resources will have some relevance to the fair use analysis that the authors next engage in. In the interest of time, I won't examine the "first sale" analysis, which in my view clearly does not apply to digital works or scanning, although there is an open case on appeal that the authors noted which might be relevant. The authors imply that first sale is somehow relevant to fair use analysis, which I think is a novel suggestion.

<u>Fair use (107)</u>

The authors are right, as noted above, to assert that a particular CDL delivery could be viewed by a court as a fair use under Section 107, and they do list the four factors correctly. The fact that CDL might be for the purposes of scholarship or research is certainly an important factor that might weigh in favor of a

fair use finding in a particular case. The authors note that the factors need to be weighed together (purpose of use; nature of work copied; amount used; market effect), but do not discuss the fact that, as many courts have found, the market effect is often given greater weight than the others. There is quite a bit of discussion here about the Authors Guild v HathiTrust case, although importantly that case involved the question of accessibility for print-disabled users.

The authors acknowledge that there re no cases directly on point, and that there is some contrary authority regarding commercial activities, and that it is important for libraries to act "within certain limits" to improve its fair use argument. Let's examine each of the four factors in turn, as the authors do.

Purpose and character of use—the assumption here is that CDL will be non-commercial and for educational and research purposes. If the librarians involve have a good faith belief that the purpose of a particular CDL delivery falls into these categories, then the authors are likely right that this will weigh in favor of a finding of fair use. The authors engage in some analysis of "transformativeness", a concept developed by Judge Pierre Leval and which concerns, properly construed, the purpose factor. The authors note that CDL is not "clearly transformative", which in my view is correct (this has been stated also with respect to the Georgia State e-coursepack case), but I do agree with the authors that this may be irrelevant in this first use factor if the other elements are there.

On the nature of the work—the traditional understanding is that more copying of more factual works is likely fairer than copying of more creative works. However I agree with the authors that this factor is not much discussed in fair use cases. Nonetheless the authors suggest that librarians might want to concentrate on more factual or scientific works as a risk mitigation factor.

On the amount used, the authors assert that "on many occasions [the] use of an entire work, when necessary to fulfill a valid purpose, does not weigh against a [fair use finding]"—that may be true, but should be viewed as part of the overall weighing of factors that courts are supposed to do. The fact is that the use of the entirety of a work, as contemplated in CDL, will be a factor weighing against a finding of fair use. It may be of course that the other factors weigh in favor of a fair use finding, but clearly this factor does not lend itself to that finding.

The market harm argument depends very much on the "20th century book problem" that the authors postulate at the beginning of the paper. The authors correctly say that courts have looked not only at market effects for the particular work in the particular format used, but have also looked at much broader potential markets, at least such markets that are "likely to be developed". One argument advanced by the authors is that the "owned to loaned" restriction (the "original" of the book is unavailable while the "copy" is being accessed, under DRM restrictions) preserves the market factors. I do agree that this is helpful, but this does ignore the more fundamental point that particularly for recently published and certainly for trade market materials, publishers are making content available digitally and likely have provisions when licensing such content that address (either positively or negatively) whether the content can be used for ILL purposes, and may provide alternative market fees for such uses.

Risk analysis (and the "control" in CDL)

The proponents of CDL suggest that incorporating the "owned to loaned" measure and DRM protection generally, along with the suggested time-limits on accessibility for the "loaned" copy, will help in risk mitigation. I think this is true and that these are factors that would be considered by a court if particular CDL instances were challenged. There may be questions about how secure and effective such measures are (not to mention the availability of commercial alternatives), but certainly such measures would be part of the legal assessment. The authors are also right to point out the sovereign immunity defense for public institutions, where monetary damages might not be available (although injunctive relief might still be available). Finally, the authors are right to point out the general hazards of litigation—in cost and time and reputation. Publishers do not generally like to engage in litigation with university libraries, and it seems to be a difficult way of obtaining greater legal certainty about certain kinds of university or library conduct.

Ultimately the authors warn that universities and libraries will need to obtain their own legal advice on these matters, and be prepared for possible litigation. However they suggest that CDL with the limits envisaged and if confined to works that might be more specialized and possibly less available through normal market means may help support fair use arguments.

Conclusion

To improve legal certainty, there is really no alternative but "bipartisan" negotiation around Section 108 and legislative amendment. This may take time, but as the authors have rightly pointed out about the Georgia State case, litigation (and appeals) also takes time. If the goal is certainty, legislation is the solution. The Section 108 Study Group recommendations shows that compromises can be found. Such a bipartisan approach would help ensure that Congress takes the proposal more seriously. The stakeholders of course need to decide whether compromise is acceptable!

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