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LAST TWENTY (L20) COLLECTIONS:

APPLYING COPYRIGHT'S SECTION 108(H) IN LIBRARIES, ARCHIVES AND MUSEUMS

INCLUDING THE NEW MUSIC MODERNIZATION ACT FOR PRE-1972 SOUND RECORDINGS

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Abstract

Legally, libraries and archives may make and distribute copies of works in the last twenty years of their copyright, as long as there is no normal commercial exploitation of the work(s) and no reasonably priced copy available. 17 U.S.C. § 108(h). Unfortunately, § 108(h) of the 1976 Copyright Act has not been utilized by libraries and archives, in part because of the uncertainty over definitions (e.g. "normal commercial exploitation"), the difficulty sometimes of determination of the eligibility window (last twenty years of the copyright term of published works), and the question of how to communicate the information in the record to the general public. This paper seeks to explore the elements necessary to implement the **Last Twenty Exception**, otherwise known as § 108(h), and suggests how to create a Last Twenty (L20) collection of all kinds of published creative works, including sound recordings, audio, books, and art. As of 2018, this means that § 108(h) is available for the forgotten and neglected works first published between 1923 and 1942, including millions of foreign works restored by the General Agreement on Tariffs and Trade (GATT) as of January 1, 1996. Each year a new set of works becomes eligible. Section 108(h) is less effective for big, commercially available works. In many ways, that is the dividing line created by § 108(h): allow for commercial exploitation of works throughout their term but allow libraries to rescue works that had no commercial exploitation or copies available for sale and make them available through copying and distribution for research, scholarship, and preservation during the last twenty years of their copyright term. In fact, § 108(h), when it was being debated in Congress, was labeled "orphan works." This paper suggests ways to think about the requirements of § 108(h) and to make it more usable for libraries. Essentially, by confidently using § 108(h), we can continue to make the past usable one query at a time. The paper ends with the two latest developments regarding § 108(h): (1) an evaluation of the recent 2017 discussion paper by the U.S. Copyright Office on § 108 and suggests changes/recommendations related to the Copyright Office's proposed changes to § 108(h) and (2) the enactment of the Music Modernization Act of 2018, which includes § 108(h) for pre-1972 sound recordings.

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Introduction

Libraries and archives hold special places in our culture—a place to discover new worlds, research complex problems, and even sometimes learn a new skill or craft. From the time we are young, we are read books to by librarians, and as we grow, we work on research papers and hunt for key sources in libraries and archives. Some of us continue to rely on libraries and archives for our professional work, and others use libraries for our hobbies, including genealogy searches for our family's past.

This is the story of how libraries and archives operate within the world of copyright, and why we give them special privileges to do their job to help us learn and grow. In particular, this is a story of one small part of the 1976 Copyright Act that allow libraries and archives to copy and distribute to the general public certain copyrighted works in the last twenty years of their term, through § 108(h), allowing greater access to works for research, scholarship and preservation purposes.[1] Until now, it has been a little-used part of the Copyright Act because of its ambiguous implementation requirements. But times are changing. The new Music Modernization Act, along with a recent study by the U.S. Copyright Office, tells us that our government believes in § 108(h), and that libraries and archives, should make better use of it.[2] Section 108(h) – after nearly 20 years of non-use – has arrived. This paper will help explain, guide, and think through the elements necessary to implement the reproduction and distribution of works not currently in commercial use during their last twenty years of copyright.

[1] 17 U.S.C. § 108(h) (2005).

[2] As of October 11, 2018, pre-1972 sound recordings are included as part of § 108(h), and the legislation is a big present in many ways to libraries and archives in the way it was enacted. The Music Modernization Act can be found here: https://www.copyright.gov/music-modernization.

This paper seeks to provide more certainty and suggestions on how to apply the **Last Twenty Exception** to every kind of work in the last twenty years of their copyright housed at archives and libraries. Works without commercial activity during the last twenty years are given a special place in our copyrighted world, and this paper will help libraries and archives start to create their own **Last Twenty (L20) Collections**, allowing the reproduction and distribution of neglected works to grant the public the opportunity to read and explore those works in the last twenty years of their copyright.

One should think of the laws applied to resources in a library as a duality. At once, there are laws for the library or archives itself, and then those that apply to patrons. Sometimes these are the same laws. In other instances, because the use is different, they are different laws. For example, a library may digitize a work that is crumbling and falling apart. That is allowable under one part of the Copyright Act.[3] That same work may be used by a scholar, quoted and commented upon, and that use is allowable under another part of the 1976 Copyright Act.[4] In both instances in our hypothetical, the work is still under copyright protection in the United States, and yet both actors are able to use the work for different purposes and under different aspects of the law. This is because the U.S. Copyright Act provides certain limitations to the exclusive rights of copyright holders, and a whole set of these are related to a library's (and sometimes a patron's) use of a work.[5] Additionally, there are the copyright holders and their relationship to libraries and archives, where works are housed at the libraries and archives, and preserved, cared for, and remembered for generations to reuse and rediscover. Copyright holders depend on libraries and archives, and in exchange the U.S. Copyright Act provides certain limitations on the copyright holder's exclusive rights so that the libraries and archives can achieve their mission of providing access and preservation to our cultural resources.[6]

Section 108 provides special limitations on the exclusive rights of copyright holders when it comes to libraries to reproduce copyrighted works without permission. When you go to a library and you photocopy an article, that is § 108 at work.[7] When your library does not have a copy of a periodical, and another library makes a copy of a specific article for your home library, that is § 108.[8] When a copy of a work begins to fall apart, and the library makes a preservation copy,

[3] § 108(c).
[4] *Id.* § 107.
[5] The title of the section of the 1976 Copyright Act is: 17 U.S. Code § 108 - Limitations on exclusive rights: Reproduction by libraries and archives.
[6] This is especially true with the Library of Congress, where many agreements have been put in place between content holders and the library to preserve great works. This is also the plot of A.S. Byatt's novel *Possession.*
[7] § 108(f)(1).
[8] *Id.* § 108(d).

that is § 108.[9] When you go to an archive, and the archivists makes copies of unpublished papers for you, that is § 108.[10] Most of § 108 works seamlessly, even if it has quirks, and librarians and archivists discuss whether to reform or change the provisions.[11] One subsection of § 108, however, has largely been under-utilized by the library community: § 108(h).[12] This provision allows a library or archive to make copies of a work for distribution (including online) and public display in the last twenty years of the work's copyright, as long as certain requirements are met.[13] It was added to the 1976 Copyright Act in 1998, as part of the Copyright Term Extension Act (CTEA).[14] While the copyright term was extended twenty years, Congress felt that libraries and archives should be able to access, copy, and even distribute works where no commercial

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[9] *Id.* § 108(c)

[10] *Id.* § 108(d) & (e).

[11] There have been numerous discussions at reform. The U.S. Copyright Office explains,

> For over a decade, the Copyright Office has led and participated in major discussions on potential changes to section 108, with the goal of updating the provisions to better reflect the facts, practices, and principles of the digital age and providing greater clarity for libraries, archives, and museums. In 2005, the Copyright Office partnered with the National Digital Information Infrastructure and Preservation Program of the Library of Congress to sponsor an independent study group, which issued a comprehensive report in March 2008 calling for an extensive revision of section 108. In February of 2013 the Copyright Office and Columbia Law School held a public symposium on section 108 revision, exploring many of the issues addressed in the 2008 section 108 Study Group Report.

U.S. Copyright Office, Revising Section 108: Copyright Exceptions for Libraries and Archives (2016), https://www.copyright.gov/policy/section108. In September 2017, the U.S. Copyright Office released a Discussion Paper related to section 108, with a model of proposed changes to section 108.

> The Copyright Office's more recent review of section 108 began during the summer of 2016 with a series of nearly 40 in-person and telephone meetings with interested persons, such as librarians, museum professionals, content creators, archivists, scholars, and technology professionals. The variety of perspectives and practices concerning section 108 activities that arose during these meetings provided the Copyright Office with insight into how section 108 operates or fails to operate in practice. The Copyright Office has issued the Section 108 Discussion Document (available at https://www.copyright.gov/policy/section108/discussion-document.pdf) in an effort to facilitate engagement with possible statutory solutions addressing this important topic.

Id.

[12] § 108(h).

[13] *Id.*

[14] Sonny Bono Copyright Term Extension Act; Fairness in Musical Licensing Act of 1998, Pub. L. 105-298, 112 Stat. 2827 (1998). Because of this, the Internet Archive has named their L20 Collection the Sony Bono Memorial Collection. See Brewster Kahle, *Books from 1923 to 1941 Now Liberated!*, INTERNET ARCHIVES BLOG https://blog.archive.org/2017/10/10/books-from-1923-to-1941-now-liberated.

activity was occurring, and that the library should not have to wait the additional twenty years added by the CTEA to make the works available to the public.[15] In some ways, the Last Twenty Exception could be seen as a library-specific public domain. When market failure occurs—there is no normal commercial exploitation and there are no copies available—the library can step in and make copies available to the public.

As of 2018, this means that libraries can digitally (and in analog form) make available to the public works that were first published during or before 1942, as they have entered the last twenty years of copyright protection.[16] (Note: the maximum term for works published before 1978 is 95 years, but many have entered the public domain before that.[17]) Each year new works are added. How many works might this be? The Internet Archive alone calculated that their collection held 279,911 text files/works first published between 1923 and 1941.[18] This is just one example. Libraries and archives across the United States are filled with texts, photographs, audiovisual works, art works, sound recordings and other works that were published during or before 1942 that might be eligible.

Why does that matter? First, on a preservation level, § 108(h) provides great freedom to libraries to digitize, even more than other aspects of § 108. Second, § 108(h) allows for reproduction and distribution without restrictions, so long as the purpose is for research, scholarship and preservation (along with other requirements). Thus, scholars like me (World War I scholar by training) would have greater access to works from the 1920s, 1930s, and 1940s, because, even though the works are still under copyright, a digital copy could be made available to view. Finally, § 108(h) preserves the balance between access and an extended term caused by the CTEA in 1998.[19]

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[15] E. Townsend Gard, *Mitigating Term*, 63 J. COPYRIGHT SOC'Y U.S.A. 1, 3 (2016).

[16] For published works of this era, the longest term is 95 years from first publication. Domestic works could have come into the public domain after 28 years from the date of publication, if not properly renewed, or could have come into the public domain upon publication without proper copyright notice. Foreign works are also measured with a maximum term of 95 years from first publication, but not all are eligible for protection. § 104(a). For more information on copyright duration, see www.durationator.com, a Tulane University Law School project on duration that is now available to the public and libraries, archives and museums.

[17] As discussed in the paper, there are two ways to approach the Last Twenty problem—calculate the exact term for the work, or skip that and calculate the maximum term. The result is that some of the works under the Last Twenty exception will be in the public domain (meaning greater freedom), but for a library or archive, the key needs—reproduction and distribution—are available under the Last Twenty exception.

[18] Published works before 1923 are in the public domain in the United States. 17 U.S.C. § 304.

[19] Gard, *supra* note 15, at 36.

Now, there are restrictions, and the greatest limitation is that § 108(h) only applies to libraries and archives, and not the patrons/users of the materials. Just because I view a 1939 novel about pacifism does not mean that I have the freedom under § 108(h) to *use the work*. But, § 107—fair use—comes into play.[20] As a scholar, I can rely on § 107 for quoting a work to comment and criticize, or other uses, including transformative uses.[21] But, the work would not have even been available in the same way for me to view and study without § 108(h) potentially—for me to have known about it, or get access to the work in the first place to think, comment, criticize, and to reject or add to my argument.

Yet, libraries were wary of using it, in part because it was difficult to determine when a work was in the last twenty years of its term, and in part because it was difficult to determine and prove that a work met the other requirements: the work was not currently commercially exploited, and no reasonable copy was available. This article sets out to address issues and suggest practical means of implementing § 108(h) in collections, both small and large.

During the summers of 2017 and 2018, a team of students, led by Dr. Townsend Gard, embarked on a study to understand how § 108(h) might be implemented, both on a small scale and with libraries with millions of records. Was it possible to meet the requirements and utilize § 108(h) without high transaction costs? The team worked with a number of libraries, including the Frick Collection, the New York Public Library, Library of Congress, Harvard University, and the Internet Archive.[22] After numerous conversations, studies, and experiments, this Article suggests an approach for understanding, interpreting and implementing § 108(h).

Part I looks at library exceptions generally and why § 108(h) is so useful and important. The remainder of this paper then provides helpful resources for implementing § 108(h). Part II explains copyright duration and the issues associated with determining the status of works and includes tools and strategies that have been developed by Team Durationator to make determining the status of works easier. Part III turns the focus to the key issues for libraries and archives, and the specific challenges in implementing § 108(h). Part IV discusses the current structure of library records, and where copyright information and data related to § 108(h) might

[20] § 107.

[21] *Id.*

[22] During the Summer 2017, students were embedded at the Internet Archive for five weeks. Additionally, Dr. Townsend Gard spent three weeks in New York, working with the Frick and the New York Public Library. Additional students worked on the data from these sites and others. We worked with library and museum partners throughout 2016-2017 to gather this data and understand the reluctance to use section 108(h). We are working on a second paper focused on the data collection for the purpose of determining copyright. During the Summer 2018, Corrie Dutton and Ricardo Gonzales continued the research, testing tools and theories at the Frick Collection in New York, and the Library of Congress, both in Culpepper and Washington, D.C. Thanks in particular to Mike Mason and Hope O'Keeffe for putting them up and working with us to better understand section 108(h) in an audiovisual context.

fit, particularly with regards to record keeping. Part V suggests an implementation plan. In the end, § 108(h) allows libraries and archives to digitize and even distribute works in the last twenty years of their copyright. In an era of long copyrights, this is a very big prize. This paper seeks to help them implement the policies and procedures necessary to take full advantage of all that § 108(h) provides. Part VI suggests a means of creating a system between libraries, the Durationator and other tools that assist in determining and tagging copyright status, and platforms (like Internet Archive, DPLA, OCLC) that allow each of the spokes to do their best, limit liability, and make more works available to patrons to preserve, research and better understand the culture(s) of the world.

In September 2017, the U.S. Copyright Office released their proposed Model Statutory Language to revise § 108, which if implemented would be the first major revision of § 108 since its enactment as part of the original 1976 Copyright Act. The first draft of this paper was completed twenty-four hours before the Discussion Paper was released. The paper continues to focus on what the law currently is. Part VII addresses the proposed Model Statutory Language. Since we are still living with the original law, this paper looks at the proposed changes as its own part and does not integrate it into the whole body of the paper. Part VII addresses the Model Statutory Language and evaluates the proposal in light of the arguments and investigations in this paper. Then, as the paper was about to be *published*, the new Music Modernization Act of 2018 (MMA) was passed unanimously by Congress and signed into law by President Trump on October 11, 2018. As part of the Classics Preservation and Access Act (CLASSICS Act), which is the second part of the MMA, pre-1972 sound recordings were partially included under federal copyright law for the first time, and with it, language related to § 108(h) was also included. Lastly, Part VIII looks at the CLASSICS Act, and, particularly, the additions for § 108(h) and a new noncommercial "person" exception as well.

I. Library Exceptions to Copyright Holder's Exclusive Rights

Copyright law is a bargain between the government and a copyright holder, a statutory-created limited monopoly.[23] With a modicum of creativity and independent creation,[24] a copyright holder receives the exclusive right to copy,[25] make derivative works,[26] distribute,[27] publicly

[23] U.S. CONST. art. I, § 8, cl. 8.
[24] 17 U.S.C. § 102(a); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 346 (1991).
[25] § 106(1).
[26] *Id.* § 106(2).
[27] *Id.* § 106(3).

perform[28] and publicly display their work[29] for a set amount of time,[30] or "limited times."[31] These five exclusive rights to control a creative work for a set number of years do have exceptions during the copyright term, the most famous being fair use, but also includes classroom uses and a whole list of other exceptions and exemptions.[32] Libraries and archives are also given special exceptions found under § 108.[33] "[I]t is *not an infringement of copyright*," reads § 108, "for a library or archives, or any of its employees acting within the scope of their employment, to reproduce . . . or to distribute such copy or phonorecord, under the *conditions* specified by this section . . . . "[34] These exceptions include making copies for preservation, for interlibrary loans requests, and for copies requested by scholars for research and study. The exception also includes reproduction and distribution of a work to the general public for the purpose of research, scholarship and preservation in its last twenty years of copyright, or what we refer to as the "Last Twenty Exception."[35] The following parts take the reader through the requirements in order to utilize § 108(h) and create a Last Twenty Exception.

A. Are You a Library or an Archive?

"The distinction between a library and a digital library has all but disappeared—at least to our patrons."
- The Digital Library, Copyright Crash Course, University of Texas Libraries[36]

In order to qualify to have any part of § 108 apply, one must be a library or an archive. These are powerful exceptions—they are what allow libraries and archives to carry out their mission(s).[37] But what exactly is a library or archive? For most of our history, a library or archive was easily identified as brick-and-mortar spaces housing collections of books, papers, photographs, and other physical works. But then the Internet happened. Does a library have to be something physical? How do we define exactly what is a library? The U.S. Copyright Act

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[28] *Id.* § 106(4).
[29] *Id.* § 106(5).
[30] *Id.* §§ 302–304.
[31] U.S. CONST. art. I, § 8, cl. 8; Feist Publ'ns Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 345 (1991).
[32] §§ 107–121.
[33] *Id.* § 108(a)(2).
[34] *Id.* § 108(a) (emphasis added).
[35] *Id.*
[36] *The Digital Library*, U. TEX. LIBRS.: COPYRIGHT CRASH COURSE (Mar. 5, 2018, 7:05 AM), http://guides.lib.utexas.edu/copyright/diglibrary.
[37] *See* U.S. COPYRIGHT OFFICE, A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS: SECTION 108 OF TITLE 17, 1 (Sept. 2017) https://www.copyright.gov/policy/section108/discussion-document.pdf. The new Model Statutory Language by the U.S. Copyright Office contemplates changing the requirements, including adding a public service mission requirement and adding museum as a category. *Id.* at 17, 19.

does not define "library" or "archives." We therefore turn to outside and secondary sources for assistance.

1. Library

Aaron Perzanowski and Jason Shultz, in *The End of Ownership*: *Personal Property in the Digital Economy*, discuss digital libraries beginning with the first known public library, the Library Company of Philadelphia, started in 1731 by Benjamin Franklin.[38] Individuals bought "shares," and the subscription money was used to buy books.[39] By 2016, over 9,000 lending libraries exist in the United States. What about digital libraries? How many are there? How do we define them?

The American Library Association defines a library to include both brick-and-mortar libraries as well as the digital library.[40] They offer several definitions:

> A library is a collection of resources in a variety of formats that is . . . organized by information professionals or other experts who . . . provide convenient physical, digital, bibliographic, or intellectual access and . . . offer targeted services and programs . . . with the mission of educating, informing, or entertaining a variety of audiences . . . and the goal of stimulating individual learning and advancing society as a whole.[41]
>
> Library—from the Latin liber, meaning "book." In Greek and the Romance languages, the corresponding term is bibliotheca. A collection or group of collections of books and/or other print or nonprint materials organized and maintained for use (reading, consultation, study, research, etc.). Institutional libraries, organized to facilitate access by a specific clientele, are staffed by librarians and other personnel trained to provide services to meet user needs. By extension, the room, building, or facility that houses such a collection, usually but not necessarily built for that purpose. . . .[42]

Both definitions include a professional or expert organizing a collection for access by the public with a mission of service and education.[43]

In 2008, the Section 108 Study Group (Study Group) was instructed by the U.S. Copyright Office to study and suggest changes to 17 U.S.C. § 108. When confronted with defining "library," the participants could not agree if a physical premise was required in order to take

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[38] AARON PERZANOWSKI & JASON SHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 103 (MIT Press 2016).

[39] *Id*.

[40] What is a "Library"?, AM. LIBR. ASS'N, http://libguides.ala.org/library-definition (last visited July 16, 2017).

[41] *Id*. (citing GEORGE EBERHART, THE LIBRARIAN'S BOOK OF LISTS 1 (ALA Editions 2010) (internal citations omitted)).

[42] *Id*. (citing JOAN M. REITZ, ONLINE DICTIONARY OF LIBRARY AND INFORMATION SCIENCE (Libraries Unlimited 2004), https://www.abc-clio.com/ODLIS/odlis_A.aspx.

[43] *See* SECTION 108 OF TITLE 17, supra note 37, at 18–19. The Model Statutory Language proposed by the U.S. Copyright Office reflects this organization in the threshold requirements for section 108.

advantage of § 108. But for our purposes, the report states: "The only provision that a virtual entity clearly could use to provide access under the current exception is sub§ 108(h), relating to works in the last 20 years of their copyright term."[44]

The Study Group suggested that museums are included in the definition of Section 108:

> Section 108 applies to libraries and archives and their employees acting within the scope of their employment. Museums currently have the benefit of the section 108 exceptions only to the extent that they house, or are part of, a library or archives that meets the threshold requirements of subsections 108(a).[45]

Museums without this were not included as part of § 108. The Study Group felt that museums, even without a library or archive, "make[] copies . . . for preservation, replacement, private study and research," and, therefore, should be subject to the same conditions as libraries and archives. The Study Group also explained that museums share a mission of "collection and preservation of, and access to, material of cultural and scientific importance for the purpose of furthering human understanding" with libraries and archives.[46] In wanting to include museums, the Study Group seems to be helping us get to a definition, which includes that a library is one that:

- makes copies for preservation, replacement, private study, and research
- shares a mission of collection and preservation of, and access to, material of cultural and scientific importance for the purpose of furthering human understanding

It seems like definitions such as these could lead to user-based libraries and archives—collections preserving materials of cultural importance by making a (digital) copy for preservation, replacement, study, and research.

Think of all the internet-based collections of materials that might fit this definition. Would these dedicated hobbyist's or fan's collections qualify as a library or archives? It is something to think about—where the boundaries and definitions of § 108(h) lead us. Interestingly, the 2017 Discussion Document put out by the U.S. Copyright Office is concerned about this problem and suggested adding to the definition of a library or archive: "[t]he proposed condition of 'trained staff or volunteers [who] provide professional services normally associated with libraries, archives, or museums' seeks to exclude the hobbyist or amateur collector from the § 108 exceptions."[47] On the opposite side of hobbyists are for-profit companies.

The Study Group did agree that for-profit organizations are generally not covered by § 108. The House Report said as much. But that same House report said that spontaneous copying by for-profit organizations would be okay in some instances.[48] Section 108(a)(2) describes the

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[44] U.S. COPYRIGHT OFFICE, SECTION 108 STUDY GROUP REPORT 116 (2008), http://www.section108.gov/docs/Sec108StudyGroupReport.pdf.

[45] *Id.* at 31.

[46] *Id.* at 32.

[47] SECTION 108 OF TITLE 17, *supra* note 37, at 19.

[48] *Id.*

requirement that the library or archives be open to the public or available to researchers in the specialized filed. The Study Group explains:

> It is designed to exclude truly private libraries and archives, and in the analog world has served as an effective means of doing so. Personal book, music, or photo collections do not qualify under section 108 unless they are open to the public, or at least to researchers. Corporate libraries and archives are eligible only so long as they are willing to make their collections open to other researchers in the field (including, for example, employees of a competitor). In the online world, however, this condition does not effectively distinguish private collections from those that serve the public. Without any further qualification, private collections that are made available to the public through websites might be considered to qualify as "open to the public."[49]

Currently, a library or archives need not be a non-profit. We learned from the House Report 1476 that, "[u]nder this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies."[50] We also learned from House Report 1476 that, "it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself."[51] In the digital age, "there is no clear reason to differentiate among these types of collecting institutions in their ability to collect, preserve, display, and provide access to their collections."[52] So, we see that the focus of the committee notes is in preventing commercial entities from possibly taking advantage of § 108. The committee also worried about a for-profit company making a database of § 108(h) eligible works and selling them to libraries.

While the 2008 Study Group might have struggled with digital libraries, it appears that at least by 2014, the American Library Association (ALA) had embraced the concept. Karen Calhoun in *Exploring Digital Libraries: Foundations, Practice, Prospects*[53] traces the history of the development of digital libraries. She addressed the question of how to define what constitutes a library by looking at digital libraries. She explains that the idea of a digital library began with a paper by the Director of the U.S. Office of Scientific Research and Development, Vannever

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[49] *Id.* at 33–34; SECTION 108 STUDY GROUP REPORT, *supra* note 44, at 34–35.

[50] H.R. REP. NO. 94-1476, at 74 (1976).

[51] *Id.*

[52] *Id.*

[53] KAREN CALHOUN, EXPLORING DIGITAL LIBRARIES: FOUNDATIONS, PRACTICES, PROSPECTS (2014), http://www.alastore.ala.org/detail.aspx?ID=4247 (last visited July 16, 2017). One review of the book states:

> This book provides an overview of the digital turn in libraries. It is informed by the rich and varied professional experience of its author, by extensive research across several national and international contexts, and by a rare synthesizing ability. It fills a clear gap in the library literature, exploring technical and research developments from the perspective of evolving library services and organization.

Bush, titled "As We May Think" (1945) and the book, *Libraries of the Future*, by M.I.T. computer scientist J.C.R Licklider (1965).[54] Licklider wrote, "[i]f books are intrinsically less than satisfactory for the storage, organization, retrieval, and display of information, then libraries of books are bound to be less than satisfactory also."[55] He sought to create a system that would improve "library organization at the system level."[56] He would be part of the ARPANET, the system that preceded the Internet. In 1991, the National Science Foundation sponsored a series of workshops on "how to make digital libraries a reality."[57] Calhoun then describes the developments that led to thinking through what a digital library would be like—from architecture, to technology, and to organization.

She defines "digital libraries" as the following:

> 1. A field of research and practice with participants from many disciplines and professions, chiefly the computer, information and library sciences; publishing; the cultural sector; and education.
> 2. Systems and services, often openly available, that (a) support the advancement of knowledge and culture; (b) contain managed collections of digital content (objects or links to objects, annotations and metadata) intended to serve the needs of defined communities; (c) often use an architecture that first emerged in the computer and information science/library domain and that typically feature a repository mechanisms supporting search and other services, resource identifiers, and user interfaces (human and machine).[58]

Calhoun defined a digital library as a "traditional repository-centered architecture," with additional social roles for communities they serve.[59] She notes that, over the years, there have been a number of perspectives on what constitutes a digital library, from a technical perspective to a space where people collaborate and share.[60] She includes a table of competing definitions.[61] What do the definitions have in common? It is a focus on organizing and collecting materials for a community of users. For instance, the IFLA/UNESCO Manifesto for Digital Libraries defined a digital library as: "an online collection of digital objects, of assured quality, that are created or collected and managed according to internationally accepted principles for collection development and made accessible in a coherent and sustainable manner, supported by services necessary to allow users to retrieve and exploit the resources."[62]

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[54] *Id*. at 2.
[55] *Id*. (citing J.C.R. Licklider, Libraries of the Future 5 (1965)).
[56] *Id.* (citing J.C.R. Licklider, Libraries of the Future 5 (1965)).
[57] *Id.* at 1.
[58] *Id.* at 18.
[59] *Id.* at 18–19.
[60] *Id.* at 19–21.
[61] *Id.* at 21–23.
[62] *IFLA/UNESCO Manifesto for Digital Libraries*, Int'l Fed'n of Library Ass'ns and Insts., https://www.ifla.org/publications/iflaunesco-manifesto-for-digital-libraries (last updated July 13, 2018).

Many of the definitions have similar elements: objects collected and made accessible that allow users to use and retrieve. Now, § 108(h) can also include a nonprofit educational institution that functions as a library or archives, expanding the definition. The general definition requires the collections of a library or archives to be open to the public, or available to specialists in the field.[63] These requirements seem to correspond to the definitions we have been finding for digital libraries.

2. Digital Spaces and § 108(h)

We see digital libraries and archives identified as a library. Let's look at an example. The Internet Archive "is a non-profit library of millions of free books, movies, software, music, websites, and more."[64] The Internet Archive behaves like a library—even with lending of digital books. It has a staff and is well organized. In its "Terms of Use," the Internet Archive states, "Access to the Archive's Collections is provided at no cost to you and is granted for scholarship and research purposes only."[65] We see other digital libraries act like brick-and-mortar libraries, like the Digital Library at the Smithsonian, which includes online books, collections, and exhibitions.[66] And, we see platforms that aggregate digital content more efficiently for libraries, such as the Digital Public Library of America (DPLA). The DPLA website states:

> The Digital Public Library of America (DPLA) is an all-digital library that aggregates metadata—or information describing an item—and thumbnails for millions of photographs, manuscripts, books, sounds, moving images, and more from libraries, archives, and museums across the United States. DPLA brings together the riches of America's libraries, archives, and museums, and makes them freely available to the world.[67]

All three examples—Internet Archive, Smithsonian, and DPLA—*could* make use of § 108(h) and make more works available online during the last twenty years of their copyright. The question is what would it take for large and small institutions to begin using § 108(h) more seriously? It was what Congress envisioned.

Section 108(h) could be used more expansively, especially if the definition for libraries and archives focused on conduct (collecting, preserving, etc.) rather than our traditional conceptions (e.g., one of the libraries we walk to with our children or the university stacks). What about websites which catalogue, preserve, and make available old radio show recordings? Do they count as archives? How broadly can one define "library or archives," and how far can one take advantage of § 108(h)'s other provisions? Just as the Internet made us all creators and

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[63] 17 U.S.C. § 108(a)(2) (2012).

[64] INTERNET ARCHIVE, https://archive.org.

[65] *Internet Archive's Terms of Use, Privacy Policy, and Copyright Policy*, https://archive.org/about/terms.php (Dec. 31, 2014).

[66] *Digital Library*, SMITHSONIAN LIBRARIES, http://library.si.edu/digital-library.

[67] *Frequently Asked Questions*, DIG. PUB. LIBRARY OF AM., https://dp.la/about/frequently-asked-questions.

distributors of content, has the Internet also made us all libraries and archives, preserving culture for research and scholarship? The possibilities for § 108(h) could be extensive.

B. General Requirements of § 108(h)

So, assuming one has met the requirement of being a library or archive, the next step is to confirm the library or archive has met the basic general requirements. To fall under § 108, a library or archives must first meet a number of general requirements.

1. No Direct or Indirect Commercial Advantage

The purpose of the copies cannot be for direct or indirect commercial advantage.[68] The notes from the House Judiciary Committee focus on "indirect commercial advantage" with respect to libraries housed within for-profit entities, such as research and development departments in "chemical, pharmaceutical, automobile and oil corporations."[69] This focus is meant to prohibit a single subscription or interlibrary loan to be copied for multiple employees, even if the employee is doing the copying.

2. Open to the Public

"[T]he collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field."[70] Again, this requirement is focused on prohibiting private, corporate libraries, which gather information for commercial purposes, from invoking § 108.

3. Copyright Notice

The third requirement states:

> [T]he reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.[71]

This provision is to make sure that those who receive copies recognize that the work being copied is still under copyright, because § 108 applies to works still under copyright. Those

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[68] 17 U.S.C. § 108(a)(1) (2012).

[69] H.R. REP. NO. 94-1476, at 74-75 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5688-89.

[70] § 108(a)(2).

[71] *Id.* § 108(a)(3).

works that are out of copyright do not need § 108, because they can be copied by the libraries without any restrictions.[72]

What must be included in the notice? The Copyright Office put out exact language required verbatim for a display warning and an order warning:

> The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.
>
> Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be "used for any purpose other than private study, scholarship, or research." If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.
>
> This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.[73]

Further, the Copyright Office specifies the form and manner of use with particularity:

> (c) Form and manner of use.
>
> (1) A Display Warning of Copyright shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted.
>
> (2) An Order Warning of Copyright shall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than eight points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.[74]

The requirement is very specific.

The ALA suggested the following notice: "Notice: This material may be protected by copyright law (Title 17 U.S. Code)."[75] With respect to form and use, the ALA suggested:

> A library may choose to stamp this sentence on the first piece of each item photocopied, to attach it to the glass on the photocopying equipment so that it is automatically transferred to each sheet, to attach a sticker bearing this notice to each item photocopied, or to use some other method whereby this message is affixed to all reproductions.[76]

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[72] Of course, some collections of public domain materials now have contract restrictions put on them as a collection. That is not the subject of this writing.

[73] 37 C.F.R. § 201.14.

[74] *Id.*

[75] *Language Suggested for the Notices Required by the Copyright Revision Act of 1976*, AM. LIBRARY ASS'N, http://www.ala.org/rusa/resources/guidelines/languagesuggested (last visited August 15, 2017).

[76] *Id.*

4. Isolated and Unrelated Copies

The copying of a single copy or phonorecord must be isolated and unrelated. Libraries and archives do not get the benefit of the § 108 safe harbor if, under § 108(g)(1), they are aware or have substantial reason to believe they:

> engage in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of [the] group.[77]

5. No Systematic Reproduction or Distribution of Single or Multiple Copies

The question is to what extent is reproduction of a work 'systematic'? In a footnote in *Author's Guild, Inc. v. HathiTrust*, the court agreed with the following definition of "systematic," proposed by defendants: "'systematic' means reproducing a single work repeatedly, rather than reproducing all the works in [the party's] libraries."[78] The Second Circuit in *Author's Guild v. HathiTrust* does not discuss the point further, as the case is focused on fair use (§ 107) and not library exceptions (§ 108). Section 108(g)(2) includes mention of interlibrary loans in relation to systematic copyright: interlibrary loan arrangements are exempted from this limitation, so long as the interlibrary loan requests do not substitute for obtaining a subscription or purchasing a work.[79]

C. Works Excluded: Applying Fair Use

The House Report specifically notes that fair use may be applied as well. Fair use is expected to be used for third party requests, even if the requests are not covered under § 108 for libraries. "Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes."[80]

D. What § 108 Allows

Section 108(b), (c), (d), (e), and (f) provide specific activities that allow libraries to make copies and distribute them to other libraries and patrons, such as making preservation copies, permitting interlibrary loans, and allowing patrons to make copies on copy machines. These are all used every day and are the backbone of the U.S. library system:

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[77] 17 U.S.C. § 108(g)(1) (2012).

[78] Author's Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 456 n.15 (S.D.N.Y. 2012), *aff'd in part, vacated in part*, 755 F.3d 87 (2d Cir. 2014). The issue was not addressed further on appeal.

[79] § 108(g)(2).

[80] H.R. REP. NO. 94-1476, at 78-79 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5692.

- Section 108(b): Copies or phonorecords of unpublished works for purposes of preservation and security
- Section 108(c): Copies or phonorecords of published works for purpose of replacement for damaged, deteriorating, lost, stolen, or if the format has become obsolete
- Section 108(d): small portions of a copyrighted work requested by a patron or another library
- Section 108(e): entire work or substantial portions of a copyrighted work requested by a patron or another library
- Section 108(f): unsupervised copying by patrons and ability to lend copies
- Section 108(h): copies or phonorecord in last twenty years of the term of a published work for preservation, research and scholarship

In each subsection, the library has requirements it must meet in order to avail itself or its patrons of the exception. While sections (b)–(f) are used every day by libraries, § 108(h) has not been used in the same manner, because it is difficult to determine the copyright status—when the last twenty years of the copyright begins—of a work, and the other requirements of commercial availability are considered ambiguous or confusing.

II. Understanding Copyright (Duration) in Relation to § 108(h)[81]

A. Copyright Status for § 108(h)

Section 108(h) allows libraries and archives to digitize, make copies, and distribute—even publicly perform—works that are in the last twenty years out of their copyright. To utilize § 108(h), one must know *when* the last twenty years of a copyright begins. That can be a difficult task, as the status of a work depends on a number of elements, including: whether the work is considered published or unpublished, as § 108(h) only applies to *published* works; the date of publication; the place of creation; and/or publication and the type of work. Sometimes, one must check the U.S. Copyright Office renewal records to determine the status; other times, one must check to see if proper notice was included. The following part is not exhaustive of all copyright issues related to the works currently eligible for § 108(h) but serves as an introduction to the complexities of determining copyright status.

[81] For the past ten years, Dr. Townsend Gard has specialized in thinking through problems of copyright's term: when does a work come into the public domain? She, along with her team of students at Tulane Law School, have researched the question in both domestic and international contexts. They have created the Durationator Copyright System®, a software tool that matches data of a work to the laws of a particular jurisdiction. In that time, Dr. Townsend Gard and her team have come to understand that sliver of copyright law for every country in the world.

1. Publication

The question of publication is complicated in the United States, particularly with respect to certain kinds of works like television shows and art works. Here, it is important to note that works distributed without restrictions are considered published under U.S. law. Books sold in bookshops, menus given out at restaurants, and art works offered for sale are some examples. Section 108(h) only applies to *published* works.

2. Date of Publication

To determine the status of works eligible for § 108(h), one must know the publication date for works first published from 1923 to the 1940s. This presents a problem: what happens when there is no publication date provided? Context clues can help. The date, for § 108(h), is to see if it is in the window of opportunity. Thus, if a work is from the Great Depression, it does not necessarily matter if one knows whether it is 1929 or 1933. So long as the work could not have been first published after 1942 (as of 2018), one could take advantage of § 108(h).

3. Geography

Copyright law is based on two geographical elements: about the work and about the use of the work. About the work: depending on the calculation, one must have the following data: author's country of origin, place of creation, and/or place of first publication. Then, one must also determine *where* the work is going to be used, that is, where potential infringement may occur. For U.S. libraries, that is, generally, within the United States. If a library or archives is working with a partner outside of the United States, that might alter the jurisdiction questions. Particularly, for pre–1978 works, the place of first publication for a status check in the United States makes a significant difference.

Section 108(h) only applies to library uses in the United States. Kenneth Crews did a study on similar library exception around the world.[82] So, if one is working with a partner library outside of the U.S. and wants to rely on § 108, there will be a different set of library exceptions and defined copyright terms in the country of potential infringement, where the library exists.

4. Type of Work

The copyright status of the work, as well as its eligibility under § 108(h), will vary depending on the type of work. Audiovisual works, musical compositions, and art works are treated differently under parts of § 108, but not under § 108(h). The type of work may also matter when

[82] KENNETH D. CREWS, WORLD INTELLECTUAL PROP. ORG., STUDY ON COPYRIGHT LIMITATIONS AND EXCEPTIONS FOR LIBRARIES AND ARCHIVES: UPDATED AND REVISED, WIPO Doc. No. SCCR/30/3 (June 10, 2015), available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216.

determining the status of a foreign work in the U.S.[83] The type of work may also come into play when a work was registered under the 1909 Copyright Act.[84] Under the 1909 Act, works were registered by type, which helped explain what was protected by that copyright.[85] Registration and renewal records are still relevant to determining the copyright status of works, and the registration category based on type of work continues to this day.[86]

B. The Role of the Durationator®

The Durationator Copyright System® is a research system developed over more than a decade at Tulane Law School with the goal of making the determination of the copyright status of works much easier. For foreign works, the Durationator has special tools for each country. For domestic works, we have developed all kinds of tools based on the type and date of the work. We have also worked to integrate § 108(h) into the output. While this is beyond the scope of the paper, it is important to note that there are tools and tricks available to make determining the copyright status of works, whether just one work or millions of works, easier to determine.[87] What is important to take away is that it not merely understanding the law or theory of § 108(h) or whether a work is in the "last twenty," but being able to implement it.

III. Applying § 108(h)

A. Basic Requirements

Even if you find that a work is still protected by copyright and is in the last twenty years of its copyright term, there are a couple more steps you must undertake in order to use the Twenty Year exception.

Section 108(h) reads as follows:

> (1) For purposes of this section, during the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.

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[83] Because one has to determine the status of a work in its country of origin, one may need the type of work because many countries base the term of protection on the type of work. See www.durationator.com for more information.

[84] *See* Copyright Act of 1909, ch. 320, 35 Stat. 1075, 1079, §§ 18 (imposing different notice and deposit requirements depending on the type of work).

[85] *Id*. at ch. 320, 35 Stat. 1075, 1076, § 5.

[86] 17 U.S.C. § 304 (2012).

[87] For more information on the Durationator, see www.durationator.com.

> (2) No reproduction, distribution, display, or performance is authorized under this subsection if—
>
> (A) the work is subject to normal commercial exploitation;
>
> (B) a copy or phonorecord of the work can be obtained at a reasonable price; or
>
> (C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.
>
> (3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.[88]

The basic requirements to implement § 108(h) can be listed as the following: (1) being a library or archives, including a nonprofit educational institution; (2) use for preservation, research, or scholarship; and (3) make a reasonable investigation that there is no commercial exploitation of the work, and no copy at a reasonable price is available. Since the first requirement is discussed above in Part I(A), the second and third requirements are discussed below.

1. Use for Preservation, Research or Scholarship

The copy and/or distribution made must be for preservation, research, or scholarship. This will play an important role later when it comes to analyzing other aspects of § 108(h). But the key is that a library or archive can make a copy of a currently copyrighted work if the use of the work will be for preservation, research, or scholarship. 'Use' is key in many of the copyright exceptions, including fair use, where the first factor in that exception analyzes the purpose and use of the copyrighted work within the potentially infringing work.[89]

2. Reasonable Investigation

In order to copy, display, distribute, or perform a work in its last twenty years of copyright, a reasonable investigation must be undertaken to determine that all the following conditions do not apply: there is currently no normal commercial exploitation of the work; there is no copy of the work available at a reasonable price; and no notice has been filed with the U.S. Copyright Office by the copyright holder stating the work is available at a reasonable price or subject to normal commercial exploitation. As of 2018, no such notices by copyright holders have been filed at the U.S. Copyright Office since 1998. In fact, the Discussion Document on § 108(h), put out by the U.S. Copyright Office in September 2017, suggests the last requirement be removed because, for the last twenty years, no one has filed a notice.[90]

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[88] § 108(h).

[89] *Id.* § 107.

[90] "The Model Statutory Language, however, would not offer the option for a copyright owner of a published work to file a notice with the Copyright Office that either the work is subject to normal

The two remaining requirements are about the market, and in fact, the Discussion Document put out by the U.S. Copyright Office regarding section 108 in September 2017 calls them a "market check."[91] The idea is that if a work is accessible in the market place at a reasonable price, there is no need for a library to make a copy and distribute it. It makes sense. Section 108(h) had its underlying justification as an "orphan works" addition to the CTEA. If the copyright term was going to be lengthened, then orphan works would be created. The question, then, is how does one define "normal commercial exploitation" and "reasonable copy"? Each term will be discussed in detail below. One reading is that "normal commercial exploitation" refers to new copies, and "reasonable copy" refers to used copies. But it is not clear, as discussed below whether a "reasonable copy" can be new and/or used, and if both, how this differs from "normal commercial exploitation."

Once a library determines that currently there is no normal commercial exploitation and a reasonably priced copy is not available, the library may make a copy (including digitizing) and distribute (including placing that work online) without restrictions. While neither "normal commercial exploitation" nor "reasonable copy" are defined, the U.S. Copyright Office noted in its 2005 Orphan Work Report, "Section 108 relies expressly on the concept of reasonableness: the terms 'reasonable investigation' and 'reasonable price' are central to its operation."[92]

What constitutes a "reasonable search"? Orphan works legislation always talks about the nature of the search, using a variety of words including reasonable, diligent, and good faith. Reasonable seems less than "diligent." The Orphan Work Report 2005 noted: "In his dissent in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), Justice Breyer called § 108(h) a 'limited' exception, and expressed the view that the term 'reasonable investigation' is 'open-ended'."[93] As will be discussed later, it seems like searching major commercial sites, such as Amazon, aggregates of information like ISBNDB.com or ISBNsearch.org, and informational sites like IMDB.com (for audiovisual works), would constitute a "reasonable search." Searching industry specific sites and catalogs for commercial activity would also be helpful. But the requirement does not require a "diligent search," only a reasonable one.

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commercial exploitation or the work can be obtained at a fair price." SECTION 108 OF TITLE 17, *supra* note 37, at 24.

[91] *Id.* at 23.

[92] U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS: REPORT ON ORPHAN WORKS, 44 (2006), https://www.copyright.gov/orphan/orphan-report.pdf [hereinafter REPORT ON ORPHAN WORKS]. For more recent work on orphan works, see Hansen, David, 2016, Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works. (Kyle K. Courtney and Peter Suber, eds.), Harvard Library.

[93] *Id.* at 46; *see* Eldred v. Ashcroft, 537 U.S. 186, 252 (2003).

The Orphan Work Report in 2005 and 2015 both explained what a diligent search was. In 2015, the Copyright Office "recommend[ed] a framework in which liability is limited for a user who conducts a good faith diligent search for the copyright owner."[94] They defined that a "diligent search was at a minimum, searching Copyright Office records; searching sources of copyright authorship, ownership, and licensing; using technology tools; and using databases, all as reasonable and appropriate under the circumstances. . . ."[95] Therefore, a reasonable search would be less exhaustive than a diligent search.

Now, with the enactment of the Music Modernization Act of 2018, the question of the requirements for a search have for the first time been enacted into law – for pre-1972 sound recordings in relationship to two aspects of the new law – noncommercial uses and § 108(h). "The legislation establishes a process for lawfully engaging in noncommercial uses of pre-1972 sound recordings that are not being commercially exploited. To qualify for this exemption, a user must submit a notice of noncommercial use after conducting a good faith, reasonable search, and the rights owner of the sound recording must not object to the use with 90 days."[96] The law states two elements that must be done: "the person engaging in the noncommercial use, in order to determine whether the sound recording is being commercially exploited by or under the authority of the rights owner, makes a good faith, reasonable search for, but does not find, the sound recording— (i) in the records of schedules filed in the Copyright Office as described in subsection (f)(5)(A); and (ii) on services offering a comprehensive set of sound recordings for sale or streaming." [97] The law also includes a rule of construction: "(2) RULES OF CONSTRUCTION.—For purposes of this subsection— (A) merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under this subsection does not itself necessarily constitute a commercial use of the sound recording; (B) the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial…"[98] But there is more: "[u]nder the Classics Protection and Access Act, the Copyright Office has 180 days to issue regulations identifying the 'specific, reasonable steps that, if taken by [noncommercial user of a Pre-1972 Sound Recording], are sufficient to constitute a good faith, reasonable search' of the Office's

[94] U.S. COPYRIGHT OFFICE, A REPORT OF THE REGISTER OF COPYRIGHTS: ORPHAN WORKS AND MASS DIGITIZATION 3 (2015), https://www.copyright.gov/orphan/reports/orphan-works2015.pdf [hereinafter ORPHAN WORKS AND MASS DIGITIZATION].

[95] *Id.*

[96] Musical Works Modernization Act (changes to section 115), U.S. COPYRIGHT OFFICE, https://www.copyright.gov/music-modernization/faq.html.

[97] Music Modernization Act of 2018, 17 U.S.C. § 1401(c)(1)(A) (2018).

[98] *Id.* § 1401(c)(2).

records and commercial services to support a conclusion that a relevant Pre-1972 Sound Recording is not being commercially exploited."[99]

The Copyright Office is currently calling for comments on what should be included in the search. And so, in a few months, we may have an answer. For now, this paper reports some of the research we have done over the last two years related to searching. The Copyright Office is asking three questions:

1. What would constitute a reasonable search of the Office's database of Pre-1972 Schedules, which will index information including the name of the rights owner, title, and featured artist for each sound recording filed on a schedule?
2. Please suggest specific "services offering a comprehensive set of sound recordings for sale or streaming" that users should be asked to reasonably search before qualifying for the safe harbor.
3. Which criteria should be used to identify music streaming services that should be searched, now and in the future? For example, one publication recently analyzed search requests for music providers, and determined that the most frequently searched services were YouTube Music, Amazon Music, Apple Music, Pandora, and Spotify. Is this a reasonable list, or should the Office consider different and/or additional analytics, such as catalog size, number of listeners, or inclusion into indexes such as Nielsen Music? To that end, Billboard recently added the iHeartRadio subscription stream to various streaming-inclusive charts, and other services, such as SiriusXM, Deezer, Bandcamp, SoundCloud, and Tidal provide music to millions of users.

The problem with any kind of search criteria has always been what would count as a good faith or diligent or reasonable search. It will be interesting to see how the comments come back, and what is finally defined as a reasonable, good faith search.

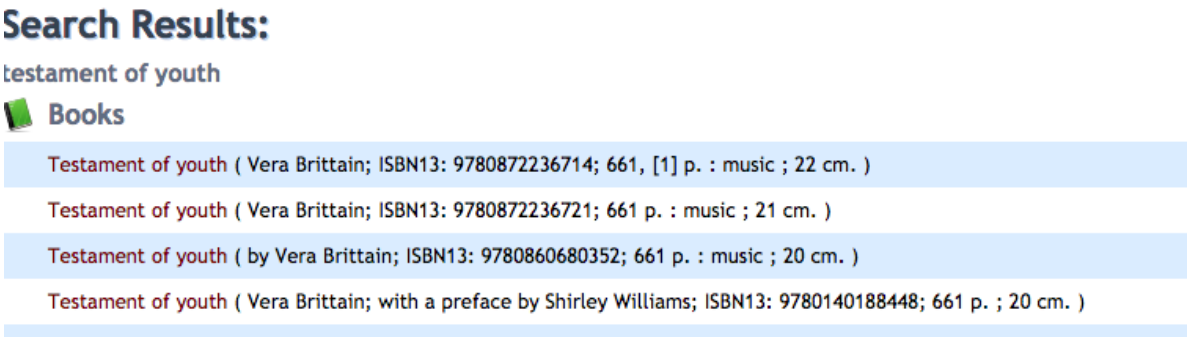
In 2017, we conducted several experiments to see if using Amazon.com would be sufficient to satisfy the "reasonable search" requirement for books. We searched, using 158 works selected randomly from the Internet Archive, to see if we could find copies available on Amazon. Of the 158 works that were randomly selected, 128 works were not commercially available, 30 works were commercially available, 98 works did not have a reasonable copy available, and 56 works had a reasonable copy available. For the works that were commercially available or had a reasonable copy, some of the results rendered were not the exact work that was on the Archive. Some works that were available on Amazon had different publishers or were later editions, although the works had the same title. But, because commercial availability and reasonable copy are not defined in the Copyright Act, there is uncertainty as to whether the works with later

[99] U.S. COPYRIGHT OFFICE, Noncommercial use of Pre-1972 Sound Recordings That Are Not Being Commercially Exploited, 83 Fed. Reg. 52,176 (Tuesday, October 16, 2018), https://www.govinfo.gov/content/pkg/FR-2018-10-16/html/2018-22516.htm.

editions or different publishers satisfy the 17 U.S.C. § 108(h) requirement for commercial availability or reasonable copy. It seems like Amazon could be a quick way to satisfy the "reasonable search" requirement. That would leave only thirty of the titles in our 2017 experiment in need of further investigation.

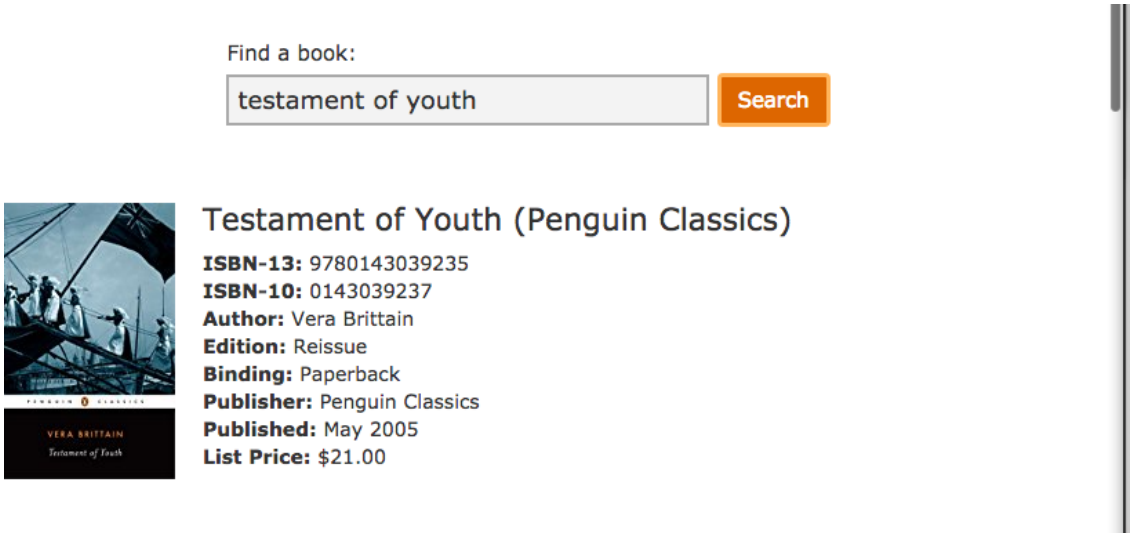
We also ran the same 158 titles through ISBNDB.com and ISBN searches as well. These are tools that allow you to see where a book is available, and if the book is new or used. ISBNdb.com states, "ISBNdb.com project is a database of books providing on-line and remote research tools for individuals, book stores, librarians, scientists, etc. Taking data from hundreds of libraries across the world ISBNdb.com is a unique tool you won't find anywhere else."[100]

One can search by name, title, subject, or ISBN on ISBNdb.com. For instance, "Testament of Youth" brought up four results. Each result had different ISBN numbers. They are all by Vera Brittain. One can then look at the individual works. ISBNDB.com returns the following results:



If one clicks the first result, it shows information about the work and lets users know that there are new and used copies of this work, which is a reprint from the 1933 version. It also provides a price history, which might be very useful for the "copy at a reasonable price" prong of the § 108(h) reasonable investigation requirement. Strangely, ISBNDB.com does not give us the publication date of this version. ISBNsearch.org does include the publication date, though. Both sites can quickly tell one the commercial status of the work.

[100] ISBNdb, http://isbndb.com.



We did not stop here. We looked at another 300 works, again, randomly chosen from the Internet Archive collection. These works were all published between 1923 to 1941. We looked at both Amazon and ISBNDB.com. We did not find any instances where a work was listed on ISBNDB.com and not on Amazon. We also focused on books, so, we would have to reevaluate for other types of works. Although, for now, we feel like Amazon is a good starting point for a conducting a "reasonable search", nothing in the law dictates that we search on Amazon or that it is sufficient for a "reasonable search." That may change soon, at least for pre-1972 sound recordings. And it might provide a sense of what to do for § 108(h) as well.

The reasonable search requirement is two-pronged: no normal commercial exploitation, and no copy of the work at a reasonable price is found. Again, this is called a Market Search in the 2017 Discussion Paper for § 108 put out by the U.S. Copyright Office. They propose keeping the language for both the normal commercial exploitation and a copy of the work obtained at a fair price. We found it confusing and a little bit too limiting.

B. Normal Commercial Exploitation

What is normal commercial exploitation? We do not get a definition in the 1976 Copyright Act. Commercial exploitation is defined by Collins dictionary as "the development and use of a resource for business."[101] Copyright law is built to incentivize commercial exploitation. As one court explained, "The Copyright Act aids commercial exploitation of copyrights by allowing the sale of particular rights . . . or of the entire bundle."[102] Section 108(h) applies when that

[101] Collins English Dictionary, https://www.collinsdictionary.com/us/dictionary/english/commercial-exploitation.

[102] Nat'l Broad. Co. v. Copyright Royalty Tribunal, 848 F.2d 1289, 1292 (D.C.Cir.1988).

> The Copyright Act aids commercial exploitation of copyrights by allowing the sale of particular rights—such as movie rights or rights to perform a popular song—or of the

commercial exploitation is no longer occurring. The problem is that there is no definition on when to know when that occurs. The work must not be "subject to normal commercial exploitation."[103] The statute does not define what this means nor did the legislative history discuss what "subject to normal commercial exploitation" means. We know that "indirect or direct commercial advantage" refers to the entity who is doing the copying.[104] Yet, "subject to normal commercial exploitation" focuses to the work itself.

We have copyright cases that look specifically at what constitutes commercial exploitation, but not in the context of § 108(h), or even of § 108 generally. *Warner Bros. v. Ron Rooding* differentiates between private/personal use and commercial use.[105] Rooding planned to jump out of an airplane in a Batman costume on the night of the new Batman film opening. Warner Bros and DC Comics won a restraining order to prevent Rooding from doing the activity. [106] Because the defendant/respondent purchased the uniform and was sold the uniform for private use, he could use it privately. [107] But, because he was not franchised, licensed, or privileged in any way to use it publicly, he could not use it publicly for any commercial or exploitative purpose. [108] The court seems to suggest any activity in connection with commercial circumstances, such as the opening of theaters, ballparks, parking lots, malls, swimming pools, and similar functions where the public comes for the purpose of purchasing services or goods would be considered to be commercial or exploitative. A masquerade party is not a public occasion by the nature of it. A walk down the beach, if no more than that, is also a personal use. Yet, this court would consider handing out free candy at orphanages to be personal. Thus, normal commercial exploitation could be defined broadly as having a presence of commercial circumstances, or where the public comes for purpose of purchase of services of goods.

Another case, *Sega Enters. Ltd. v. MAPHIA*, states that it is commercial when users download video games to avoid having to buy video game cartridges.[109] Here the act is replacing the act of purchasing the work. It is implied that the work is available for purchase. In *Bridgeport Music, Inc. v. Still N The Water Pub.*, the case concerned "music publishing, recording and distributing sound recordings, and other form of commercial exploitation of musical copyrights."[110] All of

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entire bundle. The intent of the parties, as expressed in their contracting, therefore can determine who enjoys copyright protection for certain rights.

See generally 3 M. Nimmer & D. Nimmer, Nimmer on Copyright §§ 10.01–.03 (1987).

[103] 17 U.S.C. § 108(h)(2)(A) (2012).

[104] *Id*. § 108(a)(1).

[105] Warner Bros. Inc., v. Rooding, No. 89 C 5038, 1989 WL 76149 (N.D. Ill. July 5, 1989).

[106] *Id*. at *1.

[107] *Id*. at *4.

[108] *Id*.

[109] Sega Enters. Ltd. v. MAPHIA, 948 F. Supp. 923, 935 (N.D. Cal. 1996).

[110] Bridgeport Music, Inc. v. Still N The Water Pub 327 F.3d 472, 475 (6th Cir. 2003).

these activities are § 106 rights under the Copyright Act.[111] These rights are designed to provide legal protection and the right to exclude others from commercial exploitation of the work.[112] The Copyright Act itself is designed to facilitate commercial exploitation.

The question relevant to § 108(h) is whether the copyright holder is currently exploiting the work commercially. In this specific part of § 108(h), if they are not, the work is in the last twenty years of its copyright, and meets the other two requirements of there being no reasonable copy and no notice from the copyright holders that there is normal commercial exploitation and/or no reasonable copy, the library may make that work available even though it is still under copyright. Section 108(h) reflects lack of market access. One cannot just go purchase a copy. The library serves a role of making that work available because the copyright holder and the publisher have not. In some way, the statute is orphan work-esque in its design and was titled "Orphan works" in its early conception.[113] The modification to § 108(h) in 2005, which allows all kinds of published works to fall under § 108(h), was called the "Preservation of Orphan Works Act."[114] The Orphan Work Report of 2005 addressed § 108(h). The Report noted that § 108(h) addressed "some users in certain situations," but noted that there were more orphans that fell outside of § 108(h).[115]

How is commercial exploitation defined in patent law? The first prong of the on-sale bar under the novelty requirement is that the work was "subject of a commercial offer for sale."[116] The Federal Circuit looks to the UCC to determine whether an offer for sale had been made.[117] "In order to constitute an offer for sale under § 102(b), an offer must be one 'which the other party could make into a binding contract by simple acceptance (assuming consideration).'"[118] The sale must be between two separate entities.[119] An attempt to make a sale counts.[120] A sale of devices

[111] 17 U.S.C. § 106 (2012).
[112] *Id.*
[113] REPORT ON ORPHAN WORKS, *supra* note 92, at 45.
[114] Family Entertainment and Copyright Act of 2005, Pub. L. No. 109-9, § 402, 119 Stat. 218, 226 (2005).
[115] REPORT ON ORPHAN WORKS, *supra* note 92, at 4. The Report also noted that §§ 115(b), 504(c)(2), and the termination provisions (§§ 203, 304(c) and 304(d)) could also be seen as "orphan work provisions." *Id.* at 44.
[116] Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 67 (1998).
[117] Grp. One, Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041, 1047 (Fed. Cir. 2001) ("As a general proposition, . . . the Uniform Commercial Code ("UCC") [] define[s] whether . . . a communication or a series of communications rises to the level of a commercial offer for sale.").
[118] Phillip W. Goter, *The Commercial Exploitation Continuum*, 13 MINN. J.L. SCI. & TECH. 795, 801 (2012) (citing *Hallmark Cards*, 254 F.3d at 1048)
[119] *Id.* at 803.
[120] Hamilton Beach Brands, Inc. v. Sunbeam Prods., Inc., 726 F.3d 1370, 1374 (Fed. Cir. 2013).

or technology counts.[121] Sale and purchase agreements count.[122] But, more than communication or information exchanged is required. Mere discussions of a sale are not enough.[123] And, preparations for sale do not count.[124]

Right of publicity also uses commercial exploitation, for example in identity cases. Nimmer, in *The Right of Publicity*, distinguishes between privacy and publicity doctrines: privacy focused on "solitude and privacy," while publicity focused on seeking to "profit by the commercial exploitation and control of name, photograph and likeness."[125] Hetherington defines direct commercial exploitation as "direct in nature and primarily commercial in its motivation."[126] He focuses on the usage and purpose, rather than manner or extent of use. Another definition is for "commercial gain."[127]

Another place we see a division in definitions of normal commercial exploitation is between published and unpublished works. A publication, both under the 1909 Copyright Act and the 1976 Copyright Act, included distributions without restrictions. The work was available to the public. These are the normal commercial exploitations of work. So, taking this into consideration, normal commercial exploitation in the context of § 108(h) may mean: sale or offer for sale. It would not likely include preparations for sale, mere discussions, or even requests for price lists.

We have a better sense of normal commercial exploitation now with the new Classics Act. As part of the noncommercial use exception, and the need to do a good faith, reasonable search to confirm there is no commercial use, the amendment defines elements that *are not* commercial uses:

> For purposes of this subsection— (A) merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under this subsection does not itself necessarily constitute a commercial use of the sound recording; (B) the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial.[128]

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[121] *Pfaff*, 525 U.S. at 67.

[122] Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc., 855 F.3d 1356, 1367 (Fed. Cir. 2017), *cert. granted*, 138 S. Ct. 2678 (2018).

[123] Moleculon Research Corp. v. CBS, Inc., 793 F.2d 1261, 1267 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1030 (1987).

[124] Intel Corp. v. U.S. Intern. Trade Com'n, 946 F.2d 821 (Fed. Cir. 1991). In re Caveney, 761 F.2d 671, 676 (Fed. Cir. 1985).

[125] H. Lee Hetherington, *Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity*, 17 COLUM.-VLA J.L. & ARTS 1, 6 (1992) (citing Melville B. Nimmer, *The Right of Publicity*, 19 L. & CONTEMP. PROBS. 203, 203-04 (1954) (discussing the evolution of the right to privacy)).

[126] *Id.* at 32.

[127] *Id.* at 30.

[128] Classics Protection and Access Act, Pub. L. No. 115-264, § 201, 132 Stat. 3728 (2018)

Even though it only relates to a specific part of the Copyright Act, it is the most recent thoughts about commercial exploitation.

Patent law, publicity rights, the definition of publication, and the recent Classics Act legislation help us in defining "normal commercial exploitation." It is the actual act of commercial gain, and not the contemplation. It is the act of selling, offering for sale, or demonstrating for sale the work. This requires the commercial exploitation requirement to be visible to the public. It is not that a company may be contemplating reissuing a book. The book must actually be for sale. What can we take away from this? Sale to the public or offer for sale likely constitutes "normal commercial exploitation," and, for books, this means channels that libraries are likely to frequent.

So, how does one determine if a work, and in this case, a book, is for sale? We came to believe that "normal commercial exploitation" could mean:

- Does the work have an ISBN number?
- Is the work available in Books in Print?
- Is a new copy of the work available on Amazon?
- Is the work available for sale from the standard sources for the industry?

We found a lack of an ISBN number for a book was particularly helpful in determining whether there was "normal commercial exploitation" occurring at the time of the start of the last twenty years of a book's copyright. Here's a little history to help explain why. W.H. Smith, the largest book retailer in Great Britain, began a means of computerizing their books by creating a Standard Book Numbering (SBN) system in 1966.[129] This became the basis of the International system (ISBN), which began in 1970, and is now used in more than 150 countries.[130] The question is understanding the current "normal commercial exploitation" for the purposes of § 108(h) that were published before the invention of the system? Since pre–1970 works would not have an ISBN, this lack of an ISBN for any copy of the work as a good indication that there is no "normal commercial exploitation" of the work now. Since the works we are looking at are from the 1920s, 1930s, and 1940s, if they have not been reissued after 1970, they would not have an ISBN number, and so there is likely no commercial exploitation currently for those works. Parallel systems occur for non-books.

We found ISBNdb.com particularly helpful in determining if a book is currently available, and whether the pre-1970 work has an ISBN number. At this free website, one can enter in the title and an author's name and retrieve all the places that one might find new and used editions of that work. We were particularly impressed that some of the results included information about that work having an earlier publication date (that the work was a reprint). One can review the used

[129] *ISBN History*, ISBN.ORG, http://www.isbn.org/ISBN_history (last visited October 11, 2018).
[130] *Id.*

and new copies and see the different versions, including the publication dates. It is an incredibly useful tool. Books in Print is also a good resource to determine whether there is currently normal commercial exploitation and availability.[131] And, of course, there is Amazon.[132]

Amazon turns out to be an amazing resource for both new and used books. In determining whether a copy of the work was available for sale, one important caveat we found on Amazon was that just because a work is on Amazon does not mean that it qualifies as "normal commercial exploitation." We found in one study that we conducted that while a copy was found on Amazon, the work was in fact in the public domain or it was clear that the copy we found was not authorized by the copyright holder or the original publisher. One must check the results to see if this is "normal commercial exploitation" *by the copyright holder*. The same holds true for the "reasonable copy" requirement. If there is a "reasonable copy" found, is this because the work is in the public domain and many people are reproducing the work? If this is the case, the library or archive can also reproduce the work because the work is in the public domain, and not under § 108(h). Check the copyright status against your findings, and you may find hidden gems.

C. Reasonable Copy

Section 108(h) also requires that the library or archives cannot obtain a reasonable copy of the work. In *Eldred v. Ashcroft*, § 108(h) is mentioned in Justice Breyer's dissent as a supplement to the First Amendment safeguards:

> The CTEA itself supplements these traditional First Amendment safeguards. First, it allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright . . . for purposes of preservation, scholarship, or research" if the work is not already being exploited commercially and further copies are unavailable at a reasonable price.[133]

Here, Justice Breyer describes the requirement as "further *copies* are unavailable at a reasonable price," and not further "copy" the singular.[134] Additionally, when one is investigating, what kind of copies count? What role does the first sale doctrine play in relation to reasonable copy? If reasonable copy is to benefit the copyright holder, one would assume only new copies are included.

The House Report related to § 108 stated this regarding a reasonable investigation:

> The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the

[131] BOOKS IN PRINT, https://www.booksinprint.com (last visited October 11, 2018).

[132] AMAZON, www.amazon.com (last visited October 11, 2018).

[133] 537 U.S. 186, 220 (2003) (citing 17 U.S.C. § 108(h)).

[134] *Id.* (emphasis added) (citing 17 U.S.C. § 108(h)).

> owner can be located at the address listed in the copyright registration), or an authorized reproducing service. . . It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purposes other than private study, scholarship or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and includes in its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.[135]

For many works, especially archival materials, meeting the two requirements above is relatively easy. For instance, the Frick Collection has many exhibition catalogs, first published here and abroad. If the works are still under copyright (many of them are not), then the next step is a § 108(h) analysis. In this case, they are not being commercially exploited—no one is actively selling these one-time, long, forgotten works, and often the reason that they are being digitized is because they are nearly one-of-a-kind.

An earlier portion of § 108 asks the library to look for unused copies at a reasonable price as a requirement before making a replacement copy: **"**the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price."[136] The Discussion Paper from the U.S. Copyright Office on § 108 seems to indicate that used copies count ("that a new or used copy of the work is not available at a reasonable price"). However, the statute itself is not as clear as the confident language from the Copyright Office.

D. The Netflix Problem and Audiovisual Works

How does one know when a work has not been made available for normal commercial exploitation or that a reasonable copy is not available for audiovisual works? First, as with books and periodicals, audiovisual works can be tracked with an ISBN-like number, called an International Standard Audiovisual Number (ISAN).[137] While a voluntary system, like ISBN, the ISAN system does allow one to see if there is commercial activity on these older works. Second, the reasonable copy requirement is more easily met in some way by looking at Amazon.com or other online resources. Older films and other audiovisual works, however, are less likely to have reasonable copies available.

What if a work is available on Netflix or another streaming search? This is normal commercial exploitation (and we see streaming services included in the new legislation for pre-1972 sound recordings). But the single problem one runs into is that the works available on Netflix and other streaming services vary. Works are added and removed periodically. What if there is no commercial exploitation of the work in May 2017, but there is in June, but again not in August? What if a scholar or teacher depends on a copy of the work? It would seem that Netflix exploitation might not be stable enough, even though it is normal commercial exploitation.

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[135] H.R. REP. NO. 94-1476, at 5,689-90 (1976) (Conf. Rep.).

[136] 17 U.S.C. § 108(c)(1) (2012).

[137] INT'L. STANDARD AUDIOVISUAL NUMBER, http://www.isan.org.

Another interpretation might be that it was normal commercial exploitation as of the drafting and enactment of the CTEA, in 1998. If that is the case, streaming availability by subscription was not a normal commercial exploitation. But given the new legislation, this interpretation seems unlikely.

The goal of § 108(h) seems to be to rescue works that would *not* be playing on Netflix. If one can communicate with the copyright holders about their commercial exploitation, that may also be a strategy. It seems in the end, we are on a search to answer one question in order to apply § 108(h): can the copyright holder point the library to a copy their patrons can read/view? If not, § 108(h) likely applies.

E. Notice from Copyright Holders

A copyright holder may file a notice to libraries and archives of normal commercial exploitation or available at a reasonable price with the U.S. Copyright Office.[138] This is the third aspect of § 108(h) for a library and/or archives—to check to see if any notices have been filed with the Copyright Office. To date, in a whole twenty years of the history of this requirement, no notices have *ever* been filed.

As part of that information, the copyright holder may include information about the normal commercial exploitation or reasonable price, but it is not required. However, the form must include: "A declaration made under penalty of perjury that the work identified is subject to normal commercial exploitation, or that a copy or phonorecord of the work is available at a reasonable price."[139] What is interesting is no information is provided in the procedures of when the notice must be filed. What about the Compendium III, the Copyright Office practices? Nothing touches upon this process.

Once a copyright holder files a notice, the exception no longer applies. In its 2005 Orphan Work Report, the Copyright Office noted:

> [t]he provision does not provide much incentive for a copyright owner to file such a notice before it discovers that one of its works is being used under this subsection. By its terms, it appears that such a notice can be filed at any time, even after a library or archive begins use of a work it had determined to have met the criteria. Once the notice is filed, the work is no longer subject to the exception, and the library or archives would have to cease its use under § 108(h). In most cases it would thus seem more efficient for a copyright owner to 'wait and see' whether a work is being used under § 108(h) rather than to file such notices proactively.[140]

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[138] 37 C.F.R § 201.39 (2017); U.S. Copyright Off., *Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price* (1998), https://www.copyright.gov/forms/nlacon.pdf

[139] 37 C.F.R § 201.39(c)(14) (2017) l.

[140] REPORT ON ORPHAN WORKS, *supra* note 92, at 46 n.104.

So, should this concern libraries and archives? Given that a notice has never been filed and, in this day and age one can take down digitizing, it may nevertheless be worth adding that there may be some reliance on § 108(h). If one puts resources into digitizing a work that is not commercially available and no copies are available at a reasonable price, and it is only after digitizing the work that the publisher/copyright holder makes a copy available, one could assume that the library/archive would have a case for collecting expenses from the publisher/copyright holder. But at the least, the only obligation the library/archive would have would be to not use § 108(h) as justification for making and distributing copies. Fair use, and all other portions of § 108, would still apply.

F. Timing

When does this search for normal commercial exploitation and/or reasonable copies need to take place? Unlike § 104A and other areas of the Copyright Act, no specifics about the timing is given. Some worry that libraries/archives might have to continually be doing a search for a new or used copy of the work. We tend to view this requirement within the context of the statute. Section 108(h) was designed to assist scholars, researchers, and libraries/archives in their missions—to research and to preserve works. The reason the works are being digitized under § 108(h) is because a reasonable copy is not found and that the work is currently not being manufactured or offered for sale as a new copy. So, the library/archive scans the work.

G. Registration

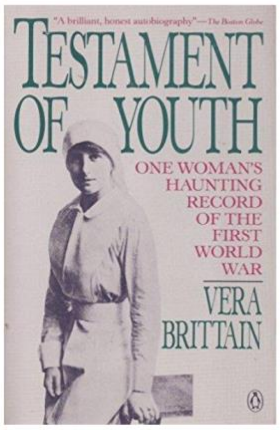
One additional element to consider is that if a work is not registered with the U.S. Copyright Office, there is less "teeth" to the copyright. Domestic authors cannot pursue a copyright infringement case without registration, and both domestic authors and foreign authors alike cannot receive statutory damages or attorney's fees without registration.

H. What is a "work" or "copy"?

One outlying question is how to define what a "work" or "copy" is for the purpose of § 108(h). For instance, *Testament of Youth* by Vera Brittain was first published in England in 1933.[141] A U.S. version came out later that year. It was republished many times, including later with a new introduction by the author's daughter, and later, three versions as part of a movie tie-in in 2015. This does not include the countless additions in other countries, including India, for example, or the translations.

Here are some examples from a search on Abebooks (September 7, 2017).

[141] VERA BRITTAIN, TESTAMENT OF YOUTH (1933).



Stock Image

Testament of Youth : One Woman's Haunting Record of the First World War

Vera Brittain

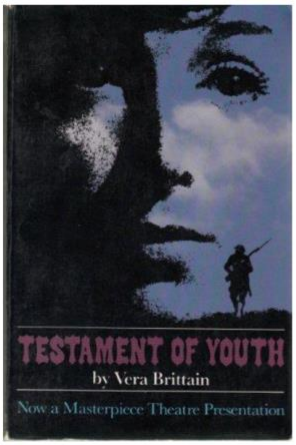
5,311 ratings by Goodreads

ISBN 10: 0140122516 / ISBN 13: 9780140122510
Published by Penguin Publishing Group

Used | Condition: Fair | Soft cover

Save for Later

From Silver Arch Books (St Louis, MO, U.S.A.)
AbeBooks Seller Since December 23, 2010
Seller Rating
Quantity Available: 1



Testament of Youth

Vera Brittain

5,305 ratings by Goodreads

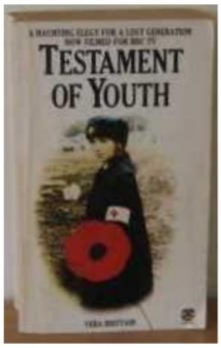
ISBN 10: 0872236722 / ISBN 13: 9780872236721
Published by Penguin Publishing Group

Used | Condition: Fair | Soft cover

Save for Later

From Yankee Clipper Books (Windsor Locks, CT, U.S.A.)
AbeBooks Seller Since December 22, 2009
Seller Rating
Quantity Available: 1

Search Results › Brittain, Vera



Stock Image

View Larger Image

Testament of Youth: An Autobiographical Study of the Years 1900-1925

Brittain, Vera

5,301 ratings by Goodreads

ISBN 10: 0006357032 / ISBN 13: 9780006357032
Published by HarperCollins Distribution Services

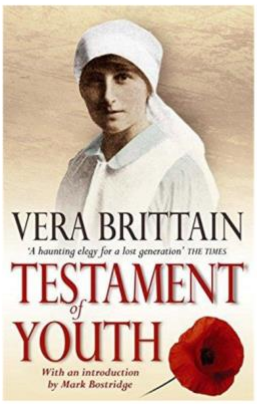
Used | Condition: Good | Soft cover

Save for Later

From Second City Books (Aurora, IL, U.S.A.)
AbeBooks Seller Since March 29, 2016
Seller Rating
Quantity Available: 1

Search | By Keyword | Find

Search Results › Vera Brittain



Testament of Youth

Vera Brittain

5,297 ratings by Goodreads

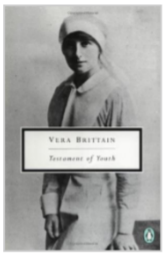
ISBN 10: 0860680355 / ISBN 13: 9780860680352
Published by Random House, Incorporated

Used | **Condition: Fair** | Soft cover

Save for Later

From **Yankee Clipper Books (Windsor Locks, CT, U.S.A.)**
AbeBooks Seller Since December 22, 2009
Seller Rating

Quantity Available: 1



Stock Image

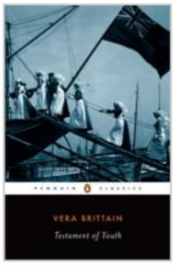
Vera Brittain: Testament of Youth: An Autobiographical Study of the Years 1900-1925 (Penguin Twentieth-Century Classics)

ISBN 10: 0140188444 / ISBN 13: 9780140188448

Used

Quantity Available: 1

From: Seattle Goodwill (Seattle, WA, U.S.A.)
Seller Rating:



Stock Image

Testament of Youth (Penguin Classics)

Brittain, Vera

Published by Penguin Classics
ISBN 10: 0143039237 / ISBN 13: 9780143039235

Used / PAPERBACK

Quantity Available: 1

From: glenthebookseller (Montgomery, IL, U.S.A.)
Seller Rating:

AbeBooks.com Passion for books.

Sign C

Advanced Search | Browse Collections | Rare Books | Textbooks | Boo

Search By Keyword Fin

Search Results › Brittain, Vera

Testament of Youth (Movie Tie-In)

Brittain, Vera

★★★★☆ 5,307 ratings by Goodreads

ISBN 10: 0143108387 / ISBN 13: 9780143108382
Published by Penguin Books, 2015

Used | **Condition: Good**

Save for Later

From **Better World Books (Mishawaka, IN, U.S.A.)**
AbeBooks Seller Since August 3, 2006
Seller Rating ★★★★★
Quantity Available: 1

Stock Image

Testament Of Youth: Film Tie In (Virago Modern Classics)

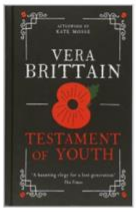
Brittain, Vera

ISBN 10: 0349005923 / ISBN 13: 9780349005928

Used / Paperback

Quantity Available: 2

From: WorldofBooks (Goring-By-Sea, WS, United Kingdom)
Seller Rating: ★★★★☆



Stock Image

Testament of Youth (Hardback)

Vera Brittain

Published by Orion Publishing Co, United Kingdom (2014)
ISBN 10: 1780226594 / ISBN 13: 9781780226590

New / Hardcover

Quantity Available: 10

From: The Book Depository US (London, United Kingdom)
Seller Rating:

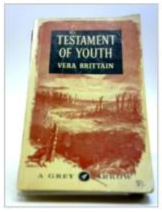
Add to Basket

Price: US$ 17.28
Convert Currency

Shipping: FREE
From United Kingdom to U.S.A.

Destination, Rates & Speeds

Item Description: Orion Publishing Co, United Kingdom, 2014. Hardback. Book Condition: New. UK ed.. Language: English . Brand New Book. This classic memoir of the First World War is now a major motion picture starring Alicia Vikander and Kit Harington. Includes an afterword by Kate Mosse OBE.In 1914 Vera Brittain was 20, and as war was declared she was preparing to study at Oxford. Four years later her life - and the life of her whole generation - had changed in a way that would have been unimaginable in the tranquil pre-war era.TESTAMENT OF YOUTH, one of the most famous autobiographies of the First World War, is Brittain s account of how she survived those agonising years; how she lost the man she loved; how she nursed the wounded and how she emerged into an altered world. A passionate record of a lost generation, it made Vera Brittain one of the best-loved writers of her time, and has lost none of its power to shock, move and enthral readers since its first publication in 1933. Bookseller Inventory # AA29781780226590



Seller Image

Testament of youth: An autobiographical story of the years 1900-1925 (Grey arrow books ; no.48)

Brittain, Vera

Published by Arrow Books (1960)

Used / Softcover

Quantity Available: 1

From: World of Rare Books
(Goring-by-Sea, WTSX, United Kingdom)
Seller Rating:

Add to Basket

Price: US$ 4.05
Convert Currency

Shipping: US$ 6.36
From United Kingdom to U.S.A.

Destination, Rates & Speeds

Item Description: Arrow Books, 1960. Book Condition: Good. 1960. 447 pages. Good condition paperback; as expected for age. Cards, pages, and binding are presentable with no major defects. Minor issues may exist such as shelf wear, inscriptions, light foxing and tanning. Bookseller Inventory # 1504084605KDG

Testament of Youth

Vera Brittain

Published by Macmillan (1935)

Used / Hardcover

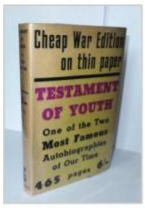
Quantity Available: 1

From: BookManBookWoman Books (Nashville, TN, U.S.A.)

Seller Rating:

tem Description: Macmillan, 1935. Hardcover. Book Condition: Good +. Shelf 1126 Text clean; p cracked; name on FFEP; pages 116 and 117 browned due to newspaper article being laid in; very some light general wear including a couple small white dots on front and some rubbing to spine st Not ex library, not a remainder, smoke free. PHOTOS POSTED WITH OUR BOOKS ARE STOCK A REFLECT CONDITION OR EDITION OF BOOK OFFERED FOR SALE. WE DO NOT POST THE PH 318304

More Information About This Seller | Ask Bookseller a Question



Seller Image

More images

Testament of Youth: An Autobiographical Study of the Years 1900 - 1925

Vera Brittain

Published by Gollancz, London (1944)

Used / Hardcover / First Edition

Quantity Available: 1

From: London Rare Books, PBFA (London, United Kingdom)

Seller Rating:

Add to Basket

Price: US$ 155.22

Convert Currency

Shipping: US$ 16.98

From United Kingdom to U.S.A.

Destination, Rates & Speeds

Item Description: Gollancz, London, 1944. Hardback. Book Condition: Very Good. Dust Jacket Condition: Very Good. Early Reprint. 16th impression of this landmark autobiography much of which is set against the back drop of World War I and its aftermath in publisher's original light blue cloth with gilt titles to spine still quite fresh looking with a little fading at the bottom edge of the spine only. The binding is tight, sound and square with some minor spotting to page block edges. Internally generally clean with some light foxing to pastedowns and one neat ownership signature, dated 1945, at the top edge of the front free ep. The scarce unclipped dustjacket is complete with some light fading, a couple of tiny nicks and the occasional hint of wear at the edges. Jacket now in a removable, transparent cover. A very nice copy - scarce in jacket. Size: 12mo - over 6¾" - 7¾" tall. Bookseller Inventory # 001226

More Information About This Seller | Ask Bookseller a Question

28.

Seller Image

Testament of Experience : An Autobiographical Story of the Years 1925-1950.

Brittain, Vera

Published by Victor Gollancz, London (1957)

Used / Hardcover / First Edition

Quantity Available: 1

From: Oxfam Books Harrogate - F0611
(Harrogate, United Kingdom)

Seller Rating:

Add to Basket

Price: US$ 21.60
Convert Currency

Shipping: US$ 11.27
From United Kingdom to U.S.A.

Destination, Rates & Speeds

Item Description: Victor Gollancz, London, 1957. Hardcover. Book Condition: Good. No Jacket. 1st Edition. A first edition copy of Brittain's continued history of a generation, followup to Testament of Youth and taking the story through the years of World War II. Brown cloth, slight shelfwear, small mark to front, spine lightly sunned and creased. No dustwrapper. Page edges browned, small mark front pastedown, otherwise internally clean. 480 pp. Bookseller Inventory # 007865

More Information About This Seller | Ask Bookseller a Question

9.

Testament of Youth

Brittain, Vera

Published by Macmillan (1933)

Used / Hardcover

Quantity Available: 1

From: Redux Books (Grand Rapids, MI, U.S.A.)

Seller Rating:

Add to Basket

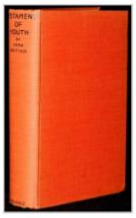
Price: US$ 15.76
Convert Currency

Shipping: FREE
Within U.S.A.

Destination, Rates & Speeds

Item Description: Macmillan, 1933. Hardcover. Book Condition: Used: Good. Good hardcover. No DJ. Pages are clean and unmarked. Covers show light edge wear with rubbing/light scuffing. Binding is tight, hinges strong.; 100% Satisfaction Guaranteed! Ships same or next business day!. Bookseller Inventory # 51706300030

And here is the original version:



Seller Image

More images

TESTAMENT OF YOUTH. AN AUTOBIOGRAPHICAL STUDY OF THE YEARS 1900-1925

LITERATURE] Vera Brittain

Published by Victor Gollancz, London (1933)

Used / Hardcover / First Edition

Quantity Available: 1

From: BLACK SWAN BOOKS, INC., ABAA, ILAB
(Richmond, VA, U.S.A.)

Seller Rating: ★★★★★

Add to Basket

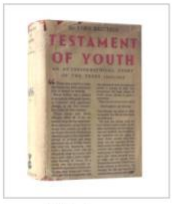
Price: US$ 1,250.00

Convert Currency

Shipping: US$ 4.00
Within U.S.A.

Destination, Rates & Speeds

Item Description: Victor Gollancz, London, 1933. Hard Cover. Book Condition: Very Good+ binding. First Edition. Quite an attractive copy of the first impression of the Brittain's moving and angry memoir of loss; one of the great books to come out of the horrible experience of the first World War. The front and rear panels of the dustjacket are laid in; they are badly chipped and the spine has perished. A clean and tight copy, with no marks of any kind, and just a trace of shelfwear. Very Good+ binding. Bookseller Inventory # 274691



Seller Image

Testament of Youth - in the original dust wrapper

Brittain, Vera

Published by London Gollancz 1933 (1933)

Used / First Edition

Quantity Available: 1

From: John Atkinson Books ABA ILAB PBFA
(Ripon, United Kingdom)

Seller Rating: ★★★★★

Add to Basket

Price: US$ 4,386.75

Convert Currency

Shipping: US$ 15.73
From United Kingdom to U.S.A.

Destination, Rates & Speeds

Item Description: London Gollancz 1933, 1933. A first edition, first printing published by Gollancz in 1933. A near fine book with one small name to the front endpaper and a small book ticket (The Times) to the rear end pastedown. Some rubbing to corners. In a good unclipped wrapper which has some internal archival repairs and skilful repair to the 'T', 'E' and 'T' of the title on the front panel. there is shallow chipping to the spine tips with a larger chip to the left of the head of the spine affecting 'Tes' of 'Testament'. Rubbing to the edges as well as creasing. Excessively scarce to find the dust wrapper in any condition. Brittain's autobiographical story of the years 1900-1925 and a cornerstone of WW1 literature. Rare. Bookseller Inventory # 10239

Now, obviously there are many, many copies of *Testament of Youth*. This would not qualify for § 108(h). But the question here is, what is considered a copy of the original work? For copyright purposes, the original work holds a copyright term. In this case, thanks to restoration, the term is through 2028. But this work was also in the U.S. public domain from 1961 to 1996. Many of these versions are no doubt because of this status. It is unclear to those interested in researching Vera Brittain what counts as a "reasonable copy" in terms of content for the purposes of § 108(h). In copyright law, the subsequent works are derivatives, if there are changes, but the underlying work is still the same in terms of the original copyright. But what about in the library community? How are all of these versions viewed, and what can be gleaned in terms of what counts as a copy for the purpose of § 108(h)? Section 108(h) includes the

concept of the "work" and "copy" of the work. How is work defined? What is a copy? As a reminder, let's look again at the statute:

> For purposes of this section, during the last 20 years of any term of copyright of a **published work**, a library or archives, including a nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form **a copy or phonorecord of such work,** or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.
> **(2)** No reproduction, distribution, display, or performance is authorized under this subsection if—
> **(A)** the **work is subject to normal commercial exploitation**;
> **(B)** a **copy** or phonorecord of the work can be obtained at a reasonable price; or
> **(C)** the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies. (Emphasis added)[142]

A published work has a base term. For instance, Vera Brittain's *Testament of Youth*, was first published in England in 1933, and so its term lasts in the U.S. through 2028. (Note, this is an example of a work that was restored. The work came out of copy in the US in 1961 but was restored to copyright in 1996).[143] The original work was published by Gollanz in 1933. A 1933 U.S. version was also published. Thereafter, there are many different derivative versions—additional introductions, tie-ins to films, and different covers. Each new version has an additional copyright term for the additions added, but the underlying main work still carries the term based on the 1933 date. So, how do we understand the relationship between the versions of the work? Which counts as a "copy" for purposes of § 108(h)? Is there an argument to be made that the normal commercial exploitation must be a copy of that original, rather than a derivative version of the work? The Copyright Act defines "copies":

> "Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "copies" includes the material object, other than a phonorecord, in which the work is first fixed.[144]

The Copyright Act defines a "work":

> A work is "created" when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work.[145]

Finally, the Copyright Act defines a "derivative work":

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[142] 17 U.S.C. § 108(h).

[143] *Id.* § 104(A).

[144] *Id.* § 101.

[145] *Id.*

> A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work."[146]

How are we to understand, then, the relationship between different versions as separate works or derivative works and the required that copies of the "published work" not be available commercially or at reasonable price, for purposes of § 108(h)? We turn to the work of Daniel Joudrey, and his mammoth work, *Introduction to Cataloging and Classification* (Eleventh edition, 2015). We should focus on his explanation of the *Functional Requirements for Bibliographic Records.*[147]

We begin with the *Functional Requirements for Bibliographic Records* (FRBR), the theoretical model for modern cataloging.[148] It is the basis for the cataloging rules found in *RDA., or, Resource Description Access*.[149] FRBR is an "abstract conceptual model . . . for understanding the components of the bibliographic universe."[150] It is a clear view of how librarians—catalogers—approach the bibliographic record, "and what it is that we expect the record to achieve in terms of answering user needs."[151] We are going to dive deep into the basics of the FRBR, with Joudrey as our guide, to understand the relationship between a "published work" and a "copy" in § 108(h). The FRBR conceptual model divides the entities comprising the bibliographic universe into three groups based on role and function.[152] For our purposes, we are focused on Group 1.

Group 1 comprises *work, expression, manifestation*, and *item* (WEMI), which are "the products or results of 'intellectual or artistic endeavor that are named or described in bibliographic records.'"[153] Joudrey explains the relationships among the four Group 1 entities as follows:

1. [A] single work may be *realized through* one or more expressions—e.g., the content of a novel may be translated into many different languages;

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[146] *Id*.

[147] In August 2017, a new version of FRBR called IFLA Library Reference Model (LRM) was authorized. It now replaces FRBR. Many aspects of the original FRBR model remain (especially WEMI), but there have been changes. The biggest one is that most of the attributes have been stripped out of the model. They were too specific and should be left up to individual implementations of the LRM (such as RDA). For our purposes, we will be using the FRBR as a means of understanding "work" or "copy".

[148] DANIEL N. JOUDREY ET AL., INTRODUCTION TO CATALOGING AND CLASSIFICATION 61(11th ed. 2015).

[149] *Id*.

[150] *Id*.

[151] *Id*. at 61–62.

[152] *Id*. at 64.

[153] *Id*.

2. [O]ne or more expressions may be *embodied in* one or more manifestations—e.g., a translated work and its original version may appear in a printed book together, and they may be distributed on microform as well; and
3. [A] manifestation is *exemplified by* one or more items, because widely distributed tangible resources having multiple items is the norm—e.g., thousands of copies of the latest Nicholas Sparks novel are published, because more than one institution or person will purchase a copy.[154]

While in many ways, the answer is already in the definitions supplied by the Copyright Act, applying FRBR to our analysis helps clarify the boundaries between the published work and copy of the work.

1. First Hierarchy – Work:

Work is an abstract "intellectual or artistic creation."[155]

> A *work* is an abstract entity; it is the intellectual or artistic content and there is no single material object one can point to as the *work*. We recognize the *work* through individual realizations or *expressions* of the *work*, but the *work* itself exists only in the commonality of content between and among the various *expressions* of the *work*.[156]

Shakespeare's *Hamlet* is a work, but one is not referring to any specific version of the work.

> It is the creator's abstract ideas that are referred to as a work. One cannot see, purchase, or touch an actual work. A work exists only in a realm of human thought… To obtain a work, it must be expressed in some manner first and then manifested into some physical form or carrier.[157]

We do not have this concept exactly in copyright. We see the work as defined by its physical embodiment. But we can see that the work is more than its physical form. It is this concept that "work" is trying to get at.

For the bibliographic record, "[t]he purpose of the work is to be able to identify unique intellectual or imaginative content and then to group expressions around it. The idea is that the work provides a name or label that may be applied to all the various expressions that orbit the same content."[158] Using Shakespeare's *Hamlet* again, Joudrey sees this as a label "consisting of a creator's name and a common title—that may be applied to myriad expressions of that work, including the original English-language versions from the First Quarto . . . as well as various translations…"[159] Joudrey explains that there are 12 attributes to the work, that describe and identify the work itself, rather than its expression, manifestation or item.[160] The goal is to

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[154] *Id.* at 65.
[155] *Id.* at 70.
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.* at 70–71.
[160] *Id.* at 71.

identify identically titled works with different content.[161] According to Joudrey, the principal work attributes are:

- Title of the work
- Form of the work (e.g., poem, play, fiction, etc.)
- Date of the work (creation date or a range of dates, and can include the publication date if creation date is unknown)
- Other distinguishing characteristics
- Intended termination (whether finite work or ongoing)
- Intended audience
- Context for the work[162]

The date of the work is of particular interest to us. Note that, because the work is focused on its pure form, the creation date is preferable; however, other dates are acceptable, like the publication date. Date is key for copyright, and so this is interesting. Here, date is being used to identify and differentiate one work from another.

In reality, it is the work that gains protection under copyright, and we use the date of first publication of the original expression of that work as the triggering event to determine the copyright status. (The first manifestation of the expression of the work.) The "fixation" helps us understand the property boundaries, but it is the work (rather than the idea of the work) that the law is protecting, not merely the exact expression or literal copying.

2. Second Hierarchy – Expression:

"[S]igns, symbols, notation, sounds, images, etc. used to convey the content of the work."[163] Joudrey explains that expression "indicates how this content is communicated. . . '[T]he specific words, sentences, paragraphs, etc. that result from the realization of a *work* in the form of a text,' but text that is not yet on the printed page. There can be, of course, more than one expression of a work."[164] Joudrey continues, "[a]n expression—like a work—is an intangible entity; it excludes physical forms. An expression is concerned with delivering the content of the work. One can neither hold nor see an expression, at least not until it has been embodied in a manifestation in some way."[165] Why would one need the *expression*? "The concept allows catalogers to group various manifestations together as long as they share the same content and communicate it the same way, no matter how different the physical carriers holding the content may be."[166] He explains, "[a]s defined, an expression reflects a mode of communication (words,

[161] *Id.*
[162] *Id.*
[163] *Id.* at 69.
[164] *Id.* at 71.
[165] *Id.* at 72.
[166] *Id.*

pictures, etc.), but it does *not* reflect a particular type of physical object (a printed book, a collage of images, etc.)."[167] Joudrey provides the example of *Twelfth Night* by Shakespeare.[168] The expression can be the original English First folio text, a Spanish translation, a performance by the Royal Shakespeare Company, and a performance by the Folger Shakespeare Theatre.[169] In this example, there is one work, but several expressions. He notes that any change in form creates a new expression. Revisions are also new expressions, while minor changes can be considered variations of the same expression.[170] This is key for understanding what works apply within the context of § 108(h), I believe. Are there genuine differences between two published editions, a British version versus an American version? If so, they are two different expressions of the work.[171] Joudrey notes that a translation of *Twelfth Night* into Spanish will be one expression, even if there are a number of different translations.[172]

Jourdrey notes that there are 12 general expression attributes, with an additional 13 established for particular forms of materials (e.g., maps, serials).[173] The basic ones are the following:

- Title of the expression. This is focused on title of the work itself
- Form of expression. How the work is realized (text, music, etc.)
- Date of the expression. Ideally the creation date, but can be a range, performance date, etc.
- Language of expression
- Other distinguishing characteristics
- Extent of the expression (e.g., number of words, running time, etc.)
- Summarization of content[174]

How does one determine whether the changes have created a new work? That is the task for the expression stage, and FRBR notes that the amount of change necessary may vary from culture to culture.[175] Joudrey includes a list of examples considered to be new expressions of the same work. He writes, "updates, revisions, translations, subtitled or dubbed films, and modest changes in content usually result in new expressions."[176] Here is his list, based on Barbara Tillett's work as cited in the book:

- Variations or versions

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[167] *Id*.
[168] *Id*. at 74.
[169] *Id*.
[170] *Id*.
[171] *Id*. at 73.
[172] *Id*. at 74
[173] *Id*. at 74-75.
[174] *Id*. at 74.
[175] *Id*. at 75.
[176] *Id*.

- Simultaneous publication
- Slight modifications
- Arrangements
- Translations
- New editions
- Revisions or updates
- Illustrated editions
- Abridged editions
- Expurgated editions[177]

Joudrey explains, "[w]hen there are significant changes in form and/or genre, when those responsible for the content have transformed the original work into something new, or when there is significant, independent intellectual or creative endeavor, then a new work has been generated."[178] Joudrey included a flowchart to understand when a new expression has been created.[179] This sounds a great deal like the definition of "work" and "derivative work" in the Copyright Act.[180] Expressions, then, are different versions of the work that are distinguishable from each other.

Related to work and expression, Joudrey writes about the concept of a bibliographic family. He begins with the original work: the original script for the play, *The Philadelphia Story*, written in the late 1930s. That play becomes five expressions: the original script, the performance of the play, the radio adaptation of the play, the performance of the radio play, and the French translation of the play. One can see the work, and then derivative works.

In the Durationator, we would structure this analysis under the categories of main, underlying, and derivative. We have created a flexible structure: Main, Underlying, Derivative, Separate (MUDS). The main work is usually the first work. Sometimes this is the work that one is focused on. For example, one may be focused upon the film, *West Side Story*, and so the musical version may be an underlying work. But usually, one begins with the first expression of the work, namely the short story, or the script. In this case, we are looking at the play, *The*

[177] *Id.* at 75.
[178] *Id.* at 76.
[179] *Id.* at 77 tbl.3.1.
[180] "A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a "derivative work"." 17 U.S.C. §101.

Philadelphia Story. In the MUDS system, we would label that first work, "Main." We now create relationships between the main work and the rest of the works that we are reviewing.

Derivative works that have the main work included may have enough creativity to secure an additional copyright.[181] The main work's term remains the same. The derivative work has a term on the new material. In the example below, the radio play may be considered a derivative work of the original, in that any new components made for the radio would be added to the original work. The performance is a derivative of the derivative radio play, with the main work's copyright still in action.

A separate work is a work that may be included at any stage but carries a separate copyright term. An illustration in a book is a good example. The label "separate" helps to indicate that the term may be distinct.

Work 1: The Philadelphia Story by Philip Barry (play)

Expression	FRBR #	Durationator MUDS system Correlation
Original script	W1 E1	Main
Performance of the Play	W1 E2	Derivative 1 of Main
Radio adaptation of the play	W1 E3	Derivative 2 of Main
Performance of Radio version of the Play	W1 E4	Derivative i of Derivative 2 of Main
French Translation of script	W1 E5	Derivative 3 of Main

Joudrey notes that there is a film version of *The Philadelphia Story*.[182] Here, he sees this as a separate work, a new work because it is a "transformation[] of Barry's original work," with "different creators involved, and…changes in genre and form…"[183] So he describes, then, the film version as having at least two new works: the film and the screenplay, but notes that it could be many more than this: costume sketches, score, set designs, etc. could all be viewed as separate

[181] *Id.*

[182] JOUDREY ET AL., *supra* note 148, at 76.

[183] *Id.* at 78.

works exhibiting whole/part relationships with the final film. In the Durationator MUDS system, we do not see them as new, but as another subset of the derivative work line from the main work.

Work 2: The Philadelphia Story (film) based on Barry's play

Expression	FRBR#	Durationator MUDS system Correlation
Original director's cut	W2 E1	Derivative 4 of Main
Remastered version	W2 E1	Derivative i of Derivative 4 of Main
Colorized version	W2 E1	Derivative ii of Derivative 4 of Main
Dubbed Spanish-language version	W2 E4	Derivative iii of Derivative 4 of Main
Film with Turkish subtitles	W2 E5	Derivative iv of Derivative 4 of Main

You can see that with the FRBR categories, the film is a new work. There is no direct way of describing the underlying work of original play (it is a work-to-work relationship in FRBR). The Durationator MUDS system keeps the works all connected. Joudrey notes that catalogers have to make judgments as to how to decide when a work is a new work rather than expression, and how a family is connected. The Durationator MUDS system does not leave it up to chance. Its focus is the work that is potentially subject to copyright, and it traces the possibilities of that copyright work through its lifetime and other expressions. That original script's copyright term will impact all the related expressions until the copyright term has expired. The colorized version has these copyrights to consider: the original script, the screenplay (incorporated into the film as one copyright), the original film, and the additions (color) of the colorized version. Each of those potentially have different copyright terms. We have to keep track of the relationships between and among expressions. Joudrey notes (based on Tillet), "[t]he so-called 'magic line' between new works and new expressions of the same work is not a fixed one, and cataloger's judgment must be relied on in every decision. After one goes beyond a single print manifestation containing a single expression of a single work, it can get complicated quickly…"[184]

[184] *Id.* at 79.

3. Third Hierarchy – Manifestation: a set of physical resources in which an expression of a work appears:

The third element in the hierarchy is manifestation, which shifts from the purely abstract to the tangible… 'When a *work* is realized, the resulting *expression* of the *work* may be physically embodied on or in a medium such as paper, audio tape, video tape, canvas, plaster, etc. That physical embodiment constitutes a *manifestation* of the *work.'*

For us, I believe that the *expression* equates to the "work" in copyright. The heart of the first expression of the work is usually the main work, with additional expressions derivative works. A work will always have at least one expression, and that expression must occur as a manifestation in order to qualify for copyright protection. Section 102(a) of the 1976 Copyright Act reads: "[c]opyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[185] The manifestation is the tangible medium of expression. The original works of authorship is the expression. It is the manifestation level that catalogers generally begin the process. Joudrey uses *Twelfth Night* as an example.[186]

Work 1: *Twelfth Night* by Shakespeare

	FBRB	Durationator MUDS System Correlation
Original English text	W1 E1	Main
1892 American Book Company Edition	W1 E1 M1	Derivative 1 of main
Microform version of 1892 American Book edition	W1 E1 M2	Copy of the Derivative if nothing was changed
2008 Arden Edition	W1 E1 M3	Derivative 2 of main
Electronic text of Project Gutenberg	W1 E1 M4	Copy of Main if nothing is changed

[185] 17 U.S.C. § 102(a).

[186] JOUDREY ET AL., *supra* note 148.

Spanish Translation	W1 E2	
1899 Spanish translation. Revista nueva edition	W1 E2 M1	Derivative 3 of main (assuming it is based on the original text)
1928 Rivadeneyra edition	W1 E2 M2	Derivative 4 of main
Performance by the Royal Shakespeare Company	W1 E3	Derivative 5 of main (no copyright unless fixed)
DVD of recorded live performance by RSC	W1 E3 M1	Derivative 5 of main
VHS tape of recorded live performance by RSC	W1 E3 M2	Derivative 5 of main

What is interesting is that the Durationator system does not currently have a way to differentiate between the DVD and VHS tape of the recorded performance. In this case, the content on the DVD and VHS may be identical. It is only the form that differs. Should we add a manifestation category to MUDS? At what point do you differentiate the copyright status of the manifestation?

You will see that the two Spanish translations, one in 1899 and the other in 1928 are two separate manifestations. This is true for copyright as well. They each receive their own copyright term for their translation, with the underlying, main work's term remaining constant. But they are the same expression—a Spanish translation.

The performance example is different. One presumes that the recording is the same for the DVD and the VHS performance. The copyright term is the same as well. How does one acknowledge that the physical manifestation holds the same copyright information, which is different from the two *different* Spanish translations? One might include a label "physical manifestation" in the MUDS category, identifying that they are linked, but that their copyright is likely the same.

DVD of recorded live performance by RSC	W1 E3 M1	Derivative 5 of main, Physical Manifestation 1

VHS tape of recorded live performance by RSC	W1 E3 M2	Derivative 5 of main, Physical Manifestation 2

Regarding book prints, Joudrey is helpful. "A print edition of a book is generally considered one manifestation whether it is hardback or paperback. 'New printings will not result in in a new manifestation unless other changes are made. A manifestation may have different bindings…or other variations…that do not significantly affect the printed image.'"[187]

For the manifestation level, where catalogers generally begin their process, there are 38 manifestation attributes.[188] The most frequently used, according to Joudrey, are the following:

> Title of the manifestation. Usually title of the work.
>
> Statement of Responsibility. "Information from a manifestation regarding the parties responsible for the creation and/or realization of the content; may include more than one person, family, or corporate body."
>
> Edition/Issue designation. "[A]lthough edition statements are associated with manifestations, actual changes in content that reflect new editions are made at the expression level."
> Place of publication/distribution. Note: it is the city that is the focus, rather than the country. For Durationator and copyright purposes, we have to translate this into the country. This also makes sense why later we will see that the city is often included in the MARC record, although the 008 field of the MARC record is based on the country or (in the case of the US) state of the work.
>
> - Publisher/distributor
> - Date of publication/distribution
> - Fabricator/manufacturer
> - Series statement
> - Form of carrier (e.g. volume, filmstrip, microfish, computer disc, etc.)
> - Extent of the carrier (number)
> - Physical medium
> - Capture mode: means used to record the content (analog, digital, ink, paper)
> - Dimensions of the carrier
> - Manifestation Identifier: unique code associated with a manifestation (e.g. ISBN, URI, etc.)[189]

[187] *Id*., at 82 (citing Edward T. O'Neill, FRBR: *Functional Requirements for Bibliographic Records Application of the Entity Relationship Model to Humphry Clinker*, 46 LIBR. RESOURCES & TECH. SERVS. 146, 152 (2002)).
[188] *Id.*
[189] *Id.* at 82-83.

Note that the tangible medium of expression in copyright is called the "carrier."[190]

4. Fourth Hierarchy – Item:

The first group also contains a fourth hierarchy: the item. This is the physical object of the manifestation. "An item is a single exemplar of a *manifestation*, which may be made up of one or more physical objects."[191] Libraries purchase items. Items, in copyright terms, are copies.

Work	Main work	The work is what holds the copyright. The expression can be the main work, but can also be a derivative of the main
Expression	Main, Underlying, Derivative of Main work	
Manifestation	Tangible Medium of Expression	The manifestation of the expression is the tangible medium. The manifestation should not in itself alter the copyright (MUD). If it does, this is a new expression.
Item	Copy	This is the copy of the manifestation and is what we are concerned with in § 108(h).

Joudrey notes, "an individual item may also contain more than one work (e.g., a collection of essays), more than one expression of the same work (e.g., original text and a translation side by side), and so on."[192] In working with the Internet Archive, we came across an example of this with a collection of short stories by Agatha Christie. Each short story had been published previously in various magazines. These were each works before they were manifest into an item.[193] The work itself—the selection, arrangement and coordination of the short stories, the collection—carried its own copyright. The item, then had multiple works (the stories) that were individual expressions, manifest into a single carrier. There was a U.S. and a U.K. edition, which may or may not have had enough differences to be different manifestations of the same work.[194] The item that was digitized by the Internet Archive, then contained more than one work—the stories were each works and the collection of the stories was a work. There was one

[190] 17 U.S.C. § 102(a).
[191] JOUDREY ET AL., *supra* note 148, at 83.
[192] *Id.* at 84.
[193] *Id.*
[194] If the differences are based on content and edition, then this is at the expression level, not the manifestation level. In this scenario, we are assuming the content is the same for both editions.

expression, in this case the collection, and it manifested, in this case, in a U.S. publication. The manifestation was digitized because the item had been purchased by a library that now made it into a new form. The digitization of the item, then, likely produces a new manifestation of the work, and a new item in the physical form of code. The digitized manifestation could be copied as a digital PDF. Each copy of the digital PDF is an item.[195] Items have nine attributes:

1. Item identifier: unique number of code linked to the item (e.g. barcode, call number, etc.)
2. Fingerprint: "identifier created from characters transcribed from specific pages of a printed book."
3. Provenance of the item
4. Marks/inscriptions
5. Exhibition history
6. Condition of the item
7. Treatment history
8. Scheduled treatment
9. Access restrictions on the item[196]

Published work: This is the expression and specific manifestation of the work. One has to identify which expression is at issue. There may be underlying works within the expression. Then, one turns to the manifestation. What manifestation of the expression is one focused upon?

> Copy: this is the item level. Can you find the item of the manifestation of the expression?[197]

The question then is, what is "normal commercial exploitation" of "the work" referring to?[198] The published manifestation of the expression is the work. That manifestation only becomes a different expression if there are enough changes or additional material included. The question in our setting then is, which of the manifestations are eligible for § 108(h)? Let us use *Testament of Youth* as our example again. I think the question is whether it is the normal commercial exploitation of the expression: the text of Testament of Youth, or its embodiment in the manifestation—the particular print editions.

At what level are we comparing "normal commercial exploitation" and "copies"? The published work is that element that defines the copyright—the manifestation of the expression of the work. In this case, the original 1933 version, the manifestation, is the published work. What is normal commercial exploitation of that work? Does it include the specific 1933 expression, even if the manifestation is different? What happens if the manifestation is so different as to cause a new expression category?

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[195] *Id* at 84-85.

[196] *Id.*

[197] 17 U.S.C. § 108(h)(1) (2012).

[198] *Id.* § 108(h)(1)(A).

We go back to the purpose of § 108(h): to make available published works that are no longer being tended to by their copyright holder because there is no commercial exploitation or even a reasonable copy of the original available.[199] The original is the item of the express manifestation of the expression of the work. The question is how far from that original item does "normal commercial exploitation" go? When is the item no longer the same manifestation, and therefore, doesn't count in the realm of § 108(h)?

The intellectual work is identified then: what is created by an artist or author. Vera Brittain is the author of *Testament of Youth*, which is the work. There are others that contribute to an expression of the work: "contributors to an expression, such as illustrators, editors, translators, performers, musicians, and writers of added commentary."[200] Shirley Williams's introduction to *Testament of Youth* contributes to the expression of a particular edition, which includes a reprint of the original 1933 work. The manifestation of the particular expression of the work is carried out by the publishers, distributors, producers, and manufacturers.

What is the work for purposes of § 108(h)? I think it is at the manifestation level, looking to the copyright status of the expression of the work. If you have an 1899 translation, one is looking to see if that 1899 translation (a manifestation of the expression of Spanish translation of the original main work) is available in the item level (that is not too different to create a new manifestation). You start with manifestation and the attributes of that manifestation. If all of the elements are included in a current manifestation or item available for sale, then the work would not qualify, as there would be normal commercial exploitation. If there are no copies available of the original manifestation, then there would be no commercial exploitation.

So, here is a way to think about determining if the particular version of the work applies to § 108(h).

1. Step One: Is the manifestation of work available as an item for purchase?
    - No or No reasonable copy.
    - Yes. Reasonable copy. (If reasonable copy, § 108(h) doesn't apply.)
2. Step Two: Is the expression of the work available for purchase as an item in a different manifestation that does not alter the content of the original expression? (We don't care if there are additions, only alterations to the original.)
    - No. No normal commercial exploitation. Section 108(h) may be applied in the last twenty years of copyright.
    - Yes. Commercial exploitation.

So, if later editions of *Testament of Youth* carry the same manifestation of the expression of the work, even if there are additions, this would count for purposes of § 108(h). However, if the

[199] *Id.* § 108.

[200] JOUDREY ET AL., *supra* note 148, at 66.

later editions had been altered so that the original manifestation created a new expression (a new ending, for instance), then the new item would not count for purposes of § 108(h). If the new manifestation alters so much as to cause a new expression, then the new manifestation does not stand in the shoes of the older manifestation. This seems to reflect the definitions of "work," "copies," and "derivative work" in the Copyright Act.[201] Let's look again at the film *Philadelphia Story* along with the underlying original play by Philip Berry. I have included the copyright status to show the impact of this approach: manifestation and item.

Work 2: The Philadelphia Story (film) based on Barry's play[202]

Expression	FRBR#	Durationator MUD system	Copyright status
Original play	W1 E1	Main	Publication date: 1939 IC-US (through 2034)
Screenplay based on original play	W2 E1	Derivative 1 of Main	Publication date: 1940 (incorporated into film) IC-US (through 2035) (underlying work out of copyright 2034)
Original director's cut based on screenplay	W3 E1	Derivative i of Derivative 1	Publication date: 1940 IC-US (through 2035) (underlying work out of copyright 2034)

[201] *See* 17 U.S.C. § 101

[202] THE PHILADELPHIA STORY (Metro-Goldwyn-Meyer 1940). PHILIP BARRY, THE PHILADELPHIA STORY (1930).

Remastered version	W3 E2 Manifestation: 2001	Derivative i(a) of Derivative 1 of Main	Publication date: 2000 IC-US (through 2095) (underlying play out of copyright 2034; underlying film out of copyright 2035)
Dubbed Spanish-language version	W3 E3 Manifestation: 1942 version	Derivative i(c) of Derivative 1 of Main	Publication date: 1942 This work is not available commercially. IC-US (through 2037) § 108(h) eligible: 2018-2037)

In this example, the original play and film are still commercially available. They do not qualify for § 108(h). However, the Spanish-dubbed version from 1942 does not appear to have any items or copies available, and there is no commercial exploitation of this 1942 manifestation of the dubbed Spanish version. Let's say there was a second dubbed version in 2000. Because it was different from the 1942 version, this would not preclude the eligibility of the 1942 version for § 108(h).

Let's say the original cut of the film from 1940 is different from the director's cut. Only the director's cut is available commercially and there are no copies of the original cut. Under this scenario, because the manifestation of the item is different from the director's cut, the original cut would be eligible for § 108(h).

Using the logic of the cataloging process for libraries and the FRBR, then, the published work is an expression that manifests in an item. You are looking to see if that item is available in its original manifestation (reasonable copy) or a new version with the original manifestation elements (normal commercial exploitation). If it is not, then the work is not commercially available.

Taken another way, if the 1933 edition of *Testament of Youth* were altered in subsequent copies, and no copies (either current books in print or older copies) of the 1933 work are available for sale, then the library could digitize it under § 108(h).

There is no further guidance from the Copyright Office, case law or the law itself. This part takes the way libraries view works and applies it to the Copyright Act. This is not settled law. But the rationale that libraries use does coincide with the way copyright views "work," "copies," and "derivative" works. I think in looking at § 108(h) requirements by manifestation of the work and the item of that manifestation for sale, one could have a clearer view of how to implement § 108(h) in the library setting, where it was designed to operate.

How might the FRBR apply in a practical cataloging situation, and, specifically, our § 108(h) search? OCLC conducted a study in which they took a random sample of 1,000 works to see how useful the FRBR categories would be.[203] They then extrapolated the data to the larger WorldCat catalog.[204] The sample matched in type of material the larger 50 million records in WorldCat: "85% books, 5% serials, 4% musical performances and scores, 3% projected mediums, 2% maps, and the remainder a variety of forms such as voice recordings, computer files, and two-dimensional non-projectable graphics."[205] Their findings were very interesting. They took the statistics from the sample and applied it to the larger collection.

As of 2001, WorldCat had nearly 47 million records.[206] They were able to determine that there were likely 32 million distinct *works* in WorldCat, with each work having approximately 1.5 manifestations.[207] "More than 25 million of the 32 million works in WorldCat (78%) consist of a single manifestation. Ninety-nine percent (99%) of all works in WorldCat have seven manifestations or less, and only about 320,000, or 1% have more than 20 manifestations."[208] How does this help us with § 108(h)? If most works have only one manifestation, it is a lot easier to track down whether a copy at a reasonable price exists or if the work is currently under normal commercial exploitation.

The study identified three classes of works: elemental (single expression and single manifestation, such as a government report), simple (single expression with multiple manifestations, such as a doctoral thesis with both a paper and microfilm version), and complex (multiple expressions or realizations, such as multiple editions of a textbook).[209]

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[203] Rick Bennett et al., *The Concept of a Work in WorldCat: an Application of FRBR*, 27 Libr. Coll. Acq. & Tech. Serv. 45, 48 (2003).
[204] *Id.*
[205] *Id.*
[206] *Id.* at 49.
[207] *Id.*
[208] *Id.*
[209] *Id*. at 50.

Elemental works, for the purposes of § 108(h), are works that have a single expression and single manifestation that can be reviewed for new and used copies. Then, a § 108(h) determination could be made. The same would be true for single works. The question would be, does the form influence the outcome of § 108(h)? If the paper version is available, but not the DVD version, is that enough to trigger § 108(h) eligibility?

The study also developed categories to describe complex works.

Augmented works: "intellectual or artistic content is supplemented by additional material."[210] We saw this discussion already. Different versions of a work may yield different results. If the original expression/manifestation is available in a new form, there is no need for § 108(h). But if the earlier version is materially different, then § 108(h) might be available. If materials were added to a later version that should not make a difference, as long as the original work is intact.

Revised works: typically, where the current version supersedes the previous version.[211] I think this is where § 108(h) would be very helpful. If no copies of the earlier editions are available, the ability for a library to scan and make available earlier versions is particularly helpful for scholars, researchers, and for preservation purposes. This is a strong example of how § 108(h) can be useful, particularly in preserving culture. The study concluded: "[b]ased on analysis of the sample, it is estimated that half of the approximately two million complex works in WorldCat are revised works"[212]

Collected/Selected Works: These are complex because they are compilations of works that may or may not exist in other forms.[213] Again, we are looking to the collection.

Multiple Translations: These are also ripe for § 108(h), as new translations replace older ones. These are different and unique. If there is no copy and there is no commercial activity on these older works, then they can apply § 108(h).

Multiple Forms of Expression: These are the most interesting, and what was the focus of the study.

The study noted that augmented works were identified in MARC fields 700 (added entries), 250 (edition statement), and 245 (title), with translation information in the 008 field.[214] As will be discussed in the MARC record part, these will allow for better clues on understanding the manifestation and its relationship to the item for purposes of § 108(h).

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[210] *Id*. at 52.
[211] *Id*.
[212] *Id*. at 53.
[213] *Id*. at 52.
[214] *Id*. at 53.

IV. Obtaining Data; Recording Results

To use § 108(h), one must know that the work is in its last 20 years of its copyright term.[215] To determine the copyright status, we must have some data. Then, once one has determined that the work was under copyright in its last twenty years, and determined the years that the work is eligible for § 108(h), the question is, where do you record that information? Additionally, if you do the work to confirm that § 108(h) applies, how would you record that data as well?

Part V discusses the current structure of library records, and where an analysis of § 108(h) might fit, particularly with regards to record keeping. How do you recreate a system that would allow one to use § 108(h)? Where in the record would you record that § 108(h) applies? One must determine the copyright status first, and then once the calculations have been made and the reasonable search has been conducted, one would have to place that information in a manner that would demonstrate "reasonable search."

One large question we had to face was to understand the structure of library records, both for retrieving data and adding copyright status data into the record. The Library of Congress released 25 million MARC records for free during the summer of 2017,[216] and that seemed to be a good place to begin.

A. MARC Records

1. What are they?

A MARC record is a Machine-Readable Cataloging record.[217] Machine-readable means that a computer can read the data. A cataloging record is the way in which libraries organize bibliographic information about a work. This includes descriptions, basic information (including publication date), subject headings, and identification numbers (usually the call number). The MARC system began in the 1960s, when the Library of Congress wanted to figure out how to make bibliographic information available in machine-readable form.[218] A pilot project was conducted for two years, beginning in 1966.[219] They started with books in 1968, and in 1976, extended to include "serials, maps, films, manuscripts, and music."[220] The second version, MARC II, became the standard format and was distributed to other libraries through magnetic

[215] 17 U.S.C. § 108(h)(1) (2012).
[216] Sheryl Cannady, *Library Offers Largest Release of Digital Catalog Records in History*, LIBR. OF CONGRESS, May 16, 2017, https://www.loc.gov/item/prn-17-068/library-offers-largest-release-of-digital-catalog-records-in-history/2017-05-16.
[217] Katharine D. Morton, The MARC Formats: An Overview, 49 AM. ARCHIVIST 21, 22 (1986).
[218] Bennett et al., *supra* note 203, at 22.
[219] *Id.*
[220] *Id.* at 23.

tape.[221] MARC II was updated, and is now referred to as MARC 21. MARC provides mandatory and voluntary fields for all types of works. The publication *MARC Formats for Bibliographic Data* provides information on each of the fields and is updated periodically.[222]

There are two types of records: bibliographic records and authority records. Bibliographic records provide data about a particular book or work, while authority records provide standardized forms of names, titles, and subjects that are used in the bibliographic records.[223] For example, when one wants to find all of the works by Vera Brittain, the authority record will have "Brittain, Vera (1893-1970)" while the bibliographic record will be for her works *Testament of Youth, Chronicle of Youth,* and *Poems of the War and After*.[224]

A bibliographic MARC record has a basic structure. The content designators are called tags, indicators and subfield codes.[225] There are nine fields the tag numbers that indicate the type of field:

1. 00X – Control Fields
2. 0XX – Variable Fields, general information
3. 1XX – Main Entry
4. 2XX – Title and Title paragraph
5. 3XX – Physical description
6. 4XX – Series notes
7. 5XX - Bibliographic notes
8. 6XX – Subject entries
9. 7XX - Added entries other than subject or series
10. 8XX – Series added Entries
11. 9XX – Local use.[226]

Each field consists of 2-digit numbers called "tags," which helps explain what kind of data is included. The most common tags are:

010 tag marks the **Library of Congress Control Number** (LCCN)

020 tag marks the **International Standard Book Number** (ISBN)

100 tag marks a **personal name main entry** (author)

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[221] *Id.*

[222] *Id.*

[223] *Id.* at 24.

[224] *Brittain, Vera, 1893-1970,* LIBR. OF CONGRESS, http://id.loc.gov/authorities/names/n81018727.html (last visited October 18, 2018).

[225] Bennett et al., *supra* note 203 at 24.

[226] *MARC 21 Bibliographic Data*, LIBR. OF CONGRESS, https://www.loc.gov/marc/bibliographic.

245 tag marks the **title information** (which includes the title, other title information, and the statement of responsibility)

250 tag marks the **edition**

260 tag marks the **publication information**

300 tag marks the **physical description** (often referred to as the "collation" when describing books)

490 tag marks the **series statement**

520 tag marks the **annotation or summary note**

650 tag marks a **topical subject heading**

700 tag marks a **personal name added entry** (joint author, editor, or illustrator)[227]

The *MARC 21 Format for Bibliographic Data*, and *MARC 21 Concise Formats* are two official resources. There are also categories called indicators, which are single digit numbers. There are two indicators. For example, for 245 field, the first indicator, indicates where a title card should be printed. The second indicator tells the number of characters before the title begins. For example, "4" indicates that the title begins four characters in: "The Emperor's new clothes." The term "the" and space are not counted. The title begins with the "E."[228] But the indicators change with each field.

Subfields contains more information about the particular field. For field 300, physical description, there are additional subfields for additional information. These are identified by lower-case alphabetical letters preceded by a delimiter, usually "$", like "$a" represents the extent of the resource (e.g. number of pages), for example.[229]

300 ## $a 675 pages

Each field has additional subfields. Here is a typical MARC record.[230]

[227] *What Is a MARC Record, and Why Is It Important*, LIBR. OF CONGRESS, https://www.loc.gov/marc/umb/um01to06.html (last visited October 29, 2018).
[228] *Id.*
[229] *Id.*
[230] *What MARC Looks Like*, LILI.ORG, http://lili.org/forlibs/ce/able/course8/03whatmarc.htm (last visited October 18, 2018).

What MARC Looks Like

This is what a typical MARC record looks like. It will be very helpful for the rest of this course if you will print this record to be able to refer to it as we go through the rest of the course.

```
001 4520371
005 19990823210448.0
008 990108s1999 cou b 001 0 eng
035 $a(DLC) 99011493
906 $a7$bcbc$corignew$d1$eocip$f19$gy-gencatlg
955 $apc14 to la00 01-08-99; lj11 to subj. 01-11-99; lj07 01-11-99; lk02
01-12-99; CIP ver. lh04 to SL 08-03-99
010 $a 99011493
020 $a1563087723 (hardbound)
020 $a1563087022 (softbound)
040 $aDLC$cDLC$dDLC
043 $an-us---
050 00$aZ675.S3$bW8735 1999
082 00$a025.1/978$221
100 1 $aWoolls, Blanche.
245 14$aThe school library media manager /$cBlanche Woolls.
250 $a2nd ed.
260 $aEnglewood, CO :$bLibraries Unlimited,$c1999.
300 $axiv, 340 p. ;$c26 cm.
490 1 $aLibrary and information science text series
504 $aIncludes bibliographical references and index.
650 0$aSchool libraries$zUnited States$xAdministration.
650 0$aMedia programs (Education)$zUnited States$xAdministration.
830 0$aLibrary science text series.
985 $eGAP
991 $bc-GenColl$hZ675.S3$iW8735 1999$oam$tCopy 1$wBOOKS
```

Author

Author name comes under 1XX fields: 100 for personal names, 110 for corporate, and 111 for conference name. For example, for 100 field, the first indicator tells us whether the surname is a single surname and forename, multiple names, or multiple surnames. We need names only when we are looking for renewal records, death dates or § 108(h) commercial information. The indicators are different for 110 and 111 fields.

Titles

2XX concerns titles. For the 245 category, the title can also include the author's name.

245 14 $a The title $c author

The "1" indicates that the title needs to be included, and the 4 next to the 1 indicates that the title begins four characters in, "The" and the space should be dropped.

Edition

We can also find if this is a particular edition with 250.

250 ## $a2nd ed.

Place of Publication

Two categories including information about publication: 260 and 264.[231]

260 subfields	264 subfields
$a - Place of publication, distribution, etc.	• $a - Place of production, publication, distribution, manufacture (R)
$b - Name of publisher, distributor, etc.	• $b - Name of producer, publisher, distributor, manufacturer (R)
$c - Date of publication, distribution, etc.	• $c - Date of production, publication, distribution, manufacture, or copyright notice (R)
$e - Place of manufacture	
$f - Manufacturer	
$g - Date of manufacture	
$3 - Materials specified	• $3 - Materials specified (NR)

260 $ a place of publication $b publisher $c date of publication.

What is interesting is that if there is more than one place of publication, they are listed as separate $a fields.

260 XX$a New York ;$a Berlin :$Springer Verlag,$c1977.

One addition to the 264 field is the "Second Indicator- Function of entity."

[231] *260 – Publication, Distribution, etc.*, LIBR. OF CONGRESS (Sept. 2011), https://www.loc.gov/marc/bibliographic/bd260.html; *264, Production, Publication, Distribution, Manufacture, and Copyright Notice*, LIBR. OF CONGRESS (Sept. 2011), https://www.loc.gov/marc/bibliographic/bd264.html.

Second Indicator - Function of entity

0 - Production
Field contains a statement relating to the inscription, fabrication, construction, etc., of a resource in an unpublished form.

1 - Publication
Field contains a statement relating to the publication, release, or issuing of a resource.

2 - Distribution
Field contains a statement relating to the distribution of a resource.

3 - Manufacture
Field contains a statement relating to the printing, duplicating, casting, etc., of a resource in a published form.

4 - Copyright notice date
Field contains a date associated with a notice of protection under copyright or a similar regime. Copyright dates include phonogram dates (i.e., dates associated with claims of protection for sound recordings).

The second indicator in a 264 tells us whether the data applies to the publication, distribution, manufacture, production or the presence of a date associated with copyright. For example, the value "1" in that indicator says the data is related to publishing. This is super helpful for the Durationator. The 260s subcategory did not have these, but the 264s do.

2. Copyright Status and MARC Records

MARC records have a special subsection, 542, for copyright information.[232] This field has been under-utilized. But they provide the perfect space for detailing copyright and access information. In particular, the death date ($b) can be recorded if not already in the record, the Copyright holder ($d), the copyright statement ($f), copyright date ($g), copyright renewal date ($h), publication date (if not already recorded ($i), copyright status ($l), publication status ($m), research date ($o), country of publication or creation ($p), supplying agency ($q), and jurisdiction of copyright assessment ($r).[233]

Using these fields, we can provide the MARC record data about the copyright status. This allows for specific information to be included to allow an understanding, not just of the copyright status, but why the status looks that way.

B. Tagging Results

So, one now knows what the status is. One key question is, how does one mark the records with copyright status? Once one processes the data, what does one do with the answer? It is not just where to put the answer (e.g. 542 field in MARC). What does that copyright status data look like? A number of groups have worked on devising tagging systems. HathiTrust, DPLA (and Rightsstatement.org) and New York Public Library (NYPL) all have very well-developed tagging systems.

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[232] *542 – Information Relating to Copyright Status*, LIBR. OF CONGRESS, https://www.loc.gov/marc/bibliographic/bd542.html.
[233] *Id.*

1. Rightsstatement.org

Rightsstatement.org is a group made up of persons from key cultural institutions such as University of Michigan, Europeana, DPLA, and NYPL.[234] Together, along with comments from third parties, they developed a way to communicate rights statements. Their goal was to keep the categories simple and flexible. They describe the project:

> RightsStatements.org provides a set of standardized rights statements that can be used to communicate the copyright and re-use status of digital objects to the public. Our rights statements are supported by major aggregation platforms such as the Digital Public Library of America and Europeana. The rights statements have been designed with both human users and machine users (such as search engines) in mind and make use of semantic web technology.[235]

For "In Copyright", there are five statements, as shown below.

The following 5 Rights Statements are intended for use when the Item is in copyright:

1. **In Copyright (InC)** - indicates that the Item labeled with the Rights Statement is in copyright.
2. **In Copyright - EU Orphan Work (InC-OW-EU)** - indicates that the Item labeled with this Rights Statement has been identified as an 'Orphan Work' under the terms of the EU Orphan Works Directive.
3. **In Copyright - Right-holder(s) Unlocatable or Unidentifiable (InC-RUU)** - indicates that the Item labeled with this Rights Statement has been identified as in copyright, but whose rights-holder(s) either cannot be identified or cannot be located.
4. **In Copyright - Educational Use Permitted (InC-EDU)** - indicates that the Item labeled with this Rights Statement is in copyright but that educational use is allowed without the need to obtain additional permission.
5. **In Copyright - Non-commercial Use Permitted (InC-NC)** - indicates that the Item labeled with this Rights Statement is in copyright but that non-commercial use is allowed without the need to obtain additional permission.[236]

The InC (in copyright) tag is helpful, but we suggest going further. In copyright where? Under what circumstances? We also noted that the additional 2-5 tags of InC is not so much copyright status information as additional related information, like copyright holder information or other issues. We wanted more from a tagging system regarding information. The InC field is general. It tells the third-party user only that the work is "In Copyright," but not why, where or for how long. We encourage more detailed tagging.

For works not in copyright, here are the four choices:

---

[234] *About RightsStatements.org*, RIGHTS STATEMENTS, https://rightsstatements.org/en/about.html (last visited October 18, 2018).

[235] RIGHTSSTATEMENTS.ORG, http://rightsstatements.org/en (last visited October 18, 2018).

[236] INT'L RIGHTS STATEMENTS WORKING GRP., RECOMMENDATIONS FOR STANDARDIZED INT'L RIGHTS STATEMENTS 17 (2015), https://rightsstatements.org/files/180531recommendations_for_standardized_international_rights_statements_v1.2.2.pdf.

1. **No Copyright - Non-commercial Use Only (NoC-NC) -** indicates that the underlying Work is in the Public Domain, but the organization that has published the Item is contractually required to allow only non-commercial use by third parties.
2. **No Copyright - Contractual Restrictions (NoC-CR) -** indicates that the underlying Work is in the Public Domain, but the organization that has published the Item is contractually required to restrict certain forms of use by third parties.
3. **No Copyright - Other Known Legal Restrictions (NoC-OKLR) -** indicates that the underlying Work is in the Public Domain, but laws other than copyright impose restrictions on the use of the Item by third parties.
4. **No Copyright - United States (NoC-US) -** indicates that the underlying Work is in the Public Domain under the laws of the United States, but that a determination was not made as to its copyright status under the copyright laws of other countries.[237]

What is interesting about these tags is that there is no "No Copyright" without qualifications. We like the "No Copyright – United States" (NoC-US). We are wondering why they did not use "PD" instead of creating "NoC." Finally, Rightsstatement.org has a list of two other statements:

1. **No Known Copyright (NKC)** – indicates that the organization that has published the Item believes that no copyright or related rights are known to exist, but that a conclusive determination could not be made.
2. **Copyright Not Evaluated (CNE)** – indicates that the organization that has published the Item has not evaluated the copyright and related rights status of the Item. [238]

This last case is interesting. "No Known Copyright" feels a lot like "Public Domain," but "a conclusive determination could not be made."[239] This tagging might be very helpful in situations where the data is leaning to PD, but one is not sure. Also, for institutions that do not want to declare "PD," one could use this tag instead, creating a little doubt as to certainty. For third-party users coming to this tag, however, there is a problem. We do not know why it had been tagged "NKC" or for where. It leaves us starting the investigation all again. Luckily for copyright, the data required is *usually* publicly accessible, but not always. Also, this means that there are resources being expended at least twice, once by the institution, and once by the user. Finally, can another institution rely on the tagging without additional information? What happens if the first institution is wrong?

Rightsstatement.org can be a useful way to express basic copyright information, but it should not be the only way to express that information. More details are encouraged to be useful to other institutions and third parties who happen about the copyright status tag.

One other strange element of the rightsstatement.org is their fixation on defining the geographic status of a work based on either US (NoC-US and InC-US) or generalized.[240] This was devised by both Europeans and Americans. The Europeans did not seem to recognize that there may be

[237] *Id.* at 18.
[238] *Id.*
[239] *Id.*
[240] *Id.*

different terms within the EU, that the status of a work is not universalized, even though there have been Term Directives. It is curious indeed.

2. HathiTrust

HathiTrust has developed a more sophisticated system that combines an ATTRIBUTE and REASON.[241] Attributes are the status of the work. Attributes include PD, IC, OP (out of print, implying in copyright), ORPH (orphaned, implying in copyright), UND (undetermined).[242] They also have more specific labels for a variety of circumstances, including PDUS, ICUS, and cc license. REASONS give the justification for the copyright status.[243] Let's look more carefully at the reasons:

> BIB: bibliographically-derived by automatic processes. This is something we are trying to achieve with this study, using a variety of techniques.
>
> NCN: no printed copyright notice. As discussed before, this matters for U.S. domestic works published in the U.S. between 1964 and February 1989.
>
> CON: contractual agreement with copyright holder on file. One assumes these are the kinds of databases that lock up public domain works, not allowing viewing or agreements with donors regarding access to the work.[244]
>
> REN: copyright renewal research was conducted. As discussed previously, this is required for U.S. domestic works published between1923 and1963.
>
> NFI: needs further investigation.
>
> CDPP; title page or verso contain copyright date and/or place of publication record. This interestingly does not identify that notice was properly met.
>
> IPMA: in-print and market availability research was conducted. This is likely for § 108(h).
>
> UNP: unpublished works.
>
> ADD: author death date research was conducted or notification was received from source.
>
> EXP: expiration of copyright term for non-US work with corporate author.

[241] HATHITRUST, HATHITRUST RIGHTS DATABASE, https://www.hathitrust.org/rights_database.
[242] *Id.*
[243] *Id.*
[244] *Id.*

GATT: non-US public domain work restored in-copyright in the US by GATT.[245]

This, combined with the status IC (in copyright), PD (public domain), or UND (undetermined), is very useful.[246] It allows more information to be communicated to third-party users. For instance, PD/REN communicates that the work is in the public domain due to lack of renewal.[247] IC/GATT tells us that the work is protected for 95 years from first publication, that the work is of foreign first publication and that it was restored by § 104A.[248] Now, the average person might not know what those tags mean, but the tagging provides information that can be translated and help in third parties understanding the result. One continuing problem is that the country is not necessarily included, except again on US works.[249]

3. NYPL

New York Public Library has adapted the HathiTrust categories adding information about the renewal searches and terms used with the renewal searches.[250] This means that PD/REN includes data "Sarita Steinberg" and "My Life in Crafts" searched in the U.S. Copyright Office's Catalog of Copyright Entries Records, "Book renewals @ Stanford Renewal database." It records the search.

Similar standardization would need to be developed for using § 108(h). One could include a list of resources that are searched and a link, or list the resources searched and the date. A tag would look something like this:

IC/REN; 108(h) applied (No copies at Amazon, Books in Print, or ISBNDB.com, 2017)

Tags for adding a reasonable investigation have yet to be standardized but NYPL's system may prove a good model.

C. Where to Record Copyright Status (with Tags) in MARC

After thinking through how to incorporate copyright information gleaned into the MARC record, we suggest the following:

> $**b** (death date). If the death date is recorded in this field, it will indicate that it was discovered as part of the copyright status research process. It will be cross-referenced as death date for the full record.

[245] MELISSA LEVINE, FINDING THE PUBLIC DOMAIN: COPYRIGHT REVIEW MANAGEMENT SYSTEM TOOLKIT (2016)
[246] *Id.*
[247] 17 U.S.C. § 304 (2012).
[248] *Id.*
[249] *Id.*
[250] A copy of their categories will be given to the author by Greg Cram, NYPL (on file with the author).

$l (copyright status). We suggest combining a slightly modified version of the NYPL tagging system (modified from HathiTrust) plus information about how we got to that answer as the key field in for 542 $l (copyright status). We also suggest using the research date and source of the information.

$f (copyright statement). If there is a statement, (e.g. ©Elizabeth Townsend Gard, 2017), it can be included here. This can serve as evidence that notice was met, or that there was no notice. If no notice was found, one could include "No Notice Found." In certain cases, notice matters on whether a work is protected by copyright.

$g (copyright date). This is the date included in the copyright statement. This is sometimes important, particularly if the notice date is different from a publication date. The earlier date is usually used to determine when the copyright term begins, particularly for works published between 1923 and1977.

$h (renewal date). This is one category that should be expanded to include: whether renewal record was searched for, whether a record was found, the renewal number, the renewal date, and any additional information including who renewed the work and all of the data included in the renewal record. Information like whether a widow renewed the record is important in determining the copyright status and availability of some aspects of the copyright law.

$p (country of publication or creation). This should be included in earlier data, namely the 260, 264 or 008 fields. But if it was not included and was part of the copyright investigation, we are suggesting it should be recorded in this field.

$q (supplying agency). We think this is where the Durationator reference would go.

$r (jurisdiction of copyright assessment). This is super important. What does the tag reference? Here it would for most U.S. libraries be "United States." But if additional information about other jurisdictions were included, it would be included here. "United States, Cuba, South Africa." The tags in $l would identify that as well: PD-US, PD-SA, IC-CU.

$o (research date). This is important, because someone can quickly assess the veracity of the copyright information, particularly if the law changes. This could be the year or the exact date.

What would this look like?

Unknown author, My Life, (Cuba: 1940)

542 $l IC/GATT-US (through 2035) (95 years from publication) (17 U.S.C. § 104A and 304); PD-CU (as of 1991) (50 years from publication) (Article 45, Law on Copyright (1994)(Cuba) [copyright status] $f No copyright notice [copyright notice] $h No renewal record search [renewal] $o Cuba [country of publication or creation] $q Durationator [supplying agency] $r United States; Cuba. $o 2017 (research date)
Here is the record without the explanations:

542 $l IC/GATT-US (through 2035) (95 years from publication) (17 U.S.C. § 104A and 304); PD-CU (as of 1991) (50 years from publication) (Article 45, Law on Copyright

(1994)(Cuba) $f No copyright notice. $h No renewal record search performed $o Cuba $q Durationator $r United States; Cuba. $o 2017

How much would be automated? The user includes the original MARC record. If a death year is needed or any additional data required for that search (e.g. whether there is a renewal record) would prompt the user to answer questions that information is then fed into the Durationator system and the 542 fields are automatically filled out. This can then be added to the record.

D. Section 108(h) and Field 506

Field 506 provides a place to include information about access.[251] In many ways, § 108(h) is an access field, and it would be here that a library or archive could include § 108(h) information and reasons why they are using § 108(h) for compliance purposes.

506 - Restrictions on Access Note (R)

MARC 21 Bibliographic - Full	October 2006
First Indicator *Restriction* # - No information provided 0 - No restrictions 1 - Restrictions apply	**Second Indicator** *Undefined* # - Undefined
Subfield Codes	
$a - Terms governing access (NR) $b - Jurisdiction (R) $c - Physical access provisions (R) $d - Authorized users (R) $e - Authorization (R) $f - Standardized terminology for access restriction (R)	$u - Uniform Resource Identifier (R) $2 - Source of term (NR) $3 - Materials specified (NR) $5 - Institution to which field applies (NR) $6 - Linkage (NR) $8 - Field link and sequence number (R)

[252]

Using $a, § 108(h) information could be included. The subfield code, $a, seems fairly flexible, described as "legal, physical or procedural restrictions imposed on individuals wishing to see the work."[253] Here are the examples included:

[251] *506 - Restrictions on Access Note*, LIBR. OF CONGRESS (Oct. 2006), https://www.loc.gov/marc/bibliographic/bd506.html.
[252] *Id.*
[253] *Id.*

$a - Terms governing access

Legal, physical, or procedural restrictions imposed on individuals wishing to see the described materials.

506 ##**$a**Classified.

506 ##**$a**For official use only.

506 ##**$a**Not available for distribution in the United States.

506 1#**$a**For use of the officials of the U.S. and Venezuela Governments only. Any exception will require prior approval of the Venezuelan Government.

506 ##**$a**Confidential.

506 ##**$a**Not available for commercial use, sale, or reproduction.

506 1#**$a**For restricted circulation--not for publication.

506 ##**$a**Prior to 1981, distribution was limited to federal judicial personnel.

Another subfield, $f, may be handy. This one is described as "data taken from a standardized list of terms indicating the level or type of restriction:"[254]

$f - Standardized terminology for access restriction

Data taken from a standardized list of terms indicating the level or type of restriction.

506 0#**$a**Access copy available to the general public.**$f**Unrestricted**$2**star**$5**MH

506 ##**$f**Unrestricted online access**$2**star

506 ##**$3**Use copy**$a**Access available to account holders only.**$f**Online access with authorization**$2**star

506 ##**$3**Use copy**$a**In copyright material. Searches will return text snippets only.**$f**Preview only**$2**star

506 ##**$a**Closed until January 1, 2068.**$f**No online access**$2**star

506 ##**$3**Master copy**$f**No online access**$2**star

"$f" in these examples included: unrestricted; unrestricted online access; online access with authorization; preview only; no online access. Section 108 categories, even those beyond § 108(h), could be included in this area. For example:

> 506 $a In copyright (through 2037). § 108(c), (d), (e), (f), and (g) applies. Copies can be made for patrons. § 108(h) eligible 2018-2037. $f Digital copies restricted to library use until § 108(h) eligible. Preview only.

Standardized fields for § 108 can be created. Here are some examples:

> No copyright restrictions (PD-US)
> In Copyright (US); § 108 applies (copies can be made for patrons); § 108(h) eligible (library can make and distribute copies as long as no commercial exploitation or reasonable copies available)
> In Copyright (US): § 108 applies (copies can be made for patrons); Not eligible for § 108(h) (unpublished)
> In Copyright (US); § 108 applies (copies can be made for patrons); Not eligible for § 108(h) until 2020 (beginning of last twenty years of copyright term)

[254] *Id.*

Alternatively, "L20" could be substituted for § 108(h) or Last Twenty Years or any other combination.

With the Durationator, these fields can be created so that they are added to the record upon running of the Durationator search. The librarian or archivist would not need to do anything additionally for the tags. Now, a recording that a reasonable search was done could be added in the $a category where there is more flexibility. One key element would be including a date on which the investigation occurred. The other field that could be used is the "authorized users" ("$d") category.

$d - Authorized users
Class of users or specific individuals (by name or title) to whom the restrictions in subfield $a do not apply.

506 **##$a**Closed for 30 years;**$d**Federal government employees with a need to know.
506 **1#$a**Restricted: cannot be viewed until 2010;**$d**Members of donor's family.

255

The $d field could be used to indicate that libraries and archives may make copies under § 108(h), but that the copy and distribution right does not extend to third parties. For example:

> $d Copying and distribution of digital copy can be made available online to general public by the library/archives. 17 U.S.C. § 108(h).

Placing the § 108(h) materials in subsection 506 makes clear that this category is about access and ability to create copies and distribute the work, rather than the copyright status "under copyright" or "in the public domain."

E. Durationator Tagging System

In looking at other tagging system and developing the Durationator Copyright System, we have come to see a combination of tagging system as ideal. We like the idea of including as part of our system any and all tagging system. We have also developed a tag that allows for detailed information to be communicated. Using the NYPL tags, we add the jurisdiction with a 2-letter code for the country the calculation, or the citation, and if in the US, the 108 information. Here is an example:

> Simple: IC-US (through 2040) 17 U.S.C. § 104A. § 108(h) eligible beginning 2016
>
> Detailed: IC/GATT-US (through 2040) 17 U.S.C. § 104A. § 108(h) eligible, 2016-2035. § 108(c)(d) and (e) eligible currently. PD as of 2041. (Durationator 2017)

When combined with other tagging systems, the results could look like this:

> InC-US (basic rightsstatement.org tag)

[255] *Id.*

IC-US/GATT (through 2040). § 108(h) eligible as of 2016. PD as of 2041. (Durationator 2018)

That tag, the copyright status, is created automatically when using the Durationator system by adding in data points required.

We suggest stacking tags:

Simple answer
More complex answer

This allows for basic answers but also a more reliable and understandable answer.

Here are some examples.

Example: Amy Poeng (1902-1950), My Life (UK: 1940)

Version 1
Publication: 1940 (UK)
In Copyright Through in the US: 2035
108(h) eligible: 2016-2035
Public Domain in the US: 2036

This provides clear information although it does not include the reason behind the information, which could be added. In Version 2, more information is given. This could be stacked or presented as a string of information.

Version 2
IC-US (through 2035)(17 USC §§ 104A; 304); 108(h) eligible 2016-2035; PD 2036 (Durationator search conducted 2017)

Or

IC-US (through 2035)
17 U.S.C. § 104A; 304
108(h) eligible 2016-2035
PD: 2036

The third version is short and simple. It uses the HathiTrust/NYPL tags, adds country code information, and adds when § 108(h) begins. It is neat and precise but does not help someone coming to the tag to understand what it means. It would be great for internal information for the library, again as long as the library staff understands what the tag means.

Version 3
IC/GATT-US (through 2035); 108(h) beginning 2016.

The fourth version is for MARC, to add to the record. It records both the copyright status and § 108(h) information.

Version 4
542 ##$l IC/GATT-US (through 2035) 17 U.S.C. §§ 104A and 304. $b 1950 $f Copyright London: Black Publishers, 1940 $g 1940 $h No renewal record found (foreign) $p United Kingdom $r Assessed for US jurisdiction $o 2017 $q Durationator Copyright Tool and Stanford Renewal Record tool used.

506 ##$a § 108(h) eligible 2016-2035 (reasonable investigation conducted 2017, no copy found at Amazon, Abe, or ISBNDB.com)

Whatever the system, providing information is critical in helping third-party users to understand the status of a work and allow investigation of the work on their own.

F. Fair Use and Other Parts of § 108

While this work is not focused on fair use, fair use is available as a tool for libraries. This can be included or asserted as part of the tagging system.

Copyright Status: IC-US. Fair Use asserted. § 108(h) applies beginning 2019.

So, for example, if a library is digitizing a full collection of domestic postcards from the 1920s and 1940s, the digitization might be justified on a variety of levels of the law. Some of the postcards are in the public domain for lack of notice or because they were not renewed.[256] Some will fall under § 108(h) and be available for viewing online to the general public.[257] There may be a few that were published after the current eligibility date but leaving them out would mean altering the meaning of the collection. One could argue that fair use could apply to those works, that the library is making them available both for preservation and research and scholarship, making them known to scholars, and that digital copies are available for direct requests under other portions of § 108. The scholar could still get copies. It would merely be another step, a request to get the image. When asserting fair use, a library might make only a thumbnail version available online or restrict use of the digital copy to the premises. Once § 108(h) applies, those restrictions could be removed. But in the meantime, patrons could request a copy be made directly available.

How would you implement this? Once a work is tagged as not eligible for § 108(h), a Fair Use or 108 tag could be included. Then that work would have the limitations described above. An "email the library to request a digital copy" could be included on the webpage for that item and near the copyright status.

IC-US. You may request a digital copy for research, preservation and scholarship if certain conditions are met. Please fill out this form to request a digital copy.

[256] 17 U.S.C. § 304.
[257] *Id*. § 108(h).

V. Creating a Last 20 Collection

While there may be hurdles to overcome, § 108(h) provides a powerful tool, when combined with determining the copyright status of works.

> **Libraries:** provide data through MARC records.
>
> **Durationator (and other tools like Stanford Renewal Database):** provides tools for assessing the copyright status of the work using the MARC records
>
> **Results:** MARC and other records include standardized tags to assist libraries/archives and patrons in assessing the copyright status of works
>
> **Platforms:** Platforms like Internet Archive, DPLA, and the libraries/archives themselves display tags, with additional links to helpful copyright information for patrons to understand the results.

In creating this copyright status ecosystem, libraries limit their liability by making an effort to determine the copyright status and demonstrate reasonable search for § 108(h). The Durationator and other tools provide legal information to assist in that assessment but leaves it up to libraries and archives and their general counsel to make legal decisions. Platforms act as Internet Service Providers on the information, and materials that are posted and can include fair use options for tagging as well, giving copyright holders notice that fair use was used for § 512 purposes.

As part of the tagging, one should determine the copyright status. There are number of ways to approach this and the question depends on a number of factors beyond the scope of what has already been presented in this paper. Once the copyright status is determined, then one has to communicate that information. For those who would like to keep the tagging simple, here is our suggestion.

> PD-US. No known copyright restrictions. Double check underlying works.
>
> IC-UC. Under Copyright. You may request a digital copy for research, preservation and scholarship if certain conditions are met. Please fill out this form to request a digital copy.
>
> IC/108(h)-US. Under copyright. Libraries/archives may make/distribute copies in last 20
> years as long as no normal commercial exploitation or reasonable copies available. Exception only applies to libraries/archives, and not patrons.

We also encourage the stacking system, described earlier with a number of versions of the results. All of these tags can be generated automatically with the Durationator Copyright System. We think that leaving the law up to the Durationator Copyright System relieves anxiety for the librarians and archivists.

Millions of works are available for libraries and archives to digitize and make available to the public, even though they are still under copyright. Section 108(h) is an amazing part of the Copyright Act that allows for such acts. The question is how to implement § 108(h). Implementation involves determining the copyright status and conducting and documenting a

reasonable investigation on current commercial status. Once that has been done, away you go! Digitize and make the work available in its last twenty years of copyright protection.

VI. U.S. Copyright Office Proposed Model Statutory Language

In September 2017, after over a decade of studying § 108, the U.S. Copyright Office released their Model Statutory Language for revising § 108.[258] This is the first attempt at a major revision of § 108 since its implementation in the 1976 Copyright Act.[259] The revision is both organizational and substantive and reflects our growing digital world. For example, instead of a limitation of "three copies," the new paradigm allows for necessary copies to create a digital version but only one end-user copy.[260] So, what are they proposing to change, and how does that impact § 108 generally, and more specifically, for our purposes, § 108(h)?

A. Conditions for Eligibility

The proposed Model Statutory Language does alter the general requirements for eligibility in using § 108 generally. Museums are added as a category, something long fought for as an eligible entity.[261] Added to the general requirements is that an institution must have a "public service mission" and that the institution has "trained staff or volunteers who provide professional services normally associated with a library, archives or museum."[262] Both are new additions.

The public service mission is meant to exclude private institutions that do not serve the public.[263] The example given by the U.S. Copyright Office indicates that a private institution that allows the local community to access the library would be eligible.[264]

Trained staff or volunteer requirement "seeks to exclude the hobbyist or amateur collector from the § 108 exceptions."[265] This seems like a very thin and arbitrary way of trying to exclude websites and other non-traditional spaces that might want to take advantage of § 108. As before, no definition of library, archives or museum is included. So long as the virtual space has a public service mission and trains its staff or volunteers, a "hobbyist or amateur collector" would meet the requirements for § 108. And I am not sure why they are concerned about excluding the

[258] *See* U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17 A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS (Sept. 2017), https://www.copyright.gov/policy/section108/discussion-document.pdf .
[259] There had been updates with the DMCA and the CTEA in 1998. *Id.* at 5.
[260] *See* Model Statutory Language *supra* note 37, §§ 108(e), (f).
[261] U.S. COPYRIGHT OFFICE, *supra* note 258, at 17.
[262] *Id.* at 19.
[263] *Id.*
[264] *Id.* at 20.
[265] *Id.* at 19.

hobbyist or amateur collector. More information on what worries they present and how § 108 would be harmed if they were to qualify is necessary.

The third new requirement, "lawfully acquired and/or licensed materials," should have every library, archive and museum *very* nervous. What would happen if unlawfully acquired materials were found in the collection? Would that rip § 108 status away from that library? Would they now be liable? The idea that a library must concern themselves with *how* the materials were gathered seems very problematic. Moreover, how many generations back does the work need to be lawful? Anything that requires knowledge like this, in applying it to practical situations, becomes burdensome and unwieldy. Even § 110(1) only applies the "lawful" requirement to audiovisual works.[266] Here, the lawful requirement is required for all works within a library. How is a library to know if it is lawfully acquired?

The conditions for eligibility also include a requirement to employ reasonable digital security measures, because of the increased availability of digital copies.[267] No specific requirements are included, or the goal of the digital security measures.[268]

The activities permitted under § 108 still have the limitations that they should not be for direct or indirect commercial advantage and that notice is required.[269] "While the prohibition of any direct/indirect commercial advantage addresses the institution's activities and the public service mission speaks to the institution itself, these requirements together support the goal of § 108 to benefit the public and not to aid the profit-making of an institution."[270]

B. Rights Affected

The goal of the Model Statutory Language is to meet the needs of our 21st century digital age. To that end, the rights afforded a library under § 108 are expanded from reproduction and distribution to include public display and public performance.[271] This allows for exhibits, for instance, at libraries and museums.

C. Copies Made

The following changes are made in the Model Statutory Language regarding preservation and security. Right now, § 108(b) only pertains to unpublished works.[272] This is expanded to all

[266] 17 U.S.C. § 110(1) (2012)
[267] U.S. COPYRIGHT OFFICE, *supra* note 258, at 21
[268] *Id.*
[269] *Id.*
[270] *Id.*
[271] *Id.* at 22.
[272] 17 U.S.C. § 108(b) (2012)

works in the new Model Statutory Language.[273] "Publication," a legally problematic term, has been replaced with "disseminated to the public," which is defined as "when the copyright owner, or any person authorized by the copyright owner, has published the work or otherwise exercised any of the rights set forth in paragraphs (3), (4), (5) or (6) of § 106 of the titles with respect to that work."[274] So, what are sections 106(3)-(6)? Rights set forth under these sections include distributing the work, public performance, public display or in the case of sound recordings, public performance using a digital audio transmission.[275] The only thing that is not covered is if a work had derivative works made.[276]

When does the dissemination to the public come in now in the proposal by the Copyright Office? Preservation and security copies are only available to employees of the institution when the work is disseminated to the public. I think this is fairly narrow thinking and should be reconsidered. Works not disseminated to the public have more flexibility. I think ideally, if there is no market copy of a work, all works should fall under the preservation and security. These may be available to the public: (a) on the premises of the eligible institution; (b) lending a physical copy; or (c) a digital copy to a single user at a time.[277] I am not sure why there would need to be a distinction based on whether the work has been disseminated, as there is not a meaningful distinction between a work that has not been disseminated and one that has no readily available market copy but had been previously disseminated. Think, for instance, of a menu from the 1990s. This work could be scanned for preservation, but because it was distributed without restrictions, it cannot be seen by anyone other than employees, and not to members of the public. I think the limitations on disseminated are fairly narrow, unnecessary, and arbitrary.

Deposit copies. The idea of a market check is found throughout the new § 108, but not as consistently as we would like. Deposit copies for research use in another institution use the distinction of not disseminated to the public (where works may be accessed on premises, borrowed by users, or accessed remotely) and those that were disseminated to the public, where to receive a copy, one must first do a market check.[278] That market check is making a reasonable effort to find a "usable copy" at a "fair price."[279] What is considered a "usable copy" is not defined nor is "fair price." What is most worrisome, however, is the treatment of a deposit copy received by the requesting institution:

> For both works publicly disseminated and those not publicly disseminated, copies made for deposit for research in another institution do not become part of the receiving

[273] Model Statutory Language, *supra* note 37, § 108(c).
[274] *Id.* § 108(m)(1).
[275] 17 U.S.C. §§ (3)-(6).
[276] *Id*. § 106(2).
[277] Model Statutory Language, *supra* note 37, § 108(c)(1).
[278] U.S. COPYRIGHT OFFICE, *supra* note 258, at 30.
[279] *Id*.

> institution's collection for purposes of section 108, meaning they are not considered to be works in the collection for purposes of making further copies for any reason.[280]

This is very concerning, and here's why. Libraries will now have to keep records on what is considered part of their collection for purposes of § 108 and what is not, and when a user or another institution requests a copy, the library is not able to make a copy without potential liability. Think 20, 30, 40 years down the line. How is a library to keep track? This one seems unnecessary and super problematic in the practical setting.

Replacement copies: "Fragile" has been added to the list of works that can be copied as a replacement copy.[281] For works disseminated to the public, they also added a "market" check that expands from "unused" replacement copies to "usable."[282] Again, no definition is given for "usable." The § 108 Study Group had suggested the change "recognizing the vibrant and easily-accessible second-hand market."[283] As this paper has established, when there is no current commercial activity, we found that there were few used copies. My question is how is including used copies benefiting the copyright holder, since their rights and royalties are extinguished with § 109, first sale doctrine? Second, there is no discussion on the quality required for the used copy. If the only copy of a used work is poor, does this preclude the library from making a replacement copy? Finally, the used market is volatile. If there is only one copy at Amazon, does this preclude the use of a creating a digital replacement copy? And, then, the limitations on the replacement copy discourages libraries from using the work. This is more limiting than the current law, which requires unused copies.[284] I would encourage the adoption of unused copies throughout § 108, which connects commercial availability by the copyright holder to the object and not a second-hand market.

A market check is also required for the reproduction of an entire work for a user.[285] The model language seems to include availability through licensing.[286] This is problematic. Is the individual work available for a license, or must the library subscribe to an entire database? What if the database is prohibitively expensive? Does "fair price" come in to assist? Who is paying the licensing fee? Is the library obligated? What if the licensing fee is more than the fair market price of the book? What happens when a library cannot afford to pay for the database access? Must a patron find a library that can afford the license fee, or can the library make a copy of the work under § 108? And finally, how is one to find the licensed work? Right now, it is easy to

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[280] *Id.* at 31.
[281] *Id.*
[282] *Id.*
[283] *Id.* at 34.
[284] 17 U.S.C. § 108(c) (2012).
[285] U.S. COPYRIGHT OFFICE, *supra* note 258, at 36.
[286] *Id.* at 36-37.

search Amazon.com or Abebooks.com to see if there are copies. How is one to find out if there is a licensed version of the book?

D. Revision to § 108(h)

In discussing § 108(h), the Copyright Office lumped it into "other provisions," rather than as part of the main discussion of § 108.[287] This seems typical for the treatment of § 108(h).

The following given example suggests that the U.S. Copyright Office has not spent much time thinking about § 108(h), or at least the reality of what works are eligible for § 108(h): "Because 51 years have expired since the death of the author, a musical work has entered its last 20 years of protection."[288] This is a strange example. To be eligible for § 108(h), the work has to be in the last twenty years, which means, musical works in the last twenty years would be measured by 95 years from first publication and published in the 1920s-1940s.

But let's stick to the scenario: an author of a musical composition in its last 20 years. "An archive would like to mount a scholarly retrospective program on the author, so it performs a reasonable investigation and discovers that the work is neither being commercially exploited, nor are copies or phonorecords available at a reasonable price. The archives may thus publicly perform a copy of the musical work as part of its retrospective."[289] So, here is the problem. Under the suggested changes, if there is *one unused copy* of a musical composition, that one work would not be included as part of § 108(h). It seems a high penalty for *one unused* copy, particularly when no requirement of a used copy of good quality is required. We have had this problem with the current § 108(h). We hoped that the U.S. Copyright Office would recognize the problem and remove "a copy" and replace it with "new copy."

Here are the proposed changes suggested by the author of this paper:

1) Expansion to all works.

Not just for published works anymore, § 108(h) should be expanded to *all works*. The general requirements that the work should be not subject to normal commercial exploitation or available at a fair price should continue. They would drop the notice by copyright holders within the Copyright Office because it was never used by copyright holders.

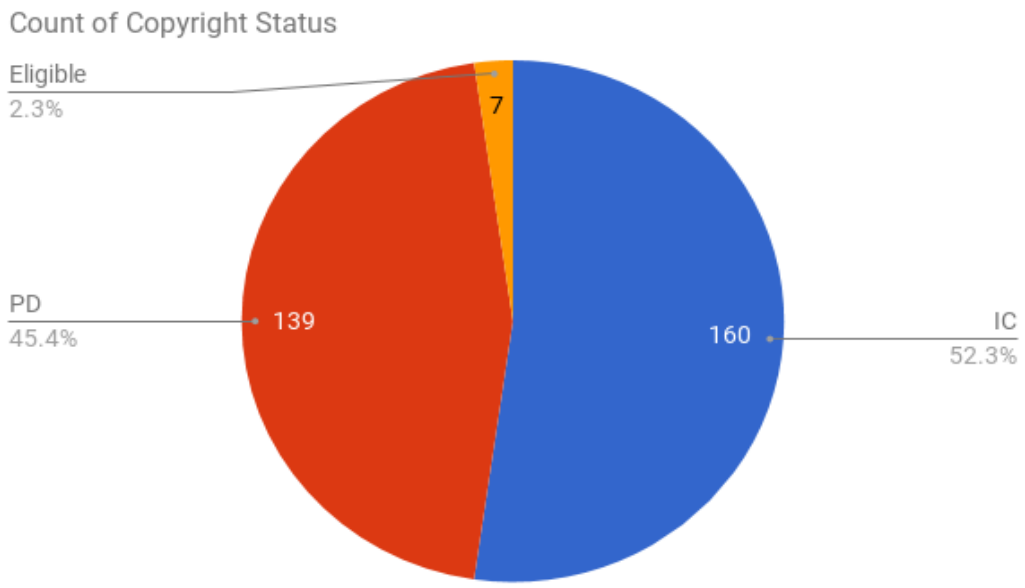
2) New Copies.

If there are no new copies available, the not commercially available requirement should be satisfied. One or two used copies of a work should not preclude a library from making the work available to a larger public. The market should be the *new* market only – for all categories of

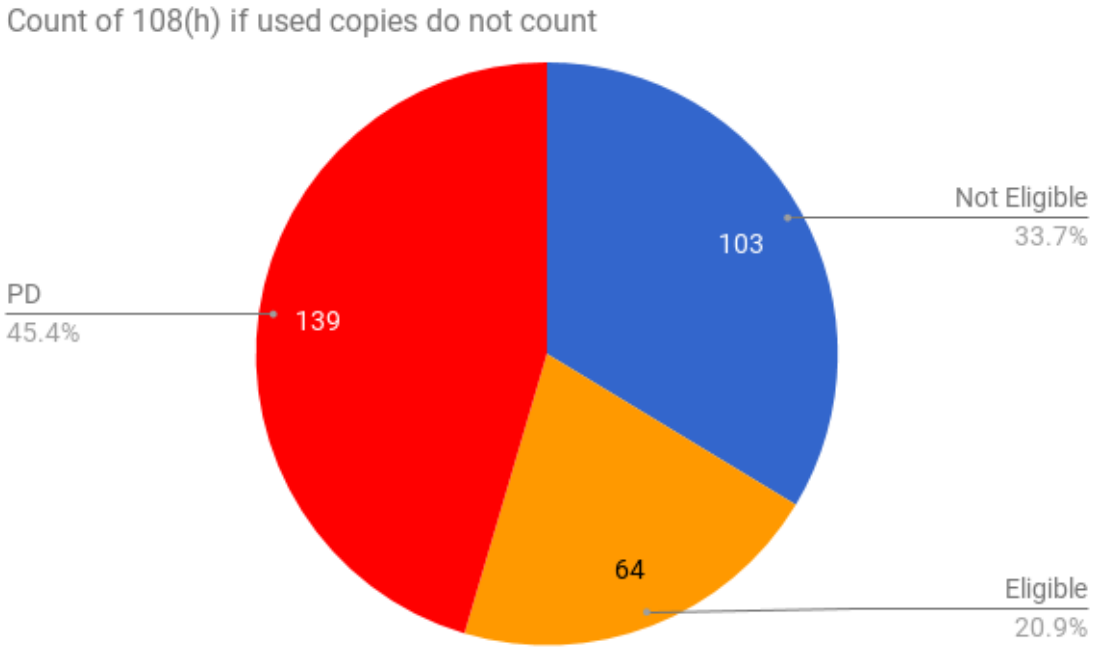
[287] *Id.* at 44-45.
[288] *Id.* at 45.
[289] *Id.* at 45.

§ 108, but especially for § 108(h). Without the limitation, § 108(h) becomes fairly narrow and not useful.

Looking at 300 random works published in the U.S. between 1923-1941, the current eligibility window for § 108(h), we found that only 7 works qualified for § 108(h) if used market was included in the definition. This meant that no used or new copies were found for seven of the works.



Then, we looked to see how many were eligible when we looked at works with used copies but not new copies available. The number jumped to 64.



Of the 64 works, 36 had under 10 copies available on Amazon. Twenty works had 30 or under copies. One had 48 copies; this was a biography of Winston Churchill. Only one had over 50 copies, at 81 copies. This was Charles Austin Beard's *America in Midpassage* (1939). For those under 10, all but 7 were 5 copies and under.

In contrast, works with both new and used copies, used copies ranged from one used copy, to as many as 401 used copies. For these the publisher was actively selling new copies. We suggest that only when a publisher is actively selling new copies should § 108(h) apply. Of the 103 works that were not eligible (new and used copies), only 9 works had 5 and under copies. Thirty-eight works had between 10 and 30 used copies available, and 51 works had between 30 and 401 copies. Twenty works had over 100 used copies. What these numbers seem to indicate is that the "vibrant and easily-accessible second-hand market" really exists for works that are *still* being sold as new, and not those that have been abandoned by their publishers. We suggest that § 108(h) requires a market search for **new copies** of the work, and only if new copies are found would a library be precluded from digitizing the work in the last 20 years of the copyright term.

Finally, there is no distinction of what kind of used copy would defeat use of § 108(h). If there is a copy that is in poor condition, would that preclude a library from using § 108(h)? Because the quality of the used copy is not included in the Model Statutory Language,[290] we suggest that the used market is too complicated and uncertain to base decisions on whether one can make a copy and distribute under § 108(h).

[290] Model Statutory Language, *supra* note 37, § 108(i)(1)(B).

The U.S. Copyright Office suggests the elimination of the register for copyright holders to announce their intention for normal commercial exploitation but suggests the creation for a similar register for unpublished works.[291] We suggest, instead, that a register is available for *all works* for copyright holders to identify that a work is commercially exploited, but that the notice must be given before the eligibility term begins. Just as there are notice requirements for termination of transfer, copyright holders would have to file notice with the U.S. Copyright Office before the start of the term. For those already in the term, a two-year notice period could be instigated. If notice was filed after the 108(h) window had begun, any library or archive that had already digitized the work would be exempted from liability for that work; only libraries digitizing after the notice was filed would be liable.

In conclusion:

1) We applaud the extension of § 108(h) to all works, regardless of status as published or unpublished, disseminated or not to the public.

2) We encourage the market requirement to apply to new copies only. Used copies do not benefit the copyright holder (§ 109), and if a work is not being commercially exploited, we have found that the used copy market is usually under 10 copies.

3) We believe the register by copyright holders at the U.S. Copyright Office should include *all works*, and that the copyright holder would have to file notice of intent to exploit commercially a work before the 108(h) window begins. Any notices that are filed after that period would exempt libraries that had already taken advantage of § 108(h).

4) Definitions for "normal commercial exploitation," "usable copy", "reasonable price", "reasonable investigation" and "fair price" should be added.

Here are our track changes for the new § 108(i): EXCEPTION FOR THE LAST 20 YEARS OF COPYRIGHT PROTECTION –

(1) for purposes of this §, during the last 20 years of any term of copyright of any work, an eligible institution may reproduce, distribute, publicly display, or publicly perform a copy or a phonorecord of such work, or portions thereof, for purposes of preservation, scholarship or research, unless such institution has first determined, on the basis of a reasonable investigation **at the start of the last 20 year term**, that—

(A) the work is subject to normal commercial exploitation **(that a copy of the work is available for sale)**

[291] U.S. COPYRIGHT OFFICE, *supra* note 258, at 44.

(B) a**n** **unused** copy or phonorecord of the work can be obtained at a fair price**; (or more than 50 used copies…)**

(C) for works not distributed to the public the copyright owner or its agent provides notice **before the start of the last 20 years of the term of copyright** pursuant to regulations promulgated by the Register of Copyrights that the work **is currently under normal commercial exploitation , or if not disseminated to the public and not in a library, archives or museum without restrictions,** objects to the use described in this subparagraph. **A library, archives or museum will respect the restrictions of the copyright holder as agreed in the contract or donor agreement, and overrides § 108(i). If a library, archives or museum have already availed themselves of § 108(i) when notice was filed, that use would be considered covered under § 108(i), and only new copies by a different institution would be covered by the notice.**

With these changes, only new copies would be eligible to negate § 108(i) (formerly § 108(h)). As for unpublished works, only those works were not placed by the copyright holder in a library, archives, or museum, or that had restrictions in the donor or contract with the library would be eligible for restrictions by notice. Finally, notice would be required before the start of the § 108(i) term, and if later, libraries, archives and museums that had already availed themselves to § 108(i), would not be liable and could continue to rely on § 108(i). This last point is important, as libraries, archives and museums worry about when the market check needs to occur, and what happens if a notice is filed.

VII. New Historical Legislation: The Music Modernization Act of 2019

Pre-1972 sound recordings were not included in the recommendations and have never been eligible for § 108(h). Now, they are. For the first time in over 20 years, duration in copyright law has changed. In October 2018, President Donald Trump signed into law the Orrin G. Hatch-Bob Goodlatte Music Modernization Act of 2019.[292] For most, including the media, the focus of

[292] *Orrin G. Hatch-Bob Goodlatte Music Modernization Act*, COPYRIGHT.GOV, https://www.copyright.gov/music-modernization (last visited October 18, 2018)

> This bipartisan and unanimously enacted legislation represents the realization of years of effort by a wide array of policymakers and stakeholders, as well as the U.S. Copyright Office itself, to update the music licensing landscape to better facilitate legal licensing of music by digital services. The Copyright Office is heartened by the passage of landmark legislation expected to benefit the many stakeholders across all aspects of the music marketplace, including songwriters, publishers, artists, record labels, digital services, libraries, and the public at large.

the legislation is on royalty rates for songwriters and rights-holders in the digital age, including the requirement of digital services paying for pre-1972 sound recordings.[293] Interestingly, the bills were passed unanimously through Congress, and the bill includes the CLASSICS Act, which had previously been seen as controversial.[294] The CLASSICS Act applies elements of the Copyright Act to pre-1972 sound recordings for the first time.[295]

Pre-1972 sound recordings have never been protected by federal copyright law, with the states tending to legal protections through Feb 15, 2067.[296] But that had created a great deal of problems, including the fact that fair use and § 108(h) did not apply to pre-1972 sound recordings. As part of the CLASSICS Act, pre-1972 sound recordings are brought into the Copyright Act, with transition periods.

In particular, § 502 through 505 and § 1203 now apply to pre-1972 sound recordings, which is infringement and damages, as does 17 limitations including fair use (§ 107), library and archives exceptions (§ 108), first sale (§ 109), certain public performances including classroom uses (§ 110), certain ephemeral copies (§ 112(f)), and the safe harbor provisions (§ 512).[297] But it

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Id. The Copyright Office has previously produced a report, "Copyright and the Music Marketplace," as well as the policy report, "Federal Copyright Protection for Pre-1972 Sound Recordings." *See* U.S. COPYRIGHT OFFICE, COPYRIGHT AND THE MUSIC MARKETPLACE A REPORT ON THE REGISTER OF COPYRIGHTS (Feb. 2015), https://www.copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf; U.S. COPYRIGHT OFFICE, FEDERAL COPYRIGHT PROTECTIONS FOR PRE-1972 SOUND RECORDINGS A REPORT OF THE REGISTER OF COPYRIGHTS (Dec. 2011), https://www.copyright.gov/docs/sound/pre-72-report.pdf.

[293] *See* Marc Schneider, *'Truly a Historic Moment': Music Business Reacts to Music Modernization Act Becoming Law*, BILLBOARD (Oct. 11, 2018), https://www.billboard.com/articles/business/8479469/music-business-reactions-music-modernisation-act-law-signing.

[294] Devin Coldewey, *Copyright Compromise: Music Modernization Act Signed into Law*, TECHCRUNCH (Oct. 11, 2018) https://techcrunch.com/2018/10/11/copyright-compromise-music-modernization-act-signed-into-law.

[295] The full title is "'Compensating Legacy Artists for Their Songs, Service, and Important Contributions to Society Act". Its short title is the "CLASSICS" Act.

[296] 17 U.S.C. § 301(c) states:

> With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

17 U.S.C. § 301(c) (2012).

[297] 17 U.S.C. §1401(C)(2)(c); 17 U.S.C. § 1401(f)(1)(A).
https://www.copyright.gov/legislation/2018_mma_amendments.pdf

does not bring pre-1972 sound recordings fully under federal protection.[298] What is noticeably missing is Chapter 2: ownership. That has not been addressed and is likely left up to state law to determine. It is also not required to register to qualify for copyright damages or to begin a copyright lawsuit. Instead, the owner of the copyright will be able to register in a special manner with the U.S. Copyright Office in order to receive statutory damages.[299]

What also is not clear is how many of the § 101 definitions apply, including the definition for "publication." But what we do see is that duration and non-commercial uses, including § 108(h) are both prominent in the new legislation. And more interestingly, the law itself is slightly (but importantly) different from both what we currently have and what the Copyright Office had recommended for non-pre-1972 sound recordings. And so, we will conclude this paper with a review of the new law–and the role of § 108(h) in it.

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[298] *See* BOB GOODLATTE, 115th Cong., H.R. 1551, The Music Modernization Act 15 (Comm. Print 2018). The House Report explains:

> This new form of protection is not technically copyright protection, so provisions of the other chapters of title 17 apply to this new right only to the extent specifically indicated in chapter 14. For example, formalities such as the copyright notice, deposit and registration provisions of chapter 4 do not apply to this new sui generis right but rather are replaced with different processes and provisions more applicable to pre-1972 recordings. Pre-1972 recordings have existed and been commercially exploited for many decades without compliance with such formalities, and it would not be feasible to apply those formalities now.

Id.

[299] *Id*. at 24. The Copyright Office has created a special excel spreadsheet to make it easier for content owners to upload their lists of pre-1972 sound recordings.

> A Schedule of Pre-1972 Sound Recordings ("Pre-1972 Schedule") is a special type of document that owners of sound recordings fixed before February 15, 1972 ("Pre-1972 Sound Recordings") may file with the Copyright Office. Under title 17, section 1401 extends remedies for copyright infringement to owners of Pre-1972 Sound Recordings. To be eligible to recover statutory damages and/or attorneys' fees for the unauthorized use of Pre-1972 Sound Recordings, rights owners typically must file schedules listing their Pre-1972 Sound Recordings with the Office, specifying the name of the rights owner, title, and featured artist for each sound recording. 17 U.S.C. § 1401(f)(5)(A). Users may search this database to locate information indexed from Pre-1972 Schedules filed with the Office.

U.S. Copyright Office, Schedules of Pre-1972 Sound Recordings, https://www.copyright.gov/music-modernization/pre1972-soundrecordings/search-soundrecordings.html. The database is available, as of December 7, 2018, to search.

A. Exclusive Rights

Exclusive rights for all sound recordings are defined in § 114.[300] Section 106 rights are limited reproduction, derivatives, distribution and "perform the…work by means of a digital audio transmission."[301] The amendment limits the definition of §§ 106(1), and (2):

- § 106(1): "the right to duplicate in the form of phonorecords or copies that directly or indirectly recapture the **actual** sounds fixed in the recording."[302] (emphasis added) This seems to mean only literally copying.

- § 106(2): the derivative right is limited to the "actual sounds fixed in the sound recording [that] are rearranged, remixed, or otherwise altered in sequence or quality."[303] This seems to include sampling.

The amendment explicitly notes: "The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of § 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording."[304] What is interesting is the limited coverage of sound recordings. And note, § 106(3), distribution, does not have any specific limitations.[305] Note: there are no limitations to the public performance right.

B. Changes to Preemption

When the 1978 Copyright Act was enacted, pre-1972 sound recordings were exempted from federal law. Now, § 301 has been amended. It appears that it is written to not be retroactive. That is, any activities done before the Classics Protection and Access Act (part of the Music

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[300] 17 U.S.C. § 114 (2018), https://www.copyright.gov/legislation/2018_mma_amendments.pdf.

[301] 17 U.S.C. § 106 (2012).

[302] 17 U.S.C. § 114 (2018), https://www.copyright.gov/legislation/2018_mma_amendments.pdf.

[303] *Id.*

[304] 17 U.S.C. § 114.

[305] *Id.* Moreover, there are additional limitations to sound recordings generally:

> The exclusive rights of the owner of a copyright in a sound recording under clauses (1), (2), and (3) of section 106 do not apply to sound recordings included in educational television and radio programs (as defined in section 397 of title 47) distributed or transmitted by or through public broadcasting entities (as defined by section 118(f)): *Provided*, That copies or phonorecords of said programs are not commercially distributed by or through public broadcasting entities to the general public.

Id.

Modernization Act) would fall under state law.[306] But it seems that the transition periods in Chapter 14 create a transition to sound recordings coming into the public domain, in many cases earlier than the longer date of Feb 15, 2067.[307]

[306] Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676 (2018).

[307] When the 1976 Copyright Act was enacted, pre-1972 sound recordings were not included in federal law. Section 301(c) has read:

> With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

17 U.S.C. § 301(c)(2012). Section 301(c) has been amended. Now, it takes into consideration the Classics Protection and Access Act. Here is the new language:

> Notwithstanding the provisions of section 303, and in accordance with [the Classics Protection and Access Act], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title. With respect to sound recordings fixed before February 15, 1972, the preemptive provisions of subsection (a) shall apply to activities that are commenced on or after the date of enactment of the Classics Protection Access Act. Nothing in this subsection may be construed to affirm or negate the preemption of rights and remedies pertaining to any cause of action arising from the nonsubscription broadcast transmission of sound recordings under common law or statute of any State for activities that do not qualify as covered activities under chapter 14 undertaken during the period between the date of enactment of the Classics Protection and Access Act and the date on which the term of prohibition on unauthorized acts under section 1401(a)(2) expires for such sound recordings. Any potential preemption of rights and remedies related to such activities undertaken during that period shall apply in all respects as it did the day before the enactment of the Classics Protection and Access Act.

Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 202, 132 Stat. 3676 (2018) What we find particularly interesting here is that § 303 is mentioned. It's curious. § 303(a) focuses on unpublished works created and not in the public domain or copyright; and § 303(b) alerts us that distribution of a phonorecord does not constitute publication of the musical work, dramatic work, or literary work embodied. So, why included in the new preemption language? It seems like either it means that § 303(a) and (b) apply to pre-1972 sound recordings, as does Chapter 14. We are still left with the question as to when a sound recording is considered published -- and of course, if distribution allows now for sound recordings to be considered published (which I'm not sure about), does it then mean that the sound recording is published but the underlying works (because of § 303(b) is not?

C. Duration Terms

One area that is significant is duration. Before the CLASSICS Act, the duration of protection of pre-1972 sound recordings was governed by state law. Now, the term of their federal protection is governed by the Copyright Act. Pre-1972 sound recordings now have a federal duration limit that vary depending on the date of first publication of the sound recording. The CLASSICS act created transition periods and divided pre-1972 sound recordings into categories based on their date of publication. The House Report makes it clear that it based on the date of publication (not defined) rather than *fixation*. This could lead to significant problems, and the law, by implication, seems to mean that unpublished sound recordings are now protected by § 303(a), measured by a different set of events. But the new law did not address transitions for those unpublished works. It seems like the law assumes *all* sound recordings are somehow published, but we know that we have both published and unpublished pre-1972 sound recordings. But the House Report doesn't seem to recognize this. The House Report explains:

> Subsection (a)(2) provides that pre-1972 recordings will enter the public domain on a rolling basis at the end of the year 95 years after their publication, regardless of fixation date, following a further transitional period of protection. Because many published pre-1972 recordings will be protected for a shorter period under federal law as a result of this legislation than they would have been protected under state law absent this legislation, it is appropriate to provide an additional period of federal protection beyond the basic 95-year period, and to diminish the risk that due process rights would be violated by taking property without just compensation.[308]

So, we are left with the question of whether § 303(a) applies to pre-1972 unpublished sound recordings. I believe it does. Otherwise, there would be no distinction between fixation and publication, and because the term for unpublished works was not included, one would have to fill in with § 303(a) terms, the section of the U.S. Copyright Act designated for works first created but not published before 1978.[309]

Pre-1923 Works

Currently, *all* pre-1972 sound recordings are under state protection (at least in New York). The CLASSICS Act changes that. This is the most significant change. Pre-1923 works now have an end duration date through December 31, 2021 (three years from date of enactment).[310]

1923 and Beyond

The new law has different transitions, depending on when the sound recording is published.

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[308] Goodlatte, *supra* note 298.

[309] 17 U.S.C. § 303(a) (2012).

[310] § 1401(2)(B)(i): "In the case of a sound recording first published before January 1, 1923, the transition period described in subparagraph (A)(i)(II) shall end on December 31 of the year that is 3 years after the date of enactment of this section." https://www.congress.gov/bill/115th-congress/house-bill/1551/text

1923-1946: 100 years from first publication (95 years plus five years from publication).[311]

1947-1956: 110 years from first publication.[312]

1957-Feb 15, 1972: ends Feb 15, 1967.[313]

So, what did they do? They allowed some recordings to enter the public domain much earlier. But for many, the terms are still long – longer than any other publications of similar time periods. Sound recordings get *extra* time. So, let's say you have a sound recording of a musical composition. That musical composition, published in 1960 will come out of copyright in 2055, while the sound recording will not come into the public domain until 2067. But there are other access devices, along with the public domain, that were included in the CLASSICS Act, namely § 108(h).

D. Section 108(h) and pre-1972 Sound Recordings

Section 108(h) applies. There is a specific Rule of Construction for § 108(h) included: "With respect to the application of § 108(h) to a claim under subsection (a) with respect to a sound recording fixed before February 15, 1972, the phrase 'during the last twenty years of any term of copyright of a published work' in such § 108(h) shall be construed to mean at any time after the date of enactment of this section."[314] What does this mean? Does the date of enactment act as the trigger for § 108(h) "last twenty"? My reading of the § 108(h) phrase is that for all pre-1972 sound recordings the "last twenty" begins at enactment. I think this was a concession, but it is only a hunch. Unfortunately, the House report does not provide guidance.[315] If this is true, then the last twenty years is now a lot longer for pre-1972 sound recordings that have no commercial use/activity.

E. Noncommercial Use by a "person"

There is a new noncommercial use exception. Certain noncommercial uses that are not being commercially exploited have protection. "Noncommercial use of a sound recording fixed before

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[311] § 1401(2)(B)(ii): "In the case of a sound recording first published during the period beginning on January 1, 1923, and ending on December 31, 1946, the transition period described in subparagraph (A)(i)(II) shall end on the date that is 5 years after the last day of the period described in subparagraph (A)(i)(I)."

[312] § 1401(2)(iii) ("In the case of a sound recording first published during the period beginning on January 1, 1947, and ending on December 31, 1956, the transition period described in subparagraph (A)(i)(II) shall end on the date that is 15 years after the last day of the period described in subparagraph (A)(i)(I).").

[313] § 1401(2)(iv) ("In the case of a sound recording fixed before February 15, 1972, that is not described in clause (i), (ii), or (iii), the transition period described in subparagraph (A)(i)(II) shall end on February 15, 2067.").

[314] § 1401(f)(1)(B)

[315] Goodlatte, *supra* note 298.

February 15, 1972, that is not being commercially exploited by or under the authority of the rights owner shall not violate subsection a person is engaged in a non-commercial uses and files a notice of that use with the U.S. Copyright Office. They also have to engage in a search to confirm there is no commercial use of the work at issue. There is no time limit (anytime during the copyright term, unlike § 108(h), which is in the last twenty years), and there seems to be no restrictions regarding § 106 rights (§ 108(h) is limited to reproduction and distribution). Here are some of the required elements for the non-commercial use exception to pre-1972 sound recordings:

1. "the person"

What is interesting is that it seems to focus on a "person" rather than a library or archive.

2. Non-commercial use

We see the same focus on non-commercial, however with a more specific requirement:

- whether the sound recording is being commercial exploited by or under the authority of rights owners
- the person makes a good faith, reasonable search for but does not find the recordings in (i) the records of schedules filed in the Copyright Office as described in subsection (f)(5)(A) and
- on services offering a comprehensive set of sound recordings for sale or streaming.

Note: that streaming services are included as "commercial" and also the "records of schedules" is filing information with the U.S. Copyright Office. The schedule includes the title, artist, and rights owner of the sound recording."[316]

3. File a Notice

Here, unlike the "regular" § 108(h), the person wanting a noncommercial use is required to file a notice describing the nature of the use with the U.S. Copyright Office.

4. Opt-out period

After the "person" has filed for noncommercial use, there is a ninety-day period to see if the copyright holder opts out of noncommercial use exceptions.

5. Definition of commercial use

The new legislation defines commercial use as what it is *not*:

[316] § 1401(5)(A)(i).

1. "merely recovering costs of production and distribution of a sound recording resulting from a use otherwise permitted under this subsection does not itself necessarily constitute a commercial use of the sound recording."
2. "the fact that a person engaging in the use of a sound recording also engages in commercial activities does not itself necessarily render the use commercial." So that is interesting too! Just because you are a commercial business doesn't mean that you can't have a noncommercial use.
3. "the fact that a person files notice of a noncommercial use of a sound recording in accordance with the regulations . . . does not itself affect any limitation on the exclusive rights of a copyright owner described in section 107, 108, 109, 110, or 112(f) as applied to a claim under subsection (a) of this section pursuant to subsection (f)(1)(A) of this section."

Defining commercial use is key in being able to use the new legislation. It was something that not had previously occurred with § 108(h). Creating a copy of the sound recording does not result in commercial use. Being a commercial entity does not create a commercial use. We have seen that with fair use, of course, as well. And the third element, that filing for noncommercial use with the U.S. Copyright office does not lessen the use of other parts of the copyright law is also important in making sure people do not feel that registering is someone taking away rights. Fair use, library uses, first sale, ephemeral uses, and classroom uses still apply and there is no requirement to participate in the notice system. And if the notice does not go in your favor – a copyright holder files a notice in one or another – you can still look to sections 107, 108, 109, 110, and 112(f).

So, what does this mean? If you find a sound recording and you want to use it as a person, you can't rely on § 108(h) beyond the listening. But you could with this. It is also broader than libraries and archives. This is the first time a noncommercial use has been included in the copyright law in a specific way. So, an amazing moment. An acknowledgement of noncommercial uses. We are now waiting to see what the Library of Congress does as it has 180 days to create the regulations.

VIII. Conclusion: Last Twenty Collections begin Twenty Years after Enactment

The Copyright Term Extension Act turned 20 in 2018. Section 108(h) was designed to mitigate the damage of adding twenty years to the term for published works. For twenty years, published works have been frozen, and it will only be on January 1, 2019 that works from 1923 will come into the public domain – 95 years after their first publication. The irony, of course, is that it is now twenty years later – after we have had to wait for 20 years for 1923 works to come into the public domain – that libraries and archives are beginning to implement § 108(h). We know that § 108(h) still survives – that it was included in the new legislation for pre-1972 sound recordings. I hope that this paper will help libraries and archives feel more confident in their use of § 108(h), or at least begin to think that maybe, just maybe, there are instances were published

works that are not currently exploited and where no copy can be found can be brought back into circulation for their last twenty years of copyright and beyond.

In the end, § 108(h) allows libraries and archives to digitize and even distribute works in the last twenty years of their copyright. In an era of long copyrights, this is a very big prize. This paper seeks to help them implement the policies and procedures necessary to take full advantage of all that § 108(h) provides.

The key questions that need to be addressed:

1) Is the work published?
2) Is the work under copyright?
3) Does the work fall into the 108(h) eligibility window?
4) Is there no normal commercial exploitation or reasonable copies of the work available?

Why take the effort to include copyright information in the records? It allows libraries to take advantage of § 108(h), if applicable, to show they have done the work, and to also show that there was effort made to determine the copyright status. But it is more than that. The Copyright Act reflects the recognition that libraries and archives serve a special place in our world, and to that end, limits liability for libraries as long as they have *tried* to get the answer right. Now, pre-1972 sound recordings are included in that special space. We must now just encourage libraries to use these tools, and to mark within the records their methods. Millions of works of all kinds would once again or for the first time be available digitally and otherwise for the public to read, research, and use. The possibilities are amazing.