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Distinguished Chairman Coble, Ranking Member Nadler, and members of the Subcommittee: Thank you for the invitation to talk to you today about "Preservation and Reuse of Copyrighted Material". I have been engaged in the practice of law since 1964, from the early 70's in the publishing industry, before retiring as Senior Vice President and General Counsel of John Wiley & Sons, Publishers in 2004. I currently serve as Vice Chairman of the Board of Directors of the Copyright Clearance Center. I was the Co-Chair of the Section 108 Study Group, convened by the Library of Congress and the Copyright Office in 2005 to recommend changes to Section 108 of the Copyright Act, which contains exceptions applicable to libraries and archives. It is in that capacity that I address you today. I should also note that my Co-Chair, Lolly Gasaway, testified before this Subcommittee on May 16, 2013, and that Jim Neal, on the panel here today, was also a member of the Study Group.

I understand that today's hearing is focused on Section 108 Revision, Orphan Works, and Mass Digitization. I will talk primarily about the first of these, though some of my remarks will apply more broadly. I will begin by reviewing the work of the Study Group, which I think is relevant because it bears on the difficulties of obtaining a degree of consensus, so important to the legislative process. I will then briefly review our recommendations, and close with some observations on the way forward.

Roughly half of the members of the Study Group came from the library, archives and museum community, and half from the content and creative community. These two communities are part of a larger community, held by common bonds, driven in part by common goals, and bedeviled by similar challenges. In the end we both serve the public

interest by making accessible art literature and science, we both face serious economic challenges, and we have both had to redeploy our assets and revise our operations to deal with the opportunities and challenges presented by new digital technologies. We are interdependent. Libraries are important customers of content providers, and without the work of authors, artists publishers and other media producers fueled by copyright, libraries could not long exist. This is a family quarrel.

As noted previously our mission was to re-examine Section 108 (enacted in 1976 to deal with the then new technology of the photocopying machine); to define what it would take to make its provisions useful and fair in light of the evolving impact of digital technologies on both our communities; and to see if, or at least how much, we could agree on how to do that - in short to make balanced recommendations on how to make this provision of our Copyright Law once again relevant in today's world.

The composition of the group and its working style were based on the idea that in a favorable environment, people of good will with differing perspectives could *listen* to each other, talk *to* instead of *at* each other, and in this way make progress towards a level of agreement on how to fulfill the mission. And always we tried to keep in mind the principle expressed in the lyrics of Mick Jagger: You can't always get what you want "but if you try some time/You just might find/You get what you need." After three years of private, thoughtful discussions and intense debate, we completed our report in 2008, proving in the words of Gypsy Rose Lee, that "anything worth doing well is worth doing slowly."

Our recommendations are in the Report, and were also summarized in Ms. Gasaway's testimony before this Subcommittee on May 16, 2013 but I will review some of them very briefly here.

With respect to eligibility, we recommended that museums be included, that the definition of eligible institutions be improved (e.g., a public service mission, a trained staff, a collection of lawfully acquired material) and that outsourcing (for example, of the

copying required for a mass digitization project) be explicitly permitted so long as the contractor did not retain a copy and agreed to safeguards.

We recommended changes in the subsections covering replacement and preservation – replacing the three copy limit with a flexible rule and removing the current restriction on offsite lending of replacement copies. Most important, we recommend two new sections: The first would facilitate up-front preservation of "at risk" publicly disseminated works, to deal with the fact that once a digital work begins to deteriorate, it may be too late to preserve it. In return, institutions that undertake such work would be required to meet certain standards, including keeping the preserved copies in a secure, managed, and monitored environment. The second would explicitly permit eligible institutions to copy and reproduce publicly available online content not restricted by access control, such as websites, and to make them available to researchers.

Offsite access was a theme that ran throughout the report. In general, it was easier for us to agree on the need and on rules for making preservation copies than on rules for offsite access. It was agreed that academic institutions, which have a defined user group and are able to authenticate its members, could provide online access, with less risk of harm from unauthorized redistribution than, say a public library. However, without safeguards to insure that electronic copies are available only to authorized users, remote access would amount potentially to broad, unauthorized, uncompensated distribution of copyrighted content.

I want to raise two subjects not addressed in the Study Group's recommendation. The first is "Mass Digitization". In 2005, after some discussion, the Group felt that the time was not ripe. It is very ripe now, in the wake of the ongoing "Hathi Trust" and "Google" cases. Not speaking for either the members of the Study Group or others, it is my own opinion that we should seek to develop legislation, and to promote voluntary programs, including collective licensing, which would facilitate legitimate projects of this kind, both in the not-for-profit and for-profit sectors, without undermining the purposes of and the incentives provided by copyright protection. I am not in a position to propose specific

solutions, but for reasons set forth below believe that fair use under Section 107 is not the best – in fact is a bad solution.

The Study Group did discuss, without reaching a conclusion, whether the fact that a work has been "commercialized' should be a factor for purposes of Section 108, in effect providing different rules for works offered in commerce and those either not intended for commercial use or no longer available commercially. Since then, the concept of "commercial availability" – whether, for example, a book is "in print", has been utilized or is being considered as a factor for various purposes, for example, in the "Google Books Settlement" which was rejected by the District Court in New York, and in proposed copyright legislation in Europe. Whether in a revision of Section 108 or in possible legislation relating to mass digitization, it would seem appropriate to consider this concept.

Finally, I want to note that perhaps because Section 108 has been so out of date for so long, libraries have come to rely more heavily on "fair use" under Section 107. Do we in fact need to revise Section 108? The members of the Study Group did address that question. We pointed out that a provision which is so outdated and inadequate as to no longer serve its function invites disrespect for the law, and that Section 108 supplements the flexibility of Section 107 "which requires a careful balancing of factors in specific factual situations … with straightforward guidance on permissible uses."

One might add not only with respect to Section 108 but also with respect to Mass Digitization and Orphan Works that reliance on Section 107 for purposes that go far beyond the purposes originally conceived or imagined invites expensive litigation with uncertain results; that a provision so dependent on analyses of individual facts and circumstances is not well suited to major projects typical of Mass Digitization; that the doctrine of fair use as codified in Section 107 does not begin to address many of content owners' concerns, such as security. From a practical standpoint, a workable, up-to-date and balanced Section 108 would complement the flexibility of Section 107's fair use provisions with straightforward guidance, predictability, and clarity in specific situations.

Clarity is the handmaiden of certainty, and an important function of the law is to provide rules which if followed keep us out of trouble. Oliver Wendell Holmes Jr once observed that "certainly, generally is illusion and repose is not the destiny of man." I am certain enough that repose is not our destiny and that absolute certainty is generally an illusion. But a level of certainty is a prerequisite for doing business, whether one's business is that of a librarian, a teacher or a student, a publisher, a writer or an artist.

Whatever its shortcomings today, Section 108 of the 1976 Copyright Act was then fair and balanced, useful to the library community, and acceptable to the content community. The Section 108 Study Group Report is evidence that with care and effort that balance can be maintained and a broadly acceptable revision of the statute could be drafted. I would like to express the hope that balanced legislation that facilitates the preservation and appropriate re-use of copyrighted works while preserving the incentives and purposes of copyright will be adopted as part of overall copyright reform.