



Copyright Law Primer for Libraries

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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 108: Exceptions for Libraries and Archives

Section 107: "Fair Use" Exceptions



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"

109(b): Additional restrictions on rental, lease, or lending of sound recordings and computer programs

- Not applicable to non-profit libraries.
- However, libraries must include © warning on copies of computer programs.



Section 109: "First Sale Doctrine" - Display

109(c): Limitation on display right

- Notwithstanding the exclusive right of public display, "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 display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located."

Same conditions:

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



Section 108: Exceptions for Libraries and Archives – General Provisions

Exception to exclusive rights of reproduction and distribution for libraries and archives

Libraries and archives not defined, but:

- Must 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

Fair use: in addition to, not instead of



Section 108: Exceptions for Libraries and Archives – General Provisions

Section 108 exceptions trumped by contract: if a license forbids the exercise of a 108 exception, the license controls.

No library or archives liability for patron use of unsupervised equipment

- Provided warning that users may be personally liable for infringing copies is placed on the machine.

Applies only to "isolated and unrelated reproduction and distribution of a single copy or phonorecord of the same material on separate occasions."



Section 108: Provisions for Internal Library Reproduction and

Distribution

Internal use:

3 copies allowed for following purposes:

- **Preservation** and **deposit in another library or archives** of unpublished works.
- **Replacement** of damaged, deteriorating, lost, or stolen copies, or of copies in an obsolete format
 - Must search for reasonably priced copy first
- All categories of copyrighted works
- Copies in digital format can't be made available outside the premises of the library or archives

Section 108: Provisions for Reproduction and Distribution upon User Request

User Request

1 copy allowed for following purposes

- User asks library to make copies or for interlibrary loan copies of:
 - Article or small part of larger work.
 - Entire work or substantial part: In this case, library must first determine whether copy can be obtained at a fair price.
- Library must display copyright warning where orders are taken
- Copies must become property of user
- Does not apply to "musical work, a pictorial, graphic or sculptural work, or a motion picture or other audiovisual work other than an audiovisual work dealing with news"



Section 108: Policy Aspects

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 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

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

- Sometimes one factor is determinative, sometimes another

Fact-dependent, requiring case-by-case analysis

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.*
- 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*)
- 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.



Thank you!

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