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Copyright and Academic Libraries

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Copyright and Academic Libraries

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Constitutional Basis of Copyright

- To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries
 - Article I, Section 8, Clause 8
- First copyright act 1789

Exclusive Rights 17 U.S.C. § 106

1. *Reproduce* the copyrighted work;
2. *Prepare derivative* works based upon the copyrighted work;
3. *Distribute* copies of the copyrighted work;
4. *Perform* the copyrighted work publicly;
5. *Display* the copyrighted work publicly; and
6. In the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Subject to Exceptions §§ 107-122

- Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights....
 - Without these exceptions, the copyright owner would have exclusive control over any copies, distribution, performance or display of their work
 - Today we will cover several exceptions that allow academic libraries to exist as they do

Reproduction and Distribution by libraries and archives § 108

- Without this exception, the exclusive right of the copyright holder
- Rights only available to libraries and archives
- Active efforts to amend this section

§108(a) Reproduction: Document Delivery

Reproduce and distribute one copy 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 includes a legend stating that the work may be protected by copyright if no such notice can be found on the work.

§108(d) Interlibrary Loan Articles

The rights of reproduction and distribution under this section apply to a copy, made [. . .] from that of another library or archives, of no more than *one article* or *other contribution* to a copyrighted collection or periodical issue, or to a copy a small part of any other copyrighted work, if—

1. the copy becomes the property of the user, and the library or archives has had no notice that the copy would be used for any purpose other than private study, scholarship, or research; and
2. the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright...

§108(e) Out of Print

The rights of reproduction and distribution under this section apply to the **entire work, or to a substantial part of it** (document delivery or ILL) *if the library or archives has first determined, on the basis of a reasonable investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price, if—*

1. the copy becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than *private study, scholarship, or research*; and
2. the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright...

§108(b) Preservation: Unpublished Works

- The rights of reproduction and distribution under this section apply to **three copies** of an *unpublished* work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives, if—
 1. the copy reproduced is currently in the collections of the library or archives; and
 2. any such copy that is reproduced in digital format is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.

§108(c) Preservation: Published Works

The right of reproduction under this section applies to three copies of a published work duplicated solely for the purpose of *replacement* of a copy 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 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.

Obsolete?

- 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.

§108(f)(1) Copiers and Scanners for Patrons

Nothing in this section shall be construed to impose liability for copyright infringement upon a library or archives or its employees for the unsupervised use of reproducing equipment located on its premises:

Provided, That such equipment displays a notice that the making of a copy may be subject to the copyright law.

§108(h) The Library Super Power

During the last 20 years of any term of copyright of a published work, a library or archives, including a nonprofit educational institution that functions as such, *may reproduce, distribute, display, or perform in facsimile or digital form a copy* of such work, or portions thereof, for purposes of preservation, scholarship, or research

The Catch

No reproduction, distribution, display, or performance is authorized under this subsection if—

- A. the work is subject to normal commercial exploitation;
- B. a copy of the work can be obtained at a reasonable price; or
- C. the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies.

A little bit more on (h)

- The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.
- The rights of reproduction and distribution under this section do not apply to a musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news...

§109 First Sale

- Notwithstanding the provisions of section 106(3) [distribution], the owner of a particular copy 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.

First Sale Exclusions

neither the owner of a particular phonorecord nor any person in possession of a particular copy of a computer program may, for the purposes of direct or indirect commercial advantage, dispose of, or authorize the disposal of, the possession of that phonorecord or computer program by rental, lease, or lending, or by any other act or practice in the nature of rental, lease, or lending.

We're still special

- Nothing in the preceding sentence shall apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution.
- The transfer of possession . . . to faculty, staff, and students does not constitute rental, lease, or lending for direct or indirect commercial purposes under this subsection.
- Lending of a computer program for nonprofit purposes by a nonprofit library, if each copy of a computer program which is lent by such library has affixed to the packaging containing the program a warning of copyright.

ReDigi and Digital Content

Capitol Records, LLC v. ReDigi Inc.

Transfer of digital data from one storage medium to another constituted a violation of copyright, because the copy was ultimately an unauthorized reproduction, and therefore outside of the protection of the first-sale doctrine.

Question

- What does the holding in ReDigi mean for library eBooks?

17 U.S.C. § 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. 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.

Judges tend to consider two things

- Did the use “transform” the material taken from the copyrighted work by using it for a broadly beneficial purpose different from that of the original, or did it just repeat the work for the same intent and value as the original?
- Was the material taken appropriate in kind and amount, considering the nature of the copyrighted work and of the use?

Fair Use § 107

- General right, not library specific
- Flexible
- Uncertain
- Vital

E-Reserves and Course Management Systems

- Fair Use Argument:
 - Non-profit educational use supporting purpose of copyright
 - Narrowly tailored to meet pedagogical purpose
 - Limited to enrolled students for limited time
 - Transformational?
 - Market harm?

Cambridge Univ. Pr. et al. v. Becker, et. al. (Georgia State case)

- Whether fair use (no permission or payment) applies to electronic reserves (and CMS systems)
- Case by case analysis – each use analyzed under 4 factors
- Most uses found to be fair use
- Litigation ongoing

Fair Use and Preservation

- § 108(c) applies to works that are damaged, deteriorating, or in obsolete formats
- A fair use argument can be made for making digital copies of material that is *likely to deteriorate*, or that exist only in difficult-to-access formats where a more accessible format is not available
 - for preservation,
 - as surrogates for fragile or otherwise inaccessible materials.

Digital Libraries

- Special Collections, especially where rights are unclear
- “Non-consumptive” research

HathiTrust

- Arose from Google's library digitization project that became Google Books
- Massive digital corpus of published works
- Preservation
- Searchable
 - No full-text of in-copyright works, but can be searched
- Access for the visually impaired

Author's Guild v. HathiTrust

- I cannot imagine a definition of fair use that would not encompass the transformative uses made by [HathiTrust] and would require that I terminate this invaluable contribution to the progress of science and cultivation of the arts that at the same time effectuates the ideals espoused by the ADA.
 - Southern District of New York, affirmed by the 2nd Circuit Court of Appeals

17 U.S.C. § 504(c)(2)

- More special treatment 😊
- The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was: (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment who. . . infringed by reproducing the work in copies . . .

Questions?