| **X** | **Learning points:**  **Copyright Subpoenas Contract Clauses** | **Red flag, or interesting tip** |
| --- | --- | --- |
|  | COPYRIGHT LAW: Section 108 for Libraries & Archives |  |
|  | [17 U.S.C. 108  Do you know about Section 108? It’s a critical protection under the Copyright Act drafted especially for libraries and archives, allowing them to make copies of copyright-protected works without fear of infringement. | To ensure awareness and continued optimal use of this special protection (as well as compliance), every library should have a Section 108 compliance policy and procedure (and perhaps a small annual party). |
|  | [17 U.S.C. 108 (h)  Before we start, a caveat: 108 does not apply to musical, pictorial, graphic or sculptural works, or audiovisual work/motion pictures (other than audiovisual work dealing with news), unless unpublished, for preservation/safety/research, or in the last 20 years of registration (in which case only the usual limits, which are set forth below, apply, including that 108 copies in digital format cannot leave the premises of the library). | Even with this carve-out, 108 is a huge boon to libraries, allowing them to make copies for patrons without any fear of liability for copyright infringement.  108 should be taught to every student on library programs. |
|  | Step 1 of qualifying for the “108 Exclusion” [17 U.S.C. 108 (a)2]  Are the collections of your library or archives (i) open to the public?  OR  If use of the library is limited by credentials or subjects studied, are the collections available not only to researchers affiliated with the library/archives or with the institution of which it is a part, but also to others doing research in its specialized field?  Yes? Then move to step 2!  Otherwise, sorry, no 108 for you. | This will be in your charter, plan of service, or if you are a library within another institution, your access/cardholder policies. |
|  | Step 2 of qualifying for the “108 Exclusion” [17 U.S.C. 108 (a)3]  When your library makes a copy for itself, a user, or another library, does the reproduction or distribution of the work include a notice of copyright? | This notice should appear on any copy provided under 108. If the library can’t determine the copyright, the copy should include a legend stating that the work may be protected by copyright. |
|  | Step 3 of qualifying for the “108 Exclusion” [17 U.S.C. 108 (a)1]  No matter what, or how many 108 copies are authorized, the reproduction or distribution must be made **without any purpose of direct or indirect commercial advantage.** | A “commercial advantage” can be attributed to activity by a not-for-profit; any activity that subverts the need for payment may qualify. |
|  | Step 4 of qualifying for the “108 Exclusion” [17 U.S.C. 108 (f)1]  Does your publicly available copying equipment display a notice that the making of a copy may be subject to the copyright law? | This is required in order to qualify from the exemption of liability for infringing use by others. |
|  | Step 5 of qualifying for the “108 Exclusion” [17 U.S.C. 108 (g)1]  If the library becomes aware or has substantial reason to believe that users are engaging in the related or concerted reproduction or distribution of multiple copies of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group, that could be a disqualifying factor. | A classic example of this is 20 students requesting a copy of a new chapter of the same text book every week during one semester.  Since it can lead to liability for the students and the library, it should be resisted. |
|  | Determining when a qualified library can make UP TO THREE copies of an **unpublished** work under the “108 Exclusion”  [17 U.S.C. 108 (b)]  Is the item to be reproduced currently in your collection?  If “yes,” continue. If “no,” stop right there.  Are the copiessolely for purposes of preservation and security at your library, OR are the copies being made for deposit for research in another library qualified per step 1?  Yes? Then copy away!  NOTE: *any such copy that converts the work into a digital format may not made available to the public in that format outside the premises of the library or archives.* | This is how you can save the crumbling, unpublished 1950’s preliminary notes of a world-changing scientific paper currently sitting in your humidity-controlled vault.  Don’t forget to put the required 108 mark on the copies. |
|  | Determining when a qualified library can make UP TO THREE copies of a **published** work under the “108 Exclusion”  [17 U.S.C. 108 (c)]  Does your library own a published work that is damaged, deteriorating, lost, or stolen? You may makethree copies **solely for the purpose of replacement** IF:  After a reasonable effort, you have determined that an unused replacement cannot be obtained at a fair price; and  If the copy is in digital format, it is not made available to the public in that format outside the premises of the library. | After an unsuccessful search for a replacement, this is how you can save the crumbling, unpublished 1950’s final copy of a world-changing scientific paper currently sitting in your humidity-controlled vault.  Don’t forget to put the required 108 mark on the copies.  And remember, someone might claim a 107 “fair use” to make a digital copy of the scan you can only host on your premises, but that is a different claim! |
|  | Determining when a qualified library can make UP TO THREE copies of a **published** work whose format is **obsolete** under the “108 Exclusion” [17 U.S.C. 108 (c)]  Does your library own a published work whose format has become obsolete?  “Obsolete” means that the machine or device necessary to “render perceptible” a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace.  If the copy is converted to digital format, it cannot be made available in that format outside the premises of the library. | The reports of the death of the VCR have not been greatly exaggerated. |
|  | Determining when a qualified library can make one copy of an article, or a small part of a **published or unpublished** work for a user. [17 U.S.C. 108 (d)]  Is a user asking for a copy ofno more than one article or other contribution to a copyrighted collection or periodical issue, or another small part of any other copyrighted work? This can be provided either directly, or via an inter-library request, if:   * The copy becomes the property of the user; * The library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and * The library or archives [displays](https://www.law.cornell.edu/uscode/text/17/108) prominently, at the place where orders are accepted, and includes on its order form, a **warning of copyright** in accordance with requirements that the Register of Copyrights shall prescribe by regulation. | The “warning of copyright” should say:  The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.  Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be “used for any purpose other than private study, scholarship, or research.” If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of “fair use,” that user may be liable for copyright infringement.  This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.  See the full text of the regulation at  <https://www.copyright.gov/title37/201/37cfr201-14.html> |
|  | Determining when a qualified library can provide a user at another library with one inter-library copy of an entire work. [17 U.S.C. 108 (e)]  Has auser at another library asked for a copy of an item in your collection? You can honor this request if:  1) You first determine, on the basis of a reasonable investigation, that a copy can’t be obtained at a fair price;  2) The copy will becomes the property of the user;  3) The library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and  4) The library or archives [displays](https://www.law.cornell.edu/uscode/text/17/108) prominently, at the place where orders are accepted, and includes on its order form, a **warning of copyright** in accordance with requirements that the Register of Copyrights shall prescribe by regulation. | Scenario:  “Hello, I would like a copy of the “Section 108” checklist created by Stephanie Adams in 2019.”  “We have that in our collection. Oh, I see she is not releasing it for sale.”  “I need it for the study on rogue copyright lawyers that I am doing for my dissertation.”  “Let me put this ‘warning of copyright’ on the copy, and you’ll be all set to go.” |
|  | Do not confuse Section 108 with Section 107 (Fair Use) and Section 110 (select exemptions for educational, cultural, and charitable uses). | For assistance with this, see the poem included in the materials! |
|  | In the state of New York, library records linked to the names of users can only be disclosed:  1) upon request or consent of the user;  2) pursuant to subpoena or court order; or  3) where otherwise required by statute. | The default answer to any request should be: no. |
|  | New York Civil Procedure Rules (“CPLR”) Section 4509 state:  Library records, which contain names or other personally identifying details regarding the users of public, free association, school, college and university libraries and library systems of this state, including but not limited to records related to the circulation of library materials, computer database searches, interlibrary loan transactions, reference queries, requests for photocopies of library materials, title reserve requests, or the use of audio-visual materials, films or records, shall be confidential and shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library and shall be disclosed upon request or consent of the user or pursuant to subpoena, court order or where otherwise required by statute. | Sample policy language  “In compliance with Section 4509 of the New York Civil Procedure Laws & Rules, [NAME] library does not release library records to third parties.  In addition to the types of records listed in the law, [NAME] library regards [INSERT] records as library records.  Third parties requesting such information will need to present appropriate documents, which shall be assessed by the library prior to any records being released.” |
|  | Compelled disclosure of library records, [optimal] Step 1  Have a “compelled disclosure of library records” policy, either as a stand-along document, or as a section of a “Confidentiality of Library Records” policy. | This policy should include a list or clear language to help your library determine when “library records” have been requested. For example, does your library consider security camera footage at the circulation desk to be a library record? Is using the copier (not requesting a photocopy from the librarian) and paying a fee a library record? |
|  | Compelled disclosure of library records, [other] Step 1  As a default, deny any third-party requests for records with identifiable user information.  *Some helpful scenarios….*  Scenario 1  [THIRD PARTY]: I am [patron’s] mother. He’s been sick. Can I have a list of books he has checked out, so I can find them in the house and bring them back?  [LIBRARY]: So sorry to hear your son is ill. We can do that as soon as we have a signed document with his permission to release the list to you.  Scenario 3  [THIRD PARTY]: I am [patron’s] neighbor. He’s been stalking me. Can I have a list of books he has checked out, so I can show he is dangerous and get an order of protection?  [LIBRARY]: So sorry to hear you have this serious concern. We cannot release library records without a warrant, order or subpoena. Here is our policy, so your attorney or law enforcement can work with us on this as quickly as possible. | *scenarios continued…*  Scenario 2  [THIRD PARTY]: I am a library trustee. This patron is dating my daughter. Can I see his records?  [LIBRARY]: My, what an interesting request. No.  Scenario 4  [THIRD PARTY]: I am the Sheriff. We have a report of a threat of violence by [patron]. May we see his internet search records right away?  [LIBRARY]: As soon as you get a warrant, of course. We’ll be ready to assess your request as soon as you present that to us. |
|  | Compelled disclosure of library records, [optimal] Step 2  Upon receiving the copy of the order, subpoena, or other compelling document, request at least 24-hours to evaluate it (barring the order setting out an immediate need). | Tip: run through a scenario or two where the warrant is actually delivered, and have staff practice saying: “We’ll evaluate this and respond as soon as possible.” |
|  | Compelled disclosure of library records, [optimal] Step 3  Have the subpoena evaluated by an attorney who is advising the library. | Tip: Every library should have a lawyer on call who can perform this function, which in a typical case should take less than two hours of attorney time (there are always exceptions to that). |
|  | Compelled disclosure of library records, [optimal] Step 4  If the request is proper, assess if it can be fulfilled while only granting access to the records it requests. If personally identifying records or other patrons will be exposed, you may need to request a modification. | How to format and supply your response should be part of the attorney’s assessment of the demand, and may require collaboration with library staff. |
|  | Compelled disclosure of library records, [possible] Step 5  If you are a library within an academic institution that receives federal funds, remember that the information may also be protected by FERPA, and work with the appropriate authority within your school, college, or university to determine a coordinated response that complies with both 4509 and FERPA. | Know your institution’s FERPA officer and have lunch or a collegial walk together at least once a year. |
|  | Compelled disclosure of library records, exclusion  Remember that 4509 states the records “…shall not be disclosed except that such records may be disclosed to the extent necessary for the proper operation of such library.” | Borrowing policies, behavior-related policies, security policies, IT policies, sexual harassment policies, procurement policies, and emergency reporting policies should be coordinated with the 4509 compliance obligations to ensure the “proper operation of the library” is promoted, while privacy rights are honored. |
|  | CONTRACTS |  |
|  | What is a contract?  Any enforceable agreement.  This can include things called “Letters of understanding,” “MOU’s”, articulation agreements, agreements written on napkins, and even a simple phone call with terms and conditions can create an enforceable contract. | The elements of an enforceable contract are like chemical formulas…they can change from circumstance to circumstance.  Whenever possible, have a proposed or asserted contract reviewed by a lawyer before assenting to the alleged terms. |
|  | Subject Matter  Common subject matter for library contracts include: cardholder agreements, collection asset purchase, content licensing/database access, courier service, employment, speaker/performer/workshop, system affiliation agreement, membership/consortia agreements, logo and marketing design, construction/repair, facility maintenance, collection agency agreement, digitization, asset warrantees, credit card processor, utilities, sale of assets, insurance policies. | Even when there are very few vendors in the field, search for ways to find leverage to make sure the contract positions your library as best as possible. |
|  | Term and Renewal  Most contracts will list the “term” (start date/end date) towards the beginning of the contract.  This clause will often tie into the “Termination Clause.” | Unless the contract is extremely favorable to your library, beware auto-renewal.  Some library procurement and/or contract signing policies bar the signer from agreeing to any contract with auto-renewal (without board permission), since the clause can have long-term budget impacts. |
|  | Consideration  Consideration is the financial or other payment for the service rendered through the contract. | Many places will have a Contract Signing Policy with financial thresholds (for instance “The Director of the Library may sign contracts for up to $10,000.”). But just as critical may be a threshold related to subject matter. |
|  | License (for content access)  This is a contract for access that is conditioned on payment and, very often, very precise terms about how that content can be accessed/used.  For instance, an academic database license may require that only registered students and faculty be able to access the content via a password-protected account at the contracting institution, and the institution must use “reasonable efforts” to ensure no systemic generation of multiple copies is happening. | BECAUSE THESE RIGHTS CAN BE LIMITED IF A PARTY AGREES TO IT IN A CONTRACT, any license for content access should be assessed for surrendering any rights the library has under 107, 108, and 110. |
|  | A clause positioning the library to protect rights under 4509  There is a chance personally identifiable information about library users could be accessible to contractors such as:   * IT Service Providers * Collection Agencies(replacement fee) * Records Management Contracts * Cleaning/Facility Maintenance Services | A sample clause to protect 4509 rights:  “As a contractor, you may have incidental or direct access to library user records. This information is confidential and may not be turned over to any third party until notification to the library, and written acknowledgement from the library that the disclosure is appropriate.” |
|  | Data Breach Notification Clause  For any library contracting with a provider who will have the library or library users’ information, a data breach clause is essential. | This should be a clear guide to what the vendor will do for the library in the event of data breach impacting library information. |
|  | PCI Compliance  PCI stands for “Payment Card Industry.”  Any agreement by which the library can accept payments by credit card should have a PCI clause.  If your library retains credit card information internally (and generally, it shouldn’t), this is a critical standard to be aware of. | Information on how to assess your vendor or library for PCI compliance is here: <https://www.pcisecuritystandards.org/pci_security/maintaining_payment_security> |
|  | Warrantees and Representations  These are things one party (or both) are saying are true. | A common example of this can be found in digitization service contracts. Very often, the vendor will require the library to give a warrantee and representation that they own or have all the permissions required to make copies of the work to be digitized. **A contract with a clause like this should not be signed if the signer is uncertain as to the truth of the representation/warrantee.** |
|  | Hold Harmless  This is a clause whereby one party agrees to not hold the other party liable for damage.  A library’s insurance carrier will care about when the library agrees to sign an agreement with this clause. | If there is any risk associated with the contract (risk of on-site injury, risk of sexual harassment claim from/against contractor, risk of data breach), a “hold harmless” in favor of the vendor should be resisted; to properly assess the balance of risks, it is best to have the document reviewed by your attorney. |
|  | Indemnification  This is a clause whereby one party agrees to pay the claims against another.  A library’s insurance carrier will care about when the library agrees to sign an agreement with this clause. | An indemnification clause means you are assuming not only your own risk, but that of (or part of) the other party; to properly assess the balance of risks, it is best to have the document reviewed by your attorney. |
|  | Insurance Clause  This is a clause requiring a vendor to show proof of coverage of a type and amount based on the risk posed by the contract’s subject matter. | For any vendor who will be providing services on-site, make sure they provide proof of worker’s compensation insurance. |
|  | Assignment Clause  This is a clause that can allow one party to swap out for another. | After you’ve gone to all the trouble to find the right vendor, this might not be a clause you want to allow in your contract! Feel free to try and have such a clause removed during the negotiation phase. |
|  | Sexual Harassment Clause  This clause simply identifies who at the other party a report can be made to. This is important in the event people associated with one party have a complaint based on circumstances under the control of the other (for example, if a delivery service person from an outside contractor harasses a clerk). | Because NY’s law was changed in 2018 to expand liability for intern and independent contractor-related claims, any contract that puts the contractors in inter-personal relations should have a clause for reporting harassment and communicating during resolution. |
|  | Dispute Resolution Clause  A good dispute resolution clause will set the parties up to address and seek resolution of an issue, before it becomes a reason for breach or termination. | This process will also develop a good record for the next phase of a dispute, if it needs to get more formal. |
|  | Termination For Cause/Termination at Will  A contract doesn’t have to have a mechanism for early termination, but it is often a good idea to have an organized series of ways to end the contract. | Make sure your contracts have a “worst-case scenario” escape hatch. For instance, if your library is contracting with a credit card services vendor who is found to be out-of-compliance with PCI, having grounds to terminate the contract without penalty is wise. |
|  | Damages/Liquidated Damages  Many contracts will set forth numbers or formulae as a consequence for breach or early termination. | Make sure you run the numbers, and play out your library’s “worst-case scenario.” |
|  | Choice of Law/Venue for Dispute  This is a clause that says what law will apply, and what court/s will be used to resolve dispute. | Whenever possible, for NY libraries, these should both be New York, unless there is a compelling reason for it to be elsewhere. |
|  | Arbitration Clause  This is a clause used to have the parties agree to confidential arbitration, rather than open court filings, if they need to formally resolve a dispute. | If they are in the right, a smaller party has more public relations leverage in a dispute when the filings associated with that dispute are accessible to the public. |
|  | Archiving your contracts  Retain the final copies of contracts and any negotiation notes per your library’s document retention policy, but no less than 7 years after termination. | The Statue of Limitations to sue on most contracts in New York is 6 years. However, this can change, so if your library has a possible claim, talk to a lawyer as soon as possible. |
|  | Using contracts in RFP’s  An RFP can contain a complete, or almost complete, contract that the vendor will be asked to sign. | This can be a great way to set the stage for a useful and library-friendly contract from the moment a vendor puts in a bid. |
|  | Coordinating assumed liabilities with insurance coverage  The liabilities a library routinely assumes by entering into contracts should be assessed in contrast to their levels of insurance. | Doing this assessment on an annual basis is a great job for the board’s finance (or risk, or audit) committee, and your insurance advisor, agent or broker! |

Stephanie “Cole” Adams is a lawyer in Buffalo, NY. She provides the “Ask the Lawyer” service to numerous library councils in New York State, and her practice includes litigation, representation, and advice in matters pertaining to libraries, cultural organizations, colleges and universities, and small businesses.

Ms. Adams may be reached at [adams@stephaniecoleadams.com](mailto:adams@stephaniecoleadams.com), or by calling (716) 464-3386. For questions on how to retain services, you can reach out to Cole, or you may speak with her assistant, Sara Loviza, in the office.

She has worked at the Town of New Hartford Public Library, the Hampshire College Library, and the Charles B. Sears Law Library at SUNY Buffalo School of Law (class of ’99). The Buffalo & Erie County Public Library Central building is one of her favorite places.