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copyright in the library

The digital library

The distinction between a library and a digital library has all but disappeared-- at least to our patrons! Most libraries are both today, and most patrons can access everything but a book on a shelf through the Internet. Still, from a legal perspective, the rights we use to provide access to books on shelves and to provide access to electronic resources are different. This article explains the legal underpinnings of providing access to (what used to be called lending) digital materials.

How does a library *legally* lend books and periodicals

Section 109 permits the owner of a lawfully made copy to dispose of it by lending or any other means. This is called the First Sale Doctrine because it permits copyright owners to control only the first sale of a work. After that first sale, copyright owners are out of the loop when it comes to earning a share of any revenues that result from passing the book or periodical on to others. This is the basic legal foundation of our public library system. It also allows book owners to sell their books at garage sales without permission from or payment to the copyright owner.

This right to dispose of a copy does not include the right to make more copies. If copies must be made to facilitate lending, they are typically authorized by other sections of the law, such as Sections 107 or 108, or by the copyright owner. Currently, libraries make copies of print materials in order to lend them to other librarian's patrons in interlibrary loans. They also make copies for their own patrons (research copies and reserve copies) and for archival purposes (preservation and replacement). The right to make copies under Sections 107 and 108 in the print environment is thus subsidiary to the more fundamental lending right under Section 109. Copies help us to lend.

Lending in the digital library

The publishing and entertainment industries believe that the distribution right libraries enjoy under Section 109 for print works should not exist for electronic works because electronic distribution **requires** that a copy be made. That copy must be authorized somewhere else in the law or by the owner before it can be made and distributed. The Digital Millennium Copyright Act ("DMCA") reflects this belief. It modified Section 108 to authorize making digital copies for archival and preservation purposes, but that's as far as the changes went. The right to distribute such a digital archival or replacement copy of an analog work still requires authorization, according to the changes made to Section 108, and it's not all that clear whether Section 107 (and other sections as appropriate) may be relied upon for such authorization.

Instead of assuming that making a digital copy requires independent authorization, Congress could have taken the position that the copies made in the course of a legal transmission (a legal lending, as it were) were "incidental" and that copies incidental to the legitimate exercise of the distribution right should be fair use. There was some support in case law for this.¹ Nevertheless, that's not what Congress did. The DMCA archiving and replacement amendments are pretty clear evidence that Congress did not accept this argument.

Different authorization for licensed and unlicensed works. But in fact, depending on the statutes for authorization to distribute digital works does not in practice pose a problem in many cases because **most digital works are licensed** and the license provides permission to distribute such works. For example, many licenses will:

- permit limited access (ie, only registered students, faculty and staff; or only from a particular machine or machines; or only in a particular place; or only from a particular domain name or names);
- not allow the library to keep a copy of the works when the license is terminated or expires;
- attempt to limit users' copies and transmissions of the works;
- permit multiple-institution (consortial) access at a higher price.

Contractual agreements are replacing copyright law's access provisions in the digital library. They are the immediate source of authority to archive, use and distribute digital works. This fact should alert us to pay attention to such contracts and **carefully negotiate their terms**. But for works in the library that we digitize ourselves, that are not made available digitally by their owners, we still need legal authority to allow us to distribute them. We've got the right to make digital copies, under certain circumstances, but we have to look to other provisions to provide convenient access to those copies to our patrons.²

Works digitized by or for libraries. So, libraries have the right to distribute works acquired digitally pursuant to contracts, and to create but not to distribute digital archival and replacement copies under Sections 108(b) and (c), and for some time have had the right to distribute digital copies of any work requested pursuant to Sections 108(d) and (e) (patron requests), unless excluded by Section 108(i) (that would be musical and artistic

works). But for mass digitization projects, including projects such as Google Book Search, our only source of authority to distribute the works we have digitized ourselves or that have been digitized for us is either fair use, the TEACH Act, or permission from the copyright owner.

Fair use has become stretched so far, because it's all that makes sense in so many cases. Nevertheless, this is a reasonable argument: If we possess a legal digital copy, that is, a copy made pursuant to Section 108's authorization, or as a fair use, we can use the copy for fair uses also. So, for example, if we have a book that's out of print and a faculty member wants to put a chapter from it within his Blackboard or other course management system, assuming that such a use is a fair use, the library's digital copy can be used for this fair use purpose.

I have provided more information about what kinds of uses are authorized for classroom use in [The TEACH Act](#).

Our digital copy could also be used to provide access to a work for which we got specific permission to make it available to our patrons. In the fair use example above, if you assume that the use described is not fair (or imagine another use that you think is not likely fair), you might be able to obtain the copyright owner's permission through the [Copyright Clearance Center](#). With that permission, your use of the digital copy has all the authorization for distribution that it requires. You're set.

Footnotes:

1 *Sega Enterprises, Ltd. v. Accolade, Inc.* 977 F.2d 1510 (9th Cir.1992); the Ninth Circuit found that intermediate copying that was a necessary step in an otherwise lawful activity (making a competing but non-infringing software product) was a fair use.

2 The archive right is discussed more fully in [Library Reproduction: Archiving](#).

The subjects in this series include:

Fair Use (Section 107)

- Reserving works for limited use, generally
- Print copies in the reserve room
- Reserve rooms for images, audio and audiovisual works
- Providing access to electronic copies
- Library copying for patrons and for the library's collection

Library reproduction and distribution (Section 108)

- Archiving
- Patron requests
- Unsupervised copying, news programs and contractual limitations on acquisitions
- Interlibrary loan

Other

- Scholarly communication
- The digital library
- [Licensing access](#)
- [Is your library an Internet service provider under the DMCA?](#)

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