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Copyright Reform: The Inclusion of Museums in Section 108

While the current United States copyright law would undoubtedly benefit from a widespread overhaul—particularly one that includes some clarification to the murky landscape surrounding digital materials—there is an aspect of the law that could be tweaked only slightly in order to improve its current status. Section 108 of United States copyright law, “Limitations on exclusive rights: Reproduction by libraries and archives,” must be amended to include museums in its scope. The current wording seems like nothing more than an oversight, and yet it puts many museums at risk, forcing these institutions to rely on fair use when making reproductions of their collections material for any number of legitimate reasons.¹ By simply modifying the wording of §108 to include museums, the United States government would be taking a major step in the right direction for copyright reform.

Section 108 of US Copyright Law currently states, “...It is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work...”² The law goes on to list specifics regarding under what conditions libraries and archives are permitted to reproduce and distribute copyrighted materials in their collections. The problem here is simple—the work done by museums and their employees is extremely similar to that of libraries and archives, and there is no immediately discernable reason why museums should be excluded. Even the Gentlemen’s Agreement of 1935 included museums in its discussion of reproduction of copyrighted materials, yet museums were inexplicably left of when the law was reevaluated in 1976.³ All three types of institutions are in the (almost always nonprofit) business of

disseminating history and culture, and all three inevitably handle issues related to preservation and access where they would benefit from being able to make and distribute reproductions of their collections materials.

The addition of museums to §108 would be a strong first step, but subsection a2 would also need amended. While museum exhibitions are open to the public, most museum collections themselves are not—that is, a member of the general public likely cannot just walk into the Metropolitan Museum of Art and request to view a piece that is not currently on display. Museums usually have much larger collections than their exhibition spaces allow, and are unable to display all pieces at all times for numerous reasons, including preservation concerns and loans to other institutions. Regardless, museums should still be able to make reproductions of materials under §108. The benefit to the public is clear—perhaps a museum needs to display a reproduction of a document while the original is being repaired, and their inclusion in §108 would allow them to do so. As the Section 108 Study Group Report states, “Museums now are more likely to be in the position of making copies of materials in their collections for preservation, replacement, private study, and research and face more and increasingly complex copyright issues.”⁴

Museums would obviously be the primary beneficiary of this potential copyright reform. If museums were added to §108, they would be permitted to make the allowed reproductions for preservation, education, and administrative purposes. Libraries, archives, and researchers would likely also benefit from and ally with this reform effort—as it would make cooperation between institutions easier and more fruitful. Conversely, some rights holders and for-profit galleries might have an interest in opposing such reform, as it could have the effect of limiting the scarcity and value of some pieces. These potential opponents could argue against the subsection a2 issue,

claiming that museums collections are not open to the public in the same ways that libraries and archives are. Similarly, opponents would perhaps argue that museums (even as frequently-underfunded nonprofits) would stand to benefit commercially from this inclusion in a way that libraries and archives did not. Whereas libraries and archives might charge fees for patron reproduction requests, museums frequently charge admission fees, and those parties against §108 reform could raise this issue as a reason for prohibiting the inclusion of museums under this exception, stating that museums stand to make a greater profit in comparison to traditional libraries and archives.

If and when copyright reform occurs, it seems likely that this exception will be amended to include museums—based on the findings of the Section 108 Study Group, the Society of American Archivists, and museum professionals across the United States.⁵ While this is certainly not the only aspect of copyright law that could use fixing, this simple change could go a long way in benefiting museums and their patrons, giving them the freedom to reproduce collections material for preservation and access without having to rely on fair use to do so. Though the wording in §108 would also need amended if museums were to be added (particularly subsection a2, regarding open collections), the benefits greatly outweigh the risks and complications. Given that museums, libraries, and archives provide similar services to the public, it is ridiculous that one type of institution should be singled out and prevented from utilizing §108.

¹ Marie C. Malaro and Ildiko DeAngelis, *A Legal Primer on Managing Museum Collections, Third Edition* (Washington, DC: Smithsonian Books, 2012), 188.

² Copyright Law of the United States, 17 U.S.C. §108 (1978).
<http://www.copyright.gov/title17/92chap1.html#108>

³ “The Section 108 Study Group Report,” Section 108 Study Group, 2008,
<http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>

⁴ Ibid., 32.

⁵ “Issue Brief: Archivists and Section 108 of the Copyright Act,” *Society of American Archivists*, May 2014, <http://www2.archivists.org/statements/issue-brief-archivists-and-section-108-of-the-copyright-act>
James Cuno et al., email message to Mary Rasenberger, March 16, 2007.

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