

# Librarian Superpowers: Inter-Library Loan, Preservation, Digitization, Fair Use & More!



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# You are all Writers...

- But, do you own a copyright?



copyright



# And... what is a copyright?

- A bundle of rights provided to authors . . . with an end date.



# Requirements to own a copyright:

- **Create** something in writing, music, video . . . [creativity]
- Write it down or **record** it . . . [fixation]
- After 1989, that's it. You've got a copyright! [length is generally life of the author + 70 years]

# So...what rights do you have?

- Reproduction
  - Distribution
  - Derivatives
- Absolutely necessary for publishing
- Arguably necessary for publishing (at least a subset of derivative rights)
- Performance
  - Public display
- Mostly come into play for creative works

The right to license any of the above to third parties

## Copyright protects...

- Writing
- Choreography
- Music
- Visual art
- Film
- Architectural works  
(as of Dec 1 1990)

## Copyright doesn't protect...

- Ideas
- Facts
- Names, titles, slogans, or short phrases (could be Trademark)
- Data
- Useful articles (that's patent)

# Who owns the copyright?

- The author, of course. The person or people who created the work—except for a work made for hire (then the employer owns the work)

**If joint authors, then each owner has an equal, undivided interest in the copyright.**



# What work is in the public domain?

First, what does the “public domain” mean?

Work published in the United States pre-1925 is in the public domain

Work published in the United States between 1925 and 1963 may be in the public domain for failure to comply with copyright formalities...





# Why can libraries loan books at all?

- The Right of First Sale

## Kirtsaeng case

- In that case, a student from Thailand bought textbooks in Thailand and sold them in the US for a profit.
- He made millions!
- Publishers sued... who won???
- Right of First Sale (Copyright Act Section 109)

# Slavish Copies

- If you, librarian, make a “slavish copy” of a public domain work, you do not create a copyright in that copy!
- Why not? (hint, think of the requirements for a copyright: originality and fixation)
- What’s missing here?

## Section 108(a)

(a) . . . it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work . . .if:

- (1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

## Section 108(b)

Librarians can make up to three copies of an unpublished work solely for purposes of preservation or for deposit in another library or archives that is open to the public or available to people doing specialized research if:

- (1) the copy is currently in the collection for the library/archives; and
- (2) any copy reproduced in digital format is not distributed outside of the premises of the library/archive.

## Section 108(b)

This boils down to a fairly broad right to make reproductions of unpublished work for preservation, but the digital copy cannot be sent (for instance) via e-mail.

Individuals wishing to view the digital copy must come to the physical location of the library/archive.

## Section 108(c)

A library/archive may make up to three copies of a published work duplicated solely for the purpose of replacement of a copy that is damaged, deteriorating, lost or stolen, or if the existing format in which the work is stored has become obsolete if:

- (1) the library/archives has, after a reasonable effort, determined that an unused replacement cannot be obtained at a fair price; and
- (2) any copy that is reproduced in digital format cannot be made available to the public outside the premises of the library.

# What does Digital Format mean?

- In Section 108, there were some questions relating to the following:

What does it mean to make a “digital copy” and does photocopying count?

No. A single photocopy = analog copy

Digital means a scan of the document or sending the photocopy via email.



# What does physical premises mean?

- What does “physical premises” mean in Section 108?

This is part of the problem with the analog/digital divide. Today, we think of the library as the entire system, which you can log in to off site, but at the time of enactment of Section 108, it was the physical building.

## Section 108(c)

- The law further notes that "a format shall be considered obsolete if the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace."

# Discussion!

- Are the following technologies obsolete pursuant to 108(c):
  - VHS tapes
  - floppy discs
  - undeveloped photograph film
  - microfiche reels
  - record players (thanks millennials!)

## Section 108(c)

- Again note the restriction on viewing the digital copy on premises.
- There are many debates about what constitutes a "fair price" for an unused copy, but generally, librarians should use good judgment.

# Inter-Library Loan Section 108(d)

The rights of reproduction and distribution ... apply to a copy, made from the collection of a library or archives where the user makes his or her request or from that of another library or archives, of no more than **one article** or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of **a small part** of any other copyrighted work, if:

- (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship, or research; and
- (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright ....



# 108(d) continued

- Note that only a small part of a portion of a book may be copied
- Note that this should be for the private study, scholarship or research use by the user (not commercial use)
- Note that the request should come through a user or another library or archives
- Note that copies for users cannot be made from musical works; pictorial, graphic, or sculptural works; or motion pictures or other audiovisual works
- Note that this applies to both published and unpublished works

# Section 108(e)

- The rights of reproduction and distribution ... apply to the **entire work**, or to a substantial part of it, made from the collection of a library or archives, if the user makes his or her request or from that of another library or archives, *if the library or archives has first determined, on the basis of a reasonably investigation, that a copy or phonorecord of the copyrighted work cannot be obtained at a fair price*, if:
  - (1) the copy or phonorecord becomes the property of the user, and the library or archives has had no notice that the copy or phonorecord would be used for any purpose other than private study, scholarship or research; and
  - (2) the library or archives displays prominently, at the place where orders are accepted, and includes on its order form, a warning of copyright ....

## Section 108(e) continued

- ❑ The entire work may only be provided if, after reasonable investigation, it appears that a copy of the work cannot be obtained at a fair price
- ❑ Similarly, this may be for both published and unpublished works and does not apply to musical works; pictorial, graphic or sculptural works; or motion pictures (audio visual works)



# Hypotheticals for Discussion

Can the library make a digital copy of a published (still in copyright) article about the demotion of Pluto as a planet from its collections for a user for the purposes of private study, scholarship, or research?

- Can the library put the digital copy on the library webpage?

## Another example

The library wishes to make a copy of an unpublished archival document as it is the only one the library has. Can it?

What can the library do with the photocopy?

- Let folks view it in the library?
- Let folks make a photocopy of it?
- Scan it and make it available on the library website?

## BUT, remember

- Section 108(d) and (e)—inter-library loan—  
don't mention the digital/physical premises  
issue!
- And, you always have fair use!



## Section 108(f)

- Nothing in this section “in any way affects the right of fair use as provided by section 107”
- In other words, fair use can operate in conjunction with Section 108 rights.

## Section 108(h)

- If a published work is in the last 20 years of its copyright term and it is not reasonably commercially available (i.e. out of print), a library/archive may reproduce, distribute, display or perform in facsimile or digital form a copy of the work.

\*maybe you've heard about the project to digitize works in the last 20 years by law prof.

Elizabeth Townsend Gard & the Internet Archive

# Section 108 Reform!

- This has been going on since 2004
- The US Copyright Office released a discussion document in Sept., 2017
- Proposed a new Model Statute for Section 108
- No indication that this will happen too soon, though

# Using Others' Work

- Here are some avenues for legally using others' work in your own work:
  - (1) Public Domain
  - (2) Creative Commons Licensing
  - (3) Copyright Exceptions
  - (4) Fair Use
  - (5) Asking for (and receiving) permission from the copyright owner

# What isn't protected by copyright?

- Works that have fallen into the public domain:
  - Works published in the US pre-1923
  - Works designated as part of the public domain by license (creative commons licenses, which we will discuss in a bit)...
  - Some works between '23-68
- Work produced by the US government



# Creative Commons Licenses

## The Licenses



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# Copyright Exception for Teaching

- Section 110: Face-to-face teaching

This exception permits the performance and display of audiovisual and images for face-to-face classroom use, so long as the material was obtained from a legal source



# FAIR USE 17 USC Section 107

Preamble to Section 107: “the fair use of a copyrighted work . . . for purposes such as criticism, comment . . . teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”

# Fair Use Factors

“In determining . . . fair use the factors to be considered shall include—

- (1) purpose and character of the use, including whether such use is . . . for nonprofit educational purposes;
- (2) nature of the copyrighted work;
- (3) amount and substantiality of the portion used . . . ; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”

# Factor 1: Purpose & Character of the Use

Commercial versus Educational Use



# Factor 2: Nature of the Work

unpublished/creative versus published/factual



# Factor 3: Amount/Substantiality Used

entire book copied/heart of work copied versus small amount copied



# Factor 4: Effect on Market for Original Work

Replaces marketplace for original work versus substantially different than original work





# Factor 1+

## Transformative Use

A transformative use is one that **alters the original work "with new expression, meaning or message . . ."** *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 579 (1994).

# As my colleague Kevin Smith says...

- Courts generally look at:
  1. Does the use transform the material by using it for a different purpose?  
&
  2. Was the amount taken appropriate to the new purpose?

## Some specific examples

- The transformative factor was first explained in a case involving a parody of the lyrics to “Pretty Woman.”
- The Supreme Court explained that a parody, not a satire, is a fair use.
- Can someone explain the difference between parody and satire?

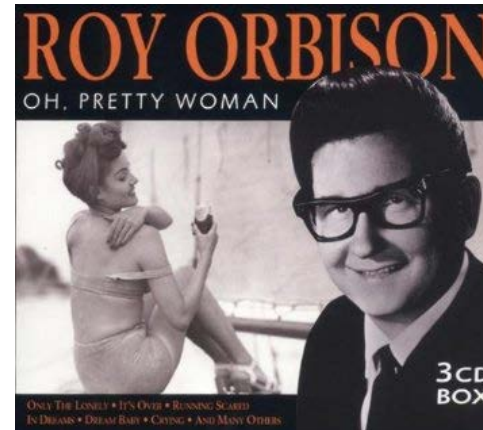
# Parody versus Satire

“[T]he heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works.”

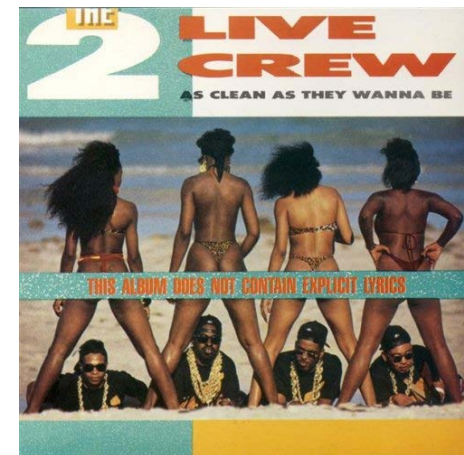
*Campbell v. Acuff-Rose Music*, 510 U.S. 569, 580-81 (1994).

# Transformative Use Example

- 1) Roy Orbison:  
 Pretty Woman Lyrics  
*“Pretty woman”*



- 2) 2 Live Crew:  
 Parody of “Pretty Woman”  
*“Big Hairy Woman”*



# Pretty Woman Parody

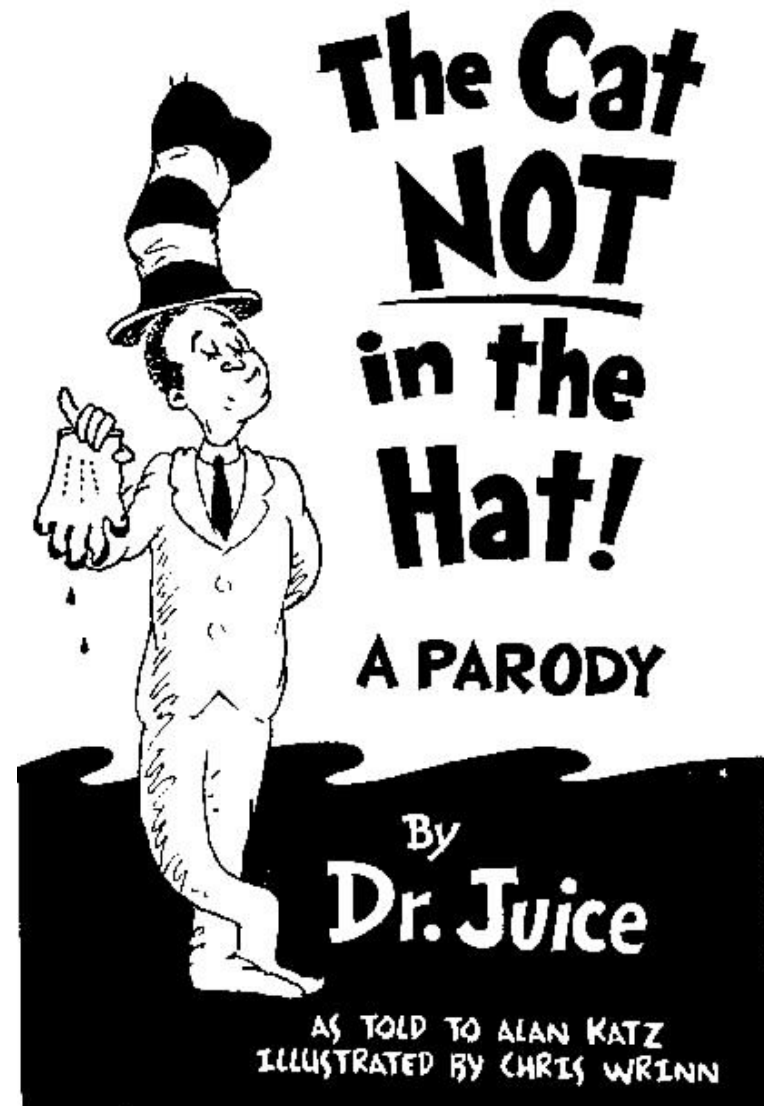
- Original Lyrics: “Pretty Woman, walkin’ down the street, pretty woman, the kind I’d like to meet . . .”
- New Lyrics: “Big hairy woman, you need to shave that stuff. Big hairy woman, you know I bet it’s tough.”
- Why is this a parody and not satire?

## Parody?

The Cat Not in the Hat  
*OJ Simpson murder trial*

*You be the judge! Is it:*

- (a) Parody (fair use)
- (b) Satire (not fair use)



# Cariou v. Prince





## But, some courts are “over it”

But, the Second Circuit in *Cariou v. Prince* explicitly said:

“Prince's work could be transformative even without commenting on Cariou's work or on culture, and even without Prince's stated intention to do so.”

- 714 F.3d 694, 707 (2013)

# So, now what is the test?

If not in the world of parody,

Back to the original language: “A transformative use is one that alters the original work ‘with new expression, meaning or message . . . .’”

# Transformative Use Example

- 1) Purpose of the original posters:

*Advertise Concerts*

- 2) Purpose of posters embedded in book:

*Historical Context*



## Moral of the story?

- You can use your fair use rights even if you asked for permission and someone told you “no.”

# Transformative Use?

The HathiTrust digital library inputs entire digital copies of books and other materials. For © works, the general public cannot see the entire book, but can search for how many times a specific “term” is used in that work.

Transformative use?

(a) Yes

(b) No



HATHI  
TRUST

# Transformative Use Example

1) Purpose of original materials:



*Communication*

2) Purpose of HathiTrust term numbers:

*Research*



# Moral of the fair use story?

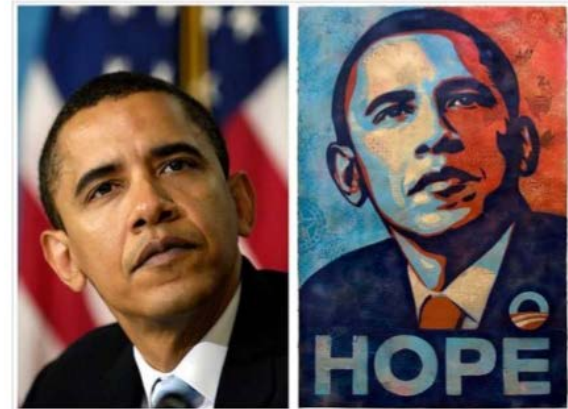
- Even using the entire work and making multiple copies of the work can constitute a transformative fair use.

# Transformative Use?

- In interviews Fairey said that it was one he had found on the Internet. Bloggers, including the Manhattan gallery owner James Danziger, pursued several leads until, according to the lawsuit, Tom Gralish, a [Pulitzer Prize](#)-winning photographer for The Philadelphia Inquirer, helped track down a photo by Mr. Garcia that showed Mr. Obama sitting beside the actor [George Clooney](#) at a 2006 event about Darfur at the National Press Club.



- “I don’t condone people taking things, just because they can, off the Internet,” Mr. Garcia said.
- Mr. Fairey decided to create the image on his own before contacting the Obama campaign, which welcomed it but never officially adopted it because of copyright concerns.







# Thank You!

You can always e-mail me at:

[srbenson@Illinois.edu](mailto:srbenson@Illinois.edu)

Check out my library guides at:

[guides.library.Illinois.edu/](http://guides.library.Illinois.edu/)

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