Can I digitize it?

- Public Domain?
- Section 108?
- Fair Use?
- Permission
How do libraries legally do what we do?

Libraries and Archives in the Law

- **Special Allowances for Reproduction**
  - Section 108: *Limitations on exclusive rights: Reproduction by libraries and archives*
  - Section 109: *First Sale*
  - Section 107: *Fair Use*
  - Section 504(c): *Remedies for Infringement*
  - *Digital Millennium Copyright Act (DMCA)*
The Many Faces of Library/Archive Digitization

- **Preservation**
- **Data production and analysis***
  - Searching books, testing search algorithms, computational linguistics, automated translation, natural language processing, macro-analysis of text
- **A platform for display and distribution of individual works**
  - Disabled access*
  - Scholarly access
  - General access

Library Copyright Super Powers:
§108 Exception for Libraries/Archives

- Permits archives and libraries to reproduce © works w/out permission in some situations
- For example, under certain circumstances, library staff can make copies for preservation [§108(b)] or to replace damaged or stolen works [§108(c)]
Library Copyright Super Powers:
§108 Exception for Libraries/Archives

- Archivists can make copies for a patron, reproducing single articles for “private, noncommercial use” or reproducing an entire work where a replacement copy cannot be found for a fair price [§ 108(e)]
- Permits lending of reproductions of copyrighted works to users in other libraries for private, noncommercial use [§ 108(a), (d)]

Library Copyright Super Powers:
Limited Liability §108(f) Exemption

- Nothing in the provision “shall be construed to impose liability upon a library or archives or its employees for the unsupervised use of reproducing equipment located on the premises”
- So long as the “equipment displays a notice that the making of a copy may be subject to the copyright law.”
Library Copyright Super Powers: §108(f) Exemption

- If the library places a © notice on any type of photocopier/scanning machine, → avoid liability for infringements

- Use is *not supervised* by staff.
  - User liability?

- Cost of compliance (stickers); Benefit (potentially enormous © judgment)
§108 Exception for Libraries

- However, the exemptions of section 108 for library copying under sections 108(d) and 108(e) do not apply to a *musical work*, a *pictorial, graphic or sculptural work*, or to a *motion picture or other audiovisual work* ...

- [Except for] pictorial or graphic works published as illustrations, diagrams, or similar adjacent to works.

The little used and mysterious §108 (h)

- Libraries may copy or digitize 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.
Digitization Rights under Section 108

You can digitize collections!
- For “purposes of preservation and security”
- For deposit in another library
- For scholarly use by a patron....

Access limited to “premises”- What does premises of the library mean in the modern context?

20 year window on digitization = During last years of copyright...

Last point....

- Digitization rights provided to libraries and archives under section 108 do not extend to musical, pictorial, graphic, or sculptural works, or to motion pictures or other audiovisual works....

- VHS, music CD’s, art and photography books, DVD’s, etc. are excluded...
  - Often under copyright....
  - But, determine the risk...
Exclusive Rights under ©

- The exclusive rights of the copyright owner include the right:
  - to reproduce the work
  - to prepare derivative works
  - to distribute copies of the work*
  - to perform the work publicly
  - to display the work publicly

First Sale Doctrine

- The principal exception to the distribution right is found in §109

- **U.S. Law**: The “first sale” doctrine
- **Worldwide**: The “exhaustion” doctrine
First Sale Doctrine

- The term first sale focuses on whether there has been a *first, authorized* sale of a particular copy; if so, the copyright owner may *not* prevent subsequent sales.
- Name stems from the “exhaustion” of the copyright owner's right to control distribution of a lawfully made copy once there has been an authorized distribution.

First Sale Doctrine

- Section 109(a) does not require a sale – it refers only to a copy being “*lawfully made under this title,*” and because the principle applies when copies are given away or are otherwise permanently transferred without the accoutrements of a sale, “exhaustion” is the better description.
Who owns your copy of *The Sun Also Rises*?
- Wrinkled paperback copy that you purchased in your college bookstore

**You do, under © law**

First Sale Doctrine

- Entire industries and enterprises are built upon the first sale rights
  - Libraries were permitted to lend to patrons copies of printed books that they acquired.
  - Codified in the Copyright Act (§ 109)
    - 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
Warm-up: Mark Twain & Copyright

- 1885: Samuel Clemens (Mark Twain) sues book sellers who offered lawfully made copies at less than the set subscription price.
- In *Clemens v. Estes*, a district court in Massachusetts held that in the absence of a contractual restriction...
  - “the defendants had the right to buy books from agents who lawfully obtained them by purchase from the plaintiff or his publishers, and had a right to advertise for sale and to sell such books at any price they saw fit.”
The book in question, *The Castaway*, had a notice on the copyright page that read:

“The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price” or grounds for infringement.

Bobbs-Merrill Co. v. Straus (1908)

- **Held:** Copyright owner could not enforce price limits on downstream sales of its book.

- But, the Court recognized that if a *license agreement existed*, the analysis would, potentially, be different...
ILL and 108

- Section 108(g) attempts to balance the interests of publishers and libraries regarding interlibrary loan arrangements.

Publishers and 108 ILL

- During the years preceding amendment of the copyright law in 1976, publishers lobbied hard for strongly worded clauses.
- Libraries, fairly certain that such language would prevent normal and customary ILL arrangements, lobbied hard for additional language.
108(g)(1) & (2)

- Section 108. Limitations on exclusive rights: Reproduction by libraries and archives

- (g) The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee--
  - (1) is a ware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group or
  - (2) engages in the systematic reproduction of distribution of single or multiple copies or phonorecords of materials described in subsection (d): ...

Libraries fight back!

- Section 108(g) proviso [the last clause in Section 108(g)(2)]:
  - Provided, that nothing in this clause prevents a library or archives from participating in interlibrary loan arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.
CONTU Answers (and confuses)

- The members of the National Commission on New Technological Uses of Copyrighted Works ("CONTU") negotiated guidelines that described what amounts of copying would substitute for a subscription to or purchase of such work, a critical measurement in the balance.
- The CONTU Guidelines is better than their “Classroom Guidelines” counterparts...

Odd CONTU Rules

- If the work is not a periodical (i.e. book), the library may make five requests per year for the “entire life of the copyright.”
- The guidelines also state that the borrowing library should maintain records for 3 years.
- Borrowing libraries should verify that the request conforms to the guidelines.
- The lending library's responsibility is to require a “certification” that the photocopy request conforms to the guidelines and not to fill requests that clearly violate the guidelines.
  - Note, however, there is no record-keeping responsibility on the lending library.
Requesting

-- a copy of an entire book:

As requesting party, the library must comply with Sections 108(e) & (g):

 ✓ Determine that a copy cannot be obtained at a fair price;
 ✓ The copy must become the property of the patron;
 ✓ The library should have no notice that the copy will be used for a purpose other than private study, scholarship or research;
 ✓ The library should both display and have on its order form a "Warning of Copyright."
 ✓ The library must not be aware or have substantial reason to believe it is engaging in related or concerted reproduction or distribution of multiple copies of the same material;
 ✓ Since the CONTU Guidelines do not apply to copies of entire works, the library must state that it has complied with copyright law (not both copyright law and CONTU).

Requesting

...a copy of an entire journal issue

As requesting party, the library must comply with Sections 108(e) & (g) and the CONTU Guidelines:

 ▪ Determine that a copy cannot be obtained at a fair price;
 ▪ The library should have no notice that the copy will be used for a purpose other than private study, scholarship or research;
 ▪ The library should both display and have on its order form a "Warning of Copyright."
 ▪ The library must not be aware or have substantial reason to believe it is engaging in related or concerted reproduction or distribution of multiple copies of the same material;
 ▪ Since the CONTU Guidelines apply to periodicals, the library must make its request with a representation that it has complied with copyright law and the Guidelines;
 ▪ The library will pay royalties on any copy that exceeds the "suggestion of five;"
 ▪ The library will maintain its records of the request for three years.
**Requesting**

-- a copy of an article from a journal issue or a small part of another work.

As requesting party, the library must comply with Sections 108(d) & (g) and the CONTU Guidelines:

- The copy must become the property of the patron;
- The library should have no notice that the copy will be used for a purpose other than private study, scholarship or research;
- The library should both display and have on its order form a "Warning of Copyright."
- The library must not be aware or have substantial reason to believe it is engaging in related or concerted reproduction or distribution of multiple copies of the same material;
- Since the CONTU Guidelines apply to periodicals and small parts of other works, the library must make its request with a representation that it has complied with copyright law and the Guidelines;
- The library will pay royalties on any copy of a periodical article that exceeds the "suggestion of five;"
- The library will maintain its records of the request for three years.

**Responding to...**

-- a request for a copy of an entire book.

- Most everyone believes that the supplying library in an IL transaction has no responsibility for compliance with copyright law. It's the requestor who has to do that. In the case of an entire book, there's no obligation on either side to comply with the CONTU Guidelines. So, all that's needed here is to require the appropriate statement of compliance from the requestor.

-- a request for a copy of one or more articles from a journal issue or a small part of a book.

- As responding party, the library only has responsibility to request a statement from the requestor of compliance with the law and the CONTU Guidelines, since the Guidelines apply to articles.
CONTU is law....?

- CONTU is not law.
- It is a cluster of recommendations made by a commission appointed by Congress.
- The commission was not supposed to make law, but interpret judicial decisions to make easy-to-follow guidelines.
- It has more weight than your average guidelines because of the commission – but again, they offer guidance, not law.

CONTU is law....??

- The "law" of ILL is in Section 108
- Libraries are allowed to engage in ILL arrangements, so long as the arrangements "do not have, as their purpose or effect, that the library or archives receiving such copies ...for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work."
ILL, Databases, Contracts

- Libraries increasingly license access to electronic works they previously acquired exclusively in analog form.
- General Rule: most licensors of electronic databases do not permit IL or document delivery from their digital materials.
  - Best practices for licensing: ILL, preservation, document delivery and ADA clauses.

108 Reform: 2016

- U.S. Copyright Office is putting forth a recommendation for reforming 108
  - It’s an “analog statute”
  - Confusing, too difficult to understand
  - “Premises of library,” “fair price,” “normal commercial exploitation,” and other language
  - Worried about “security” or digital copies escaping (piracy)
  - Etc.
Wrong.

- Fairly simple statute
- Similar statutes in other jurisdictions
- Might be outdated as to number of copies, and “virtual” premises of the library, but otherwise language is clear
- Our library super-power – don’t mess about!
- Preservation exceptions are necessary for libraries and archives, publishers don’t have the same mission
- Add museums and cultural institutions

Copyright Superpowers of Libraries and Archives (Part II)

- 17 USC 504(c)(2): The court shall remit statutory damages in any case where an infringer believed and had reasonable grounds for believing that his or her use of the copyrighted work was a fair use under section 107, if the infringer was:
  - (i) an employee or agent of a nonprofit educational institution, library, or archives acting within the scope of his or her employment....
Copyright Superpowers of Libraries and Archives (Part III)

- §108 Libraries and Archives (Copying, ILL, Preservation, etc.)
- DMCA – take down notice and policy
- Pre-requisite for filing copyright infringement suit
- Fair Use (the more transformative, the better)
- Orphan Works

Can I digitize it?

1. **Start**
   - Public Domain?

2. If no
   - Section 108?

3. If no
   - Fair Use?

4. If no
   - Permission
What are we really talking about?

RISK

72%

Yes

28%

No

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http://kylecourtney.com/

http://scholar.harvard.edu/kcourtney