

No. 19-14924-HH

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BENJAMIN VIENT,

Appellant,

v.

HIGHLANDS NEWS-SUN and ROMONA WASHINGTON,

Appellees.

On Appeal from the United States District Court
For the Southern District of Florida

**MOTION FOR LEAVE TO FILE THE BRIEF OF *AMICI CURIAE*
THE AUTHORS GUILD AND JUNE M. BESEK
IN SUPPORT OF NEITHER PARTY**

COWAN, DEBAETS, ABRAHAMS
& SHEPPARD LLP
Nancy E. Wolff
41 Madison Avenue, 38th Floor
New York, NY 10010
Telephone: (212) 974-7474
Facsimile: (212) 974-8474
nwolff@cdas.com

Counsel for Proposed Amici Curiae

Date: July 24, 2020

CERTIFICATE OF INTERESTED PERSONS

Amici curiae, pursuant 11th Cir. Rule 26.1-1, adopt the list of interested persons identified in the previous briefs filed with the Court, and further identify the following people and entities as having an interest in the outcome of this appeal:

Besek, June

Cowan, DeBaets, Abrahams & Sheppard LLP

Rasenberger, Mary

The Authors Guild, Inc.

Wolff, Nancy

The Authors Guild, Inc., pursuant to Fed. R. App. P. 26.1, states that it is a non-profit 501(c)(6) organization and does not have a parent corporation.

Proposed *amici curiae* The Authors Guild, Inc. (the “Guild”) and June M. Besek respectfully move, pursuant to Fed. R. App. P. 29(a) and 11th Cir. R. 29-1, for leave to file the accompanying brief of *amici curiae* in support of neither party in the above-captioned action. *Amici curiae* seek to submit this brief in order to help this Court understand Section 108 and why the district court erred in applying the statute in this case. Appellant Benjamin Vient consents to the filing of the brief; Appellees Highlands News-Sun and Romona Washington do not consent to this filing.

INTERESTS OF AMICI CURIAE

Founded in 1912, The Authors Guild is a national non-profit association of approximately 10,000 professional, published writers of all genres including periodicals and other composite works. The Guild counts historians, biographers, academicians, journalists, and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation.

Of particular interest here is the distinctive experience of the Executive Director of the Guild, Mary Rasenberger. Before taking the helm at the Guild, Rasenberger worked for the U.S. Copyright Office and Library of Congress as senior policy advisor and program director for the Library’s National Digital Preservation Program. In that role, Rasenberger convened and managed a study group to analyze

Section 108 of the Copyright Act, which provides limited exceptions to copyright for libraries and archives. Rasenberger worked with 19 prominent copyright lawyers and scholars to study 17 U.S.C. § 108 over a period of three years, culminating in the publication of an exhaustive 132-page report detailing the purposes of Section 108, analyzing its requirements, and recommending how the statute could be updated to ensure the balanced and proper application of the narrow exceptions to new digital technologies.

June M. Besek, the Executive Director of the Kernochan Center for Law, Media and the Arts and a Lecturer in Law at Columbia Law School, served as legal advisor to the study group. In that role, she guided the research and recommendations of the Section 108 study group, based on her considerable knowledge and experience practicing copyright law. Before joining Columbia Law School, Besek was the Director of Intellectual Property at Reuters America Inc. and previously in private practice in New York City, where she focused on copyright. At Columbia, Besek's research and teaching focus on copyright and related rights, particularly concerning new technologies.

Given their extensive study of Section 108 and their commitment to the correct and balanced construction of copyright law, Rasenberger of the Guild and Besek are uniquely qualified to help this Court understand Section 108.

ARGUMENT

A court of appeals, in its broad discretion, may grant leave for later filing of an *amicus curiae* brief pursuant to Fed. R. App. P. 29(a)(3) and (a)(6). Leave should be granted if the court is satisfied as to “the movant’s interest” and “the reason why an amicus brief would be desirable and relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3); *United States v. UBS AG*, No. 09-20423-CIV, 2009 WL 10669118, at *1 (S.D. Fla. May 19, 2009). As Judge Posner of the Seventh Circuit recognized:

An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

Ryan v. Commodity Futures Trading Comm’n, 125 F.3d 1062, 1063 (7th Cir. 1997).

This is not a situation where *amici curiae* are seeking to belatedly introduce a brief more than a year after petitioner submitted his principal brief. *See, e.g., Spaho v. United States Attorney Gen.*, 837 F.3d 1172, 1175 (11th Cir. 2016) (deeming *amicus curiae*’s brief untimely). *Amici curiae* seek the Court’s leave to submit their brief a mere few months after the parties filed their respective briefs. Moreover, the specific circumstances of this case, weigh in favor of the Court’s acceptance of the brief. Appellant is proceeding with his appeal *pro se*, and neither party have

adequately addressed the scope and application of Section 108 in their briefs submitted to this Court, even though the district court relied heavily on the statute in reaching its decision dismissing the case.

Rasenberger of the Guild and Besek have a substantial interest in the proper application of Section 108 and, given their comprehensive study of the statute at the behest of the U.S. Copyright Office, believe that they are uniquely qualified to offer this Court insight into the proper application of the exceptions. As detailed in the accompanying brief, *amici curiae* have identified at least three legal errors that the district court committed in its construction and application of Section 108. They are concerned that, if adopted, the district court's specious interpretation of Section 108 would deal critical damage to copyright law and erode authors' exclusive rights. Consideration of the *amici curiae* brief would not require the Court to review the case multiple times, but rather would serve to supplement and enhance the Court's knowledge and understanding of Section 108 and why it does not apply in this case.

CONCLUSION

For these reasons, and as set forth in further detail in the attached brief, the Guild and Besek respectfully request that this Court grant their motion for leave to file the accompanying *amici curiae* brief.

Dated: July 24, 2020

COWAN, DEBAETS, ABRAHAMS &
SHEPPARD LLP

 /s/ Nancy E. Wolff
Nancy E. Wolff
41 Madison Avenue, 38th Floor
New York, New York 10010
Tel: (212) 974-7474
Fax: (212) 974-8474
nwolff@cdas.com

Attorneys for Proposed Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Nancy E. Wolff

Nancy E. Wolff

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COWAN, DEBAETS, ABRAHAMAS
& SHEPPARD LLP
Nancy E. Wolff
Counsel of Record
Sara Gates
41 Madison Avenue, 38th Floor
New York, NY 10010
Telephone: (212) 974-7474
Facsimile: (212) 974-8474
nwofff@cdas.com

Counsel for Amici Curiae

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STATEMENT OF THE ISSUES

1. Whether the district court properly applied 17 U.S.C. § 108.

STATEMENT OF INTEREST¹

Founded in 1912, The Authors Guild, Inc. (the “Guild”) is a national non-profit association of approximately 10,000 professional, published writers of all genres including periodicals and other composite works. The Guild counts historians, biographers, academicians, journalists, and other writers of nonfiction and fiction as members. The Guild works to promote the rights and professional interests of authors in various areas, including copyright, freedom of expression, and taxation.

Of particular interest here is the distinctive experience of the Executive Director of the Guild, Mary Rasenberger. Before taking the helm at the Guild, Rasenberger worked for the U.S. Copyright Office and Library of Congress as senior policy advisor and program director for the Library’s National Digital Preservation Program. In that role, Rasenberger, at the behest of the U.S. Copyright Office and the Library of Congress, convened and managed a study group to analyze Section 108 of the Copyright Act, which provides limited exceptions to copyright for libraries and archives. The study group was charged with making recommendations to the Librarian of Congress and the Register of Copyrights to provide a basis for

¹ Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* states that no counsel for a party authored this brief in whole or in part, no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici curiae*, its members, or counsel, contributed money intended to fund preparation or submission of this brief.

possible amendments to the law in light of rapidly changing digital technologies. Rasenberger worked with 19 prominent copyright lawyers and scholars—including the author of this brief, the Authors Guild’s counsel Nancy Wolff—to study 17 U.S.C. § 108 over a period of three years, culminating in the 2008 publication of an exhaustive 132-page report detailing the purposes of Section 108, analyzing the statute’s requirements, and recommending how the law could be amended to ensure the balanced and proper application of the narrow exceptions to new digital technologies.

June M. Besek, the Executive Director of the Kernochan Center for Law, Media and the Arts and a Lecturer in Law at Columbia Law School, who also submits this brief, served as legal advisor to the study group. In that role, she guided the research and recommendations of the study group, based on her considerable knowledge and experience practicing copyright law. Before joining Columbia Law School, Besek was the Director of Intellectual Property at Reuters America Inc. and previously in private practice in New York City, where she focused on copyright. At Columbia, Besek’s research and teaching focus on copyright and related rights, particularly concerning new technologies. She is the author of many articles and

studies on copyright law. She is currently Chair-Elect of the American Bar Association's Section of Intellectual Property Law.²

Although Congress has yet to substantially revise Section 108 to update it for the digital age (aside from a few minor amendments), the comprehensive knowledge of the Section 108 study group members reflected in the report, authored by Rasenberger, Besek, and the group's chairs, can provide this Court with key insight into the limited application of Section 108, especially in the context of digital platforms. Accordingly, given their extensive study of Section 108 and their commitment to the correct and balanced construction of copyright law, Rasenberger of the Guild and Besek are uniquely qualified to help this Court understand Section 108 and why it does not apply in this case.

Amici curiae submit this brief with their accompanying motion for leave to file the brief, in support of neither party, pursuant to Fed. R. App. P. 29(a) and 11th Cir. R. 29-1.

SUMMARY OF ARGUMENT

This case does not concern a library or archives; rather, the parties at odds are Benjamin Vient, a writer who authored two articles, and Highlands News-Sun, a newspaper that published Vient's articles in print pursuant to a one-time print

² She joins this brief in her individual capacity, and not on behalf of the American Bar Association or its Section of Intellectual Property Law.

license, but is alleged to have reproduced, distributed, and displayed the articles online outside the scope of the license. Surprisingly, the district court, on its own without the benefit of any briefing on the subject, cited and misapplied 17 U.S.C. § 108(a) as a standalone exception in an order dismissing the case with prejudice. *See Vient v. Highlands News-Sun*, No. 2:19-CV-14012, 2019 WL 8014477, at *2–3 (S.D. Fla. Sept. 30, 2019). *Amici curiae* submit this brief not to opine on the merits of the case but solely to convey to this Court the legal errors committed by the district court in relying on Section 108(a), which is not in itself a copyright exception and pertains only to qualified libraries and archives, to dismiss the action.

Contrary to the district court’s opinion, Section 108(a) is not an independent provision—it is a list of requirements that a library or archives must meet in order to qualify for one of the several exceptions to copyright identified in the subsequent subsections. For example, Section 108(b)–(d) provide carefully circumscribed exceptions for qualified libraries and archives to make a limited number of copies for preservation of unpublished works (§ 108(b)), replacement of a copy of a published work that is damaged, deteriorating, or lost (§ 108(c)), and for making and distributing a copy of a work, made from the collection of a library or archives upon the request of a user, of no more than one article or other contribution to a copyrighted collection or periodical issue (§ 108(d)). The district court misapplied Section 108, ignoring the express language of Section 108(a), which requires the

library or archives to meet the “conditions specified by this section,” referring to the entirety of the statute. § 108(a).

Without even reaching the question of which of the Section 108 exceptions may apply, the district court failed to properly apply Section 108(a) and consider whether the newspaper, Highlands News-Sun, and the associated for-profit corporation, NewsBank, Inc., which sells access to individual articles for a per-article or subscription fee, met the threshold requirements to invoke the statute. To qualify for any one of the exceptions, (1) the reproduction or distribution must not be for direct or indirect commercial advantage; (2) the library or archives must be open to the public, or open to researchers in a specialized field; and (3) the reproduction or distribution of the work must include a copyright notice on any copies, or at least a legend stating that the work may be protected by copyright. § 108(a). Additionally, the library or archives may not make more than one copy of a work, unless otherwise specified in the subsections that follow. *Id.* Absent full compliance with these requirements, a library or archives is not eligible for any of the exceptions enumerated in Section 108. The district court circumvented this analysis entirely.

Instead, the court determined, in a circular and conclusory fashion, that Highlands News-Sun and NewsBank provide public library records and archives, so Section 108(a) applies, and the alleged acts do not constitute copyright infringement.

See Vient, 2019 WL 8014477, at *2–3. In reaching its unwarranted conclusion, the court failed to actually apply Section 108(a) and duly consider whether Highlands News-Sun and NewsBank met all of the threshold requirements. Under the district court’s misinterpretation of Section 108(a), any entity that calls itself a “library” or “archives” (or even counts a library or archives as its client) is eligible for the exception and can freely copy and distribute copyrighted works. Copyright law does not countenance such a widespread erosion of copyright owners’ exclusive rights. Accordingly, the Court should decline to affirm the district court’s misapplication of Section 108. This dispute can and should be decided on other grounds, separate from Section 108, which has no place in this litigation.

ARGUMENT

I. SECTION 108 DOES NOT APPLY IN THIS CASE

Section 108 does not apply to these facts. Congress, as empowered by the U.S. Constitution, enacted the statute to provide limited exceptions to the exclusive rights granted to authors, permitting libraries and archives to perform certain specified activities without infringing an author’s exclusive rights. *See* § 108. As members of the Section 108 study group recognized, the purpose of the statute is “to balance the exclusive rights that enable authors and publishers to invest time and money in the creation and publication of creative works with the ability of libraries and archives to serve the needs of scholars and other users, by disseminating

knowledge and facilitating creativity.” Section 108 Study Group, *The Section 108 Study Group Report* at 16 (2008), <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> [hereinafter *Study Group Report*].³

The parties accused of infringement here are not the intended beneficiaries of Section 108’s exceptions. They are not libraries or archives and do not serve a public benefit. NewsBank, Inc., which reproduces and distributes individual articles for a fee on behalf of publications like Highlands News-Sun, is unequivocally a for-profit corporation. NewsBank may count certain self-proclaimed archives as its clients, but there is no dispute that NewsBank is selling articles for profit to gain a commercial advantage. *Vient*, 2019 WL 8014477, at *2 (“More than 1,000 websites use NewsBank to sell articles from their archives.”). Highlands News-Sun likewise is not operating as a qualifying library or archives to put it within the scope of Section 108. As a result, neither NewsBank or Highlands News-Sun pass the threshold to invoke any of the exceptions of Section 108.

³ Members of the Section 108 Study Group came from a diversity of backgrounds—from government work and university position, to private practice and in-house counsel roles. *See Members of the Section 108 Study Group*, Section108.gov, <http://www.section108.gov/members.html> (last visited July 13, 2020). The Section 108 Study Group reached their conclusions and recommendations by consensus. *Study Group Report* at 2.

A. Section 108 Provides Limited Exceptions for *Qualified* Libraries and Archives

Although “libraries” and “archives” are not defined in the Copyright Act, Section 108 provides certain privileges to institutions that meet the statutory qualifications. As Congress noted in enacting the statute, an entity cannot merely call itself a “library” or “archives” in order to be eligible for the Section 108 exceptions. See H.R. Rep. No. 94-1476, at 74 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5688 (Under Section 108, “a purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies.”).

Any self-proclaimed library or archives must first meet the threshold requirements to be eligible for one of the exceptions. See U.S. Copyright Office, *Section 108 of Title 17: A Discussion Document of the Register of Copyrights* at 18 (2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf> (“In order to qualify for a section 108 exception, the particular institution must meet certain requirements outlined in subsection 108(a).”) [hereinafter *Discussion Document*]; *Study Group Report* at 34–35, 93 (“[S]ubsection 108(a) provides threshold eligibility criteria for all of the section 108 exceptions.”); see also *Pac. & S. Co. v. Duncan*, 744 F.2d 1490, 1494 n.6 (11th Cir. 1984) (stating that Section 108 “defines an archive with some precision” and finding that a commercial organization

that videotapes television news programs and sells the tapes is not an “archives” within the meaning of Section 108). As noted above, the qualifications include:

- Copies cannot be made for a commercial advantage;
- Collections must be open to the public or to researchers in a specialized field;
- Copies must bear a copyright notice or legend; and
- Only one copy of a work can be made, unless separately authorized under one of the exceptions

§ 108(a); *Study Group Report* at Appendix K, K:179–80.

If a library or archives meets the requirements, it may then exercise certain activities exempted from copyright infringement, so long as the entity meets the conditions of the specific exception. *See generally* § 108. These exceptions may be summarized as follows: preservation and replacement (§ 108(b)–(c)), supplying a portion of a work, or under narrow circumstances, an entire work at the request of a patron (§ 108(d)–(e)), further limitations on reproductions for patrons (§ 108(g)), newscasts (§ 108(f)(3)), and orphan works (§ 108(h)). *See Study Group Report* at Appendix K, K:180–86; *see also* U.S. Copyright Office, *Circular 21: Reproduction of Copyrighted Works by Educators and Librarians* at 15–16 (2014), <https://www.copyright.gov/circs/circ21.pdf>.

Notably, the exceptions in Section 108 were always meant to be limited exceptions to the exclusive rights of copyright owners. Congress carefully crafted Section 108—including the threshold qualifications—so that statute would allow libraries to perform certain functions for legitimate purposes, such as preservation

and scholarship, without impeding copyright owners' ability to exploit their work. *See Study Group Report* at Appendix H, H:147–48. Section 108 was never intended to be applied to a commercial enterprise that proclaims itself to be a library or archives, or to excuse the reproduction and distribution of multiple copies for commercial purposes. *See* H.R. Rep. No. 94-1476, at 74–75 (“[S]ection 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were ‘systematic’ in the sense that their aim was to substitute for subscriptions or purchases.”).

Even more limiting, Section 108 was also never intended to apply to virtual-only libraries or archives. The original Section 108 was enacted in 1976 before the digital age—at a time when virtual institutions did not exist. When Congress enacted the Digital Millennium Copyright Act in 1998, it made only a few minor changes to the section, including to make clear that, under subsections 108(b)(2) and (c)(2), that libraries and archives could not provide off-site access to copies made in digital formats if not otherwise distributed to the public in that format. Congress indicated its express intent not to permit digital libraries to take advantage of the provisions, stating that the terms “libraries” and “archives” refer to entities only in the conventional sense of brick-and-mortar institutions. S. Rep. No. 105-190, at 62

(1998).⁴ Congress warned that Section 108 should not be extended to anyone who creates a digital “library” or “archives,” lest the exception would swallow the rule and “severely impair the copyright owners’ right and ability to commercially exploit their copyrighted works.” *Id.*

In light of the plain language of the statute and Congress’ clear intent, courts have applied Section 108 sparingly. See David R. Hansen, *Copyright Reform Principles for Libraries, Archives, and Other Memory Institutions*, 29 Berkeley

⁴ For further context, the Senate Report stated:

Finally, the Committee wants to make clear that, just as when section 108 of the Copyright Act was first enacted, the term “libraries” and “archives” as used and described in this provision still refer to such institutions only in the conventional sense of entities that are established as, and conduct their operations through, physical premises in which collections of information may be used by researchers and other members of the public. Although online interactive digital networks have since given birth to online digital “libraries” and “archives” that exist only in the virtual (rather than physical) sense on websites, bulletin boards and homepages across the Internet, it is not the Committee’s intent that section 108 as revised apply to such collections of information. The ease with which such sites are established online literally allows anyone to create his or her own digital “library” or “archives.” The extension of the application of section 108 to all such sites would be tantamount to creating an exception to the exclusive rights of copyright holders that would permit any person who has an online website, bulletin board or a homepage to freely reproduce and distribute copyrighted works. Such an exemption would swallow the general rule and severely impair the copyright owners’ right and ability to commercially exploit their copyrighted works.

S. Rep. 105-190, at 62.

Tech. L.J. 1559, 1573 (2014) (“The vast majority of cases citing section 108 have done so merely for the proposition that it is in fact part of the Copyright Act and could potentially be raised, in appropriate circumstances, as a defense.”); *see also New York Times Co. v. Tasini*, 533 U.S. 483, 503 n.12 (2001) (citing and dismissing Section 108 as applied to print publishers’ licensing and reproduction of articles in various databases, noting in a footnote that “the Copyright Act’s special authorizations for libraries do not cover the Databases’ reproductions” of articles).

B. The District Court Misapplied Section 108

The district court in the instant action, however, failed to heed the plain language of the statute, Congress’ clear intent, and the precedent of this Circuit, ultimately applying an erroneous and fractured interpretation of Section 108. Notably, the district court committed at least three legal errors in its analysis. First, the district court failed to look at Section 108(a) in context. It is not an independent exception, but a prerequisite to the exceptions that follow. Second, in its attempt to apply Section 108(a), the district court did not consider whether the Highlands News-Sun and NewsBank met the requirements of the subsection. Third, the district court also failed to examine whether no more than one copy was made, as required

by Section 108(a). For these reasons, the Court should decline to affirm the district court's erroneous construction and misapplication of Section 108.

1. The District Court Erred in Applying Section 108(a) as a Standalone Exception

The district court's first legal error in the misapplication of Section 108 was its exclusive reliance on Section 108(a). As detailed above, it is well-settled that Section 108(a) is not an independent or standalone exception; it is the list of threshold qualifications that a library or archives must first meet in order to be eligible for the exceptions enumerated later in the section. In its decision, the district court relied solely on Section 108(a) to conclude that Highlands News-Sun and NewsBank are "public library records and archives" and their actions do "not constitute copyright infringement." *Vient*, 2019 WL 8014477, at *2–3. The court did not cite or rely on any of the provisions of Section 108 that actually state the exceptions to copyright owners' exclusive rights.

The district court's sole reliance on Section 108(a) is contrary to the plain language of the subsection, which expressly refers to the exceptions in subsections (b) and (c) and provides that "it is not an infringement of copyright for a library or archives . . . to reproduce no more than one copy or phonorecord of a work . . . or to distribute such copy or phonorecord, under the conditions specified by this section . . ." § 108(a) (emphasis added). This language clearly requires the library or archives not only to comply with the three requirements in Section 108(a), but

also to reproduce (and in some cases, distribute) copyrighted works under the conditions specified by whichever Section 108 exception it seeks to use.

As evident from the legislative history of the Copyright Act, and the Copyright Office's numerous writings on the statute, Section 108(a) should not be construed as an independent exception but, rather, as a list of threshold qualifications for libraries and archives. *See* H.R. Rep. No. 94-1476, at 74; S. Rep. No. 94-473, at 67 (1975); *Discussion Document* at 18; *Study Group Report* at 34–35, 93. By failing to tread beyond this initial provision of Section 108, the district court did not identify any exception that would apply to the case at bar.

2. The District Court Did Not Properly Consider the Section 108(a) Requirements

Although the district court quoted Section 108(a), its decision failed to properly apply its requirements in the context of the case. A library or archives may only meet the qualifications of Section 108 if:

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
- (2) 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; and
- (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no

such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

§ 108(a). An entity may not merely call itself a “library” or “archives” in order to be eligible for Section 108. *See* H.R. Rep. No. 94-1476, at 74.

Rather than consider whether Highlands News-Sun or NewsBank actually met these three prerequisites, the district court concluded at the outset that the articles appear in “public library records and archives,” ostensibly focusing on the fact that the databases used the term “archives” to describe their digital collections. *See Vient*, 2019 WL 8014477, at *2; Dkt. No. 108 (exhibits considered by the district court). As apparent from the evidence cited by the district court, Highlands News-Sun and NewsBank do not qualify under Section 108(a). *See* Dkt. No. 108. NewsBank sells articles from websites like Highlands News-Sun for profit. *See Vient*, 2019 WL 8014477, at *2.⁵ To access Highlands News-Sun’s articles through NewsBank, users must first sign up for an account, which requires the user to either purchase single articles (for \$3.95 per article) or pay for a daily, weekly, or monthly subscription, at varying rates. *See* Dkt. No. 108-3.⁶ As users cannot view or access

⁵ Defendant-Appellee has stated that NewsBank provides the newspaper’s archives for articles it has published. *See* Dkt. No. 70 at 2.

⁶ The webpage identified in Exhibit 3 is located at https://yoursunsebring.newsbank.com/search?text=vient&content_added=&date_from=&date_to=&pubX0%5D=HJFL&pub%5B0%5D=HJFL. When clicking on either of Vient’s articles in order to access them through this web page, the web page redirects to another web page that prompts the user to sign in or register for an

the articles without first paying NewsBank, the corporation would undoubtedly derive a direct commercial advantage from the reproduction and distribution of these articles in violation of Section 108(a)(1).

Highlands News-Sun's "archives" (on yoursun.com, as identified in Exhibit 2) similarly fail to meet the requirements because Vient's articles, as displayed, do not contain a copyright notice from the original work or a legend stating that the work may be protected by copyright in violation of Section 108(a)(3). *See* Dkt. No. 108-2.⁷ As the Supreme Court recognized in *New York Times Co. v. Tasini*, Section 108's special authorizations do not cover print publishers' licensing and reproduction of articles in a database. *See* 533 U.S. at 503 n.12. Merely because the publishers referred to their databases as "electronic libraries" did not bring the reproductions of individual articles within the scope of Section 108 absent full compliance with the prerequisites of subsection 108(a) and the conditions of one of

account. When choosing the registration option, new users must choose their subscription preference and provide credit card information in order to create an account to access the articles.

⁷ The full articles, as depicted in Exhibit 2, are available on yoursun.com. *See* Ben Vient, *Using a Town to Sell a Station*, YourSun.com (Jan. 15, 2015), https://www.yoursun.com/sebring/newsarchives/using-a-tower-to-sell-a-station/article_0b5c3d73-f9b9-5edb-9a2d-6ea5fd3b63c1.html; Ben Vient, *On the Rails Welcome on Board, Enjoy the Ride*, YourSun.com (Jan. 8, 2015), https://www.yoursun.com/sebring/newsarchives/on-the-railswelcome-on-board-enjoy-the-ride/article_0043e39b-de4c-590f-b3d6-b78f7056fb33.html. Even if these versions of Vient's articles on yoursun.com fall within the scope of Section 108(a), the copies available through NewsBank's website, for a per-article or subscription fee, do not qualify for any of the Section 108 exceptions.

the enumerated exceptions. *See id.* NewsBank and Highlands News-Sun fail to qualify for Section 108 on these grounds alone, without even considering the other threshold qualifications.

Even when Appellant raised the question of whether Highlands News-Sun or NewsBank are receiving a financial advantage—referring to NewsBank’s website, which states that “More than 1,000 websites use NewsBank to sell articles from their archives”—the court dismissed this point outright, concluding that the sale of articles is but one facet of its business. *Vient*, 2019 WL 8014477, at *2. Yet, this hasty conclusion ignores the express language of the statute, which requires that the reproduction or distribution of a copy be “made without any purpose of direct or indirect commercial advantage.” § 108(a)(1). NewsBank restricts access to Highlands News-Sun articles, only allowing paying subscribers to view articles. These sales are unquestionably for a commercial advantage. Whether NewsBank also offers other products that do not derive a commercial profit is not relevant to the Section 108(a)(1) analysis; the only germane inquiry is whether NewsBank is making a reproduction or distribution for a commercial advantage, which it is. The district court instead relied upon the fact that the source of the digital articles were databases that used the term “archives” to describe a digital collection of newspaper articles available for distribution—in NewsBank’s case, for profit—without

considering whether the self-proclaimed “archives” qualified under Section 108(a), or whether the articles were otherwise legally obtained.

3. The District Court Also Overlooked Section 108(a)’s One-Copy Requirement

The district court also overlooked Section 108(a)’s requirement that a qualified library or archives “reproduce no more than one copy.” § 108(a). Though the district court quoted this language it did not appear to give it any acknowledgement, as it failed to contemplate the number of copies that may have been made by Highlands News-Sun or NewsBank.

The preamble language of Section § 108(a) is specific: to trigger any of the exceptions, the qualified library or archives may not reproduce more than one copy unless one of the operative provisions states otherwise (subsections 108 (b) and (c) permit making up to three copies, but digital copies may not be distributed outside the library’s or archives’ premises). If the library or archives wanted to make or obtain more copies, it would need to license or purchase the additional copies or obtain the rights from the rights holder.

In the digital realm, a digital copy is made any time a work is transmitted or made available for download. *See Study Group Report* at 100. Indeed, “producing and then transmitting a digital copy involves the production of temporary, incidental copies, which are deemed ‘copies’ under the Copyright Act.” *Id.* As Congress recognized when it enacted certain limiting amendments to Section 108: the “risk

that uncontrolled public access to the copies or phonorecords in digital formats could substantially harm the interests of the copyright owner by facilitating immediate, flawless and widespread reproduction and distribution of additional copies or phonorecords of the work.” S. Rep. No. 105-190, at 61.⁸

When the district court overlooked this language of Section 108(a), it failed to consider the fact that, when Highlands News-Sun and NewsBank made individual articles available for transmission or download, they were not simply reproducing a single copy of the article—they were making many, each time the entities transmitted an article. Any such reproduction and distribution of multiple copies of the articles would violate the express language of Section 108(a), and also violate Section 108(g), which prohibits the reproduction and distribution of multiple copies, “whether made on one occasion or over a period of time.” § 108(g).

Even considering the exceptions for copies for users in subsections 108(d) and (e)—which, notably, have individual conditions in addition to the preconditions Section 108(a)⁹—as Section 108(g) makes clear, these exceptions encompass only

⁸ In recognition of this risk, Congress amended Section 108(b) to permit copies in digital as analog formats, but amendment also provided “that any copy of a work that the library or archive makes in a digital format must not be otherwise distributed in that format and must not be made available in that format to the public outside the premises of the library or archives.” S. Rep. No. 105-190, at 61.

⁹ For example, these exceptions they can be used only if (1) the copy becomes the property of the user; (2) the library or archives has “no notice that the copy would be used for any purpose other than private study, scholarship, or research; and (3)

“the isolated and unrelated reproduction or distribution of a single copy,” at a user’s request. § 108(d)–(e), (g); *Study Group Report* at 20. The exceptions do not apply when a library or archives “is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies” of the same work, or when the library or archives “engages in the systematic reproduction or distribution of single or multiple copies” of that work. § 108(g); *Study Group Report* at 20.

Neither Highlands News-Sun nor NewsBank have demonstrated that they meet the threshold requirements or qualify for these narrow exceptions, which apply to no more than one article from a copyrighted collection or periodical issue (§ 108(d)) and out-of-print works that cannot otherwise be obtained at a fair price (§ 108(e)). Both appear to be providing copies of numerous articles from the same periodical issue of the newspaper, and Highlands News-Sun is making copies available to anyone at any time, rather than by specific user request, as required under either exception. *See* Dkt. No. 108. These types of uses, in lieu of licensing the work from the copyright owner, are not within the limited scope of the statute, which is meant to except certain library activities, not permit unrestricted copying and distribution.

the library or archives displayed a copyright warning at the place where orders are accepted. § 108(d)–(e); *see Study Group Report* at 20.

C. Overextending Section 108 Undermines the Balance Between Rights Holders and Libraries and Archives

This Court should reject the district court’s misapplication of Section 108. Adopting its reasoning would deal critical damage to copyright law and erode authors’ exclusive rights. As detailed above, the exceptions from copyright infringement for certain activities of libraries and archives were always meant to be just that—exceptions. Under the district court’s interpretation of Section 108, any entity that calls itself a “library” or “archives” could employ the statute to excuse its systematic reproductions and distribution of copyrighted works without the authorization of (or payment to) the authors. The exception would swallow the rule and permit any website to engage in the same type of widespread and unrelenting copyright infringement that Congress warned of when it added limiting language regarding digital copies in the DMCA amendments. *See* S. Rep. 105-190, at 61.

Section 108 does not cover virtual-only databases like Highlands News-Sun’s “archives” and NewsBank, which makes multiple copies of copyrighted works each time it transmits the work and sell individual articles for profit. These entities are exactly the type that Section 108 does not cover. *See id.* at 62. Congress enacted the limited exceptions to strike an appropriate balance between the exclusive rights of authors and the needs of venerable and trusted institutions like libraries and archives to preserve works and promote public scholarship. *See Study Group Report* at 16, H:147–48, K:156. When the Section 108 study group looked at the issue of

extending Section 108 to virtual-only collections, the group rejected it, and reiterated the importance of Congress' earlier focus on physical premises and brick-and-mortar institutions. *See id.* at 113–16. The risk of for-profit corporations like NewsBank abusing Section 108, if it were extended to virtual-only libraries and archives, was too great. Congress struck a careful balance when it enacted Section 108, but any significant extension of the limited exceptions would upset this equilibrium in favor of infringers.

It would undermine the purposes of copyright for this Court to follow the district court's reasoning and extend Section 108—meant to except trusted institutions that preserve and manage the nation's works—to for-profit corporations like NewsBank, in contradiction of the statute. Only Congress has the authority to amend Section 108 to extend it to virtual-only databases or for-profit corporations.

CONCLUSION

For the reasons set forth above, The Authors Guild and Professor Besek, as *amici curiae*, respectfully request that the Court decline to affirm the district court's application of 17 U.S.C. § 108.

Dated: July 24, 2020

COWAN, DEBAETS, ABRAHAMS &
SHEPPARD LLP

 /s/ Nancy E. Wolff
Nancy E. Wolff
Sara Gates
41 Madison Avenue, 38th Floor
New York, New York 10010
Tel: (212) 974-7474
Fax: (212) 974-8474
nwolff@cdas.com

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Fed. R. App. P. 32(a)(7) because this brief contains 5,366 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as counted by Microsoft® Word 2018, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2018, Times New Roman, 14 point.

/s/ Nancy E. Wolff
Nancy E. Wolff

Dated: July 24, 2020

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system.

/s/ Nancy E. Wolff
Nancy E. Wolff