Libraries in a Digital and Aggressively Copyrighted World: Retaining Patron Access through Changing Technologies

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I. BACKGROUND

Libraries have always been important to me, though I am not a librarian. My relationship with libraries has long been personal rather than professional. The summer before I began kindergarten, the mother of one of my neighborhood friends began taking her daughter and me to the local public library on a weekly basis. I can still vividly recall the way that simply entering the library building gave me goosebumps. Everything about it seemed extraordinary; the acrid but not unpleasant smell of ink, paper, and binding glue, the then unfamiliar drone and chill of air conditioning, even the drinking fountain seemed magical. Most remarkable, however, were the shelves of books, and the fact that I could pick out and read whichever ones I wanted, borrow as many as five at a time,[1] and actually take them home and keep them until our return trip.

As I got older the local public library became a place to research term papers, to hang out and do homework with friends, as well as to borrow books for leisure reading. Then college[2] gave me a glorious selection of libraries to choose from: the library that employed me as a work-study student; the undergraduate "social" library, a place to see and be seen; the reserve reading room of my own school library, where I spent countless hours doing assigned reserve reading (but still probably not as many as I should have); and the music library, that featured overstuffed sofas, humming fluorescent lights, and semi-private alcoves that made it a great place to take a quick midday nap. Then there was the engineering school library, the best place to get serious studying done because the chairs were really uncomfortable, the people were unfriendly, and it was always cold.

Later, my law school library was a place to study, perform research, access Lexis and Westlaw, use school computers, get at least a portion of my course reading done so I could avoid lugging fifty pounds of textbooks home, and touch base with friends. When it came time to study for the bar, however, the

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[1] I believe I obsessively checked out FERDINAND THE BULL by Munro Leaf at least six successive weeks that summer. I never got tired of looking at the humorous illustrations by Robert Lawson that accompany the story of that pacifist, flower loving bull.

[2] Cornell University, Ithaca, New York.

environment there became a bit too intense for my tastes, so, closing one of the many circles of life, I spent that summer camped out at a local public library. I subsequently passed many productive but anxiety filled hours in yet another private library during my tenure at a large law firm.

Libraries have thus served many different purposes for me over the years, and met many different needs, but always in the context of me as a user, rather than administrator, of libraries. Now that I have an office and computer-with-modem at my disposal, the real space attributes of libraries matter little, but the access to information libraries provide has become critical. Yet, the importance of libraries, to many of us, may be underestimated. As one librarian observed: "The library occupies an honored place in the American marketplace of ideas. The free library tradition is firmly established and, if not consciously cherished, is at least taken for granted."[3]

II. LIBRARY USE AS A SOCIAL CONSTRUCT

The so-called "electronic revolution in data technology" has been widely (if ambiguously) extolled as a transcendent force propelling expansive distribution of information, and in many contexts this is an accurate articulation of the impact of recent technological innovations. Paradoxically, however, transformation of the mechanisms of information delivery actually threatens to impede access to information to patrons of nonprofit libraries, as data transfer technology enables micro-managed control of access, giving content owners the ability to control and restrict access to their informational wares with considerable precision. At a time when technology can enable unprecedented access to information, content provider business practices can undermine and virtually incapacitate the ability of nonprofit libraries to maintain the level of access provided by traditional paper-and-print books and periodicals. The goal of this article is to articulate the necessity, importance, and rectitude of establishing for individual library patrons "real space access" as the minimal standard of free, unfettered, and unmonitored entrée to information in the electronic future. Despite the fact that access to information is seemingly broadening geometrically, library patrons need, and ought to be guaranteed, a minimal level of access that comports with "pre-Internet" real space access. This concept, a cognizable penumbra of interference-free, library associated information access, will be denominated for the purposes of this discussion "library use," a library-specific conceptual cousin of the "fair use" concept found in section 107 of the Copyright Act of 1976,[4] guaranteed to all library patrons.

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[3] Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey,* 84 LAW LIBR. J. 341, 363 (1992).

[4] *See* 17 U.S.C. § 107 (1994).

Library use may (and hopefully will) overlap extensively with the goals and interests of most librarians, but they are not the intended beneficiaries. Professor Jessica Litman has sardonically observed:

> Because we copyright specialists take pride in the arcane technicalities of our specialty, we too often exclude from our policy discussions—or fail to take seriously—the contributions of the vast number of interested observers who are not copyright lawyers. We talk with each other instead, and forget to recognize the degree to which we have come to take for granted that the terms of our discourse are the appropriate ones. We all know that, without strong incentives cast in the property mold, authors will lack the will to create and publishers have no motive to disseminate the works that form the currency of our information economy. We all agree that the copyright system's solicitude for copyright owners is an appropriate, nay, indispensable element in its role as the engine of free expression. We all believe that copyright's success in fostering authorship is what made America great. Outsiders may say intemperate things, but that's probably because they are too unsophisticated in the ways of intellectual property to understand the intricacies of the system, and are thus unable to appreciate its virtues.[5]

In answer to Professor Litman's implicit challenge, this essay asks the reader to consider the effects that copyright laws and policies, when filtered through the digital prism and bundled with restrictive contract terms, will have on library patrons. It further implores the reader to consider the broad benefits to library patrons of a statutorily guaranteed right to library use of copyrighted materials in any form.

A library ordinarily provides access to a work in its collections to everyone in its constituent community—to those who have alternative means of access to the work (for example, by means of purchase) and to those who do not—without differentiating between them. To define library use in the digital context, it is important to focus first on access in real space. Despite the myriad ways that cyberspace differs from physical (or "real") space, real space sets important thresholds of patron access and patron privacy that new technologies and new intellectual property protections should not be permitted to compromise. Just as intellectual property rules and practices that developed in the physical world cannot be imported or easily adapted into the digital environment, the level of access in the physical world will not be automatically, or even smoothly, replicated in the electronic one unless it is affirmatively mandated. Rather than setting up doctrinal tests or isolating "factors for consideration" in establishing the parameters of electronic works exploitation in library contexts (an approach that has failed users so miserably in the context of fair use), straightforward codification of a right to use digital documents as if they were constructed of ink-and-paper would promote certainty and stability. Copyright law can be configured

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[5] Jessica Litman, *Copyright Owners' Rights and Users' Privileges on the Internet: Reforming Information Law in Copyright's Image*, 22 U. DAYTON L. REV. 587, 588–89 (1997).

to guarantee, at a minimum, library patrons the right and ability to use digital publications in the same ways they have traditionally used bound books, paper periodicals, microfilm, and microfiche. Patrons should have the ability to read anonymously; to perform the electronic equivalent of pulling and rifling selected books, and also those adjacent on the shelf to a target publication; to place holds on desired publications already in use by others; and to freely check publications out for reasonable intervals of time,[6] with the tacit understanding that they may choose to make fair use copies of excerpts, or even entire works, at their discretion, guided by the dictates of their consciences.

Maintaining this access in the digital domain is a goal of at least some librarians. Carol Henderson of the American Library Association has written: "What librarians seek as copyright law and related rules are being reshaped for the digital age is to maintain for users, and for libraries and educational institutions acting on their behalf, their rights to at least the same extent as they have enjoyed them in the analog environment."[7] To the extent the objectives of librarians and library patrons are coterminous, both interest groups demarcate the metes and bounds of library use simply by articulating traditional, experiential ink-and-paper library modalities.

Written works are often placed into one of two capacious categories: those that are copyright protected, and those that are in the "public domain." There is, however, a significant amount of public domain treatment of copyrighted works. Sharing copyrighted works is a part of informal information culture: individuals share the physical embodiment of copyrighted works within their homes, within their educational institutions, and in the context of their employment.[8] While these informal, noncommercial exchanges usually do not constitute acts of

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[6] *See* Tepper, *supra* note 3, at 363 ("In the United States . . . the free library tradition includes the free borrowing of works.").

[7] Carol C. Henderson, *Libraries as Creatures of Copyright: Why Librarians Care about Intellectual Property Law and Policy, at* http://www.ala.org/washoff/copylib.html (Nov. 1998).

[8] Michael J. Meurer, *Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works,* 45 BUFF. L. REV. 845, 854–55 (1997):

> Sharing of copyrighted works is commonplace. Most buyers share any works they purchase within their homes. Buyers often lend novels, sheet music, and videotapes to their friends. Parents teach songs, poems, and stories to their children. Magazine and newspaper buyers photocopy or clip articles and give them to friends. Music, video, and software buyers sometimes copy a work and give it away; they also lend a work knowing it will be copied. Institutions like businesses and schools buy reference books that are shared by employees or students. These institutions also photocopy copyrighted works and distribute the photocopies internally. Explicit authorization to share a copyrighted work is not the norm. One important instance of authorization is a site license for software that allows a purchaser to share access to the software with a specified number of other users. Most of the time sharing is either implicitly authorized or unauthorized.

copyright infringement,[9] (and even when they do) they generally occur beneath the radar of litigious publishers. Libraries are the ultimate sharers—a fixed geographic or cyber place to which an individual can go to access a wide range of copyrighted materials.

As high profile sharers, libraries are carefully scrutinized by copyright owners to ensure they stay within the confines of their authorized mandates. Fear, or purported fear, of rampant, unauthorized, uncompensated distribution of their copyrighted works in cyberspace drives publishers to compress access through sharing in the digital age. They rhetorically equate the concept of a "library without walls" with a "bookstore without customers" as if access to an electronic work in a library somehow has a more deleterious effect on profits than ink-and-paper library availability does. The assertion that the rapid non-permissive dissemination made possible by the Internet will decimate the marketplace for authorized ink-and-paper or electronic books certainly appears overstated. By way of illustration, the "Harry Potter" books by J.K. Rowling are wildly popular with adults as well as children, and millions of copies have been sold.[10] Anecdotally, they are especially well-liked by computer aficionados, but even the average person has the ability and equipment to scan these books into digital form and distribute them widely over the Internet. Yet there is no evidence of this happening to any significant degree, and even if it is, millions of copies of the books are still being sold, and both the author and her publishers have made buckets of money on the series.

The uncertainties of cyberspace allow copyright owners to exaggerate and mischaracterize "digital dangers" to their intellectual property with little fear of contradiction. As new information technologies have surfaced, copyright owners have sought to limit the scope of use of the technologies by libraries so that access is not only not enlarged, but actually compressed beneath preexisting levels, by leveraging the modes of information distribution to rearrange norms and

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[9] *See* Michael J. Madison, *Legal-Ware: Contract and Copyright in the Digital Age*, 67 FORDHAM L. REV. 1025, 1081 (1998):

> Vast quantities of intellectual property and especially copyright "rights" are acquired on a daily basis by readers, viewers, listeners, and users who have only the vaguest idea that they are acquiring something more than a mere book, newspaper, or computer program. Intellectual property rights are in transit on a vast scale, yet wholesale or partial copying (or other forbidden re-use) does not, as a rule, occur.

[10] As of January 26, 2001, the hardcover edition of HARRY POTTER AND THE SORCERER'S STONE had been on the New York Times Children's Chapter Best Sellers list for 110 weeks, and the Children's Paperback Best Sellers list for 62 weeks; HARRY POTTER AND THE CHAMBER OF SECRETS had been on the Children's Chapter Best Sellers list for 85 weeks and the Children's Paperback Best Sellers list for 19 weeks; and HARRY POTTER AND THE PRISONER OF AZKABAN had been on the Children's Chapter Best Seller list for 71 weeks. The fourth book in the series, HARRY POTTER AND THE GOBLET OF FIRE had been on the Children's Chapter Best Sellers list for 28 weeks. *See Children's Book Bestsellers*, N.Y. TIMES ON THE WEB, *at* www.nytimes.com/books/01/01/28/bsp/bestchildren.html (last visited Jan. 26, 2001).

conventions of information use. The Copyright Act grants copyright owners the exclusive right to make and distribute copies of their works.[11] In real space, access to a book requires acquiring only one copy, and extensive sharing of the book can be done without copying that copy. In the digital world, however, even routine access to information requires "making a copy," as the courts have decided that unfixed, ephemeral RAM use of a digital work is copying.[12] "Copying" is a touchstone of copyright infringement even if the ostensible copies are intangible and fleeting. As a result, functionally identical uses of books may be legally disparate: loaning an ink-and-paper book to twelve eager readers is acceptable but loaning an electronic book to even half that number is potentially a copyright infringement, because the library has enabled six "unauthorized copies" of the work to be made, even if the work was never saved or printed by patrons.

Patron access is also affected by the ability of libraries to share with each other.[13] The tradition of libraries freely lending, borrowing, and exchanging portions of their collections with other libraries is embodied in widespread, long standing formulations of inter-library loan networks. Making the publication available to a patron of the borrowing library renders it temporarily unavailable to patrons of the library making the loan, and perhaps that is also appropriately part of the fiber of library use. A real space standard of access is not wholly expansive in the library context: it is limiting to the extent that it minimizes or neutralizes the advantages of digitalization to library users.

III. LIBRARY USE AS A STATUTORY CONSTRUCT

Fair use is a limitation on the exclusive rights of copyright owners, codified at section 107 of the Copyright Act of 1976.[14] All library users, particularly researchers, educators, and scholars, are ostensibly at least somewhat protected from rapacious publishers by the doctrine of fair use, limited and uncertain though it may be. library use should be an explicit constraint on copyright exploitation just as fair use is, giving library patrons the right to access and use the digital works owned by libraries with no more constraints than have historically been placed upon ink-and-paper publications. Library use will not enlarge or restrict fair use, nor effect the legality of copying or quoting extensively from copyrighted works. It will simply allow access to the works in the first place, to

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[11] 17 U.S.C. § 106 (1), (3) (1994 & Supp. IV 1998).

[12] MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) ("The law also supports the conclusion that Peak's loading of copyrighted software into RAM creates a 'copy' of that software in violation of the Copyright Act.").

[13] The sharing of digital books and journals between libraries is largely beyond the scope of this article as currently constituted.

[14] 17 U.S.C. § 107 (1994).

the extent rising prices allow libraries to maintain and add to their holdings, electronic or otherwise.[15]

Convincing Congress to promulgate library use will not be an easy task. Even if publishers did not massively oppose such legislation (which they will), Congress is uneasy about all things digital. Consider the fact that the government generally seeks revenues wherever possible, and yet the Internet remains a tax free zone. This is in part because government actors do not understand e-commerce, and are afraid to tinker with the intangible, vaguely incomprehensible, yet inordinately energetic economic engine it appears to be.

Yet even if library use became a statutory limitation on the exclusive rights of copyright owners, if it is narrowly constructed it could still permit publishers to propagate their own, private copyright laws in the form of favorable contract terms, which could be pernicious to free access in a library use context. As Professor Mark Lemley has noted in a somewhat different context: "If a license term that goes further than federal intellectual property law can be enforced by a suit for infringement or its equivalent, the federal law has been expanded just as effectively as if the statute were rewritten."[16] Library use therefore will not be meaningful unless libraries are deterred (and perhaps even prohibited)[17] from

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[15] *See, e.g.*, Peter Givler, *Scholarly Book, the Coin of the Realm of Knowledge*, CHRON. HIGHER EDUC., Nov. 12, 1999, at A76, *available at* http://www.chronicle.com/weekly/v46/i12/12a07601.htm:

> Research libraries have watched their purchasing budgets dwindle, while the portion they earmark for scholarly books has gone down as journal prices have risen. . . . Locked in a vicious spiral, publishers attempt to recover costs from dwindling markets by charging more, as the price of scholarly books balloons past the reach of all but the most determined buyers.

See also Marjolein Bot, Johan Burgemeester & Hans Roes, *The Cost of Publishing an Electronic Journal: A General Model and a Case Study*, D-LIB MAGAZINE, (Nov. 1998), *at* http://www.dlib.org/dlib/november98/11roes.html:

> In their excellent review of the development of scholarly publishing in the United States, Tenopir and King . . . present evidence showing that the average institutional price of a scholarly journal subscription has increased from $39 in 1975 to $284 in 1995, a factor of 7.3 in just twenty years. Based on these figures, Tenopir and King conclude that: "It is clear that traditional scholarly publishing is in serious economic difficulty."
> General inflation and increase in size (more pages per issue, more issues per volume, more volumes per year) of the journals, account for only 52 percent of the price increase. Tenopir and King explain the remaining 48 percent by pointing to the dramatic decrease in personal subscriptions which started in the late seventies. Publishers have apparently addressed this fall in revenue by increasing institutional subscription rates, thereby causing a vicious circle of cancellations and further increases in institutional rates. .

[16] Mark A. Lemley, *Beyond Preemption: The Law and Policy of Intellectual Property Licensing*, 87 CAL. L. REV. 111, 136 (1999).

[17] This may be necessary to prevent such practices because at least one high profile academic librarian is a strong advocate for information resource licensing, characterizing it as a "viable way to avoid misunderstandings and courtroom appearances." Jim Ronningen, Article

contracting away any of the protections of the Copyright Act, and from ceding any facet or measure of patron access, in order to gain access to the "products" of large publishing interests. Section 108 of the Copyright Act[18] places "library oriented" limits on a copyright owner's exclusive rights, enabling libraries (and archives) to make limited numbers of copies of copyrighted works to replace, preserve or supplement market-acquired copies in a library or archival collection.[19] However, section 108(f)(4) expressly states that nothing in section 108 "in any way affects . . . any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections."[20] This legislative loophole makes libraries vulnerable to private ordering through contract that can hamper a library's ability to provide patron access. Specifically, content owners can refuse to sell books or periodicals to libraries, instead requiring them to "license" copyrighted works.

Licensing reconfigures digital information as a service rather than a product, potentially subject to use restrictions or even reclamation, and seemingly immune to public policy considerations imbedded in copyright law such as fair use and section 108 rights and privileges. As copyright owners write contracts granting themselves greater rights than the copyright laws provide, and libraries fewer privileges, copying-related activities such as archiving and preservation can be limited or prohibited[21] through a judicious combination of contract terms and new technologies. As Professor Litman cogently observed: "Until very recently, a copyright holder had no means to instruct a book that it should sprout wings and

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Review, 9 CURRENT CITES (Feb. 1998) *at* http://sunsite.berkeley.edu/CurrentCites/1998/cc98.9.2.html (reviewing Ann Okerson, *Copyright or Contract?*, 122 LIBR.J. 136 (Sept. 1997)).

[18] 17 U.S.C. § 108 (1994 & Supp. IV 1998).

[19] More specifically:

> Section 108 permits a library, under certain circumstances, to make a single copy of a periodical article or small excerpt of a larger work (such as a book chapter) upon request of the library's patron or in response to a request from another library on behalf of *that* library's patron. This right is subject to two conditions. Subsection (g)(1) of section 108 prohibits a library from engaging in related or concerted copying or distribution of either single or multiple copies of the same material on one occasion or over a period of time. Subsection (g)(2) prohibits a library from engaging in the systematic reproduction of a single or multiple copies of articles or short excerpts. Libraries may, however, participate in interlibrary arrangements that do not have as their purpose or effect the receipt of copies in such aggregate quantities as to substitute for a subscription to or purchase of a work. Section 108, therefore, allows isolated and unrelated copying and distribution of single copies of the same or different materials on separate occasions, but interlibrary lending that is systematic may be viewed as substituting for a subscription or the purchase of the work.

James S. Heller, *The Impact of Recent Litigation on Interlibrary Loan and Document Delivery*, 88 LAW LIBR. J. 158, 160–61 (1996).

[20] 17 U.S.C. § 108.

[21] Lemley, *supra* note 16, at 128–29 ("some contracts provide that the licensee may not make *any* copies of the licensed work . . . whether or not the copying would be fair use").

fly back to its publisher after it had been read N times, crumble into unusability on a certain date, or reveal indecipherable script until a designated reader shouted, 'Open sesame!'"[22]

It is the digitalization of information that enables licensing, and licensing that threatens to compromise patron access in a manner that is not possible with ink-and-paper books or periodicals. The first-sale doctrine embedded in section 109 of the Copyright Act[23] guarantees to purchasers, be they individuals or libraries, the right to sell or "otherwise dispose of" that copy of a work that has been straightforwardly purchased. It therefore legitimizes traditional "book behaviors." People who buy books can re-read them, loan them to others, trade them, give them away or even lease them without violating copyright law, and so can libraries.[24] It also codifies the convention, loathsome to content owners, that profiting from a physical article embodying a copyrighted work is a one shot deal. Copyright owners are precluded from regulating or restricting distribution of a book or periodical after it is sold. Therefore, among other things, section 109 enables students to sell textbooks back to bookstores, and bookstores to resell the textbooks to other students without transmitting additional royalties to entities that own the copyrights in the texts. Publishers can blunt the effect of the first-sale doctrine by constantly issuing revised editions of textbooks, which renders used copies of "old" editions less attractive and shrinks the market for used texts,[25] but they cannot do so without giving the world an updated and at least hypothetically improved information product.

Claims are made by content owners that the first-sale doctrine is justifiable only by the fact that "real space" books and periodicals are not easily reproduced by individuals, and, when in an individual's possession, are not accessible to multiple distant viewers. While stopping short of calling for an abatement of the fair use doctrine with respect to library purchasers in the context of paper-and-print, publishers emphatically make this claim about digital works, or avoid the doctrine altogether by eschewing sales and engaging in licensing only.

Among its other advantages for libraries, the first-sale doctrine helps prevent price discrimination because it allows those who buy a work at a low price to resell it to an entity targeted for a high price at a price less than that asked by the contact provided. In other words, publishers cannot effectively tack a surcharge onto books they sell to libraries, even though those copies are likely to be read by more people than copies sold to individuals. When the first-sale doctrine is circumvented through contract provisions governing licensing, reselling can be prevented (since there was never a "sale" in the first place) and libraries become

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[22] Litman, *supra* note 5, at 601.

[23] 17 U.S.C. § 109 (1994 & Supp. IV 1998).

[24] Individuals are, by statute, restricted in what they may do with computer software, and audio and visual recordings. *See id.* § 109(b).

[25] *See, e.g.*, Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, 214 (1998).

vulnerable to price discrimination.[26] In addition, certain kinds of multiple uses can be prevented, and contract terms can be automatically enforced, with technology that meters digital access, or computer discs that self-destruct after a certain amount of time, number of users, or attempts to print.[27]

Licenses could also force librarians into becoming gatekeepers of copyrights. As a condition of acquiring copyrighted works, libraries could be compelled to police how patrons get access to digital publications based on who patrons are, the reasons patrons desire access, the ways patrons expect to use the publication, or the nature of the publications at issue. One privilege that library patrons have long enjoyed, access to photocopiers, could be functionally taken away from them in the digital environment.

Before the advent of photocopiers, "it was a customary fact of copyright life that individuals could make entire handwritten copies of copyrighted materials for their own use and that secretaries could make typed copies for the use of their employers."[28] With the advent of photocopiers, making copies of library holdings became faster and easier, to the consternation of copyright owners. Libraries, however, have never been required to monitor patron use of photocopiers, and as long as library photocopiers carry appropriate notices, libraries are immune from liability as contributory infringers[29] regardless of how egregiously patrons may exceed the bounds of fair use. Making copies of portions of copyrighted works will continue to be important to patrons accessing digital works. As Professor Mary Brandt Jensen has noted:

> The longstanding need to quote from, rely upon, and copy parts of previously existing works is the basis of the fair use doctrine. The fact that the works are stored in

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[26] *See* Meurer, *supra* note 8, at 861.

[27] *See, e.g.*, Andy Patrizio, *DVDs That Self-Destruct,* WIRED NEWS, Jan. 20, 2000, *at* http://www.wired.com/news/print/0,1294,33781,00.html; Peter Wayner, *To Cover Electronic Tracks, E-mail That Self-Destructs,* N.Y. TIMES, Oct. 12, 1999, *at* http://www.nytimes.com/library/tech/99/10/cyber/articles/13mail.html ("Several companies are exploring ways to control the copying and dissemination of electronic documents with their own versions of self-destructing e-mail. They aim to make it possible to send a message or document that will become unreadable after a predetermined period so that companies and individuals can keep their information on a short leash."); Bob Tedeschi, *On-line Publishing, Venturists Are Still Looking for a Way Around Retailers' Sales Resistance,* N.Y. TIMES, Oct. 4, 1999, at C14:

> Technologies developed by companies like SoftLock, Authentica and Fatbrain allow publishers to sell information online to one user, and have that information encrypted on the hard drive of the user's computer. Software that the user downloads with the document controls the information, so it cannot be digitally reproduced, forwarded via E-mail or even, in some cases, printed.

[28] Tepper, *supra* note 3, at 350.

[29] *See* 17 U.S.C. § 108(f)(1) (1994).

> electronic rather than paper form does not materially alter that need, nor should it affect the determination that such uses are fair.[30]

However, unless library use prevents it, publishers can contract around the fair use doctrine, forbidding even modest copying, and requiring librarians to be their enforcers. If copyright owners are so panicked about possible acts of infringement and so determined to reap a profit from every use of a work, library users could be put in the position of hand copying excerpts from a computer screen, relegating patrons to a "pre-photocopying" level of access of usability, which will arguably slow scholarly output but still enable circumvention, however onerous, of pay-per-use or pay-per-volume-of-users.

Libraries could also be contractually compelled to collect and monitor data about the use of library assets on behalf of copyright owners. This would compromise patron privacy, and thereby eviscerate a core library value.[31]

Library use would place limitations on libraries and patrons as well as copyright owners. For their part libraries might be compelled to limit perusal of information units to one user at a time, as with books (although why it would ultimately make a difference if two patrons access an electronic document sequentially rather than simultaneously is unclear). If libraries limit themselves to granting book-like access, patrons and libraries both will lose some of the advantages of electronic mediums. Others will be maintained, such as the amount of physical space required, maintenance, searchability, preservability, and ease of acquisition. At a minimum, publishers will be thwarted in their efforts to exclusively garner any costs savings inherent in electronic mediums.

IV. RESTORING SOME BALANCE

When library patrons do engage in activities such as making copies, they are often pursuing formal or informal research, education, and/or scholarship objectives. Copyright owners would love to burden researchers, educators, and

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[30] Mary Brandt Jensen, *Electronic Library: Is the Library Without Walls on a Collision Course with the 1976 Copyright Act?*, 85 LAW LIBR. J. 619, 628 (1993).

[31] *See, e.g.*, American Library Association Core Values Task Force Draft Statement, (Nov. 21, 1999), *at* http://www.ala.org/congress/corevalues/draft.html. "Core Values of Librarianship" include:

> The connection of people to ideas; Unfettered access to ideas; Learning in all of its contexts; Freedom for all people to form, to hold, and to express their own beliefs; Respect for the individual person; Preservation of the human record; Interdependence among information professionals and agencies; and Professionalism in service to these values.

Id. (paragraph structure omitted). An explication of "Respect for the individual person" is as follows: "We honor each request without bias and we meet it with the fullness of tools at our command. We respect the individual's need for privacy and for confidentiality in their search or their study." *Id.*

scholars with a duty to buy or pay royalties for all of the works they use, despite the fact that it is this very access that provides future (potentially profitable) copyrightable material,[32] because they are among the heaviest consumers of knowledge. As one commentator noted:

> All scholarship is built on the conviction that, while the writing of books may be a lonely activity, the construction of knowledge is anything but. It is a public work-in-progress, a vast collaborative enterprise in which many people sift facts and ideas in a ceaseless quest for significance and meaning.[33]

Cashing in on such collaboration is a financially attractive prospect that publishers relentlessly pursue, which is precisely why library use is needed to protect access to copyrighted works, and fair use is needed to do something productive with that access.

Consider the ways that publishers treat consumers of their wares as contrasted with the ways automobile manufacturers treat their customers. Most of us acquire our cars by buying, rather than stealing them. When we lease cars, we are generally free to treat them as if we own them, with perhaps a surcharge for excessive mileage. Sometimes, we provide transportation to other people. Automobile manufacturers do not attempt to prevent ride sharing, in part because the incredible freedom and convenience of having one's own car keeps demand strong. The expediency and cost savings of carpooling makes it attractive for some people in some contexts, but you cannot have a carpool without at least one vehicle, and that vehicle can hold only a finite number of people. Moreover, members of a carpool may enjoy sharing rides to work, but still maintain automobiles of their own for personal or local use. Even if ride sharing does depress automotive sales, a car owner is likely to bristle at any suggestion that a car manufacturer has the right to place limitations on use of the vehicle or on the number or category of passengers the car purchaser may transport—and rightly so. Carmakers may oppose the development or expansion of mass transit systems, but generally can do so only as lobbyists. They generally do not have the benefit

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[32] Dennis F. Thompson, *Intellectual Property Meets Information Technology,* EDUCOM REV., Mar.–Apr. 1999, at 18:

> Consider first the critical problem that university libraries are now confronting—the increasing costs of serials and other forms of scholarly publication. Faculty members sign over their rights to their articles to journal publishers, who then require university libraries to pay high prices for the hard copies they would rather not have in order to gain access to the digital versions they prefer. Many academic publishers reap large profits while university libraries struggle to cover their increasing costs. Faculty in their role as producers benefit little, and faculty in their role as consumers suffer much, along with their colleagues, students and their institutions.

[33] Givler, *supra* note 15, at A76.

of legislation drafted expressly for them that limits or circumscribes bus or train service.

One of many obvious, fundamental differences between a book and a car is that, though two people usually cannot share a book simultaneously, the owner can generally make long term loans of a book without being significantly inconvenienced. If you can freely and handily borrow something, from a friend or a library, you are not likely to buy it. For this reason, publishers may need to factor "sharing" into the price of information products, but they should not be permitted to prevent it.

Copyright owners might also hasten to point out that unlike cars, books can also be easily replicated, but that raises an important question: If you can borrow something to use as your own for a reasonable length of time, why would you copy it? Though libraries may very well cost publishers sales, it does not necessarily follow that libraries foster or enable copyright infringements that would not otherwise occur.

Copyright law is supposed to balance the access rights of the public with the profit and control interests of copyright holders, but recently copyright owners have placed their thumbs heavily on the scale. The recently passed Copyright Term Extension Act[34] gives copyright owners twenty more years of exclusivity,[35] with no corresponding benefit to society.[36] Similarly, the Digital Millenium Copyright Act[37] impedes the public's ability to exercise the right fair use of digital works, another gift to copyright owners without any countervailing burden or concession to societal interests. A statutory right to library use could restore some balance. Once a copyright owner decides to publish a work widely enough to give the public access to it, whether on paper or electronically, she could be deemed to have *unconditionally* dedicated the work to library uses. Authors and copyright owners would have to accept the fact that, like death and taxes, it is a certainty that individuals will be able to access their works, digital or not, in libraries.

Finally, to the extent electronic or "cyberspace" libraries function similarly to traditional libraries, that is how they should be treated. Publishers benefit from decreased production and distribution costs of digitalization; library use will allow libraries to benefit from the ability to keep larger collections in smaller spaces, and patrons to benefit from being able to access libraries from work or home.

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[34] Sony Bono Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified at 17 U.S.C. §§ 301–304).

[35] *Id.*

[36] *See* Amended Complaint at 65a(c), Eldred v. Reno, 74 F. Supp. 2d. 1, 3–4 (D.D.C. 1999) (No. 1:99CV00065JLG), *aff'd by* 239 F.3d 372 (D.C. Cir. 2000) (argument by plaintiffs that dead authors cannot be incentivized to create new works, while extension of copyright protection prevents unfettered distribution of works that otherwise would have entered the public domain).

[37] Digital Millenium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

Professor Julie Cohen has persuasively and broadly argued that "both the legal regime governing rights in digital works and the technology for implementing it should be determined with reference to expressly chosen social priorities."[38] A specific and enforceable right to "library use" of copyrighted works ought to be one of those priorities. There is no evidence that library access suppressed or discouraged writers in the past (in all likelihood, quite the contrary), and no reason to expect that library use would do so in the future if ink-and-paper levels of access are imported into the digital domain.

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[38] Julie E. Cohen, *Lochner in Cyberspace: The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462, 467 & 559–63 (1998).