

HEINONLINE

Citation: 105 Law Libr. J. 425 2013



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Mar 24 12:06:41 2015

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0023-9283](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0023-9283)

Locked Collections: Copyright and the Future of Research Support*

D.R. Jones**

Researchers in institutions of higher education depend on access to the scholarly record, and academic libraries play a critical role in supporting this research. As academic collections shift to primarily electronic format, research support is in jeopardy. Copyright holders, through the use of licensing and contracts to control electronic works, limit or prohibit interlibrary loan and other means of research support. As predominantly digital library collections increase, libraries may find that they have locked collections. They will be unable to lend or to borrow. This article examines how increased reliance on e-collections impacts the ability of academic libraries to support research and explores and assesses various approaches to ensure research support.

Introduction	426
Research Needs and Shrinking Library Collections.	427
Copyright Holders and Libraries: A History of Control Versus Access	429
The Beginnings of Interlibrary Loan: Limited Technology	430
Technology Advances: The Search for Legislation or Agreement	431
Further Technological Advances Force a Legislative Solution	432
The Rise of Agreements and Technological Limitations	434
Loss of Control: The Effect of Licensing and Contracts	434
Interlibrary Loan	436
Pricing	438
Pay-per-View	439
Preservation	440
Options for Ensuring Research Support	441
Legal Entitlements and Exceptions	442
Revisions to Section 108	442
CONTU Guidelines	443
Section 109(a)	445
Orphan Works	445
Contracts and Private Agreements	447

* © D.R. Jones, 2013. I would like to thank the participants and faculty at the Duke/UNC Legal Information and Information Law and Policy Workshop held April 4–5, 2013, in Chapel Hill, North Carolina, for their comments and suggestions. I would also like to thank Professor William Kratzke for his suggestions.

** Assistant Professor of Law, Associate Dean for Information Resources and Law Library Director, The University of Memphis Cecil C. Humphreys School of Law, Memphis, Tennessee.

Collaboration	450
Examples of Collaborative Collections	450
Implications of Adopting a Collaborative Collection Model	453
Using Technology to Gain Control: Open Access	454
The Role of Libraries	456
Conclusion	458

Introduction

¶1 Scholars need access to existing scholarship to ensure the reliability of their work and to further develop their research. The work of these scholars in turn expands the body of knowledge. Academic libraries are “key players in [this] generation and propagation of knowledge.”¹ To support the needs of researchers, an academic library must rely not only on its own collection, but also on the collections of other libraries.

¶2 As academic library collections have become more electronic, publishers have curtailed libraries’ ability to support research through interlibrary loan and other methods. Publishers have preferred to license, rather than sell, e-journals and e-books. This arrangement has allowed publishers to control the use of scholarly works beyond what copyright law would allow. This increasing control jeopardizes the ability of libraries to support research. In effect, library collections are becoming “locked” as publishers rather than libraries determine access.

¶3 This article examines the challenge to libraries of making resources available as publishers’ control of digital works increases. It explores and assesses various approaches that libraries can pursue to ensure research support and to enhance the availability and preservation of the scholarly record. The section “Research Needs and Shrinking Library Collections” discusses scholars’ use of resources to ensure the reliability of their works. It explains how academic libraries have had to limit their individual collections and therefore must seek outside support to meet the needs of scholars. The section “Copyright Holders and Libraries” reviews the intertwined relationship of copyright law with library lending and borrowing during a time of technological advances. It traces the efforts of copyright holders to control usage of copyrighted works on the one hand and of libraries to obtain and provide access on the other. The section “Loss of Control: The Effect of Licensing and Contracts” examines how publishers’ reliance on licensing and contracts to control e-collections jeopardizes research support and eliminates copyright protections such as fair use. “Options for Ensuring Research Support” explores and assesses approaches that libraries can take to ensure the use of e-collections for research support. In conclusion, the article urges libraries to actively pursue agreements that reinforce their mission to support the creation, dissemination, and preservation of knowledge. At the same time, libraries must be agents of change. They must be active participants in the transformation of the scholarly communication system to allow scholars to regain control of their works.

1. ASS’N OF RESEARCH LIBRARIES, FAIR USE CHALLENGES IN ACADEMIC AND RESEARCH LIBRARIES 2 (2010), available at http://www.arl.org/storage/documents/publications/arl_csm_fairusereport.pdf.

Research Needs and Shrinking Library Collections

¶4 Institutions of higher education foster the development, circulation, and exchange of knowledge. Academic libraries, including law libraries, play a key role in this mission by supporting, facilitating, and fostering faculty research and scholarship.² These libraries “have a deeply ingrained mission to promote the creation and diffusion of knowledge and to preserve it for the long term.”³ In expanding the body of knowledge in a discipline, scholars are both consumers and producers.⁴ Scholars consult the works of others in creating their own work.⁵ Their writings then become available for future researchers. Academic libraries facilitate access for scholars to existing research and also preserve the record of scholarship,⁶ thus supporting faculty scholars in both their roles. While researchers have a critical need to access a wide variety of resources, individual library collections cannot meet all of these needs, and libraries must seek support to fulfill their mission.

¶5 It is a fundamental requirement that scholarly research be reliable.⁷ To ensure that their research is reliable, scholars must be exacting in their use of and reference to sources.⁸ Researchers must verify the accuracy of the information they find in secondary sources.⁹ They also seek support for their own assertions and to provide information for readers of their works and future researchers.¹⁰ The only

2. Academic law libraries also have a unique role in supporting faculty research through library support of law reviews. Student-edited law reviews at law schools are the primary outlet for scholarly writing in law. Student editors select articles and prepare them for publication in the law review. They review and edit each article. This process includes identifying, obtaining, and checking all cited sources and identifying the need for additional citations. Darby Dickerson, *Citation Frustration—And Solutions*, 30 STETSON L. REV. 477 app.1 at 506–08 (2000). This review is to ensure accuracy. The student editors therefore are critically involved not just in disseminating faculty scholarship but in assuring the reliability of the work. Law librarians support the work of law review editors and staff in their work, especially in identifying and obtaining sources. See Pamela D. Burdett et al., *What Librarians Can Do for Your Law Review*, 30 STETSON L. REV. 593 (2000); Benjamin J. Keele & Michelle Pearce, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 2012 LAW LIBR. J. 28.

3. James L. Mullins et al., *Foreword*, in RAYM CROW ET AL., *LIBRARY PUBLISHING SERVICES: STRATEGIES FOR SUCCESS* 1 (2012), http://docs.lib.purdue.edu/cgi/viewcontent.cgi?article=1023&context=purduepress_ebooks.

4. ELDRED SMITH, *THE LIBRARIAN, THE SCHOLAR, AND THE FUTURE OF THE RESEARCH LIBRARY* 20 (1990).

5. *Id.* at 19; STAFF OF S. COMM. ON THE JUDICIARY, 86TH CONG., STUDY NO. 15: *PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES* 49 (Comm. Print 1960) (written by Borge Varmer) [hereinafter *PHOTODUPLICATION BY LIBRARIES*] (“Effective research requires that the researcher be informed of the findings and opinions of others and have an opportunity to study the materials written by them.”).

6. SMITH, *supra* note 4, at 7 (“Throughout their history, research librarians have functioned as the conservators of the record of scholarship.”).

7. *Id.* at 20 (“Inaccurate or omitted relevant information jeopardizes the quality and acceptance of the work.”).

8. VERNER W. CLAPP, *THE FUTURE OF THE RESEARCH LIBRARY* 15 (1964). As Clapp noted, “Exactitude is one of the hallmarks of scholarship.” *Id.*

9. Clapp describes how checking references reveals flaws: “How often the secondary text proves corrupt! How often the footnote citation, traced to its source, fails to support the statement that it seemed to imply! How still more often are the meaningful details abridged!” *Id.*

10. Paul N. Courant notes that “to practice the scholar’s trade it is essential that we be able to provide our readers . . . with accurate and reliable guides to the sources of our knowledge and understanding.” Paul N. Courant, *Scholarship: The Wave of the Future in the Digital Age*, in *THE TOWER AND THE CLOUD: HIGHER EDUCATION IN THE AGE OF CLOUD COMPUTING* 202, 204 (Richard N. Katz ed., 2008). One legal scholar comments: “[T]he digital age has made the need for background information more

way to ensure accuracy and provide reliability is to consult the sources of the information.¹¹

¶6 It is the role of the library “to make available, to the fullest extent of its assignment and its capabilities,” the needed resources.¹² Having all materials available in a single library collection would provide the most accessibility. Budget and space limitations, however, routinely preclude any library from maintaining a collection that could meet all possible needs of researchers, even in specialized areas. The rise in interdisciplinary research has made it even more difficult for specialized research libraries, such as law libraries, to maintain collections that serve faculty who need materials from many different disciplines. In working to develop collections that they can sustain, libraries have realized that researchers only use a small portion of a collection on a regular basis.¹³ Libraries thus have an incentive to focus their core collections on those “vital few”¹⁴ resources that their primary researchers regularly use. Increasing budget restrictions are forcing more and more academic

necessary, not less. Precisely because an online search can turn up *any* article, not just the seminal article on a topic, every article should have sufficient background information to direct a reader to the most important primary sources.” Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y. L. SCH. L. REV. 349, 362 (2007–2008).

11. “For the truth one must go to the sources.” CLAPP, *supra* note 8, at 15. The precision that scholarship demands often requires consulting a source “to verify a date, to find a chemical formula, to check up on the terms of an equation, to note the exact phraseology used in a legal decision.” FREMONT RIDER, *THE SCHOLAR AND THE FUTURE OF THE RESEARCH LIBRARY* 26 (1944).

12. CLAPP, *supra* note 8, at 59.

13. This phenomenon (researchers using only a small portion of the collection) is a manifestation of the “Pareto principle,” which is commonly associated with economist Vilfredo Pareto. It was actually J.M. Juran who used the name “Pareto principle” to describe the universal phenomenon that, “[i]n any series of elements to be controlled, a selected small fraction, in terms of numbers of elements, always accounts for a large fraction, in terms of effect.” J.M. Juran, *Universals in Management Planning and Controlling*, 43 MGMT. REV. 748, 749 (1954) [hereinafter Juran, *Universals*]. See also J.M. JURAN, *The Non-Pareto Principle: Mea Culpa*, in JURAN ON QUALITY BY DESIGN 68 (1992) [hereinafter JURAN, *The Non-Pareto Principle*]. Juran applied Pareto’s discussion of the unequal distribution of wealth (20% of the population owns 80% of the wealth) in a number of contexts to illustrate universal characteristics. See J.M. Juran, *Economics of Quality*, in QUALITY CONTROL HANDBOOK 1, 38–39 (J.M. Juran ed., 1951). Juran coined the term *vital few* to describe the small number of elements that account for the most effect and the term *trivial many* to describe the remaining elements that account for a small fraction of the effect. JURAN, *The Non-Pareto Principle*, *supra*, at 68, 70; see also Juran, *Universals*, *supra*. Richard Trueswell applied the Pareto principle, which he referred to as the 80/20 rule, to library collections. Richard Trueswell, *Some Behavioral Patterns of Library Users: The 80/20 Rule*, 43 WILSON LIBR. BULL. 458 (1969). Trueswell suggested using this analysis in determining which materials should be put into “core collections.” *Id.* at 459. See also Richard W. Trueswell, *Growing Libraries: Who Needs Them? A Statistical Basis for the No-Growth Collection*, in FAREWELL TO ALEXANDRIA: SOLUTIONS TO SPACE, GROWTH, AND PERFORMANCE PROBLEMS OF LIBRARIES 72 (Daniel Gore ed., 1976). A small portion of a collection (the “vital few”) accounts for the vast majority of collection usage, while a large portion (the “trivial many”) is rarely used. While the classic proportion is 80/20, some studies have shown the proportion to be even more skewed. For example, a study of circulation of books and manuscripts in a consortium comprising ninety institutions of higher education revealed that six percent of this collection accounted for eighty percent of the circulation. JULIA GAMMON & EDWARD T. O’NEILL, OHIOLINK COLLECTION BUILDING TASK FORCE, OHIOLINK–OCLC COLLECTION AND CIRCULATION ANALYSIS PROJECT 2011, at 31 (2011), available at <http://www.oclc.org/content/dam/research/publications/library/2011/2011-06.pdf>.

14. See sources cited *supra* note 13.

libraries to maintain collections to provide “just in time”¹⁵ research support instead of maintaining large, often unused collections “just in case”¹⁶ a researcher needs a work in the future. To support research needs, an individual library must consider alternatives to relying on its internal collection.

Copyright Holders and Libraries: A History of Control Versus Access

¶7 One way a library can obtain materials that it does not have in its own collection is interlibrary loan. Many of the works that libraries request through interlibrary loan or provide in their collections, however, are under copyright protection. The development of interlibrary loan and of research support in general therefore has been intertwined with the concerns of copyright holders.¹⁷ Copyright holders and libraries have sought various means of controlling the use of research materials on the one hand and of obtaining and providing access to those materials on the other. These means are (1) use of technological limitations and capabilities; (2) use of contracts and other private agreements; and (3) development of legal entitlements and exceptions.¹⁸ While copyright holders and libraries have used the same means to further their interests, they do not share the same values or goals.¹⁹ The history and current state of balancing these interests, particularly as library collec-

15. Toyota Motor Company created the concept of “just in time” as a manufacturing strategy. Göran Svensson, *Just-In-Time: The Reincarnation of Past Theory and Practice*, 39 MGMT. DECISION 866, 867 (2001). “The basic concept of a just-in-time (JIT) system is that inventory is an undesirable asset, and should never be held if at all possible. Therefore, all goods are produced ‘just in time’ to meet demand.” Rajan Suri & Suzanne de Treville, *Getting from “Just-in-Case” to “Just-in-Time”: Insights from a Simple Model*, 6 J. OPERATIONS MGMT. 295, 295 (1986). A library with a just-in-time collection would hold only those materials in high demand.

16. The concept of “just in case” is a “precursor” to the just-in-time concept. Svensson, *supra* note 15, at 867. In manufacturing, a just-in-case approach would require maintaining a “substantial work-in-progress (WIP) inventory” to avoid any production delays and address changes in demand. Suri & de Treville, *supra* note 15, at 296. A library with a just-in-case collection would maintain a wide variety of materials “just in case” someone might happen to request them.

17. The “great bulk” of a research library’s work, in fact, “deals with accessing, storing, exhibiting, or providing access to copyrighted material.” ASS’N OF RESEARCH LIBRARIES, CODE OF BEST PRACTICES IN FAIR USE FOR ACADEMIC AND RESEARCH LIBRARIES 1 (2012), <http://www.arl.org/storage/documents/publications/code-of-best-practices-fair-use.pdf>.

18. These categories are based on a taxonomy that Trotter Hardy outlined in Trotter Hardy, *Property (and Copyright) in Cyberspace*, 1996 U. CHI. LEGAL F. 217. Hardy describes a four-part taxonomy of incentives for the production of “informational works.” *Id.* at 218. These incentives focus on ways of assuring limits on copying. Assurances of copying limits come not just from legal protections, but also from contract protections, technical limitations and controls, and “state-of-the-art limitations.” *See id.* at 223. While Hardy focused on information producers, information users (such as libraries) use the same methods for gaining access to and using works. For example, libraries may prefer to negotiate with publishers rather than fight for changes in copyright law. Hardy notes that as one area, such as state-of-the-art technological limitations, decreases the level of protection from copying, information producers will seek to increase another area of coverage, such as trying to change copyright law. *See id.* at 226–28; I. Trotter Hardy, *Contracts, Copyright and Preemption in a Digital World*, 1 RICH. J.L. & TECH. 2, ¶ 13 (1995).

19. See Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 115–17 (2000).

tions move from print to electronic, offer instruction as to future ways that libraries can ensure research support.

The Beginnings of Interlibrary Loan: Limited Technology

¶8 Libraries in the United States have used interlibrary loan since the late 1800s.²⁰ By the late 1890s, the practice had become widespread.²¹ During the early period of interlibrary loan in the United States, neither copyright holders nor libraries were concerned about defending their respective interests because of the limited technology available for making copies. Until the early twentieth century, the only way to provide materials was by physically sending a book or work to another library. Methods of copying were tedious (copying from a work by hand) or useful only for copying single pages (copy presses).²² In the early twentieth century, new methods provided libraries and their users with a way to copy from books.²³ By 1913, the Photostat machine²⁴ was in use in libraries for several purposes, including interlibrary loan.²⁵ The American Library Association (ALA)

20. Library publications from the late 1800s document the development of interlibrary loan in the United States as of that time. See Jurgen G. Raymond, *Interlibrary Loans*, 34 BULL. MED. LIBR. ASS'N. 189 (1946) (enumerating early discussions of interlibrary loan in library publications such as *Library Journal*). For example, in a letter published in the first issue of *Library Journal* in 1876, Samuel Green recommended that libraries "lend books to each other for short periods of time." Samuel S. Green, Letter to the Editor, *The Lending of Books to One Another by Libraries*, 1 LIBR. J. 15 (1876). The extent of the practice in the United States before the late nineteenth century is unclear.

21. In 1892, Melvil Dewey (using his preferred simplified spelling) noted: "Interlibrary loans, which wer a litl while ago almost unknown ar now of daily occurence." Melvil Dewey, *Inter-library Loans*, 3 LIBR. NOTES 405 (1892).

22. See generally BARBARA RHODES & WILLIAM WELLS STREETER, BEFORE PHOTOCOPYING: THE ART & HISTORY OF MECHANICAL COPYING, 1780–1938 (1999) (providing extensive documentation of early mechanical copying methods, particularly letterpresses). Early copying methods were useful for correspondence but required the making of a copy at the time of the creation of the document or soon after. JOANNE YATES, CONTROL THROUGH COMMUNICATION: THE RISE OF SYSTEM IN AMERICAN MANAGEMENT 54 (1989).

23. These methods were forms of photography. One type of equipment was the cameragraph, which was used to meet the demand resulting from a "recent increase in the request for books on inter-library loan." Charles J. Barr, *The Cameragraph*, 17 PUB. LIBR. 220, 220 (1912). See also Edward D. Tweedell, *The Use of the Cameragraph in the John Crerar Library*, 15 BIBLIOGRAPHICAL SOC'Y AM. PAPERS 22 (1921). In 1913, the St. Louis Public Library reported that it was providing library users with a "photograph room" to allow them to make copies from books, including those "that have been borrowed from other cities on interlibrary loan." The users were "expected to provide their own chemicals and plates or films" but the library had a camera they could borrow. *St. Louis (Mo.) P.L.*, 38 LIBR. J. 123, 123–24 (1913).

24. The Eastman Kodak Company manufactured the Photostat camera, which was the "dominant photographic copier in the early twentieth century." RHODES & STREETER, *supra* note 22, at 159. "Although not the first on the market, [the Photostat] . . . became the photoduplication process most commonly found in those libraries which could afford such a service." Hubbard W. Ballou, *Photography and the Library*, 5 LIBR. TRENDS 265, 269 (1956). By 1912, the Library of Congress had installed Photostat machines. James Benjamin Wilbur, *The Photostat*, in ESSAYS OFFERED TO HERBERT PUTNAM BY HIS COLLEAGUES ON HIS THIRTIETH ANNIVERSARY AS LIBRARIAN OF CONGRESS 520, 524 (William Warner Bishop & Andrew Keogh eds., 1929). See also REPORT OF THE LIBRARIAN OF CONGRESS . . . FOR THE FISCAL YEAR ENDING JUNE 30, 1912, at 114, 123 (1912) (listing \$626 for a Photostat and appropriation of \$600 for a Photostat operator). For a description of a Photostat machine and its use, see Luther D. Burlingame, *The Photostat and Its Use*, 21 MACHINERY 951 (1915).

25. In a 1913 article on interlibrary loan, Frederick Hicks noted: "Many libraries have . . . installed [Photostat] machines and are operating them economically, not only as a substitute for

adopted an interlibrary loan code in 1917.²⁶ This code referred to the use of photographic copies as a substitute for physical loans of a work²⁷ but did not mention compliance with the 1909 Copyright Act.²⁸ In the early twentieth century, copying by mechanical means was so unsophisticated that copyright holders perceived no threat from it.

Technology Advances: The Search for Legislation or Agreement

¶19 As photographic copying improved and another form of copying (microfilm) developed, librarians became concerned that the 1909 Copyright Act might apply to copying of library materials.²⁹ Librarians were aware that the judicially developed doctrine of fair use³⁰ might permit copying, but the application of the doctrine was highly dependent on the facts of the each case. While there may have been uncertainty in the library community about the application of copyright law to library copying, it was not librarians who sought clarification. It was a committee representing scholars and researchers (the “Joint Committee”) that initially undertook the

inter-library loans but to reduce the expense of copying generally.” Frederick C. Hicks, *Inter-Library Loans*, 38 LIBR. J. 67, 72 (1913). For a discussion of other uses of the Photostat in libraries, see Walter T. Swingle & Maude Kellerman Swingle, *The Utilization of Photographic Methods in Library Research Work, With Especial Reference to the Natural Sciences*, 10 BULL. AM. LIBR. ASS’N 194 (1916); Wilbur, *supra* note 24, at 525–27 (providing numerous examples of libraries making copies of rare and fragile materials and of historical publications).

26. *Code of Practice for Inter-library Loans*, 11 BULL. AM. LIBR. ASS’N 27 (1917).

27. The 1917 code stated: “When applying for a loan, librarians should state whether a photographic reproduction would be a satisfactory substitute.” *Id.* Although a lending library still had to physically provide the copy to a borrowing library, the original work continued to be available for use at the lending library. Also, the copy stayed with the requesting patron, so the borrowing library did not have to pay to ship the book back to the lending library. *Id.* at 27–28. The researcher benefited from being able to obtain materials without having to travel. A scholar working in one city might need a “copy of a title-page, or a few pages from a rare book, or an essay, or a print” that was located in another city. “No matter where one is working, he can send to any of the libraries and obtain photostat copies of the material he wishes to examine.” Wilbur, *supra* note 24, at 523–24.

28. Copyright Act of 1909, ch. 320, 35 Stat. 1075. The drafters of the 1909 Copyright Act did not consider photographic reproductions, although the technology was in existence at the time. For a discussion of the 1909 Copyright Act and libraries, see Laura N. Gasaway, *Libraries and Copyright at the Dawn of the Twentieth Century: The 1909 Copyright Act*, 11 N.C. J.L. & TECH. 419 (2010).

29. Verner W. Clapp, *Library Photocopying and Copyright: Recent Developments*, 55 LAW LIBR. J. 10, 11–12 (1962). Changes in the wording of the law raised this concern. For a discussion of how drafters of the 1909 Copyright Act, in revising the prior law, “inadvertently” expanded copyright to include the right to copy, see VERNER W. CLAPP, COPYRIGHT—A LIBRARIAN’S VIEW 2–3, 25–28 (1968).

30. In *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901), Justice Story outlined the factors that would become the basis of the fair use doctrine. The factors to determine whether a party had engaged in fair use of a work were “the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.” *Id.* at 348. The term *fair use* first appeared in *Lawrence v. Dana*, 15 F. Cas. 26, 44 (C.C.D. Mass. 1869) (No. 8136). Barton Beebe, *An Empirical Study of U.S. Copyright Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 560 n.42 (2008); Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1588 (2004). An advanced search in WestlawNext for “fair use” & DA(<01/01/1875) retrieved only *Lawrence v. Dana* as using this phrase in relation to copyright. Another author reports conducting a search with the same results. Steven Hetcher, *The Immorality of Strict Liability in Copyright*, 17 MARQ. INTELL. PROP. L. REV. 1, 15 n.46 (2013).

task of determining the application of copyright law to libraries making copies for scholars.³¹

¶10 The Joint Committee considered litigation and the passage of legislation as possible means of obtaining clarification,³² but ultimately these legal options did not seem workable. The Joint Committee therefore pursued negotiation with publishers.³³ The result was the Gentlemen's Agreement of 1935.³⁴ Robert C. Binkley, the chair of the Joint Committee, and W.W. Norton, the president of the National Association of Book Publishers, described the Gentlemen's Agreement as a "statement" addressing "the problem of conscientious observance of copyright that faces research libraries in connection with the growing use of photographic methods of reproduction."³⁵ The parties involved in adopting the Gentlemen's Agreement did not broadly represent libraries, researchers, or publishers,³⁶ and there was later criticism of the agreement.³⁷ Despite these issues, the agreement was very influential on the development of guidelines for library copying³⁸ and remained so until enactment of the 1976 Copyright Act.

Further Technological Advances Force a Legislative Solution

¶11 By the 1960s, the popularity of the Xerox copier³⁹ "had begun to make the old accommodation [the Gentlemen's Agreement] seem unsatisfactory to

31. Peter B. Hirtle extensively discusses the history of the Joint Committee's attempts to clarify the application of copyright law in the context of library copying for scholars in his article *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, 53 J. COPYRIGHT SOC'Y U.S.A. 545 (2006).

32. *Id.* at 563.

33. *Id.* at 565, 568, 573.

34. The text of the Gentlemen's Agreement is reproduced in several sources. In 1935 the text appeared in both *Library Journal* and *Publishers Weekly*. *Copyright in Photographic Reproductions*, 60 LIBR. J. 763, 763–64 (1935); *Copyright and Photostats*, 128 PUBLISHERS WKLY. 1665, 1666–67 (1935). The text and copies of some of the correspondence relating to the Gentlemen's Agreement were also later published in *The Gentlemen's Agreement and the Problem of Copyright*, 2 J. DOCUMENTARY REPRODUCTION 29 (1939). The text also appears in *REPROGRAPHY AND COPYRIGHT LAW* 157 (Lowell H. Hattery & George P. Bush eds., 1964). The history of the Gentlemen's Agreement is recounted in Jackson S. Saunders, *Origin of the "Gentlemen's Agreement" of 1935*, in *REPROGRAPHY AND COPYRIGHT LAW*, *supra*, at 159.

35. *Copyright in Photographic Reproductions*, *supra* note 34, at 763; *Copyright and Photostats*, *supra* note 34, at 1666.

36. See *PHOTODUPLICATION BY LIBRARIES*, *supra* note 5, at 51 n.9; Hirtle, *supra* note 31, at 548 (noting that the participants, including the librarian who negotiated the agreement, were not representative); Louis Charles Smith, *The Copying of Literary Property in Library Collections*, 46 LAW LIBR. J. 197, 203 editor's n. (1953) (stating that law book publishers were not involved in the agreement).

37. See Clapp, *supra* note 8, at 12–13.

38. Hirtle, *supra* note 31, at 546–48. For example, the language of a section of the 1952 revision of the *ALA Interlibrary Loan Code* was based on language in the Gentlemen's Agreement. Section IX.4 of the *General Interlibrary Loan Code 1952* requires the person requesting a copy to sign a statement "attesting to his responsibility for observing copyright provisions." *General Interlibrary Loan Code 1952*, 13 C. & RES. LIBR. 350, 353 (1952). This responsibility derives from the sixth paragraph of the Gentlemen's Agreement directing "applicant[s] for photo-mechanical reproductions . . . to assume full responsibility for such copying." *Copyright in Photographic Reproductions*, *supra* note 34, at 764; see also *General Interlibrary Loan Code 1952*, *supra*, at 353 note *. Other library associations, including the American Association of Law Libraries, also approved this code. *Id.* at 350. See also Margaret D. Uridge, *The General Interlibrary Loan Code 1952: An Explanation*, 46 LAW LIBR. J. 6 (1953).

39. See RHODES & STREETER, *supra* note 22, at 160–61 (discussing the development of xerography).

publishers.”⁴⁰ Yet relying on the 1909 Copyright Act was also not a satisfactory solution. Congress had adopted the act before the development and use of many new types of technology, and issues regarding these technologies challenged the courts.⁴¹ Both copyright holders and libraries sought legislative relief, but they were far apart in their approaches.⁴² After more than a decade of work,⁴³ Congress enacted the Copyright Act of 1976.⁴⁴

¶12 The 1976 Copyright Act contains several provisions that cover library lending and copying. Section 109(a) permits libraries (and others) to sell and lend books that they own.⁴⁵ Section 107 codifies the fair use doctrine.⁴⁶ Section 108 provides exceptions for library photocopying in various circumstances, including interlibrary loan.⁴⁷ Under section 108(g)(2), making copies for interlibrary loan is permissible as long as these arrangements “do not have, as their purpose or effect, that the library or archives receiving such copies . . . does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.”⁴⁸ To provide guidance regarding the meaning of the language in section 108(g)(2), Congress accepted the help of the National Commission on New Technological Uses of Copyrighted Works (CONTU). The commission produced the CONTU Guidelines on Photocopying under Interlibrary Loan Arrangements.⁴⁹ These guidelines

40. Louise Weinberg, *The Photocopying Revolution and the Copyright Crisis*, 38 PUB. INT. 99, 100 (1975). The dissatisfaction increased when publishers considered the use of copying for interlibrary loan. *Id.* at 101. See also Joseph E. Young, *Copyright and the New Technologies—The Case of Library Photocopying*, 28 COPYRIGHT L. SYMP. 51, 67 (1982) (“As technology improved and photocopying increased, publishers began to take a somewhat less tolerant position.”).

41. Weinberg, *supra* note 40, at 107 (listing some technology issues that were difficult to address under the 1909 Copyright Act). See also Young, *supra* note 40, at 61 (noting that the 1909 act “gave no clear solutions to the problems posed by technological innovation. . . . [T]he draftsmen failed to anticipate a variety of technologies which were later developed, and they neglected even to provide for the possibility of their development.”).

42. Young, *supra* note 40, at 67–70 (describing the vastly different views of publishers and librarians as to how to address library photocopying). Young also notes that publishers and libraries were “[u]nable to reach a private solution” and thus sought relief through litigation. *Id.* at 70. He was referring to (and discusses) *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *aff’d without opinion by equally divided court*, 420 U.S. 376 (1975).

43. Laurie C. Tepper, *Copyright Law and Library Photocopying: An Historical Survey*, 84 LAW LIBR. J. 341, 352 (1992).

44. Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C.).

45. 17 U.S.C. § 109(a) (2006). This is referred to as the right of “first sale.” This exception for lending (by libraries and others) was necessary because the act gives the copyright owner the exclusive right “to distribute copies . . . to the public by sale or other transfer of ownership, or by rental, lease or lending.” *Id.* § 106(3) (emphasis added). The 1909 Copyright Act gave the copyright holder the rights only to “print, reprint, publish, copy, and vend the copyrighted work.” Copyright Act of 1909, ch. 320 § 1(a), 35 Stat. 1075, 1075.

46. 17 U.S.C. § 107 (2006).

47. *Id.* § 108. In discussing the application of fair use to section 108, the House report states: “Nothing in section 108 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 collection, where the user requests the reproduction for legitimate scholarly or research purposes.” H.R. REP. NO. 94-1476, at 78–79 (1976).

48. 17 U.S.C. § 108(g)(2) (2006).

49. NAT’L COMM’N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 54–55 (1979), available at <http://digital-law-online.info/CONTU/PDF/index.html>. These guidelines are also known as suggestions since they do not have the force of law.

provide, in part, that during a calendar year a library may borrow five copies of articles from the most recent five years of publication of a journal. Presumably, upon the sixth request, the library should consider whether it is substituting interlibrary loan copies for a subscription. The guidelines do not apply to articles from journal issues published more than five years before the date of the request.⁵⁰ These guidelines were the work of an appointed commission and were not a negotiated agreement.⁵¹ They do not have the force of law, although they were referenced in the conference report on the 1976 Copyright Act.⁵²

The Rise of Agreements and Technological Limitations

¶13 In recent years, the increasing ease with which digital works can be copied and transmitted has raised publisher and other copyright holder concerns to new levels. As a result, copyright holders began to impose technological limitations in the form of digital rights management controls. In addition, they were successful in changing copyright law⁵³ to provide penalties for anyone who circumvented these controls.⁵⁴ While there were some exceptions for libraries,⁵⁵ attempts to address library concerns for lending digital works failed. For example, an attempt to develop guidelines for interlibrary loan of digital works was unsuccessful due to irreconcilable differences between publishers and libraries.⁵⁶ For even greater control of digital works, copyright holders began using licenses and contracts.

Loss of Control: The Effect of Licensing and Contracts

¶14 The rise in the use of digital works has permitted copyright holders to change the model of providing materials to libraries. This change has allowed publishers to fundamentally alter libraries' ability to obtain and provide journals and books for researchers through interlibrary loan or even from within their own collections. Academic libraries now operate in what John Palfrey called a "world of 'digital plus.'"⁵⁷ While academic collections are a "hybrid . . . of print and digital materials,"⁵⁸ expenditures on electronic resources are increasing.⁵⁹ These digital

50. *Id.* at 55.

51. See Kenneth D. Crews, *The Law of Fair Use and the Illusion of Fair-Use Guidelines*, 62 OHIO ST. L.J. 599, 624–25 (2001) (discussing the nature of the CONTU guidelines in comparison to other guidelines for copyright enforcement).

52. H.R. REP. NO. 94-1733, at 71–74 (1976) (Conf. Rep.).

53. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 17 U.S.C.).

54. 17 U.S.C. § 1201 (2006).

55. See Gasaway, *supra* note 19, at 137–41.

56. See Laura N. Gasaway, *Guidelines for Distance Learning and Interlibrary Loan: Doomed and More Doomed*, 50 J. AM. SOC'Y INFO. SCI. 1337, 1339–41 (1999) (reporting on the Conference on Fair Use (CONFU) discussions of interlibrary loan that occurred between 1994 and 1998).

57. John Palfrey, *Cornerstones of Law Libraries for an Era of Digital-Plus*, 102 LAW LIBR. J. 171, 175, 2010 LAW LIBR. J. 11, ¶ 14.

58. *Id.* at 172, ¶ 4. Palfrey describes how in this hybrid world, "print and other analog formats will not disappear," but "[t]he dominant mode of information creation and access will continue its shift from analog to digital." *Id.* at 175, ¶¶ 15, 14.

59. See Taylor Fitchett et al., *Law Library Budgets in Hard Times*, 103 LAW LIBR. J. 91, 94, 2011 LAW LIBR. J. 5, ¶ 10. Association of Research Libraries (ARL) statistics indicate that for

works may contain the same content as their print counterparts, but the ability of libraries to provide access to these materials is quite different. Publishers primarily control the copyright to these works.⁶⁰ They have preferred to license, rather than sell, e-journals and e-books to libraries.

¶15 A shift to digital format did not require a licensing model.⁶¹ Digital works, however, provide something that print works do not: a means to control use.⁶² Once a print work is on the shelf, a publisher cannot control how a library and its patrons might use this work. Digital technology offers ways to control use. If the publisher sold the digital work to the library, it would give up the ability to exercise this control.⁶³ By licensing the work, the publisher retains control over the work while simply providing access.

¶16 An additional incentive to adopt a licensing model is that licensing allows a publisher to limit the reach of copyright law. Copyright law governing library copying and lending operates in a print-based world where libraries own the materials.⁶⁴ On the other hand, contract law, not copyright, governs licensed materials. For publishers, licensing provides “absolute control” of a work.⁶⁵ This control can yield a better return on their investment.⁶⁶ Publishers who license rather than sell to libraries are no longer fettered with section 108 exceptions and can ignore the first sale doctrine. They can even create restrictions that essentially eliminate fair use.⁶⁷ Library exceptions for copying under section 108 and for lending under section

2010–11, in the surveyed academic libraries, electronic resources expenditures accounted on average for sixty-two percent of total materials expenditures. By comparison, in 2000–01 electronic resources accounted for sixteen percent of total materials expenditures. Electronic Resources vs Total Materials Expenditures—Yearly Increases in Average Expenditures 1993–2011, <http://www.arl.org/focus-areas/statistics-assessment/statistical-trends> (click on XLS link) (percentages calculated from spreadsheet amounts). Interestingly, an FAQ provided in 2011 for the statistics questionnaire explained that when counting unique serial titles, libraries should count only the electronic version if the library held both a print and an electronic version. The reason was that “as serials move to electronic form and become the version of record, a count for electronic titles is more representative of library collections.” Statistics FAQ (Aug. 1, 2011), <http://www.libqual.org/documents/admin/11statfaq.pdf>. The 2012 Survey of Ebook Usage in U.S. Academic Libraries reported that ninety-five percent of reporting academic libraries provided e-books, with the two most frequently held categories being reference materials and scholarly monographs. LIBRARY JOURNAL & SCH. LIBRARY JOURNAL, 2012 EBOOK USAGE IN U.S. ACADEMIC LIBRARIES: THIRD ANNUAL SURVEY 5, 35 (2012), available at <http://www.library.arkansas.gov/PublicLibraryServices/Documents/Ebook-Usage-Report-Academic.pdf>.

60. See L. RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT* 187–89 (1991) (discussing issues arising from publisher ownership of copyrights).

61. Scott Matheson, *Access Versus Ownership: A Changing Model of Intellectual Property*, 21 LEGAL REFERENCE SERVICES Q., nos. 2/3, 2002, at 153, 157.

62. See Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILL. L. REV. 13, 78 (2003).

63. For example, if the library purchased a journal and downloaded the contents to its own server when each issue arrived, the library would control this issue of the journal much like a print journal.

64. Even if a library cancels a subscription to a journal, it still owns the back issues.

65. Bartow, *supra* note 62, at 16.

66. Matheson, *supra* note 61, at 157. Publishers can repeatedly charge for access to the same material rather than receiving a one-time payment. *Id.* at 159.

67. For example, prohibiting interlibrary loans of electronic books or journals not only eliminates the section 108 interlibrary loan exception, it also eliminates the ability of the library to claim the fair use exception.

109(a) do not apply when a copyright holder licenses a work to a library. Under section 108(f)(4), contract provisions override the exceptions for library copying.⁶⁸ Section 109(d) provides that the first sale exception does not apply to anyone who has not acquired ownership of a work.⁶⁹ Within this world of licensing, libraries often find their ability to lend and borrow materials for researchers restricted or even prohibited. This change from a “property-based system . . . governed by copyright law to a contract-based system . . . governed by whatever terms the market will bear”⁷⁰ jeopardizes the ability of academic libraries to support research and the advancement of knowledge.

Interlibrary Loan

¶17 Licensing terms determine whether libraries can provide copies of e-journal articles and lend e-books through interlibrary loan. Provisions in licenses can vary from publisher to publisher and even for different titles held by one publisher,⁷¹ making it difficult for libraries to determine the scope of their rights. Many agreements place limits on the number of loans that the subscribing library can make.⁷² These restrictions on interlibrary loan of e-journal articles often mimic the language of the CONTU guidelines.⁷³ The publisher restrictions, for example, may refer to “five (5) free article copies”⁷⁴ for interlibrary loan, which sounds similar to the suggestion of five copies in the guidelines. The publishers, however, pervert the purpose of section 108(g)(2) and the CONTU guidelines by

68. 17 U.S.C. § 108(f)(4) (2006).

69. *Id.* § 109(d). See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102, 1107 (9th Cir. 2010) (“The first sale doctrine does not apply to a person who possesses a copy of the copyrighted work without owning it, such as a licensee.”); Anne Klinefelter, *Copyright and Electronic Library Resources: An Overview of How the Law Is Affecting Traditional Library Services*, 19 LEGAL REFERENCE SERVICES Q., nos. 3/4, 2001, at 175, 178. Section 109(d) states that first sale does not apply if a person “has acquired possession of the copy . . . by rental, lease, loan, or otherwise, without acquiring ownership of it.” It is questionable whether a library that licenses content even has “possession,” given that the materials are stored on a server that the library does not own or control.

70. Kathleen K. Olson, *Preserving the Copyright Balance: Statutory and Constitutional Preemption of Contract-Based Claims*, 11 COMM. L. & POL’Y 83, 88 (2006).

71. Lynn N. Wiley, *License to Deny? Publisher Restrictions on Document Delivery from E-Licensed Journals*, 32 INTERLENDING & DOCUMENT SUPPLY 94, 97 (2004) (“There are as many licenses as there are vendors and as many again for the products the vendors provide and are applied variously to the buyer of that product.”). A 2012 survey of clauses in research library licensing agreements showed that with regard to interlibrary loan provisions, there was “a lack of consistency among publishers and even among libraries that may have signed agreements with the same publisher.” Karla L. Strieb & Julia C. Blixrud, *The State of Large-Publisher Bundles in 2012*, RES. LIBR. ISSUES, no. 282, at 13, 18 (2013), <http://publications.arl.org/rli282/13>. The Liblicense web site (<http://liblicense.crl.edu>) is helpful for finding information about licenses, including links to various publishers’ licensing agreements.

72. See TOMAS A. LIPINSKI, *THE LIBRARIAN’S LEGAL COMPANION FOR LICENSING INFORMATION RESOURCES AND SERVICES* 467–68 (2013).

73. *Id.* The restrictions also can be broader than the CONTU guidelines by not allowing for fair use exceptions and counting any source (rather than a particular source) toward the allowable number of articles. One example is in the American Chemical Society license: Am. Chemical Soc’y, Pub. Div., Online Products Institutional Access Agreement, http://pubs.acs.org/userimages/ContentEditor/1367593694540/ACS_Institutional_Access_Agreement_Academic.pdf [hereinafter ACS License]. See LIPINSKI, *supra* note 72, at 467, for a discussion of this license.

74. ACS License, *supra* note 73.

applying their restrictions to the *lending* library rather than to the *borrowing* library. The lending library, which licenses the work, can provide only five copies and must pay a royalty fee if it exceeds the limit.⁷⁵ The CONTU guidelines apply to the *borrowing* library. These publisher restrictions have completely reversed the application of the CONTU guidelines.

¶18 The intent of the CONTU guidelines was to assist a borrowing library in determining whether it needed to subscribe to a publication rather than continue using interlibrary loan. If the borrowing library needed to request additional articles beyond the number suggested in the guidelines, then it might determine that it should obtain a subscription. The publisher restrictions apply to the lending library, *which already has a subscription*.⁷⁶ Publishers' use of language similar to that of the CONTU guidelines therefore has no real relationship to the purpose of section 108(g)(2). No matter how many times the lending library provides a copy of an article, it is not substituting interlibrary loan for a subscription. Publishers cannot control the borrowing library, but they can control the lending library through the license. These provisions are simply a way for publishers to charge for use while creating the illusion that they are complying with the CONTU guidelines.

¶19 Some license agreements go further and prohibit all interlibrary loans. This can force libraries whose patrons need articles to pay high fees in order to obtain one-time uses. These types of restrictions diminish or eliminate the ability of libraries to obtain needed materials for scholars.⁷⁷ Libraries are unable to lend or to borrow.⁷⁸

¶20 Publisher agreements regarding e-books are also very restrictive. A library can physically lend an entire print book under the first sale doctrine because the library owns the book. Using e-books for interlibrary loan is appealing to libraries since it eliminates the costs and time associated with physically shipping the borrowed book.⁷⁹ Publishers, by licensing e-books, can determine whether a library can lend an e-book under the terms of the license agreement. Publishers either prohibit any interlibrary loan of e-books or they restrict loans to printouts of chapters.⁸⁰ These restrictions severely limit the ability of libraries to support research needs.

75. *Id.*

76. Gasaway notes that these provisions reflect publisher attempts during the Conference on Fair Use to twist the CONTU suggestions and impose them on the lending library. Publishers also expressed their determination to eliminate interlibrary loan. Gasaway, *supra* note 19, at 148.

77. See Klinefelter, *supra* note 69, at 185.

78. A recent example of the problems a locked collection creates is as follows: A law school faculty member requested an article from a journal. The law library did not have access to the journal either through its own subscription or through the university library. The law library would not subscribe to this journal since it was not appropriate for the collection. There was merely a one-time need for an article. Other libraries had only electronic access and could not, due to licensing restrictions, provide a copy. The only option was to obtain a copy of this article from the publisher at a cost of \$30.

79. Bronwen Woods & Michael Ireland, *eBook Loans: An E-Twist on a Classic Interlending Service*, 36 INTERLENDING & DOCUMENT SUPPLY 105, 106 (2008).

80. Becky Albitz & David Brennan, *Licensing of E-Books*, in BUILDING AND MANAGING E-BOOK COLLECTIONS 75, 79–80 (Richard Kaplan ed., 2012); see also William Gee, *The Conundrum of eBooks and Interlibrary Loan*, AGAINST THE GRAIN, Apr. 2007, at 22, 24 (discussing how libraries are forced to reject interlibrary loan requests for e-books because the books “are locked behind proprietary licensed interfaces that prohibit loans or copying”). Publishers also restrict authorized users of a library in

Pricing

¶21 The cost of digital works is yet another issue confronting libraries. They may be unable to provide access to needed materials because the publisher will license to the library only at a very high cost (often higher than the price for individuals) or not at all.⁸¹ Until recently many larger publishers would not license to libraries, and once they decided to license to libraries they imposed licensing restrictions and charged higher prices.⁸² Some publishers refuse to work with libraries to establish consortial acquisitions of e-books.⁸³ A continuing issue regarding e-journals is the practice of “bundling” individual titles or journal databases on a take-it-or-leave-it basis. This means that a library cannot subscribe to an individual title or selected group of resources. It must either subscribe to the bundle or forgo access to the materials.⁸⁴

their usage of the work. For example, they limit how much a user can copy and paste from an e-book within a limited time period. Albitz & Brennan, *Licensing of E-Books*, *supra*, at 80 (reprinting portions of a Cambridge University Press contract).

81. See Douglas Cnty. Libraries, Pricing Comparison as of May 2, 2013, <http://www.americanlibrariesmagazine.org/sites/americanlibrariesmagazine.org/files/DCL%20Pricing%20Comparison%205-2-13.pdf>. This report shows that some e-book prices for libraries are as much as eleven times the consumer price. For a discussion of the report, see Christopher Harris, *DCL May Ebook Price Report: The Devil Is in the Details*, AM. LIBRARIES, <http://www.americanlibrariesmagazine.org/blog/dcl-may-ebook-price-report-devil-details> (last visited Aug. 20, 2013).

82. As of September 2012, only a few of the big six publishers would license e-books to libraries. See *An Open Letter to America's Publishers from ALA President Maureen Sullivan*, AM. LIBRARY ASS'N (Sept. 28, 2012), <http://www.ala.org/news/2012/09/open-letter-america%E2%80%99s-publishers-ala-president-maureen-sullivan> (discussing refusal of certain publishers to sell to public libraries). By May 2013, all of the big six publishers had some form of e-book licensing for libraries. Andrew Albanese, *Hachette Makes Full E-book Catalogue Available to Libraries*, PUBLISHERS WEEKLY .COM (May 1, 2013), <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/57049-hachette-makes-full-e-book-catalogue-available-to-libraries.html> (noting that “all of the big six publishers are now enabling library e-book lending”). As revealed in the Douglas County Libraries pricing comparison, however, many top-selling books are not available for licensing. See Douglas Cnty. Libraries, *supra* note 81. Also, there are restrictions on loan length and the length of the licenses. Anthony W. Marx, Op-Ed., *E-Books and Democracy*, N.Y. TIMES, May 1, 2013, at A25 (discussing some of the limitations on e-book lending). The ALA Digital Content and Libraries Working Group maintains a chart on the big six publishers and library lending that notes restrictions. See Rob Maier, *DCWG Big Six Matrix for Ebook License Comparisons*, AM. LIBRARIES, <http://www.americanlibrariesmagazine.org/blog/dcwg-big-six-matrix-ebook-license-comparisons> (last visited Aug. 22, 2013) (describing and linking to chart). See also *Frequently Asked Questions Regarding E-books and U.S. Libraries*, TRANSFORMING LIBRARIES, <http://www.ala.org/transforminglibraries/frequently-asked-questions-e-books-us-libraries> (last updated Aug. 16, 2013).

83. Jill Emery, *The Demand Driven Acquisitions Pilot Project by the Orbis Cascade Alliance: An Interview with Members of the Demand Driven Acquisitions Implementation Team*, 38 SERIALS REV. 132, 133 (2012).

84. See PETER SUBER, OPEN ACCESS 32 (2012); Timothy Gowers, *Elsevier—My Part in Its Downfall*, GOWERS'S WEBLOG (Jan. 21, 2012, 5:30 P.M.), <https://gowers.wordpress.com/2012/01/21/elsevier-my-part-in-its-downfall/> (discussing the problems for libraries caused by bundling). As an example, while individuals can subscribe to a print and online version of just the *American Journal of Bioethics*, libraries cannot. Libraries can only subscribe to this journal as part of a journal “pack.” *The American Journal of Bioethics*, TAYLOR & FRANCIS ONLINE, <http://www.tandfonline.com/pricing/journal/uajb20> (last visited Aug. 16, 2013). The price for an individual subscription to the journal (print and online) is \$200. It costs \$1479 for a library to obtain an online-only subscription and \$1690 for a print and online subscription. *Id.* The difference in price reflects that the library must also subscribe to two

Pay-per-View

¶22 A concern about publisher pricing of e-resources is that technology can support digital tracking and management of individual titles. This means that “library activities . . . that were essentially unmonitorable in the offline world become ascertainable and quantifiable when conducted online.”⁸⁵ Pay-per-view is an illustration of this troubling aspect of some business models for e-journals and e-books. Under this model, a library has no ongoing subscriptions or licenses. Instead, there is a charge each time a library user accesses an article or book.⁸⁶ The library does not own the book, and serves merely as a conduit between the user and the publisher. It is the publisher that will profit from the use. If the library owned the book, users could read the book many times for free. The publishers are essentially imposing a license or a tax to read.⁸⁷

¶23 This arrangement may seem attractive to some libraries as smaller budgets force them to cut both their print and electronic collections.⁸⁸ One service even ties pay-per-view to interlibrary loan to facilitate acquiring articles after a library has requested its five articles under the CONTU guidelines.⁸⁹ It is easy for libraries to make this automatic payment without considering whether fair use or another exception would apply. If the library does not identify the exception, it will be lost. The system simply tracks a use and does not assess whether there is an exception.⁹⁰

other journals as well as the *American Journal of Bioethics*. If these publications are not appropriate for the library's collection, it does not matter. If the library wants to subscribe, it must pay for all journals in the bundle. Libraries will also find that although this publication is available in certain “aggregator” databases such as CINAHL, those databases do not provide access to issues published during the most recent eighteen months. So, if the library cannot or will not pay the high price for the bundle, then it cannot provide access at all. There is the option to purchase articles from the publisher's web site for \$37 per article. Purchases of online articles are designed for individual payment by credit card, which can be difficult for libraries.

85. Bartow, *supra* note 62, at 91.

86. Regina Koury, *Coping with Economic Issues and a Paradigm Shift in Collections*, in *MANAGING ELECTRONIC RESOURCES* 17, 24–25 (Ryan O. Weir ed., 2012) (discussing use of pay-per-view for e-journal articles). See also Patrick L. Carr & Maria Collins, *Acquiring Articles Through Unmediated, User-Initiated Pay-Per-View Transactions: An Assessment of Current Practices*, 35 *SERIALS REV.* 272 (2009) (discussing use of pay-per-view as an alternative to e-journal publisher-packaged subscriptions).

87. This arrangement is a “user's tax . . . on learning materials.” L. Ray Patterson, *Understanding Fair Use*, *LAW & CONTEMP. PROBS.*, Spring 1992, at 249, 263.

88. A library could use pay-per-view to replace interlibrary loan, with the payment going to the publisher. See Heather L. Brown, *Pay-Per-View in Interlibrary Loan: A Case Study*, 100 *J. MED. LIBR. ASS'N* 98 (2012).

89. The Copyright Clearance Center's Get It Now service allows libraries to order an article immediately and pay for that single article. This service is available through the ILLiad interlibrary loan service that many libraries use. It can be tempting for a library to use the service rather than considering fair use options. *Id.* at 101. See also JAMES S. HELLER, PAUL HELLYER & BENJAMIN J. KEELE, *THE LIBRARIAN'S COPYRIGHT COMPANION* 86 (2d ed. 2012) (discussing concerns about the Get It Now service).

90. Penny Hazelton, in discussing pay-per-view arrangements for e-books, notes that “this model fails to take into account the way researchers use information from books in any format. Researchers search for relevant information without always knowing where the information might be located. They might look at a table of contents or index before rejecting the work as irrelevant.” Penny A. Hazelton, *Law Students and the New Law Library: An Old Paradigm*, in *LEGAL EDUCATION IN THE*

¶24 Libraries may believe pay-per-view simply provides users with quick and convenient access to materials, “[b]ut in the quest for more responsive customer services, libraries must not overlook the longer-term societal goals and cultural missions.”⁹¹ Engaging in a pattern that eliminates consideration of fair use ultimately can be detrimental to preserving that right.⁹² As L. Ray Patterson warned: “At issue here is access to learning, endangered by the efforts of copyright owners to make a commodity of all the knowledge in the land for the purpose of obtaining private fortunes.”⁹³

¶25 Publishers may also use technological capabilities to track an individual’s e-book use and then charge for that usage. The technology is available to track individual, incremental use. An article in the *Wall Street Journal* titled *Your E-Book is Reading You* discusses the ways that publishers, through e-readers, track reader usage.⁹⁴ If publishers can track these bits of information for marketing purposes, they can track the same information bits to assess fees. For example, if users can copy portions and save them, publishers could impose a charge each time something is copied. Charging for granular use would dispense with the most basic form of fair use, which is the making of personal notes. All of these limitations, whether charged for or not, put the publishers in control of the use of publications.

Preservation

¶26 The licensing of e-resources also has long-term consequences for scholarship because it hampers the ability of libraries to preserve information. Licensing arrangements can offer short-term benefits to libraries that provide just-in-time services. Since the libraries do not own these materials, however, future availability of these materials is in doubt. Sometimes publishers decide to stop including certain works in library subscriptions. Many licenses provide that a library loses all access to the materials, including back issues, if the subscription ends. This decrease in library ownership jeopardizes the availability of works for future research needs. The archiving of and future access to works will be left to publishers and database vendors.⁹⁵

¶27 Even a library that obtains “perpetual access” to materials may find it difficult to provide access if it ends its relationship with the publisher or distributor.⁹⁶

DIGITAL AGE 158, 169 (Edward Rubin ed., 2012).

91. Clifford Lynch, *The Battle to Define the Future of the Book in the Digital World*, 6 FIRST MONDAY, no. 6, 2001, <http://firstmonday.org/ojs/index.php/fm/article/view/864/773>.

92. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 884 (2007).

93. Patterson, *supra* note 87, at 266.

94. Alexandra Alter, *Your E-Book Is Reading You*, WALL ST. J., June 29, 2012, at D1 (noting the kind of tracking that companies can do through e-readers). For example, the Kindle user’s agreement grants Amazon permission to capture and store information from the device. This information includes the last page the user read as well as the user’s “annotations, bookmarks, notes, highlights, or similar markings.” *Kindle Terms of Use*, AMAZON, <http://www.amazon.com/gp/help/customer/display.html/?&nodeId=200506200> (last updated Sept. 6, 2012). Amazon then provides some of this information, in aggregate form, for the public to view. Alter, *supra*.

95. See Klinefelter, *supra* note 69, at 180, 184.

96. For e-journals, an agreement might provide long-term access to contents through “archive” provisions. See LIPINSKI, *supra* note 72, at 399–403. Perpetual access is a common model for e-books.

Once a library severs the relationship, it might possess only bare data files and will need to figure out how to provide an interface and an appropriate platform.⁹⁷ Another concern is whether publishers that have locked copyrighted resources will relinquish and release these materials once the copyrights expire.⁹⁸ Given the lengthy terms of copyrights, this scenario is far in the future for many works. Will this control by publishers bar locked works from ever entering the public domain?

¶28 These arrangements create a very uncertain future for the availability of the scholarly record. As one author notes: "Persistent access to licensed content is a serious issue. Scholarship requires the ability to check sources and verify information . . . weeks, months and often years after publication or creation."⁹⁹ Research libraries are conservators¹⁰⁰ and stewards¹⁰¹ of the record of scholarship. "If librarians abdicate their stewardship responsibility for creating the archive of the scholarly record, and yield that responsibility to publishers instead,"¹⁰² they are relinquishing the future of the scholarly record into the hands of those who are interested in maintaining resources for profit, not for the promotion and advancement of knowledge.

Options for Ensuring Research Support

¶29 The licensing model for e-journals and e-books can severely restrict an academic library's ability to support its faculty researchers and preserve the scholarly record. Addressing this problem requires examination of the same approaches that have governed library and copyright-holder relations in the past: development

LIBRARY JOURNAL & SCH. LIBRARY JOURNAL, *supra* note 59, at 7 (83% of survey respondents obtained perpetual access for e-books). Perpetual access agreements for e-books allow the library to "pay[] for the book once with an additional small annual platform fee to use the book at the publisher's website with customized and updated software." Joanne Doucette & Amy Lewontin, *Selecting E-Books, in BUILDING AND MANAGING E-BOOK COLLECTIONS*, *supra* note 80, at 51, 61; *see also* David R. O'Brien, Urs Gasser & John Palfrey, *E-Books in Libraries: A Briefing Document Developed in Preparation for a Workshop on E-Lending in Libraries* 14–15 (Berkman Ctr. Res. Pub. No. 2012-15, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111396. Doucette and Lewontin caution that it is important to understand what perpetual access means if a library ends a relationship with a vendor or the vendor goes out of business. Doucette & Lewontin, *supra*, at 61 ("Will your books be hosted on a third-party electronic archival website . . . or will you be receiving a stack of CD-ROMs in the mail?").

97. In a recent article, law librarians discussed the challenges in developing a delivery platform when they decided to end the "access" portion of a "purchase plus access" arrangement. Sallie Smith, Susanna Leers & Patricia Roncovich, *Database Ownership: Myth or Reality?*, 103 LAW LIBR. J. 233, 2011 LAW LIBR. J. 15. Under the purchase-plus-access model, the library "pays a lump sum for content ownership and an annual subscription fee for access to that content and its search interface on the database provider's remote servers." *Id.* at 234, ¶ 2. *See* Simon Canick, *The Ownership Delusion: When Law Libraries "Buy" Electronic Documents, Are They Getting More, or Simply Paying More?*, AALL SPECTRUM, Feb. 2008, at 30, 31, for a discussion of purchase plus access.

98. *See* Olson, *supra* note 70, at 88.

99. Sharon Farb, *Libraries, Licensing and the Challenge of Stewardship*, 11 FIRST MONDAY, no. 7, 2006, <http://firstmonday.org/ojs/index.php/fm/article/view/1364/1283>.

100. SMITH, *supra* note 4, at 7–8.

101. Farb, *supra* note 99.

102. Rachel Miller, *Acts of Vision: The Practice of Licensing*, 32 COLLECTION MGMT. 173, 183 (2007).

of legal entitlements and exceptions, use of contracts and other private agreements, and use of technology.

Legal Entitlements and Exceptions

¶30 Changing copyright law is one possible way of ensuring scholarly access to digital materials. It is, however, “especially difficult to pass useful legislation in the copyright sphere.”¹⁰³ The 1976 Copyright Act was the product of “compromises negotiated among those with economic interests in copyright.”¹⁰⁴ Revisions in the current law are unlikely because of the irreconcilable nature of the differences between stakeholders. Achieving any change will involve a lengthy process. With the recent movement toward copyright reform,¹⁰⁵ however, it is worth assessing which areas might hold promise for improving research support and are likely to receive congressional attention.

Revisions to Section 108

¶31 In 2008, the Section 108 Study Group¹⁰⁶ completed a review of 17 U.S.C. § 108.¹⁰⁷ The group’s review of provisions related to interlibrary loan yielded no definite recommendations.¹⁰⁸ Overall the group’s report “gives a helpful account of the problems faced by libraries and other institutions operating under current law, but it is unlikely that any such process will yield helpful substantive fixes in the near future.”¹⁰⁹

103. PRUDENCE ADLER ET AL., ASS’N OF RESEARCH LIBRARIES, RESOURCE PACKET ON ORPHAN WORKS: LEGAL AND POLICY ISSUES FOR RESEARCH LIBRARIES 3 (2011), available at http://www.arl.org/storage/documents/publications/resource_orphanworks_13sept11.pdf.

104. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 869 (1987).

105. In April 2013, the chairman of the House Judiciary Committee announced that the committee would “conduct a comprehensive review of U.S. copyright law.” Press Release, Comm. on the Judiciary, Chairman Goodlatte Announces Comprehensive Review of Copyright Law (Apr. 24, 2013), http://judiciary.house.gov/news/2013/04242013_2.html. In May 2013, a subcommittee of the House Judiciary Committee began a series of hearings related to this review. Press Release, Comm. on the Judiciary, Subcommittee to Hold First Hearing on Comprehensive Copyright Review (May 15, 2013), http://www.judiciary.house.gov/news/2013/05152013_2.html.

106. The Library of Congress National Digital Information Infrastructure and Preservation Program and the U.S. Copyright Office sponsored the nineteen-member Section 108 Study Group to “conduct a reexamination of the exceptions and limitations applicable to libraries and archives under the Copyright Act, specifically in light of the changes wrought by digital media.” Press Release, Section 108 Study Group, Section 108 Study Group Convenes to Discuss Exceptions to Copyright Law for Libraries and Archives (May 13, 2005), http://www.section108.gov/release_051305.html. For more information see THE SECTION 108 STUDY GROUP, <http://www.section108.gov/index.html> (last visited July 26, 2013).

107. THE SECTION 108 STUDY GROUP REPORT (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

108. See *id.* at x–xi, 95–106.

109. ASS’N OF RESEARCH LIBRARIES, FAIR USE FAQ FOR LIBRARIANS/GENERAL OVERVIEW 4 (2012), available at <http://www.arl.org/storage/documents/publications/fair-use-code-faq-librarians.pdf>. See also KENNETH D. CREWS, COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS 99 (3d ed. 2012) (“The current prospect for passage of [the Section 108 Study Group’s proposals] in Congress is meager, although the work of the study group has drawn further attention to the deficiencies of the law and the need for improvements.”). In 2011, the Copyright Office identified “exceptions for libraries” as

¶32 Whatever revisions to section 108 there might be to address the use of digital copies for interlibrary loan, copyright holders can override those provisions through licensing and contract terms.¹¹⁰ As long as section 108 allows contracts to control, changes to section 108 will not affect limitations on interlibrary loan of digital articles. Current licensing terms in many agreements already contradict section 108(g)(2) by placing restrictions on the lending library when the concern in section 108(g)(2) was with a requesting library obtaining interlibrary loan copies to substitute for a subscription. The Section 108 Study Group discussed section 108(f)(4), which provides that nothing in section 108 “in any way affects . . . any contractual obligations.”¹¹¹ The group agreed that section 108(f)(4) should apply to negotiated agreements, but disagreed on the application to nonnegotiable agreements.¹¹² “Negotiated” agreements supposedly allow the parties to arrive at terms they bargained for. Yet these agreements do not affect only the two parties. They affect anyone who wants to borrow the work if there is a limitation on lending, and thus they affect a broader public interest.¹¹³ As long as publishers’ contractual terms can override section 108 provisions, revisions to section 108, even if passed, will be hollow.

CONTU Guidelines

¶33 Libraries refer to the CONTU guidelines¹¹⁴ when requesting copies of articles through interlibrary loan.¹¹⁵ These guidelines are not the law, but a “reasonable

a priority. MARIA A. PALLANTE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE, OCTOBER 2011–OCTOBER 2013, at 8 (2011), available at <http://www.copyright.gov/docs/priorities.pdf>. The report states that the Copyright Office would provide preliminary recommendations in 2012, but as of fall 2013 the Copyright Office has not provided recommendations or a discussion document on section 108.

While there have been no formal recommendations regarding section 108, it remains a subject of concern within the context of copyright reform. See Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 333 (2013) (noting that section 108 is “the subject of ongoing public inquiries, symposia and recommendations”). Pallante, the Register of Copyrights, in a statement to the House Subcommittee on Courts, Intellectual Property and the Internet, indicated that there were studies available on topics under consideration for copyright reform, including library exceptions. *The Register’s Call for Updates to U.S. Copyright Law, Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. 7 (2013). A recent symposium on Copyright Exceptions for Libraries in the Digital Age focused on section 108 reform. See *Section 108 Reform*, COLUMBIA LAW SCH. (Feb. 8, 2013), <http://web.law.columbia.edu/kernochan/symposia/section-108-reform>. At a hearing of the House subcommittee on May 16, 2013, one witness, Laura Gasaway, discussed section 108 extensively. *A Case Study for Consensus Building: The Copyright Principles Project: Hearing Before the Subcomm. on Courts, Intell. Prop. and the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2013), available at http://judiciary.house.gov/hearings/113th/hear_05162013.html.

110. Licensing terms, for example, can provide that a lending library must send a print or fax copy of an online article.

111. 17 U.S.C. § 108(f)(4) (2006).

112. THE SECTION 108 GROUP STUDY REPORT, *supra* note 107, at xii. One approach suggested was to amend section 108(f)(4) to state that “rights and privileges granted under section 108 may not be waived by a non-negotiable contract.” *Id.* at 122. The opposing view was to rely on “existing legal tools [i.e., state law and judicial opinions] . . . to address contractual issues among libraries and archives and rights holders.” *Id.*

113. See JASON MAZZONE, COPYFRAUD AND OTHER ABUSES OF INTELLECTUAL PROPERTY LAW 110–11 (2011).

114. See *supra* ¶ 12.

115. The ALA *Interlibrary Loan Code* states that in making copy requests, “the requesting

interpretation.”¹¹⁶ The guidelines have remained unchanged since their creation, and it is improbable that there will be any change in the near future.¹¹⁷ They remain a guide for a requesting library’s evaluation of its requests. These guidelines serve as an alert for a library to evaluate requests it makes.¹¹⁸ They provide no bright-line determination of what action a library should take if it reaches the suggested limit. The conference committee report on the 1976 Copyright Act, in discussing the CONTU guidelines, stated: “[T]he guidelines are not intended as, and cannot be considered, explicit rules or directions governing any and all cases, now or in the future.”¹¹⁹ A library, having made five requests that fit within the CONTU guidelines, can evaluate any additional requests. It might determine that the requests indicate that the library should obtain a subscription or pay a fee for single requests. Alternatively, the library could determine that the additional request does not trigger a need to subscribe or pay.¹²⁰

¶34 Research librarians should consider their options each time they make a request rather than automatically paying a license fee. Unfortunately, an Association of Research Libraries (ARL) survey of the application of fair use in academic research libraries noted that interviewees rarely consider fair use when making interlibrary loan decisions.¹²¹ Routinely paying fees when, for example, a library could rely on fair use, entrenches copyright-holder control. As James Gibson noted: “If a rights-holder . . . routinely issues licenses for a given use, then copyright law views that use as properly falling within the rights-holder’s control. . . . [T]he practice of licensing within gray areas eventually makes those areas less gray, as the licensing itself becomes the proof that the entitlement covers the use.”¹²² Sometimes it may seem easier to pay than to make an evaluation. Librarians should not be lured by convenience into simply making payments without any evaluation.

library must comply with the U.S. copyright law . . . and its accompanying guidelines.” AM. LIBRARY ASS’N, REFERENCE & USER SERVS. ASS’N, INTERLIBRARY LOAN CODE FOR THE UNITED STATES § 4.7 (rev. 2008), <http://www.ala.org/rusa/resources/guidelines/interlibrary>.

116. H.R. REP. NO. 94-1733, at 72 (1976) (Conf. Rep.).

117. An attempt to develop guidelines for interlibrary loan that would address the use of digital works resulted in “a complete failure to reach agreement.” Gasaway, *supra* note 56, at 1340. These discussions occurred during the Conference on Fair Use. *Id.* at 1339–40.

118. See CREWS, *supra* note 109, at 98.

119. H.R. REP. NO. 94-1733, at 71.

120. See HELLER, HELLYER & KEELE, *supra* note 88, at 101–02 (describing a scenario in which a visiting professor needs articles for a short-term project). A law library might also be justified in ordering additional articles over the CONTU limit when a law review is producing a symposium issue on a specialized topic. Many of the authors might have cited articles from a specific journal or journals that the library does not have. The requests, which are for citation verification only, do not reasonably indicate that the library should acquire an ongoing subscription to a journal.

121. ASS’N OF RESEARCH LIBRARIES, *supra* note 1, at 13 (noting reliance instead on the CONTU guidelines).

122. Gibson, *supra* note 92, at 884; see also William M. Cross, *Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship*, 104 LAW LIBR. J. 195, 208, 2012 LAW LIBR. J. 18, ¶ 52. Establishing a community pattern of fair use, on the other hand, can support library decisions not to pay fees. See Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1624–25 (2004).

Section 109(a)

¶35 Adding coverage for digital works under section 109(a) (the first sale provision) does not address the problem of publishers' licensing rather than selling e-resources. Section 109(a) applies when a library owns a work.¹²³ When libraries license works, they do not have possession of the work because it is usually housed on a remote server controlled by a third party. The copyright holder in these situations controls whether a library can lend the work in whole or in part.

¶36 Libraries that actually own digital works (such as e-book files) and house them on their own servers¹²⁴ arguably meet the requirements of section 109(a), since they own the work and possess the file. If they make loans to one person at a time, this arrangement should meet the requirements of section 109(a).¹²⁵ It is unclear, however, whether section 109(a) applies to digital works even if they are owned.¹²⁶ Legislation may be necessary to clarify that section 109(a) applies to the sale or other disposal (such as lending) of owned digital works.

Orphan Works

¶37 Research libraries want to digitize print works for preservation and wider availability. This is part of their mission to preserve "accrued knowledge" and foster access to it.¹²⁷ In considering works for digitization, however, libraries are encountering the problem of "orphan works." The Copyright Office has described this problem as "the situation where the owner of a copyrighted work cannot be identified and located by someone who wishes to make use of the work in a manner that requires permission of the copyright owner."¹²⁸ Uncertainty about orphan works

123. See 17 U.S.C. § 109(d) (2006) (stating that § 109 does not apply to nonowners).

124. Some libraries have this arrangement for e-books under the Douglas County model. See *infra* ¶ 52.

125. There is a question of whether lending the work requires making a copy that the library then lends. If it does not, there is not an issue. If there is a copy, there might be an exception for this incidental copy. The section 109(a) exception applies only to the distribution right in 17 U.S.C. § 106(3), not to the reproduction right in § 106(1).

126. In a recent case involving the resale of digital sound recordings by owners who had legally paid for and downloaded music files, the court held that section 109(a) did not apply to the sale of digital works. *Capitol Records v. ReDigi*, No. 12 Civ. 95 (RJS), 2013 WL 1286134 *11 (S.D.N.Y. Mar. 30, 2013). See Kevin Smith, *We're Not Done with First Sale*, SCHOLARLY COMMUNICATIONS @ DUKE (Apr. 2, 2013), <http://blogs.library.duke.edu/scholcomm/2013/04/02/were-not-done-with-first-sale/> (discussing *ReDigi* and recommending congressional action). Other courts have not addressed the issue, and the question of how section 109(a) applies to digital works is still very much an open one.

127. See JENNIFER URBAN ET AL., REPORT ON ORPHAN WORKS CHALLENGES FOR LIBRARIES, ARCHIVES, AND OTHER MEMORY INSTITUTIONS 1 (2013), available at http://www.centerforsocialmedia.org/sites/default/files/documents/report_on_orphan_works_challenges.pdf. Obtaining access to a digital version of a work can take the place of interlibrary loan of the physical work. While interlibrary loan facilitates access to print works, it is still a slow process with many of the same challenges as it had a hundred years ago: shipping costs, delivery delays, and difficulties in lending fragile and rare materials.

128. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS 1 (2006), available at <http://www.copyright.gov/orphan/orphan-report-full.pdf>. See also David R. Hansen, *Orphan Works: Definitional Issues* (Berkeley Digital Library Copyright Project, White Paper No. 1, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974614 (discussing the various definitions of orphan works). Orphan works discussions focus on print format works, but there could be digital orphans, particularly as the

inhibits libraries in digitization since “they face the perceived risk of costly infringement suits from copyright owners who might later emerge.”¹²⁹ This uncertainty can also “obscure uses that libraries could make under fair use or under other copyright limitations.”¹³⁰

¶38 Concerns about orphan works led to a report from the Register of Copyrights¹³¹ and proposed legislation in the latter part of the last decade. The legislative efforts failed.¹³² In 2012, the Copyright Office revived the issue by soliciting comments.¹³³ A review of the comments received indicates a strong interest in a resolution. Some commentators favor legislation,¹³⁴ while others argue that the fair use doctrine is adequate.¹³⁵ The Copyright Office has not issued any further notices.

¶39 In the meantime, the 2013 *Report on Orphan Works Challenges for Libraries, Archives, and Other Memory Institutions* encourages libraries to develop “best practices in orphan works use,” promote “better documentation and information-sharing among community members about their experiences using orphan works,” and enhance support “to understand the copyright challenges and to identify when solutions unrelated to orphan works status might apply.”¹³⁶ This report recognizes the *ARL Code of Best Practices in Fair Use for Academic and Research Libraries*¹³⁷ as a good example of community development of best practices that can help com-

number of e-books increases. The orphan works problem has developed due to changes in copyright law that eliminated registration and notice requirements and that extended the duration of copyright. Orphan Works and Mass Digitization, 77 Fed. Reg. 64555, 64555–56 (Oct. 22, 2012). See also David R. Hansen, *Orphan Works: Causes of the Problem* (Berkeley Digital Library Copyright Project, White Paper No. 3, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038068 (tracing the development of the orphan works problem); Keith Porcaro, *Private Ordering and Orphan Works: Our Least Worst Hope?*, 2010 DUKE L. & TECH. REV. 15, ¶¶ 5–7, <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1210&context=dltr>.

129. URBAN ET AL., *supra* note 127, at 1.

130. *Id.*

131. U.S. COPYRIGHT OFFICE, *supra* note 128.

132. Proposals included the Orphan Works Act of 2006, H.R. 5439, 109th Cong. (2006); the Orphan Works Act of 2008, H.R. 5889, 110th Cong. (2008); and the Shawn Bentley Orphan Works Act of 2008, S. 2913, 110th Cong. (2008). For a discussion of these proposals, see David R. Hansen, *Orphan Works: Mapping the Possible Solution Spaces* 5–8 (Berkeley Digital Library Copyright Project, White Paper No. 2, 2012), <http://ssrn.com/abstract=2019121>.

133. The notice stated: “The U.S. Copyright office is reviewing the problem of orphan works . . . in continuation of its previous work on the subject and in order to advise Congress as to possible next steps for the United States.” Orphan Works and Mass Digitization, 77 Fed. Reg. at 64555.

134. See, e.g., Letter from Jean M. Wenger, President, Am. Ass’n of Law Libraries, Carla J. Funk, Exec. Dir., Med. Library Ass’n, & Douglas Newcomb, Deputy Chief Exec. Officer, Special Libraries Ass’n, to Maria Pallante, Register of Copyrights (Feb. 1, 2013), available at http://www.copyright.gov/orphan/comments/noi_10222012/American-Association-Law-Libraries.pdf (supporting legislation).

135. See, e.g., Comments of the Library Copyright Alliance in Response to the Copyright Office’s Notice of Inquiry Concerning Orphan Works and Mass Digitization 1 (Jan. 14, 2013), http://www.copyright.gov/orphan/comments/noi_10222012/Library-Copyright-Alliance.pdf (“[S]ignificant changes in the copyright landscape over the past seven years convince us that libraries no longer need legislative reform in order to make appropriate uses of orphan works.”).

136. URBAN ET AL., *supra* note 127, at 2, 14.

137. ASS’N OF RESEARCH LIBRARIES, *supra* note 17.

munity members address copyright issues.¹³⁸ Librarians should be engaged in addressing the orphan works issue by tracking and commenting on proposed legislation and following the suggestions in the *Report on Orphan Works Challenges*.

Contracts and Private Agreements

¶40 Private agreements have increasingly controlled the relationships between libraries and copyright holders, particularly in the absence of clear legal rules. One strategy for ensuring research support is to negotiate favorable terms in the licenses and contracts that govern e-books and e-journals. It is unclear how successful libraries are in negotiating terms of licenses and contracts, and many of these agreements (or at least their core terms) are nonnegotiable. Still, libraries should review and understand the terms of their existing agreements and seek opportunities to negotiate new ones. A library may negotiate its own agreements or it may rely on consortial representation.¹³⁹ As e-resources begin to dominate a library's collection, librarians must know the terms that govern these resources and must work to ensure that the agreements do not diminish or hamper research support.¹⁴⁰

¶41 The negotiation environment is different for e-journals than for e-books. E-journals have been available under licensing for many years, and libraries often merely renew prior agreements. Since the early use of license agreements for e-resources in the 1980s and 1990s, librarians have used negotiation to alter terms that restrict or prohibit important library services such as interlibrary loan and to support library values such as fair use.¹⁴¹

¶42 The Section 108 Study Group suggested that, given the uncertainty of changing or clarifying the law, "the best near-term solution" is for libraries "to develop and negotiate model terms and informal guidelines."¹⁴² There are numerous resources available to assist libraries in understanding and negotiating licenses and agreements for e-journals and databases.¹⁴³ Model licenses, standards, and licensing principles also provide guidance and are helpful for understanding licensing.¹⁴⁴ It is unclear how much libraries and publishers actually rely on these guiding

138. See URBAN ET AL., *supra* note 127, at 13, 14.

139. Consortial negotiation may be more successful due to the stronger bargaining power of a number of libraries.

140. Maintaining a primarily digital collection requires rethinking management of many library functions. Staffing in particular is an area that library managers need to review. See Kathe S. Obrig, *Changing Library Staffing Models to Manage E-Collections—George Washington University*, in BUILDING AND MANAGING E-BOOK COLLECTIONS, *supra* note 80, at 159, for a good discussion of position modifications and staffing needed to manage an increasingly electronic collection.

141. See Miller, *supra* note 102, at 174 (discussing the development of librarian expertise in negotiating licenses).

142. THE SECTION 108 STUDY GROUP REPORT, *supra* note 107, at 122.

143. See, e.g., LIPINSKI, *supra* note 72 (an outstanding resource on all aspects of licensing); LESLEY ELLEN HARRIS, LICENSING DIGITAL CONTENT: A PRACTICAL GUIDE FOR LIBRARIANS (2d ed. 2009); Ryan O. Weir, *Licensing Electronic Resources and Contract Negotiation*, in MANAGING ELECTRONIC RESOURCES, *supra* note 86, at 53.

144. See, e.g., LIBLICENSE, <http://liblicense.crl.edu> (last visited July 31, 2013) (web site with many types of resources including model licenses and actual publishers' licenses); NAT'L INFO. STANDARDS ORG., SERU: A SHARED ELECTRONIC RESOURCE UNDERSTANDING (May 2012), http://www.niso.org/publications/rp/RP-7-2012_SERU.pdf (outlining best practices for creating a shared understanding,

documents, particularly stated principles, in their agreements. It is important to support and apply principles, not merely to state them. Librarians should demand agreements that meet these principles.

¶43 E-books are much newer than e-journals, and the business models are experimental.¹⁴⁵ Libraries must consider how the choice of a business model for e-books will ultimately affect research and preservation of the scholarly record. Some models, while they may be tempting as ways to support just-in-time service, contradict library values such as fair use. One author argues that “libraries must demand license concessions before purchasing or subscribing to content.”¹⁴⁶ E-book usage and business models are still in development in academic libraries, particularly in academic law libraries. In this “volatile period,”¹⁴⁷ librarians must not be anxious to immediately embrace certain business models when negotiating e-book arrangements.¹⁴⁸ Many aspects of current business models run counter to library values and missions and inhibit important services. Pricing may be exorbitantly out of line with prices individuals pay.¹⁴⁹ Publishers are exploring models

rather than a license, between a publisher and a library); *Procurement Toolkit and Code of Best Practices For Licensing Electronic Resources*, AM. ASS'N OF LAW LIBRARIES, <http://www.aallnet.org/main-menu/Advocacy/vendorrelations/docs/procurement-toolkit.html> (approved Apr. 2013); *IFLA Licensing Principles* (2001), IFLA, <http://www.ifla.org/publications/ifla-licensing-principles-2001> (last updated Dec. 14, 2012). See also HARRIS, *supra* note 143, at 8–13 (discussing model licenses, standard agreements, and licensing principles and their use); Kristen M. Cichocki, *Unlocking the Future of Public Libraries: Digital Licensing That Preserves Access*, 16 U. BALT. INTELL. PROP. L.J. 29, 56–59 (2007–2008) (discussing standards and model licenses).

145. AM. LIBRARY ASS'N, *EBOOK BUSINESS MODELS FOR PUBLIC LIBRARIES* (Aug. 8, 2012), http://americanlibrariesmagazine.org/sites/default/files/EbookBusinessModelsPublicLibs_ALA.pdf [hereinafter ALA EBOOK MODELS]. There are some resources that discuss current models and options. ALA has developed some guidance materials for public libraries. AM. LIBRARY ASS'N, *EBOOK BUSINESS MODELS: A SCORECARD FOR PUBLIC LIBRARIES* (Jan. 25, 2013), http://www.districtdispatch.org/wp-content/uploads/2013/01/Ebook_Scorecard.pdf. The International Federation of Library Associations (IFLA) recently developed principles for library e-lending. *IFLA Principles for Library eLending*, IFLA (rev. Aug. 16, 2013), <http://www.ifla.org/node/7418>. IFLA provides several helpful documents that discuss underlying principles for the terms of library e-lending agreements. Civic Agenda, *The Thinkpiece “Libraries, eLending, and the Future of Public Access to Digital Content,”* available at <http://www.ifla.org/files/assets/hq/topics/e-lending/thinkpiece-on-libraries-elending.pdf> (last visited July 9, 2013). A matrix accompanying this document outlines models of access. Civic Agenda, *Matrix: Models of Accessing Digital Content*, available at <http://www.ifla.org/files/assets/hq/topics/e-lending/thinkpiece-matrix.pdf> (last visited July 9, 2013). See also IFLA, *IFLA E-Lending Background Paper*, <http://www.ifla.org/files/assets/clm/publications/ifla-background-paper-e-lending-en.pdf> (last visited July 9, 2013). For a general discussion of current e-book models, see Albitz & Brennan, *supra* note 80, at 75; Becky Albitz & David Brennan, *Budgeting for E-Books*, in *BUILDING AND MANAGING E-BOOK COLLECTIONS*, *supra* note 80, at 85; Doucette & Lewontin, *supra* note 96, at 51, 60–62.

146. Gee, *supra* note 80, at 28.

147. ALA EBOOK MODELS, *supra* note 145, at 1.

148. The ALA EBook Business Models report urges libraries to negotiate aggressively for the most favorable and flexible terms possible in e-book agreements. The concern is that any models adopted at this time will lock in the future. *Id.* Walking away is another approach that keeps unfavorable models from becoming the norm.

149. See sources cited *supra* note 81.

that are commercially focused.¹⁵⁰ Libraries need to ensure that the models are values focused.¹⁵¹

¶44 The current e-book environment is contentious, creating librarian frustration over prices, restrictions, and publishers' changes in terms. Some librarians urge that libraries reject e-books and "[s]top buying [them] across the board, at any price, under any terms."¹⁵² Sarah Houghton declared that

eBooks in libraries are a non-starter, their path has been set for the foreseeable future, and their future is determined by people who are not us. . . . [Publishers] have attempted to salvage their failing business model with high prices, limited licensing policies, and technology so locked down that it remains impenetrable to many people.¹⁵³

Her recommendation is simple: "Walk away, my friend. Walk away."¹⁵⁴ Another librarian offers the same sentiment and advocates "an ideology centered around *not* wasting time, energy, and resources on deals that don't serve the library as an institution, the community as a dependable and enduring resource, and our stakeholders as a wise investment."¹⁵⁵ These librarians are discussing e-books in the public library context, but the same approach applies to academic libraries and e-books. Walking away may be the best way to approach e-books if the contract terms violate library values.

¶45 A library can "walk away" from bad e-book business models by not entering into or severing relationships that require licensing through a distributor. A library can instead purchase and manage content on its own. The pioneering and best-known example for this approach is the Douglas County model. This model is named for the program that the Douglas County Libraries in Colorado implemented to address concerns and frustrations with providing e-books through an aggregator platform.¹⁵⁶ The intent in adopting this model was to "regain control of

150. For example, preservation of scholarship is an important value of research libraries. Publishers may decide to drop works that they don't deem profitable, or they might sell a publishing division. They may raise prices excessively, which could jeopardize the ability of a library to continue the relationship. They may provide "perpetual access" without concern as to how practical it really is. See *supra* ¶ 27. All of these actions could be good commercial decisions, but they do not support the library's values.

151. See IFLA, *IFLA E-Lending Background Paper*, *supra* note 145, at 5, 8; Mike Shatzkin, *Libraries and Publishers Don't Have Symmetrical Interest in a Conversation*, THE SHATZKIN FILES (Feb. 22, 2012, 4:21 P.M.), <http://www.idealogue.com/blog/libraries-and-publishers-dont-have-symmetrical-interest-in-a-conversation/>.

152. Guy LeCharles Gonzalez, *Ebooks and Libraries: Is it Worth the Effort?*, LOUDPOET.COM: BLOGGING IT LIKE IT IS SINCE 2003 (Mar. 6, 2012), <http://loudpoet.com/2012/03/06/ebooks-and-libraries-is-it-worth-the-effort>. See also Andrew Richard Albanese, *Life with E-Books*, PUBLISHERS WEEKLY.COM (Aug. 24, 2012), <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/53703-life-with-e-books.html> (discussion of librarians' mixed attitudes to collecting e-books).

153. Sarah Houghton, *I'm Breaking Up with eBooks (and You Can Too)*, LIBRARIAN IN BLACK (Aug. 1, 2012), <http://librarianinblack.net/librarianinblack/2012/08/ebookssuckitude.html>.

154. *Id.*

155. Andy Woodworth, *Libraries and eBook Publishers: Friend Zone Level 300*, AGNOSTIC, MAYBE (Aug. 13, 2012), <http://agnosticmaybe.wordpress.com/2012/08/13/libraries-and-ebook-publishers-friend-zone-level-300>.

156. For discussion of this model, and the rationale for adopting it, see James LaRue, *The Last One Standing*, PUB. LIBR., Jan./Feb. 2012, at 28; Monique Sendze, *The E-Book Experiment*, PUB. LIBR., Jan./Feb. 2012, at 34. Other libraries and library consortia are following the Douglas County

the content.”¹⁵⁷ Under this model, the library negotiates directly with publishers to purchase e-book files that the library owns and hosts on its own server.¹⁵⁸ The founders of the Douglas County model urge libraries to “fight to regain control of the content and establish . . . rules that will benefit the library patron most.”¹⁵⁹ The underlying premise of this model should inspire librarians to take control and not simply follow whatever path publishers choose. Addressing licensing and contract agreement terms is a direct way for a library to control the provision of research support.

Collaboration

¶46 Libraries may be unable to negotiate favorable terms in all their agreements with publishers. Pricing and other limitations may realistically preclude access to some resources. Restrictions on lending, borrowing, and licensing e-journals and e-books force libraries to seek other arrangements to ensure access for researchers to a wide range of scholarly works. As one alternative, libraries can expand access for their patrons by participating in collaborative licensing and purchasing with other libraries. In this type of arrangement, participants provide funding for shared resources. There are no lending and borrowing issues because there is joint licensing or ownership. All users of participating libraries have access. This collaboration can greatly expand the diversity and amount of accessible materials for individual libraries. Because of increased market power, representatives of a group or partnership may be able to negotiate considerably more favorable pricing and terms than individual libraries could. Collaborative funding, licensing, and ownership can help libraries overcome limitations on accessing and providing e-resources.

Examples of Collaborative Collections

¶47 *Collaborative Database Collections.* A powerful means of procuring access to electronic materials is through a consortium. The OhioLINK consortium has long been a model of library collaboration, including collaborative funding for shared e-resources.¹⁶⁰ Membership encompasses almost ninety Ohio libraries from

model. Matt Enis, *Momentum Builds for DCL's eBook Model*, DIGITAL SHIFT (May 9, 2012), <http://www.thedigitalshift.com/2012/05/ebooks/momentum-builds-for-dcls-ebook-model>. See also Sue Polanka, *Trailblazers: Moving the Library Upstream in the Digital Distribution Process*, ONLINE, July/Aug. 2012, at 53.

157. Sendze, *supra* note 156, at 35.

158. Publishers usually do not sell e-book files to libraries, instead providing e-books through an aggregator (distributor). STANLEY M. BESEN & SHEILA NATARAJ KIRBY, E-BOOKS AND LIBRARIES: AN ECONOMIC PERSPECTIVE 6 (2012), http://www.ala.org/offices/sites/ala.org.offices/files/content/oitp/publications/booksstudies/ebooks_libraries_economic_perspective.pdf. The publisher licenses a right of distribution to the aggregator. The aggregator then sublicenses to libraries and hosts the e-books on its proprietary software platform. O'Brien, Gasser & Palfrey, *supra* note 96, at 11. The publisher usually dictates the terms of the sublicense. *Id.* at 12.

159. Sendze, *supra* note 156, at 35. “DCL believes that no contract should be signed without the right to own a copy of the e-book file, to lend that e-book to our users for as long as we decide, and to receive the e-book in an EPUB format.” *Id.*

160. OhioLINK celebrated its twentieth anniversary in 2012. Press Release, Univ. System of Ohio, OhioLINK Celebrates 20th Anniversary of Shared Services (Nov. 1, 2012), <https://www.ohiohighered.org/press/ohiolink-celebrates-20th-anniversary-shared-services>. OhioLINK services for all members include statewide borrowing and delivery among all member institutions. See *The*

a broad range of institutions of higher education, both public and private.¹⁶¹ Collaborative funding and licensing¹⁶² provide member faculty, staff, and students with access to over one hundred research databases and almost ten thousand e-journals.¹⁶³ This access and the scope of the materials is far beyond what individual member institutions could provide in either electronic or print format.¹⁶⁴

¶48 *Collaborative E-book Collections*. In recent years, libraries have also partnered to fund shared e-book collections. These partnerships illustrate how collaboration can provide access to otherwise unavailable e-resources and allow a library to better support research needs. Rather than maintaining individual locked collections, the participants can all access a wider range of resources. Due to the extensive coordination needed to develop and provide shared e-book collections,¹⁶⁵ the partners are often members of established library consortia that are expanding their collaboration. On the other hand, a few libraries with shared interests can also establish a collaborative e-book collection. The following examples illustrate the organization and models of three collaborative e-book collections.

¶49 One library consortium that has recently developed a successful shared e-book program is the Orbis Cascade Alliance (Orbis), which has thirty-seven academic library members, primarily in Washington and Oregon.¹⁶⁶ Orbis members share the print resources of the individual members by maintaining a union catalog, giving borrowing privileges to all member library users, and providing a courier

Ohio Library and Information Network, OHIOLINK, <http://www.ohiolink.edu/about/what-is-ol.html> (last updated Jan. 4, 2013).

161. *The Ohio Library and Information Network*, *supra* note 160. The number of libraries participating in OhioLINK is actually much greater than ninety because many institutions have multiple libraries. The consortium also includes the State Library of Ohio. For a list of members, see *OhioLINK Member Libraries*, OHIOLINK, <http://www.ohiolink.edu/members-info/> (last visited Aug. 17, 2013).

162. Although OhioLINK receives state funding, members provide most of the funding for e-resources. See OHIOLINK, *SNAPSHOT 2008: SUPPORTING TEACHING, LEARNING AND RESEARCH* 11 (2008), available at <http://www.ohiolink.edu/about/snapshot2008.pdf> (member libraries provide \$22.3 million of the consortium's \$26.7 million budget). OhioLINK negotiates group license fees. Member funding is through a combination of funding models. In one model, OhioLINK pays a portion of the cost and the members pay a portion of the remaining cost based on the number of their FTE users. If a limited number of members are interested in a database, they can each "pay to play" and only their users will have access. If enough member institutions are interested so that the cost for them all to pay to play is equal to or greater than the group license, then OhioLINK will use the pooled funds to obtain a group license. All members then have access to the database. This model is called the NPR model since, like National Public Radio, a few pay and many benefit. See Rocki Strader & Sandy Hurd, *Complicated, Constant, and Consortial: Managing Electronic Resources at The Ohio State University*, PowerPoint presentation at North Carolina Serials Conference, Apr. 15–16, 2004, available at <http://www.nccuslis.org/conted/serials2004/StraderHurd.ppt> (slides 23–24).

163. *The Ohio Library and Information Network*, *supra* note 160.

164. *Snapshot 2008: Supporting Teaching, Learning and Research*, *supra* note 162, at 4.

165. See James Bunnelle, *Pilot to Program: Demand Driven E-books at the Orbis-Cascade Consortium, 1 Year Later*, AGAINST THE GRAIN, Nov. 2012, at 24, for a discussion of some of the logistics involved in establishing a collaborative e-book arrangement.

166. ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org> (last updated Aug. 2, 2013). A list of members is available at *Members*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/member-institutions> (last updated Aug. 28, 2013).

system for delivery of requests.¹⁶⁷ When members began to acquire e-books for their individual collections, however, they determined that they could not provide access to the e-books for the users of other consortium libraries.¹⁶⁸ Rather than maintain separate, locked e-book collections, the libraries chose to develop shared funding¹⁶⁹ as well as shared development of the collection.¹⁷⁰

¶50 The Orbis e-book project illustrates how “a diverse group of academic libraries across two states, with vastly different missions, financial situations, and FTEs”¹⁷¹ expanded its collaborative model to include collective funding and acquisitions.¹⁷² Users of all member libraries can access the e-books, providing a benefit to the individual libraries that they would otherwise not have if they maintained only their own e-book collections.

¶51 Even without a formal consortial agreement, two or more libraries with similar collections and focus can partner to develop and share an e-book collection. For example, the University of Florida Levin College of Law Legal Information Center and the Florida State University College of Law Research Center have agreed to develop and share an e-book collection. Each library contributed equal funding for the acquisitions. Users from both libraries have access to the selected e-books, with a maximum of three simultaneous users from either law library for any particular book. Both law libraries have perpetual ownership of the selected books.¹⁷³

¶52 A consortium interested in sharing an e-book collection could use the Douglas County model. Under this model, the consortium would purchase e-book files from the publisher and maintain them on its own server. An example of a consortium using this type of model is the Califa Library Group, which is an

167. *About the Alliance*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/about-the-alliance> (last updated Nov. 30, 2012).

168. Emery, *supra* note 83 at 133. One librarian observed that Orbis members were concerned about “how our consortium would continue meeting the needs of our users as each library purchased e-books that could not be shared within the Alliance.” *Id.* at 136.

169. *See id.* at 134.

170. The development of the e-book collection is through a demand-driven acquisitions (DDA) model (also known as patron-driven acquisitions (PDA)). In this model, librarians decide on titles that will be available for user selection, but it is a user’s selection of the title that will trigger a purchase. Emily McElroy & Susan Hinken, *Pioneering Partnerships: Building a Demand-Driven Consortium eBook Collection*, AGAINST THE GRAIN, June 2011, at 34, 36. Orbis partnered with YBP and EBL to develop the Orbis model. The system allows the first few uses of a book to be short-term loans. After a threshold number of users have accessed the book, the book is purchased. *Id.* For more discussion of the Orbis DDA model, see *FAQ: Orbis-Cascade’s DDA Program*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/orbis-cascade-alliance-ebook-working-group> (under FAQ and Related Documents, click on Orbis Cascade’s Demand Driven Project) (last updated Oct. 16, 2012).

171. Emery, *supra* note 83, at 136.

172. Each member contributes funds based on a formula. *See Board Meeting Minutes 2012 February 17*, ORBIS CASCADE ALLIANCE, <http://www.orbiscascade.org/index/board-meeting-minutes-2012-february-17> (last updated July 2, 2012).

173. *Seminole and Gators: Can Shared Patron-Driven Acquisitions of E-books Overcome the Rivalry?*, program presented at the Annual Meeting of the Am. Ass’n of Law Libraries, Boston, Mass., July 23, 2012 (audio on file with author). The university libraries of the two institutions have a cooperative partnership. The selection of books is through PDA, which means that the library users from either library select the books for purchase. Once users from either library access a title through the catalog, the e-book is purchased for the combined collection.

alliance of more than 220 libraries.¹⁷⁴ In May 2013, Califa launched the Enki Library¹⁷⁵ using a model similar to the Douglas County model.¹⁷⁶ The project manager noted that small libraries would have difficulty adopting the Douglas County model on their own, but “through working together cooperatively, they will have the same results.”¹⁷⁷ This model could work well in a consortium or partnership of libraries that can share the resource management.

Implications of Adopting a Collaborative Collection Model

¶53 Collaborative licensing and ownership of collections require joint responsibility for a shared collection, while cooperative lending requires sharing resources from separate collections. This distinction necessitates a shift away from the traditional view of libraries. In cooperative lending arrangements, there is extensive sharing of resources as users from participating libraries borrow materials from individual collections.¹⁷⁸ Underlying these efforts is a “view of the research library as an independent and self-sustaining organization.”¹⁷⁹ Libraries share their resources, but each develops, funds, and maintains its own collection. Research libraries have developed collections “separately . . . and even competitively.”¹⁸⁰

¶54 To support research in an electronic environment, libraries must “forge alliances with the larger community” despite “tension between collaboration and self interest.”¹⁸¹ Libraries must move from “sharing of resources” to “sharing of dependencies.”¹⁸² Ultimately, the collaboration creates “new value”¹⁸³ as the shared collection is stronger. Shared collections, whether licensed or owned, make it difficult to distinguish how one collection is “better” than another. The strength of each library collection lies, in part, in the combined resources and access. It is possible that the continuing development of collaborative collections could affect assessment measures for libraries, since those measures often compare individual collections.

174. *Membership FAQ*, CALIFA, <http://califa.org/members/faq/member-faq/> (last visited Sept. 7, 2013).

175. *Ebooks*, CALIFA, <http://califa.org/ebooks/> (last visited Aug. 17, 2013).

176. Matt Enis, *Declaring Independence*, DIGITAL SHIFT (July 26, 2013), <http://www.thedigitalshift.com/2013/07/ebooks/declaring-independence/>.

177. Michael Kelley, *Large California Consortium Joins Movement Toward Library Ebook Ownership*, DIGITAL SHIFT (Mar. 12, 2012), <http://www.thedigitalshift.com/2012/03/ebooks/large-california-consortium-joins-movement-toward-library-ebook-ownership> (quoting Heather Teysko, Califa project manager).

178. Cooperative lending arrangements can include using a union catalog, granting borrowing privileges for users of participating libraries, and maintaining pickup and delivery services for borrowed materials.

179. James G. Neal, *Advancing from Kumbaya to Radical Collaboration: Redefining the Future Research Library*, 51 J. LIBR. ADMIN. 66, 66 (2011).

180. SMITH, *supra* note 4, at 43.

181. COUNCIL ON LIBRARY & INFO. RESOURCES, NO BRIEF CANDLE: RECONCEIVING RESEARCH LIBRARIES FOR THE 21ST CENTURY 6 (Aug. 2008), available at <http://www.clir.org/pubs/reports/pub142/reports/pub142/pub142.pdf>.

182. Patricia Battin, *Research Libraries in the Network Environment: The Case for Cooperation*, 6 J. ACAD. LIBRARIANSHIP 68, 70 (1980).

183. Rosabeth Moss Kanter, *Collaborative Advantage: The Art of Alliances*, HARV. BUS. REV., July/Aug. 1994, at 96, 97 (defining collaboration).

¶55 Participation in sharing collaborative electronic collections can significantly benefit member libraries by expanding direct access to works and providing materials at a more favorable price. Members would not be able to own or even borrow many of these works if they did not participate. In most cases, however, the participants are also working within “the system” by operating within parameters still largely controlled by publishers.¹⁸⁴ For example, they may not be able to lend some works outside of the consortium. It is the participants in these arrangements that primarily benefit, while the research community as a whole may not. The control of publishers over the works in the system still limits the wider community of libraries in supporting the research needs of scholars.

Using Technology to Gain Control: Open Access

¶56 Access to scholarly material is decreasing despite the technological capacity to provide information on a global scale.¹⁸⁵ The suggestions in earlier sections can help ameliorate shrinking access to scholarly works. Ultimately, however, success in ensuring research support lies in gaining control over the ownership and distribution of scholarly works. Institutions, scholars, and libraries can use technology to gain this control.

¶57 Publishers are engaged in “know-biz,” that is, managing scholarly works as a commodity.¹⁸⁶ Publishers are businesses and will manage their assets to maximize profits. This approach focuses on the competitive value of knowledge and information. It ignores, however, that the knowledge captured in scholarly works has another value, the “accumulative value.”¹⁸⁷ As Peter Johan Lor and Johannes Britz describe, “[K]nowledge is created cumulatively. Knowledge is needed to create new knowledge. This gives rise to [another] value: the value of knowledge for the further development of science and scholarship.”¹⁸⁸ Scholars write not only to be read, but to “influence more new writing.”¹⁸⁹ This scholarly work comes with a duty. John Willinsky discusses what he calls the “access principle,” which is that “a commitment to the value and quality of research carries with it a responsibility to extend the circulation of this work as far as possible, and ideally to all who are interested in it and all who might profit by it.”¹⁹⁰ Kathleen Fitzpatrick describes the scholarly duty as “paying forward knowledge that one likewise received as a gift.”¹⁹¹

184. The exception would be libraries participating in a Douglas County model of collaborative collections. This model could enhance libraries’ ability to contribute to a wider community.

185. JOHN WILLINSKY, *THE ACCESS PRINCIPLE* 17 (2006).

186. *Id.* See Peter Johan Lor & Johannes Britz, *Knowledge Production from an African Perspective: International Information Flows and Intellectual Property*, 37 INT’L INFO. & LIBR. REV. 61, 65 (2005) (“[W]e are seeing the focus of journal publishers shift from the journal as a unit, to the individual article as the sellable commodity.”).

187. Lor & Britz, *supra* note 186.

188. *Id.* at 63. Lor and Britz point out that knowledge, if it is a commodity, is not the same as other commodities. It has six different values, five of which are public values. It is only the competitive value that is private. *Id.* at 63–64.

189. Kathleen Fitzpatrick, *Giving It Away: Sharing and the Future of Scholarly Communication*, PLANNED OBSOLESCENCE (Jan. 12, 2012), <http://www.plannedobsolescence.net/blog/giving-it-away>.

190. WILLINSKY, *supra* note 185, at 5 (emphasis omitted).

191. Fitzpatrick, *supra* note 189.

Publisher business models do not support these values and often work at cross-purposes to them.¹⁹²

¶58 In the past, publishers were essential for disseminating scholarly works, but changes in technology have allowed scholars to elect other options for publishing.¹⁹³ One alternative model of publishing and distribution is open access. Open access is a transformation in the scholarly communication system.¹⁹⁴ Authors retain control of their works and can disseminate them in a way that maximizes their accumulative value. Open access works are scholarly works that are freely available online with minimal or no restrictions on use.¹⁹⁵ Two primary vehicles for open access works are open access journals and open access repositories.¹⁹⁶ There are now also open access e-book collections.¹⁹⁷ “Barrier-free access” to these works

192. Publishers may even decide to abandon publishing academic works. See JOHN B. THOMPSON, *BOOKS IN THE DIGITAL AGE* 97–98 (2005); Fitzpatrick, *supra* note 189. See also Jennifer Smith, *Thomson Reuters Bids Adieu to Law School Publishing*, PRIVATE EQUITY BEAT (Feb. 4, 2013), <http://blogs.wsj.com/privateequity/2013/02/04/thomson-reuters-bids-adieu-to-law-school-publishing> (discussing Thomson Reuters’ sale of its law school publishing division).

193. See Gowers, *supra* note 84. Gowers initiated a boycott against the publisher Elsevier: “Why can’t we just tell Elsevier that we no longer wish to publish with them? Well, part of the answer is that we *can*. . . [W]e have much greater bargaining power than we are wielding at the moment, for the very simple reason that we don’t actually *need* their services.” Gowers noted that Elsevier’s actions were business decisions. It was up to scholars to choose not to publish with Elsevier because working with Elsevier was “making it easier for Elsevier to take action that harms academic institutions.” *Id.* See also Stacy Johnson, *Why Do E-Books Cost So Much?*, CHRISTIAN SCI. MONITOR (Jan. 12, 2013), <http://www.csmonitor.com/Business/Saving-Money/2013/0112/Why-do-e-books-cost-so-much> (discussing how authors can now publish and promote books themselves without the need for publishers).

194. See Charles W. Bailey, Jr., *What is Open Access*, in OPEN ACCESS: KEY STRATEGIC, TECHNICAL AND ECONOMIC ASPECTS 13, 13 (Neil Jacobs ed., 2006). For a general discussion of the open access movement, see Peter Suber, *Opening Access to Research*, BERFROIS (Aug. 24, 2012), <http://www.berfrois.com/2012/08/peter-suber-opening-access-to-research> [hereinafter Suber, *Opening Access to Research*]; Peter Suber, *Open Access Overview*, <http://legacy.earlham.edu/~peters/fos/overview.htm> (last updated Aug. 12, 2013) [hereinafter Suber, *Open Access Overview*]. For a discussion of the open access movement and open access as it relates to legal scholarship, see Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think About Legal Scholarship*, 37 N.M. L. REV. 431 (2007).

195. See Suber, *Open Access Overview*, *supra* note 194. The 2002 Budapest Open Access Initiative contains the well-known definition of open access for scholarly literature:

The literature that should be freely accessible online is that which scholars give to the world without expectation of payment. . . . By “open access” to this literature, we mean its free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself. The only constraint on reproduction and distribution, and the only role for copyright in this domain, should be to give authors control over the integrity of their work and the right to be properly acknowledged and cited.

BUDAPEST OPEN ACCESS INITIATIVE (Feb. 14, 2002), <http://www.opensocietyfoundations.org/open-access/read>.

196. Suber, *Open Access Overview*, *supra* note 194. Repositories can contain many types of scholarly works, including “gray literature,” which encompasses works such as conference presentations that may not otherwise be published. Jennifer Howard, *Academic Libraries Expand Their Publishing Services, but with Limited Resources*, WIRED CAMPUS (Nov. 1, 2011, 9:11 P.M.), <http://chronicle.com/blogs/wiredcampus/academic-libraries-expand-their-publishing-services-but-with-limited-resources/34086> (quoting Charles Watkinson, director of Purdue University Press).

197. See, e.g., AMHERST COLL. PRESS, <https://www.amherst.edu/library/press> (last visited July 31, 2013); *Frequently Asked Questions*, AMHERST COLL. PRESS, <https://www.amherst.edu/library/press/faq> (last visited Sept. 7, 2013).

"helps readers find and retrieve the research they need, and helps authors reach readers who can apply, cite and build on their work."¹⁹⁸

¶59 Open access works and collections allow libraries to address what Peter Suber calls the "permission crisis." This arises out of the control the publishers exert over scholarly works through licensing and technological controls.¹⁹⁹ Along with the "pricing crisis," the permission crisis "severely impedes research."²⁰⁰ Suber views open access as the solution to both of these crises for libraries. He argues that "[i]f we had to persuade publishers to give up their revenue streams, or legislatures to reform copyright law" then we would make no headway.²⁰¹ Open access provides both free access (which addresses pricing) and unrestricted use (which addresses permission). With open access, the copyright holder controls pricing and permissions. When publishers hold copyrights, they "create pricing and permission barriers."²⁰² Suber stresses: "The key to open access is not to abolish or violate copyright, but to keep copyright in the hands of . . . authors who retain copyright" or who transfer their rights "to open access publishers."²⁰³ It is open access that will ultimately ensure and even expand research support and the accumulated value of knowledge.

The Role of Libraries

¶60 Research libraries should play a "proactive role . . . in increasing access to . . . knowledge"²⁰⁴ by enabling and supporting open access. There is a "remarkable harmony" between the skills of research librarians and the skills needed to support open access efforts such as the development of repositories.²⁰⁵ An ARL task force in 2009 noted that while "[r]epository management will not be the sole purview of libraries . . . libraries have key strengths and missions requiring them to undertake various roles in repository service development."²⁰⁶

198. Suber, *Opening Access to Research*, *supra* note 194.

199. Peter Suber, *Removing the Barriers to Research: An Introduction to Open Access for Librarians*, 64 C. & RES. LIBR. NEWS 92, 92 (2003).

200. *Id.* at 93.

201. *Id.*

202. *Id.*

203. *Id.*

204. JOHN WILLINSKY, *THE ACCESS PRINCIPLE*, at xv (paperback ed. 2009).

205. Charles W. Bailey, Jr., *Open Access and Libraries*, 32 COLLECTION MGMT. 351, 372 (2006). See also Richard A. Danner, *Supporting Scholarship: Thoughts on the Role of the Academic Law Librarian*, 39 J.L. & EDUC. 365, 385 (2010) (noting the "specialized skills" that law librarians can bring to supporting open access).

206. ASS'N OF RESEARCH LIBRARIES, *THE RESEARCH LIBRARY'S ROLE IN DIGITAL REPOSITORY SERVICES* 10 (2009), available at <http://www.arl.org/storage/documents/publications/repository-services-report-jan09.pdf>. The task force considered "delivering repository services" to be "a crucial function of research libraries." *Id.* at 9. The task force report also discussed areas where research libraries should seek to make contributions. *Id.* at 35-37.

¶61 There are numerous roles for libraries in supporting and facilitating open access.²⁰⁷ Key areas of library involvement are preservation²⁰⁸ and curation.²⁰⁹ Law libraries can not only assist in developing repositories,²¹⁰ but they can also deeply engage in support of scholarship because law reviews are student edited and under the sponsorship of law schools.²¹¹

¶62 Research libraries are already supporting open access efforts at institutions of higher education. These libraries are “contribut[ing] actively to the evolution of scholarly communication”²¹² and are “no longer simply consumers of scholarly information.”²¹³ One area of library activism is digital publishing. According to a 2012 report on library publishing services, academic libraries are actively involved with scholarly publishing.²¹⁴ Fifty-five percent of the respondents “indicated having or developing library publishing services.”²¹⁵

207. Bailey, *supra* note 205, at 370–75. These activities include digitizing public domain works, providing enhanced access to open access works, preserving open access works, and engaging in digital publishing. *Id.*

208. See COUNCIL ON LIBRARY & INFO. RESOURCES, *supra* note 181, at 43; Richard A. Danner, Kelly Leong & Wayne V. Miller, *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 LAW LIBR. J. 39, 52–54, 2011 LAW LIBR. J. 2, ¶¶ 43–45 (discussing preservation of e-journals in law). In 2005, ARL endorsed a statement regarding the urgent need to preserve e-journals. Press Release, Ass’n of Research Libraries, ARL Endorses Call for Action to Preserve E-Journals (Oct. 31, 2005), <http://old.arl.org/news/pr/presvejrnl0ct05-print.shtml>. The statement noted: “[A]s the creation and use of digital information accelerate, responsibility for preservation is diffuse, and the responsible parties . . . have been slow to identify and invest in the necessary infrastructure to ensure that the published scholarly record represented in electronic formats remains intact over the long-term.” There was concern for the proliferation of publisher-controlled works. The statement urged the development of “trusted archives in which the published scholarly record in electronic form can persist outside of the exclusive control of publishers, and in the control of entities that value long-term persistence.” *Urgent Action Needed to Preserve Scholarly Electronic Journals* 1–2, <http://www.arl.org/storage/documents/publications/ejournal-preservation-15oct05.pdf>. The statement’s focus was on e-journals still under publisher control, but the concerns are equally applicable to open access journals.

209. One writer noted the confusion arising from the proliferation of repositories: “Repository fatigue is setting in: publisher repositories, disciplinary repositories, academic unit repositories, institutional repositories, individual repositories, government repositories, national repositories, preservation repositories . . . What is the authoritative, official and citable version? . . . How do we work together to integrate and rationalize repositories and the open-access agenda into the system of scholarly communication and collection development in our libraries?” Neal, *supra* note 179, at 70.

210. Danner, *supra* note 205, at 385.

211. Benjamin Keele and Michelle Pearse have provided an extensive list and discussion of how law libraries can be more engaged in assisting law reviews. Keele & Pearse, *supra* note 2. These suggestions go beyond traditional library support by involving librarians in key aspects of law review production, both print and electronic.

212. RAYM CROW, THE CASE FOR INSTITUTIONAL REPOSITORIES: A SPARC POSITION PAPER 20 (2002), available at http://works.bepress.com/ir_research/7/.

213. Bailey, *supra* note 205, at 371.

214. CROW ET AL., *supra* note 3. A version of the report on the SPARC web site (<http://wp.sparc.arl.org/lps>) also contains substantial appendixes. For additional discussion of developments in library publishing, see sources cited in Keele & Pearse, *supra* note 2 at 384 n.8. See also KARLA L. HAHN, RESEARCH LIBRARY PUBLISHING SERVICES: NEW OPTIONS FOR UNIVERSITY PUBLISHING (2008), <http://www.arl.org/storage/documents/publications/research-library-publishing-services-mar08.pdf> (discussing the results of a 2007 survey of ARL members regarding library publishing services). The report noted that “[p]ublishing services are rapidly becoming a norm for research libraries, particularly journal publishing services.” HAHN, *supra*, at 7.

215. CROW ET AL., *supra* note 3, at 6. One example of a library publisher is the Amherst College Press. Their web site notes: “In addition to the library’s traditional role of collecting

¶63 Of these programs, almost ninety percent “were launched in order to contribute to change in the scholarly publishing system.”²¹⁶ Bryn Geffert, in discussing the formation of the Amherst College Press, which is affiliated with the college’s library, wrote: “We cannot provide those we serve with what they need. Perhaps it is time to produce ourselves what we can no longer afford to purchase; to use personnel and financial resources from our libraries, even our small libraries, to save and revive academic publishing of high quality.”²¹⁷

¶64 Kathleen Fitzpatrick, in discussing the problems arising from the current publishing model, declared: “We can’t beat them, and we can’t join them; what we can do is change the game entirely. One clear way of changing the game, dramatically and unequivocally, is a move toward the full embrace of open access modes of digital publishing.”²¹⁸ Academic libraries should be proactive in assuming a pivotal role in not only the production and preservation of knowledge, but also the development of new modes of scholarly publishing.²¹⁹ These new modes allow scholars to gain control of scholarly works and their dissemination. Gaining control of works ensures increases in the accumulative value of knowledge and promotes the access principle.

Conclusion

¶65 The advanced technology that supports publisher domination over scholarly works also now allows institutions, scholars, and libraries to control those works and expand availability of them to all.²²⁰ Open access for scholarly works supports the core values of scholarship and also promotes the furtherance of knowledge, the underlying principle of copyright law.²²¹ The development of open

knowledge, it will begin *producing* knowledge and facilitating the free, electronic distribution of high-quality literature and scholarship.” AMHERST COLL. PRESS, *supra* note 197. See also Scott Jaschik, *New (Kind of) Scholarly Press*, INSIDE HIGHER ED (Dec. 6, 2012), <http://www.insidehighered.com/news/2012/12/06/amherst-college-launches-open-access-scholarly-press> (discussing the launch of Amherst College Press). For more on library publishing, see KATHLEEN FITZPATRICK, *PLANNED OBSOLESCENCE: PUBLISHING, TECHNOLOGY, AND THE FUTURE OF THE ACADEMY* 167–69 (2011); Adeline Koh, *Are You a Press or Are You a Library? An Interview with NYU’s Monica McCormick*, CHRON. OF HIGHER EDUC.: PROFHACKER (Mar. 27, 2012, 11:00 A.M.), <http://chronicle.com/blogs/profhacker/press-or-library/39216>; Press Release, Utah State Univ., Utah State University Press Merges With Merrill-Cazier Library (Nov. 2, 2009), <http://www.usu.edu/ust/index.cfm?article=40291>.

216. CROW ET AL., *supra* note 3, at 6. As Bryn Geffert, Amherst College Librarian, stated with regard to the creation of the Amherst College Press: “Current models of scholarly publishing do far more to lock down than to disseminate it to those who need it.” Press Release, Amherst Coll., Amherst College to Launch First Open-Access, Digital Academic Press Devoted to the Liberal Arts (Dec. 5, 2012), <https://www.amherst.edu/library/press/news>.

217. Bryn Geffert, *Libraries, Publishers, and a Plea for Shotgun Weddings*, CHRONICLE REVIEW (Mar. 20, 2011), <http://chronicle.com/article/Libraries-Publishing/126755/>.

218. FITZPATRICK, *supra* note 215, at 159–60.

219. Fitzpatrick argues that libraries may have the “key position in the scholarly publishing program of the future.” *Id.* at 169.

220. See WILLINSKY, *supra* note 185, at 39. Willinsky notes that the “technology that is used by journal publishers to . . . exploit and enforce their ownership of scholarly literature” is the same technology used “by researchers to make their work available through open e-print archives.” *Id.*

221. See U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” (emphasis added)).

access requires committed action from institutions, scholars, and libraries. Institutions must support open access and alternative publishing. Scholars must also embrace this reform, including publishing their works through open access.²²² Libraries must assume a substantial role in this reform of the scholarly communication system.

¶66 As libraries take on this vital role in supporting faculty publishing, “the best approach is to engage staff as soon as possible, to help them envision themselves in an open access future.”²²³ Some libraries will not have the resources to immediately engage in actions that involve control of digital works, such as publishing open access works, digitizing and maintaining open access archives, or owning e-resource files in a Douglas County model. Initiating and participating in consortial and other group arrangements and agreements for these services is therefore critical to making advances.²²⁴

¶67 Although the open access movement is progressing, vast numbers of works are already locked under publisher control, and that number is increasing every day. Publishers have become “choke points in the distribution of knowledge.”²²⁵ Limitations and prohibitions on library use of materials for research support continue. New models do not “address the problem of accessing copyrighted material that has not been disseminated under an open access model.”²²⁶ Gaining control of scholarly works through open access and ownership models cannot be the only path to ensuring research support. Libraries must vigorously pursue other strategies.

¶68 Libraries should focus their efforts on influencing and changing licenses, contracts, and business models for e-collections. Libraries can increase their negotiating power and the scope of their access to works through consortial efforts. Whether acting individually or as a group, libraries must not simply accept publisher proposed arrangements, even if those arrangements are financially tempting. They must not be lulled into accepting licensing and usage arrangements that eliminate fair use and other rights. Libraries must be aware of when exercise of these rights is appropriate and not merely assume that they do not apply.

¶69 Many libraries have been complacent in accepting publisher arrangements for e-resources. Going forward, libraries should review all current agreements and consider carefully any new arrangements, particularly business models for e-books. In some cases, a library will need a particular resource and will not be able to walk

222. When scholars cling to traditional methods of publication, they help perpetuate the current system and turn their works into restricted commodities. Joseph J. Branin & Mary Case, *Reforming Scholarly Publishing in the Sciences: A Librarian Perspective*, 45 NOTICES OF THE AMS 475, 485 (1998).

223. Heather Morrison, *Rethinking Collections—Libraries and Librarians in an Open Age: A Theoretical View*, 12 FIRST MONDAY, no. 10, Oct. 2007, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1965/1841>.

224. HathiTrust is an example of a partnership among research institutions and libraries that collaboratively develop, own, and maintain a digital repository. See *About*, HATHITRUST, <http://www.hathitrust.org/about> (last visited July 9, 2013).

225. Peter Ludlow, *Aaron Swartz Was Right*, CHRONICLE REVIEW (Feb. 25, 2013), <http://chronicle.com/article/Aaron-Swartz-Was-Right/137425/>.

226. ASS'N OF RESEARCH LIBRARIES, *supra* note 1, at 11.

away or negotiate favorable terms. Still, libraries should assertively make an ongoing effort, revisiting arrangements on a regular basis. Academic libraries must focus on their mission to “promote the creation and diffusion of knowledge and to preserve it for the long term”²²⁷ as they acquire and maintain e-collections.

¶70 It is imperative that academic libraries act to protect research support. Just discussing what to do is not enough. Jamie LaRue describes people who “talk the talk but don’t walk it, who have plenty to say but never get around to doing anything” as “all hat, no cattle.”²²⁸ He urges that librarians “corral some cattle” and take action “to provide access to the intellectual content of our culture.”²²⁹ Library engagement will involve considerable work and require in many cases that librarians move outside of traditional roles. In pursuing these options, libraries “must preserve traditional library values, not traditional library institutions, processes, and services.”²³⁰ Taking action requires more than merely adapting to change as digital collections increase. Librarians must do more than react to change. They “must be more willing not just to accept change, but to become its agents.”²³¹

227. Mullins et al., *supra* note 3, at 1.

228. Jamie LaRue, *All Hat, No Cattle: A Call for Libraries to Transform Before It's Too Late*, LIBR. J., Aug. 2012, at 32, 32.

229. *Id.* at 34.

230. Eric Van de Velde, *Annealing the Library*, SCITECH SOCIETY (Apr. 17, 2012), <http://scitechsociety.blogspot.com/2012/04/annealing-library.html#!/2012/04/annealing-library.html>.

231. FREDERICK G. KILGOUR, *BEYOND BIBLIOGRAPHY* 5 (1985). Kilgour, a leading agent of change, founded OCLC (Online Computer Library Center), the world’s largest international library network. Margalit Fox, *Frederick G. Kilgour, Innovative Librarian, Dies at 92*, N.Y. TIMES, Aug. 2, 2006, at B8; Press Release, Frederick G. Kilgour, Founder of OCLC, Dies at 92, OCLC (Aug. 1, 2006), <http://worldcat.org/arcviewer/2/OCC/2010/05/07/H1273247331100/viewer/file442.htm>.