



Copyright and Digital Library Lending

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Outline

- Basics
- First Sale Doctrine – Section 109
- Fair Use – Section 107
- Reproduction in Libraries – Section 108
- TEACH Act and Public Performance – Section 110

Basics

- Copyright – distinct part of “Intellectual Property” law
 - Patent
 - Trademark
 - Contract/Licensing
- Only applies to expression of ideas, not the idea itself
- Requires it be in a “fixed, tangible format”
- Bundle of Rights, for redistribution
- Exceptions within copyright law to enable certain activities

Basics

Effects of Licenses

- License always supersedes any of these exceptions
- License agreements may specifically exclude notions of fair use, reproduction, or other laws
- If we sign a license that does any of these things it means that we must comply with the terms of that license

First Sale Doctrine – Section 109

- If a copy of a book, CD, DVD, etc. has been legally obtained, then it is OK to lend that book to a limited audience
- Does not apply to software

First Sale Doctrine – Section 109

Controlled Digital Lending

- Some argue that the first sale doctrine should apply to digitized copies
 - If a library makes a digital copy of a book
 - Does not lend its print copy
 - Lends electronic copy same way it would print copy
 - only one person can use it at a time
 - Can only borrow for limited period of time

First Sale Doctrine – Section 109

Controlled Digital Lending

- This is not written in the law
- Argument that some libraries, lawyers, and other groups are making that controlled digital lending is a natural extension of the first sale doctrine

First Sale Doctrine – Section 109

Controlled Digital Lending

- During the pandemic, the Internet Archive used this argument to create its National Emergency Library
- Took argument a bit further than others
- HathiTrust, for instance, more limited

First Sale Doctrine – Section 109

Internet Archive Case

- How far can First Sale Doctrine be applied?
- How does First Sale Doctrine affect licenses?
- Publishers often license e-content differently from print content
- Courts tend to favor market solutions

First Sale Doctrine – Section 109

Internet Archive Case

- So far there have been no injunctions or other orders from the court
- Nothing has changed as of yet

Fair Use – Section 107

- the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
- the nature of the copyrighted work
- the amount and substantiality of the portion used in relation to the copyrighted work as a whole
- the effect of the use upon the potential market for or value of the copyrighted work.
- <http://fairuse.stanford.edu/>

Reproduction in Libraries – Section 108

- Librarians working within scope of employment can make one copy and distribute it (for purposes of ILL, etc.)
- Can make 3 copies for purpose of preservation

Reproduction in Libraries – Section 108

- No direct or indirect commercial advantage
- Library collections open to public (or open to persons doing research in a specialized field)
- Reproduction includes a notice of copyright
- Copy of work is currently in collections of library

Reproduction in Libraries – Section 108

- If in digital format it is not made available outside the premises of the library
- The library has made a “reasonable effort” to obtain a copy at a fair price
- The copy becomes property of user, and the library has no reason to believe the user will violate copyright

Reproduction in Libraries – Section 108

- Does not apply to photographs, recordings, works of art, etc.
- Does not apply if work can be commercially exploited
- Does not apply if a copy can be obtained at a reasonable price
- Does not apply if copyright owner provides notice to “cease and desist”

Section 110 - TEACH Act

- “Public Performances” of copyrighted work
- The institution must be an accredited, non-profit educational institution.
- The use must be part of mediated instructional activities.
- The use must be limited to a specific number of students enrolled in a specific class.

Section 110 - TEACH Act

- The use must either be for ‘live’ or asynchronous class sessions.
- The use must not include the transmission of textbook materials, materials “typically purchased or acquired by students,” or works developed specifically for online uses.

Section 110 - TEACH Act

- Only “reasonable and limited portions,” such as might be performed or displayed during a typical live classroom session, may be used.
- The institution must have developed and publicized its copyright policies, specifically informing students that course content may be covered by copyright, and include a notice of copyright on the online materials.

Section 110 - TEACH Act

- The institution must implement some technological measures to ensure compliance with these policies, beyond merely assigning a password. Ensuring compliance through technological means may include user and location authentication through Internet Protocol (IP) checking, content timeouts, print-disabling, cut and paste disabling, etc.

Conclusions

- Even if Internet Archive case does not favor extension of controlled digital lending, does not preclude our use of sections 107, 108, or 110
- For discussion of future options we really need to consider all of these copyright sections in light of all of our lending activities both print and electronic



Thank you & Questions/Discussion

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