
NOTE

CONTRACT, COPYRIGHT, AND THE FUTURE OF DIGITAL PRESERVATION

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I. INTRODUCTION

Today, fifty-one percent of U.S. households have at least one computer,¹

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¹ U.S. CENSUS BUREAU, HOME COMPUTERS AND INTERNET USE IN THE UNITED STATES: AUGUST 2000 5 (2001), at <http://www.census.gov/population/www/socdemo/computer.html> (last visited Jan. 21, 2003).

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and eighty-nine percent of school-age children have access to a computer either at school or at home.² More of our culture is being created and stored electronically, from school projects to financial data to works of art and music, than ever before.

The problem is that no one is prepared to preserve and protect these digital cultural artifacts.³ We have records from thousands of years ago because records were carved in stone or painted on cave walls – media that would last thousands of years. Even paper has a relatively impressive lifespan of 100-500 years.⁴ Perhaps more importantly, paper is very robust; it survives well even when neglected. Digital media are not nearly so robust or long-lasting. CD-ROMs may last as little as five years or as many as 200, depending on the storage conditions.⁵ Digital tape will last anywhere from ten to thirty years.⁶ The average Web page lasts only two or three months.⁷

In an increasingly digital world, libraries and archives must develop strategies to preserve and provide access to Web pages, e-books, and online journals, magazines, and newspapers. However, libraries and archives face a very different legal landscape in the digital world than they do in the world of published print materials. Most notably, the acquisition and use of digital assets may not be governed by copyright, but instead by contract.⁸ This threatens the ability of libraries to lend copies, to make copies, to keep copies, and, most importantly, to preserve copies of digital works.⁹

Congress should create new legal rights for all non-profit libraries and archives. These organizations need new rights immediately to ensure that their best preservation efforts will be legally acceptable. Only with legal buttressing can libraries make digital preservation an established practice. Only when

² *Id.*

³ See Peter Lyman & Howard Besser, *Defining the Problem of Our Vanishing Memory: Background, Current Status, Models for Resolution*, in THE PAUL H. GETTY TRUST, TIME AND BITS: MANAGING DIGITAL CONTINUITY 11, 11-14 (Margaret MacLean & Ben H. Davis eds., 1998).

⁴ *Id.* at back cover.

⁵ *Id.*

⁶ *Id.*

⁷ COUNCIL ON LIBRARY AND INFORMATION RESOURCES & THE LIBRARY OF CONGRESS, BUILDING A NATIONAL STRATEGY FOR DIGITAL PRESERVATION: ISSUES IN DIGITAL MEDIA ARCHIVING 38 (2002), available at <http://www.clir.org/pubs/abstract/pub106abst.html> [hereinafter COUNCIL ON LIBRARY AND INFORMATION RESOURCES].

⁸ See *id.* at 39; COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS AND THE EMERGING INFORMATION INFRASTRUCTURE OF THE NATIONAL ACADEMY OF SCIENCES, THE DIGITAL DILEMMA: INTELLECTUAL PROPERTY IN THE INFORMATION AGE 100 (2000), available at <http://books.nap.edu/books/0309064996/html/index.html> (last visited Jan. 21, 2003) [hereinafter COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS].

⁹ See COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 39.

preservation is an established practice will society be able to “fully exploit the digital medium to generate, publish and disseminate information.”¹⁰

This Note proposes legal changes that will enable libraries and archives to preserve their traditional functions in our increasingly digital world. Part II of this Note briefly explains the traditional functions of libraries and how the copyright law has been modified to preserve those functions. Part III explores the new features of digital information and its distribution systems and why they threaten the traditional functions of the library system. Part IV recommends a “rescue right” that libraries and archives could invoke in order to prevent the disappearance of digital assets. It also recommends that libraries be allowed to lend digital works after those works have ceased to have commercial value. Works that remain commercially valuable would continue to be restricted to use only on library premises. Part V compares this rescue right with the law of abandonment and eminent domain. Finally, Part VI addresses potential objections to the proposed rights. The comparisons in Parts V and VI clarify why the proposed rights are necessary, reasonable, and of minimal threat to the interests of copyright owners.

II. LIBRARIES AND COPYRIGHT IN THE WORLD OF PRINT

A. Libraries and the Legal System

The first publicly supported library in the nation was established in Charles Town (South Carolina) in 1698. This library, founded just 28 years after the first permanent settlement, owed its organization to the zeal and enthusiasm of the Reverend Dr. Thomas Bray, an Episcopal clergyman of that period. The General Assembly of South Carolina confirmed the establishment of the library by official act in 1700 but even before that date had appropriated funds for the purchase of books for the new “Publick Library.”¹¹

Libraries in this country began as an effort to bring books to the masses.¹² This effort has evolved into a dual system of libraries and archives, with libraries focusing on providing access and archives focusing on preservation.¹³

¹⁰ THE COMMISSION ON PRESERVATION AND ACCESS, PRESERVING DIGITAL INFORMATION: REPORT OF THE TASK FORCE ON ARCHIVING DIGITAL INFORMATION 7 (1996), available at <http://www.rlg.org/ArchTF/> (last visited Jan. 21, 2003) [hereinafter THE COMMISSION ON PRESERVATION AND ACCESS].

¹¹ ESTELLENE P. WALKER, SO GOOD AND NECESSARY A WORK: THE PUBLIC LIBRARY IN SOUTH CAROLINA 1698-1980 (1981), available at <http://www.libsci.sc.edu/histories/vts/epw01.html> (last visited Jan. 21, 2003).

¹² See generally *id.*

¹³ See THE COMMISSION ON PRESERVATION AND ACCESS, *supra* note 10, at 8 (noting that libraries usually preserve works for the short to medium term so that they can continue to be

However, each has a responsibility for providing both preservation and access,¹⁴ and these responsibilities are mutually sustaining. If there were no access, the public would be reluctant to fund preservation; if there were no preservation, there would be fewer materials available to access and access would be correspondingly less valuable.¹⁵

The law of copyright has, to date, evolved in such a way that the essential features of the library system are protected, even as the rights of copyright holders have grown in number and in scope. Authors' rights in their works, their copyrights, formally came into being with the Statute of Anne in England in 1710.¹⁶ The purpose of this act was "the encouragement of learned men to compose and write useful books."¹⁷ It aimed to achieve this end by giving authors the exclusive right to make copies of their new works for up to twenty-one years.¹⁸

In this country, some of the individual states had their own copyright and patent laws,¹⁹ but the Framers recognized the need for uniformity, and so included the "Copyright Clause" in the United States Constitution.²⁰ This clause gives 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."²¹

Congress has enacted several Copyright Acts since then, the first in 1790.²² The most recent is the Copyright Act of 1976.²³ This act was amended twice in 1998 by the Sonny Bono Copyright Term Extension Act (CTEA)²⁴ and the Digital Millennium Copyright Act (DMCA).²⁵ The CTEA extended the basic copyright grant to a term of the life of the author plus seventy years.²⁶ The DMCA, among other things, restricts the circulation of digital copies of works and makes it a crime to circumvent technology that effectively controls access

accessed by patrons; archives focus on more intensive, long-term preservation, which, for print materials, often necessitates limited public access).

¹⁴ *Id.*

¹⁵ See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 8, at 114, 119.

¹⁶ 1710, 8 Ann., c. 19 (Eng.).

¹⁷ *Id.* at c. 19, § 1.

¹⁸ *Id.*

¹⁹ See Howard B. Abrams, *The Historic Foundation of American Copyright Law: Exploding the Myth of Common Law Copyright*, 29 WAYNE L. REV. 1119, 1173 (1983).

²⁰ U.S. CONST. art. I, § 8, cl. 8.

²¹ *Id.*

²² Act of May 31, 1790, ch. 15, § 1 Stat. 124 (current version at 17 U.S.C. (2001)).

²³ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976).

²⁴ The Sonny Bono Copyright Term Extension Act, Pub. L. No. 105 – 298, 112 Stat. 2827 (1998).

²⁵ The Digital Millennium Copyright Act, Pub. L. No. 105 – 304, 112 Stat. 2860 (1998).

²⁶ 17 U.S.C. § 302 (2000).

to a work.²⁷ Both of these amendments will have a detrimental effect on the archiving of our digital culture if some action is not taken.

One of the most important aspects of copyright law for libraries has always been the first-sale doctrine.²⁸ The first-sale doctrine grew out of English common law and was cited in court decisions long before being codified in the most recent copyright act.²⁹ Once a physical copy of a work is lawfully obtained, the first sale doctrine allows the lawful owner to dispose of that copy as he or she sees fit. Section 109(a) of the Copyright Act provides that “the owner of a particular copy . . . is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”³⁰ This provision is what allows libraries to lend books to patrons and patrons to donate books to libraries without violating copyright law.

Congress also granted libraries special exemptions to some of the rules of the copyright regime. For example, copyright law reserves the rights to reproduce and to distribute copies of protected works to the owner of the copyright.³¹ Libraries, however, are allowed to make copies of small portions of copyrighted works for patrons³² or even copies of a complete work, if that work is out of print.³³ Libraries may also make up to three copies of a work for the purposes of preservation, if new copies of the work are not commercially available.³⁴

Copyright owners are required to deposit a copy of all published works originating in the United States with the Library of Congress within three months of publication.³⁵ Failure to deposit can result in the levying of fines.³⁶ Once materials are submitted, however, the Library selects only about half of them for addition to its collection.³⁷ These materials can then be requested and borrowed by other libraries and patrons around the country.

²⁷ *Id.* § 1201(a)(1)(A).

²⁸ *Id.* § 109.

²⁹ *See* *Stephens v. Cady*, 55 U.S. 528, 530-531 (1852) (citing Lord Mansfield in *Millar v. Taylor* for the principle that ownership of the copyright and ownership of the physical work were distinct notions).

³⁰ 17 U.S.C. § 109(a) (2000).

³¹ *Id.* § 106.

³² *Id.* § 108(d).

³³ *Id.* § 108(e).

³⁴ *Id.* § 108(c).

³⁵ 17 U.S.C. § 407(a) (2000).

³⁶ *Id.* § 407(d).

³⁷ COMMITTEE ON AN INFORMATION TECHNOLOGY STRATEGY FOR THE LIBRARY OF CONGRESS, LC21: A DIGITAL STRATEGY FOR THE LIBRARY OF CONGRESS 83 (2000), available at <http://books.nap.edu/books/0309071445/html/index.html> (last visited Jan. 21, 2003).

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B. Library Acquisitions

The above passage on the establishment of the nation's first library is instructive in several respects. First, it is important to note that the method of funding libraries has not changed since 1700. Support for public libraries still comes largely from local tax money, supported by state and federal aid and private donations.³⁸ As a result, there is likely to be a strong causal link between a library's ability to provide useful access to its patrons and the willingness of those patrons to continue to fund the library.

Acquisition practices are also little changed. Libraries still make most of their purchases from either a commercial or educational entity.³⁹ Books, magazines, and newspapers come from institutional publishers.⁴⁰ Journals are purchased from publishers or research organizations or universities.⁴¹ Relatively few items are obtained from individuals, either through purchase or donation.⁴²

In the digital age, these practices will likely change as the ability of individuals to become their own publishers increases. This can already be seen in the case of the World Wide Web. The Web is created and recreated by millions of individuals – each of whom has a copyright in his or her individual contribution.⁴³ Since preserving computer files involves making copies, a library that wishes to preserve a snapshot of the Web would need to get permission from every single Web site creator.⁴⁴ This would, of course, be physically impossible. The Web, however, is now arguably one of the most important vehicles for the transmission of human culture. The archiving of it should not be made impossible by the law of copyright.

III. THE DIGITAL FUTURE

We're very fortunate that civilizations thousands of years ago recorded things on media like stone tablets that lasted for thousands of years. And

³⁸ See WALKER, *supra* note 11, at vi (discussing the funding of the modern public library system in South Carolina).

³⁹ COMMITTEE ON AN INFORMATION TECHNOLOGY STRATEGY FOR THE LIBRARY OF CONGRESS, *supra* note 37, at 83-84.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*; see also <http://www.loc.gov/about/faqs/index.html> (last visited Jan 21, 2003) (discussing the collection policies of the Library of Congress).

⁴³ See COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7; see also *Getaped.com, Inc. v. Cangemi*, 188 F. Supp. 2d 398 (S.D.N.Y. 2002) (holding public Web pages were considered published works and therefore entitled to statutory damages if successful in an infringement action).

⁴⁴ A snapshot of the Web is a static copy of all accessible Web pages as they looked on the date the copy was made.

we're fortunate that people hundreds of years ago recorded things on acid-free paper that lasted for hundreds of years. And I suppose by the same reasoning, we're fortunate that people 10 years ago stored things on media like magnetic tapes that lasted at least 10 years. . . . But our good fortune is running out . . . because we're in a period now where we are storing things that will not last even our own lifetimes.⁴⁵

In the future, acquisition of e-books and online periodicals will transpire in one of two ways. Libraries will either be allowed to download and keep copies without any restrictions, much as they now do with paper issues, or they will have to agree to the terms of various "click-wrap" contracts in return for remote access to some subset of a publisher's content.⁴⁶ It is this change to contractual relationships that poses the most danger to traditional library functions because contract terms supercede the law of copyright and can restrict the rights that libraries and their patrons have traditionally enjoyed.⁴⁷

Libraries currently subscribe to and maintain collections of many print periodicals. The Harvard libraries receive approximately 100,000 active titles.⁴⁸ These collections are highly redundant and libraries take active measures (binding, repairing, reformatting, etc.) to ensure the usability of these collections for current and future generations.⁴⁹ The increasing prevalence of contract-governed access, instead of copyright-governed ownership, will work fundamental changes in these and other practices.⁵⁰ Libraries will no longer receive and store materials locally. Nor will they necessarily enjoy the same rights as they would under the copyright regime.⁵¹ Most notably, these transactions do not provide ownership. They are not sales, but merely access licenses. For a certain fee, a library will get online access to the New York Times, for instance, but it will not actually own any copies of the paper. The days of thumbing through back issues of old magazines at the library or even in Aunt Mary's attic are gone; access to back issues may now be limited to users willing to pay a higher fee.⁵² According to the Library of Congress, this change will have profound implications for preservation because it will

⁴⁵ TIME AND BITS, *supra* note 3, at 42 (quoting Danny Hillis, Vice President of Research & Development at Walt Disney Imagineering, at a panel discussion at the Getty Institute).

⁴⁶ COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 8, at 100; COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 44.

⁴⁷ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996); *I-Lan Systems, Inc. v. Netscout Serv. Level Corp.* 183 F. Supp. 2d 328, 329 (D. Mass. 2002) (each holding that click-wrap licenses are enforceable).

⁴⁸ COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 10.

⁴⁹ *Id.*

⁵⁰ *Id.* at 11.

⁵¹ *Id.*

⁵² *Id.* at 35.

eliminate both the ability of libraries to store copies for future generations of users and the redundancy of copies that has heretofore ensured that data survived both accidental and intentional destruction.⁵³

Licenses may also restrict the types of use that can be made of a work. E-books, for instance, are usually delivered by allowing the reader to download a copy of the book, along with the necessary software. However, each download is accompanied by technological as well as contractual restrictions. These restrictions eliminate the ability to print pages, to copy and paste, or to lend a copy of the work.⁵⁴ The work may also be set to expire after a certain length of time or after the work is accessed a certain number of times.⁵⁵ Merely monitoring all these various contracts, along with any technological restrictions that may come with them, will add substantially to the librarian's task.⁵⁶

Though the change to a contract-governed legal environment poses the biggest challenge to preservation efforts, even if digital works were provided under existing copyright law, libraries would be impaired from functioning as they do in relation to print work. In the past, preservation involved making copies of paper assets. These copies could be kept as archival backup copies while the original, purchased copy continued to be lent and used.⁵⁷ In the digital world, it will not be so simple.

The Digital Millennium Copyright Act amended the existing copyright law to allow libraries to make digital copies of works they own, but it limited the use of those copies to the library premises.⁵⁸ Presumably, this restriction extends to works that are acquired in digital format, with the exception of computer programs, of which lending is specifically allowed.⁵⁹

More importantly, the traditional legal doctrine that allows for lending of print works does not apply to the lending of many digital works.⁶⁰ The first-sale doctrine provides an exception to the distribution right afforded to

⁵³ COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 11.

⁵⁴ *See, e.g.*, eBooks.com, at <http://www.ebooks.com> (last visited Jan. 16, 2003) (using some or all of the technological restrictions mentioned in selling electronic copies of various books to consumers).

⁵⁵ *See id.*

⁵⁶ *See* AMERICAN LIBRARY ASSOCIATION, HOW WILL UCITA IMPACT LIBRARIES?, available at http://www.ala.org/Content/NavigationMenu/Our_Association/Offices/ALA_Washington/Issues2/Copyright1/UCITA/Impact.htm. (last visited Aug. 19, 2003) (asserting that, "libraries can anticipate that more staff time will be needed to negotiate and review contracts for access or lease of computer information products.").

⁵⁷ 17 U.S.C. §§ 108(c), 109 (2001).

⁵⁸ *Id.* § 108(b)-(c).

⁵⁹ *Id.* § 109(b).

⁶⁰ COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 8, at 106.

copyright owners, but not to the right of reproduction.⁶¹ Libraries are allowed to dispose of their copies in any way they see fit, but they are not allowed to make more copies (except under limited circumstances).⁶² The nature of digital documents is such that lending would almost always involve copying. Lending an issue of an online magazine, for example, would involve making a copy,⁶³ and would, therefore, be illegal – at least until its term of copyright protection expired.⁶⁴

To the extent that these restrictions abridge what the public views as its traditional rights of access – i.e., the ability to check out a book and take it home to read – financial support for all library activities may dry up. Public support for libraries is premised on the ability of libraries to make works accessible.⁶⁵ It is uncertain whether the public would agree to fund the century-long preservation of an electronic book if everyone who wished to read it during the period of the author's life plus seventy years had to physically go to the library, sit at a computer terminal, and stay until he or she was done.⁶⁶

The Internet also poses a challenge to traditional acquisition practices. Though the Web is publicly accessible, it is protected by copyright.⁶⁷ Since it has no single creator, owner, or distributor, a library that wanted to save a snapshot of the internet would presumably be required to get permission from every single contributor before such action would be legal. This would be impossible as there are over four billion public Web pages, all made up of various elements (such as text, graphics, sounds, video, and the underlying code), which may all belong to different intellectual property owners.⁶⁸

IV. THE PROPOSED RESCUE POWER

This proposal envisions legislation setting forth a national, comprehensive strategy for digital preservation, along with guidelines for the furtherance of that strategy. The centerpiece of the legislation would be the ability of libraries and archives to abridge copyright, contract and technological restrictions on digital works in order to ensure their preservation in the face of

⁶¹ 17 U.S.C. § 109(a) (2001).

⁶² *Id.* § 108.

⁶³ COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 8, at 106; *see also* MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511, 518 (9th Cir. 1993) (holding that loading a computer program into a computer's RAM involved making a copy for purposes of copyright law).

⁶⁴ 17 U.S.C. § 106 (2001).

⁶⁵ COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 8, at 114.

⁶⁶ *Id.* at 119.

⁶⁷ *See* Getaped.com, Inc. v. Cangemi, 188 F. Supp. 2d 398 (S.D.N.Y. 2002).

⁶⁸ COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 38, 42.

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owner neglect, the inability to find an owner, or an owner's active intention to destroy a valuable cultural artifact. This legislation would abridge current copyright law by allowing the copying of Web sites, by eliminating library liability for circumventing technological control measures in certain circumstances, and by expressly allowing libraries to distribute digital works after the works have ceased to be commercially available. It would also need to clearly preempt state contract law and allow libraries, upon a finding that the work was endangered, to copy works provided to them via a license. An examination of state power to regulate other forms of property, recent congressional actions limiting copyrights, and the minimal economic impact such a right would have on content owners will show that the rights called for in this Note are reasonable abridgements of the current rights of content owners.

Libraries and archives should be able to make copies of works they do not own, but to which they have access, without the permission of the copyright owner. They should also have the power to compel the owner to make a copy available for preservation if no copy of the work is available.

Libraries and archives should also be allowed to copy digital documents for patrons and make digital documents available outside their premises upon a finding that the work has not been commercially available for a reasonable period – five years, for example. Current law only allows the lending of digital works after their copyright has expired, life of the author plus seventy years, or twenty years earlier, life of the author plus fifty years, if the work is no longer commercially available.⁶⁹ The public, understandably, may not be willing to fund such preservation for the length of time that will be necessary before they can legally enjoy the same rights in digital media that they now have with respect to print media. Without this legal change, the increasing terms of copyright and the decreasing lifespan of popular media may combine to render libraries obsolete.

A. The Right to Preserve Digital Works

For most types of endangered digital works, the first step would be to simply request donation of a copy for preservation. Many owners of endangered work would be happy to foist the burden of preservation onto a library.⁷⁰ If an organization refuses to comply with a request to donate copies for preservation, archives would be allowed either to go to court to force a transfer of the assets from the owner or to bypass technological access controls and/or contract restrictions on copies to which the library might already have access. The most frequent effect of this right would merely be to enable libraries and archives to use and preserve assets whose owners could no longer

⁶⁹ 17 U.S.C. § 108(h) (2001).

⁷⁰ COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 15.

be identified.⁷¹

The right could also be invoked in cases where a copyright owner acted, either intentionally or negligently, to endanger a work. For example, consider a popular author who distributes his books online in 2010, with all the appropriate contractual and technological restrictions, so that no customer owns a version that can be copied or transferred. He may decide in 2020 to remove several of his earlier works from his Web site because they are inferior and he wishes to rewrite them. He could even go so far as to cause the copies he already licensed to expire or crash if he planned in advance for this eventuality.

The author's opinion notwithstanding, these works might be culturally or historically important as a view into the author's early development as a writer. Under the proposed right, an archive would be able to force the author to make a copy of those works available to it, and to bypass the technological and contractual restrictions on copies of the digital books that the archive might already possess.

A more likely and striking example of why this right is necessary is RCA's destruction of its Camden, New Jersey, warehouse in the early 1960s. "The warehouse . . . held four floors of . . . pre-tape-era material ranging from metal parts, acetates, shellac disc masters, and alternate takes to test pressings, master matrix books and session rehearsal recordings."⁷² Some material was saved, but most of it was dynamited along with the warehouse and bulldozed into the Delaware River.⁷³ The same fate could easily await valuable published digital material if for-profit entities are the only ones with access to and control over the actual data.

B. The Right to Preserve the World Wide Web

The proposed rescue power would also specifically allow copying of the World Wide Web. In the case of the Internet, copyright puts a tremendous practical burden on would-be preservationists.⁷⁴ The Web is made up of over four billion public pages.⁷⁵ Finding the owners of all the respective pages, art,

⁷¹ See Brief of Amici Curiae American Association of Law Libraries at 19-20, *Eldred v. Ashcroft*, No. 01-618, 2003 U.S. LEXIS 751 (2003) (giving an example of a digitization project at the University of North Carolina that is limited to primary documents made prior to 1923 because the budget is not large enough to fund the extensive copyright searches that are necessary to locate individual owners of copyrights in personal documents).

⁷² *Id.* at 26-27 (citing Bill Holland, *Labels Strive to Rectify Past Archival Problems*, BILLBOARD, July 12, 1997).

⁷³ *Id.*

⁷⁴ See COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 38-42.

⁷⁵ *Id.* at 38.

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advertisements, sound, and graphics is impossible.⁷⁶ The rescue function would allow for the copying of public, non-password protected Web sites.

Current copyright law only allows an institution that owns a work to make up to three copies of that work for purposes of preservation.⁷⁷ The right advocated here would not be so limited. It would allow libraries, in the case of the World Wide Web, to copy works that they do not own, without permission from the copyright owner. Because of the short life-span of most Web pages, it would allow this copying to be done systematically, without any requirement of a finding that each individual page is in danger of disappearing.

Fortunately for the library-going public, the rationale for limiting the circulation of digital copies of print works or even digital copies of digital works does not really apply to the World Wide Web. The right proposed here would allow the unrestricted copying only of publicly available Web pages. These pages are, by definition, provided to the public free of charge, thus there is no commercial interest to protect on behalf of the copyright owner.

The only interest such an owner might have would be in the integrity of his work, specifically his own right to remove what he has published. But this right is unrealizable from the moment the information is put on the Web. Copies of the page will live in scattered memory caches and hard drives forever, even absent library action. Allowing the library to copy Web pages will merely turn what is now a publicly available, but transitory, resource into a resource that is available long-term as a series of snapshots of our culture. Since there is no harm to the commercial interests of copyright owners in the case of the World Wide Web, Congress should enact legislation making it clear that libraries have the right to copy, preserve, and distribute in digital format if they so desire, the pages of the World Wide Web.

This would go a long way toward giving digital preservation a more certain legal footing. However, it is only a partial solution since it does not address the availability of other types of digital works.

C. The Right to Lend Digital Materials

In recognition of the fact that access is what enables preservation, libraries and archives should also be allowed to lend digital materials the same way they lend paper materials, once those digital materials have ceased to have commercial value to their owners. Legislation giving libraries and archives the right to legally make and preserve copies of digital materials would likely be crafted, and judicially interpreted, so as to disrupt existing copyright law as little as possible. The legislation would need to make a specific allowance for this right to reproduce and distribute certain digital, copyrighted works. After all, allowing libraries to keep copies in their vaults poses little threat to

⁷⁶ See *id.* at 38-42.

⁷⁷ 17 U.S.C. § 108(c) (2001).

copyright holders, but allowing the circulation of digital copies could potentially pose a commercial threat.⁷⁸

This is the reason that current law limits the ability of libraries to circulate digital copies to the confines of their premises.⁷⁹ However, as noted earlier, access is one of the enablers of preservation.⁸⁰ A library's value is its vitality – “the diverse and innovative uses to which its collections are put.”⁸¹ Without this, a library is just a “book museum.”⁸² No legal changes will suffice if public support for the mission of preservation is undermined because its costs are perceived to exceed its benefits.

To continue with the earlier example, under current law any works rescued by the library from the dissatisfied author would be inaccessible to the public outside the library walls from 2020 until the author died and at least another fifty years had passed – which would be 2070 at the earliest, depending on the author's age and good fortune.⁸³ This is vastly different from the traditional way that libraries have functioned in relation to print works, and also vastly different from what the public expects from its libraries. Will the public be willing to foot the bill for the preservation of works that their children might not even live to see (unless they travel to the library and stay there until they are done with it – which, incidentally, negates all the advantages of going digital in the first place)?

Rev. Bray, the founder of the first public library in the United States, said in 1698 that, “[s]tanding libraries will signify little in the Country, where Persons must ride some miles to look into a Book; such journeys being too expensive of Time and Money, but Lending Libraries which come home to ‘em Without Charge, may tolerably well supply the Vacancies in their own Studies”⁸⁴ As more and more information becomes available in digital form, and only in digital form, this restriction runs the risk of negating the very reason libraries

⁷⁸ See COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 17, 40 (discussing owner sensitivity to who would be able to access their archived data).

⁷⁹ See 17 U.S.C. § 108(c) (2001); see also TIME WARNER, INC., *Comments on the DMCA Section 104 Report by the Register of Copyrights*, at <http://www.copyright.gov/reports/studies/dmca/comments/Init029.pdf> (last visited Jan. 24, 2003) (explaining how expanding the first sale doctrine into digital documents would result in damage to copyright owners).

⁸⁰ See COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 8, at 114 (“Patrons support libraries for their ability to make works accessible.”); see also TIME AND BITS, *supra* note 3, at 20 (noting that libraries restricted by the term of copyright on digital materials will be more like time capsules than libraries).

⁸¹ COMMITTEE ON AN INFORMATION TECHNOLOGY STRATEGY FOR THE LIBRARY OF CONGRESS, *supra* note 37, at 4.

⁸² *Id.*

⁸³ 17 U.S.C. § 302 (2001).

⁸⁴ WALKER, *supra* note 11.

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were initially formed.

For works that have been rescued or donated for purposes of preservation, this Note also proposes that libraries and archives should be allowed to infringe the Copyright holders' rights of reproduction *and* distribution when a finding can be made that the work is no longer commercially available and has not been available for a reasonable period, such as five years. This would minimize the harm to copyright owners and yet still allow the public to have access to digital works that is similar to what they enjoy in relation to printed works.

Currently, copies of paper materials can be lent to patrons long before their term of copyright has ended – indeed as soon as they are published and a lawful copy can be acquired.⁸⁵ Digital copies, however, are limited to use on the library premises until their copyright term (life of the author plus seventy years) expires.⁸⁶ A limit of five years after a work had ceased to be commercially available would give copyright owners time to negotiate the sale of their digital content to another provider if they themselves were unable to take advantage of it and ensure its continued availability. However, if they were not able to do so, if there were not enough of a market for their assets, then the public, and by extension, libraries, would not be bound by a term of copyright that gives them less access than they have to paper materials. Nor would the owner be injured, since by definition, he would have no remaining economic interest.

Under such a solution, the public would benefit from increased certainty of preservation and increased access, although it would not likely be seen as an increase, since it would merely mirror what most library patrons now enjoy. Copyright owners also would not be hurt because their market would have to disappear before libraries could lend their works outside the library walls. Such a right would not create any disincentives for copyright owners and would only help libraries and the public.

V. WHY THE PROPOSAL IS REASONABLE: SCOPE AND PRECEDENT

A. The Affected Parties

Though at first blush it might seem to be a broad grant of power, the proposed measure is not without legal precedent, nor would it be likely to affect large numbers of copyright holders, except in the case of the Web. Enabling Web preservation will require the infringement of the copyrights of everyone who publishes a publicly accessible Web page.

In other circumstances, the proposed reforms will only affect those

⁸⁵ 17 U.S.C. § 109 (2001).

⁸⁶ *Id.* § 108 (c). These works could be circulated twenty years earlier under the provisions of subsection h if they are no longer commercially available; *Id.* § 108 (h).

copyright holders who are both unwilling to donate their data and unable to assure its preservation themselves. Copyright owners will preserve their own information as long as it has value to them.⁸⁷ That value might be personal, academic or commercial. Those whose assets have merely personal or scholarly value may or may not be able to preserve the works themselves, but they would most likely be willing for others to preserve their works.⁸⁸ They might even be willing to invest in that preservation effort.⁸⁹

Works with ongoing commercial value, however, will not likely be relinquished to libraries and archives, at least not without access restrictions.⁹⁰ Access restrictions, in the case of commercially valuable works, are reasonable, and libraries would continue to honor them now and in the future.⁹¹ Also, in many cases, commercial entities will be able to undertake preservation themselves, simply because they have sufficient funding. However, this is not the best model for preservation, nor will it always be feasible.⁹²

One scenario in which the rescue right will come into play is when a commercial entity is failing to adequately preserve its assets. Such an entity might be going out of business or be unable to continue to fund an adequate preservation system. Alternatively, the owner of an asset may have already disappeared as a legal entity before the preservation decision is made. The rights advocated here, unlike those under the current copyright law, would not force libraries to choose between undertaking costly searches for owners or foregoing the information altogether.⁹³

Another possibility is that a work no longer has commercial value to the owner, but the owner is nevertheless unwilling for that work to be preserved. Such an eventuality might arise because an owner perceives that public access to his work will do him harm,⁹⁴ or because of a dispute over the method or manner in which the archive plans to preserve the work. For example, a library might want to preserve a work in the way it was originally seen or heard. An author, however, might want the best possible version of his work

⁸⁷ TIME AND BITS, *supra* note 3, at 30.

⁸⁸ COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 15.

⁸⁹ *Id.*

⁹⁰ *Id.* at 17.

⁹¹ *Id.* at 16-17.

⁹² See COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 16 (stating that preservation is best left to institutions for which it is a core mission).

⁹³ See Brief of Amici Curiae American Association of Law Libraries at 19-20, *Eldred v. Ashcroft*, No. 01-618, 2003 U.S. LEXIS 751 (Jan. 15, 2003) (giving an example of a digitization project at the University of North Carolina that is limited to primary documents made prior to 1923 because the budget is not large enough to fund the extensive copyright searches that are necessary to locate individual owners of copyrights in personal documents).

⁹⁴ See TIME AND BITS, *supra* note 3, at 30.

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preserved, complete with all possible technological clean-ups or enhancements.⁹⁵ The reverse could also occur. A library or archive might need to use compression technology to effectively store images, for example. Use of such technology can lead to irreversible loss of data,⁹⁶ to which an author might object.

Libraries and archives will make the decisions about what should be preserved and when preservation should occur.⁹⁷ Most likely, these decisions will be based on national guidelines or a national strategy drawn up in accordance with the legislation enabling the various preservation rights prescribed here.⁹⁸ Participating institutions would likely have to meet certain technical criteria in order to assure the public that preservation was being undertaken in the best known manner by any institution empowered to exercise these rights.⁹⁹

⁹⁵ THE COMMISSION ON PRESERVATION AND ACCESS, *supra* note 10, at 27.

⁹⁶ *Id.* at 13.

⁹⁷ *See id.* at 9 (discussing current library collection and preservation efforts with regard to periodicals).

⁹⁸ *See generally* COMMITTEE ON AN INFORMATION TECHNOLOGY STRATEGY FOR THE LIBRARY OF CONGRESS, *supra* note 37. This report is an initial step toward developing such a strategy for the Library of Congress.

⁹⁹ THE COMMISSION ON PRESERVATION AND ACCESS, *supra* note 10, at 49 n.16 (recommending that archives be certified, perhaps along the lines of the model used now to certify official depositories of government documents).

B. Abandonment as a Legal Basis for the Proposed Right to Lend Digital Copies

The Report of the Task Force on Archiving Digital Information briefly suggests that a legal argument for a rescue right might be based on the notion of abandonment in real property.¹⁰⁰ Although this analogy is too narrow to provide support for all three of the rights advocated in this Note, it does provide an appropriate analogy for the proposal to allow libraries to lend digital works when the work in question has not been commercially available for at least five years.

For property to be considered legally abandoned, the court must find that the owner intended to relinquish all his rights in the property¹⁰¹ and that he committed some overt act that would signify that intent to any possible takers.¹⁰² This analogy, therefore, would not support the preservation of Web pages, nor of works whose owners were opposed to preservation, neither of which could be characterized as abandoned.

However, the goals of abandonment law and of the rights advocated here are the same. They are utilitarian and focused on the furtherance of a common good, the preservation and use of property.¹⁰³ Trademark law has adopted an abandonment approach for that reason; it furthers trademark's goals of efficient markets and free speech.¹⁰⁴ The Lanham Act allows a defendant in a trademark infringement action to prove that the plaintiff abandoned the mark.¹⁰⁵ This must include a showing that the plaintiff discontinued its use of the mark with no intent to resume.¹⁰⁶ Nonuse for three consecutive years constitutes prima facie evidence of abandonment.¹⁰⁷

¹⁰⁰ *Id.* at 23.

¹⁰¹ See *Cerro de Alcala Homeowners Assn. v. Burns*, 169 Cal. App. 3d Supp. 1, 4 (Cal. App. Dep't Super. Ct. 1985); *Kahr v. Markland*, 543 N.E.2d 579, 608 (Ill. App. Ct. 1989); *Mitteneess v. Dahl*, 351 N.W.2d 685, 688 (Minn. Ct. App. 1984) (all stating that intent is crucial to a finding of abandonment).

¹⁰² See *Pickens v. Johnson*, 107 Cal. App. 2d 778, 787 (Cal. Ct. App. 1951); *Billings v. McDaniel*, 60 S.E.2d 592, 594 (S.C. 1950) (stating that an overt act was required to establish abandonment).

¹⁰³ See generally *JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY* 919 (4th ed. 1998) (explaining how abandonment law originated in feudal England from the requirement that a land tenant who did not perform his service forfeited his land).

¹⁰⁴ See *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 873, 875 (9th Cir. 1999) (noting that the goals of trademark law are to protect consumers and to protect business investments and how trademark law is narrowly crafted so as not to allow trademark rights to impinge on other non-trademark uses of words).

¹⁰⁵ 15 U.S.C. § 1127 (2001).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

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This is exactly the approach proposed here – with one modification to ensure that the rights of copyright owners are not unduly burdened. While trademarks and property are considered abandoned as to the whole world, the right advocated here is merely a right for libraries and archives to lend digital works in the same way that they lend paper works. The only requirement is that a showing can be made that the work has not been commercially available for five years. This proposed right would not put the work into the public domain, but would merely enable libraries to continue to function as they have in the past. The copyright owner's rights would still be valid against everyone except archives and lending libraries. Any library patron who abused the system could still be prosecuted for copyright infringement.

C. Eminent Domain Law as an Appropriate Analogy

The other proposed right, allowing a library to make copies of works without the copyright owner's permission, and in some cases against his wishes, needs some other legal basis besides abandonment. This right would specifically allow libraries to make and preserve copies of works that a copyright owner might want to destroy. In such a case, the owner cannot be said to have abandoned his interest in his property. Similarly, the owners of active Web pages cannot be said to have abandoned them.

Eminent domain/land use law provides an analogy for the proposed rights to copy and preserve Web pages and electronically distributed books and periodicals. Eminent domain law allows the state to take property for any legitimate public purpose.¹⁰⁸ It is what allows governments to create parks, build highways, and preserve historic buildings. The taking of property simply must be rationally related to a conceivable public use.¹⁰⁹ Surely, if the preservation of buildings for their aesthetic value is a legitimate public purpose,¹¹⁰ then preservation of our cultural record is also legitimate.

The problem with rooting such a rescue right solely in the power of eminent domain is that the Fifth Amendment of the U.S. Constitution requires that compensation be provided to the owner when property is taken for a public use.¹¹¹ For libraries to have to negotiate with every owner for the rights to preserve the information would discourage donation and give a perverse

¹⁰⁸ See e.g., *Dolan v. Tigard*, 512 U.S. 374, 386 (1994); *State ex rel. Wash. State Conv. and Trade Ctr. v. Evans*, 966 P.2d 1252, 1258 (Wash. 1998).

¹⁰⁹ See *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (holding the housing authority's action legal because it was rationally related to the achievement of a legitimate public purpose).

¹¹⁰ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978) (stating that the "objective of preserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible governmental goal.").

¹¹¹ U.S. CONST. amend. V.

incentive for owners to neglect or threaten to destroy their digital assets that are no longer commercially valuable, but which have value to the historian or scholar. It would also put the additional burden on libraries of having to initiate legal actions.¹¹² This is a role that libraries and archives are neither equipped nor funded to perform. Libraries are not the sort of public agencies that are staffed with lawyers and accustomed to going to court on a regular basis. To change that runs the risk of fundamentally altering the role of the library. Changes in the function of libraries are exactly what this note hopes to avoid.

The right proposed here is much closer to a regulation than a taking. Thus, the issue of compensation is not an obstacle. The closest analogy from real property law is the analogy to historic preservation. The seminal case on this issue, *Penn Central Transportation Co. v. City of New York*,¹¹³ acknowledged that the inquiry into whether a regulation constituted a taking was somewhat ad hoc.¹¹⁴ However, Justice Brennan then went on to identify two factors that the court would take into account.¹¹⁵ The first of these is the economic impact of the regulation on the claimant, specifically whether the regulation interferes with “distinct investment-backed expectations.”¹¹⁶ The other important factor is the character of the government action.¹¹⁷ A taking will more readily be found when the government’s use constitutes a physical invasion of the property, as opposed to “some public program adjusting the benefits and burdens of economic life to promote the common good.”¹¹⁸

When a library requires an owner to provide a copy of a work, or acquires such a copy itself by bypassing the work’s accompanying technological or contractual restrictions, the owner has not been deprived of either the use or value of his property. He has merely been deprived of the ability to wipe all traces of it from the earth, either intentionally or through neglect. This is exactly what the owners of Grand Central Station lost in the *Penn Central* case.¹¹⁹ Moreover, the minimization of harm to copyright owners would be assured by restricting the ability of libraries and archives to distribute

¹¹² The usual way a state exercises its power of eminent domain is through condemnation proceedings. See *State v. Blackburn*, 655 So. 2d 948 (Ala. 1995); *Union Pac. R.R. v. State ex rel. Faulkner County*, 873 S.W.2d 805; (Ark. 1994) (both examples of state condemnation actions).

¹¹³ *Penn Central*, 438 U.S. at 138 (holding that the City of New York did not effect a taking from Penn Central when it enforced zoning regulations that kept the company from being able to build a skyscraper on top of Grand Central station).

¹¹⁴ *Id.* at 124.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Penn Central*, at 136.

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preserved copies.

The only other requirement is that there is a connection between the interest to be served and the property to be taken. In *Dolan v. Tigard*, the United States Supreme Court stated that the test for this connection was a “rough proportionality.”¹²⁰ This language implies that if Congress were to set out a plan for preservation of digital cultural artifacts and delegate its power of eminent domain to various libraries and archives for that purpose,¹²¹ the decisions of those institutions would be given some degree of deference in the courts.

This regulation-based model would also allow libraries to take copies without first bringing a condemnation suit. Notice would be provided, of course, and any copyright owner who felt himself aggrieved could sue. In any resulting litigation, the rescuing institution would have to show a basis for its decision, but probably no more would be required to show proportionality than would be required to make the decision to rescue in the first place.¹²² Judicial review under this legal rubric would provide transparency into the rescue decision-making and encourage consistency between all institutions in the rescue role, without impairing the ability of libraries and archives to perform their traditional functions.

VI. POTENTIAL OBJECTIONS

A. Objection 1: Copyright is Distinct from Real Property

Because copyrights are rights specifically granted by Congress for a limited purpose,¹²³ it seems a stretch to argue that they are somehow more inalienable than rights given to any other private property. The government has a long tradition of regulating private property for the public good.¹²⁴ It might nevertheless be argued that a corresponding practice of reducing the grant of copyright does not exist.

Such an argument would be erroneous. In fact, copyrights have been altered for the public good. For example, in 1984 the Hatch-Waxman Amendments to

¹²⁰ *Dolan v. Tigard*, 512 U.S. 374, 391 (1994).

¹²¹ *See e.g.*, *Kelo v. City of New London*, 2002 WL 500238, (Conn. Super. Ct. Mar. 13, 2002) (holding that the state power of eminent domain can be delegated to a private entity serving as its agent).

¹²² This Note assumes that national guidelines will be drawn up in accordance with the enabling legislation that will set out the criteria for when a work is endangered and a library or archives can therefore take action to rescue it.

¹²³ U.S. CONST. art. I, § 8, cl. 8.

¹²⁴ The U.S. Supreme Court first held that zoning ordinances were legitimate uses of the state’s police power in 1926 in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 397 (1926).

the Federal Food Drug and Cosmetic Act were enacted to “make available more low cost generic drugs.”¹²⁵ These amendments allowed a generic drug manufacturer to speed up its FDA approval process by incorporating the pioneer drug’s clinical trial results and the labeling of the pioneer drug into its own application.¹²⁶ In *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc.*, the Second Circuit found that the FDA required Watson Pharmaceuticals to use the same labeling, user’s guide, and audiotape for its generic version of Nicorette as came with the original version of the drug produced by SmithKline.¹²⁷

To allow this, the Court construed the Hatch-Waxman amendments as essentially amending the Copyright Act.¹²⁸ It also reversed the lower court, holding that no compensation was due to SmithKline for infringement because Congress did not consider the use of the label to be a copyright infringement.¹²⁹ The court reasoned that the incentive purpose of the Copyright Act would not be undermined by allowing the amendments to function as the FDA had interpreted them.¹³⁰ SmithKline’s petition was then dismissed for failure to state a claim.¹³¹ The court anchored its decision on the fact that even if generic manufacturers were allowed to copy labels verbatim, it would not deter pioneer drug makers from producing either drugs or labels.¹³² The incentive purpose of copyright would remain intact and the good purposes of Hatch-Waxman could be furthered at the same time.¹³³

¹²⁵ Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (Sept. 24, 1984) (codified in part at 21 U.S.C. § 355(j), 35 U.S.C. § 271(e)) [hereinafter “Hatch-Waxman” Act].

¹²⁶ See 21 U.S.C. § 355(j)(2)(A)(v) (2000).

¹²⁷ *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc.*, 211 F.3d 21, 23 (2d Cir. 2000), *cert. denied*, 531 U.S. 872 (2000).

¹²⁸ *Id.* at 25, 28 (“We do not doubt that SmithKline has demonstrated the existence of substantial issues under the copyright laws, at least when they are considered in isolation SmithKline’s guide and tape are creative works in which it has a substantial investment, and they are integral to both the marketing and use of Nicorette. Watson’s guide and tape are concededly in large part copies of SmithKline’s copyrighted materials. Moreover, Watson intends to use the guide and tape in marketing a product in direct competition with SmithKline’s gum. Absent more, the propriety of a preliminary injunction would seem clear In our view, the case can more easily be disposed of on the straightforward ground that the Hatch-Waxman Amendments to the FDCA not only permit but require producers of generic drugs to use the same labeling as was approved for, and is used in, the sale of the pioneer drug, even if that label has been copyrighted.” (citation omitted)).

¹²⁹ *Id.* at 28.

¹³⁰ *Id.*

¹³¹ *Id.* at 29.

¹³² *Id.* at 28-29.

¹³³ *Id.* at 28.

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SmithKline shows that copyrights are not sacrosanct. Like the rights of other property owners, they can be abridged for the sake of a legitimate public interest. It should be noted that the decision of the court did not completely withdraw copyright protection from SmithKline's guide and tape. SmithKline still has a copyright that is valid against everyone but the makers of identical generics.¹³⁴ *SmithKline*, therefore, further supports the idea that the rights advocated in this Note would be acceptable, as long as they do not go so far as to undermine the incentive purposes of the copyright regime.

Certainly, in the case of the Web, enabling libraries and archives to copy its pages will not likely stop or even chill Web publications. Nor will allowing libraries to copy certain other works without owner permission. As to these works, libraries would be restricted in their ability to distribute them until such time as the works have ceased to be commercially valuable, so no economic harm or disincentive will befall the owner.

B. Objection 2: Preservation Should Be Performed by Copyright Owners

It might be argued that if libraries and archives require changes to the law of contract and copyright in order to preserve digital materials, that perhaps that function should be performed by the copyright owners themselves. Commercial gain will certainly provide some motivation for owners to keep their data current and usable. However, a system that relied on owner preservation efforts would face real problems, which would prove much more severe and systemic than the legal changes advocated above.

First, it may not be desirable for decisions concerning which works should be preserved as artifacts of our culture to be made by for-profit institutions. In a report prepared for the Library of Congress on its digital strategy for the upcoming century, the authors concluded that, "[w]here licensed digital distribution is the only means of access, business decisions by the publishers and distributors may determine what information is preserved and remains available in the long run."¹³⁵ This in turn "poses the risk that important scientific or cultural information could be lost because its retention was not profitable."¹³⁶

In addition to the risks posed by having preservation decisions made by entities that may or may not have the necessary interest, there is also the risk that such entities simply will not have the required technical expertise. Digital

¹³⁴ *SmithKline*, 211 F.3d at 29 ("Even though such an owner cannot enforce its copyright against generic drug manufacturers who are required by the Hatch-Waxman Amendments to copy labeling and who do no more than that, it still retains a copyright, if otherwise valid, in the label and might well pursue copyright claims against potential infringers in other circumstances, e.g., use of the copyrighted material in non-labeling advertisements.").

¹³⁵ COMMITTEE ON INTELLECTUAL PROPERTY RIGHTS, *supra* note 8, at 98.

¹³⁶ *Id.*

assets are much more fragile than their paper counterparts. For example, magnetic tape degrades within about twenty-five years.¹³⁷ Most computer code more than 10 years old is on media too degraded to be read – even assuming that one could locate the necessary hardware and software.¹³⁸ Adequate preservation may require periodic hardware and software migration.¹³⁹ This material would have to be monitored and systematically refreshed. This is far beyond the technical skills of the typical corporate file clerk.¹⁴⁰ Preservation would require a significant commitment of resources as well as good intentions.¹⁴¹

The necessary expertise encompasses not only technical, but also historical knowledge. Even organizations with adequate funds and technical ability may not be able to adequately judge which works are worth saving. Examples of this can already be readily found. Publishers of online journals, for instance, rarely save masthead information.¹⁴² This information is treated as part of the Web page so earlier information is lost when the Web page is updated.¹⁴³ “[F]ew, if any scholarly e-journals provide a list of who was on the editorial board for an issue published a year or two ago.”¹⁴⁴ Nevertheless, this information may have historical, if not commercial, value.

Beyond the issues of funding or expertise, there are additional concerns associated with the idea of having important historical artifacts preserved by a single entity at a single location. The Library of Congress believes that the backup systems used by most large-scale publications are not sufficient.¹⁴⁵ Those systems provide only a partial form of redundancy. They offer adequate protection against accidents and hardware failures, but they leave data vulnerable to “institutional failure, changes in institutional policy, conscious ‘amendment’ (think of the Stalinist removal from photographs of those who had fallen from grace), systematic software errors, and the like.”¹⁴⁶ Effective protection requires that different institutions in different political jurisdictions, preferably with different technical environments, hold independent copies.¹⁴⁷ In short, preservation should continue to be the responsibility of “institutions

¹³⁷ TIME AND BITS, *supra* note 3, at 25.

¹³⁸ *Id.*

¹³⁹ See THE COMMISSION ON PRESERVATION AND ACCESS, *supra* note 10, at 6-8 (describing the process of digital migration).

¹⁴⁰ *See id.*

¹⁴¹ *See id.*

¹⁴² COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 20.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 11 n.2.

¹⁴⁶ *Id.*

¹⁴⁷ COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 11 n.2.

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for which it is a core mission . . . [because] it is unlikely that a large number of institutions will have the motivation, skill or resources to undertake the long-term archiving of digital products.”¹⁴⁸

If private institutions are ill-equipped to provide society with preservation services for digital assets, that task must fall to the existing system of libraries and archives. The problem is simply that the current law handicaps them in that task.

C. Objection 3: Preservation Should Be Done Solely by the Library of Congress

It might also be argued that the remedy for all these problems is for the Library of Congress to acquire copies of all digital materials through its mandatory deposit requirements.¹⁴⁹ Unfortunately, the Library is geared toward the preservation of tangible assets. By its own admission, its collection methods are primarily focused on things like books and periodicals.¹⁵⁰ These types of materials are deposited via well-established channels.¹⁵¹

Digital materials, on the other hand, are often not acquired at all because they are produced and distributed by different types of organizations with different business models and technologies.¹⁵² The Library of Congress’ traditional collection models simply do not work well in a digital publishing environment.¹⁵³ For that reason, the Library of Congress may not currently be the best institution to receive and preserve digital materials.

If and when the Library becomes a more ideal repository with a view to providing a fail-safe preservation system, many preservation issues will become less critical. Even then, though, they will not disappear because the sheer volume of digital information will make it impossible for any one organization to archive every work. Moreover, no system of central deposit can work if digital copies are restricted to the library premises, as they are under current law.¹⁵⁴ The Library itself recommends redundant, multi-site archival systems.¹⁵⁵ The law should therefore reflect the reality that the responsibility for preservation of digital assets resides, and should continue to reside, in the national system of libraries and archives.

¹⁴⁸ *Id.* at 16.

¹⁴⁹ *See* 17 U.S.C. § 407 (2001).

¹⁵⁰ *See* COMMITTEE ON AN INFORMATION TECHNOLOGY STRATEGY FOR THE LIBRARY OF CONGRESS, *supra* note 37, at 6, 87.

¹⁵¹ *Id.* at 87.

¹⁵² *See id.* at 87-89, 98-101.

¹⁵³ *Id.*

¹⁵⁴ *See* 17 U.S.C. § 108(c) (2001).

¹⁵⁵ *See* COUNCIL ON LIBRARY AND INFORMATION RESOURCES, *supra* note 7, at 11 n.2.

VII. CONCLUSION

Copyright law has historically been created by “the representatives of copyright-intensive businesses and institutions, who were chiefly concerned about their interaction with other copyright-intensive businesses and institutions.”¹⁵⁶ The identities of the businesses have changed over the years, but the basic mechanism by which copyright law is created has not.¹⁵⁷ Copyright law is created by representatives from various industries debating specific points that they feel are crucial to their respective business models.¹⁵⁸ This debate produces very specific legislation, often with unintended consequences for those with no lawyer at the bargaining table.¹⁵⁹ Unfortunately, the public has no such representative at the table.

The first sale doctrine for print works has largely prevented consumers from coming into direct conflict with the law of copyright until recently. The advent of online and digital technology has changed all this. The increasing number of digital works, the fact that the transmission and use of digital works involve making copies, and the fact that the law has seen fit to grant rights in those copies to the copyright holder all mean that ordinary consumers of copyrighted works must now concern themselves with copyright law.¹⁶⁰

In an understandable effort to keep pace with the tremendous potential for illegal copying that digital media creates, copyright owners have lobbied for increased rights under copyright law, and have even empowered themselves with technological and contractual means of augmenting those rights. Unfortunately, the increased rights of copyright holders and their decreasing ability to preserve their own works are on a collision course that will eventually leave society with no record of itself for this crucial period at the birth of the digital millennium.

This Note has proposed three library/archive rights to be carved out of a copyright owner’s existing rights under copyright and contract law. These three rights – the right to copy and preserve the World Wide Web, the right to copy and preserve other digital works that are found to be endangered, and the right to lend these works once they have been commercially unavailable for a period of five years – will enable libraries and archives to continue to perform their traditional functions in the new digital environment.

Each of these three rights, though new, can be comfortably analogized to rights stemming from traditional property law doctrines. The right to preserve and copy Web pages and the right to preserve other types of digital works that

¹⁵⁶ See Jessica Litman, *Copyright in the Twenty-First Century: The Exclusive Right to Read*, 13 *CARDOZO ARTS & ENT. L.J.* 29, 38 (1994).

¹⁵⁷ *Id.* at 52.

¹⁵⁸ *Id.* at 50-51.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 41.

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are endangered, even without the owner's consent, are possible as a legitimate exercise of the state's power to regulate property. Real property is regulated every day for the common good. Zoning laws are an example of this. Use of property is often restricted for purposes of health, safety, aesthetics, and historical and environmental preservation.¹⁶¹ The rights advocated here simply involve regulating intellectual property, in a limited fashion, for the common good of preserving our digital cultural and historical record.

The right to lend these works, after they have been commercially unavailable for five years, can be derived from the law of abandonment. However, the right advocated here is not nearly as broad as advocated under such a comparison. A finding of abandonment in trademark law means that anyone can use the abandoned mark.¹⁶² A library finding that a digital work has not been commercially available for five years or more, however, would not mean that the copyright was now void. It would merely mean that the library could lend the digital work in the same way that it lends print works. Library patrons would still be subject to prosecution for copyright infringement if they used the library copy to conduct piracy. This right would merely be a library exemption for the purposes of preservation. The copyright would remain valid in all other respects.

These rights would be crafted along with a national strategy for digital preservation. This strategy would ensure that all the nation's libraries and archives operate along similar guidelines. This strategy would likely include a requirement that participating libraries and archives be certified as appropriate repositories for digital works.

In short, the rights advocated here are necessary to preserve both cultural information and the nation's library system in the coming digital age. Copyright owners need not be alarmed, because these proposed rights take specific notice of the copyright holder's commercial interest in his work. The only thing a library will do pursuant to any of these rights is make a copy of a work to preserve it or lend it to patrons once the commercial market for it has dried up. The only thing that copyright holders lose is the right to – intentionally, accidentally, or through neglect – allow their work to disappear forever from the public domain and the historical record.

Comparisons to other bodies of law show that these rights are reasonable in comparison to the types of restrictions that are commonly placed on the owners of real property. A look at recent drug legislation shows that copyrights are not immune to the same sort of limited regulation. Congress should adopt the

¹⁶¹ See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 129 (1978).

¹⁶² See *Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd.* 817 F.Supp. 1103, 1132-33 (S.D.N.Y. 1993) (citing Callmann, *The Law of Unfair Competition, Trademarks, and Monopolies* § 19.67 at 515 (1989)).

rationale imparted to it by the Second Circuit in *SmithKline*¹⁶³ and enact legislation along the lines proposed here. Such legislation will allow libraries and archives to continue to perform their vital functions without undermining any of the incentive effect of current copyright or contract laws.

¹⁶³ See *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharms., Inc.*, 211 F.3d 21, 28 (2d Cir. 2000), *cert. denied*, 531 U.S. 872 (2000).