

# OPENING THE DOORS TO DIGITAL LIBRARIES: A PROPOSAL TO EXEMPT DIGITAL LIBRARIES FROM THE COPYRIGHT ACT

Christopher Van Le\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	121
II. THE PURPOSE OF COPYRIGHT LAW IN THE U.S.....	125
III. COPYRIGHT LAW AND DIGITAL LIBRARIES.....	130
A. <i>The Google Books Project</i> .....	130
B. <i>How Google Books Works</i> .....	131
C. <i>Opt-In vs. Opt-Out Systems</i> .....	132
D. <i>International Analysis of Orphaned Works Problem</i> ....	134
IV. DIGITAL LIBRARY EXEMPTION FROM COPYRIGHT LAW.....	135
A. <i>Library Exemption as a Model for Legislative Change</i> .136	
B. <i>Proposed Exemption for Digital Libraries</i> .....	137
V. POTENTIAL PROBLEMS WITH THE PROPOSAL.....	144
A. <i>Administrative Problems</i> .....	144
B. <i>Economic Impact on the Market for Books</i> .....	145
VI. CONCLUSION.....	146

## I. INTRODUCTION

The primary purpose of copyright law is “to promote the Progress of Science and the useful Arts,”<sup>1</sup> or in other words - knowledge. To reach this end, copyright law grants authors temporary monopolies over the rights to their works, and thereby both rewards their efforts and promotes the creation of new works.<sup>2</sup> In the digital realm, however, copyright law obstructs the very purpose it was designed to promote. Copyright law hinders the advancement of knowledge in the

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\* Associate Attorney, Straus & Boies, LLP; J.D., Cum Laude, Case Western Reserve University, 2007. This student Comment was revised in fall 2009. The Author thanks Scott Nakama and the editors of JOLTI for the helpful feedback.

<sup>1</sup> U.S. CONST. art. I, § 8.

<sup>2</sup> PAUL K. SAINT-AMOUR, THE COPYWRITERS: INTELLECTUAL PROPERTY AND THE LITERARY IMAGINATION 1 (2003); Steven Hetcher, *Orphan Works and Google's Global Library Project*, 8 WAKE FOREST INTELL. PROP. L.J. 1, 3 (2007).

digital realm because it has failed to keep up with new technological developments.

The development of the World Wide Web in the 1990s opened a floodgate of information access and exchange.<sup>3</sup> As a result, people across the globe now share information instantaneously and increasingly rely on the Internet for information.<sup>4</sup> In response, an increasing number of digital library projects have developed.<sup>5</sup> A digital library is an “organized collection [] of informational items in digital format, accessible through computers.”<sup>6</sup> A digital library can act as a hub for an almost limitless volume of information and, therefore, has the potential to provide a wide variety of public benefits. Such benefits include: (1) increasing the awareness of a particular work’s existence, (2) reducing the search costs associated with finding a particular work, (3) protecting works from being lost due to physical decay, and (4) allowing for a much greater dissemination of the work.

Despite this potential, the development of large-scale digital libraries has been reduced to a crawl under current copyright law.<sup>7</sup> A large-scale or universal digital library must scan and include copyrighted works. In order to do so legally, such a library generally must choose between two options. It can either: (1) scan the books first and allow the authors to “opt-out” of their project or (2) ask for the authors’ permission before scanning the books and allow the authors to “opt-in” to its project.<sup>8</sup> Practically speaking, the opt-out system is similar to a person walking into a library, scanning all the books, and then allowing any author who objects to having his or her work

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<sup>3</sup> See Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 765-66 (2006).

<sup>4</sup> See *id.* at 768.

<sup>5</sup> See, e.g., Access My Library, <http://www.accessmylibrary.com/> (last visited Feb. 12, 2010); Arts and Humanities Data Service, <http://ahds.ac.uk/> (last visited Feb. 12, 2010); Book Share, <http://bookshare.org/> (last visited Feb. 12, 2010); Digital Mechanism and Gear Library, <http://www.dmg-lib.org> (last visited Feb. 12, 2010); Network of Excellence on Digital Libraries, <http://www.delos.info/> (last visited Feb. 12, 2010); The European Library, <http://search.theeuropeanlibrary.org> (last visited Feb. 12, 2010); The National Academies Press, <http://www.nap.edu/> (last visited Feb. 12, 2010); Northern California Digital Library, <http://califa.lib.overdrive.com> (last visited Feb. 12, 2010); The National Science Digital Library, <http://nsdl.org/> (last visited Feb. 12, 2010); World Digital Library, <http://www.wdl.org/en/> (last visited Feb. 12, 2010).

<sup>6</sup> Oren Bracha, *Standing Copyright Law on Its Head? The Googlization of Everything and the Many Faces of Property*, 85 TEX. L. REV. 1799, 1817 (2007).

<sup>7</sup> See Hannibal Travis, *Google Book Search and Fair Use: iTunes for Authors, or Napster for Books?*, 61 U. MIAMI L. REV. 87, 97 (2006) (“This is a chilling effect due to overbroad and ambiguous copyright laws, which have prompted Google to ‘err on the side of caution’ by giving more books the snippet treatment than the law actually requires.”).

<sup>8</sup> See Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, 9 J. MARSHALL REV. INTELL. PROP. L. 227, 235-36 (2009).

included in the digital library notify the person of his or her objection after the fact and request removal of the work. On the other hand, a digital library operating under the opt-in system will only digitize copyrighted works only after it receives approval from the authors.<sup>9</sup>

This Comment examines the problematic application of copyright law to digital libraries using Google's Book Search project as a case study. Google has set for itself the ambitious goal of scanning every book ever printed and creating a searchable database open to the public.<sup>10</sup> In order to do so, Google began scanning the books at certain university libraries and chose to use an opt-out system.<sup>11</sup> Even though the Google Books project captures the spirit and original purpose of copyright law, it very likely may conflict with the letter of the law.<sup>12</sup> Accordingly, and somewhat predictably, Google's efforts triggered a series of copyright infringement lawsuits.<sup>13</sup>

In October 2008, Google reached a landmark settlement ("Settlement") with the Authors Guild and the Association of American Publishers.<sup>14</sup> The parties amended the Settlement in

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<sup>9</sup> *See Id.*

<sup>10</sup> Google Books Library Project, <http://books.google.com/googlebooks/library.html> ("Our ultimate goal is to work with publishers and libraries to create a comprehensive, searchable, virtual card catalog of all books in all languages that helps users discover new books and publishers discover new readers.") (last visited Feb. 12, 2010).

<sup>11</sup> Press Release, Google, Google Checks out Library Books, (Dec. 14, 2004), [http://www.google.com/press/pressrel/print\\_library.html](http://www.google.com/press/pressrel/print_library.html) (last visited Apr. 9, 2010).

<sup>12</sup> *See* Elisabeth Hanratty, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 10, ¶ 33 (2005) (arguing that a court would likely find Google Book Search to be unfair use); Manali Shah, *Fair Use and the Google Book Search Project: The Case for Creating Digital Libraries*, 15 COMMLAW CONSPECTUS 569, 613 (2007) (arguing that Google would likely lose a traditional fair use defense for operating Google Books, but concluding that "because of the public benefit likely to be derived from such a project along with future projects of its kind, the District Court for the Southern District of New York must find a way to construe copyright law to accommodate for this technology..."). *See generally* Matt Williams, *Recent Second Circuit Opinions Indicate That Google's Library Project Is Not Transformative*, 25 CARDOZO ARTS & ENT. L.J. 303, 319-31 (2007) (arguing that Google Book search is unfair use because Google does not add any new descriptive commentary to books to meet the "transformative use" test under the first fair use factor).

<sup>13</sup> *See, e.g.*, Complaint, Authors Guild v. Google, Inc., No. 05 Civ. 8136 (S.D.N.Y. filed Sept. 20, 2005); Complaint, McGraw-Hill, Inc. v. Google, Inc., No. 05 Civ. 8881 (S.D.N.Y. filed Oct. 19, 2005). The two federal cases were eventually consolidated. *See also* La Martiniere Groupe v. Google, Tribunal De Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Dec. 18, 2009, Cass. 3e civ. (court ordered Google to pay €300,000 (approx. \$385,410) to French publisher for violating French copyright laws by displaying French Books in its Google Books Project).

<sup>14</sup> The Authors Guild v. Google Settlement Resources, <http://www.authorsguild.org/advocacy/articles/settlement-resources.html> (last visited Feb. 19, 2010).

2009<sup>15</sup> to address additional concerns raised by the Department of Justice.<sup>16</sup> Under the terms of the amended Settlement (“Amended Settlement”), Google will pay 34.5 million dollars to set up a Books Rights Registry,<sup>17</sup> forty-five million dollars in cash payments to copyright holders whose books have been scanned by Google prior to May 5, 2009,<sup>18</sup> and sixty-three percent of all advertising and e-commerce revenues as royalties to copyright holders of the associated work.<sup>19</sup> In exchange, Google will be able to index the books, display advertisements on these pages, and make available for sale digital versions of each book.<sup>20</sup>

While the Amended Settlement provides a solution to Google’s legal woes regarding its digital library project, it leaves other digital libraries back at square one. Accordingly, the central question of what a digital library can do within the confines of fair use<sup>21</sup> remains unanswered. Some commentators dislike the Amended Settlement because it prevented courts from possibly creating a fair use principle applicable to digital works.<sup>22</sup> The Copyright Office argued that the class action settlement procedure was “tantamount to creating a private

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<sup>15</sup> Amended Settlement Agreement, *Authors Guild v. Google, Inc.*, No. 05 Civ. 8136 (S.D.N.Y. filed Nov. 9, 2009) (the court preliminarily approved the Amended Settlement Agreement on November 13, 2009) [hereinafter Amended Settlement Agreement], available at [http://www.googlebooksettlement.com/r/view\\_settlement\\_agreement](http://www.googlebooksettlement.com/r/view_settlement_agreement).

<sup>16</sup> Increasing Access to Books: The Google Books Settlement, <https://sites.google.com/a/pressatgoogle.com/googlebooksettlement/home> (last visited Feb. 17, 2010); see also Jessica E. Vascellaro & Jeffrey A. Trachtenberg, *Google Seeks Hearing Delay*, WALL ST. J., Sept. 23, 2009, at B6.

<sup>17</sup> Amended Settlement Agreement, *supra* note 15, at art. 2.1(c) (“[The Books Rights Registry is] responsible for locating and collecting information from Rightsholders, identifying and coordinating payments to Rightsholders, and otherwise representing the interests of Rightsholders under this Amended Settlement Agreement.”).

<sup>18</sup> *Id.* at art. 2.1(b).

<sup>19</sup> *Id.* at art. 2.1(a).

<sup>20</sup> *Id.* at arts. 2.1(a), 2.2.

<sup>21</sup> Fair use of a copyrighted material is a defense to copyright infringement. Courts must balance four factors when determining whether an unauthorized use of a copyrighted material is fair use: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” 17 U.S.C. § 107 (2006).

<sup>22</sup> Band, *supra* note 8, at 293 (“Law professors condemned Google for ‘abandoning’ its fight for fair use, and establishing a pay-per-use precedent for accessing digital works.”); but see James Grimmelman, *How to Fix the Google Book Search Settlement*, 12 NO. 10 J. INTERNET L. 1, 12 (2009) (encouraging acceptance of the settlement because, although it does not permit fair use defenses, it is best option for all affected parties).

compulsory license through the judiciary,”<sup>23</sup> which has “traditionally been the domain of Congress.”<sup>24</sup> The Copyright Office further contended that, “Congress is much better situated than the judiciary to consider such important and far-reaching changes to the copyright system.”<sup>25</sup> This Comment assumes that Google was correct in not risking a court’s decision regarding whether its digital library project’s practices fall under fair use. As much as a court may want to create a practical solution to the problem copyright law poses to digital library projects, it would require what some call “legislating from the bench.”<sup>26</sup>

This Comment will focus on certain proposed legislative changes that would provide a copyright exemption for digital libraries. Part II will provide a historical background of copyright law and argue that the traditional purpose of copyright law has been primarily to benefit the public. Part II will also describe how Congress sculpted copyright law to be flexible in the face of changes in technology and social need. Part III will argue that copyright law has failed in this regard in the specific area of digital technology. It will use the Google Books project as an example of how current copyright law does not adequately address society’s need for digital libraries. Part IV will propose how Congress can amend the Copyright Act<sup>27</sup> to meet those needs by creating an exemption for digital libraries from copyright liability. Finally, Part V assesses two types of problems associated with such a legislative proposal.

## II. THE PURPOSE OF COPYRIGHT LAW IN THE U.S.

In the U.S., a copyright is automatically created when a copyrightable work is fixed in a tangible medium.<sup>28</sup> Copyright protection provides an author a “limited monopoly” over his or her work for a certain period.<sup>29</sup> In order to sue an infringer, however, the author must deposit two complete copies of the work, an executed copyright application, and an application fee

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<sup>23</sup> *Competition and Commerce in Digital Books: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2-3 (2009) (statement of Marybeth Peters, Reg. of Copyrights, United States Copyright Office).

<sup>24</sup> *Id.* at 5.

<sup>25</sup> *Id.* at 8.

<sup>26</sup> “Legislating from the Bench” refers to the idea that some judges create novel law through judicial decision as opposed to applying existing law. See Michael L. Buenger, *Friction By Design: The Necessary Contest of State Judicial Power and Legislative Policy Making*, 43 U. RICH. L. REV. 571, 573 (2009); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 470 (2009); Michael J. Gerhardt, *How a Judge Thinks*, 93 MINN. L. REV. 2185, 2201 (2009).

<sup>27</sup> Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in scattered sections of 17 U.S.C.).

<sup>28</sup> 17 U.S.C. § 201(a) (2006).

<sup>29</sup> 17 U.S.C. §§ 106, 302 (2006).

with the Copyright Office.<sup>30</sup> The copyrighted work must be both original and fixed in a tangible medium of expression.<sup>31</sup> The latter requirement reflects the principle that copyright does not protect ideas but merely protects the particular expression of those ideas.<sup>32</sup> Copyright protection provides the author certain enumerated exclusive rights, which include the reproduction of the work in copies.<sup>33</sup> Accordingly, copyrights are limited both in duration and in scope. They are limited in scope because they are not created for the author's benefit,<sup>34</sup> but rather for the public's benefit.<sup>35</sup> A brief examination of the historical origins of American copyright law demonstrates this.

The invention of the printing press led to the issuance of the first copyright in 1469.<sup>36</sup> At the time, English monarchs would grant copyrights to printing guilds based on favor.<sup>37</sup> In its infancy, therefore, copyright protection was a function of privilege as opposed to right. In fact, authors were not recognized as having a proprietary right in their work under English law until 1710.<sup>38</sup> In that year, Parliament enacted the Statute of Anne, also known as the Copyright Act of 1709.<sup>39</sup> The Act itself, despite its status while under the "beguiling disguise of the 'encouragement of learning,'"<sup>40</sup> ended the monopolies granted to various printing companies and instead vested authors with proprietary rights in their works for a

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<sup>30</sup> 17 U.S.C. § 408 (2006).

<sup>31</sup> 17 U.S.C. § 102(a) (2006).

<sup>32</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344-45 (1991) (stating that no one may copyright facts or ideas); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985) (stating that a discovery in itself is not copyrightable).

<sup>33</sup> 17 U.S.C. § 106 (2006) (providing that authors have the right to reproduce the work in copies or photocopies, to prepare derivative works, to distribute copies or photocopies publicly, to perform the work publicly, and to display the work publicly).

<sup>34</sup> *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994) ("The primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'") (citations omitted); *Id.* at 526 ("[Copyright privileges] are limited in nature and must ultimately serve the public good.").

<sup>35</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (finding that the ultimate aim of Copyright law was stimulating artistic creativity for the public's benefit); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 678 (7th Cir. 1986) ("The purpose of federal copyright protection is to benefit the public by encouraging works in which it is interested.").

<sup>36</sup> Tucker Griffith, Comment, *Beyond the Perfect Score: Protecting Routine-Oriented Athletic Performance with Copyright Law*, 30 CONN. L. REV. 675, 683 (1998).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> John Feather, *The Book Trade in Politics: The Making of the Copyright Act of 1710*, 8 PUBLISHING HIST. 19, 39 (1980).

<sup>40</sup> *Id.* at 39.

limited period.<sup>41</sup> The Statute of Anne applied to books, and gave authors the exclusive right to print and reprint their books.<sup>42</sup>

In the U.S., copyright law developed as an outgrowth of the Statute of Anne.<sup>43</sup> The U.S. Constitution provides that "the Congress shall have Power ... to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>44</sup> The first Congress exercised its power to create the first U.S. copyright law in 1790.<sup>45</sup> Similar to the Statute of Anne, which was meant for "the encouragement of learning,"<sup>46</sup> the first copyright law in the U.S. was grounded in an effort to promote public knowledge.<sup>47</sup> The copyright statute of 1790 was far more limited than the copyright laws of today, and only provided copyright protection for books, maps, and charts.<sup>48</sup> For the most part, Congress deemed the expansion of copyright protection appropriate "as long as the emphasis of the extension was placed on the public-welfare implications."<sup>49</sup>

In 1909, Congress passed a more extensive copyright act that extended protection to types of works such as dramatic performances.<sup>50</sup> Despite this expansion of copyright protection, however, the original purpose of copyright law, as found in the Statute of Anne and the Constitution, was still alive and well, as evidenced in a report accompanying the Copyright Act of 1909.<sup>51</sup> Justice Stevens cited the House Report for the 1909 Act in *Sony Corp. of America v. Universal City Studios, Inc.*<sup>52</sup> while discussing the purpose of copyright law. It read:

The enactment of copyright legislation by Congress under the terms of the Constitution is not based upon any natural right that the author has in his writings, . . . but upon the ground that the welfare of the public will be served and progress of science and useful arts will be promoted by securing to authors for limited periods the exclusive rights to their writings.

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<sup>41</sup> *Id.*

<sup>42</sup> Michael W. Carroll, *The Struggle for Music Copyright*, 57 FLA. L. REV. 907, 923 (2005).

<sup>43</sup> See *Eldred v. Ashcroft*, 537 U.S. 186, 232-33 (2003) (citations omitted).

<sup>44</sup> U.S. CONST. art. I, § 8, cl. 8.

<sup>45</sup> H.R. REP. NO. 94-1476 (1976), reprinted in 1976 U.S.C.C.A.N. 5659 (opening statement to the House Report committee notes for the library exemption found in the Copyright Act).

<sup>46</sup> Feather, *supra* note 39.

<sup>47</sup> U.S. CONST. art. I, § 8.

<sup>48</sup> See Griffith, *supra* note 36, at 686.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> H.R. REP. NO. 60-2222 (1909).

<sup>52</sup> 464 U.S. 417, 429 (1984) (citing H.R. REP. NO. 60-2222, *supra* note 51).

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In enacting a copyright law Congress must consider . . . two questions: First, how much will the legislation stimulate the producer and so benefit the public; and, second, how much will the monopoly granted be detrimental to the public? The granting of such exclusive rights, under the proper terms and conditions, confers a benefit upon the public that outweighs the evils of the temporary monopoly.<sup>53</sup>

Justice Stevens further explained: “The monopoly created by copyright thus rewards the individual author in order to benefit the public.”<sup>54</sup> Public benefit is what the framers of the Constitution envisioned when they empowered Congress to establish the boundaries of copyright law. This task required Congress to strike a “difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand.”<sup>55</sup> One commentator described the essence of copyright law as being the advancement of three fundamental principles: “(1) the promotion of learning, (2) the provision of public access, and (3) the protection of the public domain.”<sup>56</sup>

The House Report for the 1909 Act provides useful guidance regarding what Congress should consider when drafting copyright laws.<sup>57</sup> Specifically, the House Report emphasized that Congress must maintain the balance between public benefit and private right.<sup>58</sup> As such, Congress should weigh the appropriateness of any proposed legislative amendment to the Copyright Act.

In 1976, Congress passed the most comprehensive revision of the Copyright Act to date.<sup>59</sup> The 1976 Act did away with such

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<sup>53</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (citing H.R. REP. NO. 60-2222, *supra* note 51, at 7).

<sup>54</sup> *Sony*, 464 U.S. at 477 (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975); *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127-28 (1932); H.R. REP. NO. 60-2222, *supra* note 51, at 7)); *see also* Craig Joyce & L. Ray Patterson, *Copyright in 1791: An Essay Concerning the Founders' View of the Copyright Power Granted to Congress in Article I, Section 8, Clause 8 of The U.S. Constitution*, 52 EMORY L.J. 909, 940 (2003) (“What is protected is not so much the right of the copyright holder to exploit the work as the right of the people of the United States to learn from it.”).

<sup>55</sup> *Sony*, 464 U.S. at 429.

<sup>56</sup> Kevin Lemeley, *The Innovative Medium Defense: A Doctrine to Promote the Multiple Goals of Copyright in the Wake of Advancing Digital Technologies*, 110 PENN ST. L. REV. 111, 114 (2005).

<sup>57</sup> *See generally* H.R. REP. NO. 60-2222, *supra* note 51, at 7.

<sup>58</sup> H.R. REP. NO. 60-2222, *supra* note 51.

<sup>59</sup> 17 U.S.C. § 101 (2006).

prior rigid requirements such as publication and instead adopted more flexible tests like the idea/expression distinction and utilitarian/non-utilitarian distinction.<sup>60</sup> The idea/expression distinction limits copyright law protection to the specific expression of an idea but not the idea itself.<sup>61</sup> The utilitarian/non-utilitarian distinction prevents purely utilitarian articles such as hubcaps or computer menus from being copyrighted.<sup>62</sup>

The 1976 Act codified the fair use factors to help ensure that certain uses of copyrighted materials were not precluded.<sup>63</sup> In addition, the 1976 Act codified a library exemption, which provided physical libraries a safe harbor from copyright infringement suits.<sup>64</sup> Congress, furthermore, left certain areas of the Act open to interpretation in order to allow for changes in technology.<sup>65</sup>

The House Report for the 1976 Act recognized that copyright law needed to be able to adapt to changes in technology.<sup>66</sup> The report describes how “changes in technology have affected the operation of the copyright law... and [how] the increasing usage of information storage and retrieval devices, communications satellites, and laser technology promises even greater changes in the near future.”<sup>67</sup> Congress recognized, even then, that copyright law must continue to adapt to changes in technology.<sup>68</sup> The report went on to recognize that “technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and [that] the business relations between authors and users have evolved new patterns.”<sup>69</sup>

Despite Congress’ best intentions, however, copyright law is not as flexible as the drafters of the 1976 Act may have hoped. In fact, “[t]he only new subject matters added to the copyright realm since 1976 have arrived through statutory amendments,

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<sup>60</sup> See Griffith, *supra* note 36, at 688.

<sup>61</sup> See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 350 (1991).

<sup>62</sup> See *Fabrica Inc. v. El Dorado Corp.*, 697 F.2d 890, 893 (9th Cir. 1983); see also Griffith, *supra* note 36, at 696 (“To allow copyright protection for a utilitarian object would create monopolized control over something which may be more beneficial to society if it were in the public domain earlier.”).

<sup>63</sup> 17 U.S.C. § 107 (2006).

<sup>64</sup> 17 U.S.C. § 108 (2006).

<sup>65</sup> Griffith, *supra* note 36, at 689.

<sup>66</sup> See H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 (discussing the significant technological changes that made the 1909 Copyright act obsolete).

<sup>67</sup> *Id.*

<sup>68</sup> Pamela Samuelson, *Preliminary Thoughts on Copyright Reform*, 2007 UTAH L. REV. 551, 552 (2007) (“Virtually every week a new technology issue emerges, presenting questions that existing copyright rules cannot easily answer.”).

<sup>69</sup> H.R. REP. NO. 94-1476, *supra* note 66.

not through common law interpretation of the 1976 Act's broad subject matter provision."<sup>70</sup>

### III. COPYRIGHT LAW AND DIGITAL LIBRARIES

One of the most significant technological developments affecting the operation of copyright law is digital scanning. Digital scanning coupled with character recognition software allows users to convert the text of a physical book into digital form. Once in digital form, a copyrighted work is permanently preserved, but also reproduced very easily. New technological developments such as digital scanning create difficult questions for courts trying to apply copyright law, and digital libraries in particular push the outer limits of what current copyright law permits.<sup>71</sup> On the one hand, digital libraries have tremendous potential for public benefit.<sup>72</sup> On the other hand, creating large-scale digital libraries arguably violates copyright law.<sup>73</sup>

#### A. *The Google Books Project*

A perfect example of the difficulties technologies like digital scanning pose for courts is Google's Book Search project ("Google Books"). In December of 2004, Google announced its plan to commence its digital library project.<sup>74</sup> Google announced that it will scan all books from the library collections of Harvard, Stanford, the University of Michigan, the University of Oxford, and the New York Public Library.<sup>75</sup> The project's goal was to create a searchable virtual card catalog of all the world's books.<sup>76</sup> The Google Books site itself states that "[t]he Library Project's aim is simple: make it easier for people to find

<sup>70</sup> Samuelson, *supra* note 68, at 551-52.

<sup>71</sup> See Nari Na, *Testing the Boundaries of Copyright Protection: The Google Books Library Project and the Fair Use Doctrine*, 16 CORNELL J.L. & PUB. POL'Y 417, 434-47 (2007) (arguing that Google Books should fall under the fair use exception even though current copyright jurisprudence is unclear if fair use would apply in this context); see also Frank Pasquale, *Internet Nondiscrimination Principles: Commercial Ethics For Carriers and Search Engines*, 2008 U. CHI. LEGAL F. 263, 292 (2008) ("As a matter of fair use law, the Google Book Search project is a coin toss.").

<sup>72</sup> Na, *supra* note 71, at 419 ("[Google Books] will increase consumer access to books by providing a new medium through which consumers can gain information about books that might have otherwise been overlooked."); Bracha, *supra* note 6, at 1819 ("Digital libraries allows us to aggregate, store, and make available a vast amount of information for a fraction of the cost and space requirements of traditional libraries. . . . An Internet-based digital library can overcome geographic limitations and offer access to millions of users worldwide.").

<sup>73</sup> See *supra* note 12 and accompanying text.

<sup>74</sup> Press Release, Google, Google Checks out Library Books, (Dec. 14, 2004), [http://www.google.com/press/pressrel/print\\_library.html](http://www.google.com/press/pressrel/print_library.html) (last visited Apr. 9, 2010).

<sup>75</sup> *Id.*

<sup>76</sup> Google Books Library Project, *supra* note 10.

relevant books – specifically, books they wouldn't find any other way such as those that are out of print – while carefully respecting authors' and publishers' copyrights.”<sup>77</sup> However, despite Google's seemingly noble purpose and its stated intention to respect the boundaries of copyright law, numerous publishers—including the Authors Guild—have sued Google for copyright infringement.<sup>78</sup> These lawsuits, whose plaintiffs also include international publishers,<sup>79</sup> arise out of Google's scanning and reproducing portions of books without explicit authorization from their copyright holders.

### B. How Google Books Works

The Google Books website allows users to type in a word or phrase, and find books that contain that word or phrase.<sup>80</sup> Each result provides basic information about the book such as its author, length, and subject material.<sup>81</sup> For many of the books, Google also provides links to locations where one can borrow or purchase the book.<sup>82</sup> One of the most controversial aspects of Google Books is that it allows users to view actual portions of the books. Depending on the book, Google Books allows users to see one of three versions of the digital copy of the book: It provides a full view, limited preview, or snippet view of the book.<sup>83</sup> For certain books, however, Google Books does not provide a preview. Google describes the different views as follows:

Full view: You can see books in Full View if the book is out of copyright, or if the publisher or author has asked to make the book fully viewable. The Full View allows you to view any page from the book, and if the book is in the public domain, you can download, save and print a PDF version to read at your own pace.

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<sup>77</sup> *Id.*

<sup>78</sup> See cases cited *supra* note 13.

<sup>79</sup> Gillian Wong, *China Writers Say Google Ready to Settle Book Row*, THE SEATTLE TIMES, Jan. 10, 2010, [http://seattletimes.nwsource.com/html/business/technology/2010755652\\_apaschinago.html](http://seattletimes.nwsource.com/html/business/technology/2010755652_apaschinago.html) (reporting that Google plans to settle with Chinese authors for scanning their books into a digital library); *La Martiniere Groupe v. Google*, Tribunal De Grande Instance [T.G.I.] [ordinary court of original jurisdiction] Paris, Dec. 18, 2009, Cass. 3e civ. (court ordered Google to pay €300,000 (approx. \$385,410) to French publisher for violating French copyright laws by displaying French Books in its Google Books Project).

<sup>80</sup> Google Books, <http://books.google.com> (last visited Apr. 9, 2010).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> About Google Books, <http://books.google.com.au/intl/en/googlebooks/about.html> (last visited Apr. 9, 2010).

Limited preview: If the publisher or author has given us permission, you can see a limited number of pages from the book as a preview.

Snippet view: The Snippet View, like a card catalog, shows information about the book plus a few snippets – a few sentences to display your search term in context.

No preview available: Like a card catalog, you're able to see basic information about the book.<sup>84</sup>

### C. Opt-In vs. Opt-Out Systems

One of the easiest ways to turn a physical book into digital text is to first scan the book and then use optical character recognition (“OCR”) software to convert the images into digital text. When scanning the books, the digital library has two options: (1) it can ask permission to scan and use each book from its author before scanning the book, or (2) it can scan the book and then simply allow the authors to remove their work from a digital library.<sup>85</sup>

The first method, better known as the opt-in system, is a practical system for digital libraries that only intend to have a small collection. The opt-in system, however, is not feasible for creating an extensive or universal digital library. First, the opt-in system requires the copyright holder’s permission.<sup>86</sup> This is often impossible in situations where the work is “orphaned” – where the copyright holder cannot be determined or found.<sup>87</sup> Second, obtaining permission from each author is often an extremely long and costly process. Digital libraries often find it difficult to track down authors, and even if they do, contract negotiations can often prove fruitless and unproductive.<sup>88</sup>

The second method, better known as the opt-out system, is problematic because it may constitute a prima facie case of copyright infringement. By scanning a book still under copyright, the creator of the digital library is “copying” a copyrighted work.<sup>89</sup> The fact that the copy is in digital form does not matter.<sup>90</sup> Courts have consistently held that scanning

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<sup>84</sup> What you’ll see when you search on Google Books, <http://books.google.com/googlebooks/screenshots.html> (last visited Apr. 9, 2010).

<sup>85</sup> See Band, *supra* note 8, at 235-36.

<sup>86</sup> See Hetcher, *supra* note 2, at 3 (citing U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006)).

<sup>87</sup> *Id.*

<sup>88</sup> See *id.* at 4 (noting the difficulty to obtain permission for orphaned works by purchasing, licensing, or gaining free access).

<sup>89</sup> See 17 U.S.C. § 101 (2006) (“‘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.”).

<sup>90</sup> See Jeanne English Sullivan, *Copyright for Visual Art in the Digital Age: A Modern Adventure in Wonderland*, 14 CARDOZO ARTS & ENT. L.J. 563, 586 (1996)

digital copies onto a computer's memory can constitute infringement of a copyright holder's right to reproduce.<sup>91</sup> Accordingly, digital libraries using an opt-out system will need to rely on the fair use doctrine<sup>92</sup> to shield them from copyright infringement claims.<sup>93</sup> Google chose to use the opt-out system.<sup>94</sup> As a result, it was sued by the Authors Guild and others who claimed Google infringed upon their copyrights.<sup>95</sup> If the cases did not settle, Google would have relied heavily if not exclusively on fair use in its defense. Unfortunately for other digital libraries, the fair use doctrine remains largely unpredictable due to lack of precedent in this realm.<sup>96</sup> As such, future copyright infringement cases against digital libraries will proceed with very uncertain futures.

Google Books is not the only digital library project constrained by copyright law. Currently, hundreds of digital libraries are actively scanning books and journals.<sup>97</sup> For example, The Million Book Project, led by the Carnegie Mellon computer science department, exceeded its goal of scanning a million books by 2007.<sup>98</sup> This project intends to provide free-to-read online access to all the books that it scans.<sup>99</sup> However, it only scans books printed before 1923 in order to avoid copyright liability.<sup>100</sup> Because it scans only old books, the Million Book Project does not need to obtain authors'

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("According to the *White Paper on Intellectual Property Rights*, '[i]t has long been clear under U.S. law that the placement of copyrighted material into a computer's memory is a reproduction of that material (because the work in memory then may be, in the law's terms, 'perceived, reproduced, or . . . communicated . . . with the aid of a machine or device').")

<sup>91</sup> See *NLFC, Inc. v. Devcom Mid-Am., Inc.*, 45 F.3d 231 (7th Cir. 1995); *Indep. Serv. Orgs. Antitrust Litig.*, 910 F. Supp. 1537 (D. Kan. 1995).

<sup>92</sup> See *supra* notes 12, 21 and accompanying text.

<sup>93</sup> See *supra* note 12, 71 and accompanying text.

<sup>94</sup> Band, *supra* note 8, at 235-36.

<sup>95</sup> Emily Proskine, Note, *Google's Technicolor Dreamcoat: A Copyright Analysis of the Google Book Search Library Project*, 21 *BERKELEY TECH. L.J.* 213, 219-20 (2006) (noting that the Authors Guild demands damages for Google's library project infringement).

<sup>96</sup> *Id.* at 239; see also Hanratty, *supra* note 12, ¶ 33; Pasquale, *supra* note 71, at 292 ("Experts have no idea how the courts will rule on it, and the leading precedents are in conflict.")

<sup>97</sup> Online Education Database, *250+ Killer Digital Libraries and Archives*, Oct. 17, 2007, <http://oedb.org/library/features/250-plus-killer-digital-libraries-and-archives>.

<sup>98</sup> Carnegie Mellon Libraries, *Frequently Asked Questions about the Million Book Project*, [http://search.library.cmu.edu/rooms/documents/libraries-and-collections/Libraries/MBP\\_FAQ.html#current](http://search.library.cmu.edu/rooms/documents/libraries-and-collections/Libraries/MBP_FAQ.html#current) (last updated Apr. 9, 2007).

<sup>99</sup> *Id.*

<sup>100</sup> See PETER YU, *INTELLECTUAL PROPERTY AND INFORMATION WEALTH: COPYRIGHT AND RELATED RIGHTS* 151 (2007) (finding that Books published prior to 1923 are in the public domain and not subject to copyright infringement).

permission, but it can only access a small fraction of available books.

#### *D. International Analysis of Orphaned Works Problem*

The issues facing digital libraries discussed herein are not uniquely American. The European Commission recognized the need to preserve cultural and scientific works in a virtual library and launched the Digital Libraries Initiative (the “Initiative”) in 2005.<sup>101</sup> In August of 2005, the European Commission issued a report<sup>102</sup> regarding the Initiative that recognized many of the same problems discussed herein, including orphaned works and the need to harmonize Europe’s copyright law with the public need for digital libraries.<sup>103</sup> By 2007, however, less than one percent of the collections of Europe’s cultural institutions had been made available in digital format.<sup>104</sup>

In December 2009, the High Level Expert Group (“Group”) issued a final report summarizing the group’s recommendations regarding difficult issues facing digital libraries, including copyright problems.<sup>105</sup> The Group recommended that member states create a mechanism to allow digital libraries to use orphaned works if the library has conducted a diligent good faith search for the right holder.<sup>106</sup> It further recommended that member states create databases and Rights Clearance centers which would track orphaned and out-of-print works. One such project is the ARROW (“Accessible Registries of Rights

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<sup>101</sup> Europe’s Information Society, Digital Libraries: Background, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/background/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/background/index_en.htm) (last visited Apr. 10, 2010).

<sup>102</sup> *Commission of the European Communities Recommendation on the Digitisation and Online Accessibility of Cultural Material and Digital Preservation*, COM (2006) 3808 final (Aug. 24, 2006), available at [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/recommendation/comm\\_recomm/en.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/comm_recomm/en.pdf).

<sup>103</sup> *Id.* Among other things, the report recommended that member nations “make provision in their legislation so as to allow multiple copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of Community and international legislation on intellectual property rights.”

<sup>104</sup> EUROPEAN COMMISSION, INFORMATION SOCIETY AND MEDIA, DIGITAL LIBRARY INITIATIVE FACT SHEET, EUROPE’S CULTURAL AND SCIENTIFIC HERITAGE AT A CLICK OF A MOUSE (2007), [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/fact\\_sheet/fact\\_sheet\\_2007.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/fact_sheet/fact_sheet_2007.pdf).

<sup>105</sup> HIGH LEVEL EXPERT GROUP ON DIGITAL LIBRARIES, FINAL REPORT, DIGITAL LIBRARIES: RECOMMENDATIONS AND CHALLENGES FOR THE FUTURE (2009), [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/hleg/reports/hlg\\_final\\_report09.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/reports/hlg_final_report09.pdf).

<sup>106</sup> *Id.*; see also Memorandum of Understanding from the European Comm’n on Diligent Search Guidelines for Orphan Works (Jun. 4, 2008) (on file with the European Comm’n) (establishing the due diligence criteria for a good faith effort of identifying a right holder).

Information and Orphan Works”) project, which aims to clarify the rights status of orphaned and out-of-print works, so that eligible works are easily cleared for digitization and made available to the public.<sup>107</sup> The Group’s many recommendations generally involved the tracking of orphaned works’ rights holders, and avoided making significant changes to the copyright framework. Nevertheless, the Group recognized the ongoing challenge of reviewing the legal framework surrounding copyright and trying to figure out how to “bring more in-copyright works online, in particular out-of-print and orphan works.”<sup>108</sup>

#### IV. DIGITAL LIBRARY EXEMPTION FROM COPYRIGHT LAW

It is estimated that only twenty percent of the books currently in existence were created before 1923.<sup>109</sup> Furthermore, of the eighty percent of books created after 1923, only five percent of them are currently printed.<sup>110</sup> This leaves approximately seventy-five percent of books in a twilight zone where they are not yet in the public domain, but are no longer in print. Google Books claims that it increases access to this seventy-five percent by serving “as a comprehensive index that enables people to discover all books.”<sup>111</sup> While it is only one example of how digital libraries can benefit the public, Google Books is indicative of the rise of digital libraries as a technological advancement which calls for legislative protection.

Some commentators believe that the fair use doctrine should provide sufficient protection for digital libraries.<sup>112</sup> The fair use

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<sup>107</sup> ARROW Project, About Arrow, <http://www.arrow-net.eu/about-arrow> (last visited Apr. 10, 2010) (“ARROW aims in particular to support the EC’s i2010 Digital Library Project by finding ways to identify rightholders, rights and clarify the rights status of a work including whether it is orphan or out of print. This will enable libraries as well as other users to obtain information on who are the pertinent rightholders, which are the relevant rights concerned, who owns and administers them and how and where they can seek permission to digitise and / or make available the work to user groups.”).

<sup>108</sup> HIGH LEVEL EXPERT GROUP ON DIGITAL LIBRARIES, *supra* note 105, at 6 (“[F]or cultural institutions there is the need for copyright reform and further harmonisation at European level to create the appropriate conditions for large scale digitisation.”).

<sup>109</sup> Google Librarian Center, *Google Book Search: An Introduction*, [http://www.google.com/librariancenter/articles/0606\\_01.html](http://www.google.com/librariancenter/articles/0606_01.html) (last visited Apr. 9, 2010).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> See Proskine, *supra* note 95, at 232 (arguing that it is “likely that the Google Library Project could be deemed a fair use”); Travis, *supra* note 7, at 91-92 (arguing that Google Books project is fair use). *But see* sources cited *supra* note 12.

doctrine, however, is unpredictable, and the judiciary is generally reluctant to expand copyright protections without explicit legislative guidance.<sup>113</sup> As Justice Stevens stated in *Sony*:

Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials. Congress has the constitutional authority and the institutional ability to fully accommodate the varied permutations of competing interests that are inevitably implicated by new technology.<sup>114</sup>

Thus, even though a particular case may fall under the protections of fair use, legislative action is still the best way to balance the needs of the public against the interest of the copyright holders.

This Comment proposes a specific amendment to the Copyright Act, which would provide an exemption for digital libraries. This amendment has two parts. The first is a legislative amendment to the Copyright Act creating a specific exemption for digital libraries (the “Exemption”), and the second calls for the creation of a federal registry for digital libraries (the “Registry”). The Exemption is modeled after the currently existing Library Exemption, which provides physical libraries protection from copyright infringement under specific conditions.<sup>115</sup> The Registry is modeled after the Federal Trade Commission’s Do Not Call Registry.<sup>116</sup>

#### *A. Library Exemption as a Model for Legislative Change*

The Library Exemption, codified as Section 108 of the Copyright Act explicitly exempts libraries and archives from liability for copyright infringement under certain circumstances.<sup>117</sup> As a result, libraries can operate to the public’s benefit without constantly worrying about copyright infringement. Even though library activities tend to conflict with

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<sup>113</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 431 (1984).

<sup>114</sup> *Sony*, 464 U.S. at 431.

<sup>115</sup> 17 U.S.C. § 108 (2006).

<sup>116</sup> Federal Trade Commission National Do Not Call Registry Information, <http://www.ftc.gov/donotcall> (last visited Apr. 9, 2010). The Do Not Call Registry, maintained and enforced by the Federal Trade Commission, is a voluntary Opt-In registry that keeps a free list of personal phone numbers that telemarketers may not call. The national registry also makes it easier and more efficient for individuals to stop receiving telemarketing calls that they do not want. *Id.*

<sup>117</sup> 17 U.S.C. § 108 (2006).

the profit oriented goals of publishers, Congress recognized the important public benefit libraries provide and drafted the exemption with this in mind.<sup>118</sup>

Under the Library Exemption, a library can reproduce one copy of a work and distribute that copy without being liable for copyright infringement, if the following conditions are satisfied:

The reproduction or distribution is made without any purpose of direct or indirect commercial advantage; Any reproduction or distribution made by an employee of the library is being done within the scope of their employment; The collections are open to the public, or available to those other than researchers doing research in a specialized field; and There is a notice of copyright on the work.<sup>119</sup>

In addition, under certain circumstances, a library can produce up to three copies.<sup>120</sup> To preclude the practice of using a library as a front for a commercial copying operation, the legislative history forbids “systematic” photocopying activities.<sup>121</sup> In other words, the Library Exemption precludes a person from requesting different parts of a copyrighted work in pieces to create an entire copy of the work. This preclusion minimizes potential commercial impact on copyright holders, and is but one of several ways that Congress has tried to maintain the balance between private rights and the public benefit. Congress also included language that the copying must be “without . . . direct or indirect commercial advantage” and that the library must be “open to the public.”<sup>122</sup> These clauses serve to ensure that libraries benefit the public as much as possible while mitigating the negative effects on copyright holders. As a result, § 108 allows libraries to operate outside the bounds of traditional copyright to a limited extent.

### *B. Proposed Exemption for Digital Libraries*

This section proposes that Congress amend the Copyright Act and create an exemption for digital libraries similar to the physical library exemption codified in Section 108. The Exemption’s aim will be to facilitate the development of digital libraries to benefit the public at large. The Exemption will try to

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<sup>118</sup> Travis, *supra* note 7, at 123.

<sup>119</sup> 17 U.S.C. § 108 (2006).

<sup>120</sup> *Id.*

<sup>121</sup> Hanratty, *supra* note 12, ¶ 9.

<sup>122</sup> 17 U.S.C. § 108(a)(1).

accomplish its goal while minimizing the burden and commercial injury to copyright holders. It will draw clear lines for digital libraries and allow them to work within the legal confines of copyright law without a need to create their own registry service as Google plans to do for Google Books under its Settlement.<sup>123</sup>

This legislative proposal is composed of four sections: Section (A) outlines how copyrighted works can be reproduced under the Exemption, Section (B) outlines when and how copyrighted works can be published and displayed to the public, Section (C) outlines the registry's role, and Section (D) provides the specific procedural requirements a digital library must comply with in order to enjoy protection under the Exemption.

#### THE EXEMPTION:

(A) *Reproduction.* It shall not be an infringement of copyright for a registered digital library to scan<sup>124</sup> a copyrighted work for the purpose of developing a digital collection if and only if the conditions specified by this section are satisfied:

- i. The collections of the digital library are (1) open to the public, or (2) available not only to researchers affiliated with the digital library or institution of which it is a part, but also to other persons doing research in a specialized field;
- ii. The digital copies of the work contain a digital watermark on each page indicating that the work is copyrighted;
- iii. Any scanning of a copyrighted work shall be done by employees of the digital library within the scope of employment with the digital library, and only to the extent necessary to advance the digital library's goals.
- iv. The digital library has complied with the procedural requirements set forth in Section (D), including but not limited to registering with the federal Registry.

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<sup>123</sup> Amended Book Settlement, *supra* note 15.

<sup>124</sup> Within this chapter, scan shall mean and include digital reproduction of any kind including but not limited to scanning, digitally photographing, and typing the text of the works.

v. There is no official indication in the Registry that the copyright holder has objected to having their work scanned by a registered digital library.

(B) *Publishing and Display.* A digital library may only publish or display copyrighted works in accordance with the following:

i. A digital library shall not publish or display a copyrighted work unless:

a) The digital library has complied with the procedural requirements set forth in Section (D), including but not limited to registering with the federal Registry.

b) The Registry has not listed the work as being excluded from display by a digital library; and

ii. For ten years from the date that a digital library files an official request with the Registry to scan a given copyrighted work, the digital library shall only publish or display such works as follows:

a) A digital library shall not reveal more than ten lines of text from a copyrighted work resulting from each search.

b) The number of views for each copyrighted work shall be limited. An individual may only view portions of the same copyrighted work three times per 10 days.

c) The digital library has taken reasonable efforts to prevent systematic copying of copyrighted works it displays in limited form.

iii. Ten years after any digital library has filed an official request with the Registry to scan a given copyrighted work as provided in Section (A), any digital library may publish the work in its entirety if there is no objection by the copyright holder filed with the Registry.

Section (A) permits the digital reproduction of copyrighted works by certain types of organizations that will provide a

benefit to the public. In exchange for compliance, participating digital libraries will enjoy the protection of the Exemption. Section (B) controls the display of the copyrighted work after a digital library has scanned it. Subsection (i) sets forth some general prerequisites that a digital library must meet before displaying copyrighted works. Subsections (ii) and (iii) create a ten-year period in which only small portions of a copyrighted digital text may be displayed. During the ten-year period, the digital library can scan the books (if there is no objection), index them, and make them searchable. Therefore, during the ten-year period, digital libraries can perform an indexing function by allowing users to view small portions of the copyrighted text without destroying the commercial potential of the copyright holder. If the copyright holder does not indicate that he objects to the complete display of the work within the ten-year period, however, then there will be a presumption that a registered digital library can display the work in its entirety. This will help resolve the “orphaned works” problem. Of course, the existence of the Registry will not prevent authors from contacting a digital library and striking a private deal regarding the exclusive publication of their work. Both Sections (A) and (B) attempt to balance the public’s interest while safeguarding the copyright holder’s commercial interests.

While the Exemption provides digital libraries much needed protection from copyright infringement claims, it also places an increased burden on copyright holders seeking to enforce their rights. A federal Registry will be created, and all digital libraries would need to register in order to enjoy the protection of the Exemption. The Registry is modeled after the Do Not Call Registry, which allows individuals to add their telephone numbers free of charge.<sup>125</sup> Once a number is added to the Do Not Call Registry, telephone solicitors must cease calling the number within 31 days.<sup>126</sup>

## THE REGISTRY

(C) *Registry Functions.* There shall be a Registry created within and maintained by the Copyright Office of the Library of Congress. The Registry shall perform the following functions:

The Registry shall maintain a list of all registered digital libraries.

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<sup>125</sup> See *supra* note 116 and accompanying text.

<sup>126</sup> *Id.*

The Registry shall maintain a list of copyrighted works where the copyright holder has objected to their work being scanned by a digital library.

The Registry shall maintain a list of all of the copyrighted works where the copyright holder has objected to their work being displayed or published.

The Registry shall maintain a list of copyrighted works scanned by each digital library.

(D) *Procedural Requirements.*

A digital library shall be exempt from copyright infringement for reproduction, display, or publication of copyrighted works only if:

The digital library has registered with the federal Registry,<sup>127</sup> and

The digital library stays in good standing by submitting a report of the works that it has scanned every 90 days to the Registry.

A copyright holder may notify the Registry at anytime that he does not want his work to be scanned by a digital library.

Once the Registry has received notification from the copyright holder that he does not want his work scanned, the Registry will add that work to the list described in Section (C)(ii) within 30 days.

A digital library may not scan a work listed in Section (C)(ii).

If a digital library has scanned a work which is subsequently listed in Section (C)(2), the digital library must delete all digital copies of the work within 45 days from when work was added to the list described in Section (C)(2).

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<sup>127</sup> There would be specific requirements that a digital library would have to meet in order to qualify for registration. The requirements themselves, however, are beyond the scope of this Comment.

A copyright holder may notify the Registry at any time before the ten-year period has expired that he does not want his work to be published either in its entirety or as provided in Section (B)(ii).

Once the Registry has received notification from the copyright holder that he does not want his work to be published in its entirety, the Registry will add that work to the list described in Section (C)(iii).

A digital library may not publish a work listed in Section (C)(iii).

If a digital library has already published a work in its entirety, and the work is subsequently listed with the Registry as described in Section (C)(iii), the digital library must cease publishing the work as soon as practicable but no later than 45 days from when work was added to the list described in Section (C)(iii).

(E) *Excluded Works*. This Exemption shall not apply to works of reference, which include but are not limited to dictionaries, encyclopedias, and thesauruses.

Section (C) provides that the Registry will not necessarily be an active enforcement body. Rather, it will simply be a record keeper. The Registry will maintain four important lists: a list of the registered digital libraries, a list of the works that cannot be scanned, a list of the works that cannot be published in their entirety, and a list of all the copyrighted works scanned by each digital library. It is possible that all works are ultimately scanned and only published in snippet form, allowing digital libraries to serve as a resource to find books even if the library cannot display the book's entire text.

Section (D) outlines the procedural requirements. First, a digital library will need to register with the federal Registry. This requirement will create accountability and give the Copyright office the power to suspend or remove digital libraries from the Registry as punishment. In addition, this will allow copyright holders to easily opt out of digital libraries. Once registered, the digital library can start building its collection by scanning books. However, it will need to notify the Registry of which works it has scanned every 90 days.

The Registry places a new burden on authors to protect their interest in their copyrighted material. Now, an author would

need to file an objection with the Registry to prevent a digital library from scanning his work. However, the amendment attempts to minimize this additional burden by only requiring the author to object once per work. Once an author files an objection with the Registry, the Exemption will not apply to that work until the copyright holder removes the objection. Although the system still creates a new burden for the copyright holder, it is preferable to a general opt-out system that requires individual authors to find out which digital libraries have copied their work and opt-out one by one.

A second way that the Exemption attempts to protect the rights of copyright holders is the right of removal. If the author initially allows his work to be scanned and published in its entirety but later changes his mind, he can notify the Registry and the burden will be on the digital libraries to remove the work within 45 days. The right of removal creates a responsibility for the digital libraries to check the Registry periodically and also allows a copyright holder to change his mind.

Under this proposal, digital libraries would function under a two-part opt-out system. First, copyright holders can decide whether they will allow their works to be scanned and digitized. Second, copyright holders can decide whether they want their work to be displayed in its entirety. If they so desire, authors can simply go to the Registry with proof of their copyright and in one fell swoop have their work removed from all digital libraries. The Registry would reduce the transaction costs involved in opting out. Authors who wish to have their work scanned and searchable, perhaps in order to make their works more easily found, could allow their work to be scanned without allowing their work to be displayed in its entirety. Another option would be for authors to opt-out entirely and then specifically contract with a particular digital library to have their work included in only that library.

This statutory proposal does not purport to be a comprehensive piece of legislation. Rather, the Exemption seeks merely to demonstrate one way in which Congress could amend the Copyright Act to facilitate the development of digital libraries. Specifics, such as enforcement, funding, registration fees, and enactments are issues better left to Congress. Part V will discuss potential problems related to the proposed Exemption.

## V. POTENTIAL PROBLEMS WITH THE PROPOSAL

This Part examines (A) the problems of administering the Registry, and (B) the problems associated with tipping the balance between public benefit and private rights of copyright holders. It limits its evaluation to these two topics, which are by no means exhaustive of the potential problems associated with the proposal.<sup>128</sup>

### A. Administrative Problems

If the proposal was adopted, the Registry would probably encounter various administrative problems. For one, there would be an incredible volume of administrative work the Registry would need to handle at the outset. Not only would every digital library seek to register as soon as possible, but the libraries will also probably file millions of notifications indicating its intention to scan every book to which it has access. Moreover, libraries may file notifications for books that it does not even possess in order to satisfy the 90-day requirement.

The tremendous workload problem will also arise when authors want to opt out. The Registry will need a procedure to verify that the person in question is in fact the author or copyright holder before adding the work to the list. Accordingly, the Registry will need to go through an evidentiary process before adding works to the opt-out list. Depending on the thoroughness of the process, the Registry may become backlogged. If the Registry is backlogged, an author who does not want his work scanned may not be added to the opt-out list before the 90-day expiration period. In this case, a digital library will scan his work despite his timely notification to the Registry. This raises the question of who would be liable for the copyright holder's injuries in such situations. A simpler question is whether the Registry would be liable for listing errors. Due to the number of works and the Registry's nature, it is probably not feasible for the Registry to be liable for listing errors. Such liability would place an even greater burden on copyright holders to regularly check the Registry to police their rights.

The Registry error problem, however, is not fatal to the proposal. The fact that the Registry probably cannot take responsibility for errors will simply mean that authors need to

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<sup>128</sup> There will also be problems associated with the international harmonization of this proposal. For one, this Registry and other international registries would probably need to coordinate, since digital libraries are accessible around the globe. In addition, problems may arise from requiring international copyright holders to register with the U.S. federal registry. Although these problems are recognized, they are not addressed here due to the limited scope of this Comment.

verify that their works are added to the list. In the case of backlogging, authors can protect their new works by providing notice as early as necessary. Once the Registry becomes common, publishers will likely opt out before the work is even published. For works that are already available in physical libraries and easily accessible, there would need to be a time period before the new law took effect during which all authors would have the opportunity to add their works to the opt-out list.

The Exemption also creates enforcement problems. If a digital library fails to comply with any of the Exemption's requirements, the Registry will be unable to directly punish the digital library. The Registry's only power to enforce the rights of copyright holders is its ability to remove digital libraries from the list of registered libraries. If a digital library fails to meet any of the procedural requirements provided in Section (D), including maintaining its registered status, it will lose its protections under the Exemption. In such cases, copyright holders can sue the digital library for infringement.

If a digital library is removed from the Registry, it cannot raise the Exemption in its defense to a copyright infringement action. Copyright holders, however, will still have the burden of proving that the digital library scanned their work. This will become an increasingly difficult task as the number of digital libraries increases and copyright holders find that they do not have the resources to police all of the digital libraries. Finally, the creation of the Registry and the Exemption will not preclude digital libraries from invoking the doctrine of fair use. Accordingly, copyright holders can opt out but may still find their rights severely impaired. Copyright holders stand to lose a great deal of commercial incentive to develop new works.

### *B. Economic Impact on the Market for Books*

The greatest potential danger of this proposal lies in the fact that it may tip the careful balance that copyright law seeks to preserve between maintaining an incentive for creators to make new works and allowing the public to benefit from new technology. On one side, there is the large potential public benefit of digital libraries open to the public. On the other side, there is the possibility that authors and creators will lose their incentive to develop new work.

In 2008, the book publishing industry had net sales totaling approximately \$24.3 billion.<sup>129</sup> In such a lucrative market,

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<sup>129</sup> Association of American Publishers, Industry Statistics, <http://publishers.org/main/IndustryStats/IndStats/2008/>

authors create new works in hope of having the next big hit. Accordingly, the market's demand for existing works directly affects an author's financial incentive to create new ones. Specifically, the adoption of this proposal may cause a decrease in the demand for books, which in turn may cause authors to lose incentive to write new books.

An additional consideration is the possibility that the creation of new works may provide a greater public benefit than the creation of digital libraries. If this is the case, then in light of copyright law's aim to promote knowledge, it would not be in the public's best interest to adopt the legislative proposal. The proposal's impact on copyright holders' incentive to create new works will hinge on two questions: (1) whether the proposal will cause an increase in illegal copying and (2) whether the publishing of snippets will hurt the demand for copyrighted books.

Currently, the Authors' Guild and others claim that digital libraries are usurping their commercial rights.<sup>130</sup> They claim that allowing their books to be scanned and viewed online reduces the demand for the physical work, and also robs them of their ability to sell the digital rights to their works.<sup>131</sup> The final answer will lie in empirical data, which is not currently available. Many of these problems, however, could be cured by the author's ability to opt out through the Registry. Authors interested in protecting their commercial rights can simply follow the procedures to add their works to the list of works that cannot be scanned, and they will not be deprived of any commercial benefit.

The opt-out system does not cure, however, the possible negative repercussions of allowing users to view snippets of the work. By allowing snippets of the work to be viewed, the opt-out system may allow users repeatedly search portions of the text in order to recreate the whole text. There is evidence both that allowing snippets to be viewed may help publishers and that it may hurt publishers. In any case, determining the economic impact of snippets is best left to a congressional committee.

## VI. CONCLUSION

This Comment provided a legislative proposal that would shield digital libraries from claims of copyright infringement. Although the proposal is not without problems, it may open the

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2008\_Stats.htm (last visited Apr. 10, 2010) The figure is according to figures released by the Association of American Publishers (AAP), the Bureau of the Census, and sales data from 81 publishers, inclusive of all major book publishing media markets.

<sup>130</sup> See cases cited *supra* note 13 and accompanying text.

<sup>131</sup> *Id.*

door for digital libraries to develop without destroying the financial incentive for authors to create new works. This balance, which the proposal attempts to maintain, is at the very heart of copyright law. As stated in the introduction, copyright law was designed primarily to promote "Progress of Science and useful Arts."<sup>132</sup> Copyright law only provides temporary monopolies to the creators of works as an incentive for creators to develop new works.<sup>133</sup> The end goal has always been to promote learning and the progress of knowledge.<sup>134</sup> Today, digital libraries stand to offer tremendous public benefit, and yet, ironically, copyright law is what is holding them back.

In considering this proposal, Congress should weigh the public benefit of digital libraries against possible harm to the public caused by reducing the incentive for authors to create new works. If the Registry functions as planned, however, there should be little to no reduction in an author's incentive to write new books. The Exemption is needed not only to promote the growth and development of digital libraries, but also to provide clear boundaries within which current digital library projects can operate.

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<sup>132</sup> U.S. CONST. art. I, § 8.

<sup>133</sup> SAINT-AMOUR, *supra* note 2, at 1.

<sup>134</sup> *Id.*