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Libraries, Digital Content, and Copyright

Laura N. Gasaway*

ABSTRACT

Libraries use, acquire, create and host generate digital content. They digitize their existing collections of works such as letters, diaries and manuscripts and post them on library websites. Increasingly, libraries are utilizing digital technology to preserve library works which may or may not be made available to the public. Libraries also create, manage and host user generated content such as posts on discussion boards, blogs, wikis, RSS feeds, social bookmarking, tagging, and social networks. Libraries use user generated content for internal library purposes, such as displays and events and for teaching. Further, libraries often are asked to assist users who are creating user generated content. User generated content raises significant copyright issues raised for libraries as they create, manage and host such content.

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Digital content is changing both the face of research and the ways in which libraries provide materials and services to their users. One noteworthy manifestation of this trend is libraries taking advantage of digital technologies to preserve printed and analog works, which operates in several ways.¹ First, libraries are acquiring, using, and creating digital content, despite conflicts with the copyright law affecting digitization.² They acquire digital works for a variety of reasons. Sometimes the work is available only in that format, but other times, the library acquires a license to a package or bundle of full-text journals in digital format.³ Some titles may not be particularly desirable for that library, but the bundling requires subscription to the entire package. Users may prefer digital versions and request that the library provide access to them because of the enhanced search features that digital works typically provide, such as the ability to search the entire corpus of the digital product with a single search. Second, librarians use digital works to which the library subscribes to respond to reference queries and to provide copies of articles to their users upon request. Third, libraries create digital content by digitizing existing collections in order to preserve the print works and to provide greater access for users since the works generally are available through the Internet.

1. Analog works refers to media other than text and photographs such as videotapes, audiotapes and other formats that pre-date digital versions of these works.

2. The Copyright Act of 1976 was amended in 1998 to permit some digital copying by libraries. See text accompanying notes 27-46.

3. See Jonathan Nabe, *E-Journal Bundling and Its Impact on Academic Libraries: Some Early Results*, ISSUES IN SCI. & TECH. LIBRARIANSHIP (Spring 2001), available at <http://www.library.ucsb.edu/ist/01-spring/article3.html>.

Journal bundling refers to the practice of aggregating all titles produced by a publisher into a single product, or subject-based subsections. This comprehensive product is then marketed and sold as an all-or-nothing deal: a library can purchase access only to all of the titles within the package, or to none at all. Within the last five years, these packages, or bundles, have become the favored subscription model for the dominant commercial publishers of Science, Technology, and Medical (STM) electronic journals.

Id.

This Article discusses libraries' creation, use, and management of digital works, including user generated content (UGC) such as posts on discussion boards, instant messaging, blogs, wikis, Really Simple Syndication (RSS) feeds, social bookmarking, tagging, and social networks.⁴ This Article addresses four major areas in which copyright issues are important for libraries and digital content: (1) the creation and management of digital content, (2) library hosting and management of UGC,⁵ (3) the use of UGC for internal library purposes, such as displays and events and for teaching, and (4) the assistance of library users and students with both using and creating digital content.

Copyright issues are important in each of these four areas, but both the law and library practices are clearer in some of these areas than others. As new formats of materials are developed, libraries embrace them and add them to their collections. For example, when motion pictures became available for purchase, libraries began to collect, house, and organize them, and made them available for viewing, initially in the library only.⁶ Ultimately, libraries arranged for the public to check them out and view them at home. Libraries followed the same process for CDs, DVDs, and digital versions of both existing analog works and those that are "born digital."⁷ Today, libraries seek to provide remote access to this material for their users.

I. CREATION AND MANAGEMENT OF DIGITAL CONTENT

Libraries have created digital copies of existing works and have managed digital content from the time it became possible to do so in the 1970s. To a librarian, there is not much difference between

4. UGC was made possible by the advent of Web 2.0, which "describes the development of greater opportunities for user participation, creation, and collaboration on the Internet." Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1500-01. Moreover, the growth of UGC is due to technological innovations in the development of the Internet. *Id.*

5. Libraries now host blogs and other UGC. They also evaluate, organize, and filter UGC just as they do for other online content.

6. The Library of Congress collected over 3,000 films from 1894-1912. The library at the Museum of Modern Art in New York City began its film collection in 1935. *MANAGING PERFORMING ART COLLECTIONS IN ACADEMIC AND PUBLIC LIBRARIES* 8 (Carolyn A. Sheehy ed. 1994). Another example is the Academy of Motion Picture Arts and Sciences Library has been collecting movies since 1929, *see* About the Academy Film Archive, <http://www.oscars.org/filmarchive/about/index.html> (last visited May 7, 2010).

7. Born digital refers to those works that never existed in print or analog form but which from their creation were available only as digital files. Definition, born digital, *BusinessDictionary.com*, at <http://www.businessdictionary.com/definition/born-digital.html> (last visited May 7, 2010).

organizing analog materials and organizing digital works, as the same principles that apply to organizing print analog materials apply to organizing digital works.⁸

A. Digitizing Existing Analog Collections

Generally, libraries are devoted to making information broadly available to their users. Most libraries seek to preserve materials for future generations to ensure that knowledge is not lost and to permit tomorrow's researchers and scholars can both locate and use it. Thus, libraries have been quick to jump on the digital preservation bandwagon.⁹ They sought to preserve print and analog collections by digital means and posted digital copies of these collections online to make them more widely available to users around the world.¹⁰ An important advantage of digital collections is that the works have enhanced search features that increase their use and make them easier to use because digital copies permit word-by-word searching. Users can efficiently search across titles, and a researcher is no longer limited to a static library catalog as a search tool. Despite the advantages, digitizing existing print and analog materials raises a number of copyright questions.

Most collections that libraries have digitized to date are comprised predominantly of public domain works, which include works on which the copyright has expired and those created under earlier copyright statutes that failed to meet the statutory requirements. Even though these collections exist in print and are available to library users who visit the libraries that own copies of the works, the digital versions are significantly more valuable because of their increased accessibility. Scholars are able to access these works without having to travel to the library or archives that own the physical copies.¹¹ Because the contents of these digital collections

8. Libraries have standards for cataloging materials, organizing them within collections, etc. The principles underlying this organization developed over a long period of years. Librarians can apply these principles of organization to digital works as well.

9. See Deanna Marcum & Amy Friedlander, *Keepers of the Crumbling Culture: What Digital Preservation Can Learn from Library History*, D-LIB MAGAZINE, May 2003, <http://www.dlib.org/dlib/may03/friedlander/05friedlander.html> (describing the history of library preservation practices).

10. For a discussion of the history of library digitization, see Abby Smith, *Digitization is not Preservation – At Least Not Yet*, in THE WHOLE DIGITAL LIBRARY HANDBOOK 342-45 (ed. Diane Kresh 2007).

11. While many libraries host archival collections, there are also stand-alone archives. Archives are defined as “[m]aterials created or received by a person, family, or organization, public or private, in the conduct of their affairs and preserved because of the enduring value contained in the information they contain or as evidence of the functions and responsibilities of

often consist of one-of-a-kind original works such as unpublished letters, documents, and manuscripts, the digitization of existing content can more broadly facilitate the creation of new knowledge by an even wider array of scholars and researchers than in the past.

There are many important collections of public domain materials in library collections around the country, such as the University of North Carolina's collection, "Documenting the American South," which is comprised of North American slave narratives, all published before 1920.¹² Many of these works were originally published in very limited numbers, and few other libraries have them in their collections.¹³ Another important example is the University of Washington's "McKenny and Hall Indian Tribes of North America" digital lithographic collection, consisting of text and 121 hand colored lithographs.¹⁴ Law libraries have taken on similar digitization projects. For example, Harvard Law School Library holds the Oliver Wendell Holmes, Jr. Collection, which is in the process of being digitized and made available online.¹⁵ Phase I of this project is already available on the Internet and consists solely of public domain materials.¹⁶

Because the early examples of library digitization projects were almost all focused on public domain materials, the only copyright

their creator, especially those materials maintained using the principles of provenance, original order, and collective control; permanent records." See The Society of American Archivists, A Glossary of Archives and Record Terminology, http://www.archivists.org/glossary/term_details.asp?DefinitionKey=156 (last visited Apr. 16, 2010). It is also defined as "[a]n organization that collects the records of individuals, families, or other organizations; a collecting archives." *Id.*

12. See The University of North Carolina at Chapel Hill, University Library, North American Slave Narratives, <http://docsouth.unc.edu/neh> (last visited Apr. 16, 2010).

13. The University of North Carolina at Chapel Hill, University Library, About North American Slave Narratives, <http://docsouth.unc.edu/neh/about.html> (last visited Apr. 16, 2010).

14. See THOMAS L. MCKENNEY AND JAMES HALL, THE HISTORY OF THE INDIAN TRIBES OF NORTH AMERICA, WITH BIOGRAPHICAL SKETCHES AND ANECDOTES OF THE PRINCIPAL CHIEFS EMBELLISHED WITH ONE HUNDRED AND TWENTY PORTRAITS, FROM THE INDIAN GALLERY IN THE DEPARTMENT OF WAR, AT WASHINGTON (E.C. BINDLE 1836-1844); University of Washington Libraries, McKenny and Hall Indian Tribes of North America, <http://content.lib.washington.edu/mckennyhallweb/index.html> (last visited Apr. 16, 2010).

15. See Harvard Law School Library, Oliver Wendell Holmes, Jr. Digital Collection, <http://www.law.harvard.edu/library/special/exhibits/digital/owh-digital-col.html> (last visited Apr. 16, 2010).

16. The first phase of the project is described as containing materials by Oliver Wendell Holmes, Jr. *Id.* Based on the date of his death (1894), all of this material is within the public domain. See *id.* This phase was completed in March 2009. *Id.* The next phase of the project, Phase II "is in development and will include the digitization of additional manuscript materials and the creation of an interpretive web presentation designed to bring all of the various digitized materials into one place." *Id.* It is not clear whether this phase will contain only public domain works or will contain a combination of copyrighted and public domain works. See *id.*

issue of note was ownership of the copyright in the collection as a whole, not of individual documents in the collection.¹⁷ Some libraries sought to claim copyright in the digital versions of individual works,¹⁸ but the digitization effort create no new copyright in the works.¹⁹ Ownership of the collection presents a different issue, however, because there may be sufficient originality in the selection, organization, new material added, and the like that the collection itself qualifies for copyright protection.²⁰

More recently, libraries have digitized collections that consist of a combination of public domain works and protected works, or even consist solely of protected works. For example, the Mississippi Civil Rights Archive contains very valuable materials including newspaper clippings, small circulation local newsletters, and oral histories from 1900 to the early 2000s.²¹ Receiving copyright clearance to include digital reproductions in the online collection proved extremely difficult. Many of the works were orphan works,²² and despite all efforts, it was not possible to obtain permission to digitize them.²³ An example of a digitized collection that consists solely of protected works is Vanderbilt University Library's Television News Archive, which is actually a collection of news programs on DVDs that have been broadcast since 1968, though the content of these DVDs is searchable online.²⁴ Billed as the world's largest archive of television news, the practice the library has followed is to mail copies of the DVDs to

17. See Laura N. Gasaway, *Copyright Ownership & the Impact on Academic Libraries*, 13 DEPAUL-LCA J. ART & ENT. L. 277, 291-92 (2003).

18. In 1997-98, the author was involved in a series of discussions with Larry Alford, Deputy University Librarian at the University of North Carolina-Chapel Hill, about whether copyright could be claimed in the individual digitized items in this collection. He advised that the answer was no, but that the collection as a whole might be copyrightable.

19. See *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999) (holding that exact photographic copies of public domain images did not have sufficient originality to qualify for copyright protection). The court ruled that the plaintiff, by its own admission, had performed "slavish copying," which did not qualify for copyright protection. See *id.* at 197 ("[T]he point of the exercise was to reproduce the underlying works with absolute fidelity.").

20. See *generally* *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

21. See The University of Southern Mississippi, McCain Library & Archives, Civil Rights in Mississippi Digital Archive, [http://www.lib.usm.edu/~spcol/crda/](http://www.lib.usm.edu/~spcol/crda/http://www.lib.usm.edu/~spcol/crda/) (last visited Apr. 16, 2010).

22. An orphan work is one in which either the owner is unknown or cannot be located despite all good faith efforts to do so. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS: A REPORT OF THE REGISTER OF COPYRIGHTS 1, 21 (2006), at <http://www.copyright.gov/orphan/orphan-report.pdf>.

23. *Id.*

24. See Vanderbilt University Television News Archive, <http://tvnews.vanderbilt.edu/> (last visited Apr. 16, 2010).

requesting libraries,²⁵ which must then return the DVDs to Vanderbilt. The University Librarian noted that it would be preferable to end the mailing and return of the DVDs and to rely instead on streaming the content of the news program to requesting libraries.²⁶

With respect to digitizing works for which the copyright status is unclear, librarians have sought assurances that their activities did not infringe copyright. Section 108 of the Copyright Act of 1976 contains exceptions to the exclusive rights of the copyright owner that are available for libraries and archives under certain conditions.²⁷ Some librarians believe that the Copyright Act should be amended to include a library exception that allows libraries to preserve works digitally.²⁸ In 1998, the Digital Millennium Copyright Act amended § 108 to permit digital preservation, but under very controlled circumstances.²⁹ Unfortunately, the restrictions on the use of digital preservation copies under the revised § 108 are so stringent as to make the exception unusable for many purposes, such as worldwide access. The amended § 108(b) and (c) allow libraries to make up to three copies of a work, one of which may be digital, but the institution may not make the digital copy available to users outside the premises of the library or archive.³⁰ There is little legislative history to explain this limitation, but subsection (b), which applies only to unpublished works, is presumably an attempt to preserve the right of first publication for the author.³¹ Subsection (c) permits libraries to make

25. *Id.*

26. See generally U.S. Copyright Office & Nat'l Digital Info. Infrastructure & Pres. Program, Library of Cong., The Section 108 Study Group Report (March 2008) [hereinafter Section 108 Study Group Report], available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf>; Letter from Paul Gherman, Univ. Librarian, Jean and Alexander Heard Library, Vanderbilt Univ., to Mary Rasenberger, Policy Advisor for Special Programs, U.S. Copyright Office, Library of Cong. (Apr. 15, 2006), available at http://www.section108.gov/docs/Gherman_Vanderbilt.pdf. The following statement appears on the Vanderbilt University Television News Archive website: "All material of the Vanderbilt Television News Archive must be used within the restrictions of the United States copyright legislation. Copyright Public Law 94-553 Section 108(f)(3) includes provisions regarding copyright exemptions for audiovisual works and archiving of television news broadcasts." Vanderbilt University Television News Archive, *supra* note 24.

27. 17 U.S.C. § 108 (2006).

28. Arnold P. Lutzker, Primer on the Digital Millennium: What the Digital Millennium Copyright Act and the Copyright Term Extension Act Mean for the Library Community 4-6 (Mar. 1999), http://www.arl.org/bm~doc/primer_digital_millennium.pdf.

29. Digital Millennium Copyright Act, 17 U.S.C. § 1201(a) (2006).

30. 17 U.S.C. § 108 (b)-(c) (2006).

31. See 17 U.S.C. § 108(b) (2006); Laura N. Gasaway, *America's Cultural Record: A Thing of the Past?*, 40 HOUS. L. REV. 643, 656-57 (2003) [hereinafter Gasaway, *America's Cultural Record*].

copies of digital works to replace lost, stolen, damaged, deteriorating, or obsolete items.³² The library must have first tried to obtain a replacement copy at a fair price.³³ If no such copy is available, subsection (c) permits the library may make up to three copies, one of which may be digital.³⁴ However, the digital copy is restricted to on-premises use.³⁵ The reason for the restriction cannot be to protect the right of first publication because the subsection applies only to published works. Presumably, therefore, the restriction is intended to protect the publisher's reproduction and distribution rights instead.³⁶

The Section 108 Study Group suggested additional amendments to § 108,³⁷ but its recommendations have not been enacted. The Study Group was unable to reach a consensus on whether digitized copies made under § 108(b) and (c) could be used outside the premises of libraries or archives.³⁸ Librarians want off-premise use, but copyright owners were concerned about wide distribution and losing control of digital versions of their works and wanted to explore and preserve potential new markets for their digital products.³⁹

Without the assurance that making digital copies available to users off the premises is permissible, libraries have used disclaimers that request users to come forward if they know anything about the

32. *Id.* § 108(c).

The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

Id.

33. *Id.*

34. *Id.*

35. *Id.*

36. Gasaway, *America's Cultural Record*, *supra* note 31.

37. The Section 108 Study Group was created by the Copyright Office and the Office of Strategic Initiatives at the Library of Congress to address concerns of libraries and archives. *See SECTION 108 STUDY GROUP REPORT*, *supra* note 26 at 1, 3. The group of nineteen knowledgeable individuals was charged to study Section 108 of the Copyright Act and make recommendations about whether it should be amended to reflect the changes that libraries and archives have experienced due to the digital revolution and to permit them to use digital technology while not unduly impacting the rights of the copyright holder. *See id.*

38. The group was made up of librarians, archivists, publishers, and producers. *Id.* at 4. This diversity of interests is the reason the group was not able to reach agreement on many issues. *Id.* Fortunately, on other issues there was consensus. *Id.*

39. *Id.* at 7.

copyright owner.⁴⁰ Libraries will first try to locate the copyright owner, and, if that fails, often post the digital copy of the work online and include a disclaimer.⁴¹ These disclaimers announce that, if someone comes forward with information about the copyright owner, the library will then contact the owner to seek permission to include the owner's copyrighted works in the digital collection and make them available to the public.⁴² If the copyright owner were to object, then presumably the library would either remove the item from the digital collection or disable access to it.⁴³

There are also archives where the staff has digitized materials but stored the digital copies in a so-called "dark archive"⁴⁴ instead of making the digital copies available to users. Typically, these institutions have not sought permission from copyright owners to digitize the works because the purpose of the digitization is pure preservation, and not distribution. While making the digital copy is still a reproduction, publisher members of the Section 108 Study Group seem to have fewer concerns about reproduction for preservation if the work is not available for patron use.⁴⁵ This is a much smaller category of digitization projects, but it does exist, perhaps more in the archives world than in the library world.⁴⁶

40. See Peter B. Hirtle, *Copyright & Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives & Museums 207-09* (Cornell University 2009).

41. *Id.*

42. See, e.g., The University of Southern Mississippi, McCain Library & Archives, Civil Rights in Mississippi Digital Archive, Intellectual Property and Privacy Information, http://www.lib.usm.edu/~spcoll/crda/ipp/subpage_names.htm (last visited Apr. 16, 2010); Cornell University Library Digital Collections, Guidelines for Using Public Domain Images, Audio, and Video Reproduced from Cornell University Library Collections, <http://cdl.library.cornell.edu/guidelines.html> (last visited Apr. 16, 2010).

43. See, e.g., State Library and Archives of Florida, Florida Memory Project, The Flickr Commons, <http://www.floridamemory.com/disclaimer-flickr.cfm> (last visited Apr. 16, 2010) ("[I]mages featured . . . have no known copyright restrictions. Acquisitions documentation transferring all rights to the Archives is obtained from the donor at the time of the transfer. Despite no known copyright restrictions, these photos may be subject to other third party rights, such as rights of privacy and rights of publicity.")

44. A dark archive is defined as "[a] collection of materials preserved for future use but with no current access." The Society of American Archivists, A Glossary of Archival and Records Terminology, http://www.archivists.org/glossary/term_details.asp?DefinitionKey=231 (last visited Apr. 16, 2010).

45. See SECTION 108 STUDY GROUP REPORT, *supra* note 26, at 77-79.

46. George Mason University Library maintains some materials in a dark archive. See generally George Mason University Libraries, Mason Archival Repository Service, <http://digilib.gmu.edu:8080/dspace/handle/1920/951> (last visited Mar. 31, 2010).

B. Acquiring Digital Content

Libraries also acquire existing digital content by subscription and by purchase,⁴⁷ but this type of digital content is easier to manage because the libraries obtain a license for the use of this content. Under § 108(f)(4) of the Copyright Act, the terms of a license agreement trump copyright.⁴⁸ While there have been some suggestions that this subsection should be modified so that only negotiated licenses⁴⁹ prevail over copyright,⁵⁰ all licenses currently prevail over copyright.⁵¹ Thus, it is important for librarians to negotiate licenses for digital content that provide the access and rights that their users need.⁵²

Additionally, there may be digital works that are acquired without a license agreement. The library would then own the copy, much as it owns copies of printed works that it purchases. Digital works of this type could then be treated as other materials acquired by the library.⁵³

C. Google Books Project

Libraries are also involved in providing books to Google and the Open Access Content Alliance⁵⁴ for digitization, which are

47. When a library purchases a title, it actually obtains a physical copy of the work. In the print world, a subscription provides copies of the work, typically a journal or an annual, to the library and was a type of purchase. In the digital world, however, a library that subscribes to an online title actually purchases a license that permits the library to provide access to that title to its users.

48. 17 U.S.C. § 108(f)(4) (2006) (stating that nothing in this section “in any way affects the right of fair use as provided by section 107, or any contractual obligations assumed at any time by the library or archives when it obtained a copy or phonorecord of a work in its collections”).

49. A non-negotiated license is one in which the library or institution clicks on an online license agreement. There is no ability to change the terms—it is a take-it-or-leave-it license. SECTION 108 STUDY GROUP REPORT, *supra* note 26, at 121.

50. *Id.* at 121-22.

51. 17 U.S.C. § 108(f)(4) (2006).

52. Several good resources are available to assist librarians in negotiating licenses to exclude, modify, or add terms. *See, e.g.*, NAT'L INFO. STANDARDS ORG., SERU: A SHARED ELECTRONIC RESOURCE UNDERSTANDING (Feb. 2008), available at <http://www.niso.org/publications/rp/RP-7-2008.pdf>.

53. An interesting question about digital works that are acquired is whether the first sale doctrine applies to such works. However, that question is outside the scope of this Article.

54. The Open Content Alliance is a competitor to the Google Books Project. *See* Open Content Alliance, About, <http://www.opencontentalliance.org/about/> (last visited Apr. 16, 2010). It describes itself as

a collaborative effort of a group of cultural, technology, nonprofit, and governmental organizations from around the world that helps build a permanent archive of

changing the way people find, read, and search for books. To provide books for the Google Books project, libraries have actually bundled books and shipped them to Google so that they could be digitized; Google completes the digitization and then returns the book to the library.⁵⁵ The Google Books project includes searchable text from both public domain and copyrighted books, and from which either full works (for public domain titles) or snippets (for protected works) are made available for online viewing free of charge.⁵⁶ In exchange for lending Google copies of works in their collections, these partner libraries receive digital copies of the works.⁵⁷ Copyright owners have challenged this project.⁵⁸ Google and the copyright owners have reached two versions of a settlement agreement,⁵⁹ but the Department of Justice,⁶⁰ the Register of Copyrights,⁶¹ and various library associations,⁶² among others, have raised so many questions about a number of issues, such as the representativeness of the class, antitrust concerns, orphan works, and basic copyright issues, that it is

multilingual digitized text and multimedia material. An archive of contributed material is available on the Internet Archive website [archive.org] and through Yahoo! and other search engines and sites.

Id. There are currently 152 member libraries. *Id.*

55. The University of Michigan Libraries describes its participation on its web page. University of Michigan, Michigan Digitization Project, <http://www.lib.umich.edu/michigan-digitization-project> (last visited Apr. 16, 2010).

56. Google Books, About Google Books, <http://books.google.com/googlebooks/history.html> (last visited Apr. 16, 2010).

57. Google Books, Help, Do the Libraries Get a Copy of the Book?, <http://books.google.com/support/bin/answer.py?hl=en&answer=43751> (last visited Apr. 16, 2010).

58. See Complaint, *Author's Guild v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. Sept. 20, 2005), available at <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/authors-guild-v-google/Authors%20Guild%20v%20Google%2009202005.pdf>; see also Complaint, *McGraw-Hill Cos. v. Google Inc.*, No. 05-CV-8881 (S.D.N.Y. Oct. 19, 2005), available at <http://www.authorsguild.org/advocacy/articles/settlement-resources.attachment/mcgraw-hill/McGraw-Hill%20v.%20Google%2010192005.pdf>.

59. The second version of the settlement agreement is some 360 pages long, illustrating its complexity. See Amended Settlement Agreement, *Authors Guild, Inc. v. Google Inc.*, No. 05-CV-8136 (S.D.N.Y. Nov. 13, 2009), available at http://thepublicindex.org/docs/amended_settlement/amended_settlement_redline.pdf.

60. John Timmer, *DOJ: Google Book Settlement Better, but Not Yet Good*, Law and Disorder, ARS TECHNICA, February 5, 2010, <http://arstechnica.com/tech-policy/news/2010/02/doj-google-book-settlement-better-but-not-yet-good.ars>.

61. See *Competition and Commerce in Digital Books: The Proposed Google Book Settlement: Hearing Before the H. Comm. On the Judiciary*, 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat091009.html>.

62. *Objection to Google Scanning Settlement Filed*, AM. LIBR., April 15, 2009, <http://www.ala.org/ala/online/currentnews/newsarchive/2009/april2009/googleobjectitions.cfm>.

unclear whether Judge Denny Chen of the Southern District of New York will approve the settlement.

D. Preserving Born Digital Materials

Other digital content that libraries want to collect and preserve is the content included in different websites and blogs. Such content might include web sites about local elections, those created after a natural disaster such as Hurricane Katrina, and blogs about almost any topic in which the users of a particular library might be interested.⁶³ Libraries can do this by actually copying the digital content and storing it on its own servers.⁶⁴ These collections of publicly available websites would be curated based on subject matter and local interest, as well as other factors, and organized and preserved for later use.⁶⁵ Currently, § 108 does not cover the collection and preservation of publicly available online content, although some libraries are already engaged in this activity, claiming that doing so is fair use.⁶⁶ The Section 108 Study Group recommends that libraries, archives and museums be permitted to preserve and make available publicly available online content after a short embargo period.⁶⁷

Some content owners may object to libraries reproducing and preserving their websites, so it is likely that an opt-out system will have to be accommodated, especially for the owners of certain commercial websites.⁶⁸

II. HOSTING AND MANAGING USER-GENERATED CONTENT

With the development of Web 2.0⁶⁹ for more interactive content and UGC, libraries have dubbed the use of this technology for

63. SECTION 108 STUDY GROUP REPORT, *supra* note 26, at 81-82.

64. *Id.*

65. This is opposed to the Internet Archive, which preserves virtually all websites. See Internet Archive, <http://www.archive.org/index.php> (last visited Apr. 16, 2010).

66. 17 U.S.C. § 107 (2006). Section 107 sets out four tests that courts use to determine whether a use is a fair use: (1) purpose and character of the use; (2) nature of the copyrighted work; (3) amount and substantiality used; and (4) market effect. *Id.* § 107(1)-(4).

67. SECTION 108 STUDY GROUP REPORT, *supra* note 26, at 81-82.

68. *Id.* at 86 (stating that the Library of Congress would serve as a fail safe for opt-out content and it would be allowed to preserve even opt-out content).

69. The term Web 2.0 seems to have been first used by Tim O'Reilly, CEO of O'Reilly Media, Inc., in 2004. By 2005 O'Reilly defined it in his blog as

the network as platform, spanning all connected devices; Web 2.0 applications are those that make the most of the intrinsic advantages of that platform: delivering software as a continually-updated service that gets better the more people use it, consuming and remixing data from multiple sources, including individual users, while

improving library service as Library 2.0.⁷⁰ Library 2.0 encourages libraries to focus on improving the services that libraries offer to their users and invites their users' participation in developing both actual and virtual services.⁷¹ Library 2.0 has also been described as a mashup various types of content:

It is a hybrid of blogs, wikis, streaming media, content aggregators, instant messaging, and social networks. Library 2.0 remembers a user when they log in. It allows the user to edit OPAC [online public access catalog] data and metadata, saves the user's tags, IM conversations with librarians, wiki entries with other users (and catalogs all of this for others to use), and the user is able to make all or part of their profile public; users can see what other users have similar items checked-out, borrow and lend tags, and a giant user-driven catalog is created and mashed with the traditional catalog.⁷²

A recent survey of 813 U.S. public libraries revealed that there are a number of types of UGC that are in use: blogs, social networks, RSS feeds, wikis, Flickr.com photo accounts, videos, podcasts, and social bookmarks (in that order of prevalence).⁷³ Libraries must now consider whether to use UGC only internally, whether to create UGC itself, and whether to host the content for the public. Libraries will then need to develop practices and policies to deal with the issues that UGC in libraries create.

A. Hosting Library-Generated UGC

Librarians are beginning to create their own UGC and to host it on library servers. Blogs are the most common type of UGC,⁷⁴ and public libraries have created blogs that include book groups that discuss books that the group is either reading or proposing to read, readers' advisories, library events, and blogs open only to staff members.⁷⁵ The New York Public Library (NYPL) maintains a

providing their own data and services in a form that allows remixing by others, creating network effects through an "architecture of participation," and going beyond the page metaphor of Web to deliver rich user experiences.

Posting of Tim O'Reilly (*Web 2.0: Compact Definition?*) to O'Reilly Radar, <http://radar.oreilly.com/archives/2005/10/web-20-compact-definition.html> (Oct. 1, 2005).

70. "Library 2.0" was coined by Michael Casey in his blog, LibraryCrunch, on September 20, 2005. Jenny Bronstein & Noa Aharony, *Views and Dreams: A Delphi Investigation into Library 2.0 Applications*, 3 J. WEB LIBRARIANSHIP 89, 90 (2009).

71. Michael E. Casey & Laura C. Savastinuk, *Library 2.0: Service for the Next-Generation Library*, LIBR. J., Sept. 1, 2006, available at <http://www.libraryjournal.com/article/CA6365200.html>.

72. Jack M. Maness, *Library 2.0 Theory: Web 2.0 and Its Implications for Libraries*, WEBOLOGY, June 2006, <http://www.webology.ir/2006/v3n2/a25.html>.

73. Lorri Mon & Ebrahim Randeree, *On the Boundaries of Reference Services Questioning and Library 2.0*, 50 J. EDUC. FOR LIBR. & INFO. SCI. 166, 168 (2009).

74. *Id.* at 168.

75. *Id.*

number of blogs, such as *Blogging@ NYPL*, *Illuminating Collections* and *Services at the New York Public Library*,⁷⁶ which is run by members of the NYPL staff (and does not contain content from library patrons).⁷⁷ NYPL also maintains an account on Twitter.com and tweets daily.⁷⁸ The considerations for operating a library staff-generated blog are the same as for other large organizations that blog for the public. For example, blogging staff must not infringe copyright because the library clearly would be liable for infringing content that its staff officially generates for the institution.

The University of Minnesota Libraries host UThink, a true UGC blog for students, faculty, and staff to support teaching, learning, scholarly communication, and individual expression.⁷⁹ The library explained its reason for hosting a blog: “The Libraries have numerous goals with this project: to promote intellectual freedom, to help build communities of interest to campus, to investigate the connections between blogging and the traditional academic enterprise, and to retain the cultural memory of the institution.”⁸⁰

The Austin Public Library in Austin, Texas is an example of a library-maintained blog on which members of the public can post.⁸¹ Public blogs present management issues for the library, as they must remove infringing material that users post and take action to deny access to repeat offenders.

Another type of UGC that libraries use is social networking pages that are used to advertise services and materials, and to highlight special events.⁸² These sites are especially popular among

76. See generally New York Public Library Blogs, <http://www.nypl.org/blog> (last visited Apr. 16, 2010). Other blog topics include art and architecture, business and industry, genealogy, mythology and folktales and food. See *id.*

77. See New York Public Library Blogs, About NYPL Blogs, <http://www.nypl.org/voices/blogs/about-nypl-blogs> (last visited Apr. 16, 2010); see also Wikipedia, New York Public Library, http://en.wikipedia.org/wiki/New_York_Public_Library (last visited Apr. 16, 2010) (giving statistics on the size of the New York Public Library).

78. See Twitter, New York Public Library, <http://twitter.com/nypl> (last visited Apr. 16, 2010). The subjects of the tweets vary considerably, but are indexed. See Twitter, NYPL Index, <http://twitter.com/nypl/index> (last visited Apr. 16, 2010). Recent subjects include appropriate restrictions for young adults, reviewing security videos and reading while on vacation. See *id.*

79. UThink: Blogs at the University of Minnesota, <http://blog.lib.umn.edu/> (last visited Apr. 16, 2010).

80. UThink: Blogs at the University of Minnesota, FAQ, <http://blog.lib.umn.edu/uthink/about.phtml> (last visited Apr. 16, 2010).

81. Austin Public Library Blog, <http://austinpupliclibraryblog.blogspot.com/> (last visited Apr. 16, 2010).

82. See Social Networks (*Young People Consist Majority of Social Network Users*), <http://www.socialnetworks10.com/young-people-consist-majority-of-social-network-users> (Jan. 19, 2009).

younger users.⁸³ The Denver Public Library, for example, maintains a social networking site.⁸⁴

Libraries have also adopted is wikis,⁸⁵ which are used for a variety of purposes, both internal and external. Libraries may use them not only for internal library communications and for hosting training materials, but also for advertising library program events to the public, posting library policies, and hosting digitized collections.⁸⁶

A further type of UGC adopted by librarians is RSS⁸⁷ feeds that are used both to aggregate news content for delivery to users and to announce new products and information that the library has added.⁸⁸ The NYPL has the most well-known RSS feeds.⁸⁹ If the news source that is fed to a subscriber included copyrighted works without permission, then the library may have secondary liability concerns.

Social bookmarking⁹⁰ has proven to be an excellent tool for users to categorize books and other materials on their own and to share their reviews of these works. Called “readers’ advisories,” even in the print environment in the past, they are typically used to provide only one-way communication from the librarian to the user.⁹¹

83. *Id.*

84. Brad Gauder, *MySpace Profile Helps Push Traffic Up 41 Percent at Teen Web Site*, NEXTSPACE (Online Computer Library Ctr., Dublin, Ohio), Sept. 2007, <http://www.oclc.org/nextspace/007/advocacy.htm>.

85. A “wiki” is defined as

a Web site that allows users to add and update content on the site using their own Web browser. This is made possible by Wiki software that runs on the Web server. Wikis end up being created mainly by a collaborative effort of the site visitors. A great example of a large wiki is the Wikipedia, a free encyclopedia in many languages that anyone can edit. The term “wiki” comes from the Hawaiian phrase, “wiki wiki,” which means “super fast.”

See The Tech Terms Computer Dictionary, Wiki, <http://www.techterms.com/definition/wiki> (last visited Apr. 16, 2010).

86. Mon & Randeree, *supra* note 73, at 168.

87. RSS stands for Really Simple Syndication. PRESSfeed, RSS Feeds Definition, http://www.press-feed.com/howitworks/rss_tutorial.php#whatarewebfeeds (last visited Apr. 16, 2010). “Also called web feeds, RSS is a content delivery vehicle. It is the format used . . . to syndicate news and other web content. When it distributes the content it is called a feed.” *Id.*

88. Chen Xu, Fenfei Ouyang & Heting Chu, *The Academic Library Meets Web 2.0: Applications and Implications*, 35 J. ACAD. LIBRARIANSHIP 324, 327 (2009).

89. See New York Public Library, Follow the Library Using RSS, <http://www.nypl.org/help/rss-feeds> (last visited Apr. 16, 2010).

90. Social bookmarking is defined as “a user-defined taxonomy system for bookmarks. Such a taxonomy is sometimes called a folksonomy and the bookmarks are referred to as tags. Unlike storing bookmarks in a folder on your computer, tagged pages are stored on the Web and can be accessed from any computer.” Whatis?.com, Social Bookmarking, http://whatis.techtarget.com/definition/0,,sid9_gcil168840,00.html (last visited Apr. 16, 2010).

91. Kaite Mediatore Stover, *Stalking the Wild Appeal Factor: Readers’ Advisory and Social Networking Sites*, 48 REFERENCE & USERS SERVICE Q. 243, 243-45 (2009), available at http://www.rusq.org/wp-content/uploads/2009/48n3/pdf/RUSQ48n3_readers.pdf.

Including quotations from copyrighted literary works in these newsletter-type publications was likely excused as a fair use since the purpose of the readers' advisory was criticism.⁹² Today, however, readers' advisories can be offered online using social bookmarking, and they contain not only librarians' recommendations but also users' recommendations on books. Examples of these are LibraryThing⁹³ and Goodreads,⁹⁴ which public librarians suggest could be used for summer reading programs.⁹⁵ The same copyright issue regarding incorporating protected content exists for online readers' advisories as for printed ones. The difference, however, is that for the online readers' advisories, users can also post content. If the library is hosting the content, it could be liable as an online service provider.⁹⁶

Podcasting⁹⁷ is not used as much as the other Web 2.0 tools, but some libraries are posting talks and other sessions.⁹⁸ There are a number of copyright issues raised by podcasting if the speaker performs or displays copyrighted content that he or she does not own. Duplicating the presentation and any embedded performances then makes a copy of the copyrighted performance or display. The library could be a direct infringer for reproducing and posting the content.

B. Organization of Non-Library UGC

Libraries also organize UGC that the libraries have neither created nor hosted, including electronic materials housed in their collections or licensed for their users' access. In order to help users locate this content, they create finding aids, bibliographies, online catalogs, bibliographies, and other tools. Organizing UGC is consistent with what libraries do with other content that they either acquire or license for access. Librarians have published bibliographies on the web, such as BlogBib: Select Librarian/Library Blogs, which

92. 17 U.S.C. § 107 (2006).

93. See Library Thing, <http://www.librarything.com/> (last visited Apr. 16, 2010).

94. See Goodreads, <http://www.goodreads.com/> (last visited Apr. 16, 2010).

95. Stover, *supra* note 91.

96. See 17 U.S.C. § 512 (2006).

97. Podcasting, a digital relative of television and radio broadcasts,

[I]s a method of publishing or distributing multimedia content (i.e. audio and video) over the Web. Podcasts are made available through syndication feeds, which enable new content, or episodes, to be automatically delivered to a personal computer. Users subscribe to podcasts that are pushed to aggregators, also called *podcatchers*. The podcast can then be played on a personal computer or MP3 player.

University of Minnesota Digital Media Center, Podcasting, <http://dmc.umn.edu/technologies/podcasting.shtml> (last visited Apr. 16, 2010) (emphasis in original).

98. Mon & Randeree, *supra* note 73, at 168; Xu, Ouyang & Chu, *supra* note 88, at 328.

has the subtitle, "An Annotated Bibliography on Weblogs and Blogging, with a Focus on Library/Librarian Blogs."⁹⁹

Libraries also can include references and links to blogs in their online catalogs, on library web sites, or in blogs that the library creates. This more properly is described as a finding tool rather than true organization of the material because libraries do not host the content found on these sites.¹⁰⁰ Therefore, they can only create "pointers" to the content. Librarians likely will continue to develop finding lists and bibliographies and to post them online to help others locate, use and participate in the creation of UGC.

C. Evaluating Content

In addition to organizing material already on the Internet, librarians also evaluate content and make suggestions to users about the content's quality. For example, Wikipedia is a great example of UGC, but it creates concern for public and school librarians who must explain to users that it is not an authoritative source as is the *Encyclopedia Britannica*.¹⁰¹ To academics who tend to understand how Wikipedia entries are created, this may seem obvious, but college English teachers report that undergraduates do not question the accuracy of Wikipedia entries and other online content, and instead consider it to be a completely authoritative source.¹⁰² Critiquing such content is likely a fair use protected as criticism if the other fair use factors are satisfied.

D. Filtering UGC

Another important UGC management issue for libraries is filtering, which may be considered either quality control or a simply

99. BlogBib: Select Librarian/Library Blogs, <http://blog-bib-liblogs.blogspot.com/> (last visited Apr. 16, 2010). A librarian is likely to be the user and would be seeking blogs on particular library science topics or about library practices. *See id.* For each blog listed, there is a short description. Topics include the history of libraries, books on blogging, studies on blogging, etc. *See id.*

100. Examples include pathfinders that include citations to user-generated content. The Internet Public Library defines "pathfinders" as Pathfinders are expert guides intended to help one get started doing research on a particular topic, both online and at a local library. Pathfinders, <http://www.ipl.org/div/pf/> (last visited May 7, 2010).

101. On the October 12, 2009 episode of the television series *Big Bang Theory*, the geeky characters discussed what they could do that evening for fun. The list included "messing" with Wikipedia entries.

102. Maness, *supra* note 72 ("The lack of peer review and editorship is a challenge to librarians, not that users should avoid wikis, but only in that they should understand and be critical in depending on them.").

type of organization of online content. Many libraries filter Internet content for inappropriate content, either because they choose to do so, or because they are required to filter because the library accepts federal funding.¹⁰³ Moreover, many states require their public libraries to filter the Internet to block inappropriate content.¹⁰⁴

Library filtering typically is content-based, focusing on eliminating pornography and other objectionable material.¹⁰⁵ While it might be possible to develop filters that could screen copyrighted content in libraries, it seems unlikely that the type of filtering used in libraries will change absent a statutory mandate. Libraries that host UGC, however, may be required to remove content if the copyright owner complains that the posting contained copyrighted material that it owns. The Digital Millennium Copyright Act¹⁰⁶ added § 512 to the Copyright Act, which provides immunity to Internet Service Providers such as libraries that host online content if certain conditions are met.¹⁰⁷ When a library receives a § 512 takedown notice from a copyright holder complaining about copyright infringement, it is obligated to remove that content.¹⁰⁸ If the library investigates the matter and makes a determination that the posting

103. One of the requirements for public and school libraries that receive federal funds is filtering of Internet content. See Institute of Museum and Library Services, Policy Notices, Complying with CIPA, <http://www.ims.gov/about/cipa.shtm> (last visited Apr. 16, 2010).

Under the Children's Internet Protection Act (CIPA), State Library Administrative Agencies (SLAA) must assure the Federal Government that: (1) no Federal funds appropriated under the Institute of Museum and Library Services (IMLS) Grants to States Program; (2) will be made available for public libraries and public elementary and secondary school libraries; (3) that do not receive E-Rate discounts; (4) to purchase computers to access the Internet or pay for the direct costs of accessing the Internet; (5) unless the libraries have certified that they have Internet safety policies in place that include the use of technology protection measures.

Id.

104. National Conference of State Legislatures, Children and the Internet: Laws Relating to Filtering, Blocking and Usage Policies in Schools and Libraries, <http://www.ncsl.org/issuesresearch/telecommunicationsinformationtechnology/stateinternetfilteringlaws/tabid/13491/default.aspx> (last visited May 7, 2010).

105. "A Web filter allows an enterprise or individual user to block out pages from Web sites that are likely to include objectionable advertising, pornographic content, spyware, viruses, and other objectionable content." Bitpipe, Internet Filtering, <http://www.bitpipe.com/tlist/Internet-Filtering.html> (last visited Apr. 16, 2010).

106. 17 U.S.C. § 1201(a) (2006).

107. If the library hosts content for third parties (such as users) then it can escape liability from monetary relief for copyright infringement committed by users only if it: (1) does not have actual knowledge that material is infringing; (2) is not aware of facts or circumstances that mean it should have known of the infringement; (3) acts expeditiously to remove the infringing material upon receiving such knowledge; (4) receives no financial benefit from the posting of the material; and (5) upon notification acts expeditiously to remove the claimed infringing material. 17 U.S.C. § 512(c)(1)(A)-(C) (2006).

108. *Id.* § 512(c)(3)(A).

constitutes fair use, it may send a counter-notification to the owner that it intends to re-post the material.¹⁰⁹ The library may then re-post the content on the Internet.¹¹⁰

III. LIBRARY USE OF UGC FOR INTERNAL PURPOSES AND TEACHING

The use of UGC is not an issue unique to libraries. One difference unique to libraries, however, may be the public nature of libraries and the fact that they typically distribute materials and information more broadly than many other users of UGC.

A. Displays and Exhibits

Libraries create both physical and online displays to promote reading, advertise services, and highlight events such as poetry readings and authors' visits to the library. They may wish to include in the displays photographs that they locate on websites like Flickr¹¹¹ or video clips from YouTube.¹¹² For example, a library display about the Harry Potter books could include images of the books' dust jackets, newspaper clippings, photographs of the actors who portray the characters in the movies, and a short movie clip. The library may also want to include UGC, such as fan fiction excerpts or blog postings. The copyright concerns for libraries that post fan fiction and blog entries are much the same as for others who reuse UGC.¹¹³ It could be infringement, or it could be permissible if the online content is publicly available with a license from the owner of the site, either explicit or by inference, as many sites appear to adopt. Furthermore, if the original blog post infringed by including a portion of a copyrighted work in the post, a library that incorporates the infringing blog entry into a library display would also infringe the copyright by displaying or reposting that infringing portion.

B. Educational Exceptions for Performance and Display

The exceptions to the Copyright Act that permit nonprofit educational institutions to perform and display audiovisual works in

109. *Id.* § 512(g).

110. *Id.*

111. Flickr, <http://www.flickr.com> (last visited Apr. 16, 2010).

112. YouTube, <http://www.youtube.com> (last visited Apr. 16, 2010).

113. See Lee, *supra* note 4, at 1531 (arguing that fan fiction, which long pre-dates the development of the Internet, has at least a colorable fair use claim and noting that no copyright owner has challenged fan fiction to the extent of obtaining a judgment in court).

the course of instruction also apply to nonprofit academic and school libraries.¹¹⁴ When a class comes to the library to see a film, if the purpose of the film screening is to instruct to a class, and no members of the public are present, then the library is considered to be a classroom for that screening.¹¹⁵ Thus, no copyright infringement on the part of the library occurs.

One caveat is that for face-to-face teaching, any copy of a copyrighted audiovisual work that is used must have been lawfully made.¹¹⁶ In a live classroom, entire works may be shown for instruction purposes, but when a teacher shows a YouTube video that consists of a television program that was downloaded without permission, the copy was not lawfully made. Fair use still applies, though, and one might question whether use of such a video could be considered fair use if it is used as an example to students of what not to do.

For performances that are to be transmitted for distance education or online instruction, copies of all types of materials must be lawfully made.¹¹⁷ The Technology in Education and Copyright Harmonization (TEACH) Act,¹¹⁸ which became § 110(2), applies to transmitted or online performances.¹¹⁹ Non-dramatic literary¹²⁰ and musical works¹²¹ may be performed in full, but only reasonable and limited portions of other copyrighted works, such as motion pictures and other audiovisual works, may be performed.¹²² This does not mean that a nonprofit educational institution may never transmit an entire motion picture, but it does mean that permission of the copyright owner would be required, typically in the form of a license. Academic and school libraries may be involved in acquiring the audiovisual works for online use, obtaining licenses and sometimes

114. 17 U.S.C. § 110(1)-(2) (2006).

115.H.R. REP. NO. 94-1476 (1976), *reprinted in* 17 OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 82 (George S. Grossman ed., 1977).

116. 17 U.S.C. § 110(1).

117. *Id.* § 110(2).

118. Technology, Education, and Copyright Harmonization Act of 2002, Pub. L. No. 107-123, 116 Stat. 1758, 1910 (2002).

119. 17 U.S.C. § 110(2) (2006).

120. Nondramatic literary works include all literary works such as novels and poems, but not dramatic works such as plays. *See* Compendium II: Copyright Office Practice § 300, http://ipmall.info/hosted_resources/CopyrightCompendium/chapter_0300.asp (last visited May 7, 2010).

121. Nondramatic musical works exclude opera and musical comedy although a single song from a musical comedy is treated as a nondramatic musical work. RICHARD SCHULENBERG, *LEGAL ASPECTS OF THE MUSIC INDUSTRY: AN INSIDER'S VIEW OF THE LEGAL AND PRACTICAL ASPECTS OF THE MUSIC BUSINESS* 454 (Billboard Books 1999).

122. 17 U.S.C. § 110(2).

even in transmitting the performance of the work to the members of a class.

IV. ASSISTING USERS TO CREATE AND USE UGC

Users often ask libraries not only to assist them in locating materials, but also to help them create mashups, collages, and other collections of content. Librarians want to encourage creativity on behalf of students and other users, and to support their production of these works or projects. Many libraries house the equipment to help users create these works, and even have on-site video laboratories for student and patron use. For example, the House Undergraduate Library at the University of North Carolina-Chapel Hill's Collaboratory has the equipment to assist students with multimedia and digital projects.¹²³

Library users rely on librarians not just to assist them with creating these works but also to advise them on fair use as it relates to incorporating content that others own in their projects.¹²⁴ Moreover, the users are often completing class projects, a fact that triggers the Copyright Act exceptions for performances and displays.¹²⁵ Typically, if the mashup or other work is to be shown only to a live class, no permission from the copyright owners is required under § 110(1). If a project containing a copyrighted work is to be posted on the Internet and will be accessible to the general public, however, the user needs to obtain permission from the copyright owner to post the copyrighted parts of the work.¹²⁶

123. See University of North Carolina Libraries, Media Resources Center, <http://www.lib.unc.edu/house/mrc/index.html> (last visited Apr. 16, 2010) ("The Digital Media Lab gives UNC-Chapel Hill students, faculty and staff access to the latest in multimedia software and hardware. Our lab has eleven work stations, each offering a wide range of video hardware and software. The Digital Audio Lab has a G5 Apple PowerMac, 88-key weighted MIDI keyboard, Nady condenser mics, MOTU audio interface and an Emagic Logic mixing board. Equipped with software such as GarageBand, Logic and Bias Peak, the Digital Audio Lab allows everybody from the beginner to the pro to create music from the ground up.").

124. Kathryn Metzinger Miller, *Copyright in a Social World*, MULTIMEDIA & INTERNET@SCHOOLS, May/June 2008, available at <http://www.mmischools.com/Articles/Editorial/Features/Copyright-in-a-Social-World-61012.aspx>.

125. 17 U.S.C. § 110(1) (stating that teachers and students in a nonprofit educational institution may perform or display copyrighted works in the course of instruction and that a class project presented only to the class conforms with the requirements of this section of the statute).

126. Section 110(1) applies only to face-to-face teaching. Any transmitted performance or display is covered by § 110(2). However, these performances are limited to students enrolled in the class. Posting a work on the web so that anyone can access it does not qualify for the § 110(2) exemption.

Librarians face difficult questions almost daily about the use of non-licensed copyrighted works and whether the use is potentially a fair use. The lack of clarity and certainty about fair use is a problem for library users just as it is for librarians and others, and greater clarity about fair use remains an unachieved goal. Furthermore, such requests for advice create a conundrum for librarians who do not want to be accused of practicing law without a license.¹²⁷ Still, there are a number of things that librarians can do to assist users to comply with the copyright law. For example, they can simply recommend that students and other users create original content. There are also some materials that clearly are “safe” to use, which include: (1) public domain material, (2) works licensed by the institution, (3) material that is licensed under some of the Creative Commons licenses that permit reuse, and (4) works for which the student has obtained permission. Additionally, directing users to various best practices documents often helps to guide users in their quest to avoid copyright violations. For example, best practices have been created for documentary filmmakers, for open course ware, and for online video.¹²⁸ Librarians may also recommend that the user actually read the online copyright notice or license agreement for the work. While not dispositive on the fair use issue, it is a useful starting point. The copyright owner may actually have granted permission for such use and so indicates in the online copyright notice or license.

Librarians are also asked for advice on using UGC which might consist solely of original work, a combination of original and copyright protected works, or solely of copyrighted works. It is difficult for librarians to provide advice to users because of the variety of content and the fact that the copyright status of particular content may not even be known. With blogs, for example, if no citation to another source is included with the entry, it is not always clear whether the content is original or is copied. Thus, librarians have no way to judge whether the content is original or may be copied.

Other than quoting general copyright and fair use statutory tests, offering guidance to students is particularly difficult. Librarians should be cautious, however, about advising broad use of others’ works because of the librarian’s personal conviction that it ought to be fair

127. In some states, unauthorized practice of law is a felony. See SOUTHERN CALIFORNIA ASSOCIATION OF LAW LIBRARIES, LOCATING THE LAW, ch. 4, available at <http://www.aallnet.org/chapter/scall/locating/ch4.pdf>; Librarians and the Unauthorized Practice of Law, http://law.sc.edu/library/circuit_riders/unauthorized_practice_of_law.pdf.

128. See Center for Social Media at American University, Fair Use and Copyright, http://www.centerforsocialmedia.org/resources/fair_use/ (last visited Apr. 16, 2010) (collecting best practice statements about using copyrighted content in various contexts).

use. The use may prove not to be fair use and the advice will have misled the user to his or her detriment or to the library's detriment.

V. CONCLUSION

Libraries will continue to deal with digital materials just as they have with other new formats in the past. Drawing on traditional library practices provides answers to questions such as how to organize materials and what language to use for disclaimers. However, prior experience with analog materials cannot answer all of these questions because digital works present some new, unique, and challenging copyright issues. Additionally, digital issues are still relatively new for libraries, and library associations are trying to provide educational materials and sessions for their members to provide answers when it is possible.¹²⁹

Section 108 of the Copyright Act was amended in 1998 to permit some digital preservation and replacement activities by libraries, but more is needed. If Congress would adopt the Section 108 Study Group recommendations, library digitization projects would benefit tremendously. Changes in addition to the digital preservation ones made by the Study Group are also needed. For example, library users should be able to access digital collections by libraries off site as long as there is appropriate authentication of the user's credentials. Users are demanding this access and copyright holders and Congress will be forced to find ways to make it happen. Further, users are demanding digital copies in lieu of photocopies that § 108(d) and (e) permit libraries to make under certain conditions. The law should permit libraries and their users to take advantage of digital technologies to provide these copies with appropriate safeguards for the rights of the copyright owner.

At the present time, librarians should continue to stay current with information about UGC and copyright issues as answers evolve. Users are unlikely to become knowledgeable about copyright in the near future, but libraries could create educational materials like frequently asked question sheets (FAQs) to advise them on copyright for content that they create. It is possible that these questions will be

129. See American Library Association, Copyright, <http://www.ala.org/ala/issuesadvocacy/copyright/index.cfm> (last visited May 7, 2010); Copyright@AALL, <http://www.aallnet.org/committee/copyright> (last visited May 7, 2010); Medical Library Association Copyright Management Guidelines, http://www.mlanet.org/government/positions/copyright_mgmt.html (last visited May 7, 2010); Special Libraries Association, Copyright Management Certificate Program, <http://www.sla.org/content/learn/certificates/copyright/index.cfm> (last visited May 7, 2010).

answered over time, but new issues will arise and complete clarity from the copyright statute appears illusory at best.