Building a Collaborative Digital Collection: A Necessary Evolution in Libraries

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Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*

Michelle M. Wu**

Law libraries are losing ground in the effort to collect and preserve information in the digital age. In part, this is due to declining budgets, user needs, and a caution born from the great responsibility libraries feel to ensure future access. That caution, though, has caused others, such as Google, to fill the gap with their own solutions. Libraries must contribute actively to the creation of digital collections if they expect to have a voice in future discussions. This article presents a vision of a collaborative, digital academic law library—one that will harness our collective strengths while still allowing individual collections to prosper. It seeks to identify and answer the thorniest issues—including copyright—surrounding digitization projects. It does not presume to solve all of these issues. It is, however, intended to be a call for collective action—to stop discussing the law library of the future and to start building it.

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Introduction

¶1 Imagine a world where library users are able to access every resource they need, regardless of time, space, and resources. While that vision may not yet be reachable, law libraries do have within their grasp the possibility of access to much more extensive collections than any one of them currently holds, with greater ease than is now provided by interlibrary loan or existing consortium efforts.

¶2 The United States has approximately two hundred American Bar Association (ABA)—accredited law schools, and collectively, they spend more than $230 million annually on building and maintaining their library collections.1 Within that $230 million, significant duplication exists, even for infrequently used materials—historically driven in part by the ABA Standards and various law school and law library rankings.2

¶3 In seeking a more useful solution for all users, law libraries can gain perspective from states like Florida, which has reduced costs through statewide collection building;3 from public libraries, which have moved to centralized forms of collection development;4 and from nonlaw academic cooperatives.5 These models can be exported and expanded for use by academic law libraries. This article proposes that

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1. See ABA Annual Law School Survey Take-offs (2009). Each fall, the American Bar Association requires each of the law schools that it accredits to complete its Annual Questionnaire. After collecting the responses, the ABA compiles the data into a statistical report that they refer to as “take-offs” and distributes the report, which is deemed confidential, to the dean of each law school.
3. See Roy Ziegler & Deborah Robinson, Building a Statewide Academic Book Collection, FLA. LIBR., Fall 2010, at 21.
4. Catherine Gibson, “But We’ve Always Done It This Way!”: Centralized Selection Five Years Later, ACQUISITIONS LIBR., no. 20, 1998, at 33 (describing the successful implementation of centralized collection development).
5. See, e.g., About CRL, CTR. FOR RES. LIBRARIES, http://www.crl.edu/about/ (last visited June 23, 2011) (“We acquire and preserve newspapers, journals, documents, archives, and other traditional and digital resources from a global network of sources. . . . We enable institutions to provide students, faculty, and other researchers liberal access to these rich source materials through interlibrary loan and electronic delivery. . . . Membership in CRL also permits librarians, specialists, and scholars at the member institution to participate in building this shared CRL corpus of research materials through the purchase proposal and demand purchase programs.”); Cornell Univ. Library, Press Release, Columbia and Cornell Libraries Announce New Partnership, http://www.library.cornell.edu/news/091012/2cul (last visited July 19, 2011); Resource Sharing, WASH. RES. LIBRARY CONSORTIUM, http://www.wrlc.org/resource/ (last visited July 19, 2011) (“WRLC members have combined resources to create a shared library collection”).
academic law libraries pool resources, through a consortium, to create a centralized collection of legal materials, including copyrighted materials, and to digitize those materials for easy, cost-effective access by all consortium members. For the sake of expediency, this proposal will be referred to here as TALLO (Taking Academic Law Libraries Online) and the proposed consortium as the TALLO consortium.

¶4 Other entities, such as Google, have made similar attempts at a digital library, but TALLO differs from those projects in that it neither assumes privileges explicitly denied in the copyright code nor underestimates the flexibility that copyright law can provide to a user. I believe it is possible to build a digital library that respects both of the intended beneficiaries of the Copyright Clause—copyright owners and society—while testing commonly held assumptions about the limitations of copyright law. In balancing these goals, TALLO permits circulation of the exact number of copies purchased, thereby acknowledging the rights inherent in copyright, but it liberates the form of circulation from the print format.

¶5 In describing TALLO and the practicalities of implementing the proposal, this article first provides a brief history of academic law libraries, explaining why no library today can afford to build as comprehensive a collection as in the past, and illustrating how collaboration would achieve a stronger collection than can be constructed by any individual library. It then articulates a model (the TALLO consortium) for such collaboration. The article then addresses the most pressing objection against all digitization projects: copyright. Elements of this argument are dependent on the specific design of the TALLO project and may not be applicable generally to other digitization projects. It next discusses the other major library, user, and external objections, outside of copyright, to centralizing collections, and describes the minimum technologies necessary to fully exploit the hypothetical collection already described. The final section of the article describes how TALLO differs from other digitizing endeavors and how the proposed consortium might be able to partner with other groups to further the overall goal of greater access to resources.

The Need for a Collaborative Digital Collection

¶6 With the costs of materials rising at an unpredictable rate each year, the uncertainty of licensing in lieu of ownership, the reliability (or unreliability) of free online sources, users’ increased desire for digital sources, and the costly dependence on physical interlibrary loan (ILL), libraries are constantly struggling to find the resources to provide their users with the information they need in ways that will increase the likelihood of that information being used. With each purchase decision, libraries risk either losing future access to databases (including retrospective content) and experiencing greater restrictions on use through license terms than are

available to publishers under copyright, or keeping materials in print even though they might not be used as often as an online equivalent. A quick review of libraries’ progress through the years will highlight how the research landscape has changed and why our collection practices must be altered.

¶7 Before the American Revolution, there were no public libraries and most individuals had little leisure time in which to use libraries. The libraries that did exist were privately owned by the privileged and wealthy. Lawyers collected materials for practice, and it was not until social, economic, and political conditions stabilized that public libraries came into being. Bar libraries were the first group-use law libraries to be formed, with the Philadelphia Bar Library founded in 1803 and the Social Law Library the year after.

¶8 With industrialization and greater regulation, corporations found higher education to be a more economical training ground than on-the-job experience. The resulting growth of universities prompted a flourishing of the academic library. University law libraries were established in the early 1800s, but law school libraries were not particularly well developed until the early twentieth century. By 1880, there were forty-eight law schools in the nation, but very few of them had dedicated libraries. The few in existence were typically expected to provide access only to materials relevant in their home state and to U.S. Supreme Court decisions, and it was not until 1912 that any minimum standard for law school libraries was adopted. That year, the Association of American Law Schools (AALS) promulgated a minimum standard for law library collections of 5000 volumes. Not surprisingly, even after this standard was adopted, the focus of most collections remained on primary sources. After World War II, though, the number of legal titles expanded greatly, due to a change in printing technology that permitted more limited runs. This enabled more specialized publications that would not have been fiscally viable in earlier years.

¶9 Despite the growing number of titles available for purchase, law libraries quickly recognized that they would need access to materials beyond their own individual collections. That access was provided in part by ILL, a service through which scholars could use resources not otherwise available at their libraries with-

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11. See Johnson & Harris, supra note 9, at 4–5, 200.
13. Johnson & Harris, supra note 9, at 273–74.
15. Id. at 20–21.
out the burden or expense of travel. It allowed libraries to meet patron needs without exponentially increasing their expenses, and it allowed library budgets to be used for common, recurring needs instead of for materials of limited value to the overall collection and future library patrons. What was allowed to be loaned and what a law library was expected to collect was determined both by the ABA Standards and by the Copyright Act. The ABA Standards set the minimum requirement for law library collections, and any law school hoping to be accredited or reaccredited was expected to satisfy that standard for a core collection.

§10 The Copyright Act was instrumental in shaping law library collections in a slightly different manner. Instead of specifying what must be collected, it dictated what should not be borrowed. Materials to be borrowed using ILL were restricted to materials infrequently used; libraries were prohibited from substituting ILL for owning an item. The National Commission on New Technological Uses of Copyrighted Works (CONTU) also issued a report with recommended guidelines on when libraries should purchase an item instead of obtaining it through ILL. While not binding, most libraries have voluntarily adopted these recommendations.

§11 Unlike during these earlier eras, today information is available more readily, in more forms and levels of reliability, and in overwhelming quantity, due both to technological advances and to the development of less costly printing practices. To illustrate, in 1860, there were only forty-eight law periodicals in print nationwide, whereas we now have almost 1000. Production of law monographs has also been steadily increasing, with almost 6000 new titles published in the United States each year. At one time, library collections were anticipated to double in size every sixteen years, but with online access supplementing ownership, that time period has shortened considerably, and the definition of a collection has become more elastic. But even as law libraries extend their reach, the types and numbers of materials law libraries are expected to offer to their users increases even more.

§12 The expansion of legal scholarship into interdisciplinary, transnational, comparative, and international arenas requires resources not traditionally collected by law libraries, thereby taxing collection budgets, especially those of libraries at stand-alone law schools. Because tenure requires scholarship, and rankings and

17. For the current version of the standard, see 2010–2011 ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS 41, 43 (Standard 606 and Interpretation 601-1).
21. SURRENCY, supra note 12, at 190.
24. JOHNSON & HARRIS, supra note 9, at 275.
reputation are driven in part by scholarly productivity, demand for informational resources and the expertise to use them are unlikely to decrease.

¶13 As a result, library collection budgets are rarely sufficient to collect all materials needed for research, and in law libraries, the financial strain has been amplified by vendor consolidation and the digitization of legal resources. Consolidation reduces competition, and this truism is borne out in cost statistics. Between the years 1993 and 2009, inflation for law library serials—which make up approximately seventy to eighty percent of the average law library collection—has averaged over nine percent annually, a rate that outstrips both the inflation rate in most other disciplines and the consumer price index.

¶14 As vendors continue to transition from selling print materials to licensing content, law libraries have shifted their approach. To counter the possibility of losing access to digital materials, many law libraries initially chose to obtain materials in dual formats: physical for preservation and future users, and electronic for current access. Increasingly, though, as budgets are cut, choices are being made and those choices often favor present use over future access; licensing an aggregator database for the short term may be affordable when acquiring all the items it contains in print is not. While such choices meet immediate needs, they serve to remind us how vulnerable our collections and populations have become—a budget cut resulting in termination of a database license could result in a loss of access to a significant portion of a library’s titles.

¶15 To address the concerns of broad and reliable access, then, law libraries need to revisit collection development. No single library is able to collect comprehensively in all of the areas desired by its researchers and also preserve those resources for future access. As a collective, though, law libraries can share the burden of developing a library deep in valuable but less frequently used (e.g., rabbinical jurisprudence) resources while concentrating local purchases on those materials used regularly (e.g., the Bluebook). They can digitize materials for easy access by current patrons while ensuring that vendor consolidation or profit-driven cost increases will not result in a loss of access for future users. Below are the particulars of one proposed configuration of such a consortium.


26. Data from 2000 to 2009 were analyzed from the Periodicals Price Survey published each year in the April 15 issue of Library Journal to arrive at these figures. See, e.g., Kathleen Born & Lee Van Orsdel, Searching for Serials Utopia, LIBR. J., Apr. 15, 2001, at 53. Consumer Price Index (CPI) data were obtained from the CPI inflation calculator at http://data.bls.gov/cgi-bin/cpicalc.pl, and as of March 25, 2010, showed an average annual increase of 2.73% over the same time period. For those attempting reproduction of this figure, there may be some deviation in the numbers, as Library Journal updates its figures each year retrospectively, but in each calculation, the CPI remained lower than the average obtained by any of the Library Journal numbers.
Collaborative Collection Building: Access and Permanence

¶16 Instead of the current practice of forming regional or bilateral agreements for resource sharing, law libraries could form a national consortium through which a centralized collection would be established. The TALLO consortium would serve as a kind of jointly owned acquisitions department for member libraries. The discussion here is limited to a collection of print and microform acquisitions and donations—licensed databases are controlled by contract; media files often face additional issues controlled by the Digital Millennium Copyright Act;27 and freely available, born-digital materials already have an archiving model in the Chesapeake Project.28 That is not to say that some of the principles in this article would not apply, just that the analysis of nonphysical materials would require greater exploration than is possible here. Within the category of printed or microform texts, though, there would be no further mandatory restrictions, although there certainly could be practical challenges (e.g., digitizing and updating a loose-leaf title) that might reduce the number of titles that could be converted.

¶17 The consortium would have independent staffing, dedicated solely to maintaining the collection, digitizing it, and providing access to it. This approach would maximize purchasing power, reduce the duplication in expenditures across libraries for common but rarely accessed sources (e.g., reporters), and address any number of existing issues with online resources, including authenticity, format choice, consistency in access, preservation, and continued access. There are three components to this proposal: dedicated staffing, shared collection development and storage, and digitization leading to more efficient document delivery.

Dedicated Staff

¶18 The most critical component of TALLO is a dedicated staff. Some of the larger cooperative projects for print collections have stalled or failed because of inactivity or slow activity,29 a predictable outcome of asking existing libraries to take on additional duties. Inevitably, a local need will arise that takes precedence over the collective need.

¶19 Another benefit of centralizing efforts is the reduced likelihood of duplication. Libraries working as independent actors might be unaware of one another’s activities and choose to digitize the same work or collection. With centralized management of the titles to be digitized, such duplication can largely be avoided. The central administration could provide online access to all members of a list of collections that had been converted or that were in the queue to be converted. Should member libraries wish to provide independent resources to scan additional titles,

they could then coordinate with the central administration. The centralized staff could also be charged with checking against other existing digital repositories and entering into sharing agreements with them if such agreements would be more resource efficient than rescanning the same content.

¶20 Establishing a dedicated staff would ensure that the project could continue to advance even if the individual members of the cooperative were otherwise occupied or if some members were no longer able to participate. While the staff may gain vision, mission, and direction from the members, it would have a great deal of autonomy in operation, ensuring consistent practices and policies regarding preservation, acquisition of multiple copies, digitization, format migration (when necessary), and cost allocation. Since time and consistency are necessary in these latter decisions, allowing the staff most intimately familiar with the use of the materials to make these decisions is the most logical option.

¶21 Staffing would exist for retrieval, digitization, cataloging/indexing, and billing. Provision of reference services and data mining of materials for library users would continue to be decentralized, housed at the individual member libraries.

¶22 The success of TALLO would depend on hiring experts in various fields. Digitization and development or adoption of search engines should be undertaken by technology experts, not necessarily librarians, while the indexing and organization of materials would be the responsibility of information specialists. Librarians have indexing expertise and can apply it to documents as they are added to a central database. Scholars have already noted the impact of the loss of features such as indexes in full-text databases; if the consortium can bring the best of technology and information management together in a single resource, it should be able to outperform existing services in accuracy and usability.

Storage and Collection Development

¶23 The TALLO consortium’s dedicated staff and member libraries would develop the initial subject-area collection development policy together, with the goal of expanding coverage as far as practical. The policy should exclude items frequently accessed by users (e.g., textbooks, reporters) and focus on scholarly materials less in demand (e.g., monographs in “law and” fields, laws in the American colonies, foreign law) but still useful for research.

¶24 Under the care of the staff, and in the same location as the staff, would be a storage facility for physical materials that would be used for preservation and historical purposes. Redundancy, while preferred, would not be necessary because of the third prong of the proposal—digitization. The physical materials would be


31. Any project involving foreign materials may face social and practical pressures; other countries have different copyright laws and, more important, different views on permitted copyright use. Many countries have no equivalent to the fair use doctrine, and therefore, while the TALLO consortium’s digitization would be legal in the United States, it might be viewed by foreign nations as contrary to their interests. Those nations’ vendors might then seek to exercise greater control through contract or restricted sales.
in a dark archive, accessed only once, for digitization, and then retained in cold storage in case the accuracy of the digital form were questioned.

¶25 All members would pay a base annual membership fee, which would give them co-ownership of materials purchased that year. If a library missed a year’s payment, it would not own that year’s acquisitions and would not have access to them. One might ask why a nonmember library could not still access the materials through ILL, and while this would be technologically possible, the TALLO proposal envisions restricting access to member libraries. Otherwise, libraries not in the consortium would have all the benefits of membership without paying for them, thereby discouraging member libraries from continuing participation. Libraries skipping payment in a given year would be permitted to pay back dues and regain co-ownership at a later date. Statistics of use by member libraries would be retained, so as to assess fairness of the membership fees. If appropriate, tiered fees could be established, distinguishing between frequent and infrequent users.

¶26 As a side benefit, this central storage facility might address some of the space issues libraries face. For libraries that have been retaining print journals, codes, and reporters purely as a safety net in case their electronic subscriptions ceased, this facility could provide them with that security without local consumption of shelf space. The logistics of digitizing and managing retrospective collections would be more complex than the processing of new titles but would be possible within this model.32

Digitization

¶27 Materials acquired would be digitized, and only the number of copies acquired in print for each subsequently digitized document would circulate at any given time. The print copy would be stored for archival purposes; only the digital copy would “circulate.” This digital copy would be an encrypted, protected document so that users could not print, save, or copy the entire work. It would allow for limited copying, to enable scholars to manage their citations easily. Documents withdrawn from libraries and offered to the consortium would be subject to the same rules.

¶28 The order of digitization would be determined by demand—as soon as an item was requested, it would be digitized, making usefulness the determining factor in prioritization. The local staff could determine priority of digitization in times when there were insufficient active requests to employ the staff’s full capacity. The digital collection would be subject to the same security, redundancy, and backup

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32. There are several reasons why this could be more complicated than the handling of other materials. First, the consortium, in theory, might want to circulate 150 copies of a given reporter volume at one time if 150 libraries had donated the same volume to the consortium. While permitted under this article’s analysis, neither the consortium nor the libraries would want to bear the expense of transport or storage, so arrangements would need to be made to document the donation and destruction of copies not used, so as to remain faithful to the one-copy-in-use restriction. Second, with primary materials, libraries would want redundancy in the print copies, so some coordination among member libraries might be necessary to ensure that some primary sources remain available in their print form even if the consortium’s central storage facility were to be destroyed or damaged.
procedures that information technology professionals routinely require for servers and materials stored on them.

**TALLO and Copyright**

¶29 Copyright has been and continues to be the greatest hurdle to transforming library collections. Even though libraries subscribe to a wide range of databases, much of a library’s retrospective collection (and indeed, most current monographic acquisitions) exists only in print or microform.

¶30 To move to a more efficient and cost-effective way of transporting information to our users, regardless of location, libraries must be willing to test the assumptions behind copyright protection. Libraries are at a point where we must move forward and address these issues or find ourselves lagging so far behind other industries that we will be unable to catch up. The approach advocated here is modest, reasonable, and reflects existing library lending norms.

**History of Copyright**

¶31 Any meaningful discussion about copyright starts with an understanding of the origins of protection within the United States. A comprehensive history is unnecessary, but an exploration of the intent behind copyright is imperative. Though copyright existed long before 1710, adopted for reasons ranging from preventing printing errors to demonstrating the value of a work to controlling the distribution of “seditious” materials, this article will treat the Statute of Anne as its beginning. The Statute of Anne was England’s first grant of copyright protection to authors—prior to this enactment, protection existed, but only for printers. The preamble of the Statute of Anne reads: “An Act for the Encouragement of Learning, by Vesting the Copies of Printed books in the Authors or Purchasers of such Copies, during the Times therein mentioned.”

¶32 The United States took its cue from this language, and at the Constitutional Convention of 1787, the Statute of Anne’s influence was apparent. The committee charged with the task of drafting the Copyright Clause was asked to propose language that would allow Congress to “secure to literary authors their copy rights for a limited time,” “grant patents for useful inventions,” and “secure to authors exclusive rights for a certain time.” These were listed as three different interests, and no mention was made of societal benefit. But when the committee returned with proposed language, it had combined the concepts and added a key phrase. The proposal, which now gave Congress the power “[t]o promote the progress of Science and

33. For those readers wishing a more detailed history, there are many useful sources. See, e.g., Richard Rogers Bowker, Copyright: Its History and Its Law (1912); Marci A. Hamilton, The Historical and Philosophical Underpinnings of the Copyright Clause (n.d.); 1 William F. Patry, Patry on Copyright §§ 1:1–1:115 (2011).
34. See 1 Patry, supra note 33, at §§ 1:2–1:4.
35. 8 Anne ch. 19 (1710) (Eng.) (quoted in 1 Patry, supra note 33, § 1:9, at 1-95).
useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” was adopted without dissent.\textsuperscript{37} ¶\textsuperscript{33} As with the Statute of Anne, the clear goal of the United States’ Copyright Clause as adopted was not to protect authors—it was to promote advancement of learning and public knowledge.\textsuperscript{39} The protection of authors was merely the means to the end. This priority of rights has been affirmed and reaffirmed by courts over the years, in language similar to that used in Fox Film Corp. v. Doyal: “The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” At the heart of copyright, then, is the public good. \textsuperscript{40} ¶\textsuperscript{34} Portions of the TALLO proposal—collection, remote access—are already permitted by the copyright code and are widely practiced by libraries nationwide. The digitization portion, on which TALLO depends, is the part that would likely trigger a copyright challenge under section 106(1) of the copyright law.\textsuperscript{41} However, a reading in line with the spirit of the code allows restrictions on copyright owners’ rights under appropriate conditions. In fact, fair use, compulsory licensing, and other exceptions in the code were developed in recognition that copyright is not an absolute right. Further, in a nod to technological advancements, the Supreme Court has already acknowledged that it “must be circumspect in constructing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests”\textsuperscript{42} and that “[w]hen technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.”\textsuperscript{43} ¶\textsuperscript{35} In recent years, the balance of copyright appears to have tipped more toward the rights of copyright owners over the benefits to society,\textsuperscript{44} with legislators unable or unwilling to change that balance through new legislation. Because existing statutory language is ill-equipped to handle new technologies, wealthy and powerful copyright holders have been quick to use technology to expand protection

\textsuperscript{37} 3 id. at 676 (emphasis added).
\textsuperscript{38} Id. at 678.
\textsuperscript{39} 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 1.03(A) (2011).
\textsuperscript{40} Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932). See also Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”).
\textsuperscript{41} 17 U.S.C. § 106(1) (2006) (giving the copyright owner the exclusive right to reproduce the work).
\textsuperscript{42} Sony, 464 U.S. at 431 (holding permissible the noncommercial recording of television programs).
\textsuperscript{43} Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) (holding that the playing of a radio broadcast containing licensed music in a public restaurant was not a copyright violation by the restaurant owner).
\textsuperscript{44} See, e.g., Digital Millennium Copyright Act of 1998, 17 U.S.C. §§ 1201–1205 (2006) (implementing restrictions on anticircumvention of technologies used to protect copyright); Eldred v. Ashcroft, 537 U.S. 186 (2003) (permitting extension of copyright term limits); New York Times Co. v. Tasini, 533 U.S. 483 (2001) (restricting right of publishers to license articles for use in databases where the right to include them in such a digital collection was not explicit in the copyright agreement with the author).
of their works or to intimidate users. TALLO is an attempt to restore balance to copyright, reminding owners that societal benefit appropriately sits on the other side of the scales.

¶ 36 TALLO presses for a greater utilization of technology, while remaining constant in meeting the goals of and supporting the means behind the Copyright Clause. It seeks to protect an author’s rights while expanding the base of knowledge available to users. It accomplishes the former by restricting circulation to the number of copies purchased and prohibiting editing or disassembly of the copyrighted piece. For publishers and vendors, such a project would arguably result in no net loss. Because the TALLO consortium might be able to afford materials that none of its member libraries otherwise could have or would have acquired, it would be positioned to purchase more varied titles. There may be some losses for particular vendors, in that fewer multiple copies of an individual title might be purchased. But as law libraries have been facing budget cuts for the past decade, this decrease would not necessarily be solely attributable to TALLO.

17 U.S.C § 108

¶ 37 The activities of the TALLO consortium arguably fall within 17 U.S.C § 108, either subsections (a) or (c). Under subsection (a), the proposal meets the three requirements set forth in the statute. First, digitization and distribution would not be done for commercial gain and would be handled in a manner completely consistent with a library’s function. Because the library would not be increasing the number of copies available for use at any given time, the digital copy would not serve as a substitute for an additional subscription or purchase. Should demand be so great that multiple copies were needed simultaneously, TALLO would need to purchase or license additional copies or individual libraries within the consortium would need to make local purchases. Second, the materials would be available both to the institution’s primary users as well as to walk-in patrons. Third, a copyright statement overlay could be added to each digital page of every


46. 17 U.S.C. § 108(a) (2006) provides:
Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, 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.
publication, ensuring that the user recognizes that the work is protected under copyright.

¶38 Alternatively, under 17 U.S.C. § 108(c), libraries can advance the argument that digitization is permitted as an archival function, given that the print form is obsolete. The digital copy would thus serve as the replacement copy permitted by statute. This reading would encounter significant challenge, from both within and outside of the library community, since the statute states that “a format shall be considered obsolete if 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.” Print works are clearly still perceptible, though one could argue that other technologies, such as Betamax tapes, which are seen to be obsolete, are also still technically perceptible but can legitimately be archived in a different format under this section. Machinery to read these technologies continues to be commercially available, though only through the resale market. Therefore, obsolescence appears to be partially subjective, despite the language of the statute, and libraries could take the approach that print falls within this definition, particularly as users show greater and greater preference for the electronic form.

¶39 Subsection (c) of section 108 also requires that before duplication the library must first check to see if “an unused replacement cannot be obtained at a fair price.” For some items in the TALLO collection, a digital version may be available for license or purchase. In cases where a digital version is available only for license, a library could argue that such a license is not equivalent to either the print copy or a digital copy they would make, because both of these items would be owned by the library and the licensed digital version would not. Thus, an unused equivalent replacement is not available in the marketplace.

¶40 One potential objection to applying section 108 to TALLO is the limiting text in subsection (g), which states that a library may not engage in “concerted reproduction or distribution of multiple copies . . . .” Some would argue that the

47. 17 U.S.C. § 108(c) (2006) provides:

   The right of reproduction under this section applies to three copies or phonorecords of a published work duplicated solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete, if—

   (1) the library or archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and

   (2) any such copy or phonorecord that is reproduced in digital format is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.

   For purposes of this subsection, a format shall be considered obsolete if 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.

48. Id.


50. 17 U.S.C. § 108(g) (2006) provides:

   The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee—
proposed consortial action is exactly what was intended to be proscribed by subsection (g), and that permitting libraries to digitize print materials would reduce copyright owners’ ability to make a living wage off their works.

¶41 However, TALLO’s limitation on circulation addresses the concerns underpinning subsection (g). The proposed consortium would be required to purchase multiple copies of any item that it anticipates will be consistently, simultaneously in demand; it would not be free to circulate more copies than it had legitimately acquired.

¶42 Indeed, libraries outside of this proposed consortium could accomplish a goal similar to what is proposed here through traditional ILL; they could simply exchange print materials via physical shipment. The costs might be higher, but those costs would be related to retrieval and shipping of the print item, not to the purchase of additional copies.

¶43 Because TALLO contemplates a more efficient method of sharing resources in a manner consistent with ILL principles, subsection (g) should not apply.\(^{51}\) Alternatively, if the proposed actions are not seen as being consistent with ILL principles, an argument could be made that any item in the consortium’s collection is co-owned by all member institutions. The participating libraries would not be substituting ownership with access, as each participating library will own a share of each title in the consortium’s holdings.\(^{52}\)

**Format Shifting**

¶44 A more straightforward justification of digitization than section 108 would be a challenge to the common assumption that digitization of a full work outside the plain language parameters of the relevant statutes always qualifies as infringement. Instead, I believe that digitizing a text and retaining its original structure should be considered permitted format shifting.

¶45 In inspecting the exclusive rights of copyright holders, two author interests are evident. The first is to ensure that the author reaps the profits coming from the

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(1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords 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; or

(2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): Provided, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

51. While lending digital copies will create some temporary copies on users’ machines and servers, this type of copyright is protected. Earlier disputes over such buffer copies and the like have been replaced by recent cases in which courts see this as an incidental activity and not necessarily an infringing one. See U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 106–46 (Aug. 2001), available at http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf; Cartoon Network LP v. CSC Holdings, Inc. 536 F.3d 121, 127–30 (2d Cir. 2008) (permitting the cable company to provide users with digital video recorders that made temporary copies of television programs and movies).

52. See supra ¶ 25 discussing how libraries will be limited to using only materials purchased during the period they belong to the consortium.
work, and the second is to afford an author control of the context of the work. Under TALLO, the author will have already received the profits when the physical book was sold, and digitization, so long as it displays the full text in context, would not distort the copyrighted work in such a way as to frustrate the author’s authorization in the original printing. And because the number of copies of a work in circulation would not exceed the number that the author sold or authorized, the author could not assert damages resulting from flooding the marketplace with unauthorized copies.

¶46 It is the work itself that is copyrighted, not the form. While works must be in a fixed form to qualify for copyright protection, that protection is for the work itself. Some forms are necessarily part of some types of works (e.g., sculpture), but this cannot be said of most printed works. The form in which a work is fixed is irrelevant, and Congress recognized the importance of media neutrality when it adopted the language in the Copyright Act. Digitization changes only the form, and “the ‘transfer of a work between media’ does not ‘alter the character of’ that work for copyright purposes.”

¶47 Once a copyrighted work is sold, the “first sale doctrine” permits a purchaser of a book to use and dispose of the book in any manner he chooses: sale, discard, rental, or destruction. The discussion in the House at the time the relevant statute was adopted illustrates that actions beyond transfer of ownership were included in the first sale doctrine: “[T]he outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.” The question posed here is whether conversion to another format can qualify as a disposition, and if not, could the action otherwise be consistent with the principles behind the first sale doctrine?

¶48 Format conversion would be an unusual and untested extension of the first sale doctrine but is supported by the Supreme Court’s determination that a copyright owner’s right to copy and distribute was intended “to secure the right of multiplying copies of the work . . . .” Because conversion, if accompanied by

55. The Supreme Court has determined that publishers are liable for infringement if they take an author’s work out of the collective work when the only authorization that the author gave was inclusion in that collection. Publishing the work in digital format, if it had been the same collective work initially published in print, would not have been infringing. Tasini, 533 U.S. at 501. See also Greenberg v. Nat’l Geographic Soc’y, 533 F.3d 1244, 1258 (11th Cir. 2008) (holding that an exact replica of the print magazine produced on CD-ROM did not infringe the author’s rights).
57. There could be some exceptions in historical materials, such as illuminated texts.
destruction of the original item, does not increase the number of total copies available of the work, libraries can argue that this is simply a new disposition made possible by technology.63

¶49 If such conversion is seen as inadequate for passing the test for a “disposition,” an alternative argument would be that the first sale doctrine supposes a user’s full use and enjoyment of the purchased item. Once a copyright owner has consented to publication of a work, he has authorized the release of a certain number of copies to the open market.64 Under this approach (and the fair use doctrine), users have long been copying CDs to MP3 players for their own use, and even copyright owners in litigation have conceded that this practice is lawful.65 While an additional copy may have been made under this scenario, that copy has not entered the marketplace, it continues to be used and controlled by the original purchaser, and it is used in a manner consistent with the purchase. If this practice is lawful, then converting a print text to a digital version should be equally legitimate so long as control of the converted text remains with the lawful title holder.

¶50 Libraries could also extrapolate from the reasoning in the Sony case to justify format shifting as fair use. In Sony, video-recorder makers were sued for producing equipment that could violate the copyright of authors and producers of televised programs. While the users, the claimed infringers of copyright, were not involved in the case, the Court’s language signaled that fair use could evolve with technology and that some novel, unauthorized uses could qualify for fair use. In Sony, copying a televised program, though impinging on authors’ exclusive rights to duplicate their work, was not seen as infringing.66 “A challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work.”67

¶51 All reported judicial opinions thus far on format conversion have involved defendants who allowed users to download and retain copies of copyrighted works they had not purchased,68 who have profited from the sale or servicing of unau-

63. Admittedly, the first sale doctrine has typically applied only to distribution, and not to reproduction. However, on the theory that digitization is actually a disposition of an item instead of a reproduction, the doctrine could still apply. That said, the owner may need to destroy the original copy for such an action to be considered a true disposition.

64. 2 Nimmer & Nimmer, supra note 39, § 8.12(A).

65. “The record companies . . . have said, for some time now, and it’s been on their Website for some time now, that it’s perfectly lawful to take a CD that you’ve purchased, upload it onto your computer, put it onto your iPod.” Transcript of Oral Argument at 12, Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 545 U.S. 913 (2005) (No. 04-480), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-480.pdf.

66. “This practice, known as ‘time-shifting,’ enlarges the television viewing audience. For that reason, a significant amount of television programming may be used in this manner without objection from the owners of the copyrights on the programs. For the same reason, even the two respondents in this case, who do assert objections to time-shifting in this litigation, were unable to prove that the practice has impaired the commercial value of their copyrights or has created any likelihood of future harm.” Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 421 (1984).

67. Id. at 451.

Authorized copies, or who downloaded unauthorized copies for their own and others use. Each of these can easily be differentiated from TALLO, which proposes legally acquiring an item and subsequently shifting its format for the same use.

§52 Conversion for self-use, where the individual in question has obtained a copy legally and where the converted format serves the same basic purpose, has not been ruled infringing. An author may not forbid a library from circulating an item it has purchased, and TALLO anticipates exactly this action, just in a different format. The conversion would not involve an alteration of the purpose of the work; it would still be a book in readable form. It involves neither reinterpretation as an audio version might, nor translation as a foreign version would, nor alteration as an abridged version would. Essentially, the nature of the use of the converted copy would be the same as that of the original.

§53 Having met both the author’s and society’s interests in copyright, format shifting should be permitted as fair use or as a disposition within the protection of the first sale doctrine. Applied to libraries, where documents are protected in their new formats, this expanded application would continue to protect copyright owners’ interests. However, it would be naive to assume that such protection and alignment with the spirit of copyright would reduce resistance by copyright owners.

Likely Objections from Publishers and Copyright Holders

§54 As libraries have already seen, publishers have used new technologies to exert control over works beyond the control they had over printed works. They are replacing ownership with licensing, where they can regulate not only the number of users but also the number of uses. Historically, the same types of post-purchase actions—for example, dictating resale prices—could not be similarly constrained with print materials. Given this trend toward greater control over material by publishers, it would be remarkable if the industry did not object to libraries’ digitizing printed materials.

§55 For the reasons set forth above, though, these objections can be countered with statutory text, constitutional intent, and judicial documents on copyright and fair use. Nevertheless, the one argument that has not yet been articulated is also likely the strongest one—if format shifting is broadly accepted, speculative future harm to the market for works could be great. Individual users, once they have possession, albeit temporary, of digital works, are unlikely to protect the rights of the copyright owners. In fact, as has happened with protected musical works, many users are dismissive of copyright protections and very likely to share electronic

documents with others. If users could transform their printed libraries into electronic versions, what effect might that have on publishers’ and copyright owners’ abilities to sell copies to nonowners? Could Google then digitize the world’s libraries as long as it obtained the original copy legally?

§56 Fortunately, through the courts and the actions of the music industry, society already has a guide on how to appropriately address such harms. Restitution is properly sought from those who illegally make copies and distribute the work, not those who have actually purchased the work and are making use of the text in a manner consistent with that purchase. Neither a user uploading a copy for mass download by others nor Google providing simultaneous text access to multiple users falls within this latter definition, while TALLO does.

§57 Finally, copyright owners should revisit the aftermath of the Sony case before objecting to TALLO. Despite studios’ concerns about drastic market damage from video recorders, the legitimization of the actions and equipment they opposed actually increased their profits by creating opportunities for new, profitable industries. Similar potential exists here, and opposing a legitimate action only out of fear of unknown consequences advances neither copyright owners’ interests nor society’s.

§58 Should Congress see format shifting as an extreme danger to copyright holders and enact explicit legislation to restrict it, libraries should advocate for language in the bill to mirror section 108, creating an exception for libraries and archives, as these entities are not seeking unrestricted distribution. Their goals, for materials in any format, remain the same—the use and preservation of knowledge while respecting copyright protections.

Possible Objections Other Than Copyright

§59 Aside from objections from copyright owners, libraries may also have concerns about such a proposal—concerns that range from cost to control to usability.

Why Re-create the Wheel?

§60 Vendors (e.g., Thomson Reuters), commercial organizations (e.g., Google), and nonprofit entities (e.g., HathiTrust) have already created substantial digital information stores. Where they are free or reasonably priced, might it make sense to rely on these instead of creating a separate database, especially as they permit simultaneous use by multiple users? Indeed, information already available at a reasonable cost from other sources should remain at the lowest priority for the consortium to digitize. However, barring the establishment of postcancellation access directly from vendors, the titles digitized by for-profit institutions should remain on the list for the TALLO consortium, albeit at a low priority, because prod-

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ucts by for-profit entities translate to unpredictable costs, uncertain future access, and varying quality.

§61 The number of objectors within libraries to the various Google settlement agreements shows that there is significant concern with the idea of relying on a for-profit source as a repository. Further, researchers using Google Books have already mentioned flaws in the resource, including unlinked volumes of the same title, weak quality control, and inaccurate data. Having a noncommercial entity house materials ensures future access to information, even in the event of a publisher’s being acquired by another or going out of business.

§62 Last, by building a digital collection, libraries can contribute to the preservation of knowledge for all. Instead of digitizing materials as they lose copyright protection, libraries could release already digitized materials to the public immediately upon the expiry of copyright terms. If each library group committed to preserving a portion of the world’s existing, printed knowledge in cooperation with one another, they could reduce duplication of effort and ensure an unbiased preservation of materials. This is where coordination with nonprofit entities would be relevant, and the TALLO consortium should endeavor first to scan unique materials instead of materials already digitized by other nonprofits.

Cost

§63 Is this proposal one that is too ambitious for our means? The information necessary for a thorough analysis is unknown, but a basic analysis demonstrates that law schools certainly have the resources to fund the immediate costs of such a project. Future costs, especially if electronic formats change, are not as easily assessed. Looking at the immediate future, if each school provided $50,000 annually to the project, the operation would have a $10,000,000 annual operating budget. For that investment, each library would gain access to many times more titles than it could afford to purchase itself. While we can debate the pricing structure and whether there should be a sliding scale or a flat fee, ultimately it would be difficult to deny the availability of resources for such a venture. It is possible that startup costs might require a greater contribution in the initial year than in subsequent years if the TALLO consortium purchased real estate for storage.

§64 Equipment, storage, and staffing costs will not be insubstantial, but it should be noted that the equipment used in digitizing has become much more affordable. For example, as of 2009, one Kirtas Technologies scanner cost $169,000 and could scan up to 3000 pages an hour. Staffing costs and storage costs are likely


77. Nunberg, supra note 30.

to outweigh any technology expenses but would still be within budget. Further, it would be possible to decrease costs significantly if the print copy of the item were to be discarded upon digitization, though such a step is not recommended.

¶65 Opportunities for cost savings that would offset the expenses of this new enterprise also abound. Storage and delivery of print materials will never be the most cost-effective or time-efficient way to share materials widely; shipping and delivery costs alone are significant. Online delivery has fewer costs and every member library should benefit from the savings resulting from the move to electronic delivery. Also, while there are expenses associated with online databases (such as storage, security, and accounting systems), these typically will not exceed the costs associated with print resources (e.g., space, lack of use, and duplication across schools). Expanding existing joint or collaborative efforts could reduce costs further. For example, the TALLO consortium could perhaps negotiate with Google for ownership of (or perpetual licenses to) their digital legal images in exchange for adding expertise to their existing database to make it more useful, or it could decentralize storage in a manner that utilizes space available at member libraries with space to spare.

Reliability

¶66 Digital resources are inherently unreliable. They require devices to read them, and any format that exists now may not exist ten years from now. While these problems are real, it is equally inescapable that most users prefer online resources. Reliability is a legitimate concern that cannot be addressed in the abstract, without knowing what future formats will be. However, the benefit of having a single central source for materials is that libraries will only have to convert a single format over to future formats instead of migrating multiple formats each time a technological advance is made.

Usability

¶67 Though e-reader popularity is increasing, the movement toward online materials has been slow in the area of scholarly monographs. These, and other resources, such as statutes, remain arguably easier to use in print than online. Further, digital resources, when heavily restricted in use, lose some of their utility (e.g., the ability to cut and paste portions) and therefore become less useful.

¶68 TALLO does not anticipate law libraries’ ceasing local collection purchases. Materials used on a regular basis or more easily accessed in print would still be most useful if available locally. After all, no library could depend solely on a collection whose volumes could be used or recalled by users throughout the nation. Immediate access to the TALLO consortium’s resources would not be as certain as it would be for a local, individually owned item. Libraries making such purchases

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79. As libraries serve a preservation function, they have an obligation to retain at least one original copy of a work.

80. Franca Rosen & Leanne Emm, The Cost of Getting Patrons What They Want: A Study in Colorado Resource Sharing, COLO. LIBR., Fall 2003, at 35, 37 tbl.2 (detailing the unit cost of borrowing and lending physical items).

81. Senior et al., supra note 8, at 208–09.
would still have reason to participate in the consortium, though, to have access both to materials they do not purchase as well as to a digital copy of a document that they may already own.

¶69 While e-book technology still has a distance to go, students already lean heavily toward online resources, and it is reasonable to posit that this collection would provide materials in a format most likely to encourage student use. Faculty are more selective, but where a document is available in multiple formats, even they have developed a prefernce for the online version over print. In short, even though this consortium may not always produce documents in their ideal format for use, it would generally produce documents in a preferred format.

**U.S. News & World Report (and Other Statistical Comparisons)**

¶70 Law schools may be concerned about contributing to an effort that raises not only their own volume count but also the volume count of competitor schools. Sidestepping the issue of validity of using these statistics in measuring the worth of a library, if all schools participate, this becomes a nonissue. If only some schools participate, then there is the possibility of skewing the data, but since titles freely available on the web can be counted if cataloged, this project would not distort information in any way that is not already possible.

**Antitrust**

¶71 It is possible that TALLO might raise concerns about antitrust, but I believe the configuration of the project is such that it should not run afoul of any antitrust laws. The Sherman Act covers a variety of activities that constrain trade: concerted action, coercion, and monopolization among others. All prohibited acts restrain or intend to restrain trade. Relevant key points in TALLO that would counter any antitrust claim are (1) membership is not mandatory, (2) local purchasing is not discouraged, (3) other libraries may engage in the same behavior as TALLO participants without penalty, and (4) vendors still have abundant room in which to market and sell their products. In fact, it would encourage competition in that vendors would be encouraged to produce both less expensive and more innovative projects to displace any of TALLO’s efforts. At its heart, TALLO is a combination of efforts that already exist elsewhere: coordinated negotiation and contracting, and searching. All of these actions are tested and accepted actions, despite the existence of multiple participants.

**Delivery to Users in Foreign Nations**

¶72 Though beyond the scope of this paper, use by individuals in foreign countries deserves a cautionary mention. As faculty and students travel on study-abroad,

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84. See Ziegler & Robinson, supra note 3, at 22–23.
research, or instructional activities, some may seek access to the consortium’s resources. As with the delivery of any materials to users in another country, libraries need to develop policies regarding such access. Even where an action is deemed legal by the United States, another country may not be in agreement and reaching into that country may trigger liability.

Underlying Technologies

¶73 A digital collection is only as good as its access points and user interface. Below is a brief discussion of the systems that would be needed, both internally and externally, to implement TALLO.

¶74 First, an integrated library system (ILS) or ILS-like utility would be required, supporting accounting and billing functions. This utility would need to communicate with or incorporate some relational databases to

- determine ownership of individual items in order to regulate which libraries were members of the consortium at the time of their purchase, and thus are able to access a particular item;
- provide rights management features to
  - track when materials can be made publicly available
  - record special permissions from authors where permission for public access is granted before the copyright term expires
  - ensure that materials not publicly available are secure
  - permit wider release of materials should copyright law be amended to make such an action lawful; and
- record and track digitization, editing, and use of any given document.

¶75 Second, a utility would need to be acquired to facilitate circulation to users. It is unlikely that we would be able to devise or obtain a utility enabling circulation systems of each member library to communicate dynamically with the consortium system, especially as ILSs used by most academic law libraries are proprietary. Even if the TALLO consortium could negotiate with vendors to overcome the technical difficulties of accessing proprietary systems, loan rules, days closed, and any number of other local factors would make such an arrangement difficult, if not impossible. Individual libraries would also need an interface containing order information, to facilitate both submitting acquisition requests to the consortium as well as evaluating their own collection purchases.

¶76 Last, and most important, is a search feature. Digital resources need to be easily found to be used. The value of a resource lies primarily in its value to the end user. Studies have been done with students in various stages of their education—K–12, undergraduate, and graduate levels—and all have come to the same conclusion: user searching has undeniably changed. For example, a 2009 study of business students found that seventy-three percent of business/marketing students started their research with Google. 86 Fifty-seven percent preferred free online sites to subscription databases or print materials. 87 No collection, however strong or complete

86. Senior et al., supra note 8, at 213.
87. Id.
it may be, will be sufficient without a user-friendly interface. Any search engine must have the ability to interface with multiple databases, including the consortium's holdings, individual library catalogs, or discovery platforms so that a user need only search once to see the available materials. This may require moving away from traditional ILS vendors and instead entering into partnerships with entities or individuals who have the greatest expertise in searching. While these seem like complex technologies, many of them have already been tested by commercial entities like Overdrive or collaborative projects like the HathiTrust.

¶77 In terms of future technologies, there are additional enhancements that libraries could provide as the project moves forward. We could create applications that allow users to copy limited text, and copy the citation information along with the selected text. We could link materials together in virtual subcollections with research guides or publicly available collections of related materials.

Google Books and Other Digitization Projects

¶78 Google Books serves as the largest and most fully developed commercial venture in this arena, and it has faced several challenges, including the recent rejection of its amended settlement plan with copyright owners’ representatives. In crafting a vision during the project’s initial stages and then later through the proposed settlement agreements, Google made several key decisions: it digitized materials without permission and without purchasing the works; its default position on any work was inclusion unless the author opted out; it negotiated to put the works into commerce, and, in the for-profit plan, it aimed to be the publisher/provider of multiple copies to multiple purchasers. The critical fault lines in this proposal dealt with profit and control: reducing the author’s ability to control the use of the work, and profiting from the works of others without remuneration (or, in the settlement agreement, with nonnegotiated remuneration). The proposed settlement plan and its amended version partially attempted to address the latter concern by creating a registry in which authors could register for payments related to the use of their works. The amended settlement was denied for various reasons, one of which was that it did not take into account sufficient interests (e.g., interests of foreign entities and authors who were more interested in exposure than profit).

¶79 TALLO differs from Google Books in that it proposes to digitize only materials legitimately obtained—through purchase or gift—by a library. It contemplates circulation only of the number of copies owned, would not damage the author’s ability to continue selling copies in the marketplace, and would be available only to library users, in a manner similar to licensed databases. Despite their divergent approaches, the TALLO consortium and Google (or other commercial entities) could work together to make each project stronger, specifically on public domain

89. Id. at 670.
90. Id. at 680.
91. Id. at 676–77.
92. Id. at 681.
93. Id. at 679, 684–86.
items. The TALLO consortium could contribute indexing and record connections (e.g., series titles) for these titles in exchange for the rights to store and use the images within its own system. In this way, Google would address some of the deficiencies in its current search engine, and the TALLO consortium could minimize the amount of scanning it would need to undertake for works already scanned by Google.

¶80 Other efforts in the United States include those by nonlaw academics like Emory,94 and nonacademic nonprofits, such as HathiTrust95 or the Open Content Alliance.96 Both types of projects focus primarily on making publicly available only materials in the public domain, licensed under a Creative Commons (or similar) license, or approved by copyright owners.

¶81 Two projects are more ambitious than the others, though they are still different in scope from TALLO. One of them, at Columbia, has digitized many orphan works and made them publicly available. Authors of the works are encouraged to contact the university, but so far none of them have.97 The second, HathiTrust, preserves more materials than it makes available; any work still protected by copyright remains inaccessible publicly in full-text until such time as copyright protection expires.98 TALLO is closer to HathiTrust than any other model, though it pursues a wider range of access. As with Google, the TALLO consortium could find mutually beneficial ways to collaborate with nonprofit efforts. Looking specifically at HathiTrust, TALLO could contribute its images to HathiTrust in exchange for obtaining copies of materials it owns in print. In this manner, TALLO would avoid needing to digitize materials already in electronic form while contributing unique records to HathiTrust for inclusion in its database.

¶82 Attempts to create a digital library are not limited to the United States, of course. Abroad, countries and institutions have undertaken mass digitization projects,99 but as their actions will be governed in part by copyright laws in their respective countries, the TALLO consortium would experience greater difficulties in collaborating with them.

95. HathiTrust, supra note 85.
98. Copyright, HathiTrust, http://www.hathitrust.org/copyright (last visited July 14, 2011). However, HathiTrust member libraries may gain access to digitized, in-copyright texts if they own the title.
Conclusion

¶83 The benefits of a central digital library are great: expanded access to information, ensured preservation, and control over form. Its creation would hopefully also allow libraries to prevent a great harm—the potential distortion of information. If users gravitate to online sources and only recent legal information is available online, then society’s perception of reality shifts to reflect only the information easily available.100 Part of our mission, therefore, should be to ensure that use of information is not determined solely by format, and the most effective way to achieve that goal is to place print and online documents on equal ground.

¶84 This article is not intended to represent a single direction for libraries, as there may be other, more carefully formulated ones. The TALLO proposal, however, is intended to be a call for collective action—to stop discussing the library of the future and to start building it.

100. Richard A. Danner, Contemporary and Future Directions in American Legal Research: Responding to the Threat of the Available, 31 INT’L J. LEGAL INFO. 179, 191–92 (2003). Another example of where this has already occurred is in rankings of academic institutions, like the ones provided by U.S. News & World Report. There is agreement among schools that U.S. News & World Report rankings cannot accurately or completely represent any institution they evaluate, and yet users have found the rankings accessible, easy to use, and a wonderful proxy for complete information. See Michael Sauder & Ryon Lancaster, Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools, 40 LAW & SOC’Y REV. 105, 127–29 (2006); Stephanie C. Emens, Comment, The Methodology & Manipulation of the U.S. News Law School Rankings, 34 J. LEGAL PROF. 197 (2009). Whether they are reliable, accurate, or complete is irrelevant: users prefer accessibility over accuracy. There is a danger that the same distortion happens in regard to legal information.