

Prepared on behalf of



## **How Flexibility Supports the Goals of Copyright Law: Fair Use and the U.S. Library Experience**

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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 supports including flexible limitations and exceptions in conjunction with purpose-specific exceptions to copyright protection as part of a robust copyright framework. This derives 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.

Based on LCA members' experience with flexible limitations under United States copyright law, especially the fair use doctrine, LCA believes it is important to consider the role of flexible limitations and exceptions in discussions on how the international copyright framework can best support libraries and archives in performing their vital public responsibilities. Accordingly, this document provides information about the benefits of flexibility as experienced by United States libraries and explains how flexibility—when used to supplement purpose-specific exceptions or other approaches—might similarly benefit libraries around the world.

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## **I. Introduction**

This briefing paper describes how the flexibility of the fair use doctrine in United States (U.S.) copyright law helps U.S. libraries fulfill their missions and offers suggestions for how flexible limitations and exceptions, when used in conjunction with purpose-specific exceptions or other approaches, might similarly benefit libraries outside of the United States. The experience of U.S. libraries may be beneficial in understanding the valuable role that flexibility can play in creating robust copyright frameworks that can assist libraries in performing their vital public responsibilities. Increasing libraries' capacity to perform their key activities allows the public to realize its investment in libraries and also benefits society as a whole.

Because libraries gather, store, exhibit, and provide access to resources and information, copyright law affects librarians' work extensively and in complex ways. In conducting their work, librarians may use purpose-specific exceptions, which define specific carve-outs for certain uses of copyrighted materials, or a combination of purpose-specific exceptions along with flexible limitations, depending on the jurisdiction.

This paper first describes the experience of U.S. libraries in applying flexible limitations, specifically fair use, under U.S. copyright law. This paper's focus on the importance of fair use to U.S. libraries should not be interpreted as suggesting that the other, more purpose-specific exceptions in the U.S. Copyright Act are not important to libraries. Rather, this paper aims to illustrate how flexibility can complement purpose-specific exceptions to help libraries fulfill their missions by allowing them to perform their key functions, adapt quickly to changing circumstances such as new technologies, and provide the public with greater access to information.

The paper also suggests that the benefits conferred on the public by providing libraries with flexible limitations and exceptions are not limited to the experience of U.S. libraries. The paper concludes that communities around the world stand to benefit from incorporating into their copyright laws flexible limitations and exceptions, of which fair use is but one example, alongside purpose-specific exceptions.

## **II. Fair Use and the U.S. Experience**

The U.S. library experience highlights how flexible limitations and exceptions, such as fair use, can supplement purpose-specific exceptions and operate as a 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. This Section introduces the role of libraries in the United States; outlines the flexible limitations and exceptions available to U.S. libraries under U.S. copyright law; and illustrates how U.S. libraries increasingly rely on flexible limitations and exceptions, particularly fair use, to fulfill their missions.

### **A. The Role of Libraries in the United States**

U.S. libraries, as institutions, serve as guardians of the public's interest in access to information. They facilitate education, research, scholarship, creativity, and discovery—activities essential to the functioning of a participatory democracy. Libraries play an essential role in achieving the U.S. copyright regime's goals of encouraging learning,

creativity, and innovation; to fulfill this role, they must regularly adapt to evolving technologies to provide the public with relevant access to information.

Contrary to the common perception that the role of libraries in the United States has diminished in the digital age, libraries remain central institutions in society. More than two-thirds of Americans say that libraries are important to them and their families, and fifty-six percent of adults in the United States have used a library in the last year.<sup>1</sup> Many Americans also depend on academic and research libraries to support teaching, learning, and research as well as to curate and preserve resources, ensuring that important materials are preserved for future generations.

*More than two-thirds of Americans say that libraries are important to them, and fifty-six percent of adults in the United States have used a library in the last year.*

Americans increasingly recognize public libraries as their primary source of free access to books, magazines, multimedia, and assistance from information professionals. In particular, despite the recent economic downturn, which severely reduced library budgets and staff, public libraries in many major U.S. cities have witnessed a rise in circulation, with some cities reporting a 50 percent increase over the past few years.<sup>2</sup> Moreover, U.S. libraries serve as lifelines for communities facing economic hardship by providing Internet access and technology training for employment, access to government resources, continuing education, and tools to start new careers or small businesses.<sup>3</sup> Notably, sixty-seven percent of U.S. public libraries report that they are the only providers of free public access to computers and the Internet in their communities.<sup>4</sup>

## **B. U.S. Libraries Rely on a Mix of Purpose-Specific Exceptions and Flexible Limitations**

U.S. libraries rely on copyright limitations and exceptions to fulfill their public service missions. Copyright law in the United States includes at least sixteen different limitations and exceptions. U.S. libraries primarily rely on five of these: three purpose-specific exceptions that define specific carve-outs for certain uses of copyrighted material, the first sale doctrine, and the flexible fair use standard.

Section 108 of the Copyright Act provides exceptions targeted at libraries and archives for activities such as preservation and making copies for users.<sup>5</sup> Section 110 allows the performance or display of works in the course of face-to-face teaching activities (Section 110(1)) and in distance-learning settings (Section 110(2)).<sup>6</sup> Section 121 permits “authorized entities” to make accessible format copies for users with print disabilities.<sup>7</sup> Libraries also rely on the principle of exhaustion, which is incorporated into the U.S. Copyright Act as the first sale doctrine.<sup>8</sup> By allowing owners to distribute works they have bought, the first sale doctrine allows libraries to perform their core lending functions.<sup>9</sup> This doctrine enables 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.<sup>10</sup>

The flexible fair use standard supplements these other foundational exceptions. In particular, fair use enables U.S. libraries to perform their core functions more effectively through the use of digital technology.<sup>11</sup> Fair use is an express limitation on an author’s exclusive rights in his or her work under U.S. law, and is considered “an integral part of

copyright, whose observance is necessary to meet the objectives of copyright law”—to advance the “progress of science and useful arts.”<sup>12</sup>

Flexible limitations like fair use serve an important function in copyright law that allows libraries to fulfill their missions when purpose-specific exceptions fall short. Moreover, flexible limitations can accommodate broader uses than the purpose-specific exceptions available to U.S. libraries and allow the public to access materials without permission or payment while still respecting the interests of the author. For instance, purpose-specific exceptions do not always account for new activities that take advantage of technological or other changes to fulfill the overall purpose of the exception. For example, even the relatively recent revisions to Section 110 that were intended to update teaching exceptions for digital technologies have proven to be less useful than was hoped at the time they were written.<sup>13</sup> In combination with fair use, however, even dated or incomplete purpose-specific exceptions can provide appropriate leeway for socially beneficial uses.

Designed as a normative standard, fair use is evaluated by weighing four non-exclusive factors—the purpose and character of the use, the nature of the copyrighted work, the amount of the copyrighted work used, and the use’s effect on the market for the copyrighted work—to determine whether a specific use is reasonable in light of copyright’s purpose.<sup>14</sup> U.S. courts, in evaluating fair use, consider on a case-by-case basis whether to allow an unauthorized use in favor of society’s broader interest in the free exchange of ideas when finding otherwise would cut against the purpose of copyright law. As such, fair use’s flexible design allows for the protection of user rights that are essential to copyright’s purpose but not protected elsewhere in copyright law, including privacy, freedom of expression, creativity, innovation, and diversity of thought.

Over time, courts have found a broad range of uses of a variety of types of works to be fair use. For example, the Supreme Court held that recording broadcast television shows on a video tape recorder for non-commercial personal uses qualified as a fair use.<sup>15</sup> Courts also have found that a search engine’s copying of full-size images of photographs in order to turn those images into searchable, low-resolution thumbnail images qualified as a fair use.<sup>16</sup> Additionally, courts held that making exact copies of high school students’ papers in order to populate a plagiarism-detection program qualified as a fair use.<sup>17</sup> However, courts find other uses not to be fair; for example, courts found that the use of exact copies of custom software for the same commercial purposes as the original is not permitted under fair use, especially when such use exceeds an express license agreement.<sup>18</sup>

With regard to library uses, the judges in two important recent decisions, *Authors Guild, Inc. v. HathiTrust* and *Cambridge University Press v. Becker* (the “Georgia State University case”), discussed further below, agreed that libraries applied fair use correctly in digitizing works for certain educational, preservation, and other purposes.<sup>19</sup> These cases are presently on appeal, but the trial court outcomes so far confirm that some important library activities are non-infringing fair use. Further, in two separate findings, the court in *Ass’n for Info. Media and Equip. v. Regents of the Univ. of California* (the “UCLA case”): 1) supported the concept of “incidental fair use”;<sup>20</sup> and 2) found that it was not unreasonable for UCLA to believe that streaming creative works to enrolled students may be fair use.<sup>21</sup>

Many courts, in drawing these conclusions, have emphasized the first factor—the purpose and character of the use—weighed against the third and fourth—the amount of the copyrighted work taken and resulting effect on the market. The second factor—the nature of the copyrighted work—is usually less decisive in the outcome, though it has been cited in

favor of library uses in recent cases.<sup>22</sup> In many instances, the purpose and character of the use is controlling, and courts typically take into account three considerations to determine whether the first factor supports fair use. First, if a use is expressly included in the preamble (available for purposes “such as criticism, comment, news reporting, teaching [...], scholarship, or research”) or has a socially beneficial purpose, such as education, it is more likely to be considered fair.<sup>23</sup> However, not all socially beneficial uses of copyrighted material qualify as fair use.<sup>24</sup> Second, the more transformative a use is, the more likely it is to be considered fair use.<sup>25</sup> A transformative use may be one that changes the original work or “serves an entirely different purpose” from the original.<sup>26</sup> However, a use need not be transformative to qualify as fair use.<sup>27</sup> Third, a commercial nature weighs against fair use,<sup>28</sup> but numerous commercial uses do qualify as fair.<sup>29</sup> Courts view these considerations collectively as “the more transformative [the use], the less will the significance of other factors, like commercialism, weigh against a finding of fair use.”<sup>30</sup>

In weighing these considerations against the third and fourth factors, courts generally support uses that take no more than is reasonable in relation to the purpose of the copying, particularly when such uses are unlikely to affect the market for the original work.<sup>31</sup> Though generally disfavored in the fair use analysis, copying an entire work may be reasonable for a given purpose, particularly when the use supports the development of a new or transformative market such as developing a search engine.<sup>32</sup> If the use involves copies more than is reasonable given the purpose or has a negative impact on the market for the original work, these factors generally weigh against fair use. However, at least for transformative uses, market harm is unlikely to be dispositive.<sup>33</sup>

In applying this framework to fair use in the context of libraries, the fair use calculus should often be set strongly in favor of libraries’ reliance on fair use, given that libraries as institutions are non-commercial and promote teaching, scholarship, and research. The recent trial court decisions in the *HathiTrust*, the Georgia State University, and the UCLA cases generally supported libraries’ fair use of copyrighted material for these reasons.<sup>34</sup>

In *HathiTrust*, the court found that the Mass Digitization Project’s digital collection of nearly 10.6 million scanned books from sixty partner library institutions was supported by fair use.<sup>35</sup> The Mass Digitization Project used its digital collection for three purposes: full-text searches, preservation, and access for people with certified print disabilities.<sup>36</sup> The court analyzed each use under fair use’s four factor analysis and concluded that each qualified as fair.<sup>37</sup> The court emphasized the social benefits of preservation as well as the transformative nature of using digital copies for full-text searches and text mining and providing access to people with print disabilities.<sup>38</sup> Importantly, the court expressly stated that fair use is not precluded by the existence of other purpose-specific exceptions available to libraries.<sup>39</sup>

In the Georgia State University case, the court generally supported Georgia State’s electronic course reserve (e-reserve) service and found that the non-profit educational purpose of e-reserves strongly favors fair use.<sup>40</sup> This case concerns the use of e-reserves and electronic course sites at Georgia State University, which made excerpts from academic books available online to students enrolled in particular courses. The court emphasized that non-profit educational uses of non-fiction works are favored for both the first and second factor of the fair use analysis (the purpose and character of the work used and the nature of the work used).<sup>41</sup> Of the 99 alleged infringements submitted to the court for evaluation, only five were determined by the court to be infringing.<sup>42</sup> Even so, the court found Georgia State University to be the prevailing party in the case and awarded the University reasonable

attorney fees that are estimated to be several million dollars.<sup>43</sup> While both the HathiTrust and Georgia State University cases are presently being appealed, these cases are likely to provide useful guidance to libraries on what constitutes fair use in particular areas of their work.

Moreover, in the UCLA case, the court affirmed the UCLA library practice of supporting teaching by copying and reformatting DVDs it had licensed for in-classroom performance to give access to UCLA students outside of the classroom.<sup>44</sup> Specifically, the court found it was fair use for UCLA to make reproductions necessary to exercise its license.<sup>45</sup> The Court emphasized that “incidental exercises [such as copying material from the DVDs to transfer that material to the network] of other lawful rights constitute[d] non-infringing fair use.”<sup>46</sup> Further, the court found that it was not unreasonable for UCLA administrators to believe that streaming video to enrolled students was fair use.<sup>47</sup> The important first factor, the non-profit educational purpose of the use, weighed in favor of fair use. The court further noted that, under the second factor, while the works at issue are “clearly creative,” their use in an “information and educational context” would render this second factor neutral rather than weighing against a fair use finding.<sup>48</sup> The court found that the third factor weighed slightly against a finding of fair use.<sup>49</sup> In addition, the fourth factor weighed in favor of fair use because “a student who watches a DVD in a classroom is no more likely to purchase the DVD than if the student watches the DVD on his or her computer.”<sup>50</sup>

### **C. U.S. Libraries Increasingly Rely on Fair Use to Support Their Key Functions and Serve the Public**

While U.S. libraries rely on a mix of both purpose-specific exceptions and flexible limitations in fulfilling their missions, for several reasons they have increasingly relied on fair use to support their key activities. First, fair use allows libraries to adapt to evolving circumstances, such as advances in technology, in ways that purpose-specific exceptions cannot. Second, several recent court decisions, such as those discussed above, have substantiated libraries’ ability to correctly apply fair use. Finally, libraries have gained increasing comfort in relying on fair use because of the development of codes of Best Practices and other education and training provided through library associations.

The U.S. Supreme Court has stressed “the importance of analyzing fair use flexibly in light of new circumstances[,]. . . especially during a period of rapid technological change.”<sup>51</sup> This has been true for U.S. libraries. For example, as discussed above, U.S. libraries have relied on fair use in creating e-reserves of teaching materials, indexing material for full-text search, digital preservation, and providing access to users with disabilities.<sup>52</sup> By allowing libraries to adapt to and incorporate new technologies to provide greater access to their users, fair use has proven to serve as a versatile tool on which libraries can rely over time as compared with purpose-specific or technology-specific exceptions, such as Section 108 or 110, which can become less useful as technology and the needs of the community evolve.<sup>53</sup>

Although there has been relatively little litigation over libraries’ application of fair use, U.S. libraries have found that they can rely on fair use for a number of activities important to their missions. In the absence of robust case law in the library context, libraries look for guidance in fair use cases from other contexts, such as *Field v. Google, A.V. ex rel. Vanderhye v. iParadigms and Perfect 10, Inc. v. Amazon.com, Inc.*, with the understanding that analogous fact patterns would likely favor libraries even more than commercial defendants given their socially beneficial missions.<sup>54</sup> Additionally, as noted above, each of



the recent cases specifically involving library assertions of fair use have generally affirmed libraries' interpretations of the fair use balance.<sup>55</sup> These results give libraries greater comfort going forward in relying on fair use.

**Code of Best Practices in Fair Use for Academic and Research Libraries**

ARL's "Code of Best Practices in Fair Use for Academic and Research Libraries," published in 2012, was based on a series of in-depth discussions with librarians from a diverse collection of U.S. academic and research institutions.

The Code has enhanced the ability of librarians to rely on fair use by documenting the considered views of the library community about best practices in fair use, drawn from the actual practices and experience of the library community itself. Specifically, the Code identifies eight situations that represent the library community's current consensus about acceptable practices for the fair use of copyrighted materials. The Code then describes a carefully derived consensus within the library community about how those rights should apply in certain recurrent situations.<sup>56</sup>

Finally, educational materials and best practices codes have helped libraries derive a set of standards and practices that libraries agree are reasonable. While these activities do not create perfect legal certainty as to libraries' practices, increasing education and collaboration helps libraries to understand how peer institutions are using fair use to support their activities, which can give libraries greater comfort in utilizing new technology, increasing access to users such as those with print disabilities, and supporting civic engagement and community-building. For example, ARL published a Code of Best Practices in 2012 documenting the library community's understanding on how to apply fair use in their work. (See "Code of Best Practices in Fair Use for Academic and Research Libraries.") ALA also has published educational materials aimed at providing guidance

to library communities on applying fair use.<sup>57</sup>

For these reasons, U.S. libraries increasingly turn to fair use to support their key functions, including: collecting and curating; preserving; lending; indexing and retrieving information; facilitating research and education; and providing access to users with disabilities, all of which contribute to libraries' support of civic engagement and community-building.

A brief evaluation of these functions illustrates the ways in which libraries and the users of their services increasingly benefit from the fair use doctrine's flexibility.

**i. Collecting and Curating**

Libraries serve the public as the primary repositories of accessible information and cultural knowledge. U.S. libraries, despite reduced budgets and staff in recent years, continue to invest significantly in their collections.<sup>58</sup> Advances in technology have expanded libraries' collecting practices beyond the traditional activities of procuring, maintaining, and curating books, manuscripts, and multimedia. For example, the Internet has profoundly changed how information is both published and disseminated. Libraries rely on fair use when making use of new technologies to undertake activities such as web archiving and creating special digital exhibits. In doing so, libraries are collecting and curating information in innovative ways while efficiently directing their limited resources towards building and maintaining extensive collections.

### **The Library of Congress’s American Memory Project**

As part of its mission “to sustain and preserve a universal collection of knowledge and creativity for future generations,”<sup>59</sup> the Library of Congress (LoC) has undertaken the American Memory project, an Internet-based digital collection of American historical and creative resources.

American Memory “provides free and open access through the Internet to written and spoken words, sound recordings, still and moving images, prints, maps, and sheet music that document the American experience.”<sup>60</sup>

The LoC, where the U.S. Copyright Office resides, relies heavily on fair use, for projects such as this.<sup>61</sup> For many of the collections within the American Memory project, the Library of Congress states that it is providing online access to items “under an assertion of fair use” if “despite extensive research, the Library has been unable to identify” the rightsholder, a type of work often referred to as an “orphan work.”<sup>62</sup>

Web archiving—the practice of copying and archiving entire websites—facilitates the ongoing discovery and use of culturally valuable information, essential for building the documentary record of many fields of research. For example, the Internet Archive, a non-profit digital repository, offers permanent storage and free public access to collections of digitized materials through “The Wayback Machine,” which includes over 150 billion web pages archived from 1996 up through a few months from the present date.<sup>63</sup> (See also “The Library of Congress’s American Memory Project.”) Copying entire websites to create such web archives does not fall under purpose-specific exceptions in U.S. copyright law. Instead, fair use is likely to support libraries’ ability to collect and curate web-based content for the public benefit.<sup>64</sup>

Beyond capturing content published across the Internet, libraries also curate culturally significant content, from either

physical or web archives, into special exhibits. For example, the JFK Presidential Library created web-based interactive exhibits by digitizing archival photographs and video footage from key events during Kennedy’s presidency, including the Cuban Missile Crisis and the Space Race.<sup>65</sup> The *Web Archive of the Crisis in Darfur, Sudan (2006)*, which was created from the Library of Congress’ Web Archives, preserves web-based documentation of the humanitarian crisis such as news report samples and responses from governments, international organizations, and the general public.<sup>66</sup> Libraries use fair use to support these valuable collection and curation activities, enabling libraries to better serve the public by expanding access to information and cultural knowledge.

## **ii. Preservation**

As with collecting and curating, advances in technology have increased libraries’ capacity to undertake important preservation activities. A library’s ability to physically care for and maintain its collection determines whether those materials are available to future generations. Libraries rely on fair use when applying new technologies, specifically digitization, to anticipate the deterioration of library and archive materials through pre-emptive preservation, to develop disaster-recovery capability through large-scale digitization, and to cope with rapid changes in media formats.

Fair use can fill gaps not covered by Section 108, the purpose-specific exception that covers some preservation activities. For example, fair use may support libraries engaged in pre-emptive preservation, an activity not recognized in Section 108. Under Section 108, libraries cannot make copies of rare materials until the originals are physically deteriorating

or damaged.<sup>67</sup> However, technological advances, including the ability to make digital copies, have expanded libraries' capacity to preserve intact but fragile items. Libraries rely on fair use to display digital images these items to the public while safely storing the originals before they actually begin to deteriorate. (See the "University of Florida's Digital Preservation Program.")

Beyond pre-emptive preservation, fair use supports libraries in developing disaster-recovery capability through preserving their collections via rapid, large-scale digitization. Under Section 108, libraries can only make three copies of copyrighted work for preservation purposes.<sup>69</sup> Because robust digital backup systems require making additional digital copies, libraries are beginning to rely on fair use for this purpose.

#### **The University of Florida's Digital Preservation Program**

The University of Florida has partnered with the Internet Archive's OpenLibrary.org, an e-lending program that allows users to check e-books out of OpenLibrary.org's 80,000+ book collection.

The University of Florida digitized hundreds of books that are too brittle to circulate and this digitize-and-lend model allows the University to provide access to these older books without risking damage to the physical copies.<sup>68</sup>

For example, the University of Michigan successfully relied on fair use to protect its collection from both deterioration and potential natural and human disasters.<sup>70</sup> Michigan's entire print collection was digitized in less than a decade, allowing the University to protect the approximately 3.5 million books that it estimated were in immediate risk of deterioration and ultimately loss when it began the project in 2004.<sup>71</sup> In contrast, libraries that have not engaged in pre-emptive preservation have suffered large-scale collection losses. For example, most of the University of

*The University of Michigan has pre-emptively digitized and thus protected 3.5 million books from loss in potential future natural and human disasters.*

*In contrast, [ . . . ] Tulane University lost 90% of the 500,000 volume Howard-Tilton Memorial Library collection during Hurricane Katrina.*

Wisconsin-Superior Library's collection of more than 200,000 volumes was damaged in a recent flood in June 2012,<sup>72</sup> and Tulane University lost 90% of the 500,000-volume Howard-Tilton Memorial Library collection during Hurricane Katrina.<sup>73</sup> Large-scale digitization for preservation purposes provides libraries with a valuable opportunity to develop disaster-recovery capabilities in order to ensure that their collections are available for future generations.

Lastly, preservation can both rescue items from physical decay and help libraries cope with ever-changing media formats. Libraries may want to make a replacement copy of a published work in a digital format (e.g., a CD, DVD, or on the library's network). While Section 108 allows reproduction of materials in digital formats, it does not permit circulation of those materials.<sup>74</sup> Instead, libraries may be able to rely on fair use to preserve and circulate their existing collections transferred to new media formats.

In sum, libraries rely on fair use for important preservation activities not accounted for under purpose-specific exceptions.<sup>75</sup> As such, libraries are taking advantage of technological advances that aid them in adapting to new media formats, rescuing items from physical decay, and ensuring that future generations have access to their valuable collections.

### iii. Lending and Other Provision of Information

Libraries also rely on fair use and, for physical copies, Section 109 (first sale) to perform one of their core functions: providing materials to the public directly and to people at a distance. Historically, libraries served as physical repositories of information, and, therefore, access was limited to users in geographic proximity to materials held on-site. Despite these limitations, libraries have aspired to increase access to physical materials by carrying out activities such as bookmobiles (mobile libraries in vehicles) and interlibrary lending. Further, aided by digital technologies, libraries now have the potential to make information and resources available to anyone with a computer anywhere in the world. U.S. libraries rely on fair use to strike the appropriate balance between the rights of authors and users when providing access to resources. As such, fair use can support libraries' ability to circulate new media formats, facilitate distance learning through e-reserves, and leverage their resources through interlibrary lending.

As discussed in the context of preservation, while reproduction of materials in digital formats is permitted under Section 108, circulation of those materials may only be available under fair use. In the context of lending, fair use may support libraries in providing digital access to unique collections for specific purposes supported by fair use, such as for scholarship or research.

#### Georgia State's University E-Reserves

Georgia State University, a public university, does not pay license fees for the electronic distribution of excerpts of copyrighted books when the instructor using the work determines that fair use applies.

In *Cambridge University Press v. Becker*, involving Georgia State University's provision of excerpts of copyrighted materials via e-reserves and course websites, 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 permissible under fair use.<sup>76</sup>

In its fair use analysis, the trial court found that the libraries were, in the vast majority of instances, correct in their application of fair use because the excerpts were used for teaching students and scholarship; the material used was primarily informational; and when the selected excerpts were appropriately-sized, they did not harm the potential market for these materials.

Additionally, many U.S. libraries rely on fair use to create and make available course materials via e-reserves and other electronic platforms.<sup>77</sup> Electronic versions of course materials are not always available under appropriate licenses at reasonable costs. Academic libraries have successfully relied on fair use to provide enrolled students access to some materials for the term of a course in the absence of any purpose-specific exception, specifically permitting them to make available electronic excerpts of course materials. While excerpts sometimes will be sufficient, the educational purpose will sometimes require access to the entire work, particularly for audio-visual materials (e.g. an entire illustrative song in a class on the history of popular music). Libraries have employed fair use in this context to support teaching through both in-classroom presentations and online streaming for use in the educational context outside of the physical classroom.<sup>78</sup> Libraries can provide guidance to help professors to tailor the amount needed to the educational purpose of the use. The outcome of the recent Georgia State University case highlights how libraries have generally succeeded in striking the appropriate balance under fair use. (See "Georgia State University's E-Reserves.")

In addition to providing users with remote access to e-reserves, libraries also can encourage information-sharing between libraries through interlibrary lending (ILL). ILL refers to the process of libraries borrowing or obtaining copies of publications from each other on behalf of library users. Section 108 permits libraries and archives to reproduce materials for other libraries through interlibrary loans. Further, some libraries share information across borders through international interlibrary lending. U.S. law governs U.S. libraries when they engage in international ILL loan arrangements with foreign partners; and fair use, together with Section 108, makes such arrangements possible for them. Their foreign partners, however, must make and fulfill ILL requests in accord with their own domestic law. U.S. libraries can engage in greater and more productive interlibrary arrangements where partners have a flexible exception than they can in cases where partners must operate within only limited, purpose-specific exceptions.

Flexibility, alongside new technology, has increased libraries' ability to provide the public with access to information through lending and other services. Fair use and, to a lesser extent, Section 109 (first sale) has allowed libraries to increase access selectively to certain users while maintaining the appropriate balance between author and users' rights to serve copyright's overall purpose.

#### **iv. Indexing and Retrieving Information**

U.S. libraries also have been able to rely on fair use to develop indexing and information retrieval systems that facilitate research, education, life-long learning, and scholarship. Information retrieval (or search) is well-supported by fair use case law. U.S. courts have found copying works for the purpose of developing search tools to be transformative uses supported by fair use, even in commercial contexts, in cases such as *Kelly v. Arriba Soft Corp.* and *Perfect 10 v. Amazon.com.*<sup>79</sup> Moreover, courts also have found developing a full-text searchable index to be fair use in the library context, specifically. (See "HathiTrust Full-Text Search Project.")<sup>80</sup>

##### **HathiTrust Full-Text Search Project**

The HathiTrust Digital consortium of over sixty academic and research institutions has recently relied successfully on fair use to create a database of over 10.6 million digitized volumes, on which users can perform full-text searches of individual works, genres, even an entire literary collection.<sup>81</sup> For works not in the public domain or for which the copyright owner has not authorized use, the full-text search indicates "only the page numbers on which a particular term is found and the number of times the term appears on each page."<sup>82</sup> In these instances, no actual text from the book is revealed.<sup>83</sup>

In concluding that the HathiTrust's digitization of works for full-text search qualifies as fair use, the court focused on fair use's first factor, finding the use transformative because "the copies serve an entirely different purpose than the original works: the purpose is superior search capabilities rather than actual access to copyrighted material."<sup>84</sup> In weighing this against the amount of the work copied and impact on the market of the work, the court found that copying entire works was "necessary to fulfill [ . . . ] the purpose of facilitation of search" and that the market impact could be to a transformative market but not the market for the works themselves.<sup>85</sup>

The HathiTrust's use of collaborative mass digitization for full-text mining purposes enhances researchers' ability to search for, process, and evaluate connections among text, language, and concepts over time.<sup>86</sup>

Historically, search involved only cataloging and finding aids limited to a work's bibliographic information (such as the title, author, and general subject matter). Now, with digitization and systems that can search the full text of entire works, "billions of pages of text can be searched in milliseconds."<sup>87</sup> Such systems enable users to more efficiently identify works in which particular terms are used, increasing the pace and diversity of research and scholarship in a variety of fields.

New methods of digitizing and indexing works improve search efficiency for information retrieval across analog and digital sources. Indexing and information retrieval systems' functionality allows users to search for relevant material from vast bodies of collections, making these systems required technology for meaningful access to the riches of the digital age. For example, as discussed earlier, the Internet Archive's "Wayback Machine" includes a search function to allow users to navigate billions of web pages to identify relevant historical web information.<sup>88</sup>

Libraries' ability to rely on fair use to support these activities enables U.S. libraries to continue to develop rigorous indexing and informational retrieval tools that keep pace with rapid changes in how works are published and distributed. In doing so, libraries can provide the public with greater and more meaningful access to information.

#### **v. Facilitating Research and Education**

Libraries rely on fair use in order to use new and emerging technologies in a variety of contexts to facilitate research and education. First, fair use enables libraries to use the same technologies, such as mass digitization, that enable innovative search capabilities to support new fields of research. Second, fair use supports libraries' use of electronic platforms for educational purposes. Finally, as other solutions to the problem of orphan works are being discussed around the world, U.S. libraries are relying on fair use to address certain issues associated with accessing orphan works.

Libraries are successfully relying on fair use to support mass digitization and large-scale shared digital repository projects, like the HathiTrust Digital Library, as discussed above, that not only allow for efficient search tools, but also enable libraries to expand the ways in which scholars conduct research.<sup>89</sup> Digital repositories have the potential to enable metadata capabilities such as full-text searching and data analysis. These search capabilities give rise to new methods of academic inquiry, enabling scholars "to process, mine, and ultimately better understand individual texts, the connections between texts, and the evolution of literary language."<sup>90</sup> The judge in the recent *HathiTrust* decision found that these transformative uses provide an "invaluable contribution to the progress of science and cultivation of the arts."<sup>91</sup> Accordingly, fair use can support libraries to facilitate the expansion of research tools that are currently limited to use with works in the public domain. (See "Stanford Literary Lab.")

Libraries also rely on fair use to support the use of electronic platforms for educational purposes. As discussed in the context of lending, in the absence of a purpose-specific exception for e-reserves, libraries rely on fair use to provide students with limited access to library materials needed for coursework as purposes such as teaching and scholarship are particularly favored in the fair use calculus because of their importance in advancing the purpose of copyright.<sup>92</sup> For example, elementary and secondary school (K-12)

### Stanford Literary Lab

Academic and research libraries' development of advanced search systems enables large-scale quantitative projects such as those at Stanford Literary Lab to "[unearth] previously unknowable information about individual works, genres, and even entire eras."<sup>94</sup>

Stanford Literary Lab's Network Theory and Dramatic Structure Project is using such systems to compare over 300 plays in the public domain from ancient Greece and Rome, Renaissance Europe, 18th-century Germany, and 19th-century Norway. The project will "identify general properties of dramatic works (breadth, density, patterns of growth) and how they change according to genre (tragedy, comedy, historical play) and historical setting (ancient city-state and empire, Renaissance court, modern nation-state)."<sup>95</sup>

Under the *HathiTrust* decision, fair use could support the expansion of this project to include more recent, in-copyright works.

libraries play a significant role in students' education by serving as teachers of technology and providing access to multimedia education centers.<sup>93</sup>

Further, libraries may rely on fair use where purpose-specific exceptions do not clearly cover a specific educational context. U.S. libraries' experience with facilitating distance education offers an example of how flexibility can complement purpose-specific exceptions that may be impractical in a given context. Libraries' continued reliance on fair use to support distance education—even after the passage of the TEACH Act, a purpose-specific exception intended for distance education—exemplifies this point.

The 2002 TEACH Act was 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>96</sup> Further the pre-requisites under the Act can be interpreted in either strict or more lenient ways, and no court rulings to date provide guidance to libraries.<sup>97</sup> Libraries—finding the TEACH Act difficult to interpret, too burdensome on administrators, or incompatible with their institutional information technology strategies—continue to rely on fair use, which is unaffected by the Act.<sup>98</sup> Instead, libraries can incorporate elements from the Act, such as using password protections to limit access and placing warning signs on copyrighted material, to strengthen their position that these activities are fair use in supporting distance education.<sup>99</sup>

Lastly, libraries rely on fair use to move forward with digital preservation and tailored access programs for orphan works, as orphan works can easily become lost or inaccessible to the public without the stewardship of libraries. U.S. libraries hold large collections of orphan works, with some studies concluding that up to 55 percent of books in U.S. research libraries are orphans.<sup>100</sup> While the U.S. Copyright Office considers ways to address the orphan works issue, at least some libraries are relying on fair use to support their orphan works projects.<sup>101</sup> For example, many of the books in the HathiTrust collection are orphans,<sup>102</sup> and the Library of Congress relies on fair use in providing access to orphans in some of its American Memory Collections, discussed above.<sup>103</sup> 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 flexibly accommodate problems that arise from evolving situations, such as the inability to identify a work's copyright owner.<sup>104</sup> This challenge occurs particularly with special collections containing ephemera and archival material which were never distributed

commercially. Fair use can ensure that libraries can apply new technologies like digitization to orphan works just as they do in cases in which authors can be located.

In a variety of contexts from supporting new fields of research, distance education, and preservation of orphan works, fair use provides a basis for libraries to offer new tools to support educators and researchers. In doing so, libraries can continue to support society's advancement of knowledge.

#### vi. Providing Access to Users with Print Disabilities

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

##### **Digital Library "Revolutionizes" Academic Participation by Students with Print Disabilities**

Before the HathiTrust's Mass Digitization Project discussed earlier, students with print disabilities accessed course materials through universities' disability student services offices, but most universities were limited in their ability to provide resources.

Now, screen-access software can allow students with print disabilities to read digital books independently. Since the digital texts in the HathiTrust's Digital Library (HDL) have become available, students at universities such as the University of Michigan have had full access to materials through secure systems for students with certified disabilities.

When text is conveyed audibly or tactilely, users with print disabilities can "access text more quickly, reread passages, annotate, and navigate, just as a sighted reader does with text." According to the court in the *HathiTrust* case, "academic participation by [students with print disabilities] has been revolutionized by the HDL."

The *HathiTrust* decision emphasizes how fair use can work together with purpose-specific exceptions, like Section 121, as the court describes how "the provision of access to previously published non-dramatic literary works within the HDL fits squarely within [Section 121], although Defendants may certainly rely on fair use to justify copies made outside of these categories."<sup>105</sup>

New technologies present opportunities for libraries to increase access for these users but require accessible format copies of materials. Such technologies include digital and audio readers, text-to-speech functionality in web browsers, and purpose-specific screen access technology that utilizes table of contents and allows for font size or color adjustments. These resources allow users with print disabilities, for example, to navigate to relevant sections with a screen reader the way in which a sighted person would use a table of contents to flip to a relevant section. Moreover, libraries create audio (and digital audio) recordings of books via machine readers and closed captioning for video to increase access to users with other disabilities.

U.S. copyright law does include a purpose-specific exception (Section 121) to allow libraries to assist visually

impaired persons, but is limited in scope.<sup>106</sup> In the recent *HathiTrust* case discussed above, the court agreed with libraries that Section 121 covered the digitization of works for access by persons with print disabilities, and also stated that fair use would apply if Section 121 had not, particularly for education and scholarship purposes.<sup>107</sup>



This decision provides an example of how fair use and purpose-specific exceptions can work together to achieve socially beneficial purposes. The court heralded the libraries' decision to use digitization to enable "the unprecedented ability of print-disabled individuals to have an equal opportunity to compete with their sighted peers" in learning and scholarship.<sup>108</sup> (See "Digital Library 'Revolutionizes' Academic Participation by Students with Print Disabilities.") As such, flexibility can help manage situations in which an older, purpose-specific exception was not drafted to clearly accommodate new approaches.

Flexibility supports libraries in providing disabled users with access as equal to their peers as technology allows for and, in doing so, helps libraries to fulfill their missions to provide the public with greater access to information. Fair use, supplementing Section 121, can support libraries' use of digital copies to increase the accessible materials that libraries offer to users with print disabilities to place them on equal footing with their peers and meet requirements under the Americans with Disabilities Act (the ADA).

#### **D. U.S. Libraries Support Civic Engagement and Community Building**

Libraries that successfully conduct their core functions not only fulfill their missions in providing the public with access but also support civic engagement and strengthen communities. U.S. libraries depend on fair use in serving their essential social and cultural functions—including preserving cultural knowledge, facilitating the exchange of information, and supporting creativity and intellectual pursuits.<sup>112</sup> When, for example, libraries pre-emptively preserve materials through digitization to prevent large-scale community loss of resources in a natural disaster; facilitate new fields of research through metadata search; or provide access to users with print disabilities to place them on equal footing in the community, they play a central role in building resilient communities that advance learning and scholarship while creating equitable access to resources.<sup>113</sup>

##### **The Dance Heritage Coalition**

The Dance Heritage Coalition (DHC) is a national alliance that builds partnerships between libraries, archives, and dance organizations and artists.<sup>109</sup>

The partnerships digitize copyrighted collections to preserve, enhance, and provide access to works that document dance as an art form. Using these digital copies, the DHC and another dance organization network collaborated to produce online resources of America's "irreplaceable dance treasures," including a searchable database of dance collections.<sup>110</sup> The partnerships rely on fair use when they make and share digital copies to expand access to collections of moving image materials for education and scholarship purposes.

The DHC undertook a two-year project to evaluate how fair use could support its work and developed a Best Practices guide on how to apply fair use to increase access to dance-related materials needed for "teaching, research and high-quality public programming."<sup>111</sup>

In addition to these core functions discussed throughout the paper, libraries also conduct other cohesion functions that support community building. Several examples highlight how libraries, in their community-building role, provide a forum for users to conduct activities that rely on fair use. First, community story hour programs offered by many public libraries are supported by fair use though these public performances may not be covered under Section 110, which only covers face-to-face teaching activities in a classroom.<sup>114</sup> These community story hour programs—during which librarians and youth read books out loud—can increase

literacy levels and inspire children to develop life-long affinities for reading at an early age.

In addition, many public libraries sponsor local events in which community members can use “maker spaces” (based on a variety of technology platforms) to produce creative works.<sup>115</sup> Libraries and their users rely on fair use to make digital copies as well as to copy multimedia and text from the library’s archives, supporting users’ creative pursuits. Libraries also assist professional communities, such as historians, filmmakers, and visual artists who rely on fair use to preserve and share culturally relevant copyrighted resources (See “The Dance Heritage Coalition.”)

Finally, libraries can link their users to the Internet, bridging the digital divide. From 2009-2010, 45 percent of the 169 million visitors to public libraries connected to the Internet using a library computer or wireless network.<sup>116</sup> Some of these users visit libraries to access resources supported by fair use such as online courses, e-reserves, and web-archives. Additionally, users make browser copies when using library computers to conduct research. Website browsing requires making a temporary copy of the site onto the Random Access Memory (RAM) of the user’s computer, and this reproduction is permitted by fair use.<sup>117</sup>

In all of these activities, libraries rely on fair use to expand access to resources and, by doing so, support their users’ creativity, freedom of expression, learning, and scholarship. Without fair use, U.S. libraries would not be able to provide the public with this range of resources and services that allow libraries to function as robust community centers, helping to shape a creative and civically-engaged society.

### **III. Libraries and Society Can Benefit from Incorporating Flexible Limitations and Exceptions in Copyright Law**

The experience of U.S. libraries demonstrates how flexible limitations and exceptions like fair use can aid libraries in performing their essential activities. This experience highlights how flexible limitations and exceptions can operate as a legal framework on which libraries can consistently and successfully rely to capture the benefits of new technology and to fulfill their missions in serving the public.

*Copyright regimes in many other countries already contain flexible provisions such as fair use, which is flexible broadly (in terms of uses and purposes) or fair dealing, which is flexible for specific purposes (such as research and scholarship).*

*Some examples of these countries are: Australia, Canada, Hong Kong, India, Israel, Jamaica, Malaysia, the Philippines, Singapore, South Korea, Taiwan, Uganda, and the United Kingdom.*

These benefits are not limited to U.S. libraries and society. This Section suggests that including flexible limitations in conjunction with purpose-specific exceptions creates robust copyright frameworks to benefit libraries and communities worldwide. Flexibility can protect important user rights that may not be accounted for elsewhere in copyright law, support the sharing of information across borders and communities, promote economic development, and offer an enduring legal framework requiring infrequent statutory revision to support the purpose of copyright law.

While there is much variation across the laws, copyright regimes in many other countries, including Australia, Canada, Hong Kong, India, Israel, Jamaica, Malaysia, the Philippines, Taiwan, Singapore, South Korea, Uganda, and the United Kingdom already contain flexible provisions such as fair use, which is flexible broadly (in terms of uses and purposes) or fair

dealing, which is flexible for specific purposes (such as research and scholarship). As in U.S. copyright law, these flexible limitations and exceptions typically supplement purpose-specific exceptions.<sup>118</sup>

Other communities around the world, including libraries, stand to benefit from countries' incorporation of flexible limitations and exceptions into copyright law. 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.”*

- The World Intellectual Property Organization

In many countries, copyright law is intended to serve the dual goals of supporting creators and improving cultural creativity and access for society. (See “The World Intellectual Property Organization (WIPO) Purpose of Copyright.”)<sup>119</sup> In these countries, flexible exceptions can supplement purpose-specific exceptions to ensure that copyright provides appropriate protection to authors while also safeguarding other important policy objectives, which may not otherwise be accommodated within copyright law, such

as protecting individuals' freedom of expression and right to privacy; fostering innovation; promoting creativity; providing access to information; and supporting diversity of thought.

Flexibility, when supplementing purpose-specific exceptions, offers a mechanism for evaluating 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. Countries also can tailor flexible limitations and exceptions to serve specific domestic priorities and advance 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 can encourage the sharing of information across borders, such as international interlibrary lending. Cross-border collaborations between institutions, universities, or community groups can 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 may be reluctant to share materials across borders. 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>120</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 incorporated into purpose-specific exceptions, incorporating flexibility can allow this environment to flourish. For example, in the United States, content-viewing devices and technologies<sup>121</sup> and Internet platforms<sup>122</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.

Some experts suggest that flexibility in copyright law may work best in more formal economies and is more difficult to employ in developing countries.<sup>123</sup> Conversely, as developing countries face international pressures to enforce intellectual property commitments made through treaties such as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), it becomes more important for copyright regimes to include flexible and purpose-specific exceptions to allow socially beneficial uses of copyrighted works in order for copyright regimes to work effectively.<sup>124</sup> Systems without flexibility may lead to, or create pressure for, the development of large informal economies outside the formal copyright regime.<sup>125</sup>

- **Flexibility Can Offer an Enduring Legal Framework to Support Copyright Law**

Relatedly, flexibility can provide an enduring legal framework that can withstand evolving circumstances, including rapid changes in technology, whereas a system with only purpose-specific 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.<sup>126</sup> The 1976 Copyright Act incorporated the fair use doctrine, in part, to prevent having to constantly revise copyright law in light of new technology.<sup>127</sup> Another example, as explained above, is the 2002 TEACH Act, which amended U.S. copyright law to facilitate distance education; however, burdensome requirements make compliance difficult, and technology-specific language limits its applicability for broader online education.<sup>128</sup> As such, libraries and other educational institutions often fall back on fair use to support their distance education projects.

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 society more broadly.

#### **IV. Conclusion**

Libraries play a distinct role in society by advancing knowledge, inspiring lifelong learning, promoting reading, bridging the digital divide, and strengthening communities worldwide. The U.S. library experience serves as an example of how flexible limitations and exceptions can work in conjunction with purpose-specific exceptions to help libraries to fulfill their public missions by allowing them to adapt quickly to new technologies, perform

their key functions, and serve the public by providing them with greater access to information. The benefits conferred on the public by providing libraries with flexible limitations and exceptions are not limited to the United States. Communities around the world stand to benefit from countries' incorporation of flexible limitations and exceptions into copyright law.

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<sup>1</sup> Pew Research Ctr. Internet & Am. Life Project, *Libraries, Patrons and E-Books* 27 (June 2012), available at <http://libraries.pewinternet.org/2012/06/22/libraries-patrons-and-e-books/>

<sup>2</sup> Am. Library Ass'n, *2012 State of America's Libraries* 5 (2012), available at <http://www.ala.org/news/sites/ala.org.news/files/content/StateofAmericasLibrariesReport2012Finalwithcover.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> Am. Library Ass'n, *2011 State of America's Libraries* 18 (2011), available at [http://www.ala.org/news/sites/ala.org.news/files/content/mediapresscenter/americaslibraries/state\\_of\\_americas\\_libraries\\_report\\_2011.pdf](http://www.ala.org/news/sites/ala.org.news/files/content/mediapresscenter/americaslibraries/state_of_americas_libraries_report_2011.pdf)

<sup>5</sup> 17 U.S.C. § 108 (2006). Section 108 grants libraries specific rights under which they can reproduce and distribute copies for archival reproduction, replace damaged copies, articles and small excerpts, and provide access to out-of-print works.

<sup>6</sup> 17 U.S.C. § 110 (2006).

<sup>7</sup> 17 U.S.C. § 121 (2006). Section 121 grants a narrow exception to non-profit organizations or government entities, which have a primary mission to serve the blind or others with print disabilities, the ability to reproduce and distribute a copy of a published nondramatic literary work. Under Section 121, the copy must be made in a specialized format made exclusively for the blind or users with print disabilities.

<sup>8</sup> 17 U.S.C. § 109 (2006) (containing several broad "exhaustion"-based limitations (109 (a), (c), and (d)) and a narrower exception (109 (b)) specifically for sound recordings or computer programs that allows the owner of a copy of copyrighted material to sell, display, rent, lease, and loan that copy without license or payment).

<sup>9</sup> *Id.*

<sup>10</sup> Contrasted with the public lending right contained in EU law, under which authors have the right to receive payment when libraries lend their book.

<sup>11</sup> 17 U.S.C. § 107 (2006).

<sup>12</sup> Pierre N. Leval, *Towards a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1107 (1990); U.S. CONST. art. I, § 8, cl. 8 (defining copyright's purpose as promoting "the Progress of Science and useful Arts.").

<sup>13</sup> See e.g., Am. Library Ass'n, *Distance Education and the TEACH Act*, (2012), available at [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) (describing how the 2002 TEACH Act amended 17 U.S.C. § 110 but did not account for the subsequent rapid growth in online education).

<sup>14</sup> 17 U.S.C. § 107 (2006) (defining the four factors as: 1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit 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); See also U.S. CONST. art. I, § 8, cl. 8; *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994) (finding that "nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright.").

<sup>15</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984). But see *Encyclopedia Britannica Educ. Corp. v. Crooks*, 542 F. Supp 1156 (W.D.N.Y. 1982) (finding that a school district's systematic copying of videotapes for educational purposes does not constitute fair use.).

<sup>16</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003). See also *Perfect 10, Inc. v. Amazon.com Inc.*, 508, F.3d 1146, 1166 (9th Cir. 2007).

<sup>17</sup> *A.V. ex rel. Vanderhuy v. iParadigms, LLC*, 562 F.3d 630, 639 (4th Cir. 2009).

<sup>18</sup> *Wall Data Inc. v. L.A. County Sheriff's Dept.*, 447 F.3d 769 (9th Cir. 2006).

<sup>19</sup> See *Author 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. See also *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \* 1363 (N.D. Ga. May 11, 2012). Appeal filed on Sept. 10, 2012.

<sup>20</sup> See *infra* note 48.

<sup>21</sup> *Ass'n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx), 2011 WL 7447148, at \*6 (C.D.Cal. Oct. 3, 2011) [hereinafter *AIME v. UCLA*, Order 1]; *Ass'n for Info. Media and Equip. v. Regents of the Univ. of California*, No. CV 10-9378 CBM (MANx) at \*11 (C.D.Cal. Nov. 20, 2012) [hereinafter *AIME v. UCLA*, Order 2].

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<sup>22</sup> See *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \* 1363 (N.D. Ga. May 11, 2012) (finding that the works at issue were all factual and scholarly in nature, which favored a finding of fair use). See also *AIME v. UCLA*, Order 1, at \*11 (noting that while the nature of creative works typically weigh against a finding of fair use, that Shakespeare plays, while “clearly creative works” could be considered neutral (not weigh against a fair use finding) when used in an “informational and educational context.”).

<sup>23</sup> 17 U.S.C. § 107 (2006).

<sup>24</sup> *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 561 (1985).

<sup>25</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-85 (1994).

<sup>26</sup> *HathiTrust*, 2012 WL 4808939, at \*16 (citing *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 609 (2d Cir. 2006)).

<sup>27</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 (1984) (holding that recording broadcast television shows on a VCR for non-commercial personal uses qualified as a fair use).

<sup>28</sup> *Harper & Row*, 471 U.S. at 561-63.

<sup>29</sup> See *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>30</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). See also *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939 (S.D.N.Y. Oct. 10, 2012), *Kelly v. Arriba Soft Corp.*, 336F.3d 811(9th Cir. 2003), and *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009) (describing how uses that serve an entirely different purpose than the original can qualify as transformative and that the use need not create a new work or market in order to be transformative.)

<sup>31</sup> *Campbell*, 510 U.S. at 586.

<sup>32</sup> See *Bill Graham Archives v. Dorling Kindersley Ltd.*, 488 F.3d 605, 614 (2nd Cir. 2006) (finding that copyright holders have an interest in preventing market harm to the original market for their work but cannot preempt exploitation of transformative markets ). See also *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 821 (9th Cir. 2003) (finding that the third factor did not weigh against a finding of fair use because “although Arriba did copy each of Kelly’s images as a whole, it was reasonable to do so in light of Arriba’s use of the images.”).

<sup>33</sup> See *Bill Graham Archives*, 488 F.3d at 614.

<sup>34</sup> See *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939, at \*21, (S.D.N.Y. Oct. 10, 2012). See also *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \* 1363 (N.D. Ga. May 11, 2012).

<sup>35</sup> See *HathiTrust*, 2012 WL 4808939, at \*21.

<sup>36</sup> *Id.* at \*3.

<sup>37</sup> *Id.* at \*21.

<sup>38</sup> *Id.* at \*15-16.

<sup>39</sup> See *id.* at \*13 (finding “here, fair use does not undermine Section 108 but rather supplements it.”). See also *id.* at \*23 (finding that “the provision of access [ . . . ] fits squarely within the Chafee Amendment, although Defendants may certainly rely on fair use [ . . . ] to justify copies made outside of these categories or in the event that they are not authorized entities.”).

<sup>40</sup> *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \* 1242 (N.D. Ga. May 11, 2012).

<sup>41</sup> *Id.* at 1242.

<sup>42</sup> *Id.* at 1363.

<sup>43</sup> Jennifer Howard, *Judge Denies Publishers’ Request for Relief in Georgia State U. E-Reserves Case*, Chronicle of Higher Education (Aug. 10, 2012), available at <http://chronicle.com/blogs/ticker/judge-denies-publishers-request-for-relief-in-georgia-state-u-e-reserves-case/46809>. See also Andrew Albanese, *What Georgia State Verdict Means for Libraries and the Publishing Industry*, Publishers Weekly (May 18, 2012), available at <http://www.publishersweekly.com/pw/by-topic/digital/copyright/article/52029-bright-lines-big-uncertainty.html>.

<sup>44</sup> *AIME v. UCLA*, Order 1, at \*6.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> The question of whether UCLA’s belief that its use was unreasonable was discussed in the case because the court was considering whether UCLA’s qualified sovereign immunity defense was viable.

<sup>48</sup> *AIME v. UCLA*, Order 2, at \*11.

<sup>49</sup> Because streaming entire works weighed against a finding of fair use. However, the court noted that UCLA made a compelling argument that the use was analogous to “time shifting” (referring to the holding in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984)).

<sup>50</sup> *AIME v. UCLA*, Order 2, at \*11.

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<sup>51</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (citing H.R. REP. No. 94-1476, at 65 (1976), reprinted in U.S.C.C.A.N. 5680.)

<sup>52</sup> See *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939, at \*21, (S.D.N.Y. Oct. 10, 2012); *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \* 1363 (N.D. Ga. May 11, 2012).

<sup>53</sup> See Educause & Am. Library Ass'n, *Technical Requirements of the TEACH Act*, 1, available at <http://net.educause.edu/ir/library/pdf/CSD2725.pdf> (discussing how "TEACH amends the copyright law by expanding teaching exemptions to the digital distance education classroom."). See also United States Copyright Office and the National Digital Information Infrastructure and Preservation Program of the Library of Congress, *Section 108 Study Group Report* (2008), available at <http://www.section108.gov/docs/Sec108StudyGroupReport.pdf> ("the law now embodies some out-dated assumptions about technology, professional practices and business models" [ . . . ] "due to the rapid pace of technological and social change.").

<sup>54</sup> 17 U.S.C. § 107 (2006) (noting that the preamble emphasizes fair use for purposes including "teaching, [ . . . ] scholarship or research."). See e.g., *Field v. Google*, 412 F. Supp. 2d 1106 (D. Nev. 2006); *A.V. ex rel. Vanderhye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

<sup>55</sup> See e.g., *HathiTrust*, 2012 WL 4808939 at \*21; See also Cambridge Univ. Press, 2012 U.S. Dist. LEXIS 78123 at \*488.

<sup>56</sup> Ass'n of Research Libraries, Program on Info. Justice & Intellectual Prop., & Ctr. for Soc. Media, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012), available at <http://centerforsocialmedia.org/libraries>.

<sup>57</sup> See e.g., Carrie Russell, *Complete Copyright for K-12 Librarians and Educators* (Am. Library Ass'n Editions, 2012); Carrie Russell, *Complete Copyright: An Everyday Guide for Librarians* (Am. Library Ass'n Editions, 2012).

<sup>58</sup> Nat'l Ctr. For Educ. Statistics, U.S. Dep't of Educ., *Academic Libraries: 2010: First Look* 13 (2011), available at <http://nces.ed.gov/pubs2012/2012365.pdf> (finding that every year U.S. academic libraries spend over \$2.5 billion purchasing copyrighted works, including \$1.2 billion on licensing electronic journals and databases).

<sup>59</sup> The Library of Congress Mission, <http://www.loc.gov/ndl/mission.html> (last visited Nov. 30, 2012).

<sup>60</sup> Library of Congress, Mission and History (American Memory), <http://memory.loc.gov/ammem/about/index.html> (last visited Nov. 30, 2012).

<sup>61</sup> Brief for Defendant at 9-10, *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939 (No. 112), available at <http://thepublicindex.org/docs/cases/hathitrust/112-ht-sj-brief.pdf>.

<sup>62</sup> See, e.g., Prosperity and Thrift, <http://memory.loc.gov/ammen/coolhtml/ccres.html> (last visited Apr. 19, 2012).

<sup>63</sup> Internet Archive Wayback Machine, <http://archive.org/web/web.php> (last visited November 15, 2012).

<sup>64</sup> Jonathan Band, *A New Day for Website Archiving 2.0*, Ass'n of Research Libraries (2012), [http://www.arl.org/bm~doc/band\\_webarchive2012.pdf](http://www.arl.org/bm~doc/band_webarchive2012.pdf). and <http://www.policybandwidth.com/> (last visited Nov. 30, 2012). See also Peter B. Hirtle, *Digital Preservation and Copyright*, Copyright & Fair Use Stanford University Libraries (Nov. 15, 2012, 10:15 PM), available at [http://fairuse.stanford.edu/commentary\\_and\\_analysis/2003\\_11\\_hirtle.html](http://fairuse.stanford.edu/commentary_and_analysis/2003_11_hirtle.html) (stating that fair use can support library web archiving because the preservation is done for non-commercial, socially beneficial reasons, and a court could consider the extent of the material being copied appropriate for preservation purposes).

<sup>65</sup> John F. Kennedy Presidential Library and Research, Interactive Exhibits, <http://www.jfklibrary.org/JFK/Interactive-Exhibits.aspx> (last visited Nov. 5, 2012).

<sup>66</sup> Library of Congress Web Archives, <http://lcweb2.loc.gov/diglib/lcwa/html/lcwa-home.html> (last visited Nov. 5, 2012).

<sup>67</sup> 17 U.S.C. § 108(c) (2006).

<sup>68</sup> More information about OpenLibrary.org is available at <http://blog.archive.org/2011/06/25/in-library-ebook-lending-program-expands-to-1000-libraries/> (last visited Nov. 22, 2012).

<sup>69</sup> 17 U.S.C. §§ 108(b) and (c) (2006).

<sup>70</sup> Brief for Defendant at 3, *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939 (No. 112), available at <http://thepublicindex.org/docs/cases/hathitrust/112-ht-sj-brief.pdf>.

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.* at 3. See also Meredith Schwartz, *UW-Superior Works to Salvage Flooded Library*, Library Journal, Jul. 15, 2012, available at <http://lj.libraryjournal.com/2012/07/managing-libraries/uw-superior-works-to-salvage-flooded-library/>.

<sup>73</sup> Brief for Defendant at 3, *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939 (No. 112), available at <http://thepublicindex.org/docs/cases/hathitrust/112-ht-sj-brief.pdf>.

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<sup>74</sup> 17 U.S.C. §§ 108(b)(2) and (c)(2) (2006).

<sup>75</sup> See Band, Jonathan, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. Copyright Soc’y 453 (2012) (describing how courts might consider the extent to which a use substantially complies with a purpose-specific exception in evaluating the first factor of the fair use test).

<sup>76</sup> *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \* 1363 (N.D. Ga. May 11, 2012).

<sup>77</sup> See *id.* at \* 1363. See also Brandon C. Butler, *Issue Brief: GSU Fair Use Decision Recap and Implications*, Ass’n of Research Libraries (2012), available at [http://www.arl.org/bm~doc/gsu\\_issuebrief\\_15may12.pdf](http://www.arl.org/bm~doc/gsu_issuebrief_15may12.pdf).

<sup>78</sup> Ass’n of Research Libraries, Program on Info. Justice & Intellectual Prop., & Ctr. for Soc. Media, *Code of Best Practices in Fair Use for Academic and Research Libraries* 13 (2012), available at <http://centerforsocialmedia.org/libraries>. See also *AIME v. UCLA*, Order 1, at \*6.

<sup>79</sup> *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (finding that the use of thumbnail images to facilitate Internet browsing constitutes fair use). See also *Perfect 10, Inc. v. Amazon.com Inc.*, 508 F.3d 1146, 1166 (9th Cir. 2007) (finding that the “transformative nature of Google’s search engine, particularly in light of its public benefit, outweighs Google’s superseding and commercial uses of the thumbnails in this case” and constitutes fair use).

<sup>80</sup> *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939, at \*22, (S.D.N.Y. Oct. 10, 2012) (finding that making copies of an entire work can be considered fair use when these activities have a transformative purpose, such as making the work searchable).

<sup>81</sup> The HathiTrust Digital Library, <http://www.hathitrust.org/about> (last visited Nov. 22, 2012).

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at \*16.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at \*19-20.

<sup>86</sup> Brief of Digital Humanities and Law Scholars as Amici Curiae Supporting Defendants at 12, *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939.

<sup>87</sup> Brief for Defendant at 9 n.31, *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939 (No. 112), available at <http://thepublicindex.org/docs/cases/hathitrust/112-ht-sj-brief.pdf>.

<sup>88</sup> Internet Archive Wayback Machine, <http://archive.org/web/web.php> (last visited Nov. 15, 2012).

<sup>89</sup> HathiTrust Digital Library, <http://www.hathitrust.org/> (last visited Nov. 12, 2012).

<sup>90</sup> Brief of Digital Humanities and Law Scholars as Amici Curiae Supporting Defendants at 5, *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939.

<sup>91</sup> *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939, at \*21, (S.D.N.Y. Oct. 10, 2012).

<sup>92</sup> *Cambridge Univ. Press v. Becker*, No. 1:08-CV-1425-ODE, 2012 U.S. Dist. LEXIS 78123, at \*1224 (N.D. Ga. May 11, 2012).

<sup>93</sup> Ctr. for Soc. Media, *Code of Best Practices in Fair Use for Media Literacy Education*, available at <http://mediaeducationlab.com/code-best-practices-fair-use-media-literacy-education-0>. (last visited Jan. 29, 2013).

<sup>94</sup> Brief of Digital Humanities and Law Scholars as Amici Curiae Supporting Defendants at 12, *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939.

<sup>95</sup> More information on the Stanford Literary Lab is available at <http://litlab.stanford.edu/> (last visited Nov. 22, 2012).

<sup>96</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 Am. Library Ass’n, *Distance Education and the TEACH Act*, (2012), available at [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).

<sup>97</sup> Carrie Russell, *Complete Copyright for K-12 Librarians and Educators*, 69 (Am. Library Ass’n Editions, 2012).

<sup>98</sup> See Educause & Am. Library Ass’n, *Technical Requirements of the TEACH Act*, 3, available at <http://net.educause.edu/ir/library/pdf/CSD2725.pdf>. See also Carrie Russell, *Complete Copyright for K-12 Librarians and Educators*, 69 (Am. Library Ass’n Editions, 2012).

<sup>99</sup> Carrie Russell, *Complete Copyright for K-12 Librarians and Educators* 69 (Am. Library Ass’n Editions, 2012); See also Band, Jonathan, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use* (November 30, 2011), available at <http://ssrn.com/abstract=1966593> or <http://dx.doi.org/10.2139/ssrn.1966593>.

<sup>100</sup> Prudence Adler, Jonathan Band & Brandon Butler, *Resource Packet on Orphan Works: Legal and Policy Issues for Research Libraries*, Ass’n of Research Libraries, 2 (2011), available at [www.arl.org/bm~doc/resource\\_orphanworks\\_13sept11.pdf](http://www.arl.org/bm~doc/resource_orphanworks_13sept11.pdf).



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- <sup>101</sup> U.S. Copyright Office Notice of Inquiry, *Orphan Works and Mass Digitization* (Oct. 22, 2012), available at <http://www.copyright.gov/fedreg/2012/77fr64555.pdf>.
- <sup>102</sup> See *Author Guild, Inc. v. HathiTrust*, No. 11-CV-6351(HB), 2012 WL 4808939, at \*11-12, (S.D.N.Y. Oct. 10, 2012).
- <sup>103</sup> Library of Cong. Am. Memory Collection, <http://memory.loc.gov/ammem/index.html> (last visited Nov. 21, 2012).
- <sup>104</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>105</sup> *HathiTrust*, 2012 WL 4808939, at \*23.
- <sup>106</sup> 17 U.S.C. § 121 (2006).
- <sup>107</sup> *HathiTrust*, 2012 WL 4808939, at \*23.
- <sup>108</sup> *Id.* at \*21.
- <sup>109</sup> The Dance Heritage Coal., <http://www.danceheritage.org/index.html> (last visited Nov. 22, 2012).
- <sup>110</sup> *Id.*
- <sup>111</sup> The Dance Heritage Coaln, <http://www.danceheritage.org/fairuse.html#fair> (discussing their application of fair use)(last visited Nov. 23, 2012)
- <sup>112</sup> See Int'l Fed'n of Library Ass'ns and Insts., *Treaty Proposal on Limitations and Exceptions for Libraries and Archives*, v 4.3 (Jul. 5, 2012), available at [http://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/TLIB\\_v4.3\\_050712.pdf](http://www.ifla.org/files/assets/hq/topics/exceptions-limitations/documents/TLIB_v4.3_050712.pdf).
- <sup>113</sup> Urban Libraries Council, *Partners for the Future: Public Libraries and Local Governments Creating Sustainable Communities*, 8 (2012), available at [http://www.libraryworks.com/INFOcus/1210/ULC\\_Sustainable\\_Communities\\_Full\\_Report.pdf](http://www.libraryworks.com/INFOcus/1210/ULC_Sustainable_Communities_Full_Report.pdf).
- <sup>114</sup> 17 U.S.C. § 110(1) (2006).
- <sup>115</sup> See e.g., Library as Incubator Project, *Westport Library Makerspace: Power Tool Practice* (Aug. 27, 2012), <http://www.libraryasincubatorproject.org/?p=6043>.
- <sup>116</sup> Samantha Becker et al., Inst. of Museum and Library Servs., *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries* 1 (2010), available at <http://www.gatesfoundation.org/learning/Documents/OpportunityForAll.pdf>.
- <sup>117</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).
- <sup>118</sup> See Program on Info. Justice and Intellectual Prop., American University Washington College of Law, *Masterlist: Elements of Limitations and Exceptions* (Sept. 2012), available at <http://tinyurl.com/LandE excerpts>. See also Crews, Kenneth D., *Study on Copyright Limitations and Exceptions for Libraries and Archives* (November 4, 2008), available at [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=109192](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192).
- <sup>119</sup> WIPO Copyright and Related Rights, <http://www.wipo.int/copyright/en/> (last visited on November 3, 2012).
- <sup>120</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 Szamosszegi, *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 one in eight U.S. workers and grow faster than the U.S. economy as a whole).
- <sup>121</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
- <sup>122</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).
- <sup>123</sup> Comments from several conference participants, Limitations and Exceptions Workshop, 2nd Global Congress on Intellectual Property and the Public Interest at Fundação Getulio Vargas in Rio de Janeiro, Brazil (Dec. 17, 2012). See generally Joe Karaganis, *Media Piracy in Emerging Economies*, SSRN (2011), available at <http://piracy.americanassembly.org/wp-content/uploads/2011/06/MPEE-PDF-1.0.4.pdf>. (last visited Feb. 4, 2013) (describing the tradeoffs that define copyright law enforcement, particularly in relation to media piracy, in emerging markets).
- <sup>124</sup> Annex Proposal by Brazil, Chile, Nicaragua and Uruguay for Work Related to Exceptions and Limitations, WIPO SCCR 16/2 at 2, available at [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_16/sccr\\_16\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_16/sccr_16_2.pdf).
- <sup>125</sup> See generally Advisory Comm. on Enforcement, Sixth Session: *Media Piracy in Emerging Economies: Price, Market Structure and Consumer Behavior*, Geneva, December 1-2, 2010, available at [http://www.wipo.int/edocs/mdocs/enforcement/en/wipo\\_ace\\_6/wipo\\_ace\\_6\\_5.pdf](http://www.wipo.int/edocs/mdocs/enforcement/en/wipo_ace_6/wipo_ace_6_5.pdf); Joe Karaganis, *Media Piracy in Emerging Economies*, SSRN (2011), available at <http://piracy.americanassembly.org/wp-content/uploads/2011/06/MPEE-PDF-1.0.4.pdf>.
- <sup>126</sup> See Meng Sung et al., *Copyright and the Advent of Xerox Machines*, History of Information (Nov. 21, 2012, 1:59 PM), <http://blogs.ischool.berkeley.edu/i103su09/structure-projects-assignments/research-project/projects-and-presentations/copyright-and-the-advent-of-xerox-machines/>.

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<sup>127</sup> S. Comm. On Judiciary, Copyright Law Revision, S. Rep. No. 94-473 (1975) (stating that “the bill endorses the purpose and general scope of the judicial doctrine of fair use [ . . . ] but there is no disposition to freeze the doctrine in the state, especially during a period of rapid technological change.”).

<sup>128</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* Am. Library Ass’n, *Distance Education and the TEACH Act*, (2012), available at [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).