

Copyright and Access in the Remote Digital Era

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NYU Law

1

My Two Other Organizations (Grant Funded)

Two distinct non-profit organizations operating for the technology-positive future of America's libraries.



Library Futures Institute is a non-profit 501(c)(3) organization building a coalition and community that empowers libraries to take control of their digital futures. **(Part of NYU Law)**



EBOOK STUDY GROUP

eBook Study Group is a non-profit 501(c)(4) organization focusing on legislative change and policy.

2

Last 3+ Years: Library Pandemic Narrative

- Many libraires and institutions were closed – can't perform normal functions, operations, programs
- Legally acquired works were “trapped” in libraires (estimated 650+ million)
 - No physical access
 - No ILL, Document Delivery
 - No Reserves
 - No reading books aloud (!)
- Digital access required permission or licensing only.
- Print had no value (yet libraires and archives spent millions on collections to share)

3

3

Last 3+ Years: Library Pandemic Narrative

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Hachette Book Group, Inc. v. Internet Archive, 1:20-cv-04160 (S.D.N.Y 2020)



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SELF-PUB [booklife](#) [JOBZONE](#) [THE MILLIONS](#) [U.S. BOOK SHOW](#)

[Home](#) [NEWS](#) [REVIEWS](#) [BESTSELLERS](#) [CHILDREN'S](#) [AUTHORS](#) [ANNOUNCEMENT](#)

[ShelfTalker](#) [Soapbox](#) [Editorials](#) [Common Core](#) [Open Book](#)

In Defense of Library Lending

The chair of Library Futures defends controlled digital lending, the practice at issue in a key copyright case.

By Kyle K. Courtney

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Despite closures, digital
libraries were always
“open”.....

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7

All things good on this Earth flow into
the [libraries], because of the
[libraries'] greatness.

- Pericles, Athenian Mayor

8

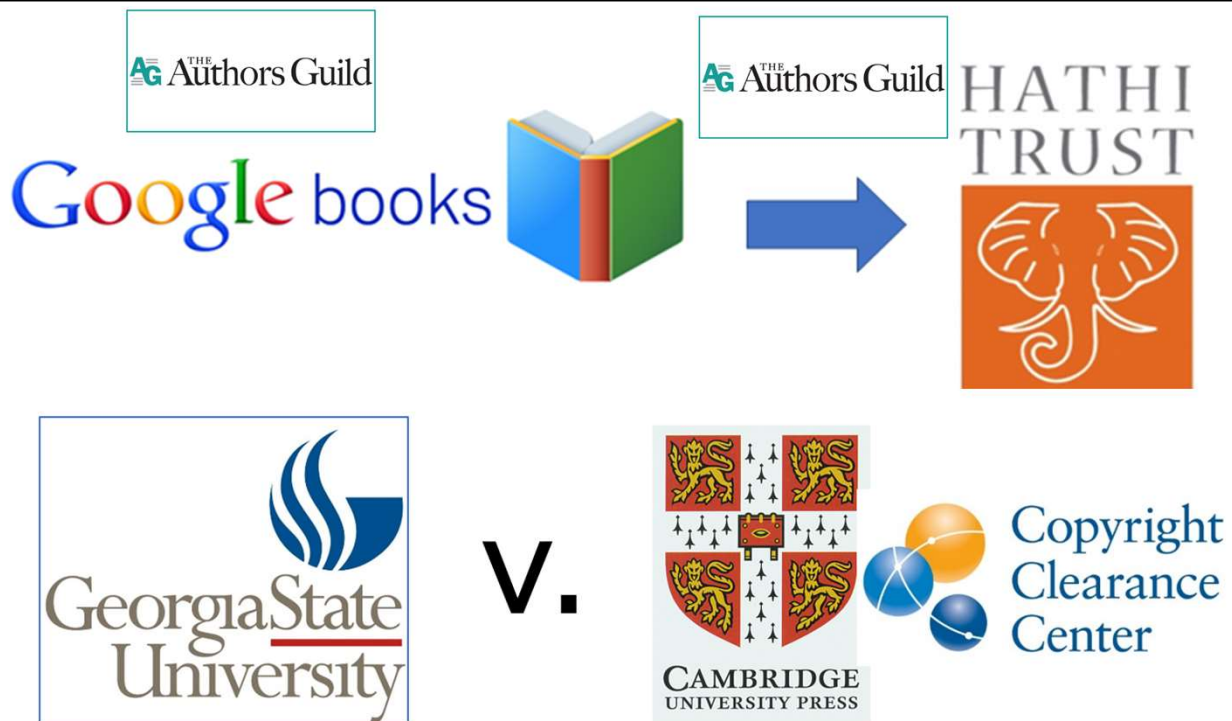
8

Archives/Libraries as the “holders of forever”



Harvard University, Harvard University Archives, W291208_1

9



10

Other areas where attempts were made to curtail the ability to ***access collections*** (physical and digital)

- Interlibrary Loan
- Photocopiers in libraires
- Open Access
- eReserves
- Increasing Digital Access for the Print Disabled
- Text and Data Mining
- Controlled Digital Lending
- The Right to Borrow Books*

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Paper now in press:

<https://bit.ly/PubPlaybook>

The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission

<i>The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission</i> By Kyle K. Courtney and Juliya M. Ziskina	
I. Introduction	1
II. Despite Publishers' Contentious, Courts Uphold Public Policies for Lending and Copyright Law (1800-2010)	2
III. Libraries Adopt New Access Technologies and Publishers Challenge the Longstanding and Locally Protected Practice of Interlibrary Loan (1910-1970)	3
IV. Publishers Pushback Against Library Photocopying Results in Stronger Fair Use Protections for Libraries (1970s)	5
V. Courts End Efforts to Ban Fair Use Despite Publishers' Prolonged Litigation and Previous "Clearance Guidelines" (1970-2010)	7
VI. Congress and Courts Enact and Affirm Increased Accessibility for Patrons with Print Disabilities (1980-2010)	12
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Citation

Courtney, Kyle K. and Juliya Ziskina. 2023. "The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission." Pre-print.

Abstract

Libraries have continuously evolved their ability to provide access to collections in innovative ways. Many of these advancements in access, however, were not achieved without overcoming serious resistance and obstruction from the rightsholder and publishing industry. The struggle to maintain the library's access-based mission and serve the public interest began as early as the late 1800s and continues through today. We call these tactics the "publishers' playbook." Libraries and their readers have routinely engaged in lengthy battles to defend the ability for libraries to fulfill their mission and serve the public good. The following is a brief review of the times and methods that publishers and rightsholder interests have attempted to hinder the library mission. This pattern of conduct, as reflected in ongoing controlled digital lending litigation, is not unexpected and belies a historical playbook on the part of publishers and rightsholders to maximize their own profits and

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would you like to have that passing from hand to hand.

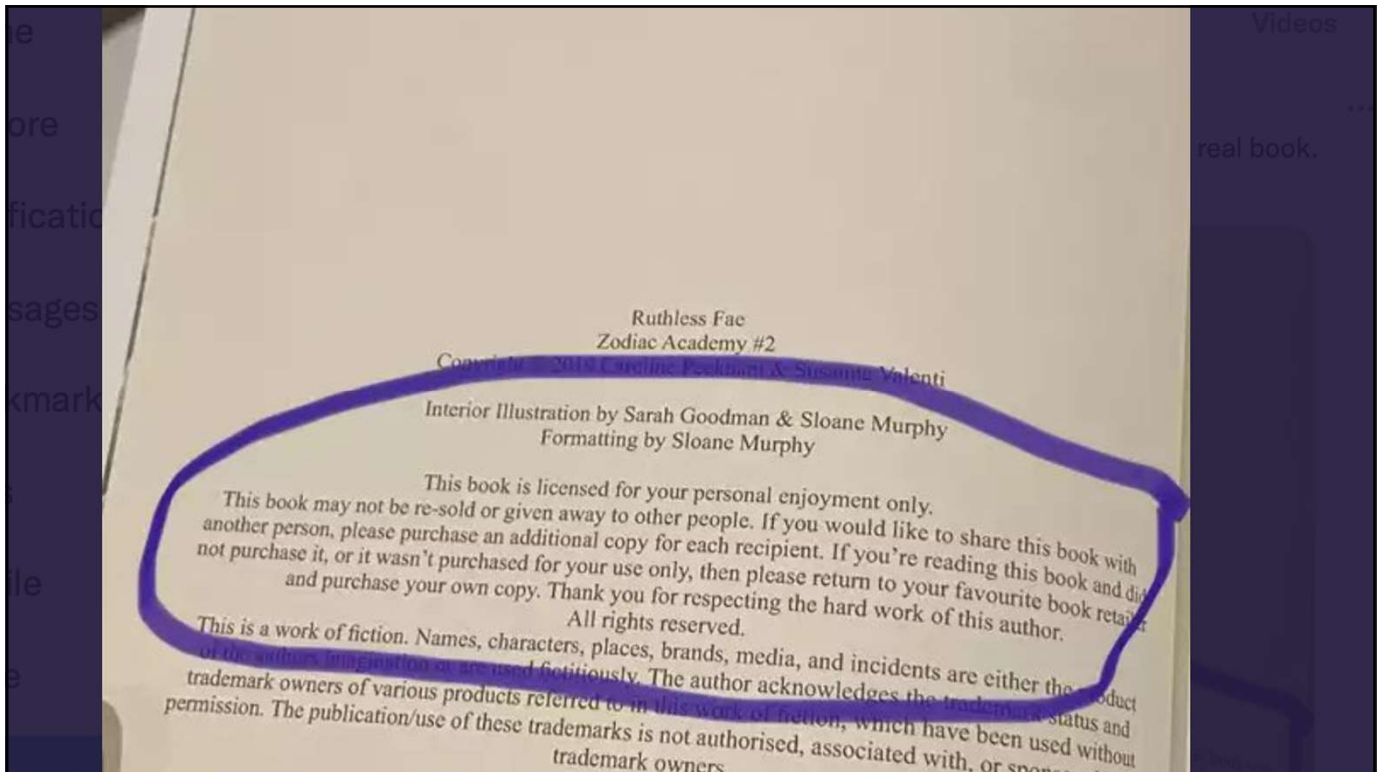
A cruder method was to reframe as theft what had long been understood as sociable sharing. In 1931, Bernays launched a contest “to look for a pejorative word for the book borrower, the wretch who raised hell with book sales and deprived authors of earned royalties.” Entries included “book weevil,” “borrocole,” “libracide,” “booklooter,” “bookbum,” “bookkibitzer,” “culture vulture,” “greeper,” “bookbummer,” “bookaneer,” “blifter,” “biblioacquisiac,” “book buzzard,” and “greader.”²²

In the new division of labor that Cold War publishers

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Welcome
bookaneers &
book weevils!

14



15

I reject the [out-of-control] licensing culture

I reject devaluation of the significant legal and economic value in our collections

I reject excessively narrow fair use and other legal analysis

I reject fear of technology preventing legitimate legal sharing within our non-profit, educational, research, access-based mission

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I embrace fair use's flexibility as a right

I promote open licensing culture (*but I do not need a license for everything)

I encourage use of library and archive's federal copyright "superpowers" (§108 and more....)

I support copyright's real public purpose: "to promote the progress of science and the useful arts..."

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17

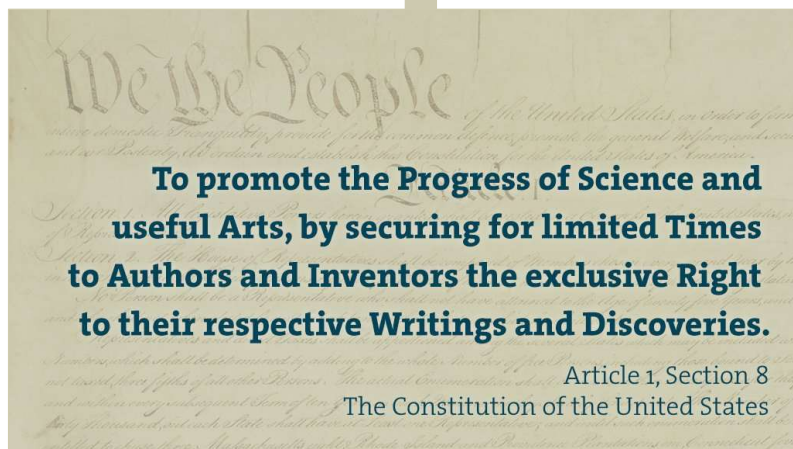
What can we do to increase
access and the ability to
share our collections with our
patrons in the present?

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U.S. Law Example:



1790: “An Act for
the Encouragement
of Learning....”

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*Google LLC v. Oracle America, Inc.,
593 U.S. ____ (2021)*

“.....to allow enforcement of Oracle’s copyright here would risk harm to the public.”

*“To that extent, the [Oracle] lock would interfere with, not further, **copyright’s basic creativity objectives.**”*

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Libraries and archives sit right in the middle of the economic purpose of copyright (**we acquire the materials!**) and the public benefit purpose of copyright (**we share the materials!**)



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Copyright life cycle....



23



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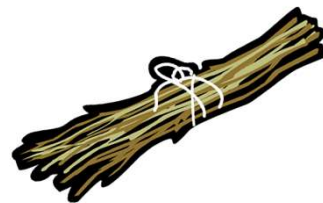
Issues with digitizing and providing access to our **current collections**

Issues with digitizing and providing access to our **future collections**

25

Exclusive Rights Under © (§106)

- 1) to reproduce the work
- 2) to prepare derivative works
- 3) to distribute copies of the work
- 4) to perform the work publicly
- 5) to display the work publicly



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Increasing Access with Copyright

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First, maybe put all the
public domain materials
online?

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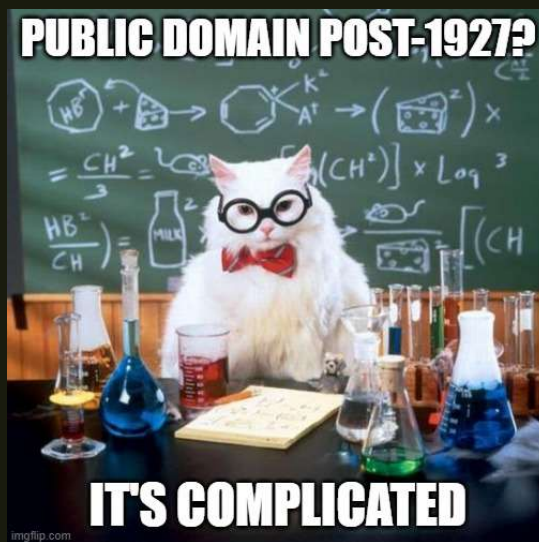
Public Domain Exists...

- U.S. published works (prior to Jan. 1, 1928)*
- U.S. government works
 - Most other governments copyright their work
- Things that are not copyrightable
 - Rulers, height charts, data, calendars, etc.



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In the U.S.
there is the
wonderful
realm of 1928
to 1978....



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Increasing Access with
Non-Exclusive Licensing

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Increasing Access w/ Policy

- Donors, faculty, students, any creators can grant **non-exclusive rights** to library in their materials

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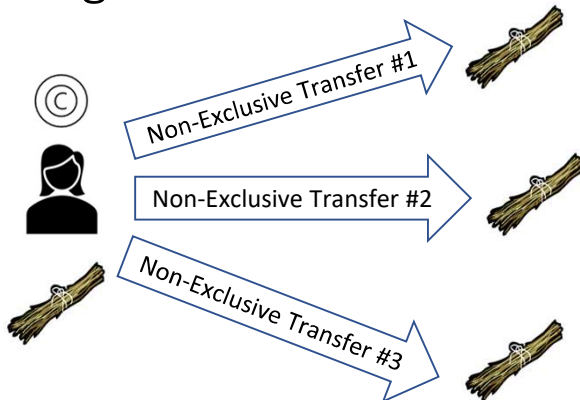
Non-exclusive Licensing Copyright Law 17 USC § 205(e):

A **nonexclusive license**, whether recorded or not, **prevails** over a conflicting transfer of copyright ownership if the license is evidenced by a **written instrument signed by the owner** of the rights licensed or such owner's duly authorized agent, and if—

- (1) the license was taken **before execution of the transfer**; or
- (2) the license **was taken in good faith** before recordation of the transfer and without notice of it.

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17 USC § 205(e)
allows non-exclusive
copyright transfer via
license, contract, or
agreement



Non-exclusive rights are
not limited or restricted to
one party

Granting non-exclusive
rights still enables a
copyright holder to grant
or assign rights elsewhere

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Non-Exclusive Rights Increasing Access

Exclusive Rights: one party
controls

Non-exclusive rights: shared rights

- *Provides library w/ rights to “do our job”*
- *Empowers open access*
- *Share with repositories*
- *Publish “openly licensed”*
- *Contracts with publishers*

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Abdominal Radiology
pp 1–8 | [Cite as](#)

5-Fluorouracil induced liver toxicity in patients with colorectal cancer: role of computed tomography texture analysis as a potential biomarker

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Hepatobiliary
First Online: 27 June 2019

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Abstract

Purpose

To assess if CT texture analysis (TA) can serve as a biomarker of liver toxicity in patients with colorectal cancer treated with 5-fluorouracil (5-FU)-based chemotherapy.

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5-Fluorouracil induced liver toxicity in patients with colorectal cancer: role of computed tomography texture analysis as a potential biomarker

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Access Status
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[Meyerhardt, Jeffrey](#)

Citation
Alessandrino, F., Qin, L., Cruz, G. et al. Abdom Radiol (2019). <https://doi.org/10.1007/s00261-019-02110-3>

Abstract


Aim: To assess if CT texture analysis (TA) can serve as a biomarker of liver toxicity in patients with colorectal cancer treated with 5-fluorouracil (5-FU)-based chemotherapy.


Materials and methods: In this IRB-approved, HIPAA-compliant retrospective study, patients with colorectal cancer treated with 5-FU-based regimens during 2008-2010 were identified from institutional electronic database. Total 43 patients (23 women; mean age 56 years) with normal baseline liver function tests (LFTs), availability of baseline (pre-chemotherapy) and first follow-up CT (median 1.7 months, interquartile range (IQR):1.5-2.5) performed during chemotherapy were included. Two single-slice ROI of right and left liver lobe were obtained on baseline and first follow-up CT for TA. Texture features (mean, entropy, kurtosis, skewness, mean of positive pixel, standard deviation (SD)) were extracted using a commercially available software (TexRAD; Feedback Medical Ltd, Cambridge, UK). Changes in texture parameters between baseline and follow-up CT were evaluated with Wilcoxon signed-rank test for patients with and without LFT elevation during chemotherapy.


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CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

Definition of rights	{	Sec. 101. Definitions.
		102. Subject matter of copyright: In general.
		103. Subject matter of copyright: Compilations and derivative works.
		104. Subject matter of copyright: National origin.
		104A. Copyright in restored works.
Fair use!	{	105. Subject matter of copyright: United States Government works.
		106. Exclusive rights in copyrighted works.
		106A. Rights of certain authors to attribution and integrity.
		107. Limitations on exclusive rights: Fair use.
		108. Limitations on exclusive rights: Reproduction by libraries and archives.
Limitations & exceptions	{	109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.
		110. Limitations on exclusive rights: Exemption of certain performances and displays.
		111. Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable.
		112. Limitations on exclusive rights: Ephemeral recordings.
		113. Scope of exclusive rights in pictorial, graphic, and sculptural works.
		114. Scope of exclusive rights in sound recordings.
		115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.
		116. Negotiated licenses for public performances by means of coin-operated phonorecord players.
		[116A. Renumbered.]
		117. Limitations on exclusive rights: Computer programs.
		118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting.
		119. Limitations on exclusive rights: Secondary transmissions of distant television programming by satellite.
120. Scope of exclusive rights in architectural works.		
121. Limitations on exclusive rights: Reproduction for blind or other people with disabilities.		
122. Limitations on exclusive rights: Secondary transmissions of local television programming by satellite.		





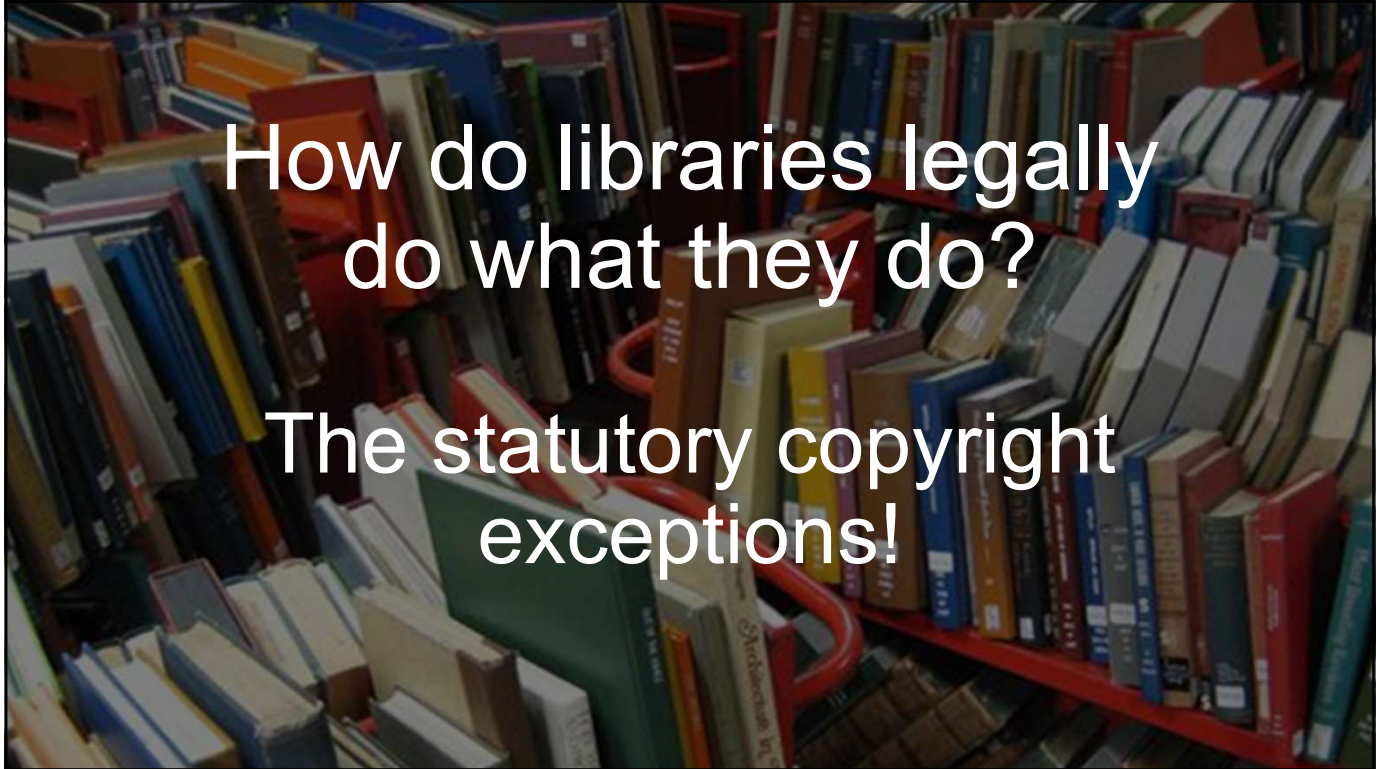


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Statutory Copyright Exceptions

- Many *statutory exceptions* allow anyone to exercise one (or all) of the exclusive rights of the copyright “bundle”
 - without obtaining the permission of the copyright owner
 - without the payment of any license fee

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How do libraries legally
do what they do?

The statutory copyright
exceptions!

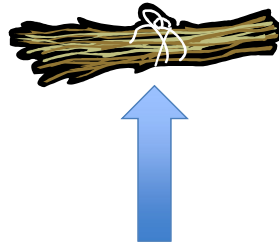
41



“**Notwithstanding** the provisions of **sections 106**...the fair use of a copyrighted work...for purposes such as ***criticism, comment, news reporting, teaching, scholarship, or research***” is not an infringement of copyright.

Fair Use, 17 U.S.C. §107

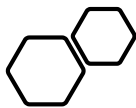
42



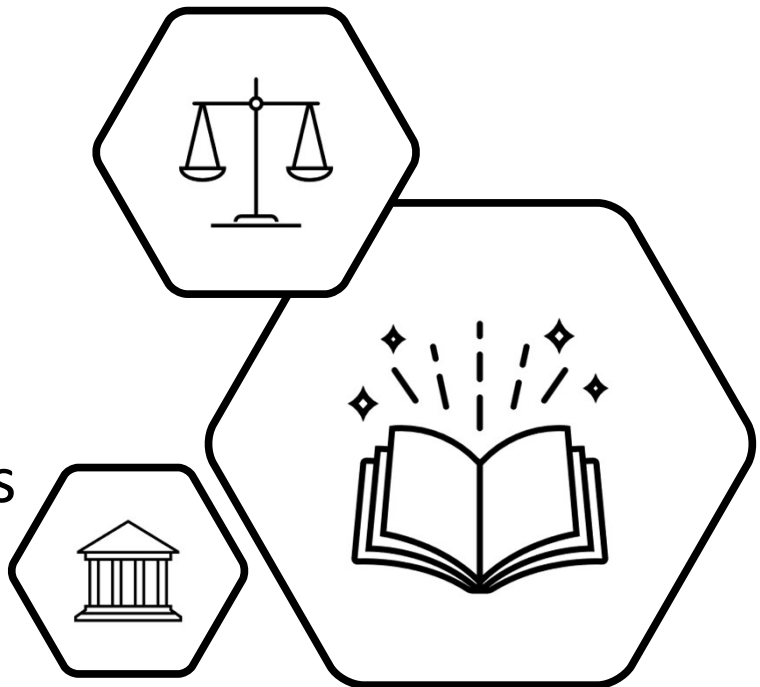
“Notwithstanding the exclusive rights of the owners of copyright,”
section 108 provides that, under certain conditions, it is not an
infringement of copyright for a **library or archives**, or any of their
employees acting within the scope of their employment, **to**
reproduce or distribute works....

Libraries and Archives, 17 U.S.C. §108

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The “rediscovery”
of Section 108
library exceptions
during our closures



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Section 108 Preservation Serving to Increase Access

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Fair use is for everyone, but §108
is only for libraires and archives

§108 manifests Congress' intent to support library and archive work:

Copy, digitize, transform, reproduce, and replicate to serve the greater mission: *preservation and access to our culture*

Whether it's law, textbooks, poetry, manuscripts, art, music, software, and more!

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*Also: §108 is the engine behind
document delivery, preservation,
& interlibrary loan*

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Section 108 Pandemic Lesson?

There are very generous rights
available to libraires and archives
to digitize and distribute works.

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Section 108: A Test & Three Buckets



Library Test

- Qualifications for relying on Section 108



Save It!

- Preservation
- Published & Unpublished
- Sharing



The Scholar's Delight

- Document Delivery
- Interlibrary Loan



"Get Out of Jail Free"

- Share the "Last 20 Years" of Works

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Save It!
...and share it?

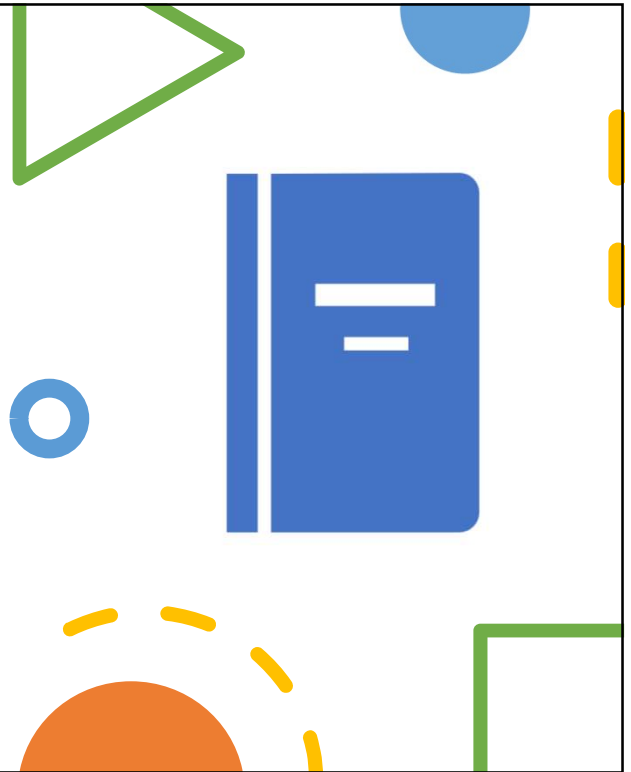
Sections
108(b) & (c)



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Unpublished Works [Section 108(b)]

108(b) outlines the conditions for making up to three preservation copies of unpublished materials that are **rare, unique, hazard of loss, and can't be replaced on open market**



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Unpublished Works [Section 108(b)]

The following conditions must be met:

- §108(b) The copy is **solely for preservation** or security purposes (or for deposit at another library for research); and....
- §108(b)(1) The work is **currently in the collection** of the library making the copy.
- If one of the **copies is digital**, however, that copy may “not [be] made available to the public in that format outside the premises of the library or archives.”

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Published Works [Section 108(c)]

Up to three copies of a published work may be reproduced solely for the purpose of **replacing a copy** that:



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Published Works [Section 108(c)]

- §108(c) The original work is **damaged, deteriorating, lost, stolen**, or in **a format that has become obsolete** and...
- §108(c)(1) The library or archive has, after a reasonable effort, determined that an **unused replacement** cannot be obtained at a **fair price**; and...
- §108(c)(2) access to the **digital copy** must be limited to the “premises of the library or archives” language

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A library or archive serving the
digital copy through the lens of
“premises of the library or archives”
language?

55

Sharing beyond the “premises of the
library or archives?”

- **Digital unpublished** copies §108(b): “is not made available **to the public** in that format outside the premises of the library or archives.”
- **Digital published** copies § 108(c): “is not made available **to the public** in that format outside the premises of the library or archives....”

(*And access to digital copies still could be utilized under a fair
use analysis.)

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Pandemic Access Lesson?

The “*made available **to the public**...outside the premises of the library or archives*” interpretation has been informed by the statute’s language, affirmed by community practice, and advanced by the technology available

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Increasing Access Now

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“Get Out of
Jail Free”

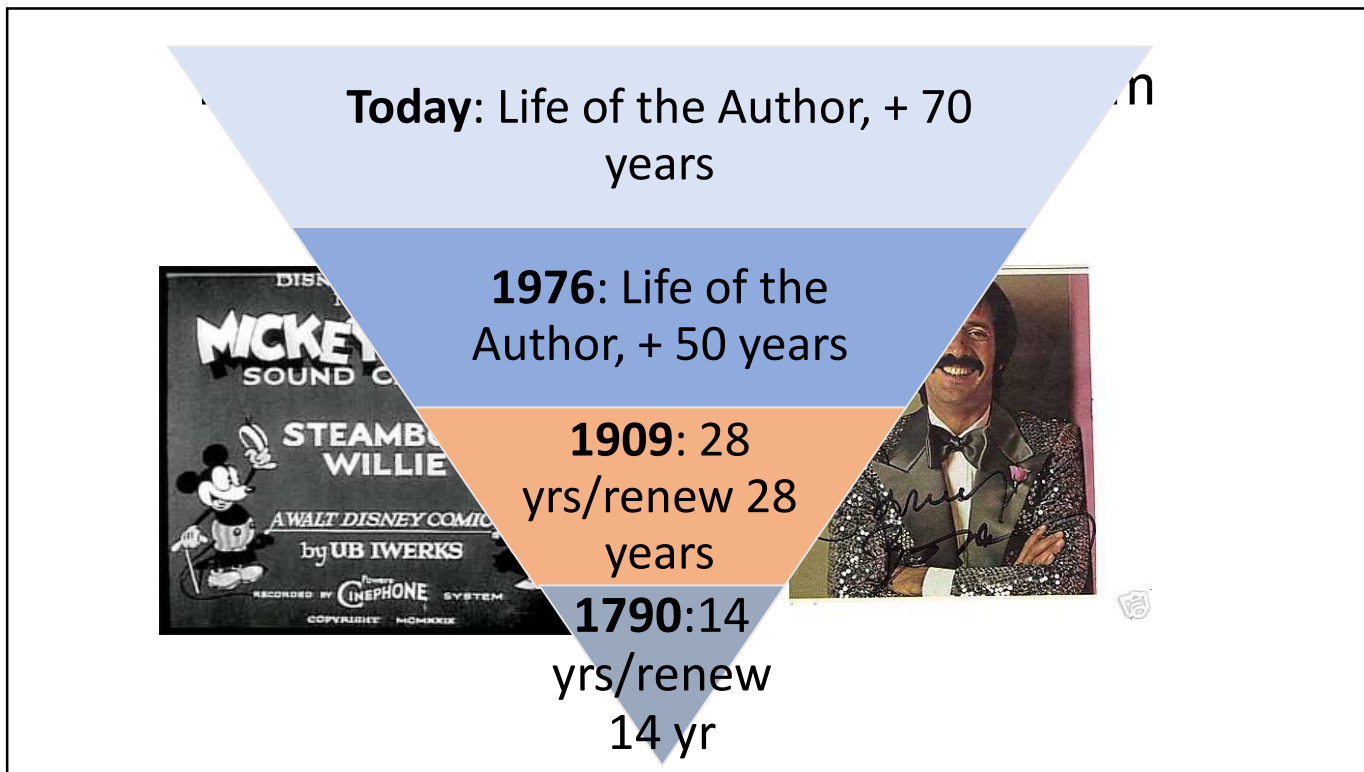
§108(h):
Last 20 Years



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The little used and mysterious §108 (h)

- Libraries may share copies of digitized works that are in the last 20 years of their copyright term.
- **Test:** Libraries should make a reasonable effort to determine that:
 - the work is not subject to **normal commercial exploitation**,
 - a copy cannot be obtained at a **reasonable price**, and
 - the copyright holder has not **filed notice** with the Register of Copyrights that either of the above conditions apply.

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Modern Digital Access

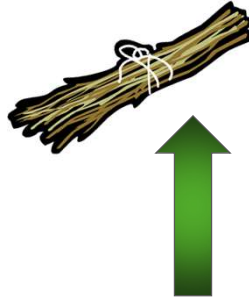
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Exclusive Rights Under © (§106)

- 1) to reproduce the work
- 2) to prepare derivative works
- 3) **to distribute copies of the work***
- 4) to perform the work publicly
- 5) to display the work publicly



66



“Notwithstanding” **section 106(3)** “the **owner of a particular copy** or phonorecord lawfully made under this title is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy”

First Sale, 17 U.S.C. §109

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First Sale Doctrine (§109)

- §109(a) does not require a **sale** – it refers only to a copy being “*lawfully made under this title*”
 - “exhaustion” is the better description
- For a library, archives, museum, or other cultural institutions?
 - *Purchases, donations, acquisitions, bequeathments, etc.*

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First Sale Doctrine

- Entire industries and enterprises are built upon the first sale rights
 - Libraries are permitted to lend copies of printed books that they acquired to patrons
 - Used CD/Record/Book stores sell copyrighted protected works in stores
 - eBay relies on this provision when it permits users to sell copyrighted protected works through its site



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A familiar system?

One acquired copy


→ Checked out to one person at a time
Limited time period, returned
Made available to next person
Repeat

[Without permission from, or more fees paid to, the © holder]

70

Book Loaning Workflow

One acquired copy



Checked out to one person at a time
Limited time period, returned
Made available to next person


Repeat

[Without permission from, or more fees paid to, the © holder]

71

Reserves Workflow

One acquired copy



Checked out to one person at a time
Limited time period, returned
Made available to next person

Repeat

[Without permission from, or more fees paid to, the © holder]

72

Interlibrary Loan Workflow

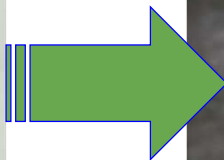
One acquired copy

Checked out to one person at a time
Limited time period, returned
Made available to next person

Repeat

[Without permission from, or more fees paid to, the © holder]

73



74



75



HarperCollins' 26-checkout limit on libraries' ebooks starts today

MARCH 7, 2011 | 2:00 PM



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Macmillan Announces Two-Month Embargo on Library Ebooks

by [Matt Enis](#)

Jul 25, 2019 | Filed in [News](#)



Following a year-long [test with its Tor imprint](#), Macmillan today announced a two-month embargo on sales of new ebook titles to libraries across all of its imprints. Under the new terms, libraries will be able to purchase only a single one-user/one-



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DPLA Agreement Makes Amazon Publishing Ebooks and Audiobooks Available to Libraries

by [Matt Enis](#)

May 25, 2021 | Filed in [News](#)



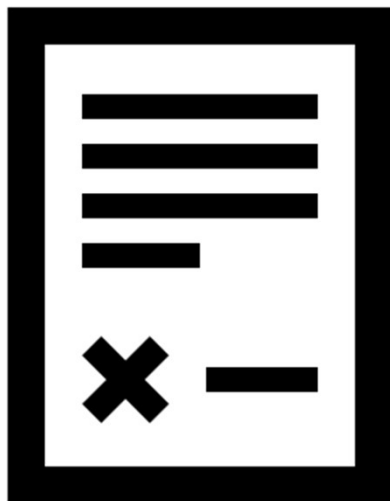
On May 18, Digital Public Library of America (DPLA) signed an [agreement with Amazon Publishing](#) that will make all of the latter's 10,000 ebooks and audiobooks available to libraries via the DPLA Exchange content marketplace. Like all content [licensed](#) through the DPLA Exchange, patrons will be able to access Amazon Publishing titles through the library-developed SimplyE e-reader app. This is the first time that ebooks and audiobooks from Amazon Publishing have been made available to libraries.



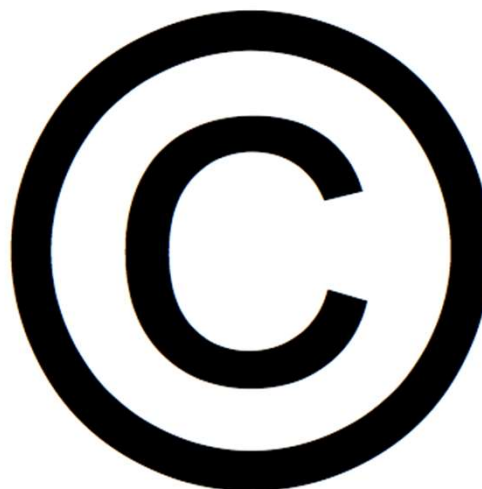
Beginning this summer, Amazon Publishing titles will be available through four licensing models, according to a DPLA announcement:

- Unlimited, one user at a time access, two-year [license](#)
- Bundles of 40 lends, available with a maximum of 10 simultaneously, with no time limit on use
- Bundles of five lends, available simultaneously, with no time limit on use
- 26 lends, one user at a time access, for the lesser of two years or 26 lends

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v.



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AAP THE LEADING ADVOCATE FOR THE MARYLAND LIBRARY COMMUNITY

Lawsuit filed against the State of Maryland by AAP; Court rules eBook law unconstitutional

Maryland's Digital Content Law

A n... license an electronic literary product to the public to also... the State on reasonable terms that would enable public... electronic literary product." The following document sets... believes the Maryland General Assembly meant by "reason... Product Licenses – Access. We invite discussion of... to engaging with all stakeholders.

What are "reasonable terms?"

It is reasonable for digital licenses to be similar: eBooks at 25 cents,

80

New York Legislature Passes Library E-book Bill

New Albany | Jun 11, 2021

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Vetoed by NY Governor because of fear of litigation by the AAP



The New York State Capitol in Albany.

New York is now the second state to pass a bill that would ensure public libraries the right to acquire and lend e-books that are available to consumers in the state.

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Library Futures Ebook Bills are on the Move



Juliya Ziskina

Library Futures Releases Policy Statement and Draft eBook Legislative Language: Mitigating the Library eBook Conundrum Through Legislative Action in the States



Kyle K. Courtney

Librarians and Lawmakers Push for Greater Access to E-Books

STATELINE ARTICLE | September 6, 2022 | By: Caitlin Dewey | Read time: 6 min

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If we don't act, end result?
Libraries turn into Netflix.

Rent/lease eBook materials; we
don't own them; we can't keep
them.

83



How can libraires prevent
“swapping out the library
card for a credit card?”

84



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Copyright and Access in the Remote Digital Era

Kyle K. Courtney, Esq.

Director of Copyright and Information Policy
Harvard Library

Engelberg Center on Innovation Law & Policy Fellow
NYU Law

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