



## **THE LIBRARY COPYRIGHT ALLIANCE’S EXPERIENCE WITH FLEXIBLE LIMITATIONS AND EXCEPTIONS IN THE U.S. COPYRIGHT REGIME**

The Library Copyright Alliance (LCA) consists of three major library associations—the American Library Association (ALA), the Association of Research Libraries (ARL), and the Association of College and Research Libraries (ACRL)—which collectively represent over 100,000 libraries in the United States and Canada employing over 350,000 librarians and other personnel. LCA provides these comments on its experience with flexible limitations and exceptions in the U.S. Copyright regime as a contribution to the ongoing international discussion on limitations and exceptions.

### **Introduction**

LCA supports including flexible limitations and exceptions in conjunction with specific-purpose exceptions to copyright protection as part of a robust copyright framework. This grows in large part from the positive experience libraries in the United States have had using flexible limitations and exceptions in order to fulfill their missions. Libraries serve as guardians of the public’s access to information and facilitate education, research, scholarship, creativity, and discovery—activities essential to the functioning of society.

Based on our members’ experience with flexible limitations under U.S. copyright law, especially the fair use doctrine, we believe it is important to consider the role of flexible limitations and exceptions in discussions of how the international copyright framework can best assist libraries and archives to perform their vital public responsibilities. Accordingly, this document provides information about the benefits of flexibility as experienced by U.S. libraries and explains how flexibility, when used to supplement specific-purpose exceptions, might similarly benefit libraries around the world.

### **The U.S. Library Experience Provides an Example of How Flexibility Can Support Libraries in Fulfilling Their Public Missions**

Flexibility in U.S. copyright law serves as an example of how flexible limitations and exceptions, when used in conjunction with specific-purpose exceptions, can support libraries in fulfilling their public service missions. U.S. libraries primarily rely on five of these: three exceptions that define specific carve-outs for certain uses of copyrighted material, the first sale doctrine, and the flexible fair use standard.

This paper’s focus on the importance of fair use to U.S. libraries should not be interpreted as suggesting that the other, more specific exceptions in the U.S. Copyright Act are not important to libraries.

Section 108 of the Copyright Act provides exceptions targeted at libraries and archives for activities such as preservation and making copies for users. Section 110(1) allows the performance or display of works in the course of face-to-face teaching activities. Section 121 permits “authorized entities” to make accessible format copies for users with print disabilities. To perform their core lending functions, libraries rely on the principle of exhaustion, incorporated into the U.S. Copyright Act as the “first sale doctrine.” This allows U.S. libraries to lend to the public their copies of books, compact discs, and a variety of computer resources, both locally and at a distance through interlibrary loans. No additional license or fee is required for libraries to engage in this lending activity.

Fair use supplements these foundational exceptions. In particular, fair use enables U.S. libraries to perform their core functions more effectively through the use of digital technology.<sup>1</sup> Thus, fair use supports libraries in collecting and curating, preserving and archiving, lending, indexing and retrieving information, facilitating research and education, providing access to users with print disabilities, and supporting civic engagement and community-building.

The following examples illustrate how flexibility aids U.S. libraries in conducting key activities.

- **Mass Digitization**

Libraries have recently been able to rely on fair use to support the digitization of works in their collections and to support the use of large-scale shared digital repositories for particular purposes. For example, the HathiTrust's Mass Digitization Project's digital collection contains millions of scanned books from sixty partner institutions. The recent court decision in *Authors Guild, Inc. v. HathiTrust* held that digitizing the books was fair use when done for the purposes of creating full-text searches, preservation, and providing access to users with print disabilities, and that those activities were also fair use.<sup>2</sup>

- **Access to Orphan Works**

Like other libraries around the world, U.S. libraries hold large collections of orphan works. (Some studies have concluded that up to 55 percent of books in U.S. research libraries are orphans).<sup>3</sup> Orphan works can easily become lost or inaccessible to the public without the stewardship of libraries. Many countries are currently considering ways to provide access to orphan works. The variety of approaches under consideration include special exception regimes, government licensing authorities, extended collective licensing systems, or limitations on remedies for those who have conducted a diligent search for rightsholders of orphaned works. The United States is also investigating the orphan works issue.<sup>4</sup>

Some U.S. libraries, however, are already relying on fair use to move forward with digital preservation and tailored access programs. For example, many of the books in the HathiTrust collection are orphans,<sup>5</sup> and the Library of Congress relies on fair use in providing some of its American Memory collections. Fair use is especially well-suited to providing access to orphan works for libraries' non-commercial purposes because fair use is equitable in nature and can accommodate problems that arise from evolving situations, such as the inability to identify a work's copyright owner.<sup>6</sup>

- **Facilitating Education and Research through E-Reserves**

Some U.S. libraries have created e-reserves and other electronic platforms to provide students with increased access to library materials needed for their coursework. Electronic materials are not, however, always available under appropriate licenses at reasonable costs. In the absence of a specific-purpose exception specifically permitting the creation and distribution of e-reserve materials, academic libraries have successfully relied on fair use to provide enrolled students access to some materials for the term of a course. In the recent *Cambridge University Press v. Becker* case, involving e-reserves and course sites at Georgia State University, the court found that the non-profit educational purpose of e-reserves provided by libraries within academic

institutions strongly favors fair use, and that the vast majority of faculty requests for materials were fair.<sup>7</sup>

- **International Interlibrary Loans**

Rules governing interlibrary loan (ILL) differ among countries. U.S. libraries rely on fair use, together with Section 108, when they engage in ILL arrangements with foreign partners. Because it can be difficult for U.S. libraries to determine whether copyright law permits the import and export of books across other countries' borders, U.S. libraries can more readily engage in interlibrary arrangements where partners have a flexible exception than they can in cases where partners must operate within only specific-purpose exceptions that require satisfaction of specific conditions.

- **Access to Users with Print Disabilities**

U.S. libraries' experience with the interaction between a specific-purpose exception for providing access to users with print disabilities and the flexible fair use doctrine provides an example of how flexibility can help libraries maintain their missions when a specific-purpose exception may not cover unforeseen or unaccounted-for changes in technology or access.

New technologies present opportunities for libraries to increase accessibility to these users who require accessible format copies of materials. Such technologies include digital and audio readers, text-to-speech functionality in web browsers, and specific-purpose screen access technologies that allow for font size and background lighting adjustments as well as make it possible for people with print disabilities to "move" within a text document using the table of contents, chapter headings, and subheadings. U.S. copyright law does include a specific exception to allow libraries to assist visually-impaired persons, but it is relatively narrow in scope.<sup>8</sup> The judge in the recent *HathiTrust* case held that Section 121 allowed creating digital versions of works to provide accessible formats to users with print disabilities, particularly for education and scholarship purposes. Importantly, though, he also noted that, if Section 121 had not applied, then the more flexible fair use provision would also cover these activities by U.S. libraries.<sup>9</sup> Flexibility can therefore help provide access where an older specific-purpose exception was not drafted with sufficient openness to anticipate and accommodate new approaches.

Open-textured and flexible copyright limitations and exceptions like fair use are sometimes perceived as creating legal uncertainty. U.S. libraries, however, have found that they can rely on fair use for a number of activities important to their missions. To date, there has been relatively little litigation over libraries' application of fair use. In each of the recent cases involving library assertions of fair use, courts found that libraries have generally interpreted the balance correctly and confirmed that libraries' activities are non-infringing fair use.<sup>10</sup> These outcomes highlight that fair use operates as an enduring legal framework on which U.S. libraries can consistently and successfully rely to capture the benefits of new technology and to fulfill their missions in serving the public. Further, because fair use is based on a normative standard and there is limited case law on which libraries can rely, libraries have joined with many other practice communities to develop best practices statements articulating a common sense of how to legitimately apply fair use in service of their shared missions. These best practice statements have helped U.S. libraries to decide how best to apply fair use.

## **How Libraries and Society Can Benefit from a Combination of Flexible Limitations and Specific-Purpose Exceptions to Copyright Law**

Based on its experience with fair use, LCA believes that communities around the world, including libraries, can benefit from countries including flexible limitations and exceptions, along with specific-purpose exceptions or other approaches, in copyright law. Incorporating flexibility into copyright law offers benefits to both common and civil law countries not only in supporting libraries' fulfillment of their public missions but also in supporting civil society more broadly. For example:

- **Flexibility Can Help Fulfill Copyright's Purpose and Safeguard the Rights and Freedoms of Information Users**

“The purpose of copyright [...] is twofold: to encourage a dynamic creative culture, while returning value to creators so that they can lead a dignified economic existence, and to provide widespread, affordable access to content for the public.”<sup>11</sup>

Flexibility, when supplementing specific-purpose exceptions, offers a mechanism to evaluate a particular use on a case-by-case basis. Accordingly, flexibility can balance the scope of an author's exclusive rights when important information user rights should be safeguarded to achieve copyright's purpose. Because of this, flexibility can safeguard important rights and freedoms—such as individuals' rights of privacy and freedoms of expression, creativity, innovation, and diversity of thought—that otherwise may not be accommodated elsewhere in copyright law. Countries can also tailor flexible limitations and exceptions to serve domestic priorities and encompass important local cultural values.

- **Flexibility Can Support Information-Sharing Across Borders and Increase Communities' Access to Information**

As noted above, U.S. libraries have found that the existence of flexibility in domestic copyright law encourages the sharing of information across borders, such as international interlibrary lending. Cross-border collaborations between institutions, universities or community groups produce more comprehensive research, make more efficient use of limited resources and advance cross-cultural understanding. Because it can be difficult to determine whether the import and export of information across borders is permitted under countries' copyright laws, information providers can be reluctant to share materials across borders for fear of infringement. Flexible limitations and exceptions give comfort to information providers that they are acting lawfully.

- **Flexibility Can Support Economic Development**

Flexibility plays an important and often underrated role in fostering economic development and innovation as part of a well-functioning intellectual property regime.<sup>12</sup> To maximize economic development, countries must balance supporting the protection of copyrighted goods and services with cultivating an environment of creativity, innovation, and knowledge advancement. Because innovation cannot often be perfectly predicted and therefore included in specific-purpose exceptions, incorporating flexibility can allow this environment to flourish. For example, in the United States, viewing technologies<sup>13</sup> and Internet platforms<sup>14</sup> have both been able to develop through fair use. In turn, the public can benefit from the development of new platforms and other technologies. Internet search and “maker spaces” are two examples of technology platforms that rely on fair use to allow for widespread access to information and the creation of new works.

- **Flexibility Offers an Enduring Legal Framework to Support Copyright Law**

Relatedly, flexibility provides an enduring legal framework that can withstand evolving circumstances, including rapid changes in technology, whereas a system with only specific-purpose and technology-specific exceptions will likely require more frequent statutory revision to adapt to changing times. For example, the development of the photocopier put pressure on existing copyright law in the United States. The resulting 1976 Copyright Act incorporated the fair use doctrine, in part, to prevent having to constantly revise copyright law in light of new technology. Another example is the 2002 TEACH Act, intended to update U.S. copyright law to allow exceptions for distance education beyond face-to-face classroom instruction given advances in technology. However, the revisions require that institutions meet a series of complex pre-requisites to exercise the exception, including the use of technical protection measures on materials used in distance education, and do not account for the recent rapid growth of online education.<sup>15</sup>

## **Conclusion**

Libraries provide essential public services by preserving and providing access to information; supporting the development of new knowledge through education, research, and scholarship; and serving as a locus for civic engagement. Flexible copyright limitations and exceptions, like fair use, can aid libraries in performing these vital public functions.

Accordingly, the LCA believes that discussions of how the international copyright framework can best support libraries and archives should include consideration of flexible limitations and exceptions alongside specific-purpose exceptions.

---

<sup>1</sup> 17 U.S.C. § 107 (2006).

<sup>2</sup> See *Authors Guild, Inc. v. Hathitrust*, No. 11-CV-6351(HB), 2012 WL 4808939, at \*21, (S.D.N.Y. Oct. 10, 2012). Appeal filed on Nov. 8, 2012.

<sup>3</sup> Association of Research Libraries, *Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries*, (2011), [www.arl.org/bm~doc/resource\\_orphanworks\\_13sept11.pdf](http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf).

<sup>4</sup> U.S. Copyright Office Notice of Inquiry. Available at <http://www.copyright.gov/fedreg/2012/77fr64555.pdf>.

<sup>5</sup> See *Authors Guild, Inc.*, 2012 WL 4808939, at \*11-12.

<sup>6</sup> Jennifer M. Urban, How Fair Use Can Help to Solve the Orphan Works Problem, 27 BERKELEY TECH. L.J., \_\_\_\_ *forthcoming* (2012). Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2089526](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2089526).

<sup>7</sup> *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \*133 (N.D. Ga. May 11, 2012). Appeal filed on Sept. 10, 2012.

<sup>8</sup> 17 U.S.C. § 121 (2006).

<sup>9</sup> *Authors Guild, Inc.*, 2012 WL 4808939, at \*21.

<sup>10</sup> See e.g. *Authors Guild, Inc.*, 2012 WL 4808939 at \*21; See also *Cambridge Univ. Press*, 2012 U.S. Dist. LEXIS 78123 at \*488.

<sup>11</sup> WIPO Copyright and Related Rights, <http://www.wipo.int/copyright/en/> (last visited on November 3, 2012).

<sup>12</sup> See Roya Ghafele and Benjamin Gilbert, The Economic Value of Fair Use in Copyright Law, Oxfirst Limited (October 2012), [http://works.bepress.com/cgi/viewcontent.cgi?article=1021&context=roya\\_ghafele](http://works.bepress.com/cgi/viewcontent.cgi?article=1021&context=roya_ghafele) (finding that adopting fair use has had an overall positive effect on Singapore's economy as it is better equipped to adapt to changing circumstances precipitated by emerging technologies). See also Thomas Rogers & Andrew Szamoszegi, *Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use*, CCIA (2011), [www.ccia.org](http://www.ccia.org) (showing that industries which rely on fair use employ 1 in 8 U.S. workers and grow faster than the U.S. economy as a whole).

<sup>13</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>14</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>15</sup> 17 U.S.C. § 110(2) (2006) (including pre-requisites § 110(2)(a)-(d) and unavailable for "works [ . . . ] marketed primarily for mediated instructional activities transmitted via digital networks."). See also American Library Association, *Distance Education and the TEACH Act*, (2012), [http://www.ala.org/Template.cfm?Section=Distance\\_Education\\_and\\_the\\_TEACH\\_Act&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25939](http://www.ala.org/Template.cfm?Section=Distance_Education_and_the_TEACH_Act&Template=/ContentManagement/ContentDisplay.cfm&ContentID=25939).