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2016]

NORMALIZING COPYRIGHT IN THE ELECTRONIC ENVIRONMENT

VICENÇ FELIÚ*

I. INTRODUCTION

WHEN asked to update an article for the sixtieth anniversary edition of the *Villanova Law Review*, I never expected to find, secretly squirreled away within the *Law Review*'s morocco, leather-bound pages, a unified theory of copyright law and librarianship. The article in question, like a library mole in a copyright world, is a piece written by Professor Ann Bartow in 2003 entitled *Electrifying Copyright Norms and Making Cyberspace More Like a Book*.¹ In this article, Bartow examined the social norms applied when using copyrighted works in the analog world and explained how social norms develop, coalesce and become de facto rules of behavior.² At the time the article was written, she proposed that real world copyright norms were not making their way into cyberspace because copyright holders were using their own normative view to exercise control of works embodied in electronic formats.³ She focused on non-profit libraries in her article to examine how the aim of copyright law—“[t]o promote the Progress of Science and useful Arts”—would be harmed if established analog norms did not survive transition to cyberspace.⁴

This update will briefly cover Bartow's examination of social norms. Her work on norms in this original article stands as a thorough analysis and is just as valid today as it was when first written; but a brief recap will help the reader place the issues on normalization in the proper context. The update will focus on how the final section of Bartow's article reflects what has happened since it was written and whether her projections have or have not come to fruition.

II. SOCIAL NORMS AND THE USE OF ANALOG WORKS

Bartow identifies one of the overarching themes of her article as the government's desire to have its citizens respect copyright law.⁵ She posits that “copyright laws . . . must embrace and reflect longstanding copyright

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

2. See generally *id.*

3. See generally *id.*

4. See U.S. CONST. art. I, § 8, cl. 8; see also Bartow, *supra* note 1.

5. See Bartow, *supra* note 1, at 17.

consumer use norms . . . to elicit widespread compliance.”⁶ Norms are patterns of behavior not constrained by statutory limits but defined through popular practice.⁷ Her article explores the possibilities of adapting and codifying the norms viable and active in “real space” to use in cyberspace. The central premise of her article is that when users have access to and use of copyrighted cyberspace works, their use may be restrained to real space levels of unauthorized infringement.⁸

A. *Intersection of Norms and Laws*

When Bartow speaks of norms, she is primarily referring to informal norms. Bartow points out that *formal norms* are generally imposed by governing bodies and are better characterized as rules or laws.⁹ *Informal norms* develop outside structured organizations to govern the interactions between close-knit groups.¹⁰ Norms may supplement law but they may not displace laws completely and vice versa.¹¹ Bartow focuses her inquiry solely on those norms governing end users. She recognizes that a set of different norms exists, governing the creation of derivatives, but clearly excludes that set from her study and proposals.¹² It is important to keep in mind that norms are based on behavior; they reference what users actually do, not what they ought to do.

B. *Copyright Norms*

The norms of use in copyright works vary by the category and format of the works.¹³ This variance in norms stems from the reality that the users consume varying categories and formats of works differently.¹⁴ Bartow points out that different types of works are produced in different “containers” and, in some specific categories, these containers have been dramatically changed by emerging technologies.¹⁵ She focuses on two specific cases—those of musical and literary works—highlighting how changes in technology have changed the ways in which the tangible ex-

6. *Id.*

7. *See id.* at 20–21 (citing Steven A. Hetcher, *Norm Proselytizers Create a Privacy Entitlement in Cyberspace*, 16 BERKELEY TECH. L.J. 877, 892 n.53 (2001)).

8. *See id.* at 18 (“This Article posits that if individuals could access and use digitalized copyrighted works in old, familiar ways, perhaps they would also restrain themselves to analog levels of unauthorized copyright uses and infringements.”).

9. *See id.*

10. *See id.*

11. *See* Richard H. McAdams, *Comment: Accounting for Norms*, 1997 WIS. L. REV. 625, 631–32 (citing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 40–81 (1991)).

12. *See* Bartow, *supra* note 1, at 18.

13. *See id.* at 21.

14. *See id.*

15. *See id.* at 22.

pression of those types of works are produced and consumed.¹⁶ Surprisingly, consumption modes of musical and literary works do not appear to have changed much since the article was originally written. In the case of literary works, despite the consumption of e-books and audio books, ink-and-paper was the predominant format of consumption at the time of Bartow's article.¹⁷ The much expected and highly anticipated demise of ink-and-paper has not occurred. As a "plot twist," the book apocalypse not only failed to happen but recent data shows that e-book sales are actually on a downward trend, with ink-and-paper showing a resurgence.¹⁸

Bartow highlights two major impediments to the creation of copyright norms. First, she posits that respect for copyright "is not an inherent or natural part of the cultural infrastructure."¹⁹ She cites Sheldon Halpern saying that copyright law is "fractured, inconsistent and difficult to understand," making normative development nearly impossible.²⁰ Second, Bartow also points out that the parties affected by digital copyright management—authors, right holders, publishers, libraries and end users—do not exhibit the characteristics identified as important to the creation of informal norms; they are not close-knit or well-defined.²¹ She is right in asserting that because of the transient nature of the user's interest in particular copyrighted works (compared to the more enduring interest of the author and right holders) the user is marked as an outsider with little or no stake in the normative process.²² Because of these two impeding factors, Bartow posits that to move the use norms developed in real space into cyberspace would require legislation.²³ This is one of the most interesting proposals in her article, the creation of a statutory right of "library use" shielding libraries from aggressive copyright enforcement in cyberspace.

Marci Hamilton pointed out that "[i]ntellectual property is nothing more than a socially-recognized, but imaginary, set of fences and gates."²⁴ Bartow, however, counters that those same laws are not intended to be locked and unscalable barriers.²⁵ Because of the permeability of these imaginary barriers, users are expected to make "independent moral judg-

16. *See id.*

17. *See id.*

18. *See* Alexandra Alter, *The Plot Twist: E-Book Sales Slip, and Print Is Far from Dead*, N.Y. TIMES, Sept. 22, 2015, http://www.nytimes.com/2015/09/23/business/media/the-plot-twist-e-book-sales-slip-and-print-is-far-from-dead.html?_r=0 [<https://perma.cc/TJ89-3CM4>].

19. *See* Bartow, *supra* note 1, at 23.

20. *See id.* (citing Sheldon W. Halpern, *Copyright Law in the Digital Age: Malum in se and Malum Prohibitum*, 4 MARQ. INTELL. PROP. L. REV. 1, 11 (2000)).

21. *See id.*

22. *See id.* at 22–23.

23. *See id.* at 23.

24. Marci A. Hamilton, *The TRIPS Agreement: Imperialistic, Outdated, and Over-protective*, 29 VAND. J. TRANSNAT'L L. 613, 616 (1996).

25. *See* Bartow, *supra* note 1, at 25.

ments about when it is acceptable to enter and when unauthorized entry might constitute a trespass.”²⁶ The best argument for the proposition that users have on making non-permissive use is the codified fair use doctrine.²⁷ Fair use offers the broadest protection when those whose use results in new creative works invoke it.²⁸ Transformative works, those works that are created from existing works, receive that greater level of protection because they “lie at the heart of the fair use doctrine[]” by promoting the greater public good in the creation of new works.²⁹

Within the major set of copyright norms, we must also consider the smaller subset of library norms. Right holders see libraries as negatively impacting their revenue streams by making copies of works available to the general public at little or no cost.³⁰ Despite the fact that sales to libraries generate financial benefits for publishers and authors, this revenue stream is generally seen as inadequate to compensate for the “lost sales” to library patrons.³¹ However, every use of library-provided materials does not simply represent a lost sale to the right holders.³² Evidence suggests that private purchasers informally share copies of works within their network of families and friends.³³ Bartow suggests that because libraries act as an access center to free or low cost copies of works, users are less likely to make infringing copies of those works.³⁴ Bartow also proposes that, because of the shift in paradigm brought about by digitization, publishers have had an opportunity to restructure their policies to force an “abandonment of all pre-existing norms” in the new media.³⁵

III. STATUTORY RIGHT OF “LIBRARY USE”

As previously stated, one of Bartow’s most interesting proposals is the idea of creating a statutory right of library use shielding libraries from aggressive copyright enforcement in cyberspace. Library use is a construct closely tied to the Section 107 concept of fair use.³⁶ To understand how a concept of library use might work in the digital arena, it is important to understand how access to library materials operates in the analog world. One key idea behind the library use construct is that patrons should have

26. *See id.* at 26.

27. *See generally* 17 U.S.C. § 107 (2012).

28. *See generally* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05 (Matthew Bender, rev. ed. 2015).

29. *See* Campbell v. Acuff–Rose Music, 510 U.S. 569, 579 (1994).

30. *See* Bartow, *supra* note 1, at 75.

31. *See id.*

32. *See id.* at 76.

33. *See id.*

34. *See id.* at 77.

35. *See id.* at 78.

36. *See* 17 U.S.C. § 107 (2012); *see also* Ann Bartow, *Libraries in a Digital and Aggressively Copyrighted World: Retaining Patron Access Through Changing Technologies*, 62 OHIO ST. L.J. 821, 822 (2001).

the same kind of access to digital as to analog materials.³⁷ In the analog environment, patrons have the ability to read anonymously, pull and scan selected materials, browse the shelves around a targeted publication, place holds on materials in use by other patrons, check out materials for a pre-determined amount of time, and do all this with the understanding that they may make fair use copies at their discretion.³⁸ The right of library use would be a direct counter to the access restrictions created by right holders allowing the norms of the analog environment digital counterparts.³⁹

In the world of librarianship there is a lot of discussion on the future of libraries and the changes that must be made to remain viable. One of the key features of the “library of the future” is the importance of open access.⁴⁰ The library of the future will not only ask patrons for feedback but will act on it to improve services.⁴¹ Another element of the library of the future is participatory networking involving content creation and sharing by patrons.⁴² The emphasis on open access and participatory networking may lead to content creation that is derived from protected works. The new content may or may not be protected by fair use but could definitely be limited by right holder restriction on digital use.

Publishers and right holders have restructured the access paradigm in cyberspace by limiting licensing agreements, restrictions on multiple point/multiple use access and extensive lockdown strategies.⁴³ Right holders and libraries have struggled to create a balance between controlling the works and creating access to those materials.⁴⁴ The struggle between right holders and libraries can be seen through the use of technological limitations and capabilities; the use of contracts and private agreements by publishers; and the development of legal entitlements and exceptions by libraries.⁴⁵ This tension between publishers and libraries has existed since there have been publishers and libraries, but the move to a digital environment has shifted the balance of power in favor of publish-

37. See Bartow, *supra* note 36, at 824.

38. See *id.*

39. See Bartow, *supra* note 1, at 80.

40. See Stephanie Davidson & Scott Matheson, *Innovations in Providing Access to Research and Knowledge: Directions for Systems Improvement in the Law Library*, 27 LEGAL REFERENCE SERVS. Q. 137, 152–53 (2008).

41. See *id.* at 153.

42. See H. Kumar Percy Jayasuriya & Frances M. Brillantine, *Student Services in the 21st Century: Evolution and Innovation in Discovering Student Needs, Teaching Information Literacy, and Designing Library 2.0-Based Services*, 26 LEGAL REFERENCE SERVS. Q. 135, 151 (2007).

43. See generally Rebecca Bolin, Comment, *Locking Down the Library: How Copyright, Contract, and Cybertrespass Block Internet Archiving*, 29 HASTINGS COMM. & ENT. L.J. 1 (2006).

44. See D.R. Jones, *Locked Collections: Copyright and the Future of Research Support*, 105 LAW LIBR. J. 425, 429 (2013).

45. See *id.*

ers and has placed users at a disadvantage.⁴⁶ For example, Section 108 has given libraries the right to replace copies of no longer usable protected works that are out of print by making archival photocopies; however, in an electronic environment, this traditional right to make archival copies may be completely meaningless if a publisher is only licensing access to the work.⁴⁷

The library use right proposed by Bartow would be one of several legal entitlements or exceptions created by Congress to support libraries. Bartow describes the library use right as

an explicit constraint on copyright exploitation giving library patrons the right to access and use the digital works owned by libraries, with no more constraints than have historically been placed upon ink-and-paper publications. Library Use will neither enlarge nor restrict the doctrine of fair use, nor affect the legality of excessive or extra-library copying. It will simply allow access to the works in the first place, to the extent rising prices allow libraries to maintain and add to their holdings, electronic or otherwise.⁴⁸

A statutorily imposed right of library use would effectively counter the restrictions imposed by right-holders on the use in electronic formats of protected works.⁴⁹ Library use would preserve the norms associated with ink-and-paper materials.⁵⁰ In essence, a right of library use would preserve the right to share, avoid the shortfalls of fair use, give libraries “safe harbor” immunities similar to those accorded to commercial ISPs, prevent replacement by for profit e-libraries and prevent the invalidation of the first sale doctrine.⁵¹

IV. AVOIDING THE PITFALLS OF SECTION 107 FAIR USE AND SECTION 108 LIBRARY REPRODUCTIONS

The doctrine of fair use is an equitable defense codifying, in Section 107 of the Copyright Act of 1976, what courts have recognized as permissible acts of copying, limiting the exclusive rights of the right holders.⁵² Essentially, fair use allows a user to make unauthorized use of protected materials without suffering the penalties of infringing if the use meets cer-

46. See Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 115 (2000), available at <http://www.unc.edu/~unc/ncg/Columbia-article3.htm> [<https://perma.cc/EG57-93MM>].

47. See 17 U.S.C. § 108 (2012).

48. Bartow, *supra* note 1, at 80.

49. See *id.* at 81.

50. See *id.* at 80.

51. See *id.* at 88.

52. See generally 4 NIMMER & NIMMER, *supra* note 28, § 13.05.

tain criteria.⁵³ Fair use is the ultimate safeguard that can mutate to strike the balance between private incentive and public benefit.⁵⁴ Like all multi-purpose tools, fair use can be a great help but it can also create uncertainty. Because of its ambiguity fair use can act as a barrier to access in questionable situations.⁵⁵

Bartow makes an excellent point when she discusses how the Digital Millennium Copyright Act (DMCA) creates a specific barrier to fair use access in relation to digital works.⁵⁶ She points out that the DMCA “makes it illegal to manufacture or distribute devices designed to bypass technology that protects copyrighted material.”⁵⁷ Making a back-up copy of a digital work, a practice that would be allowable with ink-and-paper materials, would run afoul of the DMCA.⁵⁸ Making allowable back-up digital copies, under the Copyright Act, violates the DMCA because it would require breaking through copy-protections.⁵⁹ Subsection 108(c) of the Copyright Act allows libraries and archives to make up to three copies of a published work to replace those that are damaged, deteriorating, lost, stolen or obsolete in format.⁶⁰ These replacement copies legally made under the subsection, however, cannot be made available to the public outside the library if they are made in a digital format.⁶¹ The limitation of access to only the premises of the library for digital format replacement copies does not extend to ink and paper replacement copies. When Congress amended subsection 108(c) with the DMCA it did so with the awareness of the “risk that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution of additional copies or phonorecords of the work”⁶²

Congress specifically limited access to digital copies to the physical premises of a library to guard against the potential harm to the right holders’ market from patrons having unlimited access to their material from any location.⁶³ This restriction on the limitation of the exclusive right runs counter to the pre-existing library norms where libraries made replacement copies available to patrons without any place restrictions. In

53. *See generally id.*

54. *See* James Gibson, *Once and Future Copyright*, 81 NOTRE DAME L. REV. 167, 191 (2005).

55. *See* Bartow, *supra* note 1, at 102.

56. *See id.*

57. *Id.* (quoting Amy Harmon, *Software Double Bind*, N.Y. TIMES, Aug. 13, 2001, available at <http://www.nytimes.com/2001/08/13/technology/ebusiness/13NECO.html?pagewanted=all> [<https://perma.cc/8PR9-GGV2>]) (internal quotation marks omitted).

58. *See id.*

59. *See id.*

60. *See* 17 U.S.C. § 108(c) (2012).

61. *See id.* § 108(c) (2).

62. S. REP. NO. 105–190, at 61 (1998).

63. *See id.* at 61–62.

the ink-and-paper world, a replacement copy stood in for the copy it replaced transparently and without restrictions. On the surface, the onsite restriction might appear insignificant, yet it may seriously affect a library's ability to provide materials via interlibrary loans (ILL) and thus stifle intellectual inquiry.⁶⁴

Perhaps the most important point to take away from Bartow's analysis is that while the fair use and library reproductions sections of the Copyright Act provided a panoply of protections for libraries and their patrons in the ink-and-paper world, those protections might not translate to the *digital* world. Her argument is that the existing protections need to be bolstered by a specific library use right that addresses the gaps in fair use and library reproductions.⁶⁵ In this, she is correct.

V. REPLACEMENT BY FOR-PROFIT E-LIBRARIES

Another interesting point in Bartow's article is her warning about the danger of brick-and-mortar public libraries being replaced by for-profit e-libraries.⁶⁶ At first blush, more than a decade after the article was written, this prediction does not appear to have materialized. But when we analyze the present reality of libraries, her warning seems more important than ever.

As previously stated, e-books have not completely replaced ink-and-paper and are suffering, at least temporarily, a downturn in popularity.⁶⁷ As a completely anecdotal aside, in the last six years of teaching with texts available in e-format, the author has only seen one instance in which a student has selected the e-format over the ink-and-paper text. This anecdotal evidence can be backed up by a study of undergraduate students that showed a marked preference for ink-and-paper texts.⁶⁸ However, it is not all good news for print format libraries. Since the economic downturn of 2008, libraries have been facing shrinking or static acquisition budgets.⁶⁹ Budget constraints have led to acquisition of materials in e-format to avoid duplication in print, processing costs and storage concerns.⁷⁰ Bartow

64. See generally Jones, *supra* note 44, at 436–37.

65. See generally Bartow, *supra* note 1, at 101–06 and accompanying notes.

66. See *id.* at 106.

67. See Alter, *supra* note 18.

68. See William Douglas Woody, David B. Daniel & Crystal A. Baker, *E-books or Textbooks: Students Prefer Textbooks*, 55 COMPUTERS & EDUC. 945, 947 (2010), available at <http://clintlalonde.net/wp-content/uploads/2013/08/Woody-et-al.-2010-E-books-or-textbooks-Students-prefer-textbooks.pdf> [<https://perma.cc/HP2X-TP9D>].

69. See, e.g., Amanda Buckingham, *Library Faces Budget Constraints*, YALE DAILY NEWS, Nov. 6, 2014, available at <http://yaledailynews.com/blog/2014/11/06/library-faces-budget-constraints/> [<https://perma.cc/ZQR7-BFXD>].

70. See *id.* Yale Library's Director of Collection Development Daniel Dollar (a man with a more appropriate name for the position could not be found anywhere else) points out that in 2013 "65 percent of overall collections spending was allotted to digital media." See *id.*

stresses that law libraries were considering selective cancellations of Shepard's citators because of duplication in electronic format.⁷¹ Today the reader would be hard pressed to find an academic law library that still purchases Shepard's in print. Again, on the surface, the replacement in format is not a problem. The patron base of academic law libraries, the faculty and students, has educational contract access to the necessary databases that make the need for print versions of Shepard's citator redundant. The problem is that most academic law libraries also perform a public function for solo practitioners, alumni, pro se patrons and the public at large who may not have access to those databases.⁷² Bartow points out that those of us with unfettered access to legal databases are the "lucky few."⁷³ Most, even in the legal profession outside of academia, have very limited access "to perform broad based legal research."⁷⁴ The present picture begins to resemble a place where for-profit libraries have not replaced but have reconfigured the traditional library.

The reconfiguring of the traditional library is grounded on the licensing schemes that publishers have been able to impose, making access to digital information resemble a service rather than a product. Traditional library acquisitions are guided by the first sale doctrine as codified in Section 109 of the Act.⁷⁵ The first sale doctrine gives the purchaser of a copy of protected work the right "to sell or otherwise dispose of the possession of that copy"⁷⁶ As Bartow points out, this doctrine legitimizes traditional book norms; anyone who purchases a book may reread, loan, trade, give away, rent, or even destroy the copy without violating the holder's exclusive rights.⁷⁷ Publishers tried to blunt the effects of the first sale doctrine in the analog world by requiring licenses placing restrictions on resale of copies but the courts did not buy their arguments.⁷⁸ However, licensing of materials is the way of the digital world, rather than outright ownership. Libraries find themselves deprived of the protections given by the first sale doctrine in cyberspace because they are limited to purchasing a service, access to the material, rather than the product itself.⁷⁹

71. See Bartow, *supra* note 1, at 108–09.

72. See Richard A. Danner, *From the Editor: Public Access to the Law*, 79 LAW LIBR. J. 163, 163 (1987).

73. See Bartow, *supra* note 1, at 109.

74. See *id.*

75. See 17 U.S.C. § 109 (2012).

76. See *id.* § 109(a).

77. See Bartow, *supra* note 1, at 110.

78. See *id.* at 111 (citing Pamela Samuelson, *Legally Speaking: Does Information Really Have to Be Licensed?*, COMMS. OF ACM, Sept. 1998, at 15, 18 available at http://people.ischool.berkeley.edu/~pam/papers/acm_2B.html [<https://perma.cc/XN E6-WZNV>]).

79. See Rachel Ann Geist, Article, A "License to Read": The Effect of E-Books on Publishers, Libraries, and the First Sale Doctrine, 52 IDEA 63, 94–95 (2012).

VI. RECENT DEVELOPMENTS

In a recent decision by the Second Circuit, the court found that Google's unauthorized digitizing of protected works was fair use because the purpose of the copying was highly transformative.⁸⁰ The Google Library Project was based on a partnership between Google and participating libraries. The libraries would submit books from their collections to Google to be scanned and included in the project.⁸¹ Google retained a digital copy of the books, returned the originals to the libraries and gave the libraries a digital copy of their original contributions.⁸² Since the beginning of the project, Google has scanned and indexed over twenty million books, including protected works.⁸³ The purpose of the Google Library Project is not to make all of the scanned books available online, but to provide researchers with a "snippet view" of text containing their search terms to help identify useful material.⁸⁴ As part of the deal, the participating libraries agreed to use the digital copies received from Google in a "non-infringing fair use manner."⁸⁵ The court supported this transformative use conclusion by saying that Google's snippet view did not allow the public full view of the text but served solely as a finding tool that would be useless if the complete text of the book were not copied.⁸⁶

This decision helps to highlight the importance of normalizing copyright rules in a digital environment. The Google Library Project really serves the purpose of a supercharged index. The project boils down to giving the public the ability to search through over twenty million books by specific terms and come up with relevant results faster and more efficiently than with print indexes. The speed, efficiency and format of the project do not change its nature, and fortunately the court recognized that. Despite the plaintiffs' argument that wholesale copying of protected materials could not be construed as fair use, the court saw the function of the project as key to its transformative use rather than focusing on the artificial construct of how much was copied.

VII. CONCLUSION

In 2003, Bartow made a solid and well-constructed argument on how integration of ink-and-paper library norms to the digital environment could lead to a better functioning of copyright law, at least where it impacted library operations. Her proposal of a library use limitation on the exclusive right could be a practical and elegant solution to some of the

80. See *Authors Guild v. Google, Inc.*, 804 F.3d 202, 229 (2d Cir. 2015), *petition for cert. docketed*, (No. 15-849), 85 U.S.L.W. 3357 (Dec. 31, 2015).

81. See *id.* at 208.

82. See *id.*

83. See *id.*

84. See *id.* at 209–10.

85. See *id.* at 228.

86. See *id.* at 229.

challenges that libraries still face when dealing with an expanding digital universe. It is a great misfortune that this proposal has not gotten any traction.

A library use exemption could easily be worked out following the format of the codified fair use and first sale doctrines. As Bartow points out, the ideal library use exemption will replicate the norms developed in the ink-and-paper world and break down the artificial restrictions created by publishers and right holders of digital materials. The Second Circuit's Google Library Project decision makes clear that some courts are willing to look past the unfounded concerns of right holders and rule in favor of access and the public good, making the creation of a codified library use doctrine a possibility.⁸⁷ There are a handful of important points that must be included in a library exemption.

A. *Section 107 Fair Use*

Library use would resemble fair use but would avoid some of the unpredictability of that doctrine. Primarily, library use would avoid the issues related to factors three and four of the four-factor fair use test—those dealing with “the amount and substantiality of the portion used” and “the effect of the use upon the potential market.”⁸⁸ As the Google Library Project case demonstrates, sometimes it is necessary to copy the whole work to be able to make fair use of it.⁸⁹ The library use exemption would recognize that not every instance of material use by library patrons represents a lost sale to the right holder.⁹⁰ The acquisition of materials by libraries does not negatively impact the potential market for the work. Bartow makes the sound argument that, because patrons can borrow protected materials “for a reasonable length of time, they are intuitively less likely to make infringing copies of the works.”⁹¹

B. *Section 108(c)(2) Reproduction by Libraries*

A codified library use exemption would have to address the issue of digital replacement copies. The amendments made to Section 108 by the DMCA would have to be rewritten to allow the use of digital replacement copies outside of library premises. The analog norm of treating a replacement ink-and-paper copy no differently than the original should be a part of a library use exemption, but that cannot be accomplished with Section 108 in its present state. There is no justification, outside the over-protection of holders' interests, to maintain this section as presently enacted.

87. *See generally id.*

88. *See* 17 U.S.C. § 107(3)–(4) (2012).

89. *See Authors Guild*, 804 F.3d at 220–24 (providing complete analysis of factor three as applied to case).

90. *See* Bartow, *supra* note 1, at 76.

91. *See id.* at 77.

C. *Section 109 First Sale*

To be fully workable, a library use exemption would have to include an adaptation of the first sale doctrine to digital materials. The present licensing schemes have stacked the cards in favor of publishers and right holders and have, with increasing frequency, limited patron access. The library use exemption should reflect the long established norms of library purchases in the ink-and-paper world. This is probably the hardest part of the puzzle to solve because of the realities involving the acquisition of digital materials. However, using licensing schemes that allow libraries to manage digital materials as they do purchased print materials should do the trick. That rearranging might be done in light of the provisions in Section 109(b)(1)(A), which states, “Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.”⁹² The provisions in this subsection apply to computer programs and sound recordings but a similar type of exclusionary clause can be drafted to address digital materials.

More than a decade ago Professor Bartow set out a visionary idea for a statutory solution to the analog/digital dichotomy in copyright issues involving libraries. Her work was timely then and remains so today. She envisioned the way this issue would develop and suggested workable solutions to some of the problems we struggle with today. It is unfortunate that her proposal has not become reality. The present Act was drafted when libraries were strictly brick and mortar institutions and even when Congress passed the DMCA there was no intention to broaden that scope.⁹³ Implementing Bartow’s proposal would go a long way toward realigning the realities of copyright in the digital world with the promise of free access considered so necessary to intellectual pursuit for the first 200 years of U.S. history.

92. See 17 U.S.C. § 109(b)(1)(A).

93. See S. REP. NO. 105-190, at 62 (1998) (“[J]ust as when section 108 of the Copyright Act was first enacted, the term ‘libraries’ and ‘archives’ as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public. Although online interactive digital networks have since given birth to online digital ‘libraries’ and ‘archives’ that exist only in the virtual (rather than physical) sense on websites, bulletin boards and homepages across the Internet, it is not the Committee’s intent that section 108 as revised apply to such collections of information.”).