

Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums

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Abstract: Section 108(h) has not been utilized by libraries and archives, in part because of the uncertainty over definitions (e.g. “normal commercial exploitation”), determination of the eligibility window (last twenty years of the copyright term of published works), and how to communicate the information in the record to the general public. This paper seeks to explore the elements necessary to implement the **Last Twenty exception**, otherwise known as Section 108(h) and create a Last Twenty (L20) collection. In short, published works in the last twenty years of the copyright may be digitized and distributed by libraries, archives and museums, as long as there is no commercial sale of the works and no reasonably priced copy is available. This means that Section 108(h) is available for the forgotten and neglected works, 1923-1941, including millions of foreign works restored by GATT. Section 108(h) is less effective for big, commercially available works. In many ways, that is the dividing line created by Section 108(h): allow for commercial exploitation of works throughout their term, but allow libraries to rescue works that had no commercial exploitation or copies available for sale and make them available through copying and distribution for research, scholarship and preservation. In fact, Section 108(h) when it was being debated in Congress was called labeled “orphan works.” This paper suggests ways to think about the requirements of Section 108(h) and to make it more usable for libraries. Essentially, by confidently using Section 108(h) we can continue to make the past usable one query at a time. The paper ends with an evaluation of the recent Discussion Paper by the U.S. Copyright Office on Section 108, and suggests changes/recommendations related to the proposed changes to Section 108(h).

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I. Introduction

Libraries and archives are special places in our culture – a place to discover new worlds, research complex problems, and even sometimes learn a new skill or craft. From the time we are young, we are read to by librarians, and as we grow, we work on research papers and hunt for key sources. Some of us continue to rely on libraries and archives for our work. This is the story of how libraries and archives are able to operate within the world of copyright, and why we give them special privileges to do their job to help us learn and grow. In particular, this is a story of one small part of the 1976 Copyright Act that allows libraries and archives to copy and distribute to the general public certain copyrighted works in the last twenty years of their term, through Section 108(h), allowing greater access to works for research, scholarship and preservation purposes.² Up until now, it has been a little-used part of the Copyright Act because of its implementation requirements. This paper seeks to change that by providing more certainty and suggestions on how to apply the **Last Twenty exception** to every kind of work housed at archives and libraries in the last twenty years of their copyright. These works in the last twenty years are given a special place in our copyrighted world, and this paper helps libraries and archives start to create their own the **Last Twenty (L20) Collections**, allowing the reproduction and distribution of neglected works to allow the public the opportunity to read and explore in the last twenty years of their copyright.

One should think of the resources in a library as a duality. At once, there are laws for the library or archives itself, and then those that apply to patrons. Sometimes these are the same laws. In other instances, because the use is different, they are different laws. For instance, a library may digitize a work that is crumbling and falling apart. That is allowable under one part of the copyright act.³ That same work may be used by a scholar, quoted and commented upon, which is another part

² 17 U.S.C. Section 108(h).

³ 17 U.S.C. Section 108(c).

of the 1976 Copyright Act.⁴ In both instances in our hypothetical, the work is still under copyright, and yet both actors are able to use the work for different purposes and under different aspects of the law. This is because the U.S. Copyright Act provides certain limitations to the exclusive rights of copyright holders, and a whole set of these are related to a library's (and sometimes patron's) use of a work.⁵ And of course, there are the copyright holders and their relationship to libraries and archives, where their whose works are housed at the libraries and archives, preserved, cared for, and remembered for generations to reuse and rediscover. Copyright holders depend on libraries and archives, and in exchange the U.S. Copyright Act, provides certain limitations on the copyright holder's exclusive rights so that the libraries and archives can achieve their mission of providing access and preservation to our cultural resources.

Section 108 provides special limitations on the exclusive rights of copyright holders when it comes to libraries to reproduce copyrighted works without permission. When you go to a library and you photocopy an article, that's Section 108 at work.⁶ When you're library doesn't have a copy of periodical, and another library makes a copy of a specific article for your home library, that's Section 108.⁷ When a copy of a work begins to fall apart, and the library makes a preservation copy, that's Section 108.⁸ When you go to an archive, and the archivists makes copies of unpublished papers for you, that is Section 108.⁹ Most of Section 108 works seamlessly, even if it has quirks, and librarians and archivists discuss whether to reform or change the provisions.¹⁰ One part of Section

⁴ 17 U.S.C. Section 107.

⁵ The title of the section of the 1976 Copyright Act is: 17 U.S. Code § 108 - Limitations on exclusive rights: Reproduction by libraries and archives.

⁶ 17 U.S.C. Section 108(f)(1).

⁷ 17 U.S.C. Section 108(d).

⁸ 17 U.S.C. Section 108(c)

⁹ 17 U.S.C. Section 108(d) and (e).

¹⁰ There have been numerous discussions at reform. The U.S. Copyright Office explains, "For over a decade, the Copyright Office has led and participated in major discussions on potential changes to section 108, with the goal of updating the provisions to better reflect the facts, practices, and principles of the digital age and providing greater clarity for libraries, archives, and museums. In 2005, the Copyright Office partnered with the National Digital Information Infrastructure and Preservation Program of the Library of Congress to sponsor an independent study group, which issued a comprehensive report in March 2008 calling for an extensive revision of section 108. In February of 2013 the Copyright Office and Columbia Law School held a public symposium on section 108 revision, exploring many of the issues addressed in the 2008 Section 108 Study Group Report." <https://www.copyright.gov/policy/section108/>. In September 2017, the U.S. Copyright Office released a Discussion Paper related to Section 108, with a model of proposed changes to Section 108.

108, however, has largely been under-utilized by the library community: Section 108(h).¹¹ This provision allows a library or archive to make copies of a work for distribution (including online) and public display in the last twenty years of the work’s copyright, as long as certain requirements are met.¹² It was added to the 1976 Copyright Act in 1998, as part of the Copyright Term Extension Act.¹³ While the copyright term was extended twenty years, Congress felt that libraries and archives should be able to access, copyright, and even distribute works where no commercial activity was occurring, that the library should not have to wait twenty years to make the works available to the public.¹⁴ In some ways, the Last Twenty Exception could be seen as a library-specific public domain. When market failure occurs—there is no normal commercial exploitation and there are no copies available, the library can step in and make copies available to the public.

As of 2017, this means that libraries can digitally (and in analog form) make available to the public works that were first published in or before 1941, as they have entered the last twenty years of copyright.¹⁵ (Note: the maximum term for works published before 1978 is 95 years, but many have entered the public domain before that.)¹⁶ Each year new works are added. How many works might this be? The Internet Archive alone calculated that their collection held 279,911 text

“The Copyright Office’s more recent review of section 108 began during the summer of 2016 with a series of nearly 40 in-person and telephone meetings with interested persons, such as librarians, museum professionals, content creators, archivists, scholars, and technology professionals. The variety of perspectives and practices concerning section 108 activities that arose during these meetings provided the Copyright Office with insight into how section 108 operates or fails to operate in practice. The Copyright Office has issued the [Section 108 Discussion Document](#) in an effort to facilitate engagement with possible statutory solutions addressing this important topic.” Id.

¹¹ 17 U.S.C. Section 108(h).

¹² 17 U.S.C. Section 108(h).

¹³ Sonny Bono Copyright Term Extension Act, 1998, [Pub.L. 105-298](#). Because of this, the Internet Archive has named their L20 Collection the Sony Bono Memorial Collection. See _____

¹⁴ Elizabeth Townsend Gard, *Mitigating Term*, J. Copyright Society. [put in citation and page number]

¹⁵ For published works of this era, the longest term is 95 years from first publication. Domestic works could have come into the public domain after 28 years from the date of publication, if not properly renewed, or could have come into the public domain upon publication without proper copyright notice. Foreign works are also measured with a maximum term of 95 years from first publication, but not all are eligible for protection. 17 U.S.C. Section 104A. For more information on copyright duration, see www.durationator.com, a Tulane University Law School project on duration that is now available to the public and libraries, archives and museums.

¹⁶ As discussed in the paper, there are two ways to approach the Last Twenty problem – calculate the exact term for the work, or skip that and calculate the maximum term. The result is that some of the works under the Last Twenty exception will be in the public domain (meaning greater freedom), but for a library or archive, the key needs – reproduction and distribution are available under the Last Twenty exception.

files/works first published between 1923-1942¹⁷ This is just one example. Libraries and archives across the United States are filled with texts, photographs, audiovisual works, art works, and any other works that were published during or before 1942 that might be eligible.

Why does that matter? First, on a preservation level, Section 108(h) provides great freedom to libraries to digitize, even more than other aspects of Section 108. Second, Section 108(h) allows for reproduction and distribution without restrictions, as long as the purpose is for research, scholarship and preservation (along with other requirements). So, scholars like me (WWI scholar by training) would have greater access to works from the 1920s, 1930s and 1940s because even though they are still under copyright, a digital copy is made available to view. Finally, Section 108(h) was added to preserve the balance between access and an extended term caused by the CTEA in 1998.¹⁸

Now, there are restrictions, of course, and the greatest limitation is that Section 108(h) only applies to libraries and archives, and not the patrons/users of the materials. Just because I view a 1939 novel about pacifism doesn't mean that I have the freedom under Section 108(h) to *use the work*. But Section 107 – fair use comes into play.¹⁹ As a scholar, I can rely on Section 107 for quoting a work to comment and criticize, or other uses, including transformative uses.²⁰ But the work would not have been even available in the same way without Section 108(h) potentially – for me to have known about it, or get access to the work in the first place to think, comment, criticize, and to reject or add to my argument.

But libraries were wary of using it, in part because it was difficult to determine when a work was in the last twenty years of its term, and also in part because it was difficult to determine and prove that a work met the requirements: the work was not current commercially exploited, and no

¹⁷ Published works before 1923 are in the public domain in the United States. 17 U.S.C. Section 304.

¹⁸ Elizabeth Townsend Gard, Mitigating Term paper (see above)

¹⁹ 17 U.S.C. Section 107.

²⁰ 17 U.S.C. Section 107.

reasonable copy was available. This article sets out to address both issues, and suggest practical means of implementing Section 108(h) in collections, both small and large.

During the summer of 2017, a team of students, led by Dr. Townsend Gard, embarked on a study to understand how Section 108(h) might be implemented, both on a small scale, but also with libraries with millions of records. Was it possible to meet the requirements and utilize Section 108(h) without high transaction costs? The team worked with a number of libraries, including the Frick Collection, the New York Public Library, Columbia University, Harvard University, and the Internet Archive.²¹ After numerous conversations, studies, and experiments, the following suggests an approach to Section 108(h).

Part II look at library exceptions generally, and why Section 108(h) is so useful and important. The remainder of the paper then provides helpful resources for implementing Section 108(h). Part III explains copyright duration, and the issues associated with determining the status of works, and includes tools and strategies that have been developed by Team Durationator to make determining the status of works easier. Part IV turns focusing on the key issues for libraries and archives and the specific challenges in implanting Section 108(h). Part V discusses the current structure of library records, and where copyright information and data related to Section 108(h) might fit, particular with regard to record keeping. Part VI suggests an implementation plan. In the end, Section 108(h) allows libraries and archives to digitize and even distribute works in the last twenty years of their copyright. In an era of long copyrights, this is a very big prize. This paper seeks to help them implement the policies and procedures necessary to take full advantage of all that Section 108(h) provides. Part VII suggests a means of creating a system between libraries, the Durationator and other tools that assist in determining and tagging copyright status, and platforms (like Internet Archive, DPLA, OCLC) that allow each of the spokes to do their best, limit liability and

²¹ During the Summer 2017, students were embedded at the Internet Archive for five weeks. Additionally, Dr. Townsend Gard spent three weeks in New York, working with the Frick and the New York Public Library. Additional students worked on the data from these sites and others. We worked work with library and museum partners throughout 2016-2017 to gather this data and understand the reluctance to use Section 108(h). We are working on a second paper focused on the gathering of data for the purpose of determining copyright.

make more works available to patrons to preserve, research and better understand the culture(s) of the world.

In September 2017, the U.S. Copyright Office released their proposed Model Statutory Language to revise Section 108, the first major revision of Section 108 since its enactment as part of the original 1976 Copyright Act. The first draft of this paper was completed 24 hours before the Discussion Paper was released. The paper continues to focus on what the law currently is. The last section addresses the proposed Model Statutory Language. Since we are still living with the original law, the author decided to look at the proposed changes as its own section, and not integrate it into the whole body of the paper. Part VIII addresses the Model Statutory Language, and evaluates the proposal in light of the arguments and investigations in this paper.

The appendices provide further information about the data we uncovered and other topics related to the paper. (Note: these are not included in the pre-publication version of the paper. Please contact the author for more information).

II: Library Exceptions to Copyright Holder's Exclusive Rights

Copyright law is a bargain, between the government and a copyright holder, a statutory-created limited monopoly.²² With a modicum of creativity and independent creation,²³ a copyright holder receives the exclusive right to copy,²⁴ make derivative works,²⁵ distribute,²⁶ publicly perform²⁷ and public display their work²⁸ for a set amount of time,²⁹ or "limited Times."³⁰ These five exclusive rights to control a creative work for a set number of years do have exceptions during the copyright term, the most famous being fair use, but also include classroom uses and a whole list of

²² U.S. Constitution, I.8.8.

²³ 17 U.S.C. Section 102(a); Feist.

²⁴ 17 U.S.C. Section 106(1)

²⁵ 17 U.S.C. Section 106(2)

²⁶ 17 U.S.C. Section 106 (3)

²⁷ 17 U.S.C. Section 106(4)

²⁸ 17 U.S.C. Section 106(5)

²⁹ 17 U.S.C. Sections 301-304.

³⁰ U.S. Constitution, I.8.8; 17 U.S.C. Section 102; Feist v. Rural.

other exceptions and exemptions.³¹ Libraries and archives are also given special exceptions found under Section 108.³² “It is *not an infringement*”, reads section 108...,”to engage in certain reproduction activities, including reproduction and distribution of copyrighted works.” (Emphasis added)³³ These exceptions include making copies for preservation, interlibrary loan and copies requested by scholars for research and study. The exception also includes reproduction and distribution of a work to the general public for the purpose of research, scholarship and preservation in its last twenty years of copyright, or what we refer to as the **Last Twenty** exception.³⁴

A. Are you a library or archive?

The distinction between a library and a digital library has all but disappeared—at least to our patrons.

- The digital Library, Copyright Crash Course, University of Texas Libraries³⁵

In order to qualify for applying any of Section 108, one has to be a library or archive. These are powerful exceptions – they are what allow libraries and archives to carry out their mission(s).

³⁶But what exactly is a library or archive? For most our history, a library or archives was easily identified as a brick-and-mortar space housing collections of books, papers, photographs and other physical works. But then the Internet happened. Does a library have to be something physical? How do we define exactly what is a library? The U.S. Copyright Act does not define “library” or “archives.” We turn to outside and secondary sources for assistance.

1. Library

³¹ 17 U.S.C. Section 107-121.

³² 17 U.S.C. Section 108

³³ 17 U.S.C. Section 108

³⁴ Id.

³⁵ <http://guides.lib.utexas.edu/copyright/diglibrary>

³⁶ The new Model language by the U.S. Copyright Office contemplates changing the requirements, including adding a mission requirement. They document is trying to define and limit the application of Section 108 by defining what a library, archive or museum. (Museum is added as a category).

Aaron Perzanowski and Jason Shultz in *The End of Ownership: Personal Property in the Digital Economy* (MIT 2016) discuss digital libraries, and begin with the first known public library, the Library Company of Philadelphia, started in 1731 by Benjamin Franklin. (103). Individuals bought “shares”, and the subscription money was used to buy books. (103). By 2016, over 9000 lending libraries exist in the United States. What about digital libraries? How many are there? How do we define them?

The American Library Association defines a library including both brick-and-mortar libraries as well as the digital library.³⁷ They offer a number of definitions.

- "A library is a collection of resources in a variety of formats that is (1) organized by information professionals or other experts who (2) provide convenient physical, digital, bibliographic, or intellectual access and (3) offer targeted services and programs (4) with the mission of educating, informing, or entertaining a variety of audiences (5) and the goal of stimulating individual learning and advancing society as a whole."³⁸
- "Library -- from the Latin *liber*, meaning "book." In Greek and the Romance languages, the corresponding term is *bibliotheca*. A collection or group of collections of books and/or other print or nonprint materials organized and maintained for use (reading, consultation, study, research, etc.). Institutional libraries, organized to facilitate access by a specific clientele, are staffed by librarians and other personnel trained to provide services to meet user needs. By extension, the room, building, or facility that houses such a collection, usually but not necessarily built for that purpose...."³⁹

Both definitions include a professional or expert organizing a collection for access by the public with a mission of service and education.⁴⁰

In 2008, the Section 108 Study Group was conveyed by the U.S. Copyright Office to study and suggest changes to Section 108. When confronted with defining “library”, the participants could not agree if a physical premise was required in order to take advantage of Section 108. But for our

³⁷ What is a Library?, ALA, <http://libguides.ala.org/library-definition> (last visited July 16, 2017)

³⁸ Id citing George Eberhart, *The Librarian's Book of Lists* (Chicago: ALA, 2010), citing (1) Heartsill Young, ed., *The ALA Glossary of Library and Information Science* (ALA, 1983)

(2) Robert S. Martin, "Libraries and Learners in the Twenty-First Century," Cora Paul Bomar Lecture, University of North Carolina at Greensboro, April 5, 2003.

(3) Deanna B. Marcum, "Research Questions for the Digital Era Library," *Library Trends* 51 (Spring 2003): 636-651.

³⁹ Id citing *Online Dictionary of Library and Information Science* (ODLIS).

⁴⁰ The proposed model language put out by the U.S. Copyright Office reflects this organization for the threshold requirements for Section 108.

purposes, the report states: “The only provision that a virtual entity clearly could use to provide access under the current exception is subsection 108(h), relating to works in the last 20 years of their copyright term.”⁴¹ (We like that!)

The Section 108 Study Group suggested that museums be included: “Section 108 applies to libraries and archives and their employees acting within the scope of their employment. Museums currently have the benefit of the section 108 exceptions only to the extent that they house, or are part of, a library or archives that meets the threshold requirements of subsections 108(a).”⁴²

Museums without this were not included as part of Section 108. The Study Group felt that now museums, even without a library or archive, “make copies for preservation, replacement private study and research,” and therefore should be included. The Study Group also explained that museums share a mission of “collection and preservation of, and access to, material of cultural and scientific importance for the purpose of furthering human understanding.”⁴³ In wanting to include Museums, the 108 Study Group seems to be helping us get to a definition:

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

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

Think of all the internet-based collections of materials that might fit this definition. Would these dedicated hobbyists/fans qualify as a library or archives? It is something to think about – where the boundaries and definitions of Section 108(h) lead us. Interesting, the Discussion Document put out by the U.S. Copyright Office is concerned about this problem: “The proposed condition of “trained staff or volunteers [who] provide professional services normally associated

⁴¹ Section 108 Study Group Report, 2008 (116), <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>

⁴² Id at 31.

⁴³ Id at 32.

with libraries, archives, or museums” seeks to exclude the hobbyist or amateur collector from the section 108 exceptions.”⁴⁴ If a group is making copies for preservation, replacement, private study and research, do they qualify as a library and/or archives? Does it require some official designation as a library or archives? On the other side from hobbyist are for-profit companies.

The 108 Study Group did agree that for-profit organizations are generally not covered by Section 108. The House Report said as much, but also in the House report, said that spontaneous copying by for-profit organizations would be ok in some instances.⁴⁵ Section 108(a)(2) describes the requirement that the library or archives be open to the public or available to researchers in the specialized field. The Study Group explains: “It is designed to exclude truly private libraries and archives, and in the analog world has served as an effective means of doing so. Personal book, music, or photo collections do not qualify under section 108 unless they are open to the public, or at least to researchers. Corporate libraries and archives are eligible only so long as they are willing to make their collections open to other researchers in the field (including, for example, employees of a competitor). In the online world, however, this condition does not effectively distinguish private collections from those that serve the public. Without any further qualification, private collections that are made available to the public through websites might be considered to qualify as “open to the public.”⁴⁶

Note: at the moment, a library or archives need not be a non-profit. We learn from the Notes on the Committee on the Judiciary, House Report No. 94-1476, “Under this provision, a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies.” (390) We also learn from the House Report, “it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to

⁴⁴ U.S. Copyright Office, Discussion Paper, Section 108, <https://www.copyright.gov/policy/section108/discussion-document.pdf>. (released September 2017).

⁴⁵ Id.

⁴⁶ Id at 33-34.

carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.” (390). In the digital age, “there is no clear reason to differentiate among these types of collecting institutions in their ability to collect, preserve, display, and provide access to their collections.”⁴⁷ So, we see that the focus of the committee notes was commercial entities taking advantage of Section 108. That is not allowed. A for-profit company cannot make a database of 108(h) eligible works and sell them to libraries, for instance.

While the 2008 108 Study Group might have struggled with Digital Libraries, it appears that by 2014 and earlier, the ALA had embraced the concept, publishing Karen Calhoun’s *Exploring Digital Libraries: Foundations, Practice, Prospects* (ALA Neal-Schuma, 2014), a textbook.⁴⁸ The work traces the history of the development of digital libraries

Karen Calhoun addressed the question of how to define what constitutes a library by looking at digital libraries. The idea of a digital library, she explains, began with a paper by Director of the US Office of Scientific Research and Development, Vannever Bush, “As We May Think” (1945) and a book, *Libraries of the Future*, by MIT computer scientist J.C.R Licklider (1965). (2) Licklider writes, “If books are intrinsically less than satisfactory for the storage, organization, retrieval, and display of information, then libraries of books are bound to be less than satisfactory also.” He sought to create a system that would improve “library organization at the system level.” He would be part of the ARPANET, the system that preceded the Internet. In 1991, the National Science Foundation sponsored a workshop on “how to make digital libraries a reality.” (1) Calhoun then describes the developments that led to thinking through what a digital library would like, from architecture to technology to organization.

She defines “digital libraries” as the following:

⁴⁷ Id at 33.

⁴⁸ “*This book provides an overview of the digital turn in libraries. It is informed by the rich and varied professional experience of its author, by extensive research across several national and international contexts, and by a rare synthesizing ability. It fills a clear gap in the library literature, exploring technical and research developments from the perspective of evolving library services and organization.*” <http://www.alastore.ala.org/detail.aspx?ID=4247> (last visited July 16, 2017)

“1. A field of research and practice with participants from many disciplines and professions, chiefly the computer, information and library sciences; publishing; the cultural sector; and education.

2. Systems and services, often openly available, that (a) support the advancement of knowledge and culture; (b) contain managed collections of digital content (objects or links to objects, annotations and metadata) intended to serve the needs of defined communities; (c) often use an architecture that first emerged in the computer and information science/library domain and that typically feature a repository mechanisms supporting search and other services, resource identifiers, and user interfaces (human and machine.)”
(18)

So what is a digital library? Calhoun defined it's as a “traditional repository-centered architecture,” with additional social roles for communities they serve.⁴⁹ She notes that over the years there have been a number of perspectives on what constitutes a digital library from a technical perspective to a space where people collaborate and share.⁵⁰ She includes a table of competing definitions.⁵¹

What do the definitions have in common? A focus on organizing and collecting materials for a community of users.

The IFLA/UNESCO Manifesto for Digital Libraries (2008) defined a digital library as: “an online collection of digital objects, of assured quality, that are created or collected and managed according to internationally accepted principles for collection development and made accessible in a coherent and sustainable manner, supported by services necessary to allow users to retrieve and exploit the resources.”⁵²

Many of the definitions have similar elements: objects, collected and made accessible that allow users to use and retrieve. Now, Section 108(h) can also include a nonprofit educational institution that functions a library or archives, expanding the definition. The general definition requires the library or archives be open to the public or the collection available to specialists in the

⁴⁹ Id at 18-19.

⁵⁰ Id at 19-21.

⁵¹ Id at 19.

⁵² <https://www.ifla.org/publications/iflaunesco-manifesto-for-digital-libraries>

field.⁵³ These requirements seem to correspond to the general definitions we have been finding for digital libraries.

3. Digital Spaces and Section 108(h)

We see digital libraries and archives identified *as a library*. The Internet Archive “is a non-profit library of millions of free books, movies, software, music, websites and more.” The library behaves like a library – even with lending of books. It has a staff and is well organized. In its “Terms,” the IA states, “Access to the Archive’s Collections is provided at no cost to you and is granted for scholarship and research purposes only.”⁵⁴ We see digital libraries as part of brick-and-mortar libraries, like the Digital Library at the Smithsonian, for example, that includes books online, collections and exhibitions.⁵⁵ And we see platforms that aggregate digital content more efficiently for libraries, such as the Digital Public Library of America. “The Digital Public Library of America (DPLA) is an all-digital library that aggregates metadata — or information describing an item — and thumbnails for millions of photographs, manuscripts, books, sounds, moving images, and more from libraries, archives, and museums around the United States. DPLA brings together the riches of America’s libraries, archives, and museums, and makes them freely available to the world.”⁵⁶ All three examples – Internet Archive, Smithsonian, and DPLA *could* make use of Section 108(h), and make more works available online during the last twenty years of their copyright. The question is what would it take for large and small institutions to begin using Section 108(h) more seriously? It was what Congress envisioned.

Section 108(h) could be used even more expansively, especially if the definition for libraries and archives focuses on the conduct (collecting, preserving, etc.) rather than our traditional concepts of the library we walk to with our children to or the university stacks. What about the website cataloging, preserving, and making available old radio show recordings? Do they count as

⁵³ 17 U.S.C. Section 108(a)(2).

⁵⁴ Copyright Policy, Terms of Use, <https://archive.org/about/terms.php>.

⁵⁵ <http://library.si.edu/digital-library>

⁵⁶ <https://dp.la/info/help/faq/>

an archive? How far and wide can one take advantage of Section 108(h) and other provisions of Section 108(h)? Just as the Internet made us all creators and distributors of content, has the Internet also made us all libraries and archives, preserving culture for research and scholarship? The possibilities for Section 108(h) could be dramatic.

B. General Requirements of Section 108(h)

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

1. No Direct or indirect commercial advantage

The purpose of the copies cannot be for direct or indirect commercial advantage.⁵⁷ The notes from the Committee focus on “indirect commercial advantage” when it comes to libraries in for-profit entities like R&D in “chemical, pharmaceutical, automobile and oil corporations.” (House Report, 390). The focus is prohibiting a single subscription or interlibrary loan to be copied for multiple employees, even if the employee is doing the copying. It looks to the institution, and not the reason for copying.

2. Open to the Public

“[T]he collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.”⁵⁸ Again, this is focused on prohibiting private, corporate libraries gathering information for commercial purposes from using Section 108.

3. Copyright Notice

⁵⁷ 17 U.S.C. Section 108(a)(1).

⁵⁸ 17 U.S.C. Section 108(a)(2).

“[T]he reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.”⁵⁹ This is to make sure that those who receive copies recognize that the work being copied is still under copyright, because Section 108 *applies to works still under copyright*. Those works that are out of copyright do not need Section 108, because they can be copied by the libraries without restrictions.⁶⁰

What must be included in the notice? The Copyright Office put out exact language for display warning and an order warning.⁶¹

NOTICE WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be “used for any purpose other than private study, scholarship, or research.” If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of “fair use,” that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

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The Copyright Office was specific:

(c) Form and manner of use.

(1) A Display Warning of Copyright shall be printed on heavy paper or other durable material in type at least 18 points in size, and shall be displayed prominently, in such manner and location as to be clearly visible, legible, and comprehensible to a casual observer within the immediate vicinity of the place where orders are accepted.

(2) An Order Warning of Copyright shall be printed within a box located prominently on the order form itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type size no smaller than that used predominantly throughout the form, and in no case shall the type size be smaller than eight points. The notice shall be printed in such manner as to be clearly legible, comprehensible, and readily apparent to a casual reader of the form.

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That is very specific.

⁵⁹ 17 U.S.C. Section 108(a)(3).

⁶⁰ Of course, some collections of public domain materials now have contract restrictions put on them as a collection. That is not the subject of this writing.

⁶¹ <https://www.copyright.gov/title37/201/37cfr201-14.html>

⁶² <https://www.copyright.gov/title37/201/37cfr201-14.html>

⁶³ <https://www.copyright.gov/title37/201/37cfr201-14.html>

The ALA's website suggested the following: "Notice: This material may be protected by copyright law (Title 17 U.S. Code)."⁶⁴ They suggested: "A library may choose to stamp this sentence on the first piece of each item photocopied, to attach it to the glass on the photocopying equipment so that it is automatically transferred to each sheet, to attach a sticker bearing this notice to each item photocopied, or to use some other method whereby this message is affixed to all reproductions."⁶⁵

4. Isolated and Unrelated Copies

The copying must be isolated and unrelated of a single copy or phonorecord. Libraries and archives, or their employees should not be aware that the library or archive is "engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of the group."⁶⁶

5. No systematic reproduction distribution of single or multiple copies.

The question is what does systematic apply. In footnote 15 of *Author's Guild v. HathiTrust* (SDNY), the Court writes, "plaintiffs also argue that this program is "systematic" in violation of Section 108(g). Pls.' Reply to Pls.' J. Pleadings 11. Defendants respond that "systematic" means reproducing a single work repeatedly, rather than reproducing all the works in their libraries. Defs.' Opp'n to Pls.' J. Pleadings (citing 17 U.S.C. § 108(g) (prohibiting systematic reproduction of "the same material")). I agree." *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 456 (S.D.N.Y. 2012), aff'd in part, vacated in part, 755 F.3d 87 (2d Cir. 2014) The Second Circuit in *Author's Guild v. HathiTrust* does not discuss the point further, as the case is focused on fair use (107) and not library exceptions (108). Section 108(2) includes mention of interlibrary loans in relation to

⁶⁴ Language Suggested for the Notices required by the copyright Revision Act of 1976, American Library Association, <http://www.ala.org/rusa/resources/guidelines/languagesuggested> (last visited August 15, 2017).

⁶⁵ *Id.*

⁶⁶ 17 U.S.C. Section 108(g)(1).

systematic copyright: interlibrary loan arrangements are exempted from this limitation, as long as the interlibrary loan requests do not substitute for obtaining a subscription or purchasing a work.⁶⁷

C. Works excluded: Apply Fair Use

Not all works fall under Section 108. In some instances, musical works, pictorial, graphic or sculptural works, motion pictures or other audiovisual works other than an audiovisual work dealing with news are not included under Section 108.⁶⁸ (These exceptions are not included in Section 108(h)).

The House Report specifically discussed excluded works, but then notes that even though “musical, graphic, and audiovisual works” are excluded in some categories, they expect that fair use may be applied nonetheless. “In the case of music, for example, it would be fair use for a scholar doing musicological research to have a library supply a copy of a portion of a score or to reproduce portions of a phonorecord of a work.” (393).⁶⁹ This is really interesting. Fair use is expected to be for third party requests, even if they are not covered in Section 108 for libraries. “Nothing in section 108 [this section] impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproduction by a library of copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.” (393).

D. What Section 108 allows

Section 108(b), (c), (d), (e), and (f) provide specific activities that libraries can make copies and distribute them to other libraries and patrons – preservation copies, interlibrary loan, and patrons making copies on copy machines. These are all used everyday and are the backbone of the U.S. library system.

1. Section 108(b): Copies or phonorecords of unpublished works for purposes of preservation and security
2. Section 108(c): Copies or phonorecords of published works for purpose of replacement for damaged, deteriorating, lost, stolen, or if the format has become obsolete

⁶⁷ 17 U.S.C. Section 108(g)(2)

⁶⁸ 17 U.S.C. Section 108(i).

⁶⁹ PUT IN CITATION (from materials from Kim)

3. Section 108(d): small portions of a copyrighted work requested by a patron or another library
4. Section 108(e): entire work or substantial portions of a copyrighted work requested by a patron or another library
5. Section 108(f): unsupervised copying by patrons and ability to lend copies
6. Section 108(h): copies or phonorecord in last twenty years of the term of a published work for preservation, research and scholarship

In each subsection, the library has requirements to meet in order avail themselves of the exception.⁷⁰ While Sections (b)-(f) are used every day by libraries, Section 108(h) has not been used in the same manner. Reasons given are that it is difficult to determine the copyright status – that is when the last twenty years begin, and that the other requirements on commercial availability are either ambiguous or confusing.

III: Understanding Copyright (Duration) in relation to Section 108(h)⁷¹

A. Copyright Status for Section 108(h)

Section 108(h) allows libraries and archives to digitize, make copies, and distribute – even publicly perform – works that are in the last 20 years of their copyright. To utilize Section 108(h), one has to know *when* the last twenty years of a copyright begins. That can be a difficult task, as the status of a work depends on a number of elements: whether the work is considered published or unpublished (Section 108(h) only applies to *published* works, although the suggested modifications by the U.S. Copyright Office want to expand it to both published and unpublished); the date of publication; the place of creation and/or publication, and the type of work, to name a few examples. Sometimes one must check U.S. Copyright Office renewal records to determine the status; other times one must check to see if proper notice was included. The following is not inclusive of all copyright issues related to the works currently eligible for Section 108(h), but starts to look at the complexities of copyright status.

⁷⁰ Put in resources

⁷¹ For the past ten years, Dr. Townsend Gard has specialized in thinking through problems of copyright's term: when does a work come into the public domain? She, along with her team of students at Tulane Law School, have researched the question, both domestically, and internationally. They have created the Durationator®, a software tool that matches data of a work to the laws of a particular jurisdiction. In that time, the Dr. Townsend Gard and her team have come to understand that sliver of copyright law for every country in the world

1. Publication

The question of publication is complicated in the United States, and in particular with certain kinds of works like television shows and art works. Many cases and law reviews discuss publication. Here it is important to note that works that were distributed without restrictions. Books sold in bookshops, menus given out at restaurants, and art works offered for sale are some examples. Section 108(h) only applies to *published works*.⁷²

2. Date of Publication

To determine the status of works eligible for Section 108(h), one must know the publication date for works first published 1923-1940s. The question is what happens when there is not a date? Context clues can help. The date, for Section 108(h), is to see if it is in the window of opportunity. So, if a work is from the Great Depression, it doesn't necessarily matter if one knows whether it is 1929 or 1933. As long as the work could not have been first published after 1942 (as of 2017), one could take advantage of Section 108(h).

2. Geography

Copyright law is based on up to the two sets geographical elements: about the work, and about the use of the work. About the work: depending on the calculation, one must have the following data: author's country of origin, place of creation, and/or place of first publication. Then, one must also determine *where* the work is going to be used, that is, where potential infringement may occur. For U.S. libraries, that is generally, the United States. If a library or archives is working with a partner outside of the United States, that might alter the jurisdiction questions. In particular for pre-1978 works, the place of first publication for a status check in the United States makes a significant difference. Section 108(h) only applies to library uses in the United States. Kenneth Crews did a study on similar library exception around the world. (See his study).⁷³ So, if one is

⁷² For more information regarding publication, see....

⁷³ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=306216

working with a partner library outside of the U.S., and wanting to rely on Section 108, there will be a different set of library exceptions *and the copyright term may be different* outside of the United States.

3. Type of Work

The copyright status of the work as well as its eligibility under Section 108(h) will vary depending on the type of work. As already mentioned, audiovisual works, musical compositions, and art works are treated differently under parts of Section 108, but not Section 108(h). Most famously, pre-1972 sound recordings are determined by state law, through Feb 15, 2067.⁷⁴ And the type of work may matter when determining the status of a foreign work in the U.S.⁷⁵ The type of work may also come into play when a work was registered under the 1909 Copyright Act.⁷⁶ Works were registered by type, and that helped explain what was protected by that copyright.⁷⁷ Registration and renewal records are still relevant to determining the copyright status of works, and the registration category based on type of work continues to this day.⁷⁸

B. The Role of the Durationator

The Durationator® is a research system developed over ten years at Tulane Law School with the goal of making determining the status of works much easier. For foreign works, the Durationator has special tools for each country of the world. For domestic works, we have developed all kinds of tools, based on the type of work but also the date. We have also worked to integrate Section 108(h) into the output. While this is beyond the scope of the paper, it is important to note that there are tools and tricks available to make determining the copyright status of works, whether one or millions, easier. See www.durationator.com for more information.

⁷⁴ <https://www.copyright.gov/docs/sound/>. Also cite to my article in JTIPs.

⁷⁵ Because one has to determine the status of a work in its country of origin, one may need the type of work because many countries base the term of protection on the type of work. See www.durationator.com/durationator_files

⁷⁶ See the 1909 Copyright Act, which had different notice and deposit requirements depending on the type of work.

⁷⁷ Id.

⁷⁸ 17 U.S.C. Section 304.

IV. Applying Section 108(h)

A. Basic Requirements

So, you have found that a work is still protected by copyright and even in the last twenty years of its copyright term (or soon to be and you are preparing for that moment). There is a couple of more steps you must undertake in order to use the Twenty Year exception.

The statute reads as follows:

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

(2) No reproduction, distribution, display, or performance is authorized under this subsection if—

(A) the work is subject to normal commercial exploitation;

(B) a copy or phonorecord of the work can be obtained at a reasonable price; or

(C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

(3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.⁷⁹

The basic requirements to implement Section 108(h) are the following:

- 1.** Library or archives, including a nonprofit educational institution (see above)
- 2.** Use for Preservation, Research or Scholarship

The copy and/or distribution must be for preservation, research or scholarship. This will play an important role later when it comes to analyzing other aspects of Section 108(h). But the key is that a library or archive is making a copy of a copyrighted work for preservation, research or scholarship.

- 3.** Reasonable Investigation

⁷⁹ 17 U.S.C. Section 108(h).

In order to make a copy, display, distribute or perform the work in its last twenty years of copyright, a reasonable investigation must be undertaken to determine that *all* the following conditions do not apply. The reasonable investigation has three prongs: currently no normal commercial exploitation; no copy available at a reasonable price; and no notice has been filed with the U.S. Copyright Office by the copyright holder that the work is available (normal commercial exploitation at a reasonable price). So far, since 1998 (and as of 2017), no notices by copyright holders have been filed at the U.S. Copyright Office. In fact, the Discussion Document on Section 108(h) put out by the U.S. Copyright Office in September 2017 suggests to drop the last requirement, because for the last twenty years, no one has filed a notice.⁸⁰

The two remaining requirements are really about the market, and in fact, the Discussion Document calls them “market check.” The idea is that if a work is accessible in the market place at a reasonable price, there is no need for a library to make a copy and distribute it. It makes sense. Section 108(h) had its underlying justification as an “orphan works” addition to the CTEA. If the copyright term was going to be lengthened, then orphans would be created, where works were still under copyright but no market copy was available. How does one read “normal commercial exploitation” and “reasonable copy”? Each will be discussed in detail below. One reading is that normal commercial exploitation refers to new copies, and “reasonable copy” may refer to used copies, but it is not clear, as discussed below if “reasonable copy” is new or also used.

Once a library determines that currently there is no normal commercial exploitation or a reasonably priced copy is not available, the library may make a copy (including digitizing) and distribute (including placing that work online) without restrictions. Copyright law is based on the

⁸⁰ “The Model Statutory Language, however, would not offer the option for a copyright owner of a published work to file a notice with the Copyright Office that either the work is subject to normal commercial exploitation or the work can be obtained at a fair price.” U.S. Copyright Office, Discussion Document on Section 108, 44, <https://www.copyright.gov/policy/section108/discussion-document.pdf>.

territory of the potential infringement. So, this law applies to the U.S. only. That same work will be protected by different laws in different countries.

While neither “normal commercial exploitation” nor “reasonable copy” is defined, as the U.S. Copyright Office noted in its 2005 Orphan Work Report, “Section 108 relies expressly on the concept of reasonableness: the terms ‘reasonable investigation’ and ‘reasonable price’ are central to its operation.”⁸¹

What constitutes a “reasonable search”? Orphan works legislation always talks about a “diligent search.” Reasonable seems less than that. The Orphan Work Report 2005 noted: “In his dissent in *Eldred v. Ashcroft*, 537 U.S. 186 (2003), Justice Breyer called section 108(h) a “limited” exception, and expressed the view that the term “reasonable investigation” is “open-ended.”⁸² As will be discussed later, it seems like searching major commercial sites – Amazon.com, for example, aggregates of information like ISBNDB.com or ISBNsearch.org, and informational sites like IMDB.COM (for audiovisual works, for example) would constitute a “reasonable search.” Searching industry specific sites and catalogs for commercial activity would also be helpful. But it does not require a “diligent search,” only reasonable.

The Orphan Work Report in 2005 and 2015 both explained what a diligent search was. In 2015, the Copyright Office “the Office recommend[ed] a framework in which liability is limited for a user who conducts a good faith diligent search for the copyright owner.”⁸³ How did they define a “diligent search was at a minimum, searching Copyright Office records; searching sources of copyright authorship, ownership, and licensing; using technology tools; and using databases, all as reasonable and appropriate under the circumstances...”⁸⁴ So, a reasonable search would be less than a diligent search.

⁸¹ <https://www.copyright.gov/orphan/orphan-report.pdf> at 46. For more recent work on orphan works, see Hansen, David. 2016. *Digitizing Orphan Works: Legal Strategies to Reduce Risks for Open Access to Copyrighted Orphan Works*. Kyle K. Courtney and Peter Suber, eds., Harvard Library.

⁸² <https://www.copyright.gov/orphan/orphan-report.pdf> at 46 citing *Eldred v. Ashcroft*, 537 U.S. 186, 252 (2003).

⁸³ <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> at 3.

⁸⁴ <https://www.copyright.gov/orphan/reports/orphan-works2015.pdf> at 3.

In 2017, we conducted a number of experiments to see if using Amazon.com would be sufficient for satisfying the “reasonable search” requirement. Using 158 works selected randomly from the Internet Archive, we searched to see if we could find copies available on Amazon.com. Of the 158 works that were randomly selected, 128 works were not commercially available, 30 works were commercially available; 98 works did not have a reasonable copy available, and 56 works had a reasonable copy available. For the works that were commercially available or had a reasonable copy, some of results rendered were not the exact work that was on the Archive. Some works that were available on Amazon had different publishers or were later editions, although the works had the same title. But because commercial availability and reasonable copy are not defined in the Copyright Act, there is uncertainty as to whether the works of later editions or different publishers satisfy the 17 U.S.C. §108(h) requirement for commercial availability or reasonable copy. It seems like Amazon could be a quick way to satisfy “reasonable search.” That would leave only 30 of the titles in need of further investigation.

We also ran the same titles through ISBNDB.com and ISBN search as well. These are tools that allow you to see where a book is available new and/or used. “ISBNdb.com project is a database of books providing on-line and remote research tools for individuals, book stores, librarians, scientists, etc. Taking data from hundreds of libraries across the world ISBNdb.com is a unique tool you won't find anywhere else.”⁸⁵ They more comprehensive than Amazon.

You can search by name, title, subject, or ISBN. So, for instance, “Testament of Youth” brought up five results. Each have different ISBN numbers. They are all by Vera Brittain. You can then look at the individual works. For instance, ISBNDB.com returns the following results:

⁸⁵ <http://isbndb.com/>

Search Results:

testament of youth

Books

Testament of youth (Vera Brittain; ISBN13: 9780872236714; 661, [1] p. : music ; 22 cm.)

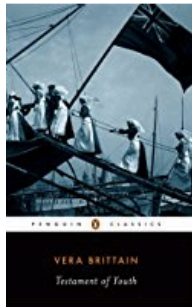
Testament of youth (Vera Brittain; ISBN13: 9780872236721; 661 p. : music ; 21 cm.)

Testament of youth (by Vera Brittain; ISBN13: 9780860680352; 661 p. : music ; 20 cm.)

Testament of youth (Vera Brittain; with a preface by Shirley Williams; ISBN13: 9780140188448; 661 p. ; 20 cm.)

The first one returns information about the work, and lets us know that there are new and used copies of this work, which is a reprint from the 1933 version. It also provides a price history, which might be very useful for the “copy at a reasonable price” prong of the 108 reasonable investigation. Strangely, ISBNDB.com does not give us the publication date of this version. ISBNsearch.org does include the publication. Both quickly can tell you the commercial status of the work.

Find a book:



Testament of Youth (Penguin Classics)

ISBN-13: 9780143039235

ISBN-10: 0143039237

Author: Vera Brittain

Edition: Reissue

Binding: Paperback

Publisher: Penguin Classics

Published: May 2005

List Price: \$21.00

We did not stop here. We looked at another 300 works, again randomly chosen from the Internet Archive collection. These were all published between 1923 and 1941. We looked at both Amazon and ISBNDB.com. We did not find any instances where a work was listed on ISBNDB.com and not on Amazon. We focused on books. So, we would have to reevaluate for other forms. But

for now, we feel like Amazon is a good starting point for a “reasonable search.” But nothing in the law is dictating that we search Amazon or that it is sufficient for a search.

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

B. Normal Commercial exploitation

Commercial exploitation is defined by Collins dictionary as “the development and use of a resource for business.”⁸⁶ Copyright law is built to incentivize commercial exploitation. As one court explained, “The Copyright Act aids commercial exploitation of copyrights by allowing the sale of particular rights ... or of the entire bundle.”⁸⁷ Section 108(h) applies when that commercial exploitation is no longer occurring. The problem is that there is no definition on when to know when that occurs. The work must not be “subject to normal commercial exploitation.” The statute does not define what this means nor did the legislative history discuss “subject to normal commercial exploitation.” We know that “indirect or direct commercial advantage” referred to *the entity* who is doing the copying. “Subject to normal commercial exploitation” focuses on the work itself.

We have copyright cases that look specifically at what constitutes commercial exploitation, but not in the context of Section 108(h), or even generally Section 108. *Warner Bros. v. Ron Rooding* differentiates between private/personal use and commercial use.⁸⁸ *Rooding* planned to

⁸⁶ <https://www.collinsdictionary.com/us/dictionary/english/commercial-exploitation>

⁸⁷ *National Broadcasting Co. v. Copyright Royalty Tribunal*, 848 F.2d 1289, 1293 (D.C.Cir.1988). See also, “The Copyright Act aids commercial exploitation of copyrights by allowing the sale of particular rights—such as movie rights or rights to perform a popular song—or of the entire bundle. The intent of the parties, as expressed in their contracting, therefore can determine who enjoys copyright protection for certain rights. See generally 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* §§ 10.01–.03 (1987).

⁸⁸ *Warner Bros v. Ron Rooding* 1989 WL 76149

jump out of an airplane in a batman costume on the night of the new Batman film opening. Warner Bros and DC Comics won a restraining order to prevent Rooding from doing the activity. Because the defendant/respondent purchased the uniform and was sold the uniform for private use, he may use it privately. Because he is not franchised, licensed or privileged in any way to use it publicly, he may not use it publicly for any commercial or exploitative purpose. A masquerade party is not a public occasion by the nature of it. A walk down the beach, if no more than that, is also a personal use. Handing out free candy at orphanages, this Court would consider to be personal. Any activity in connection with commercial circumstances, such as the opening of theaters, ballparks, parking lots, malls, swimming pools, and similar functions where the public comes for purpose of purchase of services or goods would be considered to be under this order commercial and/or exploitative. So, normal commercial exploitation could be defined broadly as commercial circumstances...where the public comes for purpose of purchase of services of goods.

Another case, *Sega Enters. Ltd. v. MAPHIA* states that it is commercial when users download video games to avoid having to buy video game cartridges. Here the act is replacing the act of purchasing the work. It is implied that the work is available for purchase. In *Bridgeport Music, Inc. v. Still N Water Pub.*, the case concerned “music publishing, recording and distributing sound recordings, and other form of commercial exploitation of musical copyrights.”⁸⁹ All of these activities are Section 106 rights under the Copyright Act. These rights are designed to provide legal protection and the right to exclude others from commercial exploitation of the work. The Copyright Act itself is designed to facilitate commercial exploitation. The question is whether the copyright holder is currently exploiting the work commercially. In this specific part of the statute, if they are not, and it is in the last twenty years of copyright (and meets the other two requirements of no reasonable copy and no notice from copyright holders that there is normal commercial exploitation and/or no reasonable copy), the library may make that work available *even though it is still under*

⁸⁹ *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 475 (6th Cir. 2003)

copyright. Section 108(h) reflects lack of market access. One cannot just go purchase a copy. The library serves a role of making that work available because the copyright holder and the publisher have not. In some way, it's orphan work-esque in its design, and was titled "Orphan works" in its early conception.⁹⁰ The modification to Section 108(h) in 2005, to allow all kinds of published works to fall under Section 108(h) was called the "Preservation of Orphan Works Act".⁹¹ In the Orphan Work Report of 2005, Section 108(h) was addressed. The Report noted that Section 108(h) addressed "some uses in certain situations," but noted that there were more orphans that fell outside of Section 108(h).⁹²

Patents, right of publicity, and indirectly the concept of publication in copyright may help us to understand a potential definition for "normal commercial exploitation." In order to obtain a patent, one of the qualification is meeting the novelty requirement, and as part of the requirement is a limitation on time (more than one year) that a work can be in public use or for sale. The term used in the statute is "commercially exploited." 35 USC Section 102(b).

How is commercial exploitation defined in patent law? For a "commercial sale" to occur, with regard to public use or sale, manufacturing of the item is not enough, but must be a transaction between a supplier and inventor. See, for example, *Dorman Products v. Paccar* (201 F.Supp. 3d 663)(ED Penny, 2016). (request and receipt of price quotes did not constitute "commercial offer for sale") General contract law is applied to determine if there was an actual commercial offer.⁹³

The first prong of the on-sale bar under novelty is that the work was for sale more than one year from filing. This could be a sale or offer for sale. The Supreme Court identified two elements:

⁹⁰ <https://www.copyright.gov/orphan/orphan-report.pdf> at 45.

⁹¹ Title IV of the Family Entertainment and Copyright Act, 2005, Pub. L. No. 109-9, 119 Stat. 218, 226 (April 27, 2005).

⁹² <https://www.copyright.gov/orphan/orphan-report.pdf> at 4. The Report also noted that Section 115(b), Section 504(c)(2), and the termination provisions in section 203, 304(c) and 304(d) could also be seen as "orphan work provisions." Id at 44.

⁹³ "Principles of contract law are generally applicable in the construction of copyright assignments, licenses and other transfers of rights." *Key Maps, Inc. v. Pruitt*, 470 F.Supp. 33, 38 (S.D.Tex.1978) (footnote omitted); see *Gordon v. Vincent Youmans, Inc.*, 358 F.2d 261 (2d Cir. 1965); *Clark v. West*, 137 App.Div. 23, 122 N.Y.S. 380 (2d Dept. 1910), affirmed 201 N.Y. 569, 95 N.E. 1125 (1911). " *Warner Bros. v. Wilkinson*, 533 F. Supp. 105, 108 (D. Utah 1981)

commercial offer and the offer must be for a patented invention.⁹⁴ The Federal Circuit looked to the UCC to determine when an offer for sale had been made. “In order to constitute an offer for sale under § 102(b), an offer must be one “which the other party could make into a binding contract by simple acceptance (assuming consideration).”⁹⁵ The sale must be between two separate entities.⁹⁶ Attempting to sale counts.⁹⁷ Sale of devices or technology counts.⁹⁸ Sale and purchase agreements count.⁹⁹ But, more than communication or information exchanged is required. Mere discussions are not enough.¹⁰⁰ And preparations for sale do not count.¹⁰¹

Right of publicity also uses commercial exploitation, in this case of identity. Nimmer in *The Right of Publicity*, distinguished between privacy and publicity doctrines: privacy focused on “solitude and privacy”, while publicity focused on seeking to “profit by the commercial exploitation and control of name, photograph and likeness.” H. Lee Hetherington, Direct Commercial Exploitation of Identity: A New Age for the Right of Publicity, 17 Colum.-VLA J.L. & Arts 1, 6 (1992) citing Melville B. Nimmer, *The Right of Publicity*, 19 Law & Contemp. Probs 203-4 (1954) (discussing the evolution of the right to privacy). Hetherington defines direct commercial exploitation as “direct in its nature and primarily commercial in its motivation.” (Id at 32). He focuses on the usage and purpose, rather than manner or extent of use. Another definition is for “commercial gain”.

⁹⁴ Phillip W. Goter, The Commercial Exploitation Continuum, 13 MINN. J.L. SCI. & TECH. 795, 803 (2012) at 800 citing Sparton Corp. v. United States, 399 F.3d 1321, 1323 (Fed. Cir. 2005) (citing Scaltech, Inc. v. Retec/Tetra, L.L.C., 269 F.3d 1321, 1328 (Fed. Cir. 2001)).

⁹⁵ Phillip W. Goter, The Commercial Exploitation Continuum, 13 MINN. J.L. SCI. & TECH. 795, 803 (2012) citing Grp. One, Ltd., 254 F.3d at 1048.

⁹⁶ Phillip W. Goter, The Commercial Exploitation Continuum, 13 MINN. J.L. SCI. & TECH. 795, 803 (2012) at 803.

⁹⁷ - Dawn Equipment Co. v. Micro-Trak Systems, Inc., C.A.7 (Ill.) 1999, 186 F.3d 981, 51 U.S.P.Q.2d 1666, Buildex Inc. v. Kason Industries, Inc., C.A.Fed. (N.Y.) 1988, 849 F.2d 1461, 7 U.S.P.Q.2d 1325, on remand, Bergstrom v. Sears, Roebuck and Co., C.A.8 (Minn.) 1979, 599 F.2d 62, 203 U.S.P.Q. 121.

⁹⁸ Manville Sales Corp. v. Paramount Systems, Inc., C.A.Fed. (Pa.) 1990, 917 F.2d 544, 16 U.S.P.Q.2d 1587, J.A. LaPorte, Inc. v. Norfolk Dredging Co., C.A.Fed. (Va.) 1986, 787 F.2d 1577, 229 U.S.P.Q. 435, certiorari denied 107 S.Ct. 274, 479 U.S. 884, 93 L.Ed.2d 250; Waterfall Farm Systems, Inc. v. Craig, D.Md.1995, 914 F.Supp. 1213, Kearns v. Wood Motors, Inc., E.D.Mich.1990, 773 F.Supp. 979, 19 U.S.P.Q.2d 1138.

⁹⁹ Helsinn Healthcare S.A. v. Teva Pharmaceuticals USA, Inc., C.A.Fed.2017, 855 F.3d 1356, 123 U.S.P.Q.2d 1045, Henry v. Francetown Soap-Stone Co., C.C.N.H.1880, 2 F. 78

¹⁰⁰ Moleculon Research Corp. v. CBS, Inc., C.A.Fed. (Del.) 1986, 793 F.2d 1261, 229 U.S.P.Q. 805, certiorari denied 107 S.Ct. 875, 479 U.S. 1030, 93 L.Ed.2d 829, on remand 666 F.Supp. 661, 4 U.S.P.Q.2d 1312.

¹⁰¹ Intel Corp. v. U.S. Intern. Trade Com'n, C.A.Fed.1991, 946 F.2d 821, 20 U.S.P.Q.2d 1161, rehearing denied.

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

This helps us in thinking about “normal commercial exploitation.” It is the actual act of commercial gain, and not the contemplation. It is the act of selling, offering for sale, or demonstrating for sale. This makes the requirement visible to the public. It is not that a company may be contemplating reissuing a book. The book is for sale. What can we take away from this? Sale to the public or offer for sale likely constitutes “normal commercial exploitation” and for books, this means channels that libraries are likely to frequent.

So, how does one determine if a work is for sale? We came to believe that a “normal commercial exploitation” could mean.

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

W.H. Smith, the largest book retailer in Great Britain, began a means of computerizing their books, creating a Standard Book Numbering (SBN) system in 1966.¹⁰² This became the basis of the International system, which began in 1970, and is now used in more than 150 countries.¹⁰³ The question is: what happened to works before 1970? If there is no ISBN for a work, is this a good indication that there is no “normal commercial exploitation” of the work now? Since the works we are looking at are from the 1920s, 1930s and 1940s, if they have not been reissued after 1970, they

¹⁰² ISBN.org, http://www.isbn.org/ISBN_history

¹⁰³ Id.

would not have an ISBN number, and so there is likely no commercial exploitation currently. (See Appendix for more on ISBN numbers). Parallel systems occur for non-books.

We found ISBNDB.com particularly helpful. At this free website, one can put in an author's name and title, and retrieve all of the places that one might find new *and used* editions of the work. We were particularly impressed that some of the results included the information that about a work having an earlier publication date (that the work was a reprint). One can review the used and new copies and see the different versions, including the publication dates. It's an incredibly useful tool. Books in Print is also a good indication of whether there is currently normal commercial exploitation, as is availability at Amazon, and other sources that are industry specific.

One important caveat: just because a work is at Amazon does not mean that it qualifies as "normal commercial exploitation." We found in one study that we conducted that while a copy was found, the work was in fact in the public domain *or* it was clear that the copy we found was not authorized by the copyright holder or the original publisher. One has to really check the results to see if this is "normal commercial exploitation" by the copyright holder. The same holds true for "a reasonable copy." If there is a "reasonable copy" found is this because the work is in the public domain and many are reproducing the work. If this is the case, the library or archive is also able to reproduce the work *because the work is in the public domain*, and not under Section 108(h). Check the copyright status against your findings, and you may find hidden gems.

C. Reasonable Copy

The statute also requires that one cannot obtain a reasonable copy. In *Eldred v. Ashcroft*, Section 108(h) is mentioned in Dissent as a supplement to the First Amendment safeguards: "The CTEA itself supplements these traditional First Amendment safeguards. First, it allows libraries, archives, and similar institutions to "reproduce" and "distribute, display, or perform in facsimile or digital form" copies of certain published works "during the last 20 years of any term of copyright ... for purposes of preservation, scholarship, or research" if the work is not already being exploited

commercially and further copies are unavailable at a reasonable price. 17 U.S.C. § 108(h)” *Eldred v. Ashcroft*, 537 U.S. 186, 220, 123 S. Ct. 769, 789, 154 L. Ed. 2d 683 (2003). Here Breyer describes the requirement as “further *copies* are unavailable at a reasonable price,” and not in the singular.

How does one reasonably investigate? So, this is the heart of the work of our exploration. How does one determine whether a work is subject to “normal commercial exploitation”, and how does one prove a negative – that there is no normal commercial exploitation. Second, what constitutes a reasonable copy? Does that include only new copies, or do used copies count too? What role does the first sale doctrine play in relation to reasonable copy? If reasonable copy is to benefit the copyright holder, one would assume only new copies are included.

The House Report related to Section 108 stated regarding a reasonable investigation: “The scope and nature of a reasonable investigation to determine that an unused copy cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly-known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if the owner can be located at the address listed in the copyright registration), or an authorized reproducing service. It is further required that the copy become the property of the user, that the library or archives have no notice that the copy would be used for any purpose other than private study, scholarship, or research, and that the library or archives display prominently at the place where reproduction requests are accepted, and include on its order form, a warning of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation.”¹⁰⁴

For many works, especially archival materials, meeting the two requirements above is relatively easy. For instance, the Frick Collection has many exhibition catalogs, first published here and abroad. If the works are still under copyright (many of them are not), then the next step is a Section 108(h) analysis. In this case, they are not being commercially exploited – no one is actively

¹⁰⁴ Reasonable Investigation - House Report No. 94-1476 pg. 75-76

selling these one-time, long forgot works, and often the reason that they are being digitized is because they are nearly one-of-a-kind.

The other major question is whether reasonable copies are new or also used copies. There is an argument to be made on both sides. An earlier portion of Section 108, asks the library to look for unused copies at a reasonable price as a requirement before making a replacement copy: “the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price.”¹⁰⁵ The Discussion Paper from the U.S. Copyright Office on Section 108 seems to indicate that used copies count (“that a new or used copy of the work is not available at a reasonable price”). However, the statute itself is not as clear as the confident language from the Copyright Office.

D. Normal Commercial Exploitation and Reasonable Copy Applied

Both queries require the same search: are copies available of the work? One could see normal commercial exploitation potentially as new copies and reasonable copies as used. It is still unclear how the law approaches this, and whether reasonable copies or even just one copy suffices. Is reasonable copies new copies only? What is a reasonable copy? Does a later version count? Likely. What if the original version matters? Does that make a difference? Again, I think it goes back to intent. The goal is to provide access for research and scholarship. If a reasonable copy is available, then that seems sufficient. But the question begins again – what is a reasonable copy in a digital realm?

E. The Netflix Problem

How does one know when a work has not been made available for normal commercial exploitation or that a reasonable copy is not available for audiovisual works?

¹⁰⁵ 17 U.S.C. Section 108(c)(1).

First, as with books and periodicals, audiovisual works can be tracked with a ISBN-like number, called the International Standard Audiovisual Number (ISAN). While a voluntary system, like ISBN, the system does allow one to see if there is commercial activity on these older works. Second, the reasonable copy requirement is more easily met in some way by looking at Amazon.com or other online resources. Older films and other audiovisual works are less likely to have reasonable copies available. The real question is “normal commercial exploitation.” Remember, the goal of Section 108(h) is to make available works that are not loved--that do not have copies available and are without normal commercial exploitation. As of 2017, these are works first published between 1923 and 1941.

What if a work is available on Netflix? Hmm... Well, that is normal commercial exploitation. But the one problem one runs into is that the works available on Netflix vary. What if there is no commercial exploitation of the work in May 2017 but there is in June, but again not in August? What if a scholar or teacher depends on a copy of the work? It seems that Netflix exploitation may not be stable enough, even though it is normal commercial exploitation. Another reading might be that it was normal commercial exploitation as of the drafting and enactment of the CTEA, in 1998. If that is the case, streaming availability by subscription was not a normal commercial exploitation.

Normal commercial exploitation also points to the library being able to purchase a copy of the work. Can a library purchase a subscription with a stable copy of the work? If not, that may not qualify as a normal commercial exploitation for the purposes of obtaining a copy to have in a library's collection.

Finally, the goal of Section 108(h), in the writer's opinion, was to rescue works that would *not* be playing on Netflix. If one can communicate with the copyright holders about their commercial exploitation, that may also be a strategy. Can the copyright holder point the library to

normal commercial exploitation, which they could pass along to their patrons? Can the library buy a copy of the work?

F. Notice from Copyright Holders

A copyright holder may file a notice to libraries and archives of normal commercial exploitation or available at a reasonable price with the U.S. Copyright Office.¹⁰⁶ This is the third aspect of the requirements for a library – that a notice hasn’t been filed in the nearly 20 years since the law was passed in October 1998 (and there are no listed fees at the Copyright Office for doing so!) To date, no notices have ever been filed. As part of that information, the copyright holder may include information about the normal commercial exploitation or reasonable price, but is not required. However, the form must include: “A declaration made under penalty of perjury that the work identified is subject to normal commercial exploitation, or that a copy or phonorecord of the work is available at a reasonable price.”¹⁰⁷ What is interesting is no information is provided in the procedures of when the notice must be filed. What about the Compendium III, the Copyright Office practices? Nothing touches upon this process.

Once a copyright holder files a notice, the exception no longer applies. In its 2005 Orphan Work Report, the Copyright Office noted: “The provision does not provide much incentive for a copyright owner to file such a notice before it discovers that one of its works is being used under this subsection. By its terms, it appears that such a notice can be filed at any time, even after a library or archive begins use of a work it had determined to have met the criteria. Once the notice is filed, the work is no longer subject to the exception, and the library or archives would have to cease its use under section 108(h). In most cases, it would thus seem more efficient for a copyright owner

¹⁰⁶ <https://www.copyright.gov/title37/201/37cfr201-39.html> and <https://www.copyright.gov/forms/nlacon.pdf>

¹⁰⁷ <https://www.copyright.gov/title37/201/37cfr201-39.html>

to “wait and see” whether a work is being used under section 108(h) rather than to file such notices proactively.”¹⁰⁸

So, should this concern libraries and archives? Well no one has filed a notice. And, in this day and age, one can take down digitizing. But I would also add that there may be some reliance on Section 108(h). If one puts resources into digitizing a work that is not commercially available and no copies are available at a reasonable price, and it is only after digitizing the work that the publisher/copyright holder then makes a copy available, one could think that the library/archive would have a case for collecting expenses from the library/archive. But at the least, the only obligation the library/archive would have would be to not use Section 108(h) as justification for making and distributing copies. Fair use, and all of the other portions of Section 108 would still apply.

G. Timing

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

H. Registration

One additional element to consider. If a work is not registered with the U.S. Copyright Office, there is less “teeth” to the copyright. Domestic authors cannot pursue a copyright infringement case

¹⁰⁸ <https://www.copyright.gov/orphan/orphan-report.pdf> at 46.

without registration, and both domestic authors and foreign authors alike cannot receive statutory damages or attorney's fees without registration. [more?]

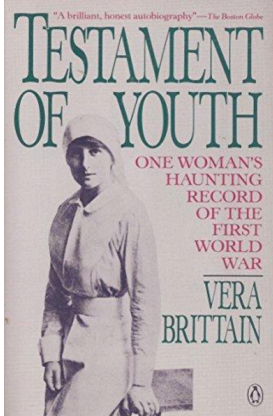
I. What is a "work" or "copy"?

One outlying question is how to define a "work" or "copy" for the purpose of Section 108(h).

For instance, Testament of Youth by Vera Brittain was first published in England in 1933. A U.S. version came out later that year. It was republished many times, including later with a new introduction by her daughter, and later three versions as part of a movie tie-in in 2015. This does not include the countless additions in other countries – India, for example, or the translations.

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

Search results for: **VERA BRITAIN**



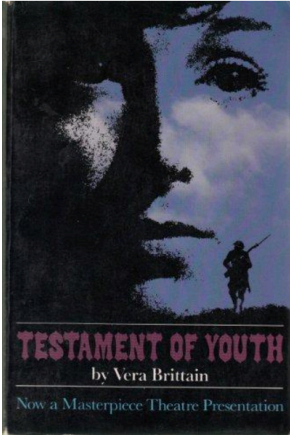
Testament of Youth : One Woman's Haunting Record of the First World War
Vera Brittain
★★★★☆ 5,311 ratings by Goodreads
ISBN 10: 0140122516 / ISBN 13: 9780140122510
Published by Penguin Publishing Group

Used Condition: Fair Soft cover

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Testament of Youth
Vera Brittain
★★★★☆ 5,305 ratings by Goodreads
ISBN 10: 0872236722 / ISBN 13: 9780872236721
Published by Penguin Publishing Group

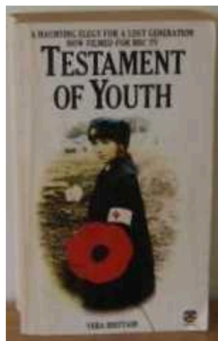
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Brittain, Vera

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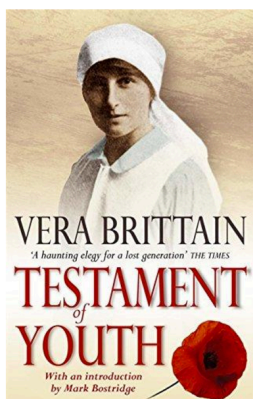
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Testament of Youth

Vera Brittain

★★★★☆ 5,297 ratings by Goodreads

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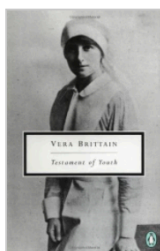
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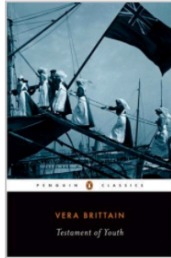
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[Testament of Youth \(Penguin Classics\)](#)

Brittain, Vera

Published by Penguin Classics

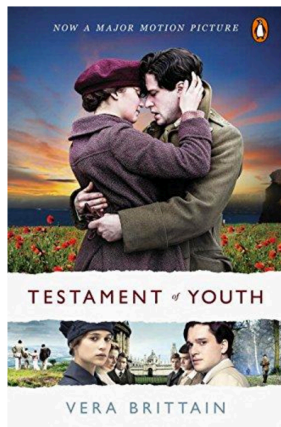
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Brittain, Vera

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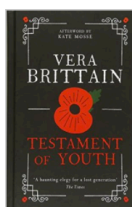
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[Testament of Youth \(Hardback\)](#)

Vera Brittain

Published by Orion Publishing Co, United Kingdom (2014)

ISBN 10: [1780226594](#) / ISBN 13: [9781780226590](#)

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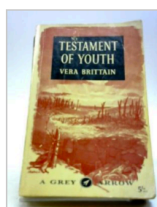
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[Testament of youth: An autobiographical story of the years 1900-1925 \(Grey arrow books ; no.48\)](#)

Brittain, Vera

Published by Arrow Books (1960)

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



Testament of Youth

Vera Brittain

Published by Macmillan (1935)

Used / Hardcover

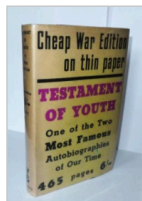
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Item Description: Macmillan, 1935. Hardcover. Book Condition: Good +. Shelf 1126 Text clean; p
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some light general wear including a couple small white dots on front and some rubbing to spine st
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Vera Brittain

Published by Gollancz, London (1944)

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Quantity Available: 1

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Seller Rating: ★★★★★



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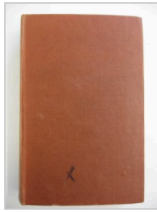
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Item Description: Gollancz, London, 1944. Hardback. Book Condition: Very Good. Dust Jacket Condition: Very Good. Early Reprint. 16th impression of this landmark autobiography much of which is set against the back drop of World War I and its aftermath in publisher's original light blue cloth with gilt titles to spine still quite fresh looking with a little fading at the bottom edge of the spine only. The binding is tight, sound and square with some minor spotting to page block edges. Internally generally clean with some light foxing to pastedowns and one neat ownership signature, dated 1945, at the top edge of the front free ep. The scarce unclipped dustjacket is complete with some light fading, a couple of tiny nicks and the occasional hint of wear at the edges. Jacket now in a removable, transparent cover. A very nice copy - scarce in jacket. Size: 12mo - over 6¼" - 7¾" tall. Bookseller Inventory # 001226

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Brittain, Vera

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

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9.



Testament of Youth

Brittain, Vera

Published by Macmillan (1933)

Used / Hardcover

Quantity Available: 1

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

[Seller Rating:](#) ★★★★★

 **Add to Basket**

Price: US\$ 15.76

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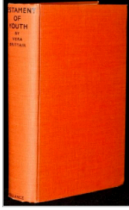
Shipping:  **FREE**

Within U.S.A.

[Destination, Rates & Speeds](#)

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

And here is the original version:



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

LITERATURE] Vera Brittain

Published by Victor Gollancz, London (1933)

Used / Hardcover / First Edition

Quantity Available: 1

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

[Seller Rating:](#) ★★★★★

Add to Basket

Price: US\$ 1,250.00

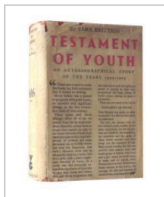
[Convert Currency](#)

Shipping: US\$ 4.00

Within U.S.A.

[Destination, Rates & Speeds](#)

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



Seller Image

Testament of Youth - in the original dust wrapper

Brittain, Vera

Published by London Gollancz 1933 (1933)

Used / First Edition

Quantity Available: 1

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

[Seller Rating:](#) ★★★★★

Add to Basket

Price: US\$ 4,386.75

[Convert Currency](#)

Shipping: US\$ 15.73

From United Kingdom to U.S.A.

[Destination, Rates & Speeds](#)

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

Now, obviously there are many, many copies of *Testament of Youth*. This would not qualify for Section 108(h). But the question here is: what is considered a copy of the original work? For copyright purposes, the original work holds a copyright term, in this case, thanks to restoration, through 2028. But this work was also in the public domain in the U.S. from 1961 to 1996. Many of these versions are no doubt because of this status. If I was a scholar (and I am) that is interested in Vera Brittain, what counts as a “reasonable copy” in terms of content for the purposes of Section

108(h). In copyright law, the other works are derivatives, if there are changes, but the underlying work is still the same in terms of the original copyright. But what about in the library community? How are all of these versions viewed, and what can be gleaned in terms of what counts as a copy for the purpose of Section 108(h). Section 108(h) includes the concept of the “work” and “copy” of the work. How is work defined? What is a copy? As a reminder, let’s look again at the statute:

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

(2)No reproduction, distribution, display, or performance is authorized under this subsection if—

(A)

the **work is subject to normal commercial exploitation**;

(B)

a **copy** or phonorecord of the work can be obtained at a reasonable price; or

(C)

the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies. (Emphasis added)

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

commercial exploitation must be a copy of that original, rather than a derivative version of the work? The Copyright Act defines “copies”:

“Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed. 17 U.S.C. Section 101

The Copyright Act defines a “work”:

A work is “created” when it is fixed in a copy or phonorecord for the first time; where a work is prepared over a period of time, the portion of it that has been fixed at any particular time constitutes the work as of that time, and where the work has been prepared in different versions, each version constitutes a separate work. 17 U.S.C. Section 101

Finally, the Copyright Act defines a “derivative work”:

A “derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work”. 17 U.S.C. 101

How are we to understand, then, the relationship between different versions as separate works or derivative works and the required that copies of the “published work” not be available commercially or at reasonable price, for purposes of Section 108(h)? We turn to the work of Daniel Joudrey, and his mammoth work, *Introduction to Cataloging and Classification* (Eleventh edition, 2015). We are focused on his explanation of the *Functional Requirements for Bibliographic Records*.¹⁰⁹

We begin with the *Functional Requirements for Bibliographic Records* (FRBR), the theoretical model for modern cataloging.¹¹⁰ It is the basis for the cataloging rules found in *RDA*:

¹⁰⁹ In August 2017, a new version of FRBR called IFLA Library Reference Model (LRM) was authorized. It now replaces FRBR. Many aspects of the original FRBR model remain (especially WEMI), but there have been changes. The biggest one is that most of the attributes have been stripped out of the model. They were too specific and should be left up to individual implementations of the LRM (such as RDA). For our purposes, we will be using the FRBR as a means of understanding “work” or “copy”.

¹¹⁰ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 61.

Resource Description Access.¹¹¹ FRBR is an “abstract conceptual model...for understanding the components of the bibliographic universe.”¹¹² It is a clear view of how librarians -- catalogers -- approach the bibliographic record “and what we expect the record to achieve in terms of answering user needs.”¹¹³ We are going to dive deep into the basics of the FRBR, with Joudrey as our guide to understand the relationship between “published work” and “copy” in Section 108(h). The FRBR conceptual model divides the entities comprising the bibliographic universe into three groups based on role and function.¹¹⁴ For our purposes, we are focused on Group 1.

Group 1 comprises *work, expression, manifestation, and item* (WEMI) that are “the products or results of “intellectual or artistic endeavor that are named or described in bibliographic records.”

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Joudrey explains the relationships among the four Group 1 entities:

1. “A single work may be *realized through* one or more expressions--e.g. The content of a novel may be translated into many different languages
2. One or more expressions may be *embodied* in one or more manifestations -- e.g. a translated work and its original version may appear in a printed book together, and they may be distributed on microform as well
3. A manifestation is *exemplified by* one or more items, because widely distributed tangible resources having multiple items is the norm -- e.g. thousands of copies of the latest Nicholas Sparks novel are published, because more than one institution or person will purchase a copy.”¹¹⁶

Group 1 has four hierarchical elements: work, expression, manifestation and item. By exploring these elements, we will have a better understanding of how to identify the “published work”, “normal commercial exploitation” and “copies” of the work. While in many ways, the answer is already in the definitions supplied by the Copyright Act, applying FRBR to our analysis helps clarify the boundaries between the published work and copy of the work.

¹¹¹ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 61.

¹¹² *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 61.

¹¹³ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 61-2.

¹¹⁴ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 64.

¹¹⁵ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 64.

¹¹⁶ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 65.

First hierarchy: Work: “an abstract intellectual or artistic creation”.¹¹⁷ The FRBR defines a work as “a distinct intellectual or artistic creation. A *work* is an abstract entity: it is the intellectual or artistic content and there is no single material object one can point to as the *work*. We recognize the *work* through individual realizations of *expressions of the work*, but the *work* itself exists only in the commonality of content between and among the various *expressions of the work*.”¹¹⁸ Shakespeare’s *Hamlet* is the work, but one is not referring to any specific version. “It is the creator’s abstract ideas that are referred to as a work. One cannot see, purchase, or touch an actual work. A work exists only in a realm of human thought... To obtain a work, it must be expressed in some manner first and then manifested into some physical form or carrier.”¹¹⁹ We don’t have this concept exactly in copyright. We see the work as defined by its physical embodiment. But we can see that the work is more than its physical form. It is this concept that “work” is trying to get at.

For the bibliographic record, “the purpose of the work is to be able to identify unique intellectual or imaginative content and then to group expressions around it. The idea is that the work provides a name or label that may be applied to all the various expressions that orbit the same content.”¹²⁰ Using Shakespeare’s *Hamlet* again, Joudrey sees this as a label “consisting of a creator’s name and common title--that may be applied to myriad expressions of that work, including the original English-language versions from the First Quarto...as well as various translations...”¹²¹ Joudrey explains that there are 12 attributes to the work, that describe and identify the work itself, rather than its expression, manifestation or item.¹²² The goal is to identify identically titled works with different content.¹²³

Title of the work
Form of the work (e.g. poem, play, fiction, etc.)

¹¹⁷ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 70.

¹¹⁸ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 70.

¹¹⁹ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 70.

¹²⁰ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 70.

¹²¹ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 71.

¹²² *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 71.

¹²³ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 71.

Date of the work (creation date or a range of date, and can include the publication date if creation date is unknown)
Other distinguishing characteristics
Intended termination (whether finite work or ongoing)
Intended audience
Context for the work¹²⁴

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

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

Second Hierarchy: Expression: “signs, symbols, notation, sounds, images, etc. used to convey the content of the work. The second level of hierarchy is expression. Joudrey explains that expression “indicates how this content is communicated.... ‘The specific words, sentences, paragraphs, etc. that result from the realization of a *work* in the form of a text’ but text that is not yet on the printed page. There can be, of course, more than one expression of a work.”¹²⁵ Joudrey continues, “An expression--like a work--is an intangible entity: it excludes the physical forms. An expression is concerned with delivering the content of the work. One can neither hold nor see an expression, at least not until it has been embodied in a manifestation in some way.”¹²⁶ Why would one need the *expression*? “The concept allows catalogers to group various manifestations together as long as they share the same content and communicate it the same way, no matter how different

¹²⁴ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 71.

¹²⁵ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 71.

¹²⁶ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 72.

the physical carriers holding the content may be.”¹²⁷ He explains, “As defined, an expression reflects a mode of communication (words, pictures, etc.) but it does *not* reflect a particular type of physical object (a printed book, a collage of images, etc.)”¹²⁸ Joudrey provides the example of *Twelfth Night* by Shakespeare. The expression can be the original English First folio text, a Spanish translation, a performance by the Royal Shakespeare Company, and a performance by the Folger Shakespeare Theatre. In this example, there is one work, but several expressions. He notes that any change in form creates a new expression. Revisions are also new expressions, while minor changes can be considered variations of the same expression. This is key for us, I believe. Are there genuine differences between two published editions, a British version versus a US version? If so, they are two different expressions of the work.¹²⁹ Joudrey notes that a translation of *Twelfth Night* into Spanish will be one expression, even if there are a number of different translations.

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

- Title of the expression. This is focused on title of the work itself
- Form of expression. How the work is realized. (text, music, etc.)
- Date of the expression. Ideally the creation date, but can be a range, performance, etc.
- Language of expression.
- Other distinguishing characteristics
- Extent of the expression (e.g. number of words, running time, etc.)
- Summarization of content (74)

How does one determine whether the changes have created a new work? That is the task for the expression stage, and FRBR notes that the amount of change necessary may vary from culture to culture. (75) Joudrey includes a list of examples considered to be new expressions of the same work. He writes “updates, revisions, translations, subtitled or dubbed films, and modest changes in content usually result in new expressions.” (75) Here is his list, based on Barbara Tillett's work as cited in the book:

¹²⁷ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 72.

¹²⁸ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 72.

¹²⁹ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 73.

- Variations or versions
- Simultaneous publication
- Slight modifications
- Arrangements
- Translations
- New editions
 - Revisions or updates
 - Illustrated editions
 - Abridged editions
 - Expurgated editions¹³⁰

Joudrey explains, “When there are significant changes in form and/or genre, when those responsible for the content have transformed the original work into something new, or when there is significant, independent intellectual or creative endeavor, then a new work has been generated.”

¹³¹ Joudrey included a flowchart to understand when a new expression has been created. Table 3.1.

¹³² This sounds a great deal like the definition of “work” and “derivative work” in the Copyright Act. Expressions then are different versions of the work distinguishable from each other.

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

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

¹³⁰ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 72.

¹³¹ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 76.

¹³² *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 77.

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

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

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

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

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

Joudrey notes that there is a film version of *The Philadelphia Story*. Here, he sees this as a separate work, a new work because it is a “transformation of Barry’s original work,” with “different creators involved, and...changes in genre and form...”¹³³ So, he describes then the film version as having at least two new works: the film and the screenplay, but notes that it could be many more than this: costume sketches, score, set designs, etc. could all be viewed as separate works exhibiting

¹³³ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 78.

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

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

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

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

on in every decision. After one goes beyond a single print manifestation containing a single expression of a single work, it can get complicated quickly..."¹³⁴

Third hierarchy - Manifestation: a set of physical resources in which an expression of a work appears. (69) The third element in the hierarchy is manifestation, which “shifts from the abstract to the tangible: ‘...When a *work* is realized, the resulting *expression* of the work may be physically embodied on or in a medium such as paper, audio tape, video tape, canvas, plaster, etc. That physical embodiment constitutes a *manifestation* of the *work*.”¹³⁵

For us, I would believe that the *expression* equates to the “*work*” in copyright. The heart of the first expression of the work is usually the main work, with additional expressions derivative works. A work will always have at least one expression, and that expression must occur as a manifestation in order to qualify for copyright protection. Section 102(a) of the 1976 Copyright act reads: “Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹³⁶ The manifestation is the tangible medium of expression. The original works of authorship is the expression. Joudrey explains that it is at the manifestation level that catalogers generally begin the process. Joudrey uses *Twelfth Night* as an example.

Work 1: *Twelfth Night* by Shakespeare

	FBRB	Durationator MUDS
Original English text	W1 E1	Main
1892 American Book Company Edition	W1 E1 M1	Derivative 1 of main
Microform version of 1892 American Book edition	W1 E1 M2	? (is this a derivative of a derivative of main)

¹³⁴ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 79.

¹³⁵ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 79-80 citing *FRBR*, p. 21.

¹³⁶ 17 U.S.C. Section 102(a).

2008 Arden Edition	W1 E1 M3	Derivative 2 of main
Electronic text of Project Gutenberg	W1 E1 M4	? (where does the text originate) of main
Spanish Translation	W1 E2	
1899 Spanish translation. Revista nueva edition	W1 E2 M1	Derivative 3 of main (assuming it is based on the original text)
1928 Rivadeneyra edition	W1 E2 M2	Derivative 4 of main
Performance by the Royal Shakespeare Company	W1 E3	Derivative 5 of main (no copyright unless fixed)
DVD of recorded live performance by RSC	W1 E3 M1	Derivative 5 of main
VHS tape of recorded live performance by RSC	W1 E3 M2	Derivative 5 of main

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

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

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

DVD of recorded live performance by RSC	W1 E3 M1	Derivative 5 of main, Physical Manifestation 1
VHS tape of recorded live performance by RSC	W1 E3 M2	Derivative 5 of main, Physical Manifestation 2

Regarding book prints, Joudrey is helpful. "A print edition of a book is generally considered one manifestation whether it is hardback or paperback. ' New printings will not result in in a new manifestation unless other changes are made. A manifestation may have different bindings or other variations that do not significantly affect the printed image.'"¹³⁷

For the manifestation level, where catalogers generally begin their process, there are 38 manifestation attributes.¹³⁸ The most frequently used, according to Joudrey, are the following:

- Title of the manifestation. Usually title of the work.
- Statement of Responsibility. "Information from manifestation regarding the parties responsible for the creation and/or realization of the content; may include more than one person, family or corporate body."
- Edition/Issue designation. "Although edition statements are associated with manifestations, actual changes in content that reflect new editions are made at the expression level." (82)
- Place of publication/distribution. Note: it is the city that is the focus, rather than the country. For Durationator and copyright purposes, we have to translate this into the country. This also makes sense why later we will see that the city is often included in the MARC record, although the 008 field of the MARC record is based on the country or (in the case of the US) state of the work.
- Publisher/Distributor
- Date of publication/distribution
- Fabricator/manufacturer
- Series statement
- Form of carrier (e.g. volume, filmstrip, microfish, computer disc, etc.)
- Extent of the carrier (number)
- Physical medium
- Capture mode: means used to record the content (analog, digital, ink, paper)
- Dimensions of the carrier
- Manifestation Identifier: unique code associated with a manifestation (e.g. ISBN, URI, etc.)

Not that the tangible medium of expression is called the "carrier."

¹³⁷ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 82 citing an article by Ed O'Neill.

¹³⁸ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 82.

Fourth hierarchy - Item: The first group also contains a fourth hierarchy: the item. This is the physical object of the manifestation. “An item is a single exemplar of a *manifestation*, which may be made up of one or more physical objects.”¹³⁹ Libraries purchase items. Items, in copyright terms, are copies.

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

Joudrey notes: “An item may also contain more than one work (e.g. a collection of essays), more than one expression of the same work (original and translation of text); and so on.” In working with the Internet Archive, we came across an example of this with a collection of short stories by Agatha Christie. Each short story had been published previously in various magazines. These were each works before they were manifest into an item. The work itself--the selection, arrangement and coordination of the short stories, the collection--carried its own copyright. The item, then had multiple works (the stories) that were individual expressions, manifest into a single carrier. There was a US and a UK edition, which may or may not have had enough differences to be different manifestations of the same work.¹⁴⁰ The item that was digitized by the Internet Archive, then contained more than one work -- the stories were each works and the collection of the stories was a work. There was one expression, in this case the collection, and it manifested, in this case, in a US

¹³⁹ *Introduction to Cataloging and Classification* (Eleventh edition, 2015), 82.

¹⁴⁰ If the differences are based on content and edition, then this is at the expression level, not the manifestation level. In this scenario, we are assuming the content is the same for both editions.

publication. The manifestation was digitized because the item had been purchased by a library that now made it into a new form. The digitization of the item, then, likely produces a new manifestation of the work, and a new item in the physical form of code. The digitized manifestation could be copied as a digital pdf. Each copy of the digital PDF is an item. Items have nine attributes

- Item identifier: unique number of code linked to the item (e.g. barcode, call number, etc.)
- Fingerprint: identifier created from characters transcribed from specific pages of a printed book.
- Provenance of the item
- Marks/inscriptions
- Exhibition history
- Condition of the item
- Treatment history
- Scheduled treatment
- Access restrictions on the item

What we are concerned with, then with Section 108(h)? Let's translate the language of Section 108(h) into the language of FRBR.

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

Copy: this is the item level. Can you find the item of the manifestation of the expression?

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

At what level are we comparing "normal commercial exploitation" and "copies"? The published work is that element that defines the copyright -- the manifestation of the expression of the work. In this case, the original 1933 version (the manifestation) is the published work. What is

normal commercial exploitation of that work? Does it include the specific 1933 expression, even if the manifestation is different? What happens if the manifestation is so different as to cause a new expression category?

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

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

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

How to boil this down?

Is the manifestation of work available as an item for purchase?

No. No reasonable copy.

Yes. Reasonable copy.

Is the expression of the work available for purchase as an item in a different manifestation that does not alter the content of the original expression? (We don't care if there are additions, only alterations to the original).

No. No normal commercial exploitation

Yes. Commercial exploitation.

So if later editions of Testament of Youth carry the same manifestation of the expression of the work, even if there are additions, this would count for purposes of Section 108(h). However, if the later editions had been altered so that the original manifestation created a new expression (a new ending, for instance), then new item would not count for purposes of Section 108(h). If the new manifestation alters so much as to cause a new expression, then the new manifestation does not stand in the shoes of the older manifestation. This seems to reflect the definitions of “work”, “copies” and “derivative work in the Copyright Act. Let’s look again at the Philadelphia Story (film), this time slightly altered. I’ve included the copyright status to show the impact of this approach: manifestation and item.

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

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

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

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

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

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

Taken another way, if the 1933 edition of Testament of Youth were altered in subsequent copies, and no copies (either current books in print or older copies) of the 1933 work are available

for sale, then the library could digitize it under Section 108(h). Note: even every library in the world has a copy of the 1933 edition, if there are no copies for sale, the work is eligible for Section 108(h).

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

How might the FRBR apply in a practical cataloging situation, and in particular our Section 108(h) search? OCLC conducted a study, “The Concept of Work in Worldcat: An Application of FRBR,” by Rick Bennett, Brian Lavoie and Edward O’Neill (2003), in which they took a random sample 1000 works to see how useful the FRBR categories would be. They then extrapolated the data to the larger WorldCat catalog. The sample matched in type of material the larger 50 million records in WorldCat: “85% books, 5% serials, 4% musical performances and scores, 3% projected mediums, 2% maps, and the remainder a variety of forms such as voice recordings, computer files, and two-dimensional non-projectable graphics.” (Id, np) Their findings were very interesting. They took the statistics from the sample, and applied it to the larger collection.

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

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

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

The study also developed six categories to describe complex works.

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

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

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

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

Multiple Forms of Expression. These are the most interesting, and what is was the focus of the work above.

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

Part V: Obtaining Data; Recording Results

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

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

One large question we had to face was understand the structure of library records, both for retrieving data and then adding copyright status data into the record. The Library of Congress

released 25 million MARC records for free this summer of 2017, and that seemed a good place to begin.

A. MARC Records

1. What are they?

A MARC record is a Machine-Readable Cataloging record. Machine-readable means that a computer can read the data. A cataloging record is the way in which libraries organize bibliographic information about a work. This includes descriptions, basic information including publication date, subject headings, and identification numbers, usually the call number. The MARC system began in the 1960s, when the Library of Congress wanted to figure out how to make bibliographic information available in machine-readable form.¹⁴¹ A pilot project was conducted for two years, beginning in 1966.¹⁴² They started with books in 1968, and was extended by 1976 to “serials, maps, films, manuscripts, and music...”¹⁴³ The second version, MARC II became the standard format, and was distributed to other libraries through magnetic tape.¹⁴⁴ MARC II was updated, and is now referred to as MARC 21. MARC provides mandatory and voluntary fields for all types of works. The publication *MARC Formats for Bibliographic Data* provides information on each of the fields, and is updated periodically.¹⁴⁵

There are different types of records: bibliographic records and authority records. Bibliographic records provide data about a particular book or work, while authority records provide standardized forms of names, titles, and subjects that are used in the bibliographic records. So, for example, when one wants to find all of the works by Vera Brittain, the authority record will have

¹⁴¹ Katharine D. Morton, *The MARC Formats: An Overview*, *American Archivist*, Vol. 49, No. 1, Winter 1986, 21-29, 22.

¹⁴² *Id.* at 22.

¹⁴³ *Id.* at 23.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 23.

“Brittain, Vera (1893-1970),¹⁴⁶ while the bibliographic record will be for her works *Testament of Youth*, *Chronicle of Youth*, and *Poems of the War and After*.

A bibliographic MARC record has a basic structure. “The content designators are called tags, indicators and subfield codes.” (24) There are nine fields the tag numbers indicate the type of field:

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

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

- 010 tag** marks the **Library of Congress Control Number (LCCN)**
- 020 tag** marks the **International Standard Book Number (ISBN)**
- 100 tag** marks a **personal name main entry** (author)
- 245 tag** marks the **title information** (which includes the title, other title information, and the statement of responsibility)
- 250 tag** marks the **edition**
- 260 tag** marks the **publication information**
- 300 tag** marks the **physical description** (often referred to as the “collation” when describing books)
- 490 tag** marks the **series statement**
- 520 tag** marks the **annotation or summary note**
- 650 tag** marks a **topical subject heading**
- 700 tag** marks a **personal name added entry** (joint author, editor, or illustrator)¹⁴⁷

The *MARC 21 Format for Bibliographic Data*, and *MARC 21 Concise Formats* are two official resources. There are also indicators. These are single digit numbers. There are two indicators. For example, for 245 field, the first indicator, indicates where a title card should be printed. The second indicator tells the number of characters before the title begins. For example, “4” indicates that the

¹⁴⁶ <http://id.loc.gov/authorities/names/n81018727.html>

¹⁴⁷ <https://www.loc.gov/marc/umb/um01to06.html>

title begins four characters in: "The Emperor's new clothes." The "the" and space are not counted. The title begins with the "E".¹⁴⁸ But the indicators change with each field.

Subfields contains more information about the particular field. For field 300, physical description, there are additional subfields for additional information. These are identified by lower-case alphabetical letters preceded by a delimiter usually, \$. \$a represents the extent of the resource (e.g. number of pages), for example.¹⁴⁹

300 ## \$a 675 pages

Each field has additional subfields.

Here is a typical MARC record.

<file://localhost/message/%253C464219627.1069157516.1503710180923.JavaMail.root@sjmas01.marketo.org%253E>

What MARC Looks Like

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

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

¹⁴⁸ <https://www.loc.gov/marc/umb/um01to06.html>

¹⁴⁹ <https://www.loc.gov/marc/umb/um01to06.html>

¹⁵⁰ <http://lili.org/forlibs/ce/able/course8/03whatmarc.htm>

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

Titles

2XX concerns titles. The 245 category – the title can also include the author’s name.

245 14 \$a The title \$c author

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

Edition

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

250 ## \$a2nd ed.

Place of Publication

Two categories including information about publication: 260 and 264.

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

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

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

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

One addition to the 264 field is the “Second Indicator- Function of entity”

Second Indicator - Function of entity

0 - Production

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

1 - Publication

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

2 - Distribution

Field contains a statement relating to the distribution of a resource.

3 - Manufacture

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

4 - Copyright notice date

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

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

2. Copyright Status and MARC Records

MARC records have a special subsection 542 for copyright information. This field has been under-utilized. But they provide the perfect space for detailing copyright and access information. In particular, the death date can be recorded, if not already in the record (\$b), the Copyright holder (\$d), the copyright statement (\$f), copyright date (\$g), copyright renewal date (\$h), publication date (if not already recorded (\$i), copyright status (\$l), publication status (\$m), research date (\$o),

¹⁵¹ See MARC 21, 260 Publication, Distribution, etc., September 2011 (<https://www.loc.gov/marc/bibliographic/bd260.html>) and 264, Production, Publication, Distribution, Manufacture, and Copyright Notice, September 2011 (<https://www.loc.gov/marc/bibliographic/bd264.html>)

country of publication or creation (\$p), supplying agency (\$q), and jurisdiction of copyright assessment (\$r).

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

B. Tagging Results

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

1. Rightsstatement.org

Rightsstatement.org is a group made up of others from key cultural institutions: University of Michigan, Creative Commons, Europeana, DPLA, NYPL, to name a few.¹⁵² Together, along with comments from third parties, they developed a way to communicate rights statements. Their goal was to keep the categories simple and flexible.

Rightsstatement.org developed 12 tags for identifying the status of works. They describe the project: "RightsStatements.org provides a set of standardized rights statements that can be used to

¹⁵² "The Rights Statements Working Group of the International Rights Statement Working Group is cochaired by Emily Gore, Director of Content for DPLA, and Paul Keller, Director of Kennisland & Copyright Advisor to Europeana, with members: Greg Cram, Associate Director of Copyright & Intellectual Property, New York Public Library; Julia Fallon, IPR and Policy Advisor, Europeana; Lucie Guibault, Associate professor, Institute for Information Law, University of Amsterdam; Karen Estlund, Associate Dean for Technology and Digital Strategies, Penn State University Libraries; David Hansen, Assistant Clinical Professor & Faculty Research Librarian, UNC School of Law Antoine Isaac, R&D Manager, Europeana; Tom Johnson, Metadata & Platform Architect, DPLA; Melissa Levine, Lead Copyright Officer, University of Michigan Library; Mark A. Matienzo, Director of Technology, DPLA; Patrick Peiffer, Digital Librarian, Bibliothèque nationale de Luxembourg; Amy Rudersdorf, Assistant Director of Content, DPLA and Richard J. Urban, Assistant Professor, Florida State University College of Communication & Information; Maarten Zeinstra, Technical Coordinator, Europeana Licensing Framework, Kennisland; Matt Lee, Technical Lead, Creative Commons and Diane Peters, General Counsel, Creative Commons."

http://rightsstatements.org/files/160208recommendations_for_standardized_international_rights_statements_v1.1.pdf at 2.

communicate the copyright and re-use status of digital objects to the public. Our rights statements are supported by major aggregation platforms such as the Digital Public Library of America and Europeana. The rights statements have been designed with both human users and machine users (such as search engines) in mind and make use of semantic web technology.”¹⁵³

For “In Copyright”, there are five statements

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

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

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

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

¹⁵³ <http://rightsstatements.org/en/>

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http://rightsstatements.org/files/160208recommendations_for_standardized_international_rights_statements_v1.1.pdf at 17.

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

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What is interesting about these tags is that there is no “No Copyright” without qualifications. We like the “No Copyright – United States” (NoC-US). We are wondering why they did not use “PD” instead of creating “NoC”.

Finally, Rightsstatement.org has a list of two other statements:

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

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This last case is interesting. “No Known Copyright” feels a lot like “Public Domain,” but “a conclusive determination could not be made. This tagging might be very helpful in situations where the data is leaning to PD, but one is not sure. Also, for institutions that do not want to declare “PD,” one could use this tag instead, creating a little doubt as to certainty. For third-party users coming to this tag, however, there is a problem. We don’t know why it had been tagged “NKC”, or for where. It leaves us starting the investigation all again. Luckily for copyright, the data required is *usually* publically

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http://rightsstatements.org/files/160208recommendations_for_standardized_international_rights_statements_v1.1.pdf at 18.

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http://rightsstatements.org/files/160208recommendations_for_standardized_international_rights_statements_v1.1.pdf at 18.

accessible, but not always. Also, this means that there are resources being expended at least twice, once by the institution, and once by the user. Finally, can another institution rely on the tagging, without additional information? What happens if the first institution is wrong?

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

One other strange element of the rightsstatement.org is their fixation on defining the geographic status of a work based on either US (NoC-US and InC-US) or generalized. This was devised by both Europeans and Americans. The Europeans did not seem to recognize that there may be different terms within the EU, that the status of a work is not universalized, even though there have been Term Directives. It is curious indeed.

2. HathiTrust

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

BIB: bibliographically-derived by automatic processes. This is something we are trying to achieve with this study, using a variety of techniques.

NCN: No printed copyright notice. As discussed before, this matters for US domestic works in the US 1964-Feb 1989.

CON: contractual agreement with copyright holder on file. One assumes these are the kinds of databases that lock up public domain works, and so don't allow viewing, or agreements with donors regarding access to the work.

REN: copyright renewal research was conducted. As discussed previously, this is required for U.S. domestic works, 1923-1963.

NFI: needs further investigation.

CDPP; title page or verso contain copyright date and/or place of publication record. This interestingly does not identify that notice was properly met.

IPMA: in-print and market availability research was conducted. This is likely for Section 108(h).

UNP: unpublished works.

ADD: author death date research was conducted or notification was received from source.

EXP: expiration of copyright term for non-US work with corporate author. Hmm...

GATT: non-US public domain work restored in-copyright in the US by GATT.¹⁵⁷

This, combined with the status IC, PD, or UND is very useful. It allows more information to be communicated to third party users. For instance, PD/REN communicates that the work is in the public domain due to lack of renewal. 17 U.S.C. Section 304. IC/GATT tells us that the work is protected for 95 years from first publication, that the work is of foreign first publication and that it was restored by Section 104A. Now, the average person might not know what those tags mean, but the tagging provides information that can be translated and help in third parties understanding the result. One continuing problem is that the country is not necessarily included, except again on US works.

3. NYPL

New York Public Library has adapted the HathiTrust categories adding information about the renewal searches and terms used with the renewal searches. This means that PD/REN includes data "Sarita Steinberg," and "My Life in Crafts" searched in CCE Records, Book renewals @ Stanford Renewal database." It records the search.

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

¹⁵⁷ Put in Melissa's publication

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

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

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

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

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

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

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

\$g (copyright date) This is the date included in the copyright statement. This is sometimes important, particularly if the notice date is different from a publication date. The earlier date is usually used to determine when the copyright term begins, particularly for works published between 1923-1977.

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

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

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

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

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

What would this look like?

Unknown author, My Life, (Cuba: 1940)

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

542 \$l IC/GATT-US (through 2035) (95 years from publication) (17 U.S.C. Section 104A and 304); PD-CU (as of 1991) (50 years from publication) (Article 45, Law on Copyright (1994)(Cuba) \$f No copyright notice. \$h No renewal record search performed \$o Cuba \$q Durationator \$r United States; Cuba. \$o 2017

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

D. Section 108(h) and Field 506

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

506 - Restrictions on Access Note (R)

MARC 21 Bibliographic - Full

October 2006

First Indicator

Restriction

- No information provided
0 - No restrictions
1 - Restrictions apply

Second Indicator

Undefined

- Undefined

Subfield Codes

\$a - Terms governing access (NR)	\$u - Uniform Resource Identifier (R)
\$b - Jurisdiction (R)	\$2 - Source of term (NR)
\$c - Physical access provisions (R)	\$3 - Materials specified (NR)
\$d - Authorized users (R)	\$5 - Institution to which field applies (NR)
\$e - Authorization (R)	\$6 - Linkage (NR)
\$f - Standardized terminology for access restriction (R)	\$8 - Field link and sequence number (R)

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Using \$a, Section 108(h) information could be included. The subfield code, \$a seems fairly flexible, described as “legal, physical or procedural restrictions imposed on individuals wishing to see the work.”¹⁵⁹ Here are the examples included:

\$a - Terms governing access

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

506 ##\$aClassified.

506 ##\$aFor official use only.

506 ##\$aNot available for distribution in the United States.

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

506 ##\$aConfidential.

506 ##\$aNot available for commercial use, sale, or reproduction.

506 1#\$aFor restricted circulation--not for publication.

506 ##\$aPrior to 1981, distribution was limited to federal judicial personnel.

Another subfield may be handy: \$f. This one is described as “data taken from a standardized list of terms indicating the level or type of restriction:”¹⁶⁰

¹⁵⁸ <https://www.loc.gov/marc/bibliographic/bd506.html>

¹⁵⁹ Id.

¹⁶⁰ Id.

\$f - Standardized terminology for access restriction

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

- 506 0#\$aAccess copy available to the general public.\$fUnrestricted\$2star\$5MH
- 506 ##\$fUnrestricted online access\$2star
- 506 ##\$3Use copy\$aAccess available to account holders only.\$fOnline access with authorization\$2star
- 506 ##\$3Use copy\$aIn copyright material. Searches will return text snippets only.\$fPreview only\$2star
- 506 ##\$aClosed until January 1, 2068.\$fNo online access\$2star
- 506 ##\$3Master copy\$fNo online access\$2star

\$f in these examples included: unrestricted, unrestricted online access; online access with authorization; preview only; no online access; no online access.

Section 108 categories, even beyond Section 108(h) could be included in this area. For example,

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

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

No copyright restrictions (PD-US)

In Copyright (US); Section 108 applies (copies can be made for patrons); Section 108(h) eligible (library can make and distribute copies as long as no commercial exploitation or reasonable copies available)

In Copyright (US): Section 108 applies (copies can be made for patrons); Not eligible for Section 108(h) (unpublished)

In Copyright (US); Section 108 applies (copies can be made for patrons); Not eligible for Section 108(h) until 2020 (beginning of last twenty years of copyright term)

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

With the Durationator, these fields can be created so that they are added to the record upon running of the Durationator search. The librarian/archivist would not need to do anything additionally for the tags. Now, for recording that a reasonable search was done, that could be added in the \$a category, where there is more flexibility.

Reasonable search for commercial exploitation and reasonable copies completed; no copies found. [one could add in databases searched as a dropdown menu]

Reasonable search for commercial exploitation and reasonable copies completed; copies found. [one could add in databases searched as a dropdown menu]
Unique archival materials; no commercial exploitation or reasonable copy presumed.

One key element would be including a date on which the investigation occurred.

The other field that could be used is the “authorized users” (\$d) category.

506 ##\$aRestricted access,**\$c**written permission required,**\$d**Donor.

\$d - Authorized users

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

506 ##\$aClosed for 30 years;**\$d**Federal government employees with a need to know.

506 1#\$aRestricted: cannot be viewed until 2010;**\$d**Members of donor's family.

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

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

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

E. Durationator Tagging System

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

Simple: IC-US (through 2040) 17 U.S.C. Section 104A. Section 108(h) eligible beginning 2016)

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

¹⁶¹ <https://www.loc.gov/marc/bibliographic/bd506.html>

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

InC-US (basic rightsstatement.org tag)
IC-US/GATT (through 2040). Section 108(h) eligible as of 2016. PD as of 2041.
(Durationator 2017)

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

We suggest stacking tags:

Simple answer
More complex answer

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

Here are some examples.

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

Version 1

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

This provides clear information, although it does not include the reason behind the information.

That could be added:

In Copyright Through in the US: 2035 (95 years from publication; 17 USC 304)

In Version 2, more information is given. This could be stacked or presented as a string of information.

Version 2

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

Or

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

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

Version 3

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

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

Version 4

542 ##\$1 IC/GATT-US (through 2035) 17 U.S.C. Sections 104A and 304. \$b 1950 \$f Copyright London: Black Publishers, 1940 \$g 1940 \$h No renewal record found (foreign) \$p United Kingdom \$r Assessed for US jurisdiction \$o 2017 \$q Durationator Copyright Tool and Stanford Renewal Record tool used.

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

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

F. Data requirements

MARC records have so much information that we realized that without the MARC record, we needed to identify key data points to see if other systems met the requirements. The data necessary for a search includes the following:

- Title
- Author
- Author's Death Year (if available)
- Author's Country of Origin
- Country of First Publication
- Date of First Publication
- Underlying Works?
- Is this the original version? If not, date and country of first publication of original version
- Jurisdiction searching (usually United States for US libraries/archives)

The Internet Archive, for example, creates its own XML categories to which libraries apply usually to their MARC records. This includes:

Item
File
Media Type
Collection
Contributor
Title
Creator
Language
Publisher
Date
Subject
Description

What was missing that is important for our purposes: country of first publication. We are assuming that the works are published. Also missing was the edition, author's death date, and categories for renewal or notice. The question is where the libraries/archives going to add copyright information *before* sending the record to the IA in the future? If so, how much information would they need to include and in what form? If there is a MARC record associated with this work, which does occur, especially when libraries are uploading materials to the IA, we strongly encourage including at least Country of First Publication, but also additional categories of edition, author's death date, and renewal or notice.

What was interesting is that the publisher category often included clues to publication country. But this was arduous. We learned along the way that libraries are pulling data for the Internet Archive requirements from MARC records, which include in the 008 or the 260/245 categories the place of publication. So, this is merely a tweak of an additional category for the future. For their current millions of records, we suggested looking to MARC records included with the data (which is sometimes occurring), or creating an algorithm that would check the "publisher" category for information on place of publication. Otherwise, searching for place of publication would mean humans (or searching the OCR) for clues.

Copyright is based on place of publication/creation and so we also started to think about how to approach the problem when this data point was missing. We looked at other instances where data was missing (e.g. author death date). We just had not looked at country of origin. In

many cases, the term would be the same regardless of whether the work was published in the United Kingdom or the United States. But in other instances, it matters greatly. The question is how to think through this problem, if the country of origin could not be pinned down. We are continuing to look at both ways to retrieve that information and also a work-around.

Once one receives the data, again the question is how is copyright status added, and in what form? This is up to each institution, or can be standardized. We strongly suggest a combination of general and detailed tags.

G. Frick: Copyright In Action

We worked with the Frick, who was uploading materials to the Internet Archive, and also tagging information in their own system. They had two fields in their system where they would record copyright information.

Their process involved beginning with MARC records, transforming them into the requirements for the Internet Archive, uploading and then adding the URL identifier from the Internet Archive to the records to their own records. In the midst of this, we were trying to figure out how they were going to determine the copyright status and if Section 108(h) applied. We decided to create a dynamic excel spreadsheet as our first try of using the Durationator system. This gave us the flexibility of asking the questions necessary, and also not having to have them learn an additional system. We began with Domestic U.S. Books. (See Appendix)

At the Frick, I watched as they uploaded MARC record information into a modified excel spreadsheet with the categories required by the Internet Archive. We knew the works were all from the US (country of first publication), that they were published, and we had information about their publication date, title, and author. The spreadsheet had an "Action" column, alerting the librarian/archivist of what additional information was necessary.

Once the librarian/archive had taken the action – looking for a renewal record or checking notice, in this case, the excel spreadsheet then provided the information and answer. We created four columns:

Status: these were the modified NYPL tags

Dtag: this included the country code, the NYPL modified tags, the reason in plain language, the citation, when the work was eligible for 108(h), and when the work came into the public domain.

Xinet: these are two field categories that the Frick uses in their internal system. Field 380 is a simple tag on the status, and Field 382 is the justification/reason for the status.

Rightsstatement.org: this is a tagging system that identifies whether it is in copyright or not, and proved to be the simplest tagging. We added the country/jurisdiction on which the information applies.

So here is the example:

We imported the data from MARC records.

In this example, one work was published before 1923. The librarian/archivist did not have to do anything else, and so the “Action” column automatically filled in: “PD-No Action Required.” The labels then were as follows:

Action	Renewal?	Notice Met?	Status	Dtag	Xinet	Rightsstatement.org
PD - No Action Needed	SKIP	SKIP	PD/Pre-1923	PD-US (pre-1923 work) (17 U.S.C. Section 304) (Durationator)	Field 380: Public Domain in the US Field 382: Pre-1923 published works are in the public domain in the US 17 USC Section 304 (Durationator)	No Copyright-United States

The status was PD/Pre-1923 This is a modified NYPL tag. We wanted a way to alert the user with the tag that it was a pre-1923 tag, and at the moment the HathiTrust/NYPL systems do not have a specific tag for that.

The Dtag:

PD-US (pre-1923 work) (17 U.S.C. Section 304) (Durationator 2017)

The Frick Xinet Tag: Field 380: Public Domain in the US. Field 382: Pre-1923 published works are in the public domain in the US. 17 USC Section 304 (Durationator).

Rightsstatement.org: NoC-US (No Copyright-United States)

These tags then can be uploaded both to their own system. The Frick can choose which ones to include on the excel spreadsheet. They can also be uploaded to the Internet Archive. The Internet Archive can then choose to display or not the tags. To accomplish this, then, the library must have access to the excel spreadsheet that corresponds to the collection (e.g. Germany postcards from the 1960s, U.S. books from the 1980s). The receiving system must have the ability to absorb the information, whether specific fields, rightsstatement.org, MARC records incorporating rightsstatement.org, or any combination.

Part VI: Implementation/Application

A. Limiting Liability

Why take the effort to include copyright information? It allows libraries to take advantage of Section 108(h), if applicable, to show they have done the work, and also to show that there was effort made to determine the copyright status. But it more than that.

The Copyright Act understands that libraries and archives serve a special place in our world, and to that end, limits liability for libraries as long as they have *tried* to get the answer right. Yes, even if the library makes a mistake, liability is limited.

B. Implementing a Plan

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

The key questions that need to be addressed:

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

1. Determining Copyright and Section 108(h) status

Section 108(h) implementation can be approached from a number of directions.

a. Archival Materials:

i) Publication Status

To be eligible to use Section 108(h), a work must be published. Sometimes this is easy – a newspaper clipping, a book, or a menu from a restaurant. Publication is anything that was circulated to the general public (for sale, offer for sale, gift, free) without restrictions.

What about the works like letters and manuscripts? These are usually not covered under Section 108(h) because they are not considered published. There are some that believe that the act of donating or selling a collection, as long as the collection was donated or sold by the copyright holder or their agent constitutes publication. If this is the case, then those works would also be available under Section 108(h). For unpublished works, Section 108(a) allows for preservation copies to be made, as does Section 108(f) (unsupervised copies by patrons), and Sections 108(d) and (e), parts or whole of works.

ii) Commercial Status

Most of these works will not be available for normal commercial exploitation. Think of the exhibition catalogs held at the Frick Collection. These are not normally available, and reasonable copies would not be obtainable. The goal in digitizing and making them available to provide access to rare works for preservation, research and scholarship purposes.

To that end, it seems reasonable, when the archive has knowledge that the commercial exploitation/reasonable copy prong is met, to and not engage in a specific search for each work. A policy statement could be written explaining the choice:

“The museum/archive believes that each of the works digitized represents works that are not now available commercially, and no reasonable copies are likely to be found.”

With that step completed, the next question is determining the copyright status of works—to see which works are eligible.

iii) Copyright Status

So the big question for archives comes down to copyright status. Team Durationator has developed a number of strategies and approaches. The goal is to identify factors that allow for the quick resolution of the copyright status. Once the status is determined, Section 108(h) can be applied in the last twenty years.

iv) Labeling

Institutions can choose the labeling, both for the public and their internal records. We suggest multiple records, one simple and one more complicated. We also encourage stacking tags, and allowing the more complicated version to be shown alongside the simple information.

2. Domestic Published Works

There are two approaches to published works: copyright status first, or Section 108(h) status first. Both require searching, depending on the year of first publication. The window for 108(h) eligibility currently is worked published between 1923-1942. This means that these domestic works would have had to have been renewed. So, one can check renewal records to see if they are still under copyright or in the public domain. Once one determines the status, the next requirement is to determine whether the work is still available, “normal commercial exploitation” or reasonable copies.

3. Foreign Published Works

Foreign works in the US can be approached as a hybrid between archive and domestic published works. Most foreign works were not republished in the U.S.. So, that’s a judgment call, and knowing the collection. The status for foreign works requires no additional searching. One must calculate the formula and requirements for the particular country of first publication, but once that has been completed, a simple excel file can be created or the basic formula communicated.

Foreign published works are the best candidates for quick digitization, when it comes to figuring out the copyright status and eligibility under Section 108(h). For example, we were able to determine the states of over 150 works from the Ukraine using Durationator Tools. Once the formula for the Ukraine was determined, that could be applied to the metadata for all of the works in the list.

We are determining the likely copyright status. These works could be out of copyright *earlier* for a variety of reasons, but the majority will be out of copyright at the stated date. Second, if the data is bad, the results are bad. Section 108(h) allows for works to be copied, digitized, circulated, and distributed in the last twenty years of copyright. This means that works from 1942 are available as of 2018. Each year more works pour into this special preserve – the library public domain. Congress' wanted this. They wanted to offset the burden of an extra twenty years of copyright term on the system.

C. Documentation and Policies

Key to using Section 108(h) is having a means of documenting the search or work that has been conducted. Did you find a renewal record? Did you find a copy at Amazon? Or perhaps, the institution has a general policy on how copyright status and Section 108(h) searches are conducted, either for a particular collection or for the library as a whole. We have been working with a number of libraries to figure out how to document searches, especially related to no commercial exploitation.

Search completed: 8/15/17 (Amazon: no copies)
Section 108(h) eligible as of 2005 (check completed 8/15 – no copies found)
Section 108(h) eligible as of 2004 (see policy on 108(h) implementation)

D. Tagging

As already discussed, there are a number of tagging systems out there. Libraries can choose one or include many. We suggest a couple of things to consider.

- Tagging systems that include the country in which the copyright status has been determined are much more helpful than just “PD” or “IC”. That doesn’t provide enough information.
- Tagging systems that explain the answer are getting than general information.
- And a system that allows for information to dynamically change (or indicates when a change will occur is important. Copyright does not last forever, and copyright laws lengthen or (maybe one day) shorten. Noting when the copyright status assessment was done is also super helpful.

Our recommendation:

We really like the combination of the Frick’s system. Basic information for one field and then explanation in a second, what we have called stacking. This could be the shorthand of the NYPL and/or Durationator Tags or a plain English explanation. For instance, for the simple code, use Rightstatement.org, or HathiTrust basic categories, along with the 2-letter country code:

IC-US
Or InC-US
Or In Copyright-US

Then, also include a detailed tag. Ideally, we recommend using modified NYPL Tags + term + citation + PD date (if known) + resources used, what we are calling a Durationator tag:

IC/GATT-US (95 years from publication) (17 U.S.C. Section 104A/304) (PD as of 2040)
(Durationator and Stanford Renewal Database, 2017)

Here is another alternative tagging recommendation of more complex stacked tags. What we like about this one is that it is clear, and also provides further information. Also note that instead of shorthand, some explanation is included to make it clearer to a third-party.

Copyright status: In Copyright-United States
Explanation of copyright status: IC/GATT-US. Work was restored by 17 U.S.C. Section 104A in 1996. Term is 95 years from publication. 17 U.S.C. Section 304. Eligible for Section 108(h) 2000-2020. In the Public Domain in the US starting 2021. (Durationator and Stanford Renewal Database, 2017)

E. Fair Use and Other Parts of 108

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

Copyright Status: IC-US. Fair Use asserted. Section 108(h) applies beginning 2019.
Copyright Status: PD-US. No known restrictions. Check underlying works for copyright status.
Copyright Status. IC-US. Section 108(h) asserted.

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

How would you implement? Once a work was tagged as not eligible for 108(h), a Fair Use/108 tag would be included. And then that work would have the limitations described above. An “email the library to request a digital copy” could be included on the webpage for that item, and near the copyright status.

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

VII. Creating a Last 20 Collection

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

Libraries: provide data through MARC records.

Durationator (and other tools like Stanford Renewal Database): provides tools for assessing the copyright status of the work using the MARC records

Results: MARC and other records include standardized tags to assist libraries/archives and patrons in assessing the copyright status of works

Platforms: Platforms like Internet Archive, DPLA, and the libraries/archives themselves display tags, with additional links to helpful copyright information for patrons to understand the results.

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

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

PD-US. No known copyright restrictions. Double check underlying works.

IC-UC. Under Copyright. You may request a digital copy for research, preservation and scholarship if certain conditions are met. Please fill out this [form](#) to request a digital copy.

IC/108(h)-US. Under copyright. Libraries/archives may make/distribute copies in last 20 years as long as no normal commercial exploitation or reasonable copies available.

Exception only applies to libraries/archives, and not patrons.

We also encourage the stacking system, described earlier, with a number of versions of the results.

All of these tags can be generated automatically with the Durationator Copyright System. We think that leaving the law up to the system relieves anxiety for the librarians and archivists.

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

determine the copyright status, and conduct (and document) a reasonable investigation on current commercial status. Once that has been done, away you go! Digitize and make the work available in its last twenty years.

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

In September 2017, after over a decade of studying section 108, the U.S. Copyright Office released their Model Statutory Language for revising Section 108.¹⁶² This is the first attempt at a major revision of Section 108 since its implementation in the 1976 Copyright Act.¹⁶³ The revision is both organizational and substantive, and reflect our increasing digital world. For example, instead of a limitation of “three copies,” the new paradigm allows for necessary copies to create a digital version but only one end-user copy. Another example is the ability to lend a digital copy of a work to one user, and once “returned,” can then be lent to another.

So, what are they proposing to change, and how does that impact on Section 108 generally, and more specifically, for our purposes, Section 108(h)?

A. General Requirements

The proposed Model Statutory language does alter the general requirements for eligibility in using Section 108 generally. Museums are added as a category, something long fought for as an eligible entity.¹⁶⁴ Added to the general requirements is that an institution must have a “public service mission” and that the institution has “trained staff or volunteers who provide professional services normally associated with a library, archives or museum...” Both are new additions. The public service mission is meant to exclude private institutions that do not serve the public. I’m not sure why this had to be included. We are looking in to examples. The example given by the U.S. Copyright Office indicates that a private institution that allows the local community to access the library would be eligible. Trained staff or volunteers requirement “seeks to exclude the hobbyist or

¹⁶² Section 108 of Title 17: A Discussion Document of the Register of Copyrights, September 2017.

¹⁶³ There had been updates with the DMCA and the CTEA in 1998.

¹⁶⁴ Section 108 of Title 17: A Discussion Document of the Register of Copyrights, September 2017, 17.

amateur collector from the section 108 exceptions.”¹⁶⁵ This seems like a very thin and arbitrary way of trying to exclude websites and other non-traditional spaces that might want to take advantage of Section 108. As before, no definition of library, archives or museum is included. As long as the (virtual) space has a public service mission and trains its staff or volunteers, a “hobbyist or amateur collector” would meet the requirements for Section 108. And I’m not sure why they are concerned about excluding the hobbyist or amateur collector. More information would be necessary on what worries they present, and how Section 108, if they were allowed to qualify, would be harmed.

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

The general requirements also include a reasonable digital security measures, because of the increased available of digital copies. No specifics on what would be required is included, or the goal of the digital security measures.¹⁶⁶ The activities permitted under Section 108 still have the limitations that they should not be for direct or indirect commercial advantage, and that notice is required.¹⁶⁷ “While the prohibition of any direct/indirect commercial advantage addresses the institution’s activities and the public service mission speaks to the institution itself, these

¹⁶⁵ Id at 19.

¹⁶⁶ Id at 21.

¹⁶⁷ Id at 21.

requirements together support the goal of section 108 to benefit the public and not to aid the profit-making of an institution.”¹⁶⁸

B. Rights Affected

The goal of the model language is to meet the needs of our 21st century digital age. To that end, the rights afforded a library under Section 108 are expanded from reproduction and distribution to include public display and public performance.¹⁶⁹

C. Copies Made

The following changes are made in the Model Statutory Language regarding preservation and security. Published changed to “disseminated to the public”: Right now, Section 108(b) only pertains to unpublished works. This is expanded to all works in the new Model Statutory Language. They have replaced “publication”, a legally problematic term, with “disseminated to the public,” which is defined as “when the copyright owner, or any person authorized by the copyright owner, has published the work or otherwise exercised any of the rights set forth in paragraphs (3), (4), (5) or (6) of section 106 of the titles with respect to that work.” So, what are 106(3-6)? So, either the work was published (reproduce the copy) or the work was distributed (Section 106(3), publicly performed (4), publicly displayed (5) or in the case of sound recordings (publicly performed by means of a digital audio transmission). So, the only thing that is not covered is if a work had derivative works made. So, there are instances where a work would have been an original manuscript, but the final version was so different that the final version was a derivative work. Under this scenario, the original work would not be “disseminated to the public” even though the story was widely known as the derivative.

When does the dissemination to the public come in now? Preservation and security copies are only available to employees of the institution when the work was disseminated to the public. I think this is fairly narrow thinking, and should be reconsidered. Works not disseminated to the

¹⁶⁸ Id at 21.

¹⁶⁹ Id at 22.

public have more flexibility. I think ideally, if there is no market copy of a work, all works should fall under the preservation and security. I'm not sure the thinking that distinguishes between the two. Works not previously disseminated have more flexibility. These may be available to the public: a) on the premises of the eligible institution; b) lending a physical copy; or c) a digital copy to a single user at a time.¹⁷⁰ I'm not sure why there would need to be a distinction, again, as long as there is no readily available market copy, for works that had been previously disseminated. Think, for instance, a menu from the 1990s. This work could be scanned for preservation, but because it was distributed without restrictions, it cannot be seen by anyone other than employees, and not to members of the public. I think the limitations on disseminated are fairly narrow, unnecessary and arbitrary.

Deposit copies. The idea of a market check is found throughout the new Section 108, but not as consistently as we would like. Deposit copies for research use in another institution use the distinction of not disseminated to the public (where works may be accessed on premises, borrowed by users, or accessed remotely) and those that were disseminated to the public, which to receive a copy, must first do a market check. That market check is finding a "usable copy" at a "fair price."¹⁷¹ What is considered a "usable copy" is not defined, nor is "fair price." What is most worrisome, however, is the ongoing distinction of a deposit copy received the requesting institution: "For both works publicly disseminated and those not publicly disseminated, copies made for deposit for research in another institution do not become part of the receiving institution's collection for purposes of section 108, meaning they are not considered to be works in the collection for purposes of making further copies for any reason."¹⁷² **This is very concerning, and here's why.** Libraries will now have to keep records on what is considered part of their collection for purposes of Section 108 and what is not, and when a user requests a copy, or another institution requests a copy, the

¹⁷⁰ Model Statutory Language, p. 52 (New Section 108(c) Preservation and Security).

¹⁷¹ Model Statutory Language, 30.

¹⁷² Id at 31, citing Section 108(d)(2)(C).

library is not able to make a copy without potential liability. Think 20, 30, 40 years down the line. How is a library to keep track? Having worked on the ground level of the laws, this one seems unnecessary, and super problematic in the practical setting.

Replacement copies: they added “fragile” to the list of works that can be copied as a replacement copy. For works disseminated to the public, they also added a “market” check that expands from “unused” replacement copies to “usable”. Again, no definition is given for “usable.” Section 108 Study Group had suggested the change “recognizing the vibrant and easily-accessible second-hand market.”¹⁷³ I’m concerned. When there is no current commercial activity, we found that there were few used copies. My question is how is including used copies benefiting the copyright holder, since their rights and royalties are extinguished with Section 109/first sale doctrine? Second, there is no discussion on the quality required for the used copy. If the only copy of a used work is poor, does this preclude the library from making a replacement copy? Finally, the used market is volatile. If there is only one copy at Amazon, does this preclude the use of a creating a digital replacement copy? And, then, the limitations on the replacement copy discourages libraries from using the work. This is more limiting than the current law, which requires unused copies. I would encourage the adoption of unused copies throughout Section 108, which connects commercial availability by the copyright holder to the object, and not a second-hand market.

The market check is seen in reproduction of an entire work for a user. The Model language seems to include availability through licensing. This is problematic. Is the individual work available for a license, or must the library subscribe to an entire database? What if the database is prohibitively expensive? Does “fair price” come in to assist? Who is paying the licensing fee? Is the library obligated? What if the licensing fee is more than the fair market price of the book? What happens when a library cannot afford to pay for the database access? Must a patron find a library that can afford the license fee, or can the library make a copy of the work under Section 108? And

¹⁷³ Id at 34.

finally, how is one to find the licensed work? Right now, it is easy to search Amazon.com or Abebooks.com to see if there are copies. How is one to find out if there is a licensed version of the book?

This is not a comprehensive review of the suggested changes of Section 108. One really strange part that contravenes the entire spirit of Section 108 has to do with copies required by a course by a professor, something near to the author's heart. Section 108(g), with the following example: "A university library is asked by a professor to make a copy of a particular sound recording for any student in the professor's class who requests it. Even assuming that a market check has demonstrated that access to this recording cannot be had at a reasonable cost, the library may not make copies requested by the professor."¹⁷⁴ This seems exactly what one wants to happen—a professor assigning materials for teaching purposes to a class. I would encourage rethinking this limitation, in the spirit of *why* we have libraries, archives and museums, and the role of educational missions as part of that. If a professor requests a work be made available to students, Section 108 should cover the availability of that use, and not categorized it as not meeting the "isolated and unrelated reproduction or distribution of a single copy...."

D. Revision to Section 108(h)

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

The example given suggests that the U.S. Copyright Office has not spent much time thinking about Section 108(h), or at least the reality of what works are eligible for Section 108(h): "Because 51 years have expired since the death of the author, a musical work has entered its last 20 years of protection...." Well, that's not quite right. This would be true of unpublished musical works, for authors that died in 1966 and before, and were not first published between 1978 and 2002. For the

¹⁷⁴ Id at 40.

published musical works (published before 1978), the works would be protected for 95 years from first publication, as long as they were renewed (for works first published before 1964) or with proper notice (1964-1989).

But let's stick to the scenario: an author of a musical composition in its last 20 years. "An archive would like to mount a scholarly retrospective program on the author, so it performs a reasonable investigation and discovers that the work is neither being commercially exploited, nor are copies or phonorecords available at a reasonable price. The archives may thus publicly perform a copy of the musical work as part of its retrospective."¹⁷⁵ So, here is the problem. If there is *one unused copy* of a musical composition, that one work would not be included as part of Section 108(h). It seems a high penalty for *one unused* copy, particularly when no requirement of a used copy of good quality is required. We have had this problem with the current Section 108(h). We hoped that the U.S. Copyright Office would recognize the problem, and remove "a copy" and replace it with "new copy".

Here are the proposed changes:

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

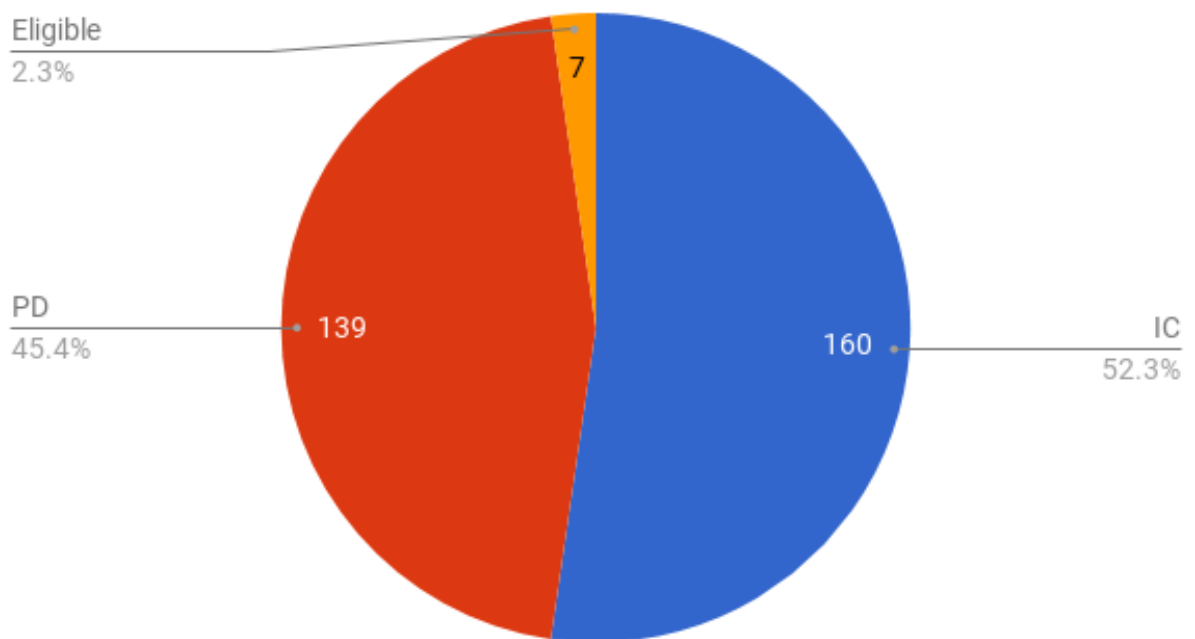
Currently, according to the document, a new or used copy should not be available at a reasonable price. We have mentioned this before. They want to keep this. We think this is a terrible idea. As we noted from our research, we believe it should only be *new* copies. These are works from the 1920s-1940s. If there are no new copies, there are generally only a couple of used copies, and no normal commercial activity. We believe these should be rescued and be

¹⁷⁵ Id at 45.

part of the saving process by the libraries. One or two used copies of a work should not preclude a library from making the work available to a larger public. The market should be the *new* market only – for all categories of Section 108, but especially for Section 108(h). Without the limitation, Section 108(h) becomes fairly narrow and not useful.

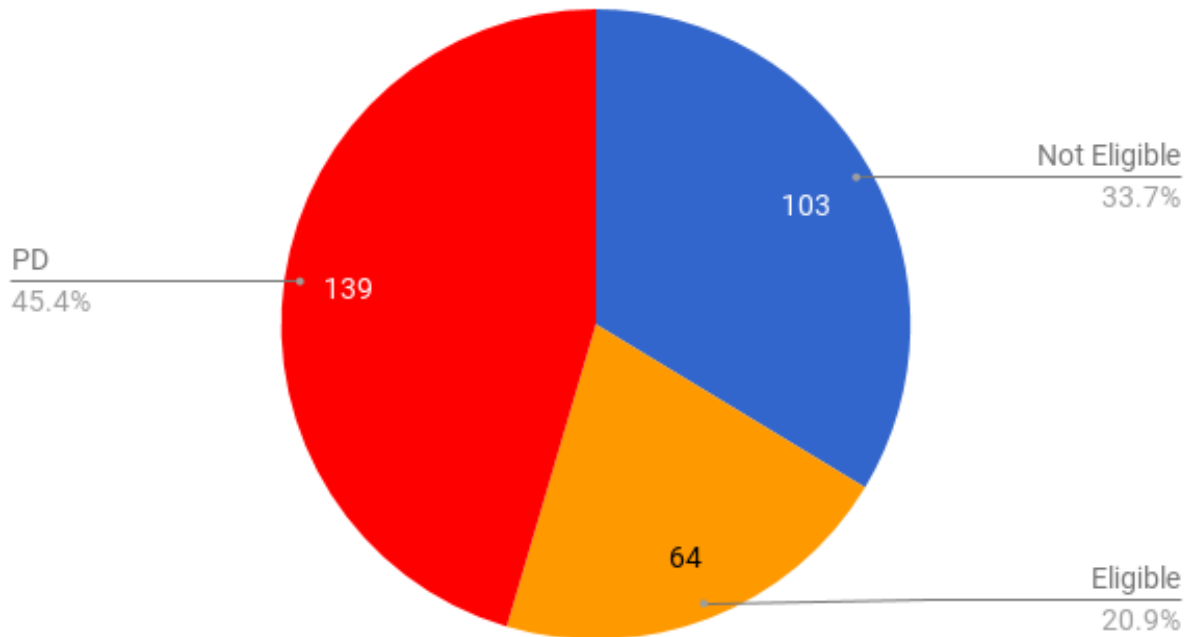
Looking at 300 random works published in the US between 1923-1941, the current eligibility window for Section 108(h), we found that only 8 works qualified for Section 108(h) if used was included in the definition. This meant that no used or new copies were found.

Count of Copyright Status



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

Count of 108(h) if used copies do not count



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

In contrast, works were both new and used copies had both 1 used copy, but as many as 401 copies. For these the publisher was actively selling new copies. We suggest that only when a publisher is actively selling new copies should Section 108(h) apply. Of the 104 works that were not eligible (new and used copies), only 9 works had 5 and under copies. Thirty eight works had between 10 and 30 used copies available, and 51 works had between 30 and 401 copies. Twenty works had over 100 used copies. What these numbers seem to indicate is that the “vibrant and easily-accessible second-hand market” really exists for works that are *still* being sold as new, and not those that have been abandoned by their publishers. For the purpose of balance, we suggest

that Section 108(h) requires a market search for **new copies** of the work, and only if new copies are found would a library be precluded from digitizing the work in the last 20 years of the term.

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

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

In conclusion:

- 1) We applaud the extension of Section 108(h) to all works, regardless of status as published or unpublished, disseminated or not to the public.
- 2) We encourage the market requirement to new copies only. Used copies do not benefit the copyright holder (Section 109), and if a work is not being commercially exploited, we have found that the used copy market is usually under 10 copies.
- 3) We believe the register by copyright holders at the U.S. Copyright Office should include *all works*, and that the copyright holder would have to file notice of intent to exploit

- commercially a work before the 108(h) window begins. Any notices that are filed after that period would exempt libraries that had already taken advantage of Section 108(h).
- 4) Add definitions for “normal commercial exploitation,” “usable copy”, “reasonable price”, “reasonable investigation“ and “fair price.”

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

- (1) for purposes of this section, during the last 20 years of any term of copyright of any work, an eligible institution may reproduce, distribute, publicly display, or publicly perform a copy or a phonorecord of such work, or portions thereof, for purposes of preservation, scholarship or research, unless such institution has first determined, on the basis of a reasonable investigation at the start of the last 20 year term, that—
- (A) the work is subject to normal commercial exploitation (that a copy of the work is available for sale)
- (B) a unused copy or phonorecord of the work can be obtained at a fair price; (or more than 50 used copies...)
- (C) ~~for works not distributed to the public~~ the copyright owner or its agent provides notice before the start of the last 20 years of the term of copyright pursuant to regulations promulgated by the Register of Copyrights that the work is currently under normal commercial exploitation , or if not disseminated to the public and not in a library, archives or museum without restrictions, objects to the use described in this subparagraph. A library, archives or museum will respect the restrictions of the copyright holder as agreed in the contract or donor agreement, and overrides Section 108(i). If a library, archives or museum have already availed themselves of Section 108(i) when notice was filed, that use would be considered covered under

Section 108(i), and only new copies by a different institution would be covered by the notice.

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

Finally, we would suggest that for pre-1972 sound recordings, if included in Section 108, the term should begin in its last 50 years, rather than last 20 years, since the term for all pre-1972 sound recordings is governed by state law through Feb 15, 2067. This would mean that works in the last 50 years, all sound recordings beginning in 2017, would be eligible for Section 108(i). The requirement of no normal commercial exploitation/no copy would apply. But it would allow that sound recordings long neglected would be included in reproduction and distribution.