



Copyright Law Exceptions for Librarians

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Copyright Exceptions for Libraries and Archives

Structure of U.S. Copyright Law

Subject Matter of Copyright:

- Original works of authorship
- Fixed in any tangible medium of expression
- From which they can be perceived, reproduced, or otherwise communicated
- Either directly or with the aid of a machine



Structure of U.S. Copyright Law

6 Exclusive Rights:

1. Reproduction
2. Preparation of Derivative Works
3. Distribution to the Public
4. Public Performance
5. Public Display
6. Public Performance via Digital Audio Transmission

Exceptions to and Limitations on Exclusive Rights



Section 109: "First Sale Doctrine"

Section 107: "Fair Use" Exceptions

Section 108: Exceptions for Libraries and Archives

Section 109: “First Sale Doctrine” - Distribution



109(a): Limitation on distribution right

- Notwithstanding the exclusive distribution right, “the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.”
- Allows Libraries to lend materials

1976 legislative history: *“The 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.”*

Section 109: “First Sale Doctrine” - Distribution



Conditions:

- Copy “lawfully made”
- Ownership, not possession
- Only applies to physical copies; no “digital first sale”

Section 107: Fair Use



"Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

Section 107: Fair Use



"In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."



Section 107: Fair Use

First Amendment protection

- prevents exclusive rights from preventing exercise of free speech: criticism, comment, news reporting

List of non-exclusive, general factors give courts wide discretion

- Sometimes one factor is determinative, sometimes another

Fact-dependent, requiring case-by-case analysis

Flexible doctrine, but some generally applicable rules can be derived from case law



Section 107: Fair Use Factors

1. Purpose of the Use

- Not restricted to list of purposes in preamble
- "Transformative Use": Question of "whether the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." *Campbell v. Acuff-Rose, Inc.* (1994)
- Commercial – practically a higher bar to finding fair use, but not insurmountable. Likewise, non-profit helps fair use claim, but doesn't guarantee it.



Section 107: Fair Use Factors

2. Nature of Copyrighted Work

- "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." (*Campbell*)
- In practice, whether a work is fact or fiction, writing or recording, sculptural or audiovisual, isn't determinative.
- Unpublished works while less likely to be made fair use of, are not *per se* exempt from being used "fairly."



Section 107: Fair Use Factors

3. Amount & Substantiality of Portion Used

- Pertains to part used in comparison to whole as well as to whether "heart" of work is taken.
- 300 words out of 200,000 in a book may be too much (*Nation*)
- Is amount used "reasonable in relation to the purpose of the copying"? (*Campbell*)
- Use of entire work may be fair (*Dorling Kindersley*)



Section 107: Fair Use Factors

4. Effect of Use Upon Potential Market for or Value of Work

- Tends to be most crucial factor.
- Analysis focuses on whether widespread conduct like that of the defendant would harm potential market for affected copyrighted works.
- "Potential" doesn't mean "theoretical," but a market that the rights-holder might logically enter given the work.



Section 107: Fair Use

"Multiple Copies for Classroom Use"

Subject of Ad Hoc Committee guidelines in 1976: NOT LAW

- **Brevity:** limits amount of work teacher can use by word count or % of total work
- **Spontaneity:** must have "inspiration" to use work after time when permission could have reasonably been sought and received.
- **Cumulative Effect:** copying only for 1 course, limits on how many works from same author, from same collective work, and on total instances of multiple copying in a term.
- No copying of "consumable" works such as workbooks & tests.
- No substitution for purchase of books.

Section 107: Fair Use



Cambridge Univ. Press v. Becker (Georgia State case), N.D. Georgia, 2012

- Suit claiming massive infringement by Georgia State digitizing books and making portions available via e-reserve.
 - Court examined 75 works copied during 2009.
- Holding: Most, but not all, of the 75 instances of copying were fair use.
- Appealed to 11th Circuit.

Section 107: Fair Use



Cambridge Univ. Press v. Becker, continued

- **Purpose of use:** educational, noncommercial, nonprofit: leans towards fair use
- **Nature of work:** informational and educational, not fictional: leans towards fair use
- **Amount and substantiality of portion used:**
 - Where a book is not divided into chapters or contains fewer than ten chapters, unpaid copying of no more than 10% of the pages in the book is permissible under factor three
 - Where a book contains ten or more chapters, the unpaid copying of up to but no more than one chapter (or its equivalent) will be permissible under fair use factor three
 - Access shall be limited only to the students who are enrolled in the course in question, and then only for the term of the course. Students must be reminded of the limitations of the copyright laws and must be prohibited by policy from distributing copies to others.
 - The chapter or other excerpt must fill a demonstrated, legitimate purpose in the course curriculum and must be narrowly tailored to accomplish that purpose.

Section 107: Fair Use



Cambridge Univ. Press v. Becker, continued

- **Effect of use upon market:** A small excerpt does not *per se* substitute for the purchase of a book; however, where a license for a small excerpt for electronic use is available at a reasonable price, this tilts against fair use. Additionally:
 - “Limited unpaid copying of excerpts will not deter academic authors from creating new academic works.”
 - “The slight limitation of permissions income caused by the fair use authorized by this Order will not appreciably diminish Plaintiffs’ ability to publish scholarly works and will promote the spread of knowledge.”
- Court found that unlicensed use of 5 of the 75 works analyzed were infringing and not fair use – primarily because of length of excerpt.

Section 107: Fair Use



Author’s Guild, Inc. v. HathiTrust, S.D. New York, 2012

- HathiTrust: consortium of universities engaged in mass digitization of in-copyright books, for:
 - Full-text searches
 - Preservation
 - Access for the print-disabled
- Agreement with Google
- Suit by individual authors and by Author’s Guild

Section 107: Fair Use



Author's Guild, Inc. v. HathiTrust, continued

Holding: HathiTrust's mass digitization a fair use for the three identified purposes.

- **Purpose of use:** nonprofit institutions and transformative uses: leans towards fair use.
- **Nature of work:** both fiction and fact: not dispositive.
- **Amount and substantiality of portion used:** entire work used, but necessary to fulfill fair use purpose: not dispositive.

Section 107: Fair Use



Author's Guild, Inc. v. HathiTrust, continued

- **Effect of use upon market:** None, because no market yet exists for licensing books for the uses HathiTrust is making of them. Court finds argument regarding potential market to be "conjecture."
 - Only "traditional, reasonable or likely to be developed markets" need to be considered (quoting *Texaco*)
- Appealed to 2nd Circuit.



Why a Separate Exception for Libraries and Archives?

Public Policy: libraries and archives provide a unique public benefit and should enjoy a special exception.

Certainty: libraries and archives need more certainty than fair use provides, because copying & distributing are central to their missions



Section 108: general provisions

- Exception to exclusive rights of reproduction and distribution for libraries and archives
 - Be open to public or to specialized researchers
 - Reproduction and distribution can't be made for direct or indirect commercial advantage
 - Copies must display copyright notice or appropriate legend



Section 108: general provisions

- In addition to "fair use" exceptions
- Trumped by contract
- No liability for use of unsupervised equipment located on premises, provided warning is present.



Section 108: general provisions

- OK: the **isolated and unrelated** reproduction or distribution of the **same material** on separate occasions
- Not OK: the **related or concerted** reproduction or distribution 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.



Section 108:

Two basic kinds of exceptions:

Internal use:

3 copies

Replacement

Preservation

All works

Upon request of users:

1 copy

In library

Interlibrary loan

Only text-based works



Section 108: Preservation of Unpublished Works

- 3 copies
- Preservation, security, or deposit in another library or archives
- Must already reside in collection
- No off-premises access for digital copies



Section 108: Replacement of Published Works

- 3 copies
- Replacement if “damaged, deteriorating, lost, stolen, or in obsolete format.”
- First make “reasonable effort” to determine that unused copy not available at “fair price.”
- No off-premises access for digital copies



Section 108: Copies of article or small portion of work for users

- One copy
- Direct to user or via ILL
- No notice that use for other than “private study, scholarship, or research.”
- Copy property of user
- Display copyright warning
- No “systematic reproduction or distribution” of copies
 - But ILL is OK so long as not in such “aggregate quantities” that could substitute for “subscription to or purchase of the work”



Section 108: CONTU Guidelines

- Not law but “reasonable interpretation”
- “Rule of 5”
 - May not receive, in a calendar year, more than 5 copies of an article(s) published in a periodical within 5 years prior to request.
 - May not receive, in a calendar year, more than 5 copies of or from a nonperiodical work.
 - Requesting library or archives must keep records for 3 years.



Section 108: Copies of entire works for substantial parts thereof

- One copy
- First perform “reasonable investigation” to determine if copy available at “fair price”
- No notice that use for other than “private study, scholarship, or research”
- Copy property of user
- Display copyright warning



Section 108: Exclusions from user copying

- Musical work
- Pictorial, graphic, or sculptural work
- Motion picture or other audiovisual work (but not news)

HOWEVER, pictorial or graphic works published as “illustrations, diagrams, or similar adjuncts” may be copied for users



Section 108: Exceptions for TV news

OK to copy and lend a limited number of copies of audiovisual news program



Section 108: Use of works in last 20 years of copyright term

OK to reproduce, distribute, or display such a work, **UNLESS**

- Currently being commercially exploited, or
- Available at reasonable price, or
- Owner has notified Copyright Office that one of first two conditions applies



Section 108 in the Digital Era

Digital is Different

- Cannot be "read" without a machine
- Machines read and render digital content by copying it.
- As a result, copies are routinely made in connection with any use of a digital file.
- No statutory exception for intermediate or temporary copies
- Enormous growth in number, kind, and accessibility of creative works
- Users expect immediate, unimpeded access



Copyright Exceptions for Libraries and Archives

Section 108 in the Digital Era

Greater burden on preservation

- “Born digital” works cannot simply be left in the proverbial “cool, dry place”
- Require active preservation due to inherent instability of formats and rapid obsolescence of hardware
- Frequent copying: Reformatting, preparing, migrating, transforming data
- Increased use by publishers of licensed access and TPMs



Copyright Exceptions for Libraries and Archives

Section 108 in the Digital Era

Greater risks to right holders

- Ease of making perfect digital copies and providing instant, wide access
- Potential of competition from libraries and archives – loss of “speed bumps”
- Need new business models based on licensed access & technological protection



Copyright Exceptions for Libraries and Archives

The Section 108 Study Group

The Study Group was formed to reexamine the exceptions for libraries and archives found in section 108 of the Copyright Act in response to the effects of digital technologies.

- Under aegis of NDIIPP: National Digital Information Infrastructure Preservation Program
- Specifically, the group was tasked with providing findings and recommendations that strike the appropriate balance between copyright holders and libraries and archives in a manner that best serves the public interest.

Section 108: Policy Aspects



Section 108 Reform

- Section 108 Study Group Report
March 2008
www.section108.gov
- Copyright Office Efforts
2012-2013
- Columbia Law School symposium
Feb. 8, 2013