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Issue Brief

Using Fair Use to Preserve and Share Disappearing Government Information

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Government Information at Risk

Access to government information is a fundamental principle in a democratic society. Particularly in the digital environment, government information is a driver for economic and social progress as well as a predicate for an informed citizenry.¹ From 2009 through 2016, open government was a hallmark of the Obama administration, which observed that, “openness in government strengthens our democracy, promotes the delivery of efficient and effective services to the public, and contributes to economic growth.”²

Libraries and archives have historically served as stewards of government documents, and in recent years, these institutions have paid special attention to the unique vulnerability of information during changeover in presidential administrations. Since 2008, these efforts have been spearheaded by archivists through projects like the [End of Term Web Archive](#). In 2017, these issues have particular currency as contested information has been removed from numerous government websites and government officials are increasingly relying on commercial social media platforms such as Twitter to communicate with the public.³ In response, many librarians, scholars, archivists, and other members of the public have come together to preserve government information with projects such as [DataRefuge](#) and [Libraries+ Network](#).

Complex Legal Issues in Government Information

Despite a clear connection to their historical mission and the urgent need to preserve disappearing information before it is lost forever, archiving government information from webpages and social media sites raises several legal issues that may give some librarians

and archivists pause. Although statutory language places works prepared by the federal government in the public domain,⁴ much information shared on government sites that citizens rely on is protected by copyright. This is the case when third-party contractors create copyrightable materials for the government and when the government gathers and shares information from outside sources.

The complex copyright status of data may further complicate the question of archiving and sharing this information. Data itself is often not sufficiently creative to qualify for copyright protection, but a creative selection and arrangement of data may qualify for at least thin protection.⁵ Data such as recorded interviews or narrative observations are likely to be protected by copyright, as are many data visualizations and other creative expressions of data. As a result, data from federal websites may, in many cases, be protected, as the licensing information on sites like Data.gov make clear.⁶ Government webpages add further complexity to these questions when they incorporate third-party materials, such as videos, news stories, and embedded social media feeds. A final layer of complexity exists for librarians and archivists saving government content posted to social media sites, such as Twitter, which have explicit terms of service governing archiving and sharing.⁷

Fair Use Cuts through This Confusion

While navigating this mix of unprotected data, government works in the public domain, and protected works from third parties could be daunting for librarians and archivists, fair use provides ample support for archiving all of these materials. Unlike other statutory exceptions that apply only to a specific community or type of practice, fair use provides an equitable exception that permits librarians and archivists to tailor their practice to meet these challenges.⁸ By permitting a flexible approach to archiving that balances several statutory factors, fair use cuts through copyright confusion to permit archiving that meets the core constitutional values at issue.⁹

Fair use acts as a “safety valve” for free expression that is at its strongest when used to protect the marketplace of ideas that would otherwise be harmed by copyright.¹⁰ The text of the statute itself enumerates a number of specific examples that highlight the role of fair use as a free expression safety valve¹¹ and courts have consistently affirmed this role.

In the context of archiving disappearing government information, established fair use jurisprudence aligns with library and archive engagement in at least three key areas:

- First, fair use has taken a central role in applying established copyright principles in the context of new and changing technology. Considering issues such as student-facing reserve collections,¹² archiving,¹³ and search and discovery,¹⁴ courts have made it clear that fair use sustains core library and archive practices in an environment of changing technologies.
- Fair use also plays a central role in correcting market failures such as exigent circumstances when seeking permission would be logistically difficult or administratively impractical. From the paradigmatic case of making multiple copies of a newly published newspaper article available for classroom reading to other cases when “the transaction costs unduly burden the social importance of the use,”¹⁵ fair use assures that information can be shared where societally vital access requires immediate action.
- Finally, fair use provides powerful support for archiving and sharing when copyright would limit access to the information needed to sustain democratic culture.¹⁶ Both fair use and the First Amendment are designed as safeguards not only for an individual’s right to speak, but also the community’s right to hear.¹⁷

A Road Map for Using Fair Use to Preserve and Share Disappearing Government Information

Fair use supports preservation and sharing government information under both an analysis of the four statutory factors and the test for transformation codified by the US Supreme Court in *Campbell v. Acuff-Rose Music*¹⁸ that has come to dominate judicial fair use decision-making.¹⁹ Each of these five aspects is analyzed below with respect to archiving and sharing government information.

The Purpose and Character of the Use

When archiving to assure access to government information in service of the public, librarians and archivists find support in all four of the statutory fair use factors. The first factor—the purpose and character of the use—clearly supports noncommercial archiving in line with the established practice of librarians and archivists. Libraries and archives have a recognized role as “a vital institution in the continuing American struggle to create a society rich in freedom and variety of thought, broad in its understanding of diverse views and cultures and justifiably proud of its democratic institutions.”²⁰ Both copyright and constitutional law reflect this special role by privileging library and archive practice and the judgment of librarians and archivists.²¹

Scholars such as Jonathan Band have argued that specific copyright exceptions such as Section 108’s exception for “reproduction by libraries and archives”²² represent congressional endorsement of specific public policy interests. As such, when libraries and archives act in harmony with those interests, “courts should give great weight to Congress’s recognition of the public policy interest when assessing the first fair use factor.”²³ As trusted actors working to fulfill the public policy interests of reproduction by libraries and archives described by Section 108, library archiving of at-risk works for public use is clearly a favored purpose.

The Nature of the Original Work

The second factor—the nature of the original work—similarly supports archiving in this context. As discussed above, most government information being archived includes substantial material that is in the public domain or carries only thin copyright protection. This information is also widely available and was initially released with the specific intent of being shared with and used by the public at large. The descriptive, widely available nature of government information on public websites clearly tilts the second factor towards a finding of fair use.

The Amount and Substantiality Used

On its face, the third statutory factor—the amount and substantiality of the use—could be perceived as a challenge for some librarians and archivists seeking to archive an entire webpage or a complete data set. In reality, the third factor is at least neutral and likely supports archiving of mirror-image copies in this context. Courts have been clear that the third factor is less concerned with a gross analysis of the amount used and more focused on the question of whether the “quantity and value of the materials used are reasonable in relation to the purpose of the copying.”²⁴ Indeed, as ARL has noted, “numerous circuits have upheld mirror-image copies as transformative and applied fair use.”²⁵ In this case, the creation of mirror-image copies is reasonable in relation to the socially valuable purpose of copying to preserve at-risk government information.

The Effect on the Market for the Original Work

Finally, the fourth factor—the effect on the market for the original work—also supports a finding of fair use. Since there is no copyright holder for materials in the public domain, there is no legitimate market or copyright violation when archiving these materials. Pages with a mix of protected and unprotected content may raise a more complicated

question, but it is unlikely that the market for any information placed on a public, government-run webpage would be substantially harmed by inclusion in a mirror-image copy of that page. Further, courts have made it clear that simply archiving materials without further sharing (often called “dark archiving”) may cause only *de minimus* harm that is not substantial enough to merit judicial redress.²⁶

Archiving to Support Transformational Use

In addition to the support of all four statutory factors, librarians and archivists can also rely on the transformation analysis both for archiving government information and as a precondition for other transformative uses. Archiving in support of expressive public policy interests fits comfortably within the framework identified by scholars such as Pamela Samuelson,²⁷ with archiving itself serving as a “productive use” and as the predicate for a variety of “orthogonal uses” that “affirm the authenticity” of information at issue in public policy discussions and debates.²⁸ Both copyright and constitutional law also privilege these subsequent uses, which would be impossible without preservation in the moment of need. For example, scholars such as Michael Madison have identified both scholars and political actors as social and professional groups whose patterns of practice have been recognized by courts as deserving special fair use recognition.²⁹

Libraries and Archives Have a Special Duty to Archive

All citizens need access to the government information currently under threat and the law makes it clear that librarians and archivists have a distinct role in preserving it. Constitutional law vests special authority in librarians and archivists making collection decisions and copyright law grants unique exceptions for library archiving, as well as immunization from statutory damages when librarians and archivists act according to their principles.³⁰ With

these privileges comes a singular responsibility to steward at-risk government information. Librarians and archivists should act with confidence to preserve and share this information.

Endnotes

1. See e.g. American Library Association's *Government Information*, available at: <http://www.ala.org/advocacy/govinfo> ("No-fee public access to government information is the foundation of an informed citizenry.").
2. See Exec. Order No. 13642, 78 FR 28111, May 14, 2013, *Making Open and Machine Readable the New Default for Government Information*, available at: <https://www.federalregister.gov/documents/2013/05/14/2013-11533/making-open-and-machine-readable-the-new-default-for-government-information>.
3. See e.g., Amy Harmon, *Activists Rush to Save Government Science Data—If They Can Find It*, *New York Times*, Mar. 6, 2017, available at: <https://www.nytimes.com/2017/03/06/science/donald-trump-data-rescue-science.html>; Matt Rocheleau, *Why are Whitehouse.gov Web Pages Disappearing?*, *Boston Globe*, Jan. 20, 2017, available at: <https://www.bostonglobe.com/metro/2017/01/20/why-are-whitehouse-gov-web-pages-disappearing/gd0HEAAU49hrLZMCiOQwuN/story.html>.
4. See ARL Issue Brief, *U.S. Copyright Status of U.S. Federal Government Works*, available at: <http://www.arl.org/storage/documents/copyright-status-of-government-works.pdf>.
5. See *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).
6. See Data.gov's licensing information available at: <https://www.data.gov/privacy-policy#license> ("Non-federal data

available through Data.gov may have different licensing.”).

7. See e.g. Twitter’s *Terms of Service* page available at: <https://twitter.com/tos?lang=en> and Twitter’s *Developer Documentation* available at: <https://dev.twitter.com/overview/terms/agreement-and-policy>.
8. See e.g. *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560 (1985) (discussing the broad “latitude” for expressive uses “traditionally afforded by fair use.”).
9. See *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”) (quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984)).
10. See Neil. W. Netanel, *Locating Copyright within the First Amendment Skein*, 54 *Stan. L. Rev.* 1, 4 (2001).
11. 17 U.S.C. 107 (citing purposes such as “criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research”).
12. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).
13. *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).
14. *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *aff’d*, 804 F.3d 202 (2d Cir. 2015).
15. Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and the Integrity of Copyright*, 31 *Ariz. St. L.J.* 1 (1999) (Citing Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 *Colum. L. Rev.* 1600 (1982)) (discussing

the importance of fair use for uses that are “socially desirable but not capable of effectuation through the market.”).

16. See e.g. *Sega Enters. v. Accolade, Inc.*, 977 F.2d 1510, 1523 (9th Cir. 1993) (“Public benefit [of fair use] need not be direct or tangible, but may arise because the challenged use serves a public interest.”).
17. See e.g. Alexander Meiklejohn, *Free Speech in Its Relation to Self-Government* (1948); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (“The sole interest of the United States and the primary object in conferring [copyright] lie in the general benefits derived by the public.”).
18. 510 U.S. 569 (1994).
19. See Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 *Lewis & Clark L. Rev.* 715 (2011).
20. William M. Cross, *Restoring the Public Library Ethos: Copyright, E-Licensing, and the Future of Librarianship*. 104 *Law L. J.* 195, 198 (2012).
21. See e.g. 17 U.S.C. 108 (“Limitations on Exclusive Rights: Reproduction by Libraries and Archives”); *Board of Education v. Pico*, 457 U.S. 853, 868-69 (1982) (Recognizing libraries as “the principal locus for [First Amendment] freedoms.”).
22. 17 U.S.C. 108.
23. Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use* (November 30, 2011). Available at SSRN: <https://ssrn.com/abstract=1966593> or <http://dx.doi.org/10.2139/ssrn.1966593>.
24. *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 587 (1994).

25. See Krista Cox, *ARL Policy Notes: Orphan Works/Mass Digitization Roundtables: Copyright and Fair Use Myths and Realities*, Available at: <http://policynotes.arl.org/?p=50> (Citing *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *A.V. ex rel. Vanderhye v. iParadigms, L.L.C.*, 562 F.3d 630 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon*, 508 F.3d 1146 (9th Cir. 2007); *Kelly v. Arriba Soft Corp.* 280 F.3d 934 (9th Cir. 2002) *withdrawn, re-filed at* 336 F.3d 811 (9th Cir. 2003); and *Bill Graham Archives v. Dorling Kindersley*, 448 F.3d 605 (2d Cir. 2006)).
26. See e.g. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232,1278 (“If the market for digital excerpts were in fact de minimis or zero, then neither Defendants’ particular use nor a widespread use of similar kind would be likely to cause significant market harm.”).
27. Pamela Samuelson, *Unbundling Fair Uses*, 77 *Fordham L. Rev.* 2537 (2009).
28. See discussion of productive and orthogonal uses in *id.* at 2555-2558.
29. Michael J. Madison, *A Pattern-Oriented Approach to Fair Use*, 45 *Wm. & Mary L. Rev.* 1525, 1645-65 (2004).
30. 17 U.S.C. 504(c)2 (remitting statutory damages when a librarian “believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use...”).

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