

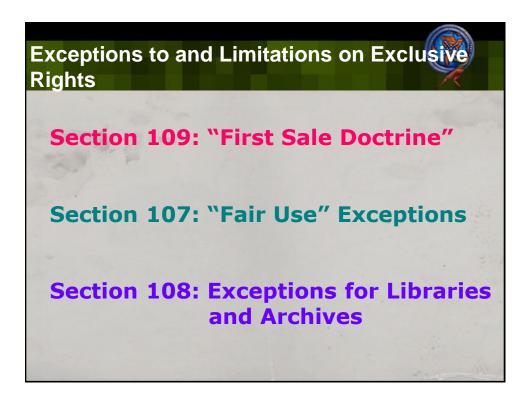


Structure of U.S. Copyright Law

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



Section 109: "First Sale Doctrine" - Distribution

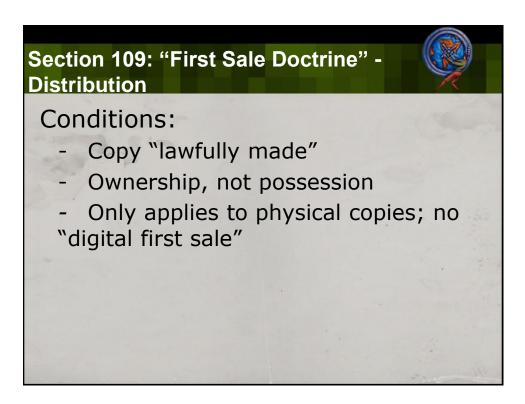


109(a): Limitation on distribution right

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."



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The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."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

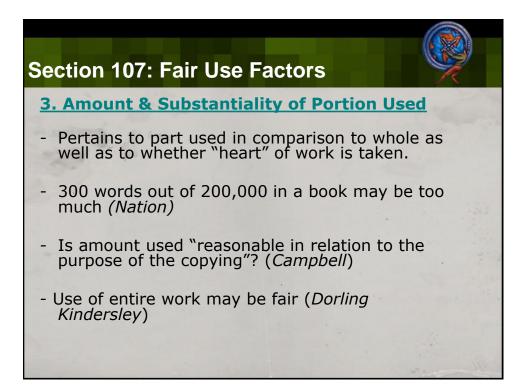
1. Purpose of the Use

- 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

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"

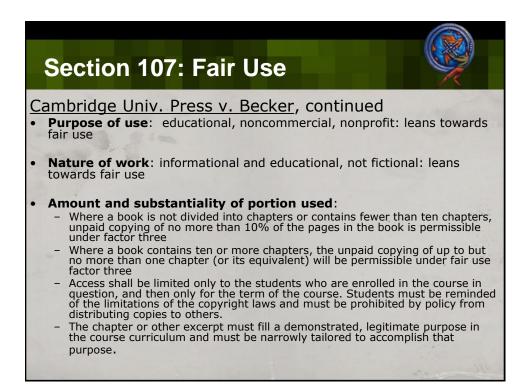
Subject of Ad Hoc Committee guidelines in 1976: NOT LAW

- 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.



<u>Cambridge Univ. Press v. Becker (Georgia</u> <u>State case)</u>, 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.





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

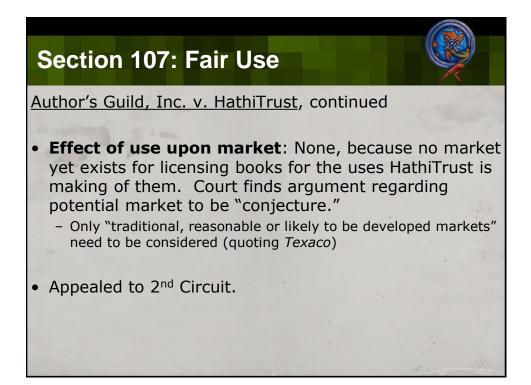
<u>Author's Guild, Inc. v. HathiTrust</u>, S.D. New York, 2012

- 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

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.



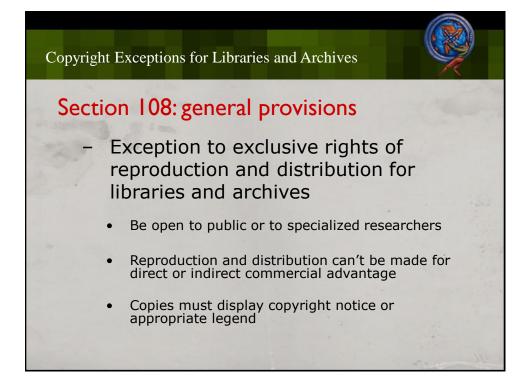
Copyright Exceptions for Libraries and Archives

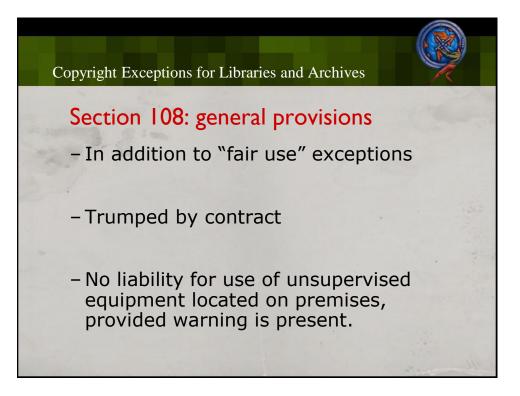


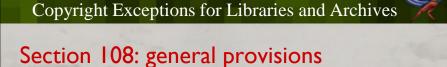
Why a Separate Exception for Libraries and Archives?

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

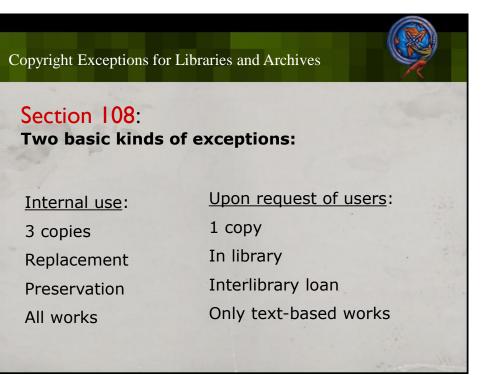
Certainty: libraries and archives need more certainty than fair use provides, because copying & distributing are central to their missions

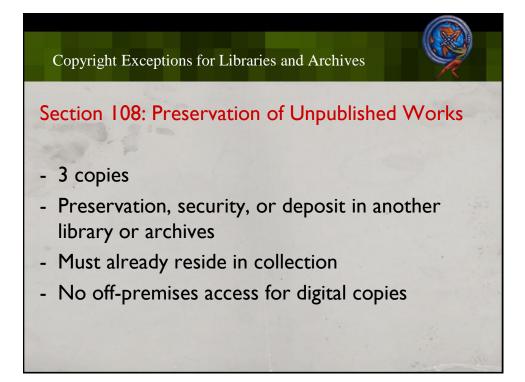


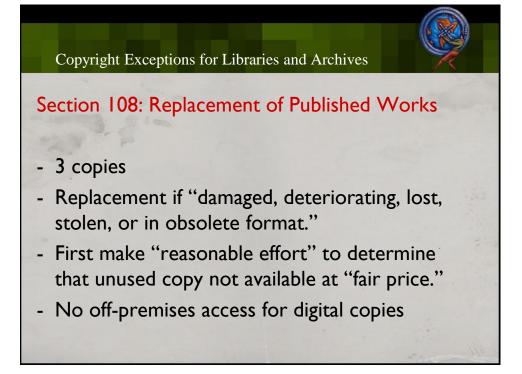


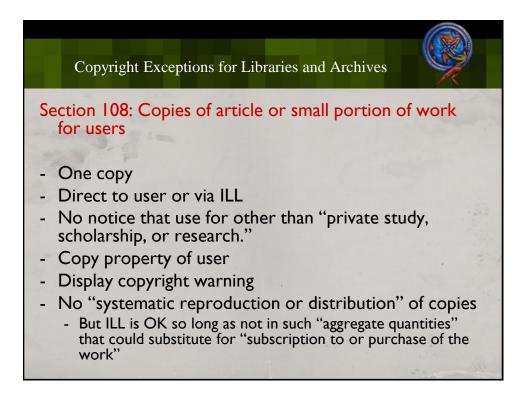


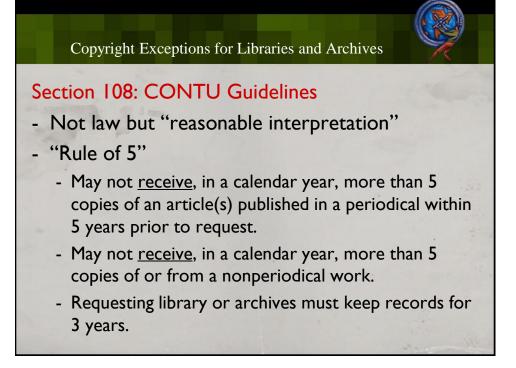
- <u>OK</u>: the **isolated and unrelated** reproduction or distribution of the **same material** on separate occasions
- <u>Not OK</u>: the **related or concerted** reproduction or distribution of the **same material**, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.

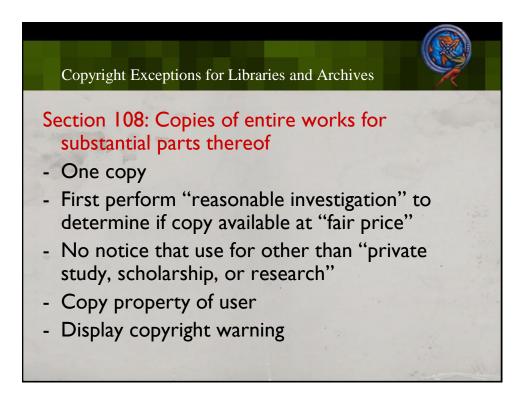


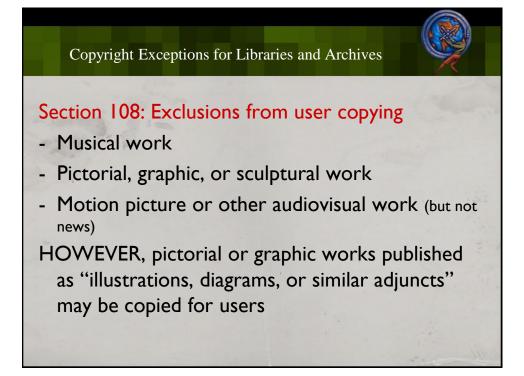


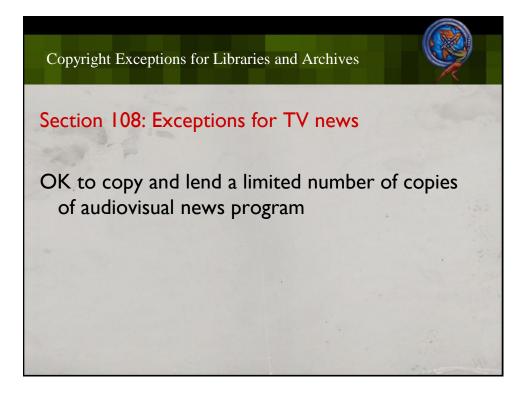




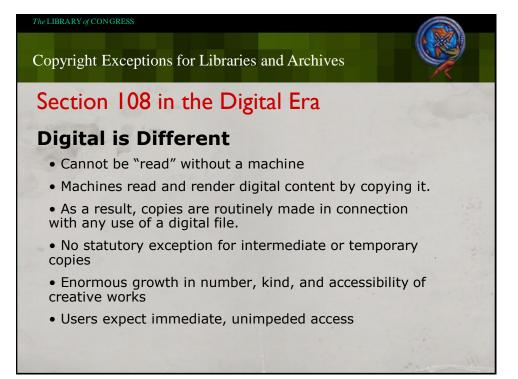


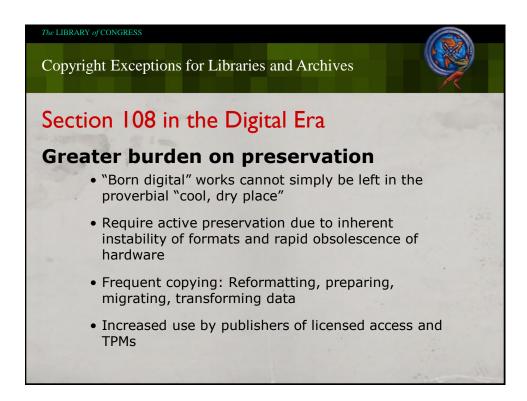












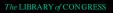
The LIBRARY of CONGRESS

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.

