

# Copyright and Fair Use 101

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ASSOCIATION OF SOUTHEASTERN RESEARCH LIBRARIES

What is Copyrightable, How is Copyright Obtained, and How Long Does it Last

# **COPYRIGHT BASICS**

# Copyright Law...in a Nutshell

## U.S. Constitution, Art. 1, § 8

“...the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries...”

## Copyright Act of 1976, 17 U.S.C. § 101 et seq.

- Protects original works that are fixed in any tangible medium of expression (e.g. books, articles, music, movies, software).
- Author/Creator holds several exclusive rights, including the right to copy and disseminate, to create derivative works, and to publicly display.
- Since 1989 - no requirement of publication, registration or inclusion of the © symbol.
- Copyright Duration – see Cornell Public Domain Chart ([copyright.cornell.edu/resources/publicdomain.cfm](http://copyright.cornell.edu/resources/publicdomain.cfm))



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The Tragedy of the Anticommons

# **LIMITATIONS AND EXCEPTIONS**

# Copyright Exceptions Often Used in Higher Education

- Section 108—Exceptions for libraries and archives: preservation, replacement, unsupervised photocopying, interlibrary loan
- Section 109—First sale, aka “exhaustion”
- Section 110—Exceptions for face to face teaching and distance education
- And probably the most frequently used and useful exception in higher education...

What are the Four Factors of Fair Use and What is the Current Legal State of Fair Use

# **FAIR USE**

# Fair Use – Balancing Test

- Broad exception allowing for legal and unauthorized use of copyrighted works under certain circumstances.
- Balancing test – examine four factors; no single factor controls



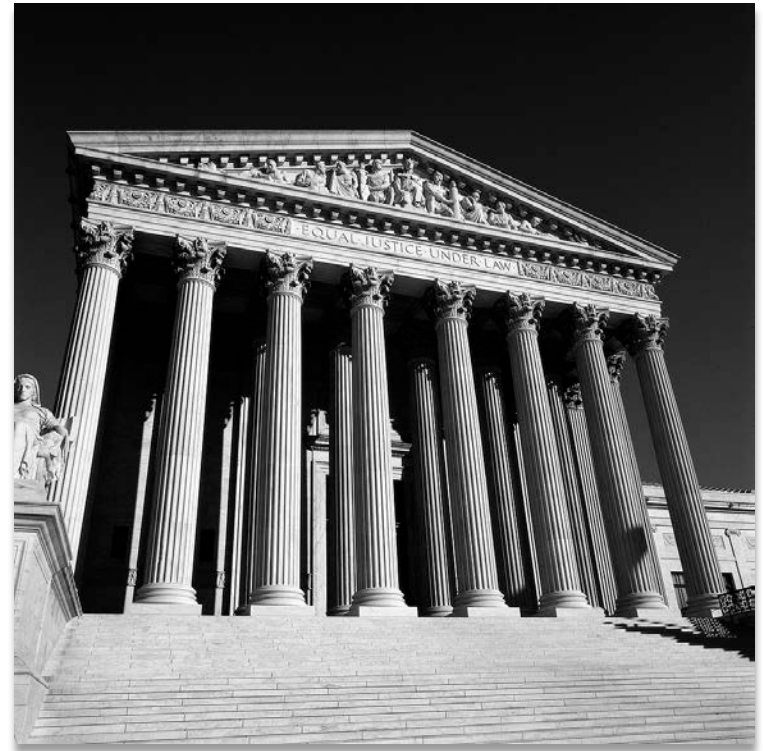
# Four Factors of Fair Use

- Purpose and character of the use
  - Educational or commercial use?
  - Transformative use
- Amount of the work being used
  - Larger quantity that needed to meet objectives
  - “Heart of the matter”
- Nature of the work being used
  - Technical/factual or creative?
  - Published or unpublished?
- Effect of the use upon the market
  - Will use replace or encourage sales of original?
  - Is original readily available for reasonable price?



# Fair Use in the Courts

- Is the use transformative?
  - For new purpose, context, audience, etc.?
  - Is the amount used appropriate for transformative purpose?
- Harm to revenue stream or reasonable availability of license at a reasonable price?



# Georgia State Case

- Publishers' suit against GSU for postings of book chapters in course reserves and course management sites.
- Trial Court Judgment
  - Overwhelmingly in favor of GSU
  - Only applies to GSU but instructive to others
  - On appeal – oral arguments Nov. 19<sup>th</sup>

# Fair Use in GSU Case

- **Factor One**
  - Educational purpose, not commercial
  - Distinguished this case from earlier coursepack cases involving commercial copyshops
  - Mere reproduction of scholarly works for course reserves not transformative
- **Factor Two**
  - Scholarly works are informational works favored by fair use
  - “Sweat of the brow” argument not applicable
- **Factor Three**
  - Classroom Guidelines rejected both as to amount and repetitive use
  - Amount must be “decidedly small” and narrowly tailored to purpose
  - If book has less than 10 chapters, 10%; if more than 10 chapters, 1 chapter – a guideline not a ceiling!
- **Factor Four**
  - No demonstrated harm to market
  - Is license reasonably available at reasonable price for excerpts in a convenient format?

# HathiTrust Case

- Author's Guild copyright infringement action against HathiTrust and partner universities for digitization of books for purposes of making preservation copies, for search and data mining, for access by persons with disabilities, and for orphan works access.
- Trial court granted summary judgment in favor of HathiTrust and universities.
  - Orphan works issue deemed not ripe for adjudication because still proposed program – not active
  - Section 108 of Copyright Act (library exceptions) does NOT preclude library invocation of Section 107 (Fair Use)
  - All major HathiTrust initiatives deemed to be fair use – trial judge wrote “I cannot imagine a definition of fair use that would not encompass the transformative uses made by defendants”
  - Section 121 – academic libraries are an “authorized entity” that can provide access to copyrighted materials for persons with disabilities
- Appeal filed – Oral argument heard October 30, 2013

# Fair Use in HathiTrust Case

- Factor One
  - Scholarly and research purposes = fair use
  - Strong public interest in preservation of scholarship (although not transformative)
  - Search function is highly transformative use because a different purpose
  - Digitization for disabled persons access is also highly transformative because different audience
- Factor Two
  - For transformative uses, this factor is “not dispositive”
- Factor Three
  - Amount taken was necessary to the use
- Factor Four
  - “Copyright holder cannot preempt a transformative market”
  - Lack of market harm for noncommercial and transformative uses
  - Stated intent to license in the future cannot trump transformative use

How to Learn More, Apply Your Knowledge, and Spread the Word

# **BEST PRACTICES AND RESOURCES**



# Association of Research Libraries Code of Best Practices

<http://www.arl.org/focus-areas/copyright-ip/fair-use/code-of-best-practices>



# Three Books About Copyright for Librarians

- Kenneth Crews. **Copyright Law for Libraries and Educators.** 3<sup>rd</sup> ed. ALA Editions, 2012
- Peter Hirtle. **Copyright and Cultural Institutions.** Cornell Univ. Press, 2009
- Carrie Russell and Dwayne Buttler. **Complete Copyright.** ALA, 2004.



Questions?