12-4547-cv

United States Court of Appeals

for the

Second Circuit

THE AUTHORS GUILD, INC., THE AUSTRALIAN SOCIETY OF AUTHORS LIMITED, UNION DES ECRIVAINES ET DES ECRIVAINS QUEBECOIS, ANGELO LOUKAKIS, ROXANA ROBINSON, ANDRE ROY, JAMES SHAPIRO, DANIELE SIMPSON, T.J. STILES, FAY WELDON, THE AUTHORS LEAGUE FUND, INC., AUTHORS' LICENSING AND COLLECTING SOCIETY, SVERIGES FORFATTARFORBUND, NORSK FAGLITTERAER FORFATTERO OG OVERSETTERFORENING, THE WRITERS' UNION OF CANADA, PAT CUMMINGS, ERIK GRUNDSTROM, HELGE RONNING, JACK R. SALAMANCA,

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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v.

HATHITRUST, CORNELL UNIVERSITY, MARY SUE COLEMAN, President, University of Michigan, MARK G. YUDOF, President, The University of California, KEVIN REILLY, President, The University of Wisconsin System, MICHAEL MCROBBIE, President, Indiana University,

Defendants-Appellees,

NATIONAL FEDERATION OF THE BLIND, GEORGINA KLEEGE, BLAIR SEIDLITZ, COURTNEY WHEELER,

Intervenor Defendants-Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(c)(1), the undersigned certifies that the Association of American Publishers does not have a parent corporation and no publicly held company owns ten percent or more of its stock.

s/ Mary E. Rasenberger
Mary E. Rasenberger

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STATEMENT OF INTEREST

The Association of American Publishers, Inc. ("AAP") is the major national association of publishers of general books, textbooks, and educational materials.[1] Its approximately 300 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish titles in every field of human interest, including textbooks and educational materials and scientific, technical, medical, professional and scholarly books and journals, computer software, and electronic products and services. Adequate copyright protection and effective copyright enforcement are critical to the success of AAP member publishers.

AAP is concerned that the district court's decision will be interpreted broadly as a green light for libraries to digitize, either independently or in collaboration with for-profit companies, the works in their collections, without regard to whether the works are deteriorating, fragile or at-risk; are commercially available; or whether they can do so securely. Mass copying of collections,

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and this Court's Rule 29.1(b), no counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitted this brief, and no person other than the *amicus curiae*, its members, or its counsel, contributed money intended to fund preparation or submission of this brief. Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

without any conditions or restrictions to maintain the works securely, is not transformative and does not qualify as fair use, which is meant to be applied on a case-by-case basis. We urge that the decision be reversed and that the complex interests at stake in this case are properly left to the legislature.

SUMMARY OF ARGUMENT

Libraries and archives provide a key role in the dissemination and preservation of learning and knowledge in our culture. At the same time, the marketplace for the works that libraries make available and preserve would not exist but for copyright. These exclusive rights provide the incentives for authors to write, and also for publishers to publish by allowing them to earn revenue from the books and other works they publish and thus support the publications of new works, ensuring a robust market in the creation and dissemination of writings. Any exceptions for library copying, whether under Section 107 or specific exceptions such as Sections 108 and 121, must take these dual interests into consideration.

The district court failed to consider the varied interests; its decision to create a mass digitization and preservation exception to copyright is improper judicial legislating. Exceptions and limitations that permit mass digitization of entire copyrighted works is a matter for Congress. The Copyright Office ("CO") has made Section 108 reform and solutions for mass digitization a priority. Where the Copyright Act specifically addressed an activity such as library/archives copying

for preservation under Section 108 and created specific limitations on such copying, it is for Congress to determine whether and how to extend those limits in light of new technologies and still ensure the exceptions reflect "fair" uses. The district court's impatience with the legislative process is an invalid excuse for circumventing the careful balancing of interests that goes into legislative reform and threatens to create precedent that would undermine the very purpose of copyright to incentivize authorship and its dissemination.

Additionally, the district court's construction of Section 121 without reference to its legislative history resulted in judicial legislating based on an erroneous application of the Americans with Disabilities Act to the Chafee Amendment, by treating university libraries as "authorized entities" contrary to clear legislative intent. The district court's holding acts as a disincentive for AAP's members to create new digital products to address the needs of the print disabled.

Finally, the district court improperly applied the transformative use standard in its fair use analysis. Instead of following the Supreme Court's and this Court's consistent interpretations of the meaning of "transformative" under copyright law, the district court expanded its meaning to include the ultimate (end-user) purpose and social benefits of the use. This marked departure from the established precedent of this Court leaves in its wake a vast loophole that could allow any

party that copies works wholesale on a mass scale to satisfy the central first-factor test of transformative use – so long as it can identify some feature of its activities that serves a social benefit.

Amicus therefore respectfully requests that the ruling below be reversed, and that the Court reexamine the use at issue within the traditional contours of copyright law.

ARGUMENT

I. IN PERMITTING MASS DIGITIZATION OF ENTIRE COPYRIGHTED WORKS, THE DISTRICT COURT IMPROPERLY EXPANDED LIMITED STATUTORY EXCEPTIONS IN A MANNER RESERVED TO CONGRESS

A. Creating Blanket Exceptions in the Law is for Congress, Not the Courts

The district court conceded that its reliance on fair use to sanction Appellees' large-scale copying of copyrighted works, in a manner that falls far outside the boundaries of Section 108, is unprecedented. Dkt#156 at 22. Nevertheless, the district court engaged in judicial legislation by creating a mass digitization and preservation exception to the exclusive rights of copyright owners. This was plain error because Congress, not the Courts, should legislate any new exceptions for digitization and preservation of copyrighted works on a massive scale. "[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives." *Authors Guild v. Google, Inc.*, 770 F. Supp.

2d 666, 677 (S.D.N.Y. 2011) (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 212 (2003) and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984)). The Supreme Court "has noted that it was Congress' responsibility to adapt the copyright laws in response to changes in technology." *Id.* (citing *Sony*, 464 U.S. at 430-31).

While the district court may believe that public policy arguments favor libraries' digitization and preservation of copyrighted works, text mining, and access for the print disabled, the court's role is to interpret the law, not to enact major new exceptions to copyright that it believes might further social good. *See Clean Flicks of Colorado, LLC v. Soderbergh*, 433 F. Supp. 2d 1236, (D. Colo. 2006) (stating that public policy arguments submitted to the district court are "inconsequential to copyright law" and "addressed in the wrong forum" because the "Court is not free to determine the social value of copyrighted works."). The district court's decision creates a significant change in copyright policy without any open and public debate and input from the numerous and diverse stakeholders affected by and interested in mass digitations and preservation, including authors, publishers, photographers, visual artists, libraries, archives, museums, and scholars.

B. The Copyright Office Has Been Taking Preparatory Steps for Legislative Action Addressing Section 108 Reform and Mass Digitization of Copyrighted Works

The legislative process is already well underway for revised exceptions and limitations to copyright that would address the uses at issue in this case. The CO is actively engaged in analyzing Section 108 reform to create legislative recommendations, as well as the complex legal issues surrounding mass digitization of books to further its intention of making recommendations for Congressional consideration.[2] At the same time, the World Intellectual Property Organization ("WIPO") is working on a treaty for exceptions for the visually impaired, and the U.S. government has been continuously involved in that effort.[3]

1. Section 108 Reform

In 2005, the Library of Congress ("LOC") National Digital Information Infrastructure and Preservation Program ("NDIIP") and the CO convened an independent study group comprised of representatives from the library, scholarly,

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[2] *See Priorities and Special Projects of the United States Copyright Office*, October 2011-October 2013, *available at* http://www.copyright.gov/docs/priorities.pdf, at 5, 8.

[3] *See, e.g.*, WIPO**,** *Update: Negotiators advance towards an international treaty for the visually impaired*, February 25, 2013, *available at* http://www.wipo.int/copyright/en/general/sccr_ss_13.html; s*ee also Copyright Office Notice of Inquiry and Request for Comments on the Topic of Facilitating Access to Copyrighted Works for the Blind or Other Persons With Disabilities*, 77 FED. REG. 52507 (2009), *available at* http://www.copyright.gov/fedreg/2009/74fr52507.pdf.

publishing, entertainment, and academic communities to make recommendations on updating Section 108 to account for changes brought by digitization and electronic delivery of copyrighted works (the "Study Group"). The Study Group met consistently over a three year period and published its report in March 2008 (the "108 Report").[4] The 108 Report presented a number of recommendations to update the exceptions for libraries and archives in Section 108 to better reflect digital technology and ensure sound preservation practices. The CO is currently working on Section 108 Reform as one of its legislative priorities, using the 108 Report as a starting point to produce "a discussion document and preliminary recommendations on amending section 108."[5]

2. Mass Digitization: The April 2011 Joint Letter

On April 1, 2011, the Librarian of Congress and Acting Register of Copyrights wrote to Congress offering their own analysis of the legal framework for mass book digitization.[6] The letter underscores the complexity involved and

[4] *See* United States Copyright Office & LOC, *The Section 108 Study Group Report* (2008), *available at* http://www.section108.gov/docs/Sec108StudyGroupReport.pdf.

[5] *See* United States Copyright Office, *Revising Section 108: Copyright Exceptions for Libraries and Archives*, *available at* http://www.copyright.gov/docs/section108 ("The Office's recommendations will draw upon but not be limited to recommendations of the Study Group Report.").

[6] *See* Letter from James H. Billington, Librarian of Congress, and Maria A. Pallante, Acting Register of Copyrights to Chairman Patrick Leahy and Senator

careful consideration required in reviewing the interplay between the exclusive rights of the copyright owner, the exceptions afforded to libraries under Section 108 and the exceptions to accommodate those with print reading disabilities under Section 121.

The letter expresses concerns that the "the basic tenets that exclusive rights afforded by copyright law may not be usurped as a matter of convenience, and policy initiatives, including those that would redefine the relationship of copyright and technology, are the proper domain of Congress, not the courts," and invited Congress to consider the "unresolved policy issues" raised by the interplay between mass digitizations and Section 108. *Id.* at 1, 4.

3. The Mass Digitization Analysis

In October 2011 the Office of the Register of Copyrights published an analysis addressing the "issues raised by the intersection between copyright law and the mass digitization of books," including the issues raised by the Google Books case and this case (the "Mass Digitization Analysis").[7] The Register identified many key policy questions raised by mass digitization, including the

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Charles Grassley of the Senate Judiciary Committee (April 1, 2011), *available at* http://www.copyright.gov/docs/massdigitization/statements/gbs_joint_letter.pdf.

[7] *See* United States Copyright Office, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* (2011), *available at* http://www.copyright.gov/docs/massdigitization/USCOMassDigitization_October2011.pdf.

objectives and public policy goals of mass digitization and the interplay with Section 108. The Register noted that, although the issues involved are "complex and require public discussion," they must be addressed within "the existing copyright framework."[8] *Id.* at ii. The Register invited Congress to "consider whether the purposes and objectives" of mass digitization are "sufficiently important to the nation to warrant possible changes to the copyright law." *Id.* at 15.

4. Mass Digitization and Orphan Works Legislation

Orphan works are an obvious issue in any mass digitization effort. In October 2012, the CO published a Notice of Inquiry regarding orphan works and mass digitization in order to advise Congress on possible next steps in this area.[9] The CO inquired about the use of orphan works in the context of mass digitization, as well as on a case-by-case basis. Initial public comments, due on February 4, 2013, are available on the CO website; reply comments are due March 6, 2013.[10]

Issues of mass digitization, orphan works, Section 108 reform, and initiatives to offer accessible works to the reading disabled are all priorities of the

[8] Indeed, the Register noted that "licensing is likely to be part of the mass digitization equation for libraries." Mass Digitization Analysis at 20.

[9] *See* Notice of Inquiry, Orphan Works and Mass Digitization, 77 FED. REG. 64555 (2012). The Notice discussed, among other things, the Google Books litigation, as well as this case.

[10] *See* United States Copyright Office, Orphan Works, *available at* http://www.copyright.gov/orphan.

CO. The process for the implementation of these reforms must take place in Congress, where the needs of all stakeholders may be fully considered, debated and balanced. Libraries and archives unquestionably serve a vital role in society that must be protected. However, exceptions to copyright that are needed to support that role must not materially harm the legitimate interests of rights holders and their incentives to create new works. By permitting mass digitization of millions of copyrighted books under fair use, the district court improperly sidestepped the legislative process and overstepped the role of the judiciary.

C. The District Court Failed to Consider the Interests of the Copyright Owners in Ensuring the Security of their Works

In granting libraries and archives a broad preservation exception to create a digital repository of millions of print books, the district court did not consider what criteria should be used to determine how analog works should be digitized, by whom, under what circumstances, and by what means to ensure the security of the works. Security of archives was a concern of both the copyright owners as well as the library and archives representatives of the Study Group and is a significant concern to *amicus*. The Study Group considered the issues in depth and recommended that there should be a new preservation exception that would permit qualified libraries and archives to reproduce published at-risk works in their

collection prior to deterioration.[11] Under this limited exception, qualified libraries or archives could make copies necessary to create and maintain a preservation copy of at-risk publicly disseminated works in its collection. These qualified trusted institutions would be required to use industry best practices and technologies to ensure the integrity and security of the works preserved (currently only a limited number of libraries have the capacity to properly implement these). *See* 108 Report at 69-79.[12]

While fair use under Section 107 is appropriate for libraries to invoke from time to time in assessing the reproduction, display or use of individual works, it is not the appropriate vehicle to permit any library or archives to conduct large-scale reproduction of copyrighted works for preservation or access. As the Study Group noted, such activities should be undertaken only by qualified trusted institutions in a manner that will not endanger the value of copyrighted works and supplant the

[11] Congress acknowledged the significant impact of digital distribution on copyright owners and the resulting need for imposing limitations on digital copies made under the library copyright exception (Section 108). *See* Senate Judiciary Committee Report on the Digital Millennium Copyright Act (S. REP. NO. 105-190, at 61-62 (1998) ("[i]n recognition of the risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution of additional copies[] of the work.")

[12] Preservation, as noted by the Study Group, requires resources and experienced archivists in order to safely digitize, maintain, and monitor the digitize collection and to prevent unauthorized access or dissemination of the works once in digital format. See 108 Report at vii.

distribution right of publishers and other rights holders. The district court's decision does just that; it creates a preservation exception under fair use that lacks the necessary legislative guidance regarding appropriate limits on library copying, devalues authors' and publishers' incentives, and leaves the nation's literature at risk of mass-scale piracy.

II. THE FAIR USE ANALYSIS OF LIBRARY ACTIVITIES SHOULD NOT BE CONDUCTED IN A VACUUM

The district court held that Appellees' mass-scale use of Appellants' copyrighted works was fair, despite the fact that their activities fall directly within the subject matter of the Section 108 exceptions, yet grossly exceed the uses permitted in Section 108. Where libraries engage in activities that are specifically legislated in Section 108, the courts should look there for guidance. As a general rule of statutory interpretation, where there is overlap between a general exception and a specific exception, the court should apply the more specific law. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992). Congress would not have enacted specific exceptions for libraries and archives in Section 108, with carefully tailored conditions on any copying, and yet intended Section 107 to permit the same activities but without any such conditions or limits. Applying Section 107 as the district court did in this case allows Section 107 to swallow Section 108 entirely, rendering Congress' careful construct of the latter superfluous.

Without a doubt, "fair use does not undermine Section 108, but rather supplements it," Dkt#156 at 13, and activities that are not directly legislated in Section 108 may fall under Section 107. However, fair use analysis of library activities should not be conducted in a vacuum as though Section 108 did not exist. Yet, that is exactly what the district court did. As the CO stated, "[a]ny review of mass book digitization would need to consider, if not compare, the activities that currently are, or should be, permissible for libraries under Section 108."[13] The same principle applies here, particularly in light of the fact that Congress viewed Section 108 as codifying certain library practices that constituted fair use and even practices that go beyond fair use.[14]

Under the canons of statutory construction, courts should interpret statutory provisions in the context of the statute as a whole. *See, e.g.*, *King v. St. Vincent's*

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[13] Mass Digitization Analysis at 20; *see also Recommendation of the Register of Copyrights in RM 2002-4* (October 27, 2003), at 51, *available at* http://www.copyright.gov/1201/docs/registers-recommendation.pdf. The CO's reports on its areas of expertise are entitled to *Chevron* deference. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012) (applying *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)).

[14] Congress stated that "section 108 authorizes certain photocopying practices which may *not* qualify as a fair use." H.R. REP. NO. 94-1476, at 74 (1976) (emphasis added). For a description of the interplay between and debate regarding what was considered fair use library copying and the adoption of Section 108, *see* REGISTER OF COPYRIGHTS, REPORT OF THE REGISTER OF COPYRIGHTS, LIBRARY REPRODUCTION OF COPYRIGHTED WORKS (17 U.S.C. 108) (1983) (the "1983 Report"), *available at* http://www.copyright.gov/reports/library-reproduction-1983.pdf.

Hosp., 502 U.S. 215, 221 (1991) (citing the cardinal rule that "a statute is to be read as a whole" because "the meaning of statutory language, plain or not, depends on context."); *Bilski v. Kappos*, 130 S.Ct. 3218, 3228-29 (2010) (noting courts should not interpret any statutory provision "in a manner that would render another provision superfluous."). The district court's decision fails to view Section 107 within the context of the Copyright Act as a whole, without consideration of the provisions that speak directly to library uses, Section 108 (or Section 121 with respect to uses for the visually impaired, discussed in Section III below). The district court also ignored the purpose and prominence of Section 106. Exceptions to copyright, including Section 107, must be viewed narrowly as compared to the exclusive rights. As the Supreme Court stated, where the Copyright Act "sets forth exceptions to a general rule, we generally construe the exceptions 'narrowly in order to preserve the primary operation of the provision.'" *Tasini v. N.Y. Times Co.,* 206 F.3d 161, 168 (2d Cir. 2000) (quoting *Commissioner v. Clark,* 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989)). In its analysis of whether the uses at issue were fair, the district court instead ignored Section 108 and analyzed fair use broadly and the exclusive rights narrowly, disrupting Congress's carefully crafted balance in Title 17.

The district court determined that digitizing millions of books, creating optical character recognition copies to index the books, making more copies to

create a shared repository distributed among a number of institutions, and necessarily more in the course of preserving the works to refresh and replicate data, and also to make audible copies for the visually impaired – all without permission – was fair use. None of those uses are currently permitted under Section 108, and none are contemplated in the 108 Report, the starting point for the CO's reform efforts without important restrictions and conditions.[15] Appellees' unprecedented uses far exceed anything contemplated by Congress as falling within Section 108 or fair use and beyond what any single sitting judge can properly authorize.[16]

In its reexamination of the library and archives exceptions for the purpose of recommending updates for the digital age, the Study Group was guided by the current Section 108 provisions, as well as current library and archives practice. Though not law, the recommendations at least point out the type of issues a court must weigh in determining what uses are fair uses. This is particularly true in this instance, given the varying interests represented, the expertise of the group

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[15] *See* United States Copyright Office, Revising Section 108: Copyright Exceptions for Libraries and Archives, *available at* http://www.copyright.gov/docs/section108.

[16] Congress never contemplated that either Sections 107 or 108 would be used to copy works en masse. Of all of the types of potentially fair uses discussed in the legislative history for Section 107, as well as Section 108, none included the mass uses of numerous works, but in each instance were a one-time use of a specific work. *See Sony*, 464 U.S. at 495 (stating Section 107 legislative history "states repeatedly that the doctrine must be applied flexibly on a case-by-case basis").

members, the mission of the group to "ensure an appropriate balance," and the care and time the group took in considering and crafting its recommendations, consistent with the Congress' goal of obtaining a balance among the relevant interest.[17] The mass digitization of copyrighted books and the copying and distribution conducted to create a shared repository among universities for preservation and other purposes (including full-text searching and access for the visually impaired) is rife with the complex issues described in the 108 Report.

While the Study Group recommended a new limited preservation for at-risk works, it did so with recommendations for specific conditions that would help avoid significant loss of rightsholder sales, and the risk of unprotected works making their way onto the internet due to lack of proper security and other appropriate procedures.[18] Such conditions would alleviate publishers' very real concern regarding potential loss of sales due to preservation copies serving as duplicate library copies and the difficulty of ensuring robust security of digital copies. *Id.* at 73-78. The district court's ruling would allow any library to engage in preservation copying without any conditions essential to protecting copyrighted works in a balanced manner.

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[17] *See* 108 Report, at ii; H.R. REP. NO. 94-1476, at 74 (1976) ("it is the intent of this legislation to provide an appropriate balancing of the rights of creators, and the needs of users.").

[18] See 108 Report at 69-75.

It is helpful in analyzing unauthorized library copying and reproduction under Section 107 to keep in mind also the long history of Section 108 and its relationship with fair use.[19] Sections 107 and 108 were enacted together, within the 1976 Act, and Congress intended for them to work together, expressly addressing their relationship in the legislative history. The Section 108 provisions were the result of Congress' weighing decades of debate among the various interested parties and their variety of interests.[20] This long history should not be shunted aside by a single fair use decision.

Congress addressed the overlap between Sections 107 and 108 in the legislative history, H.R. REP. NO. 94-1476 at 73-74, noting a lack of clarity under the case law at the time as to whether even one-off copying for a single user was a fair use. *See* 1983 Report at 95-104. While Congress understood that specific Section 108 exceptions would not cover every activity a library might engage as fair use, the type of uses it had in mind were user "requests for copies for legitimate scholarly or research purposes," not wholesale copying and preservation

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[19] The 1983 Report includes a description of how Congress viewed library copying under fair use, the debates leading up to the enactment of Sections 107 and 108 and Congress' purpose in enacting a separate set of exceptions for libraries and archives.

[20] For the history of Section 108, *see generally* Appellants' Br. at 18-19; Mary Rasenberger & Chris Weston, OVERVIEW OF THE LIBRARIES AND ARCHIVES EXCEPTION IN THE COPYRIGHT ACT (2005), *available at* http://section108.gov/docs/108BACKGROUNDPAPER%28final%29.pdf; 1983 Report.

en masse. H.R. REP. NO. 94-1476, at 78-79; Dkt#156 at 13, n.17. The legislative history further clarifies that Section 108 goes beyond what might fall under fair use: "To [the] contrary, Section 108 authorizes certain photocopying practices which may *not* qualify as a fair use." H.R. REP. NO. 94-1476 at 74-75.

In other words, by enacting Section 108, Congress intended to provide libraries with more liberal, as well as more certain, exceptions than would qualify under fair use. It did not view fair use as an expansion of Section 108 rights, swallowing the Section 108 exceptions, but instead viewed Section 108 as providing more generous uses than might otherwise be allowed under Section 107. When Section 107 is viewed in the context of Section 108, it becomes inconceivable that Congress would have intended for Section 107 to allow mass digitization of copyrighted works without appropriate restrictions to balance all interests, particularly since it did not do so even in Section 108.

III. THE DISTRICT COURT MISAPPLIED SECTION 121 TO LIBRARIES

The district court's application of Section 121 to the University of Michigan resulted in dramatically broadening the class of "authorized entities" entitled to take advantage of this exception under the statute. Section 121, known as the Chafee Amendment, was enacted in 1996 with support from AAP. It allows "an authorized entity," without permission from the copyright owner, "to reproduce or to distribute copies or phonorecords of a previously published, nondramatic literary

work if such copies or phonorecords are reproduced or distributed in specialized formats exclusively for use by blind or other persons with disabilities." 17 U.S.C. § 121(a). An authorized entity" is defined as "a nonprofit organization or a governmental agency that *has a primary mission* to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities." 17 U.S.C. § 121(d)(1) (emphasis added).

Speaking in support of his amendment, Senator John Chafee explained that it "includes *a very narrow definition* of those who are eligible to undertake such production and applies the definition for eligibility used by the National Library Service to those who receive reproductions." 142 CONG. REC. S. 9763, 9764, Sept. 3, 1996 (emphasis added). He specifically named the "authorized entities" contemplated: "National Library Service and a number of nonprofit organizations, such as The American Printing House for the Blind and Recording for the Blind and Dyslexic, [that] reproduce, in specialized formats, published material that is readily available to sighted individuals in libraries, bookstores, newsstands, and countless other locations," describing them as "groups that produce specialized formats for the blind." *Id*.

A. The District Court Erred in Relying Upon the ADA to Determine that University Libraries Qualify as "Authorized Entities" under Section 121

Ignoring the clear statutory meaning of "authorized entity" and the legislative history of Section 121, the district court concluded that University of Michigan is an "authorized entity" by using a strained interpretation of the phrase "has as its primary mission." Its conclusion ignored the University of Michigan's primary mission,[21] and instead relied on an unrelated statute, the Americans with Disabilities Act of 1990 ("ADA"). The ADA requires institutions to take measures to provide equal access to individuals with disabilities. H.R. REP. 101-485(II), at 108 (1990). The ADA applies to a wide variety of public and private entities, including those providing public transportation and public accommodations among others.[22] Under the district court's interpretation, all of these entities are entitled to avail themselves of Section 121.

The district court is correct in noting that the ADA "provide[s] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." Dkt#156 at 22. It is also correct in noting that, among other things, this means that the provision of equal access to copyrighted information for print-disabled individuals is mandated by the ADA. However, the

[21] *See* University of Michigan, Mission Statement, *available at* http://president.umich.edu/mission.php.

[22] 42 U.S.C. §§ 12111-12117; 12131-12165; 12181-12189

ADA only addresses the "obligation" of those providing "public accommodations," such as universities and libraries, to provide equal treatment to and avoid discriminating against individuals with disabilities in such matters; it does not "authorize" such entities to satisfy those obligations in any particular manner, and certainly not with respect to unpermissioned and unpaid reproduction and distribution of copyrighted works in "specialized" accessible formats. Indeed, the ADA does not refer to copyright or copyrighted works in any manner, much less grant covered entities the status of "authorized entities" under the Chafee Amendment.

Nor does the Chafee Amendment, even though it was enacted six years after the ADA, refer to the ADA anywhere in its limited legislative history or reference any of the specific language or requirements of the ADA.[23] The Chafee Amendment authorized specific entities identified in Chafee's floor statement to engage in reproduction and distribution in "specialized formats *exclusively* for use by blind …," without any reference to their having obligations to provide equal

[23] Because the Chafee Amendment was enacted as a Senate floor amendment to an appropriations bill, the Congressional Operations Appropriations Act of 1997, 142 Cong. Rec. S. 9763, 9764, Sept. 3, 1996, there are no committee reports. The only directly relevant legislative history of the Chafee Amendment is Senator Chafee's floor statement and Register Marybeth Peters' testimony on an earlier bill. S*ee* Statement of Marybeth Peters before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary, Nov. 15, 1995, *available at* http://www.copyright.gov/docs/niitest.html.

access to and avoid discriminating against individuals with disabilities. There is no mention in the Chafee Amendment and its legislative history of universities and their libraries or any other entities that might qualify and have obligations as "public accommodations" under the ADA. *See* 142 CONG. REC. S. 9763, Sept. 3, 1996. If Congress had intended such entities to be covered it would have expressly so stated.

Senator Chafee emphasized the "narrow" nature of the provision and that it was "a very small change in current copyright law" – "a very simple amendment." *Id*.[24] But if all institutions of higher education or their libraries, much less all "public accommodations" under the ADA, were "authorized entities," as interpreted by the district court, the number of entities permitted to copy and distribute accessible versions of publishers' copyrighted works would be in the hundreds of thousands – hardly a "narrow" exception.

The district court's reliance on the ADA in interpreting the Chafee Amendment is simply without foundation in the histories of either law. If universities and/or their libraries are to have the status of "authorized entities" under Chafee, it is for Congress to say so, not for a court to make a public policy determination in the absence of any supporting intent of Congress.

[24] *See also Tasini,* 206 F.3d at 168.

B. The District Court Erred in Concluding that Rightsholders Do Not Consider Print-Disabled Individuals to be a Significant Potential Market

The district court found that "[p]rint-disabled individuals are not considered to be a significant market or potential market to publishers and authors. As a result, the provision of access for them was not the intended use of the original work (enjoyment and use by sighted persons) and this use is transformative." Dkt#156 at 18 (citations omitted). This is error. To the contrary, the book market for the print-disabled is growing and strong. In particular, there is a potentially vibrant market for postsecondary students with print disabilities. As part of the Higher Education Opportunity Act of 2008 (HEOA), Congress established a federal advisory committee – the "AIM Commission" – to study and make recommendations to improve the availability of accessible instructional materials ("AIM" products") for postsecondary students with disabilities. The AIM Commission reported numerous efforts and strides being made by publishers to provide market solutions. The Commission heard testimony from numerous witnesses, including students with disabilities, providers, faculty and stakeholder groups, including textbook publishers, among others.[25] The Commission found:

[25] Report of the Advisory Commission on Accessible Instructional Materials in Postsecondary Education for Students with Disabilities, December 6, 2011 (the AIM Report"), at12, *available at* http://www2.ed.gov/about/bdscomm/list/aim/meeting/aim-report.pdf.

> The number of curriculum publishers and other content developers offering accessible digital versions of their print materials has increased in recent years. Large learning technology companies, such as C-engage, Elsevier, McGraw-Hill, Pearson and Wiley are providing versions of their educational materials with accessibility features. Other companies, including CouseSmart (a cooperative digital venture of several major publishers), VitalSource (Ingram Digital) and CafeScribe (Follett) are currently offering digital versions of instructional materials on a variety of technology platforms. New sources are regularly entering the market (e.g., Inkling, AcademicPub, Kno).

Id. at 16-17. The 108 Report explains that the number of publishers offering accessible materials for the print disabled is growing and major educational publishers are providing their educational materials in accessible formats or with accessibility features, while other technology companies are offering instructional materials on a variety of platforms.[26] In sum, it is simply untrue that the print-disabled publishing market is not a significant current and potential market for publishers.

The AIM Commission Report also includes a recommendation for Congress to review the Chafee Amendment. *Id.* at 43-46. As noted, any amendment (including the definition of "authorized entity") is a matter for Congress, as is currently underway, not the courts. The district court's radical interpretation and

[26] *See id.* at 12-13, 22-23 and 51; *see also* The Individuals with Disabilities Education Improvement Act of 2004, P.L.108-446 ("IDEA Act") at 40-41 (AAP and disabilities advocacy groups negotiated law requiring a key "national file format" and "central national repository" features for improved access to accessible instructional materials for elementary and secondary students with disabilities, including through purchase directly from publishers.).

departure from the intent of Section 121 cannot be enacted by *fiat* from a single court, but only by Congressional legislation that is based on input from all interested parties, weighing their interests in a manner that maintains a balance of user and rightsholder interests.

IV. THE DISTRICT COURT MISAPPLIED THE STANDARD FOR "TRANSFORMATIVE" USE UNDER THE FIRST FACTOR

The fair use test leads with an inquiry into the "purpose and character of the use." 17 U.S.C. § 107(1). The Supreme Court's landmark ruling in *Campbell v. Acuff-Rose Music, Inc.*, dictates the central question underlying the first factor: whether the work is "transformative." *See* 510 U.S. 569, 579 (1994). This Court has properly adopted that holding. *See, e.g., American Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 923 (2d Cir. 1994), *cert. denied*, 516 U.S. 1005 (1995). The district court itself likewise acknowledged its importance under *Campbell*. Dtk#156 at 16.

The district court erred in its understanding of transformative use. As Judge Leval elaborated in his seminal article on fair use, "the use must be of a character that serves the copyright objective of stimulating productive thought and public instruction without excessively diminishing the incentives for creativity." Pierre N. Leval, *Toward A Fair Use Standard*, 103 Harv. L. Rev. 1105, 1110 (1990). Consistent with these well-established principles, the *Campbell* Court held that a work is "transformative" if it "adds something new, with a further purpose or

different character, altering the first with new expression, meaning or message . . . " 510 U.S. at 579.

A work is *not* transformative where the new work "merely 'supersede[s] the objects' of the original creation . . . ." *Id.* (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841)). "[A] work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original." *Id.* at 587-88. "The first fair use factor calls for a careful evaluation whether the particular quotation is of the transformative type that advances knowledge and the progress of the arts or whether it merely repackages, free riding on another's creations." Leval, *supra*, at 1116.

Had the district court made a "careful evaluation" that adhered to these well-established principles, it would have found that the uses were not transformative: the HDL copies the entirety of the original works and make those full works available for searching and archiving, and for consumption by a segment of the public.

To overcome this obstacle to a finding of transformative use, the district court grossly expanded the boundaries of the fair use doctrine through the misconstruction of the term "purpose" in the first factor. According to the district court's formulation, "[a] transformative use may be one that actually changes the

original work. However, a transformative use can also be one that serves an entirely different purpose." Dkt#156 at 16 (citing *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006)). The district court identified new purposes for the copies, including "superior search capabilities" and "facilitat[ing] access for print-disabled persons." *Id.* at 16, 18.

These purposes may serve the public benefit, but no legal basis exists for classifying them as "transformative." District courts in this Circuit have easily rejected the invitation to rely on the concept of a different "purpose" to turn a non-transformative use into a transformative one. *See, e.g., United States v. American Soc'y of Composers, Authors & Publishers*, 599 F. Supp. 2d 415, 424, 427-29 (S.D.N.Y. 2009) (informational purpose); *UMG Recordings, Inc. v. MP3.Com, Inc.*, 92 F. Supp. 2d 349, 351 (S.D.N.Y. 2000) (providing mp3-format copies of audio CDs as a means to "space shift," explaining that, "[w]hile such services may be innovative, they are not transformative"). Other courts of appeals have similarly refused to dilute the concept of transformativeness in such a manner. *See, e.g., Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc.*, 342 F.3d 191, 198, 200 (3d Cir. 2003) (informational purpose of clip previews did not make use of plaintiff's works transformative); *Micro Star v. FormGen Inc.*, 154 F.3d 1107, 1113 n.6 (9th Cir. 1998) (purpose of allowing customers to extend play of plaintiff's game could "hardly be described as transformative; anything but."); *see*

also Princeton Univ. Press v. Michigan Doc. Svcs., 99 F.3d 1381, 1389 (6th Cir. 1994) ("[t]his kind of mechanical transformation bears little resemblance to the creative metamorphosis accomplished by the parodists in the *Campbell* case.").

This Court's ruling in *Bill Graham Archives* did not promulgate a rule that simply finding "a different purpose" may alone render copying of entire works "transformative." Indeed, consistent with the aforementioned principles, the defendant transformed advertising posters by incorporating them in "significantly reduced form" in an editorial context that placed the works in a historical light. *See* 448 F.3d at 609. The purposes here, archiving and consumptive use, are remarkably different from those in *Bill Graham Archives*: the HDL copies substitute for the original rather than transform by adding "new expression, meaning or message." That the copies may be used to create audio versions of the works does not make the copies or their audio versions transformative. All that has occurred in this case is a change of format, which is a quintessential example of non-transformative copying. *See, e.g., Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 72 (2d Cir. 1999); *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 150 F.3d 132, 143 (2d Cir. 1998); *see also Society of the Holy Transfiguration Monastery, Inc. v. Archbishop Gregory of Denver, Colorado*, 685 F. Supp. 2d 217, 227 (D. Mass. 2010) (placing book in new media format is not transformative), *aff'd* 689 F.3d 29 (1st Cir. 2012).

The district court appeared to make no finding that the archival purpose of the HDL copies was transformative. In fact, it noted that "[t]he argument that preservation on its own is a transformative use is not strong." Dkt#156 at 15 n.19. Yet nowhere in the opinion does the district court reconcile its differing conclusions on the various intended end-uses of the HDL and MDP copies. Tellingly, at the conclusion of its analysis of the first factor, the district court abandoned the transformative test in favor of relying on factually distinct *dicta* in *Sony*, 464 U.S. at 455, n.40 (1984) – a pre-*Campbell* decision – to find fair use *per se*.

Moreover, after finding that the uses were transformative under the first fair use factor, the district court erred in failing to give any meaningful consideration to the second and third factors in its analysis. *See Campbell*, 510 U.S. at 578 ("[n]or may the four [fair use] statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright."). The district court paid mere lip service to this requirement by dismissing the second and third fair use factors in two short paragraphs. Dkt#156 at 18-19. The minimal analysis given to the second and third fair use factors makes clear that the district court failed to properly conduct its fair use analysis and reached an outcome that was motivated by the public benefits the district court identified earlier in its opinion.

CONCLUSION

For the reasons set forth above, and for those set forth in Appellants' brief, *amicus curiae* respectfully requests that the decision below be reversed.

Dated: New York, New York
March 4, 2013

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,897 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2007, the word processing software used to prepare this brief.

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