



The Authors Guild's Top Legislative Priorities - 2015

The Authors Guild has been the nation's leading advocate for writers' interests in effective copyright protection, fair contracts and free expression since it was founded as the Authors League of America in 1912. It provides legal assistance and a broad range of web services to its members. The Authors Guild has a rich history of contributing to debates before Congress on the proper scope and function of copyright law, and we look forward to continuing to do so as Congress reviews the current state of copyright law.

The Authors Guild's priorities in the copyright review are:

- Mass Digitization and Orphan Works
- Small Claims
- Updating Exceptions for Libraries and Archives
- Online Enforcement and the Safe Harbors
- Copyright Office Modernization

Mass Digitization and Display

Problem: Current ad hoc approaches to mass digitization and copying of books and orphan works are rife with problems and seriously endanger our literary culture. There can be no clearer demonstration of the need for Congressional action than the mass digitization and use of authors' literary property at issue in our case *Authors Guild v. Google*.¹ Under the guise of fair use, Google copied and displays² millions of works still in copyright and owned by their authors without permission from authors or paying any compensation. Authors rely on licensing revenues for these kinds of uses to support their ability to write; and, in the case of Google Book Search, authors are not only losing fees that Google should be paying for copying and making their works available, but they are also losing immeasurable income from lost sales. This is because researchers can usually find all they need from a book through Google Book Search. Allowing this kind of use as fair use dramatically undermines the very purpose of copyright law—allowing authors to control use of their works and obtain compensation for the use as an incentive to write.

¹ *Authors Guild, Inc., v. Google, Inc.*, 721 F.3d 132 (2d Cir. 2013) (pending decision in the Second Circuit).

² Google Books Search makes 78% of the books available for viewing by the public through search. While only portions of pages come up as a result of any particular search, the fact is that all but 10% of the book and one snippet per page is made available, and the needs of researchers are readily fulfilled.

The drastic policy implications of permitting mass uses of books and other works without permission should be addressed by Congress rather than the courts. Recent fair use cases involving books³ take fair use law far beyond any types of uses that Congress contemplated in drafting the 1976 Act and far beyond what courts have previously allowed. The courts have failed to recognize the impact these decisions will have on the copyright incentives and the fact that the balance in the 1976 Act that was the result of decades of study.

Courts have struggled to find a way to allow these beneficial uses to take place and have resorted to fair use because of the prohibitively high transaction costs of acquiring licenses (especially for difficult to locate rights holders), sacrificing authors' right to be compensated for use of their work. The Authors Guild does not contest the benefits of mass digitization and access, but strenuously objects to allowing these types of uses for free. While there are policy justifications for reducing transaction costs through statutory licenses, there is no good justification for allowing entities like Google, the Hathi Trust, universities and others to free ride off of the backs of authors. As between large corporations or universities and authors, authors are the least able to bear the costs of creating these types of services. Most of our members live on the edge of being able to keep writing or find other paying work, and indeed many of our members have had to find other jobs in recent years. While the loss of relatively small amounts of potential income may seem trivial to courts, it is a matter of being able to continue writing full time or not for many authors. Congress is by far the better venue for making policy decisions that will inevitably affect the ability of many authors to keep writing full time or at all. The Founders included copyright law in the Constitution because they understood how important a thriving culture of authorship is to democracy. Congress, not the courts, needs to decide whether and to what extent we as a society want to allow those incentives to be shifted so dramatically that they continue to function only for best-selling authors and academics.

In sum, applying fair use to mass digitization is a form of free compulsive licensing—one created by courts, when considering only one party's interests against another, and determining that authors get no compensation. Congress is the body that should be determine what the rules should be for this sort of use, as it has the ability to broadly study and balance the needs of creators, users, and other interested parties in the best interest of the nation as a whole.

AG Solution: We recommend establishing collective licensing for out-of-print book rights (which the authors and not publishers generally own). This would allow authors to be compensated at a reasonable rate and at the same time pave the way for a true digital library, where full books could be viewed, not just the excerpts and snippets currently offered. At the same time, users would not have to negotiate and obtain licenses on a case-by-case basis. And, critically, the books subject to the license would be out of print, to avoid disrupting commercial markets.

A limited set of rights would be licensed and could include display rights, so that colleges, universities, school libraries, public libraries and other institutions would have ready access to

³ See *Authors Guild v. Google*; *Authors Guild v. Hathi Trust*; __ F.3d __, 2014 WL 2576342 C.A.2 (2d Cir. 2014); *Cambridge University Press et al. v. Patton et al.*, No. 12-14676, (11th Cir., Oct. 17, 2014, available at <http://media.ca11.uscourts.gov/opinions/pub/files/201214676.pdf>).

millions of copyright-protected works. Print and e-book distribution rights would not be part of the package—only the author or other rights holder could authorize such uses. This solution addresses both mass digitization and orphan works issues.

Small Copyright Claims Court

Problem: The costs of obtaining counsel and maintaining a copyright cause of action in federal court effectively precludes most individual copyright owners whose works are clearly infringed from being able to vindicate their rights and deter continuing violations. This means that many individual authors have a right without a remedy—in other words, no real rights at all. On an individual level, the inability to enforce one's rights undermines the economic incentive to continue investing in the creation of new works. On a collective level, the inability to enforce rights corrodes respect for the rule of law and deprives society of the benefit of new and expressive works of authorship.

AG Solution: If created with care, a small claims court for copyright infringement would allow individual authors much greater access to the courts to protect their property rights, appreciably enhancing market incentives to create the literary works that the public values. Frivolous, harassing claims could be avoided by routine, automatic rejection of claims that do not raise a prima facie case of infringement. Dismissal without prejudice of claims in which a substantial fair use defense is raised would greatly speed and simplify the court's proceedings, as would permitting the proceedings to be conducted by mail and phone. Affiliation with the Copyright Office would assure the court's competence in copyright law. Finally, granting the court limited power to issue injunctions would strengthen the court and its credibility.

Online Piracy

Problem: The Digital Millennium Copyright Act's 'safe harbors' for Internet service providers (ISPs) have turned into an exploitable gold mine for corrupt online enterprises. Rather than just protect innocent ISPs from liability for users' posting or transmitting infringing content on or through their services without the ISPs knowledge, or their intentionally profiting from the infringement, as Congress had intended, the safe harbors have been used to bless massive online infringement. Courts have interpreted the safe harbors in a sweeping manner to shield ISPs from liability at all costs, while imposing exaggerated burdens on rights holders. As a result, ISPs have little motive to rid their sites of piracy and are even permitted to profit knowingly from use of their services to traffic in stolen books, music, and movies, disclaiming any responsibility for that illegal traffic.

Courts in recent cases⁴ have construed Section 512 of the Copyright Act to require a copyright owner to send a notice for each instance of infringement on an ISP's service, specifying the URL of the particular infringing copy. The ISP has no obligation to take down infringing copies if the URL is not specified or even to take back down a copy that is reposted immediately after being removed. Individual copyright owners do not have the resources to find and send notices for

⁴ *UMG Recordings v. Shelter Capital Partners*, No. 09-55902, 2013 WL 1092793 __ F.3d __ (9th Cir. Mar. 14, 2013); *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2d Cir. 2012).

every instance of infringement online, however, much less to keep resending them for copies reposted after being taken down. Authors and other individual copyright owners do not have access to automated systems that track infringing copies and send countless notices, nor do they have the bargaining power to make the kind of deals with ISPs that industry can. The private, industry solutions that some are advocating to address the ineffectiveness of notice and takedown by and large ignore the interests of individual rights holders and leave them without recourse.

AG Solution: U.S. copyright law must provide meaningful protection and enforcement against widespread online piracy of books and journals so that authors can earn a living from creating and disseminating new literary works. Facilitators of online piracy that host or provide support for that illegal activity often disclaim responsibility by taking shelter in the safe harbor protections of our Digital Millennium Copyright Act. A key part of the solution to the piracy problem is to hold those who purposefully profit from online file-sharing activities legally responsible for those activities.

To achieve this, the requirements for the safe harbor in Section 512 should be clarified, whether by clear statements in the legislative history or amending the statute to clarify that service providers that purposefully promote infringement on or through their services are not protected from liability for that infringement by the safe harbor. Courts have interpreted the requirement to not have any awareness “of facts or circumstances from which the infringement is apparent” to mean actual knowledge of specific instances of infringement, including the precise location (i.e., URL) of the infringing content. We do not believe that Congress intended the safe harbors to protect ISPs who have knowledge that there are infringing copies of specific works made available on or through their services and are welcoming that infringement, especially where a simple search would confirm that the works are there and were posted by people who do not own the rights. We are sympathetic with the argument that ISPs cannot know for certain if a use has been licensed, but where it appears that a copy is infringing, they should be required to take it down as Congress clearly contemplated in Section 512. Subsection 512(f) and (g) adequately protect the innocent user where a work is mistakenly taken down, and Section 512(g) provides ISPs with sufficient safeguards from liability for takedowns.

On balance, given the millions of infringing works available on online services and the rarity of false takedowns, we believe that service providers should be required to take copies down where, as Section 512(c) states, it is apparent that a copy is infringing—not just where they have knowledge of the actual location and identity of every single infringing copy on the site. In addition, once an ISP is on notice that a particular work is being infringed on or through its service, it should not have continued safe harbor protection unless it takes down all copies of the infringed work and especially any copies of the same work re-posted by the same user.

Updating Exceptions for Libraries and Archives

Problem: Authors and libraries are strong natural allies. Libraries have traditionally been major buyers of books, and authors are major users of libraries and rely on libraries to buy copies of their books so that researchers and the public can have access to their books. And libraries rely on authors to keep writing so that they can continue to enhance their collections. As such, authors have long recognized the need of libraries to make certain uses, such as replacement and preservation copying and making one-off copies for their users in certain circumstances, without obtaining permission each time. Section 108 of the Copyright Act was created to allow libraries and archives to make certain uses without permission or payment where the use was not necessarily covered by fair use. The Section 108 exceptions gave librarians and archivists the guidance and comfort that they could make certain uses in their day-to-day activities without fear of breaking the law.

Because of the specificity of the exceptions, however, Section 108 became badly outdated with the introduction of digital technologies into libraries. Librarians found themselves having to rely on analogy to decide what they could or could not do without permission. After receiving many complaints from librarians and archivists, the Copyright Office and Library of Congress convened the Section 108 Study Group,⁵ composed of representatives from various interested parties to make recommendations to update Section 108. The group spent several years reviewing the law, obtaining advice from other experts and debating how the provisions of Section 108 should be updated in a manner that considered the important interests of libraries, archives, rights holders and the public generally. The group issued a detailed report with its recommendations.⁶ Many of the recommendations are non-controversial and would merely update the law to accurately reflect current common uses and to make it more useful. For instance, the report recommends that museums also be allowed to take advantage of the exceptions, a need that has arisen with new technologies changing the types of services museums provide. The report also calls for clarity in a number of places. And it proposes a new exception that would permit libraries and archives to make copies of websites, an increasingly important part of our cultural record, for preservation. The report also recognized the need of libraries and archives to make digital preservation copies and proposes new exceptions permitting such uses.

In the interim, the principal library associations, the American Library Association (ALA) and the American Research Libraries (ARL), have determined that they do not want to revise Section 108 because they believe that all of the activities they wish to make of copyrighted works in the digital environment can be done under fair use, without the need to rely on Section 108. They want Congress to leave Section 108 as is—so outdated that it does not in any way match actual practice. Why would the library associations not want a Section 108 that makes sense? It is because they view the courts as more liberal than Congress. The courts have allowed fair use to protect mass uses of works without imposing any limitations or restrictions on those uses, or providing for payment. Courts cannot set conditions on use in the manner Congress can to ensure that such permitted uses are not abused to the extent that they would undermine copyright. The exceptions in Sections 108 through 122 of the Copyright Act were carefully crafted by Congress

⁵ See <http://www.section108.gov/>; <http://www.copyright.gov/docs/section108/>.

⁶ See *Report of the Section 108 Study Group*, at <http://www.section108.gov/>.

to allow certain uses in certain conditions to be undertaken without seeking permission. Important limitations are built into each use. The fair use doctrine has no such nuance; it is either on or off. As a result, courts may draw the line far too broadly, such as to allow uses with no security or protection for authors.

For instance, the Second Circuit in *Authors Guild v. Hathi Trust* determined that HathiTrust's making copies for its repository was fair use. Even if HathiTrust had sufficient security to protect the copyrighted works, the case sets precedent so that others might make the same uses, without employing any security protections to keep the works from becoming widely distributed on the internet. The Section 108 Study Group recommendations, on the other hand, suggest that a library or archives have certain technological capabilities and follow best practices in order to create a repository of digital copies without permission.⁷

We believe that libraries' reliance on fair use is misplaced and risks creating a culture of favoring use of copyrighted works without compensating the author, in ways that were never contemplated by Congress. Just as authors respect libraries' need to make one-off uses, it is in libraries' interests to respect authors' rights to make a living and understand that their buying books or paying license fees is central to the literary ecosystem. A balanced revision of Section 108, updating it to allow libraries to conduct activities that further their mission without interfering unreasonably with authors' rights and ability to make a decent living, would address the needs of libraries and authors alike. We urge Congress to undertake this much-needed revision and not too cede this important area of the law to the courts and fair use. Most uses of books can be described as socially beneficial; indeed, the very creation and dissemination of books is socially beneficial. That is why we have copyright law in the first place. To sweep socially beneficial uses of books under the fair use umbrella, as recent cases have done, is to undermine the copyright incentives and the very purpose of copyright law.

Copyright Office Modernization

Problem: The Copyright Office sits in the Library of Congress for historical reasons that no longer carry the same weight they once did. The Register of Copyrights reports to the Librarian of Congress, its budget request is submitted through the Library, its technology infrastructure is operated by the Library, and the Librarian must issue all Copyright Office regulations. Copyright law has become exceedingly complex, and yet the Librarian is not required to be a copyright expert. Moreover, the Library has very different needs and interests than the Copyright Office. It no longer makes sense to keep the Copyright Office as a dependent service unit of the Library.

Further, as we have seen, technologies have moved faster than legislation. It may not be practical for Congress to continue to legislate the particulars of all parts of the copyright law, where application of the law may be affected by the technologies at issue. As we have seen, as soon as technology-related laws are adopted, the technologies change and how the law should be applied to those new technologies is not always clear. This is true for Section 108 and Section 512, as described above, as well as for many technical aspects of the Copyright Act, such as the gap of coverage in the termination provisions in Section 203 and 304 of the Copyright Act. The

⁷ *Report of the Section 108 Study Group*, § IV.A.2.

Copyright Office could play an important role in interpreting the law and creating guidelines for these and other provision of the law, as well as in establishing guidelines for a reasonable search and for reasonable compensation in relation to orphan works legislation and collective licensing for mass uses and other statutory licenses. An independent Copyright Office would also provide a good forum for a Small Claims tribunal, as discussed above.

The Copyright Office's technology is in dire need of upgrading, and it has insufficient funding to update its technological infrastructure. It relies on the Library of Congress' IT systems and services, which were built to serve different users with different needs. As a result, the Office's systems are not user friendly, and finding information regarding registrations and chain of title for clearance or other purposes often can be difficult. While the Office has made great strides with little funding and reduced staff, it needs additional funding and staff to move into the 21st Century.

AG Solution: The Copyright Office should be made an independent agency with the authority and autonomy of an expert agency, so that it may provide guidance on complex copyright issues and issue its own regulations. At the same time, the Copyright Office should have its own budget request authority and the funding necessary to build an independent IT system that meets the unique needs of its users. We submitted comments to the House Judiciary Committee that more fully describe our positions for the record in connection with the Hearings on November 12, 2014 (Statement of Mary Rasenberger on Behalf of the Authors Guild in Response to the Hearing on "Oversight of the U.S. Copyright Office," and on March 9, 2015 (Statement of Mary Rasenberger on Behalf of the Authors Guild In Response to the Hearing on "The U.S. Copyright Office: Its Functions and Resources").