



“Beam Me a Book, Scotty” Virtual Access Rooms under Section 108 of the Copyright Act

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DRAFT

“Beam Me a Book, Scotty”

Virtual Access Rooms under Section 108 of the Copyright Act^{*}

By Kyle K. Courtney, Esq.[†]

***Abstract:** Many library and archive reading rooms mandate in-person visits, but this requirement often restricts access rather than enhancing it. Such limitations can be viewed as ableist, classist, and fundamentally at odds with the purpose of copyright, which is to “promote the progress of science and useful arts.” Libraries have historically been at the forefront of providing new modes of access by adopting new technologies to facilitate broader and easier access to preserved works. Unfortunately, these efforts have been hindered by restrictive interpretations of the rights granted to libraries under Section 108 of the Copyright Act—specifically, the notion that providing access to preserved works in digital formats violates the Act. This interpretation is unfounded. This paper launches the concept of Virtual Access Rooms (VARs) that are not only permissible under a proper reading of Section 108 but are also essential to the modern library’s mission. Knowledge should not be confined to physical spaces, and access to preserved works should not be contingent upon a patron’s ability to visit such spaces. There is no legitimate basis for denying access to these works through physical location requirements. The solution offered in this paper is both straightforward and aligned with an accurate reading of the language of the section. It requires no amendments or updates. The language Congress chose in drafting Section 108 in the Copyright Act empowers libraries and archives to provide remote access to their collections via VARs because: (1) libraries and archives do not make digital works “available to the public” when they enable regulated, mitigated access for researchers and other approved patrons; and (2) in offering remote access, libraries and archives do not make such works available “outside the premises” of their institutions.*

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Table of Contents

I.	A VAR is an Online Version of a Physical Reading Room.....	2
II.	The Copyright Act Supports the Creation of VARs.....	5
A.	A Brief History of Section 108.....	6
B.	Section 108 of the Copyright Act Should be Interpreted to Provide Access to Knowledge... 	9
C.	Sections 108(b) and 108(c) Allow Libraries and Archives to Make Three Copies of Certain Works Viewable in Physical Reading Rooms.	10
D.	Nothing in Sections 108(b) and 108(c) Prevents Libraries and Archives From Providing Access to Those Copies in VARs.....	11
1.	Copies in a VAR are “not made available to the public.”.....	11
2.	Copies accessed through a VAR are not distributed "outside the premises.".....	12
3.	Unpublished copies are not distributed.....	14
4.	Back-up copies are incidental to use and do not contribute to the statutory cap on copies.	16
III.	VARs Are Already Accepted Ways to Share Information.	18
A.	Electronic Reading Rooms facilitate FOIA Requests.....	18
B.	VARs already exist for works in the public domain.....	19
C.	VARs exist for certain copyrighted works.	19
IV.	Virtual Access Rooms (VARs) Provide Crucial Access to Copyrighted Works.	20
A.	VARs increase access for patrons with disabilities.....	21
B.	VARs increase access for rural and Indigenous American patrons.	21
C.	VARs increase access for patrons with financial constraints.....	22
D.	VARs increase access during national crises and natural disasters.	23
E.	VARs increase the number of works preserved for future generations.....	24
V.	Conclusion	25

Introduction

The pursuit of knowledge has long driven scholars to travel great distances. Millennia ago, scholars like Plato and Herodotus had to journey from Athens to the Library of Alexandria to access important works held in the library. Today, the Library of Congress (“LOC”) hosts approximately 1.6 million onsite visitors annually—many of which are scholars seeking the same type of access to works that Plato and Herodotus desired. Scholars today similarly undertake these efforts because they need access to unique works found only in specific library collections. Library reading rooms safeguard an array of materials—some unpublished and existing solely in archives, some rare and difficult to locate, and others so old or fragile that they cannot be handled frequently, if at all. Libraries have historically been entrusted with preserving and providing access to the world’s cultural treasures.

In modern times, U.S. libraries are further authorized to preserve collections under 17 U.S.C. § 108 (“Section 108”), which, in certain circumstances, exempts libraries from copyright liability. Section 108 also permits libraries to provide digital access to these works through what has traditionally been termed a “virtual reading room.” However, since patrons may engage with materials in diverse formats—not just reading, but listening to audio, viewing digital objects, or watching audiovisual works—this article will introduce and adopt the term “virtual access room” (“VAR”).

A VAR is a digital environment, such as an online portal or website, where registered patrons can request access to specific works digitized by a library. As online research and digital access become increasingly indispensable, establishing and maintaining VARs represents the logical and necessary evolution of library services.

Yet, in most cases, access to reading rooms still requires an in-person visit. This requirement frequently restricts access rather than expanding it, imposing barriers that can be considered ableist, classist, and fundamentally at odds with the purpose of copyright: “to promote the progress of science and useful arts.”³ While this has long been the norm, libraries are not to blame. Indeed, libraries have often led the adoption of technologies that enhance access to preserved works. Unfortunately, these efforts have been stymied by regressive interpretations of Section 108—particularly the flawed notion that providing digital access to preserved works violates the Copyright Act. This interpretation is incorrect.

The concept of VARs is not new. Many libraries already use them to provide digital access to public domain works. Ideally, this existing infrastructure could be expanded to include copyrighted materials, incorporating safeguards to prevent unlawful copying—all of which is

³ U.S. Constitution Art. I, § 8, cl. 8.

permissible under Section 108. Such an approach would enhance access to and preservation of rare and valuable works through broader digitization.

VARs are not merely permitted under a proper reading of Section 108; they are essential. Knowledge should not be confined to physical spaces, especially when access to such spaces is hazardous, as during the COVID-19 pandemic, or when valuable archives face risks from disasters like floods or fires. The technology to preserve and provide access to these works already exists. Requiring physical visits to access preserved works is not only unnecessary but also inequitable and counterproductive.

The solution is clear and practical. Section 108 authorizes libraries and archives to provide remote access through VARs because: (1) offering regulated, controlled access to approved patrons does not constitute making works “available to the public,” and (2) enabling remote access to digital works does not equate to making them available “outside the premises” of the institution.

I. A VAR is an Online Version of a Physical Reading Room.

According to the Society of American Archivist’s Dictionary of Archives Terminology, a virtual reading room is “an online research environment in which the discoverability and/or downloading of materials is deliberately limited, and/or access is restricted to researchers who have created a limited-term account and agreed to terms of use similar to those that apply in a physical reading room of an archives.”⁴ And, as patrons are no longer just “reading” in these virtual rooms (they may be listening to audio, viewing digital objects, or watching audio visual works in addition to reading) this paper will use the phrase *virtual access room* (“VAR”). Current technology allows VARs to employ digital controls that approximate the limitations and restrictions in physical reading rooms.

In libraries, reading rooms have long served as restricted areas that offer monitored access to certain types of materials.⁵ Patrons are granted access to these rooms, which often house rare or specialized works, only after signing in and agreeing to certain rules.⁶ For example, a patron of the LOC must obtain a library card⁷ in advance of their appointment and make a specific request to

⁴ *Virtual Reading Rooms*, Dictionary of Archives Terminology, <https://dictionary.archivists.org/entry/virtual-reading-room.html> (last visited Jun. 8, 2023).

⁵ See *The Reading Room*, THE BRITISH MUSEUM, <https://www.britishmuseum.org/about-us/british-museum-story/architecture/reading-room> (“Those wanting to use [the Reading Room at the British Museum] had to apply in writing and were issued a reader’s ticket by the Principal Librarian.”) (last visited Jun. 8 2023).

⁶ *About the Main Reading Room*, LIBR. CONG. (e.g., no flash photography, no removal of the works, no eating or drinking, and beginning with the COVID-19 pandemic, patrons have had to make appointments in advance, where they are assigned a time slot when they can access the reading room), <https://www.loc.gov/rr/main/about.html#:~:text=The%20Main%20Reading%20Room%20is,in%20the%20Main%20Reading%20Room> (last visited Jun. 8, 2023).

⁷ Specifically, a Reader Registration Card.

access one of the LOC's many reading rooms. After traveling to the LOC, they must go through security, sign in, and then check any coats and bags at the coat check. They must then navigate the labyrinthian, albeit beautiful, halls of the LOC to reach the specific reading room for which they have been granted access. There, a librarian will check their library card, give them a printed list of the reading room's rules, and require the patron to fill out a form with their personal identifying information, in addition to information about which materials they will be using.⁸ When accessing a physical reading room at the LOC, the patron acknowledges that the Library "neither grants nor denies permission to publish or quote from material in [the] collections."⁹

After this process, the patron will find the requested item laid out for them on a table, along with a librarian to answer any questions regarding the work. If, for example, the patron is in the main reading room, the requested book will have been delivered from the depths of the library's closed stacks on a conveyor belt. The patron may take photographs of the work, but only with the permission of the librarian. Regarding all the other books on the shelves that line the reading room's walls, the patron cannot access any of them without filling out the requisite forms. Patrons have a specific timeslot in which they can access the LOC reading rooms, and access is limited to business hours.

A VAR can be configured with a similar design, thereby mimicking the requirements and protections featured in a physical reading room. For example, a VAR may require advance registration and a specific request that must be approved by the librarian.¹⁰ Requesters may also be required to meet certain reasonable criteria that will be determined by each institution. For example, a patron may be required to sign and date an agreement to the terms and conditions of the VAR that, while similar to that used for physical reading rooms, has been configured for a VAR specifically. A VAR could certainly be set up to prohibit patrons from browsing a digital bookshelf and pulling out whichever file they choose, and to only be given access to the specific works they request (e.g., a Tolkien scholar requesting a letter between Tolkien and Rosemary Summers held in the Bodleian Library in Oxford would only have access to that specific work).¹¹ If a library chooses to have repercussions in place for violators of these rules and safeguards, then these could be spelled out in the form that patrons are required to sign. These repercussions might mean restricting a particular user from accessing a specific work in the future or suspending them from using a VAR for a certain length of time.¹²

⁸ Main Reading Room, *supra* note 7.

⁹ Form to access Rare Books Reading Room at Library of Congress.

¹⁰ See *Reader Registration and Access to Library of Congress Reading Rooms*, LIB. CONGR., (example that reading rooms today require some kind of registration to get access, such as requiring you to be of a certain age, have a driver's license, or other qualifications) <https://www.loc.gov/rr/readerregistration.html> (last visited Jun. 8, 2023).

¹¹ *Letters from J.R.R. Tolkien to Mrs Rosemary Summers*, BODLEIAN ARCHIVES & MANUSCRIPTS <https://archives.bodleian.ox.ac.uk/repositories/2/resources/2163> (last visited Jun. 8, 2023).

¹² The options in this paragraph should not be construed as requirements for libraries to comply with § 108.

VARs can also place limitations on access to works by employing access control measures, such as a proprietary software system, to ensure that only one patron can access a particular work at any given time.¹³ While libraries should not be in a position to track what individuals do in their own home or office due to legitimate and important patron privacy concerns, they can make it clear in the VAR access terms and conditions that works accessed through the VAR are meant to only be accessed by the individual who made the request. Additionally, the library or archive may impose a time limit on access to a digital copy. After this time slot has expired, the document, the patron's access, and any copies on their device, would be removed.¹⁴

Libraries can also employ safeguards aimed at preventing users from copying, downloading or otherwise permanently acquiring the work from the VAR.¹⁵ Not only do such technologies already exist, but they have increased in availability since the pandemic.¹⁶ For example, libraries can look to current exam proctoring software that prevents students from taking images or downloading tests,¹⁷ software similar to Snapchat's that alerts senders if the recipient has taken a screenshot,¹⁸ or Netflix and Hulu's approach that shows only a black screen if one tries to take a screenshot or screenshare. Other forms of extraction (e.g., printing the page or converting to a PDF) could be blocked on the server. Another example of this type of protective device is used by American Academy of Motion Pictures: when copies of Oscar-nominated movies are sent to Academy members, each copy has a unique identifier on the disc and one that appears on the screen during the movie.¹⁹

Yet another precaution VARs could employ is watermarking the works with information regarding the user, which would allow a patron who violates these rules to be easily identified and

¹³ See Shelly Black, *Introducing the Virtual Reading Room*, NC STATE UNIV. LIBRS. (Mar. 11, 2022) <https://www.lib.ncsu.edu/news/special-collections/introducing-virtual-reading-room>; see also Rules of Use for the Virtual Reading Room in UCISpace @ the Libraries, NC STATE UNIV. LIBRS. (example of reading room restrictions) <https://special.lib.uci.edu/sites/all/docs/special/rules-of-use-virtual-reading-room-ucispace.pdf>.

¹⁴ It may be important that the total number of copies of a particular digitally preserved work being accessed is limited to three. This means that if two patrons are accessing separate copies through a VAR then only one copy can be accessed by patron(s) in a physical reading room. See § 108(b) and (c).

¹⁵ This should not be construed as holding libraries liable for individuals violating the terms of service and making their own copies. Libraries can have vastly different access to IT support and funding and should only be expected to create safeguards that are proportional to their capabilities. It would be unreasonable to expect librarians to become virtual enforcers of the terms and conditions. This lines up with safe harbors for online service providers (OSPs) where they cannot be expected to actively monitor and regulate what is posted on their site. Librarians have only a fraction of the resources that Big Tech does, and it would be absurd to require them to have a higher level of enforcement against copyright violations than YouTube or Facebook. Instead, librarians can make their own judgment calls for what actions should be taken if an impermissible copy is brought to their attention.

¹⁶ See, e.g., Nora Caplan-Bricker, *Is Online Test-Monitoring Here to Stay?*, NEW YORKER (May 27, 2021) <https://www.newyorker.com/tech/annals-of-technology/is-online-test-monitoring-here-to-stay> (demonstrating that test monitoring services such as Proctorio have software to prevent students from cheating during exams, which includes monitoring behavior).

¹⁷ This is not an endorsement by the author of the outdated and flawed test-monitoring software that is Exam4. It is merely an acknowledgement of its features.

¹⁸ Steven John, *'Does Snapchat Notify Users When You Take Screenshots?': Here's What You Need to Know*, BUS. INSIDER (Oct. 28, 2019, 2:10 PM) <https://www.businessinsider.com/does-snapchat-notify-screenshots>.

¹⁹ Day to Day, *Putting a Watermark on Oscar Film 'Screeners'*, NPR, (Jan. 12, 2006) <https://www.npr.org/templates/story/story.php?storyId=5151434>.

held responsible. Even if an individual can circumvent technological safeguards, the watermark will still be visible.

All of these technologies are intended to prevent unauthorized access, and VARs could employ similar mechanisms to protect copyrighted works. Libraries could also consider imposing bans on users who circumvent these safeguards and make this policy clear before patrons can access the works.

1. Note: The Need for VAR Access Controls Must Be Balanced with the Privacy Rights of VAR Users.

The safety, security, and autonomy of users must be considered when implementing technological control measures for works in VARs. Policies requiring that users verify their identity or provide detailed information about their research, although it may be necessary to ensure the required safeguards function properly, compromises user privacy. In addition, systems that offer computer monitoring, particularly those purchased from third party vendors, present additional concerns about data privacy. Therefore, libraries will have to find a balance between controls that protect them from potential copyright infringement, while also protecting the privacy rights of their patrons.

II. The Copyright Act Supports the Creation of VARs.

In discussions about promoting access to copyrighted works through VARs, librarians have suggested several aspects of U.S. copyright law that may provide protection to users and libraries from liability for copyright infringement; this paper provides another.

Greg Cram, the New York Public Library's Associate General Counsel and Director of Information Policy, has described how the doctrine of fair use may grant users the right to access works that are under copyright protection through VARs.²⁰ However, he recognizes that the fair use exception loses some of its utility as a safe harbor because of the complexity of the fair use analysis.²¹ Cram has also suggested that the first sale doctrine and §§ 108(d) and 108(e) of the Copyright Act may give libraries the right to provide access to copyrighted works through VARs.²²

²⁰ Greg Cram, *Feeling Around a Dimly Lit Room: Towards a Virtual Reading Room*, STAN. LIBRS., at 6:50 (Feb. 10, 2020) <https://exhibits.stanford.edu/lightingtheway/catalog/yv187wv5370>. While Cram is specifically discussing providing access to audiovisual works through VARs, which is not entirely covered in this paper, the fair use argument can also be applied to non-audiovisual works.

²¹ *Id.*

²² THE LIGHTING THE WAY HANDBOOK: CASE STUDIES, GUIDELINES, AND EMERGENT FUTURES FOR ARCHIVAL DISCOVERY AND DELIVERY 155-56 (Mark A. Matienzo & Dinah Handel, eds., 2021), <https://doi.org/10.25740/gg453cv6438>.

This paper argues that providing access to copyrighted works through VARs is specifically permitted by §§ 108(b) and 108(c) of the Copyright Act, which have been traditionally cited as granting libraries and archives permission to make copies of copyrighted works for use in physical reading rooms.

A. A Brief History of Section 108

Section 108 was codified as part of the Copyright Act of 1976, but its underlying principles reflect an earlier doctrine: the Gentlemen's Agreement of 1935.²³ The Agreement permitted research institutions, including libraries, to create a single photographic copy of a copyrighted work for a patron.²⁴ This concept parallels the language of Section 108 prior to its amendment under the Digital Millennium Copyright Act (DMCA), which later allowed for the creation of three copies. The Gentlemen's Agreement and Section 108 share key elements, including the stipulation that copies be "intended solely to facilitate research"²⁵ rather than to circumvent copyright protections, and the placement of liability for infringement on the individual rather than the library itself.²⁶

However, the Gentlemen's Agreement exhibited notable flaws in both its development and execution.²⁷ The Agreement originated from the Joint Committee on Materials for Research, established by the American Council of Learned Societies and the Social Science Research Council.²⁸ This Committee aimed to evaluate the collective infrastructure of libraries, research institutes, museums, and archives as a unified enterprise supporting scholarly research. Intellectual property attorney William I. Denning initially supported the Committee's vision of creating an exception to copyright law for scholarly purposes, viewing it as a natural extension of libraries' socially beneficial role.²⁹ Despite this, the Committee ceased collaborating with Denning, possibly due to financial constraints or prioritization of broader research objectives over copyright reform.³⁰

The Committee explored three strategies to secure a copying exemption for scholars: litigation, legislation, and negotiation with publishers.³¹ Of these, only negotiation proved

²³ Peter B. Hirtle, The Gentlemen's Agreement and Copyright, 39 J. COPYRIGHT SOC'Y U.S.A. 545, 545–46 (1992)(hereinafter "Hirtle").

²⁴ *Id.*

²⁵ Hirtle, *supra* note 23, at 546.

²⁶ *Id.* at Appendix A

²⁷ *Id.* at 591 ("[T]he Gentlemen's Agreement only made clearer those areas where there was no consensus on what constituted fair practice.").

²⁸ Solon J. Buck & Robert C. Brinkley, Report of the Joint Committee of the SSRC and the ACLS on the Materials for Research, 15 A.C.L.S. BULL. 366, 368 (1931).

²⁹ Hirtle at 561–63.

³⁰ *Id.* at 563.

³¹ *Id.* at 563–64.

successful.³² Representatives of the Committee met with publishers and the Executive Secretary of the National Association of Book Publishers to draft a voluntary agreement outlining acceptable reproduction practices for libraries.³³ Although this agreement was nonbinding, it aimed to provide guidance to researchers and librarians.³⁴ The publishers' lawyer contributed significantly to the drafting process, and the final version of the Gentlemen's Agreement largely reflected publishers' interests, including revisions to restrict copying to portions of works rather than entire texts.³⁵

Despite its contributions to advancing access to research materials, the Gentlemen's Agreement did not address copying for educational purposes.³⁶ As early as 1933, concerns arose over professors assigning reproduced excerpts to students instead of requiring the purchase of entire volumes.³⁷ Recognizing publishers' resistance to such practices, the Committee refrained from advocating for copyright reforms supporting educational reproductions.³⁸

The efforts of the Joint Committee resulted in proposed legislation in 1940 and 1944 that sought narrower library copying protections than originally envisioned.³⁹ Both bills ultimately failed.⁴⁰ The next significant development occurred in 1959 when Congress tasked the Copyright Office with preparing reports for a comprehensive revision of the 1909 Copyright Act.⁴¹ Among these reports was Study No. 15, authored by Borge Varmer, an Attorney-Advisor to the Copyright Office.⁴² Varmer's study emphasized the importance of library photocopying in facilitating scholarly research, particularly in scientific and technical fields where access costs could otherwise be prohibitive.⁴³

Varmer examined library copyright practices in the United States and abroad, proposing three statutory approaches to library copying.⁴⁴ His second proposal, which suggested precise statutory limitations on library reproduction, became the basis for Section 108 of the 1976 Act.⁴⁵

³² *Id.*

³³ Letter from H.M. Lyndenberg to Robert C. Binkley (Mar. 27, 1935), in the Lyndenberg Papers at the New York Public Library

³⁴ *Hirtle* at 576.

³⁵ *Id.* at 587-589.

³⁶ *Id.* at 557.

³⁷ *Id.*

³⁸ *Id.* at 565.

³⁹ Mary Rasenberger & Chris Weston, Overview of the Libraries and Archives Exception in the Copyright Act: Background, History and Meaning 2 (Apr. 14, 2005), available at [http://www.section108.gov/docs/108BACKGROUNDPAPEr\(final\).pdf](http://www.section108.gov/docs/108BACKGROUNDPAPEr(final).pdf) (hereinafter "Overview")

⁴⁰ *Id.*

⁴¹ *Id.* at 11.

⁴² Borge Varmer, S. Comm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 86th Cong., Study No. 15: Photoduplication of Copyrighted Materials by Libraries (Comm. Print 1960), available at <http://www.copyright.gov/history/studies/study15.pdf> (hereinafter "Varmer")

⁴³ *Id.*

⁴⁴ *Id.* at 49.

⁴⁵ *Overview* at 11.

However, Varmer himself expressed concerns about its efficacy, warning that statutory restrictions could quickly become obsolete due to technological advancements.⁴⁶

Debates surrounding Section 108 persisted throughout the legislative process.⁴⁷ Publishers argued that library copying could harm their financial interests, while librarians emphasized the importance of access to research materials.⁴⁸ Ultimately, the Copyright Act of 1976 incorporated compromises such as limitations on systematic reproduction and interlibrary loan practices, as reflected in Subsection (g)(2).⁴⁹ The CONTU Guidelines later attempted to clarify these provisions, balancing researchers' needs with publishers' concerns, but has had limited balancing effect since the Guidelines have not been updated in forty years.⁵⁰

Section 108 remained largely unchanged until the release of the "White Paper: Intellectual Property and the National Information Infrastructure" in 1995.⁵¹ This report, prepared by the Working Group on Intellectual Property Rights, addressed the impact of emerging digital technologies on copyright law.⁵² The White Paper proposed several revisions to copyright law, including amendments recognizing that digital transmissions could constitute distribution under Section 106(3).⁵³ This interpretation raised concerns about libraries' ability to lend digital copies without infringing on copyright owners' rights.⁵⁴

Regarding Section 108, the White Paper recommended allowing libraries to make three copies of a work, rather than one,⁵⁵ and acknowledged challenges associated with digital lending.⁵⁶ While supporting the development of institutional licenses for digital use,⁵⁷ the report

⁴⁶ Varmer at 66.

⁴⁷ Overview at 12-13.

⁴⁸ *Id.*

⁴⁹ H.R. REP. NO. 94-1476, at 78 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5691.

⁵⁰ The CONTU Guidelines, introduced over four decades ago, were established in a vastly different scholarly and publishing landscape than exists today. Since their publication, libraries have faced significantly increased costs per title, a dramatically expanded array of journal titles, and a growing percentage of their budgets allocated to serials acquisitions compared to 1978. Despite these increased expenditures, no academic library can afford to subscribe to every journal that its researchers may require. Consequently, the ability to obtain materials through interlibrary loan remains an essential mechanism for researchers to access the resources necessary to advance scholarship and innovation—a fundamental objective of copyright law. See Oakley, M., Quilter, L., & Benson, S. R. (2020). *Modern Interlibrary Loan Practices: Moving beyond the CONTU Guidelines*. (ARL White Paper). Association of Research Libraries. <https://doi.org/10.29242/report.contu2020>

⁵¹ Working Group on Intellectual Property Rights, *The White Paper: Intellectual Property and the National Information Infrastructure* (1995), reprinted in Craig Joyce et al., *Copyright Law* 451 (8th ed. Supp. 2010)

⁵² *Id.*

⁵³ *Id.* at 462

⁵⁴ Arnold P. Lutzer, "Defining the Quiet Zone: Library and Educational Perspective on The White Paper," in *Growing Pains: Adapting Copyright for Libraries, Education, and Society* 236 (Laura N. Gasaway, ed. 1997).

⁵⁵ Working Group on Intellectual Property Rights, *The White Paper: Intellectual Property and the National Information Infrastructure* (1995), reprinted in Craig Joyce et al., *Copyright Law* 468 (8th ed. Supp. 2010)

⁵⁶ *Id.*

⁵⁷ *Id.* at 469.

reinforced the importance of balancing copyright holders' rights with libraries' role in facilitating access to knowledge.⁵⁸

B. Section 108 of the Copyright Act Should be Interpreted to Provide Access to Knowledge.

Section 108 of the Copyright Act requires a balancing of rights and restrictions, which stems from copyright holders seeking to prevent libraries from using the latest technology to make works more accessible for patrons.⁵⁹ This dispute began between publishers and libraries over the use of microfilm in the 1930s.⁶⁰ Microfilm, also known as “microform,” gained popularity as a novel, affordable means of reproducing and publishing research materials. The method also improved libraries' abilities to share their collections among one another, which had already been common practice for over a century.⁶¹ This technology, ideal for archival purposes, allowed the contents of a book to be preserved in a way that was more economical than preserving the book itself.⁶² Publishers, however, believed that these microfilm-preserved copies infringed on their own reproduction and distribution rights.⁶³

To resolve this conflict, the Joint Committee on Materials for Research, consisting of the American Council of Learned Societies (ACLS), the Social Science Research Council (SSRC), and the American book publishers' trade association negotiated the Gentlemen's Agreement of 1935,⁶⁴ one of the precursors to Section 108. The Agreement set guidelines for libraries, archives, and museums by limiting the acceptable amount of reproduction of copyrighted materials.⁶⁵ The Agreement permitted libraries to make singular copies of portions of copyrighted material from their collections and loan them out in place of the originals.⁶⁶ This agreement marked the first of its kind between publishers, librarians, and research institutions concerning copyright law and advanced technological copying, representing what would become interlibrary loan and document delivery. While the Agreement was imperfect, it, along with similar professional guidelines, raised the importance of allowing advanced technological copying for archival purposes while still protecting copyright owners' interests.⁶⁷ The Gentlemen's Agreement provisions have been cited

⁵⁸ Arnold P. Lutzer, “Defining the Quiet Zone: Library and Educational Perspective on The White Paper,” in *Growing Pains: Adapting Copyright for Libraries, Education, and Society* 237 (Laura N. Gasaway, ed. 1997).

⁵⁹ See Peter Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935* 1-3 (Mar. 20, 2006) (<https://hdl.handle.net/1813/2719>) [hereinafter *Research on Gentleman's Agreement*].

⁶⁰ See *id.* at 1, 21, 23-4.

⁶¹ See INTERLIBRARY LOAN PRACTICES HANDBOOK 4 (Cherié L. Weible & Karen L. Janke eds., 3d ed. 2011).

⁶² See Robert C. Binkley, *Manual on Methods of Reproducing Research Materials; A Survey Made For the Joint Committee on Materials for Research of the Social Science Research Council and the American Council of Learned Societies* (1936).

⁶³ *Research on Gentleman's Agreement*, *supra* note 24, at 24-7, 29.

⁶⁴ *Id.* at 4.

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 39.

⁶⁷ U.S. COPYRIGHT OFFICE, SECTION 108 OF TITLE 17 — A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS 5 (Sept. 2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf> [hereinafter *Discussion Document*].

in litigation⁶⁸ and appellate decisions,⁶⁹ and its spirit animated Section 108 of the Copyright Act of 1976, which grants rights to libraries and archives to create copies.⁷⁰

Section 108 of the Copyright Act also addresses libraries' and archives' use of technology. It exempts libraries and archives from liability for copyright infringement for the reproduction and distribution rights of certain copyrighted works.⁷¹ These provisions were enacted to create a balance between the exclusive rights of copyright holders and the ability for libraries and other institutions to support the public interest by ensuring that scholars and everyday users can access important information.⁷²

C. Sections 108(b) and 108(c) Allow Libraries and Archives to Make Three Copies of Certain Works Viewable in Physical Reading Rooms.

Section 108 of the Copyright Act provides libraries and archives with the right to reproduce and distribute copies of a copyrighted work if certain prerequisites are met.⁷³ Sections 108(b) and 108(c) extend this special right of reproduction and distribution afforded to libraries and archives, allowing them to create three copies if additional conditions are met.

- In the case of unpublished works, three copies may be made of works currently in the collections of the library, as long as they are reproduced for preservation and security, or for deposit for research use in another library or archives.
- In the case of published works, three copies may be made to replace a lost or deteriorating copy or if the original format has become obsolete, so long as an unused replacement cannot be obtained at a fair price.
- In both cases, any digital copies made must not be “made available to the public in that format outside the premises of the library or archives.”⁷⁴

Copies made pursuant to § 108 are often available for access only in reading rooms where their handling can be monitored under the careful watch of librarians. Many of these rooms are climate controlled, a preservation technique that would not be available if the works were to be checked out. In addition, handling of the works is reduced as much as the librarians deem necessary.⁷⁵

⁶⁸ *Williams & Wilkins Co. v. United States*, 172 U.S.P.Q. 670, 672 (Ct. Cl. 1972), rev'd, 487 F.2d 1345 (Ct. Cl. 1973).

⁶⁹ *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1355 (Ct. Cl. 1973).

⁷⁰ Discussion Document, *supra* note 32, at 5.

⁷¹ 17 U.S.C. § 108.

⁷² See Discussion Document, *supra* note 32, at 10.

⁷³ § 108(a).

⁷⁴ § 108(b)(2).

⁷⁵ For example, book weights are provided to keep the books open without constantly touching the pages.

Under this rule, digital copies may be made available to view on terminals in the physical reading room of the library or archives. However, access to these works in physical reading rooms, whether in analog or digital format, is limited by the policies of the institution in which the reading room is located. Accordingly, institutions have determined that access to copies in this way does not make them “available to the public in that format outside the premises of the library or archives.”⁷⁶

D. Nothing in Sections 108(b) and 108(c) Prevents Libraries and Archives from Providing Access to Those Copies in VARs.

1. Copies in a VAR are “not made available to the public.”

Sections 108(b) and 108(c) do not define the term “public” as it is used in the provision prohibiting libraries and archives from making digital copies made pursuant to those subsections “available to the public.” However, the language of Section 108(a) differentiates between “open to the public” and other types of access and enumerates what qualifications a library or archive must meet in order to fall under its express exemptions. For example, Section 108(a)(2) requires that “the collections of the library or archives are (i) **open to the public, or** (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field.” The “or” in this provision indicates that archives can provide access to a specific group of people (“research[ers] in a specialized field”) without being “open to the public.”

The definition of “public” in the Merriam-Webster dictionary supports that interpretation. “Public” is defined as follows: “Adjective: exposed to general view; accessible to or shared by all members of the community. Noun: a place accessible or visible to the public—usually used in the phrase in public; a group of people having common interests or characteristics specifically: the group at which a particular activity or enterprise aims.”⁷⁷

Because access to VARs will be circumscribed to a select group, they are not public.⁷⁸ As noted in section 1 of this paper, access to a VAR can be restricted to those who comply with the application process of the library or archives and have agreed to abide by the terms and conditions for such access, which can be similar to those that apply in a physical reading room of an archive. For example, rules may include limits on the use of the work, or prohibitions against mounting the work on a public server.⁷⁹

⁷⁶ § 108(b)(2).

⁷⁷ *Public*, Merriam-Webster (11th ed. 2020).

⁷⁸ Howard Besser et al., *Video at Risk: Strategies for Preserving Commercial Video Collections in Libraries*, N.Y.U. LIBRS. 15-6 n.17 (Dec. 2012) http://guides.nyu.edu/ld.php?content_id=24818036.

⁷⁹ University of California Irvine Libraries, *Rules of Use for the Virtual Reading Room in UCISpace @ the Libraries*, <https://special.lib.uci.edu/sites/all/docs/special/rules-of-use-virtual-reading-room-ucispace.pdf> (last visited Jun. 8, 2023)

Furthermore, because VARs, by design, will provide access only to specific researchers, this means that VARs will not be “open to the public.”⁸⁰ By registering and requesting a specific work, qualified patrons become part of a subset of “researchers” with specialized and authorized access to materials. This special access is limited in time, similar to how patrons must either request time slots to access reading rooms or comply with business hours. The registration and technical requirements to access a work in a VAR mean that the work will not be available to general view or visible to the public. Additionally, an individual will be required to agree to not share the work in its digital format before being permitted to access the file. Accordingly, copies of works available to only this subset of patrons and under these specific restrictions are “not made available to the public” under Sections 108(b) and 108(c) of the Copyright Act.⁸¹

Certain works in a library or archives may not be “available to the public” even if the library or archives permits public access generally. Section 101 of the Copyright Act specifies that “[t]o perform or display a work ‘publicly’ means— (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” VARs would only transmit the requested work to one specific person at a time, and that person is unlikely to constitute the “public” under the transmit clause.

2. Copies accessed through a VAR are not distributed "outside the premises."

Subsections 108(b)(2) and 108(c)(2) specify that digital copies made under the provisions of Section 108 cannot be made available “outside the premises of the library or archives.” This language has been interpreted to limit the public distribution of a digital preservation copy to the physical premises of the library or archives.⁸² In other words, the public could access the digital format of the work, but only by traveling to the library or archives to view the work on a dedicated computer terminal within the library’s four walls.

Before digitization, the premises language made sense because one had little choice but to visit a physical library in order to access works.⁸³ This interpretation makes less sense, however,

⁸⁰ This paper argues that VARs are a public accommodation that promote public interests, but this should not be confused as to mean being available to the public.

⁸¹ Besser, *supra* note 43.

⁸² Discussion Document, *supra* note 32, at 24 (“If the unpublished works are converted to a digital format, they cannot be made available to the public outside the premises of the library or archives in that format.”); Section 108 Study Group, *The Section 108 Study Group Report* (Mar. 2008), <https://section108.gov/docs/Sec108StudyGroupReport.pdf> at 114 (“While they may possess physical premises where their servers are located and employees work, if they are not providing access through these locations it is unlikely they would be deemed to be “conducting operations” through physical premises.”) (assuming conducting operations is behavior allowed under § 108).

⁸³ See Section 108 Study Group, *The Section 108 Study Group Report* (Mar. 2008), <https://section108.gov/docs/Sec108StudyGroupReport.pdf> [hereinafter Study Group] at 17 (discussing how, prior to the Digital

in our current technological world, in which this type of binary paradigm (either you are physically present, or you are not) does not apply. Not only is access possible without regard to the physical location of a work, but access to physical premises can frequently be prohibitive, and can in fact be a barrier to those who, for physical or other reasons, are unable to do so.⁸⁴ Such an unreasonable barrier is directly contrary to the goal of the Copyright Act, which is to promote the progress of science and arts.⁸⁵

The term “premises” is not defined in the Copyright Act.⁸⁶ Regarding Section 108 specifically, “[t]here is no definition of what constitutes ‘premises’, but most analysts assume that this restricts use to a specific library building.”⁸⁷ In lieu of a statutory definition, the narrow definition of premises offered by traditional dictionaries—as well as by industry analysts—suggests that it is unlikely that VARs will be considered “on the premises” in a traditional sense because a user would not have to be at a physical library to access the work.⁸⁸ That said, Section 108 does not require the work to only be accessed “on” the premises, only that it **not** be accessed “outside” the premises.

A Discussion Document of the Register of Copyrights: Section 108 of Title 17 (“Discussion Document”) written by the U.S. Copyright Office, a division of the Library of Congress, suggests that VARs are neither on the premises nor outside the premises, but instead fall into a third category. The *Discussion Document* provides an example in which “[c]opies in digital formats not on physical media may be accessed by users **remotely** for a limited time by one user at a time.”⁸⁹ Although these copies are not “on the premises” in the same way that a book may be, they are still not “outside the premises” in the same way that a book lent and taken home by a patron may be.

Therefore, as long as the remote access is still tethered to the library, such as through an online portal, and the patron cannot download it, then it is clearly not “outside the premises.” Libraries are already providing access to analog works in a way that falls into this third category. For example, the Huntington Library and University of Washington Library in the United States, in addition to several libraries in the United Kingdom, have set up cameras to remotely stream

Millennium Copyright Act (DMCA) in 1998, it was more realistic to require visiting a physical space to use the library computers).

⁸⁴ See *infra* Part III.

⁸⁵ Previous interpretations of copyright law state that Congress is unlikely to put in place unreasonable barriers that would undermine access to copyrighted works. See *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 530 (2013) (regarding the first sale doctrine “[w]e also doubt that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities.”). Requiring a physical premise would be an unreasonable barrier.

⁸⁶ 17 U.S.C. §§ 101, 108.

⁸⁷ Peter B. Hirtle et al., *COPYRIGHT AND CULTURAL INSTITUTIONS: GUIDELINES FOR DIGITIZATION FOR U.S. LIBRARIES, ARCHIVES, AND MUSEUMS* 115 (2009).

⁸⁸ *Id.*; *Premises*, *Merriam-Webster* (11th ed. 2020).

⁸⁹ See *Discussion Document*, *supra* note 32, at 30.

video images of analog works using remote meeting services like Zoom or Microsoft Teams.⁹⁰ Similarly, VARs that provide access to copies of works made pursuant to Section 108 operate in this alternative way, which, while it may not be considered to be “on the premises,” it is certainly not “outside the premises” of the library or archives.

The existence of digital copies—and the way they are accessed—complicates the meaning of “premises” and renders the term somewhat obsolete in the modern world.⁹¹ However, if the premises binary were to be maintained, it could be argued that the library’s website and the VAR fall under the umbrella of being “on the premises.” For instance, many of the same requirements for library access will be required of VARs. The same way patrons need a library card to use the physical library, patrons will need login credentials or another access mechanism to use the VAR. Although users will not have to be physically present at the library to use the VAR, they will still be operating within the confines of the library’s digital environment and be subject to their rules and procedures.

The *Discussion Document* provides the following interpretation: imagine that a library creates a digital copy of a damaged analog work that is to be stored on a library computer, which can also be accessed via streaming on the library network.⁹² The library may allow users to access the work on a library terminal, but may prevent users from saving or otherwise extracting the file to view outside the library terminal.⁹³ The *Discussion Document* makes a distinction between digital access and the notion of “outside the premises,” leading to the interpretation that such digital access may be considered “on the premises.” As long as the user is unable to remove the file from the VAR, the digital copy is still available only “on the premises” because the copy itself never leaves the VAR.

3. Unpublished copies are not distributed.

Unpublished works represent an important number of works. These works may still be under copyright protection, even though they were never published. One famous example of this type of work is J.D. Salinger’s personal correspondence.⁹⁴ If these works, which are likely one-of-

⁹⁰ *Virtual Reading Room*, HUNTINGTON, <https://huntingtonlibrary.libcal.com/appointments/vrr> (last visited Jun 8, 2023); *Virtual Reading Room Appointment*, UNIV. WASH. LIBRS., <https://cal.lib.uw.edu/space/123219> (last visited Jun. 8, 2023); *The Virtual Reading Room at the University of Manchester Library*, RLUK, <https://www.rluk.ac.uk/the-virtual-reading-room-vrr-at-the-university-of-manchester-library/> (last visited June 8, 2023); *Supporting Researchers Remotely*, LEEDS UNIV. LIBR. BLOG, <https://leedsunilibrary.wordpress.com/2021/03/24/supporting-researchers-remotely/> (last visited June 8, 2023); *University of Reading Virtual Reading Room*, UNIV. READING, <https://vrr.reading.ac.uk/> (last visited June 8, 2023). One study of this version of a VAR noted that “[c]opyright and Intellectual Property issues were cited regularly by respondents as reasons for restricting access” MATT GREENHALL & RESEARCH LIBRARIES UK, *NEW FRONTIERS OF DIGITAL ACCESS: THE DEVELOPMENT AND DELIVERY OF VIRTUAL READING ROOMS AND VIRTUAL TEACHING SPACES AMONGST COLLECTION-HOLDING INSTITUTIONS* 17 (2021), <https://www.rluk.ac.uk/portfolio-items/new-frontiers-of-digital-access-the-development-and-delivery-of-vrrs-and-vtss/>

⁹¹ See Study Group, *supra* note 48, at 56-60.

⁹² Discussion Document, *supra* note 32, at 33.

⁹³ *Id.*

⁹⁴ See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir. 1987).

a-kind, are unpublished, they cannot be obtained in the market.⁹⁵ Section 108(b) recognizes that libraries will want to house and share these important works, which may otherwise fail to be preserved. At this point, the important question that a VAR helps answer is as follows: Can the library make this digitized version of this unpublished work available to patrons? Or is this a violation of the Copyright Act?

The language of Section 108(b) lays out several requirements regarding access to unpublished works. Section 108(b)(2) requires that “any such copy or phonorecord that is reproduced in *digital format* is **not otherwise distributed in that format and is not made available to the public in that format** outside the premises of the library or archives.”⁹⁶ While it is unclear whether “otherwise distributed” refers to a distribution in the past or to a distribution of one of the three copies made under this subsection, VARs are within the bounds of Section 108 under either interpretation.

If the phrase “not otherwise distributed” means that the work has been distributed in a digital format in the past, then the key word “and” that has been inserted between “format” and “is not made available to the public” is very important. Why? Because this “and” creates two distinct criteria that limits a library’s ability to distribute a digitized version of that work outside the premises. If both criteria are met, then this kind of distribution of the work is not permitted.

When is this restriction triggered? Under the Copyright Act, distribution is restricted only if **both** of the Section 108(b)(2) factors apply: (1) it has not been “otherwise distributed” **and** (2) has not been “made available to the public.” However, if only one of these terms is applicable, then distribution is permissible under Section 108(b)(2).

For example, distributing a digital unpublished work to a specific group of students, such as posting a digital copy of a letter written by J.D. Salinger on the access-controlled course website of a literature class, would not be considered making the document “available to the public.” Therefore, since this term is not applicable, this is permissible under Section 108.

Furthermore, according to the statute, if a work has been distributed in digital format in the past **and** made available to the public, then the distribution limitation does not apply under Section 108(b). Why? This is because when a work is distributed to the public, this means that it has been published. Accordingly, this distribution should be evaluated under Section 108(c) (the rule for distribution of *published* works), not Section 108(b) (the rule for distribution of *unpublished* works). The *publication binary* is key to the analysis in this situation. For a work to be published, it must have been distributed to the public.⁹⁷ If a work is distributed, but not to the public, then it is not a publication. It can therefore be inferred that the limiting distribution language is present in

⁹⁵ Unpublished works might be a collection of personal letters, diaries, or other works that have never been available in the commercial market.

⁹⁶ 17 U.S.C. § 108(b)(2)(*emphasis added*)

⁹⁷ 17 U.S.C. § 101 (“the **distribution** of copies or phonorecords of a work **to the public**.”).

order to keep “unpublished” works from being distributed in such a way that they would become published. After all, libraries traditionally have been repositories of knowledge, not necessary publishers of it.

This interpretation is furthered by the fact that the “otherwise distributed” language is missing from Section 108(c): it is not necessary, because Section 108(c) applies to published works. Furthermore, a requirement for a work to be “published” is for it to have been distributed to the public.⁹⁸ If a work has not been “distributed” to the public, then clearly it has not been published.

Therefore, the language in Section 108(b)(2) should not be read as to prevent the distribution of digital works entirely, but merely to prevent the library-made digital copies from being “made available to the public outside the premises” if they have not been “otherwise distributed.” This means that the only key restriction for “unpublished” works under Section 108(b) is that they are *not* distributed to the public. As long as the unpublished works in VARs are not distributed to the public, then access to unpublished works via VARs should be permitted.

However, this is not the only way to read the distribution limitation for unpublished works. Even if the reader disagrees with the above interpretation of “otherwise distributed,” the following argument provides an alternate, but equally valid, interpretation of the distribution language.

If the “otherwise distributed” language refers to distribution of the copies created under Section 108(b)(2), then a librarian-made copy of an unpublished work may not be distributed and made available to the public, and that the copy cannot be distributed outside the premises **if it is also** made available to the public. This allows for two possible scenarios: 1) a copy is distributed but not made available to the public, and 2) a copy can be distributed outside the premises as long as it is not made available to the public. In Part II(C)(1), this paper made it clear that works in a VAR are not “made available to the public.” This means that VARs are permitted to distribute unpublished work outside the premises.

Therefore, the key word “and” in § 108(b)(2) means that “distribution” of digital copies is prohibited only when they are “made available to the public.”⁹⁹ It is in combination with the distribution of copies that a work becomes published.

4. Back-up copies are incidental to use and do not contribute to the statutory cap on copies.

⁹⁸ *Id.*

⁹⁹ The protection of the distribution right in the Copyright Act furthers the argument that in § 108(b)(2) it is meant to specifically indicate distribution to the public. § 106 specifies the right “to distribute copies or phonorecords of the copyrighted **work to the public** by sale or other transfer of ownership, or by rental, lease, or lending” The exclusive right is not just to distribute but to distribute to the public. Therefore, distribution on its own is not inherently “to the public.” A public performance or display of a work does not of itself constitute publication. § 101.

It is necessary for libraries and archives to make copies to disseminate knowledge, preserve materials, and ensure that future generations have access to the works.¹⁰⁰ Digital copies require many back-ups in case the files, due to system or other failures, become corrupted or get deleted.¹⁰¹ These copies should be “incidental to use” because they would not be accessible by patrons; rather, librarians would maintain them in a protected digital archive and only make them available in the event that a copy that is used by patrons needs to be replaced.¹⁰² Furthermore, these copies should not count towards the statutory cap because they exist only to ensure libraries can execute their duties, and because they pose no risk of market harm to copyright holders.¹⁰³

As with any remote transmission of information over the internet, it is difficult to determine how many digital copies are produced when a work is made available to a patron through a VAR. The making of these copies cannot be avoided given how the technology functions.¹⁰⁴ These copies should be treated in a similar manner to backup computer copies, as defined in Section 117 of the Copyright Act. This section allows owners of a copy of a computer program to create another copy under certain conditions.¹⁰⁵ It is not an infringement to make such a copy for the purposes of maintenance or repair if one of two conditions is met. The new copy must either be “created as an essential step in the utilization of a computer program and used in no other manner,”¹⁰⁶ or “used for archival purposes only” and be immediately destroyed.¹⁰⁷

Although copies in VARs need not follow the exact requirements of Section 117, the underlying purpose, that is, maintaining and preserving at-risk copies, is in line with the goals of Section 108. Digital copies that will be accessed by patrons, and which arguably count toward the three-copy statutory limit, should be distinguished from the copies made by libraries for backup, which should not count towards this limit.

In order to provide not only legal interpretation, but also practical considerations and guidelines for users, it is important to note that industry analysts find the three-copy statutory cap to be outdated.¹⁰⁸ Perhaps prior to the digital age, such a number was workable in light of the technologies available at the time; however, such a cap in the twenty-first century cuts libraries and archives’ legs out from under them. Although Section 108 is intended to balance the rights of copyright holders with the public interest served by libraries and archives, clinging to outdated language undermines this purpose.¹⁰⁹ Altering the standard to reflect something more flexible,

¹⁰⁰ See Study Group, *supra* note 48, at 15.

¹⁰¹ *Id.* at 45.

¹⁰² This might be needed if a file is corrupted or lost.

¹⁰³ See Study Group, *supra* note 48, at 44.

¹⁰⁴ *Id.*

¹⁰⁵ See generally 17 U.S.C. § 117.

¹⁰⁶ 17 U.S.C. § 117(a)(1).

¹⁰⁷ 17 U.S.C. § 117(a)(2).

¹⁰⁸ See Discussion Document, *supra* note 32, at 25.

¹⁰⁹ *Id.*

such as a “reasonably necessary” standard, would provide libraries with the ability to execute their duties without fear of retaliation from lawsuit-happy publishers, while still ensuring that copyright holders’ rights are protected.¹¹⁰

III. VARs Are Already Accepted Ways to Share Information.

VARs are already accepted as a way to easily share information and improve access. For example, VARs have been used to facilitate widespread access to documents requested under the Freedom of Information Act (FOIA), to encourage access to public domain works no longer under copyright, and to increase access to certain copyrighted works with permission of the owner. The VARs proposed in this paper only differ in improving access to copyrighted works, which is permitted under Section 108 of the Copyright Act.

A. Electronic Reading Rooms facilitate FOIA Requests.

FOIA, codified under Section 552 of Title 5 of the United States Code, is a federal law that requires the government to disclose certain documents upon request.¹¹¹ It applies equally to physical and electronic records,¹¹² and requires agencies to produce information in the requester’s preferred format.¹¹³ FOIA electronic reading rooms make the requested information readily accessible to the public and reflect the principles of openness that democratic governance is meant to embody.¹¹⁴ Just as electronic reading rooms encourage the transparency values behind FOIA, VARs help achieve the Copyright Act’s underlying goal of promoting access to knowledge in furtherance of “progress of science and the useful arts.”¹¹⁵

FOIA’s statutory language distinguishes between information that must be published and information that must be made available for public inspection in an electronic format.¹¹⁶ Similarly, the Court of Appeals for the District of Columbia Circuit, in its 2017 decision in the case of *Citizens for Responsibility and Ethics in Washington. v. U.S. Department of Justice*, “[d]istinguish[ed] between ‘[p]roviding documents to the individual’ and ‘ordering publication,’”¹¹⁷ making it clear that unpublished works under copyright can be distributed to individuals without being “published.” This same distinction can be applied to the distribution

¹¹⁰ *Id.*

¹¹¹ 5 U.S.C. § 552.

¹¹² The Electronic Freedom of Information Act Amendment of 1996 meant that electronic records were now subject to the same disclosure requirements as paper records. Freedom of Information Act (FOIA) 5 U.S.C. § 552 (a)(2)(D)-(E) (1967) (amended 1996).

¹¹³ *Id.*, <https://www.justice.gov/oip/blog/foia-update-freedom-information-act-5-usc-sect-552-amended-public-law-no-104-231-110-stat>.

¹¹⁴ *FOIA Guide, 2004 Edition: FOIA Reading Rooms*, Dep’t. Jus. Archives: Off. Info. Pol’y, (2004)

<https://www.justice.gov/archives/oip/foia-guide-2004-edition-foia-reading-rooms> (last modified Dec. 3, 2021).

¹¹⁵ U.S. CONST. art. I, § 8, cl. 8.

¹¹⁶ 5 U.S.C. 552(a)(1) and (2). See also *Citizens for Resp. & Ethics in Wash. v. U. S. Dep’t of Just.*, 846 F.3d 1235, 1240 (D.C. Cir. 2017) (citing *Kennecott Utah Copper Corp. v. U.S. Dep’t of Interior*, 88 F.3d 1191 (D.C. Cir. 1996)).

¹¹⁷ *Id.*

limitation in Section 108(b). Therefore, VARs would be able to include unpublished works without risk of publishing them because they are only published if they are distributed to the public.

B. VARs already exist for works in the public domain.

VARs are already in use for works in the public domain. Currently, the public domain includes most works published before 1927,¹¹⁸ works by the federal government, and any works dedicated to the public domain by their authors.¹¹⁹ By definition, when a work passes into the public domain, its copyright holder no longer retains any rights to it, and the public may utilize it without worrying about infringement.¹²⁰ For example, the New York Public Library has a variety of digitized collections, which are freely available online, featuring public domain works.¹²¹ These collections, such as the Early American Manuscripts Project, which contains documents from the United States' founding, are available on the library's VAR.¹²²

The Rare and Distinctive Collections at the University of Colorado Boulder serves as “a regional library of the Federal Depository Library Program as well as a Preservation Steward for U.S. Congressional publications.”¹²³ As government documents, most of the works included are unprotected by copyright.¹²⁴ In April 2021, the university launched a VAR specifically for their Rare and Distinctive Collections, providing much-needed digital access to these works in the middle of a global pandemic.¹²⁵ The public domain nature of the works allowed the university to implement the VAR with ease. This paper asserts copyright is the only difference between the Rare and Distinctive Collections VAR and the Section 108 VARs.

C. VARs exist for certain copyrighted works.

If a copyright holder gives permission for users to access their copyrighted work via VAR access, copyright does not pose a problem for VARs. In 2010, the University of California Irvine (UCI) launched a VAR after Richard Rorty donated some of his works to the university's Critical

¹¹⁸ *Welcome to the Public Domain*, STAN. LIBR.: COPYRIGHT AND FAIR USE (as of 2022, all works published before January 1, 1927, are in the public domain; however, public domain is a moving target, and thus changes with each calendar year) <https://fairuse.stanford.edu/overview/public-domain/welcome> (last accessed Apr. 21, 2022).

¹¹⁹ 17 U.S.C. § 105.

¹²⁰ 17 U.S.C. § 303.

¹²¹ Meredith Mann, *Welcome to the Virtual Reading Room: Digitized Archives for Home Research*, N.Y. PUB. LIBR. (May 4, 2020), <https://www.nypl.org/blog/2020/05/04/welcome-virtual-reading-room>.

¹²² *Id.*

¹²³ Government Information, UNIV. COLO. BOULDER, <https://www.colorado.edu/libraries/libraries-collections/rare-distinctive/government-info> (last visited Jun. 8, 2023).

¹²⁴ Government works such as Congressional publications are not protected by copyright. § 105.

¹²⁵ *University Libraries Opens Virtual Reading Room for Rare and Distinctive Collections*, UNIV. COLO. BOULDER (Apr. 5, 2021), <https://www.colorado.edu/libraries/2021/04/05/university-libraries-opens-virtual-reading-room-rare-and-distinctive-collections> (last visited Jun. 8, 2023).

Theory Archive.¹²⁶ Still under copyright, UCI was allowed to utilize these works with the permission of the author, who passed away shortly after he made this donation.¹²⁷ Although his widow retained the copyright to these materials after Rorty's death, the gift agreement allowed UCI to make his works available "for research without restriction according to the established procedures of the UCI Libraries."¹²⁸ According to the creator of the VAR, providing this type of online access would not impede Rorty's widow from exercising her rights.¹²⁹

In a blog post announcing its own VAR, North Carolina State University hailed the UCI VAR as one of the first in the country and highlighted how the pandemic illustrated the need for remote access.¹³⁰ The post also referred to access control measures intended to protect copyrighted works and emphasized the benefits of VARs, including the elimination of the requirement travel in person to the library for interested patrons who do not live locally.¹³¹

As previously mentioned, Section 108 VARs can have extensive access control mechanisms to protect the copyright holder's interests. With these safeguards in place, refusing to allow Section 108-compliant VARs in a world where VARs for other works are already commonplace is an unreasonable restriction that libraries should not have to meet.

IV. Virtual Access Rooms (VARs) Provide Crucial Access to Copyrighted Works.

VARs meet the mission of libraries using the technology available today. They ensure all patrons can avail themselves of a libraries' public benefits. Simply put, VARs offer a virtual portal that allows individual users to access works, including copyrighted works, that are preserved in a digital format by libraries or archives, as allowed under Section 108 of the Copyright Act. VARs are necessary because they provide an essential service: specifically, the ability to equitably, legally loan digitized works without having to physically visit a library. They reflect our current digital era, in which disability, location, financial constraints, and national crises and natural disasters cannot and must not impede an individual's pursuit of knowledge. By encouraging digitization, VARs support Section 108's goal of preservation as well.¹³²

In a world where virtual access is possible, restricting access to the incredible amounts of knowledge housed by libraries to only those who can visit them in person is ludicrous and contrary to the spirit of copyright law. Increasing accessibility in all facets of life is an invaluable mission

¹²⁶ Michelle Light, *Managing Risk with a Virtual Reading Room: Two Born Digital Projects*, in REFERENCE AND ACCESS INNOVATIVE PRACTICES FOR ARCHIVES AND SPECIAL COLLECTIONS 17 (Kate Theimer ed., 2014) https://digitalscholarship.unlv.edu/cgi/viewcontent.cgi?article=1462&context=lib_articles.

¹²⁷ *Id.*

¹²⁸ *Id.* at 19.

¹²⁹ *Id.*

¹³⁰ Black, *supra* note 14.

¹³¹ *Id.*

¹³² § 108 is meant to preserve only copies that are not commercially available, unavailable at a reasonable price, or are so fragile that they need to be preserved in a new medium. 17 U.S.C. § 108.

and ought to be extended to the primary stewards of knowledge in our culture – libraries. VARs level the playing field and increase access for patrons who are otherwise unable to gain access to a library’s resources.

A. VARs increase access for patrons with disabilities.¹³³

VARs allow access to those for whom physically entering a reading room is impractical or dangerous. One should not have to risk either their own or their loved ones’ health just to access knowledge.¹³⁴ For example, VARs would grant immunocompromised patrons access to all the knowledge the library has preserved, without posing unnecessary risks to those patrons’ health and livelihood.¹³⁵

Virtual access to works in libraries and archives also furthers access for patrons with disabilities. Digitized works may enable dictation or provide visual aids for people who are visually impaired.¹³⁶ Patrons with mobility and other restrictions that make travel difficult or impossible will no longer have to physically visit a library’s reading room and navigate the library itself.¹³⁷ VARs provide equitable and convenient access for patrons with disabilities.

B. VARs increase access for rural and Indigenous American¹³⁸ patrons.¹³⁹

¹³³ We have chosen to use the term “patrons with disabilities” as opposed to “disabled patrons” in an effort to adopt person-first language consistent with the Americans with Disabilities Network as well as previous Library Futures work.

¹³⁴ “In crafting exceptions, Congress and the courts have been mindful of the need to avoid harm to the incentives to create and disseminate works of authorship that copyright law was designed to foster and still serve the public good by ensuring the dissemination of knowledge.” Study Group, *supra* note 48, at ii (Mar. 2008)

¹³⁵ Accessibility for patrons with disabilities is always in the public interest. VARs accomplish this because they promote the pursuit of knowledge and create a more accessible system, which in turn benefits society as a whole, even if only a subset of patrons is granted access. The entirety of the general public need not avail themselves of a VAR for VARs to still serve the public interest.

¹³⁶ See, e.g., *Authors Guild Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) (finding that mass digitization of more than 20 million in copyright works for purposes of full-text searching and access for people with print disabilities was fair use).

¹³⁷ An average of twenty-eight wheelchairs a day are damaged by airlines. A patron should not have to risk being immobilized because of another’s mistake to access a physical reading room. “It makes me not want to travel because even if there’s a small chance of my chair being damaged, that risk just doesn’t exist for non-wheelchair users. They don’t have to think about a 1 in 10 chance of having their legs broken on a flight,” Bethany Dawson, *US Airlines Damage Thousands of Wheelchairs Every Year. Disabled Sen. Tammy Duckworth Says, ‘It’s Like They’re Breaking my Legs Every 3-4 flights.’*, BUS. INSIDER (Oct. 16, 2021) <https://www.businessinsider.com/disability-us-airlines-damage-thousands-of-wheelchairs-a-year-2021-10#:~:text=834%20wheelchairs%20were%20damaged%20by,destroying%20part%20of%20the%20body> (quoting Theo Donnelly, a wheelchair user interviewed for the article).

¹³⁸ We have elected to use the term “Indigenous Americans” based on guidance from the National Museum of the American Indian stating that “Native American” has fallen out of favor with some groups. *Teaching & Learning About Native Americans*, NATIONAL MUSEUM OF THE AMERICAN INDIAN: NATIVE KNOWLEDGE 360° FAQ, <https://americanindian.si.edu/nk360/faq/did-you-know#:~:text=In%20the%20United%20States%2C%20Native,preferred%20by%20many%20Native%20people> (select “Terminology”) (acknowledging that when possible, a specific tribal name is preferred over other terms) (last visited June 8, 2023) We use the word “group” because “nation” and “tribe” are not universally agreed upon. *The Impact of Words and Tips for Using Appropriate Terminology: Am I Using the Right Word?*, NATIONAL MUSEUM OF THE AMERICAN INDIAN: NATIVE KNOWLEDGE 360°, <https://americanindian.si.edu/nk360/informational/impact-words-tips> (last visited Jun. 8, 2023).

¹³⁹ This paper acknowledges that a flaw with VARs is that it requires patrons to have access to power, the internet, and a device that connects to the internet. Libraries will need to consider this when deciding which patrons will likely want access to the works in their VAR. A solution might be VAR portals that do not require consistent internet access in order to access the request work, or other technical solutions.

Not everyone has equal, unfettered access to libraries in the first place. For patrons in rural communities, their local library may be quite far away. Rural libraries are also typically under-resourced compared to libraries in more populated areas, and it may be difficult for patrons living in rural areas to arrange sufficient, convenient, and affordable transportation to libraries with more comprehensive materials.¹⁴⁰ By circumventing locality, VARs would enable rural researchers to enjoy the same level of access as patrons who live down the street from the New York Public Library.¹⁴¹

VARs may also supplement libraries on Indigenous American reservations, thereby providing important services to Indigenous American patrons.¹⁴² Due to a lack of federal aid, these reservations are some of the poorest areas in the United States, and among the locations where public benefits are needed the most.¹⁴³ While many Indigenous Americans have libraries on their reservations, these libraries face a severe lack of resources.

VARs could benefit Indigenous Americans and their communities in several ways. For example, they could serve as a conduit by which researchers from different Indigenous American groups can share resources, strengthen their cultural roots, and provide access to knowledge and materials that would have otherwise been destroyed.¹⁴⁴ Furthermore, VARs would enable Indigenous Americans to access copyrighted works relevant to their culture, such as those housed at the National Museum of the American Indian in Washington, D.C. Ensuring that Indigenous Americans have ease of access to their culture's important works helps preserve history and fight revisionism – an objective that is particularly important for marginalized groups. By allowing copyrighted works to be shared via VARs, patrons who are not located in close proximity to a well-stocked library will no longer be at such a drastic disadvantage.

C. VARs increase access for patrons with financial constraints.

VARs would allow patrons to access the materials they want¹⁴⁵ regardless of their financial circumstances. Currently, scholars and researchers must dip into their personal or grant money to

¹⁴⁰ See Brian Real & R. Norman Rose, *Rural Libraries in the United States: Recent Strides, Future Possibilities, and Meeting Community Needs*, AMERICAN LIBR. ASS'N 2 (Jul. 2017) <https://www.ala.org/advocacy/sites/ala.org/advocacy/files/content/pdfs/Rural%20paper%2007-31-2017.pdf>.

¹⁴¹ This is not to say that VARs will be accessible by patrons in foreign countries. This would involve other countries copyright laws and is beyond the scope of this paper.

¹⁴² For a discussion of libraries on Indigenous American reservations see Sandra D. Littletree, "Let Me Tell You About Indian Libraries": Self-Determination, Leadership, and Vision – The Basis of Tribal Library Development in the United States, 7 (2018) (Ph.D. dissertation, University of Washington), <https://www.atalm.org/sites/default/files/History%20of%20Tribal%20Libraries%20-%20Littletree%20doctoral%20dissertation.pdf>.

¹⁴³ See Rebekah May Yeagley, *Why Native American Reservations Are the Most Poverty-Stricken Lands in America*, FOUND. FOR ECON. EDUC. (Nov. 9, 2009), <https://fee.org/articles/why-native-american-reservations-are-the-most-poverty-stricken-lands-in-america/>.

¹⁴⁴ Littletree, *supra* note 107, at 7.

¹⁴⁵ Libraries will have discretion in allowing patrons access to VARs. Although scholars and researchers are a focal point of § 108, it is important to note that libraries may allow patrons to access materials for other purposes as well, provided they meet the required (library-specific) criteria. For example, a schoolteacher may request access to materials in a reading room in order to

visit other institutions' reading rooms.¹⁴⁶ As works are located around the world, it is unlikely that any one scholar will live near all the materials they need. Whether they have to take an Uber across town to another university or the Amtrak from New York to Washington, D.C., VARs would eliminate this time-consuming and expensive travel entirely. Now the funds that would have otherwise been used for travel can be put towards living expenses and funding the research itself.

D. VARs increase access during national crises and natural disasters.

VARs allow patrons to continue accessing works during national health crises, such as the COVID-19 pandemic, as well as during natural disasters. For example, at the beginning of the COVID-19 pandemic, travel was limited or entirely impossible for extended periods.¹⁴⁷ Without VARs, scholars had to halt their research for an indefinite period of time because they were unable to travel and visit libraries in person.¹⁴⁸ Some libraries took over a year to reopen.¹⁴⁹ VARs would eliminate the need to risk one's health and safety by virtue of in-person interactions at a physical space in times of natural disasters, civil unrest, or an international health emergency.

The climate crisis poses another risk to library access. As the climate crisis becomes more prevalent, libraries are increasingly threatened by hurricanes, floods, and fires. An article published by the *Houston Chronicle* reported that six of Houston's libraries had not reopened a year after Hurricane Harvey.¹⁵⁰ Libraries are vital parts of the community, particularly to low-income communities, underserved communities, and communities of color,¹⁵¹ that should never

uncover cool, obscure facts from works otherwise not available to them. Some works, such as Drew Barrymore's first biography, are out of print and can only be found in a few libraries, such as the New York Public Library. *Little Girl Lost*, N.Y. PUB. LIBR., <https://browse.nypl.org> (search "Little Girl Lost"; then select search result for Barrymore, Drew) (last visited Jun. 8, 2023). One of the few places where a copy can be purchased is Amazon, which sells copies as "collectibles" for at least \$199, far above a "fair price." AMAZON, <https://www.amazon.com/Little-Girl-Lost-Drew-Barrymore/dp/0671689223> (last visited Jun. 8, 2023); § 108 (c)(1).

¹⁴⁶ See, e.g., *Dissertation Travel Worksheet Guidelines*, UNIV. ILL. GRADUATE. COLL., <https://grad.illinois.edu/fellowship/dissertation-travel-worksheet-guidelines> (last visited Jun. 8, 2023) (demonstrating that graduate students request to have their travel expenses reimbursed through grant funds).

¹⁴⁷ See, e.g., Karen Schwartz, *Thinking of Traveling in the U.S.? Check Which States Have Travel Restrictions*, N.Y. TIMES (Jul. 10, 2020) (last modified Nov. 4, 2021), (<https://www.nytimes.com/2020/07/10/travel/state-travel-restrictions.html>).

¹⁴⁸ *Id.*

¹⁴⁹ *Library of Congress to Reopen Four Reading Rooms in June*, LIBR. CONG: NEWS FROM THE LIBRARY OF CONGRESS, 2021 (May 20, 2021) <https://www.loc.gov/item/prn-21-024/library-of-congress-to-reopen-4-reading-rooms-in-june/2021-05-20/#:~:text=Beginning%20on%20Tuesday%2C%20June%201,only%2C%20the%20Library%20announced%20today> (last modified May 21, 2021).

¹⁵⁰ Alyson Ward, *Nearly a Year After Harvey's Floods, Six Houston Libraries Remain Shuttered – Some Indefinitely*, HOUS. CHRON. (Jul. 19, 2018) <https://www.houstonchronicle.com/news/houston-texas/houston/article/Nearly-a-year-after-Harvey-s-floods-six-13085785.php> (last modified Jul. 30, 2018 12:00 PM).

¹⁵¹ John B. Horrigan, *Libraries at the Crossroads, Chapter 3: Lower Income Americans and Communities of Color More Likely to see Libraries as Community Anchors*, PEW RSCH. CTR. (Sept. 15, 2015), <https://www.pewresearch.org/internet/2015/09/15/lower-income-americans-and-communities-of-color-more-likely-to-see-libraries-as-community-anchors/>.

be inaccessible in the digital age. VARs would have enabled the communities that relied on these six libraries to continue to access their resources. Furthermore, VARs will encourage the digitization of more works,¹⁵² ensuring that those works are not lost or destroyed in the event of a natural disaster.

E. VARs increase the number of works preserved for future generations.

The loss of knowledge is a tragedy of untold magnitude. The destruction of the Library of Alexandria,¹⁵³ the burning of the Library of Congress during the War of 1812,¹⁵⁴ the looting of books and art by the Nazis during WWII,¹⁵⁵ and the flooding of libraries in Houston¹⁵⁶ and New Orleans libraries during hurricanes,¹⁵⁷ were all monumental losses of human ingenuity and creativity. What if we could save additional knowledge from being lost? Libraries digitizing more materials for use in VARs will preserve more material that may otherwise be lost in natural or other disasters

Digital access encourages the preservation and survival of the physical work.¹⁵⁸ Many works preserved under Section 108 are difficult to obtain, unpublished, and at high risk of being lost because copies are unlikely to be obtained elsewhere;¹⁵⁹ they are also often rare, fragile, or otherwise sensitive to physical handling. For scholars interested in the physical elements of a work, the original physical item is valuable in its own right.¹⁶⁰ VARs allow users to access the contents of the work without compromising the integrity of its physical materials. For example, the Emily Dickinson Archive provides users with images of Dickinson's surviving manuscripts.¹⁶¹ While the contents are valuable for Dickinson scholars, the manuscripts in their original form are valuable as artifacts of 1800s life.

Ensuring that future generations have access to a wealth of knowledge is an important motivation behind preservation,¹⁶² and accomplishing that goal will require VARs. VARs will be

¹⁵² See Peter B. Hirtle, *The Impact of Digitization on Special Collections in Libraries*, 37 LIBRS. & CULTURE 45-48, (2002) <https://www.jstor.org/stable/25548976?seq=9> [hereinafter *Impact Digitization*].

¹⁵³ Preston Chesser, *The Burning of the Library of Alexandria*, OHIO STATE UNIV., <https://ehistory.osu.edu/articles/burning-library-alexandria> (last visited Jun. 8, 2023).

¹⁵⁴ *Out of the Ashes: A New Library for Congress and the Nation*, LIBR. CONG.: ONLINE EXHIBITION, <https://loc.gov/exhibits/out-of-the-ashes/online-exhibition.html> (last visited Jun. 8, 2023).

¹⁵⁵ Livia Gershon, *New Digital Project Details 150 Belgian Libraries Looted by the Nazis*, SMITHSONIAN MAG.; SMART NEWS (Dec. 9, 2020), <https://www.smithsonianmag.com/smart-news/online-project-documents-libraries-looted-nazis-180976486/#:~:text=Between%20August%201940%20and%20February,seized%20volumes%20with%20the%20public.>

¹⁵⁶ Ward, *supra* note 115.

¹⁵⁷ See New Orleans reopens last of 6 libraries destroyed by Katrina, AP NEWS (Aug. 13, 2018) <https://apnews.com/article/fa1342b26c02440097136f1d48465ad5>.

¹⁵⁸ See generally *Impact Digitization*, *supra* note 117, at 42.

¹⁵⁹ See Study Group, *supra* note 48, at 18.

¹⁶⁰ See generally *Impact Digitization*, *supra* note 117.

¹⁶¹ *Emily Dickinson Archive*, <https://www.edickinson.org> (last visited Jun. 8, 2023).

¹⁶² Study Group, *supra* note 48, at 15.

vital in ensuring future generations can access works both digitally and in person.¹⁶³ Constraining libraries to sharing the work they house without the aid of digitization renders them powerless to fully serve their patrons.

V. Conclusion

VARs represent a transformative technological advancement poised to democratize access to knowledge nationwide. By bridging gaps for patrons with disabilities, individuals in remote or underserved areas, and those unable to travel due to personal, natural, or national crises, VARs embody the core mission of libraries: equitable access to information. Neither Section 108 of the Copyright Act nor resistance from the publishing industry should obstruct libraries from leveraging this technology to better serve their communities in the digital age.

The principles that underpin the legality of physical reading rooms unequivocally extend to VARs. The inability to visit a physical space must not be used as a pretext to deny access to preserved knowledge. Libraries are the guardians of information, and knowledge remains one of the most powerful tools for fostering equality and progress. Section 108 provides libraries with the framework to fulfill this vital role, and VARs serve as an essential instrument in advancing that mission. The time to embrace VARs is now, ensuring that knowledge remains accessible to all, regardless of physical location or circumstance.

¹⁶³ THE LIGHTING THE WAY HANDBOOK: CASE STUDIES, GUIDELINES, AND EMERGENT FUTURES FOR ARCHIVAL DISCOVERY AND DELIVERY 155-56 (Mark A. Matienzo & Dinah Handel, eds., 2021), <https://doi.org/10.25740/gg453cv6438>.

