The Kernochan Center for Law, Media and the Arts
Columbia University School of Law

# Copyright Exceptions in the United States For Educational Uses of Copyrighted Works

By June M. Besek, Jane C. Ginsburg,
Philippa Loengard and Yafit Lev-Aretz[1]

[1] June M. Besek is the Executive Director of the Kernochan Center for Law, Media and the Arts and a Lecturer in Law at Columbia University School of Law. Jane C. Ginsburg is the Morton L. Janklow Professor of Literary and Artistic Property Law at Columbia and the Faculty Director of the Kernochan Center. Philippa Loengard is the Assistant Director of the Kernochan Center and is a Lecturer in Law at Columbia. Yafit Lev-Aretz is an Intellectual Property Fellow at the Kernochan Center. We also gratefully acknowledge excellent research assistance from Michael Druckman-Church, Caitlin Giaimo, Liliana Paparelli and Alexander White.

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## Executive Summary

We provide this report in connection with the Australian Law Reform Commission's ongoing study of copyright and the digital economy, and in particular its request for comments on the possibility of a new free use exception for education or an open ended "fair use" type exception. We have been asked to describe the principal US copyright exceptions relevant to educational uses of copyright-protected materials, with an emphasis on broadcast materials, and the application of the US fair use doctrine to those uses.

The principal exceptions in US copyright law relating to educational uses of copyright-protected materials – in addition to fair use – are sections 110(1), 110(2), 108, and 121. Section 110(1) permits performances of copyrighted works in face-to-face teaching situations in the classroom. Section 110(2) permits certain performances to be transmitted to students; it was intended to address distance education. Section 110(2) has a number of restrictions designed to protect copyrighted materials from unauthorized use. Section 108 provides exceptions for libraries and archives, including exceptions permitting libraries, in certain circumstances, to make copies of a copyrighted work upon a user's request, for scholarship or research. Section 121 provides an exception for making copies of works in specialized formats for the visually impaired.

The US fair use doctrine dates from the early 19th century, but was codified only in the last major revision of the US Copyright Act in 1976. That codification was not meant to change the law as it then existed, nor to freeze it. Section 107 of the Copyright Act requires four factors to be taken into account in all fair use determinations, although courts may consider other factors they deem relevant. The factors are to be weighed together; there is no formula for determining whether a use is a fair use, nor is any one factor dispositive. Educational uses are not automatically deemed to be fair use.

The fair use doctrine continues to develop through case law. The US Supreme Court has decided a number of cases that provide guidance as to how fair use should be evaluated. While the Supreme Court has not directly addressed fair use in the context of educational materials, a number of US district courts and appellate courts have done so, and there are relevant lawsuits that are ongoing.

While fair use is not entirely unpredictable, in some cases even copyright attorneys have difficulty determining in advance whether a use will be deemed a fair use. There are fair use cases that have been reversed at every level in the courts, in litigations that have lasted for several years. A number of different fair use "guidelines" have been developed under the 1976 Copyright Act; some have been widely followed (in particular, those with Congressional approval) but others less so.

Even assuming Australia were to adopt a fair use doctrine like that of the US, it is likely that the laws would diverge – first, because many US decisions have been close and could easily have gone the other way (indeed, in the US, the law can sometimes diverge from circuit to circuit), and second, because the economic, legal and social aspects of the two countries can differ. For example, the ready availability of a license tends to weigh against fair use, so to the extent collective licensing means are more readily available in Australia, it could affect the scope of fair use.

CAG Schools advocates an exception for fair use or educational use from legislation prohibiting circumvention of technological protection measures. It also recommends invalidating contract terms that would restrict educational fair use. The US has neither provision; as a general matter, copyright law in the US is a "default rule" and does not override contracts. Exceptions from the US anti-circumvention provisions for certain types of educational uses can be achieved only by participating in a triennial "rulemaking" proceeding in the US Copyright Office and establishing through evidence that a particular fair use is or will be adversely affected by the anti-circumvention provisions.

Finally, any comparison between a proposal for a fair use provision in Australian law and the existing US law must recognize that US law is a "moving target." Some significant issues with respect to fair use of educational materials are still working their way through the US courts. Moreover, it is possible that the US will pass laws over the next few years that in some measure will affect the educational use of copyrighted works.

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## 1.0 Introduction and Background

The Australian Law Reform Commission (ALRC) has undertaken a study of Copyright and the Digital Economy to consider, *inter alia*, whether the existing exceptions in Australian copyright law are sufficient to promote creativity and innovation in the digital economy, and whether they should be modified or supplemented. Its report is due in November 2013.

Specifically with respect to broadcast works, the ALRC's Copyright and the Digital Economy Issues Paper (ALRC Issues Paper) raises the question whether the existing statutory licensing scheme for the copying and communication of broadcasts by educational institutions (part VA of the Australian Copyright Act) should be amended. It asks whether some of the material covered by the statutory license should be removed from its purview and covered instead by a free-use exception (either under fair dealing or as a new stand-alone exception), e.g., a new exception to allow educational institutions to copy and communicate free and publicly available material. The ALRC has also sought comments on the advisability of creating an open-ended "fair use" type exception, to supplement existing exceptions (or possibly, in some cases, to substitute for them).

We have been asked to describe the principal US copyright exceptions relevant to educational uses of copyright-protected materials, with an emphasis on broadcast materials, and the application of the fair use doctrine to those uses.

We begin in section 2.0 with a description of the principal exceptions in US law relating to educational uses of copyrighted works, other than fair use. Section 3.0 focuses on the fair use doctrine, including the statutory factors, significant cases, guidelines created over the years, cases concerning educational uses such as course packs and online course materials, recent cases that represent assertions of fair use that involve copying of complete copyrighted works, and finally, the interface between fair use and the specific exceptions in the US Copyright Act.

We turn in section 4.0 to the anti-circumvention provisions in section 1201 of the US Copyright Act, and what the Copyright Office's rulemaking proceedings indicate with respect to its view of fair use of audiovisual materials in the educational context. Section 5.0 addresses current practices of educational institutions. In section 6.0 we discuss a specific issue of US law – state sovereign immunity – that may be affecting the development of the fair use doctrine in the educational context. In section 7.0 we discuss recent proposals for change in US law and policy.

In Section 8.0 we focus specifically on CAG Schools' proposal. We describe it briefly (as it relates to educational use of broadcast materials), and then compare it to US law. Section 9.0 considers source licensing of audiovisual materials to educational institutions. We conclude in section 10.0.

## 2.0 Overview of Principal US Exceptions Relating to Educational Uses of Copyrighted Works

United States copyright law is contained in Title 17 of the US Code. It is available at http://www.copyright.gov/title17/ and relevant provisions have been included in Appendix A hereto. The last overall revision of the US Copyright Act took place in 1976 (effective in 1978), but there have been many legislative amendments since that time. The revision process leading to the 1976 Copyright Act took almost 20 years. The previous major revision was the 1909 Act.

Exceptions and limitations to copyright are addressed in chapter one of Title 17, sections 107 to 122. In this section we address the statutory exceptions for in-classroom performances and displays, distance education, copying and distribution by libraries and archives, and exceptions for the visually impaired. In section 3.0 we address the fair use doctrine.

### 2.1 Section 110(1): In-Classroom Performances and Displays

Section 110(1) of the U.S. Copyright Act was enacted as an exception for academic institutions, to allow performances or displays of copyrighted works, including audiovisual works, "in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction."[2] The language of section 110(1) specifies four conditions that must be met for the exception to apply. First, the performance or display must be made by the instructor or by the pupils. While guest lecturers would qualify as instructors for the purpose of the exception, performances by actors, singers, or instrumentalists brought into a school would not.[3] Second, the performance must take place "in the course of face-to-face teaching activities."[4] The concept of "face-to-face" is vital, as it plays a pivotal role in distinguishing section 110(1) from section 110(2). While the former permits a wide range of uses in "face-to-face" teaching activities, the latter is invoked when the uses are in "transmissions." The legislative report from the US House of Representatives concerning the 1976 Copyright Act explains the face-to-face requirement:

> The concept does not require that the teacher and students be able to see each other, although it does require their simultaneous presence in the same general place. Use of the phrase "in the course of face-to-face teaching activities" is intended to exclude broadcasting or other transmissions from an outside location into classrooms, whether radio or television and whether open or closed circuit. However, as long as the instructor and pupils are in the same building or general area, the exemption would

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[2] 17 U.S.C. § 110(1) (West 2013).The legislative history provides that "nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display." H.R. REP. NO. 94-1476, at 81 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5695.

[3] 2 NIMMER ON COPYRIGHT § 8.15 (2012).

[4] 17 U.S.C. § 110(1) (West 2013).

extend to the use of devices for amplifying or reproducing sound and for projecting visual images.[5]

Third, the statute requires that the performance take place in "in a classroom or similar place devoted to instruction," which includes studios, gymnasiums, libraries, and more, as long as those venues host instructional activities.[6] The educational institution in which the performance is conducted must also be nonprofit, to exclude profit-making bodies, e.g., dance studios and language schools, from the exception.[7] Finally, in the case of a motion picture or other audiovisual work, the section 110(1) exception does not pertain to a situation where "the performance... is given by means of a copy that was not lawfully made under this title," and "the person responsible for the performance knew or had reason to believe was not lawfully made..."[8]

The legislative history of the 1976 Copyright Act provides that "nothing in this provision is intended to sanction the unauthorized reproduction of copies or phonorecords for the purpose of classroom performance or display." [9]

### 2.2 Section 110(2): Distance Education Use ("the TEACH Act")

As explained above, section 110(1) of the Copyright Act is strictly confined to traditional face-to-face teaching, and does not offer a similar exception for distance learning. As passed in 1976, section 110(2) provided for performances and displays in the course of certain transmissions that were part of systematic instructional activities, but the provision was too narrow to cover distance education.[10] Congress amended section 110(2) with the Technology Education and Copyright Harmonization Act of 2002 (hereinafter referred to as the TEACH Act).[11]

The TEACH Act expanded the scope of section 110(2) to apply to performances and displays of all copyrighted works, except for works that are "produced or marketed primarily for... mediated instructional activities transmitted via digital networks," as well as performances and displays "given by means of a copy... not lawfully made and acquired," which the transmitting institution "knew or had

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[5] H.R. REP. NO. 94-1476, at 81.

[6] NIMMER, *supra* note 3.

[7] NIMMER, *supra* note 3.

[8] 17 U.S.C. § 110(1). Nimmer notes that while the statute used the verb "believe," the House Report used the verb "suspect." NIMMER, *supra* note 3.

[9] H.R. REP. NO. 94-1476, at 81.

[10] The provision as originally passed applied to transmissions of nondramatic literary or musical works made primarily for reception in classrooms or similar places devoted to instruction, to persons to whom the transmission is directed because of disabilities or other special circumstances that precluded their classroom attendance, or to government employees (all subject to certain conditions). 17 U.S.C. § 110(2) (1976), (current version at 17 U.S.C. § 110(2) (West 2013)).

[11] Technology Education and Copyright Harmonization Act of 2002, Pub. L. No. 107-273, § 13301, 116 Stat. 1758 (2002).

reason to believe fell into such category."[12] However, while non-dramatic literary or musical works can be performed in their entirety, performances of other works are limited to "reasonable and limited portions" thereof.[13] To determine what constitutes "reasonable and limited portions," distance educators must consider the nature of the market for the work and the academic objectives of the use.[14] Displays of copyrighted works are not subject to the "reasonable and limited portions" requirement. Instead, as displays of certain works (like displaying text using an ebook reader) could substitute for the original work and discourage students from purchasing a lawful copy, a transmitted display is confined to "an amount comparable to [what] is typically displayed in the course of a live classroom setting."[15]

The distance education exception applies to any "nonprofit accredited educational institution." Accreditation is determined based on the nature of the institution for those offering elementary, secondary or post-secondary education.[16] The "nonprofit" requirement applies equally to public and private institutions, and does not demand that the courses be offered free of charge, or as part of a degree program. Transmission by the educator must be limited to either those students enrolled in the class for which the transmission is conducted, or to governmental employees within the scope of their employment.[17]

Under the TEACH Act, the performance or display must meet certain cumulative requirements to ensure that the exception applies only to the equivalent of a traditional classroom setting. Hence, the permissible use of copyrighted works shall be "at the direction of or under the actual supervision of the instructor," and "as an integral part of a class session offered as a regular part of the systematic mediated instructional activities." The first part demands that the use of copyrighted materials is conducted by the instructor or by a student, under the direction or under the "actual supervision" of the class instructor. The Senate Report explains that "actual supervision" requires that "the instructor is, in fact, supervising the class activities, and that supervision is not in name or theory only."[18] The supervision requirement is intended to prevent students from broadcasting works for entertainment purposes under the guise of educational activity.[19]

The second part of the TEACH Act directs that the performance or display must be essential to the class, as opposed to merely supplementing it. It must also be "directly related and of material assistance to

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[12] 17 U.S.C. § 110(2) (West 2013). See also STEVEN A. ARMATAS, DISTANCE LEARNING AND COPYRIGHT, A GUIDE TO LEGAL ISSUES, 430 (2008).
[13] ARMATAS, *supra* note 12, at 430.
[14] *Id.*
[15] *Id.* at 431.
[16] According to the American Library Association: "For higher education, regional or national accrediting agencies recognized by the Council on Higher Education Accreditation or the U.S. Department of Education provide authorized accreditation. For primary and secondary institutions, applicable state certification or licensing agencies provide accreditation." Kenneth D. Crews, The TEACH Act and Some Frequently Asked Questions, AM. LIBRARY ASS'N, http://www.ala.org/advocacy/copyright/teachact/faq.
[17] Stephana I. Colbert & Oren R. Griffin, *The Teach Act: Recognizing Its Challenges and Overcoming Its Limitations*, 33 J.C. & U.L. 499 , 502 (2007).
[18] S. REP. NO. 107-31, at 9 (2001).
[19] ARMATAS, *supra* note 12, at 433.

the teaching content of the transmission."[20] The Senate Report notes on this point that the portion used may not be "for the mere entertainment of the students or as unrelated background material."[21] The second part also requires that the class session, to which the performance or display is essential, is offered as a regular part of "systematic mediated instructional activities." Mediated instructional activities are defined as activities that make use of copyrighted works "as an integral part of the class experience, controlled by or under the actual supervision of the instructor and analogous to the type of performance or display that would take place in a live classroom setting."[22]

To qualify for the TEACH Act exception, distance educators are required to adopt policies designed to further compliance with copyright law. Such policies should be implemented and communicated to students, faculty, and relevant staff members.[23] The institution must employ technological protection measures to reasonably prevent unauthorized retention and unauthorized dissemination of the copyrighted material.[24] The TEACH Act allows the work to remain "in accessible form" to the students during "the class session" only. "Accessible form" refers to the use of technological protection measures that encrypt the material and limit access to the keys and the period in which the copyrighted content may be in use.[25] The duration of the "class session" is generally considered "the period during which a student is logged on to the server of the institution . . . but is likely to vary with the needs of the student and with the design of the particular course."[26]

The Act also mandates that access to the copyrighted materials in online education is provided exclusively to students officially enrolled in the class. Under this requirement the educational institution must use standard measures to deliver secure transmission, e.g., password protection, so that the copyrighted content will not be accessible to unauthorized users.[27] Students must be notified in the course of each session that the online class includes materials that may be subject to copyright protection. If a copyright owner has adopted technological measures to block retention and distribution of her work, the institution must not interfere with those measures.[28]

While the only rights afforded under section 110(2) itself remain the transmission of *performances and displays*, the TEACH Act also added subsection (f)(1) to section 112 ("Ephemeral recordings"), which authorizes the storage of the transmitted copyrighted material on online servers.[29] Specifically, section 112(f) (1) allows an educational institution or government body entitled to the 110(2) exception to make copies of works in digital form to facilitate such transmissions, provided those copies are used solely by

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[20] 17 U.S.C. § 110(2)(B).
[21] S. Rep. No. 107-31, at 11.
[22] 17 U.S.C. § 110 (2).
[23] 17 U.S.C. § 110(2)(D).
[24] 17 U.S.C. § 110(2).
[25] S. Rep. No. 107-31, at 12.
[26] *Id.*
[27] ARMATAS, *supra* note 12, at 434. Armatas emphasizes the need for "standard" measures; circumvention of an "imperfect technology" employed by the educator should not expose it to liability.
[28] 17 U.S.C. § 110(2)D(ii)(II).
[29] 17 U.S.C. § 110(f)( 1); see Raquel Xalabarder, *Copyright and Digital Distance Education: The Use of Pre-Existing Works in Distance Education Through the Internet*, 26 COLUM. J.L. & ARTS 101, 115 (2003).

the institution that created them, only for transmissions authorized under section 110(2), and no further copies are made. The institution may also convert analog versions of works to digital if no digital version is available (or those that are available are subject to technological protection measures), but only to the extent that section 110(2) permits use of the works.[30]

The TEACH Act was intended to reduce the gap between distance education and its traditional face-to-face counterpart, at least with respect to performances and displays of copyrighted works. While it eliminated much of the disparity between the two forms of teaching, the TEACH Act cannot be said to put them on equal footing.[31] For example, for distance education the instructor may use only "reasonable and limited" portions of most copyrighted works (including audiovisual works), whereas she could use the entire work under the face-to-face teaching exception. As one commentator pointed out: "a professor wishing to show the movie *Ben Hur* to his Roman History course may play the entire movie for his on-campus class without the need to obtain permission. Conversely, only 'reasonable and limited' portions thereof may be shown to students taking the same course over the Internet. Even students viewing the class simultaneously at a regional campus of the same university must receive an 'edited' broadcast."[32]

One difficulty educators associate with the TEACH Act concerns its "all or nothing" approach.[33] An educational institution that strictly follows the mandate of using only "reasonable and limited" portions of the work would not be entitled to the exception unless it also implements the administrative and technical measures specified in the Act (e.g., developing institutional copyright policy, and installing protective measures to prevent unauthorized access to copyrighted works).[34] Implementing these measures may be prohibitively expensive for some schools.[35] Users also complain about the vagueness of the "reasonable" standard and the complexity of some of the Act's requirements. [36]

While the TEACH Act applies mainly to instructors, it is said to have a significant effect on libraries and the ways they make information available. As one commentator pointed out: "Nothing in the TEACH Act mentions duties of librarians, but the growth and complexity of distance education throughout the country have escalated the need for innovative library services. Fundamentally, librarians have a mission centered on the management and dissemination of information resources. Distance education is simply another form of exactly that pursuit."[37]

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[30] 17 U.S.C. § 110(f)( 2).
[31] ARMATAS, *supra* note 12, at 446.
[32] *Id*, at 447.
[33] ARMATAS, *supra* note 12, at 447-448.
[34] *Id.*
[35] *Id.* at 448.
[36] *See* Ralph Oman, *Five Years Later, What Has the TEACH Act Taught Us?*, 1 No. 1 LANDSLIDE 26, 28 (Sept./Oct. 2008) .
[37] Kenneth D. Crews, *New Copyright Law for Distance Education: The Meaning and Importance of the TEACH Act*, available at http://www.ala.org/PrinterTemplate.cfm?Section=distanceed&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25939#newc.

### 2.3 Section 108: Exceptions for Libraries and Archives

Section 108 of the US Copyright Act contains a number of copyright exceptions specific to libraries and archives.[38] The section 108 exceptions are primarily directed toward library copying and, in some cases, limited distribution of copyrighted materials. Most relevant are section 108(d), which allows libraries and archives to reproduce individual articles or short excerpts of a longer work at the request of a user;[39] and section 108(e), which permits them to reproduce a complete work or a substantial portion thereof, if a copy of the work cannot be obtained at a fair price.[40] The library or archives must have "no notice that the copy would be used for any purpose other than private study, scholarship, or research," and the copy must be turned over to the user (and not used to augment the library's collection).[41] In either case, certain categories of works are excluded from these "copies for users" provisions. The excluded categories include musical works, pictorial works, or motion pictures or other audiovisual works (other than an audiovisual work dealing with news – see the discussion of section 108(f)(3), below).[42]

Section 108(d) does not require a library to check first if a copy is available on the market. Recognizing the potential adverse effect on journal subscriptions if libraries were to terminate subscriptions and systematically rely on each other to supply journal articles, Congress provided in section 108(g) that the exceptions apply only to "the isolated and unrelated reproduction or distribution of a single copy . . ." but not to systematic reproduction or distribution of one or multiple copies of a work. At the same time, Congress, trying to achieve a balance among the stakeholders, included a proviso in section 108(g) 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 . . . for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."

With regard to what qualifies as "aggregate quantities" that would substitute for purchase of the works, Congress relied on guidelines developed by the National Commission on New Technological Uses of Copyrighted Works (CONTU) in consultation with the stakeholders. Those guidelines, reproduced in the Conference Committee Report accompanying the 1976 Copyright Act, provide, for example, that six or more copies of an article or articles from a given periodical within five years (or for other material

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[38] To qualify, the library or archive must be open to the public, or at least to researchers in a specialized field; it may not be using the copyrighted work for commercial advantage, and it must include a copyright notice (or legend) on copies that it makes. 17 U.S.C. §108(a) (West 2013). Sections 108 (b) and (c) set out the conditions on which libraries may make copies of works in their own collections: they may make up to three copies of an unpublished work for preservation or deposit at another library, and up to three copies of a published work to replace one that is damaged, deteriorating, lost, stolen, or obsolete, if an unused replacement can't be obtained at a fair price. §108(b), (c). The copies may be made in digital form, but digital copies may not be made outside the premises of the library. *Id.*

[39] 17 U.S.C. §108(d).

[40] 17 U.S.C. §108(e).

[41] 17 U.S.C. §108(d )(1), (e)(1).

[42] Section 108(f)(3) makes clear that section 108 should not to be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts of an audiovisual news program by a qualifying library or archives.

described in section 108(d), six or more copies during the copyright term) constitutes "such aggregate quantities."[43]

Section 108(f)(3) Is one of the few provisions that allow libraries to make copies for their own collections: "Nothing in this section . . . shall be construed to limit the reproduction and distribution by lending of a limited number of copies and excerpts by a library or archives of an audiovisual news program . . . ." This exception permits libraries and archives to acquire copies of audiovisual news programs by copying them off the air for their collections. Copies made may be lent to users so long as copies are in physical (as opposed to digital) form and are returned to the library after a reasonable period. In contrast, copies of text-based works made for users must become the property of the user.

According to the House of Representatives Report accompanying the 1976 Copyright Act:

> Section 108(f)(3) is intended to apply to the daily newscasts of the national television networks, which report the major events of the day. It does not apply to documentary (except documentary programs involving news reporting as that term is used in section 107), magazine-format or other public affairs broadcasting dealing with subjects of general interest to the viewing public.[44]

Section 108(f)(4) situates fair use in the context of other laws. First, it states that section 108 does not affect "the right of fair use." Second, it provides that section 108 does not affect any contractual obligations the library or archives undertook when it obtained the copy for its collections.

Finally, section 108 (h) provides for broader use by libraries of works in their last 20 years of copyright, if the works are not commercially available or not available at a fair price. Libraries may reproduce, distribute, display or perform such works for purposes of preservation, scholarship or research. Unlike sections 108(d) and (e), this exception applies to all categories of works, including audiovisual works.

### 2.3.1 Proposals to Amend Section 108

In 2005 the US Copyright Office and the Library of Congress convened a Study Group whose mission was to review section 108 and recommend how it should be amended in light of digital technologies. The Section 108 Study Group had 19 members, including representatives from libraries, archives, and various sectors of the copyright industries (books, movies, software, etc.). Their report, published in 2008, made a number of recommendations for legislative change.[45] For example, the Study Group recommended an exception to allow libraries under certain conditions to proactively make digital copies of works in their collections for preservation (rather than waiting until the work is damaged or lost). It

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[43] H.R. REP. NO. 94-1733 at 71-72 (1976) (Conf. Rep.). The Committee cautioned that these guidelines were not to be considered rigid rules and would likely require adjustment over time. *Id.* at 71.

[44] H.R. REP. NO. 94-1476 at 77 (1976). This provision aims to ensure independent third-party resources for news broadcasts and the public's ability to access these resources. *See* S. REP. NO. 94-473, at 70 (1975).

[45] SECTION 108 STUDY GROUP REPORT xiv (Mar. 2008*), available at* http://www.section108.gov.

also recommended an exception to allow libraries to crawl and copy websites for preservation purposes, and to make those copies available online. It recommended conditions to protect right holders of websites who derive revenue from their sites. First, only publicly available websites that are not restricted by access controls or registration requirements are subject to such archiving; second, a website owner would be entitled to opt out of the copying; and third, no website could be made publicly available online until some specified period of time after it was crawled and copied.[46]

Although the Section 108 Study Group did not make a specific recommendation with respect to the provisions in section 108 that permit libraries to make copies for users for private study, research, and scholarship, it did conclude that electronic copies (rather than hard copies) under section 108(d) and (e) should be permitted only if libraries take adequate measures to ensure that access is provided only to the requesting user, and to deter unauthorized reproduction and distribution. The Study Group also concluded that it might be possible to expand these exceptions to cover non-text based works currently excluded under section 108(i) -- such as musical works or audiovisual works -- but more investigation would have to be done to determine whether such a change would adversely affect the market for certain categories of works currently excluded, and whether it would otherwise harm the legitimate interests of the rights holders. It suggested a number of ways in which such harm might be mitigated (e.g., by excluding commercial entertainment works) but made no overall recommendation for legislative change on this issue.[47]

### 2.4 Section 121: Reproduction for Blind or Other People with Disabilities

While reproduction for the visually impaired is not directly relevant to our study, we discuss it briefly here because section 121 is implicated in the *Authors Guild v. HathiTrust* decision, discussed below in section 3.5.2.

Section 121 provides a statutory limitation on the exclusive right of reproduction to enable certain nonprofit organizations or governmental agencies to provide alternative accessible copies of previously published nondramatic literary works in specialized formats exclusively for use by blind or other persons with disabilities.

Section 121 aims to serve as a safe harbor for the activities of certain authorized entities, allowing them to operate without having to perform the more particularized analysis required by section 107. Since it was passed over 15 years ago, the only case to interpret and apply this section has been the *HathiTrust* case, discussed below, which provided only a cursory analysis of defendants' section 121 defense.

To benefit from the protections of section 121, the following requirements must be satisfied:

- The entity engaged in reproduction or distribution of the section 121 copies must be an "authorized entity." This is defined in section 121(d)(1) as a nonprofit organization or governmental agency that has a primary mission to provide specialized services relating to

[46] *Id.* at viii.

[47] The Study Group made a "recommendation" only when it reached unanimous agreement. *Id.* at ii.

training, education, or adaptive reading or information access needs of blind or other persons with disabilities.

- The use of the copyrighted work must be limited to reproduction or distribution and cannot include such uses as performance or display.
- The works copied must be published, nondramatic literary works. Making copies of any unpublished or dramatic literary works, or any other type of copyrighted work such as audiovisual works, is not covered by this section and must rely on section 107 for protection.
- The copies must be reproduced or distributed in "specialized formats" exclusively for use by blind or other persons with disabilities. "Specialized formats" is defined in section 121(d)(4) as Braille, audio, or digital text which is exclusively for use by blind or other persons with disabilities. Copies made under this provision must bear a notice that any further reproduction or distribution in a format other than a specialized format is infringing.
- Copies made under this provision must include a copyright notice identifying the copyright owner and the date of original publication.

## 3.0 Section 107: Fair Use

### 3.1 Fair Use Principles

Fair use is a defense to an action for copyright infringement. It "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster."[48] It has been defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."[49]

Fair use was originally a judicial doctrine and dates back almost two centuries.[50] Congress codified fair use in 17 U.S.C. section 107 to "'restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way' and intended that courts continue the common-law tradition of fair use adjudication."[51]

Section 107 provides:

**Limitations on exclusive rights: 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

[48] Campbell v. Acuff-Rose Music, 510 U.S. 569, 577 (1994) (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).
[49] Harper & Row, Publrs v. Nation Enters., 471 U.S. 539, 549 (1985) (quoting H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 260 (1944)).
[50] *See* Folsom v. Marsh, 9 F. Cas. 342, 348 (C.C.D. Mass. 1841) (holding that in deciding whether use of a copyrighted work in developing a new work is a "justifiable use" a court must "look to the nature and object of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.")
[51] *Campbell*, 510 U.S. at 577 (quoting H.R. REP. NO. 94-1476 at. 66 (1976)).

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.

Section 107 requires a case-by-case analysis to determine if a use qualifies as a fair use, taking into consideration the four statutory factors.[52] The analysis is "not to be simplified with bright-line rules..." and no single factor is determinative.[53] Rather, "all [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright."[54] While the four factors dominate most fair use discussions, they are non-exclusive and courts explore additional considerations where relevant.

*Factor 1: The Purpose and Character of the Use*

The first fair use factor requires courts to consider "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes."[55] The preamble to section 107 offers a list of purposes which will weigh in favor of fair use, including "criticism, comment, news reporting, teaching, (including multiple copies for classroom use), scholarship, [and] research."[56] However, these purposes are not automatically deemed fair use; all of the factors must be considered. Also, this list is not exhaustive, and other non-enumerated purposes will be considered.[57] In deciding whether a particular use weighs in favor of fair use under the first factor, courts have looked primarily at whether the use was transformative or productive, and whether the use was commercial.

A particular use is more likely to be fair if it is transformative or productive. A transformative or productive use is one where the defendant has created something new, repurposed the original work, or otherwise added value. While easily stated, determining whether a use is transformative or productive is not entirely predictable. Examples of transformative or productive uses include presenting

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[52] *Harper & Row,* 471 U.S. at 549.
[53] *Campbell,* 510 U.S. at 577.
[54] *Id.*
[55] 17 U.S.C § 107(1) (2006).
[56] 17 U.S.C § 107 (2006).
[57] *See Harper & Row,* 471 U.S. at 561.

images of magazine covers for historical reasons;[58] copying of an entire photo in conjunction with commentary about that photo;[59] and superimposing an actor's face on a copy of a famous photograph for the purpose of parody.[60] Examples where a transformative or productive use was not found include direct translation of news articles;[61] creation of a multiple-choice test based on a TV-series;[62] and the use of copyrighted jewelry in an advertisement for a clothing line.[63]

A particular use is less likely to be fair if it is commercial. However, if a commercial work is substantially transformative, it may still qualify as a fair use.[64]

Finally, a particular use is less likely to be fair if the infringer's conduct is viewed as improper. For example, removal of a copyright notice[65] and knowing use of stolen material[66] weighed against a finding of fair use.

*Factor 2: The Nature of the Copyrighted Work*

The second fair use factor requires courts to consider "the nature of the copyrighted work." According to the Supreme Court: "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."[67] The major distinction in evaluating the nature of the copyrighted work is whether the work is factual or fictional. "[F]or example, informational works, such as news reports, that readily lend themselves to productive use by others, are less protected than creative works of entertainment."[68]

Another consideration is whether the work is available to the public. Courts are less likely to find fair use in the copying of an unpublished and confidential work.[69] However, the unpublished nature is not dispositive. Section 107 explicitly states that "[t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of [the four] factors.'[70]

*Factor 3: The Amount and Substantiality of the Portion Used*

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[58] Warren Publ'g Co. v. Spurlock, 645 F. Supp. 2d 402 (E.D. Pa. 2009).
[59] Nuñez v. Caribbean Int'l News Corp., 235 F.3d 18 (1st Cir. 2000).
[60] Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998)
[61] Nihon Keizai Shimbun, Inc. v. Comline Business Data, Inc., 166 F.3d 65 (2d Cir. 1999).
[62] Castle Rock Enter. v. Carol Publ'g Group, Inc., 150 F.3d 132 (2d Cir. 1998).
[63] Davis v. The Gap, Inc., 246 F.3d 152 (2d Cir. 2001).
[64] Blanch v. Koons, 467 F.3d 244 (2d Cir. 2006); *see* Cariou v. Prince, No. 11-1197-ev, 2013 U.S. App. Lexis 8380 (2d Cir. Apr. 25, 2013).
[65] Rogers v. Koons, 960 F.2d 301 (2d Cir.), *cert. denied*, 506 U.S. 934 (1992).
[66] *Harper & Row,* 471 U.S. 539.
[67] *Campbell,* 510 U.S. at 586.
[68] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 496-97 (1984).
[69] *Harper & Row,* 471 U.S. 539.
[70] 17 U.S.C. §107 (West 2013).

The third fair use factor requires courts to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole."[71] This factor calls for "a determination of not just quantitative, but also qualitative substantiality."[72] For example, the copying of 300 words from an unpublished 200,000-word manuscript was considered substantial because the words were essentially the heart of the manuscript.[73] In contrast, reproduction of concert posters in their entirety in a much reduced size as part of a chronology of the group of performers, was not considered substantial because the reproductions did not capture "the essence or 'heart' of the original work."[74]

*Factor 4: The Effect of the Use Upon the Actual or Potential Market for or Value of the Copyrighted Work*

The fourth fair use factor requires courts to consider "the effect of the use upon the potential market for or value of the copyrighted work."[75] "It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market' for the original."[76] The cognizable market harm, however, does not include harm resulting from criticism of the original work.[77] The role of courts is to distinguish between criticism, which suppresses demand, and copyright infringement, which usurps demand.[78]

Both commentators and courts have noted the danger of circularity inherent in factor four. This is because "a potential market, no matter how unlikely, has always been supplanted in every fair use case, to the extent that the defendant, by definition, has made some actual use of plaintiff's work, which could in turn be defined in terms of the relevant potential market."[79] To avoid circularity, courts have recognized limits by considering only "traditional, reasonable, or likely to be developed markets."[80] Thus, for example, the law does not recognize a derivative market for critical works.[81] A court is apt to find that a genuinely transformative use will not result in lost revenue to the right holder. See the discussion of *Bill Graham Archives* in section 3.5.

The interplay between fair use and the other exceptions in the Copyright Act are discussed below in section 3.6.

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[71] *Id.* §107(3).
[72] 4 NIMMER, *supra* note 3, § 13.05 (A)(4).
[73] *Harper & Row,* 471 U.S. 539.
[74] Bill Graham Archives, LLC v. Dorling Kindersley Ltd., 448 F.3d 605 (2d Cir. 2006).
[75] 17 U.S.C. § 107(4) (West 2013)
[76] *Campbell,* 510 U.S. at 590 (quoting 4 NIMMER, *supra* note 3, § 13.05(A)(4)).
[77] *Id.*
[78] *Id.* (quoting *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986)).
[79] 4 NIMMER, *supra* note 3, § 13.05 (A)(4).
[80] Am. Geophysical Union v. Texaco Inc., 802 F. Supp. 1, 7 (S.D.N.Y. 1992), *aff'd*, 60 F.3d 913, 930 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).
[81] *Campbell*, 510 U.S. at 592.