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## Copyright, Pandemics, and Emergencies: When Desperate Times Dictate Contextual Responses

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# Copyright, Pandemics, and Emergencies: When Desperate Times Dictate Contextual Responses

Caroline L. Osborne\*

## ABSTRACT

This article explores fair use, the library exception, the first sale doctrine, and controlled digital lending as responses to copyright in the context of permitting libraries to digitize materials existing exclusively in print in their collection for use in teaching, research, and scholarship by students, faculty, and other patrons. Also included is a decision matrix to be employed as a tool for analysis in making the decisions as to digitization of print resources in response to instances of emergencies.

Keywords: copyright, fair use, pandemic, epidemic, emergency, state of emergency, national emergency, obsolesce, hurricane, wildfire, flood, reproduction, distribution, controlled digital lending, CDL, library exception, first sale doctrine, decision matrix

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## INTRODUCTION

Complications arising out of the COVID-19 pandemic highlight the relevance and necessity of fair use, the first sale doctrine, controlled digital lending, and the section 108 library exception, approaches to copyright that librarians and others invoke routinely to ensure access to information. On March 11, 2020, the World Health Organization Director General characterized the outbreak of COVID-19 as a pandemic.<sup>1</sup> The response to such declaration was the disruption of life as normal with the imposition of stay-at-home orders, remote work arrangements, and virtual learning for a significant portion of the global population. The direct impact on many was the loss of access to the information they routinely relied upon in their daily work.

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1. *WHO Director-General's Opening Remarks at Media Briefing on COVID-19*, WORLD HEALTH ORG. (Mar. 11, 2020), <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020> [https://perma.cc/9WUC-VCPN] (“We have therefore made the assessment that COVID-19 can be characterized as a pandemic.”).

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Librarians looked to fair use, the library exception under section 108 of the Copyright Act, the first sale doctrine, and controlled digital lending as solutions.<sup>2</sup> Social distancing, closure of workspaces, elimination of face-to-face instruction in favor of online classes, and the shuttering of university campuses, including libraries, in a brief period of time and in the middle of a semester defined day-to-day life for over a year and emphasized the barriers disrupting access to information.<sup>3</sup> Hurricanes like Katrina and Sandy, wildfires, and floods similarly cause the institutions we rely upon to provide the information in support of research, teaching, and learning to close or restrict access to their physical premises and print collections for undefined, sometimes extensive, periods of time.<sup>4</sup>

In the recent global pandemic, as everyone rushed to embrace a new way of working and learning, the need to consider new and innovative ways of meeting the demands of everyday life became clear. Particularly acute questions arose around meeting the information needs of the public, students, faculty, and researchers where access to traditional physical print collections was eliminated and the unknowns regarding the underlying virus exceeded the knowns. The limitations of Google quickly revealed it as a poor substitute for the institutions of libraries and archives.<sup>5</sup> The presence of a global pan-

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2. KEVIN T. RICHARDS, CONG. RSCH. SERV., LSB10453, COVID-19 AND LIBRARIES: E-BOOKS AND INTELLECTUAL PROPERTY ISSUES 3–4 (2020).
3. See Ryan Clough, *Digitization in an Emergency: Fair Use/Fair Dealing and How Libraries Are Adapting to the Pandemic*, ASS'N OF RES. LIBRS. (Apr. 1, 2020), <https://www.arl.org/blog/digitization-in-an-emergency-fair-use-fair-dealing-and-how-libraries-are-adapting-to-the-pandemic> [<https://perma.cc/DE4M-6FG9>].

As of [April 1, 2020], nearly every ARL member in the United States and Canada has closed its brick-and-mortar facilities and discontinued or severely limited access to print collections. The same is true for most other types of libraries – both local public libraries and school libraries are widely shut down. . . . During the shutdowns, most libraries and their users must now go entirely online. The problem is that the digital availability of many library holdings is not equivalent to their physical availability.

*Id.*

4. Andre M. Perry, *Hurricane Katrina Provides Lessons About Closing Campuses During the Coronavirus Crisis*, BROOKINGS (Mar. 16, 2020), <https://www.brookings.edu/blog/the-avenue/2020/03/16/the-lessons-hurricane-katrina-taught-us-about-closing-campus-in-a-crisis/> [<https://perma.cc/GM2L-UQV3>] (“[I]n 2005, Hurricane Katrina forced months-long shutdowns on local college campuses.”).
5. Brewster Kahle, *The National Emergency Library – Who Needs It? Who Reads It? Lessons From the First Two Weeks*, INTERNET ARCHIVE BLOGS (Apr. 7, 2020), <http://blog.archive.org/2020/04/07/the-national-emergency-library-who-needs-it-who-reads-it-lessons-from-the-first-two-weeks> [<https://perma.cc/YH5G-GMED>].

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demic presented unique challenges; however, libraries face similar questions in the instances of flood, fire, hurricane, tornado, and other climate events where acts of God result in restricted access to information and traditional spaces and institutions like libraries and archives. The resulting questions of how a library attends to its core function, providing access to information, follow. May a library digitize all or a significant portion of a work on course reserve or in its physical collection and make it available to students, researchers, scholars, faculty, or the public in support of teaching, research, or scholarship when, because of an emergency, the print copy is not available either because of a fear of contamination of the work itself or physical access to the work is prohibited by events such as: quarantine, stay-at-home orders, damage to infrastructure, or the like? How does a library meet the information demands of its users without violating the exclusive rights reserved to the copyright holder in section 106 of the Copyright Act when the information is not held in a digital form and access to the print is not possible?

Section 106 of the Copyright Act reserves to the copyright holder a series of exclusive rights.<sup>6</sup> Those rights are:

1. The right to reproduce the copyrighted work;
2. The right to create a derivative work based on the copyrighted work;
3. The right to distribute a copy of the work to the public by sale, rental, lease, loan or other transfer;
4. The right to perform a literary, musical, dramatic or choreographed work;
5. The right to perform a sound recording of a copyrighted work in public using a digital audio transmission.<sup>7</sup>

Article I, Section 8 of the Constitution directs establishment of copyright in order to “Promote the Progress of Science and the useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings.”<sup>8</sup> The granting of these exclusive rights is the basis of a bargain struck in the Constitution providing incentives to authors to create, publish, and disseminate their work.<sup>9</sup> The bargain strikes a balance.<sup>10</sup> Authors benefit because they receive a limited monopoly on their work that provides a reward for their labor.<sup>11</sup> On the other side of the bargain is the benefit to the

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6. 17 U.S.C. § 106.

7. *Id.*

8. U.S. CONST. art. I, § 8, cl. 8.

9. MARY RASENBERGER & CHRIS WESTON, U.S. COPYRIGHT OFF. & NAT’L DIGIT. INFO. INFRASTRUCTURE & PRES. PROGRAM OF THE LIBR. OF CONG., THE SECTION 108 STUDY GROUP REPORT 121 (2008), <https://tigerprints.clemson.edu/cheer/campus/acrosscampus/15> [<https://perma.cc/SK5R-WLS9>].

10. *Id.* at 9.

11. *Id.* at 9 n.17.

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public.<sup>12</sup> This bargain is reflected in the Copyright Act, with section 106 reserving limited rights to the exclusive use of the author, providing authors the right to expect and receive a reasonable return on their labor while promoting creativity and innovation to the benefit of society.<sup>13</sup> While arguably frustrating to some in periods of normalcy, the question shifts in times of extremis, resulting in seemingly insurmountable barriers to information required to function, thrive, and encourage the creativity and innovation suggested in the bargain. Or does it? Does the Copyright Act, as written, offer solutions to navigate, albeit perhaps only on a temporary basis, the unique needs raised in times of emergency?

This article explores the role of fair use, the library exception, the first sale doctrine, and the theory of controlled digital lending as devices and theory to meet information needs in the event of extraordinary changes in daily lives as asserted during times of local, regional, national, and world-wide crisis such as a pandemic, climate-related event, or other like emergency. Each plays a significant role in providing information to a user during times of normalcy. In times of exigent circumstances, their importance and use is heightened. Fair use is an affirmative defense invoked against a claim of

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These exclusive rights provide incentives to authors in order to increase the publication and dissemination of intellectual works. To ensure that the public interest in dissemination of works is best served, copyright law also balances the exclusive rights of creators and publishers against the interests of subsequent users and others who provide access to works through certain exceptions and limitations on the exclusive rights . . . . The exclusive rights incentives enable authors and publishers to invest both time and money in the creation and publication of creative works, while the exceptions and limitations ensure that the success of those works are not restricted by the exclusive rights in ways that would be unreasonably detrimental to the public interest. Depending upon where they sit in this creative marketplace, rightsholders and libraries and archives have varying perspectives on how to calibrate the balance so that the purposes of copyright are best achieved.

Speaking in gross generalizations, libraries and archives place primary importance on the value of providing access to their patrons, viewing copyright issues through the lens of the public's need for uninhibited information flow in order to fully participate in creative, intellectual, and political life. Rights-holders, on the other hand, emphasize the value of exclusive rights for creators, recognizing that without incentives and compensation to creators and their publishers, the amount and quality of creative and intellectual works available to the public will be severely diminished. Of course, for copyright law to work optimally, the core values of dissemination to the public and incentives to create should reinforce one another, not work at cross-purposes.

*Id.* at 156.

12. *Id.* at 9 n.17.

13. *Id.* at 62.

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copyright infringement where material under copyright is copied without the permission of the copyright owner, traditionally in a limited manner supporting a transformative purpose.<sup>14</sup> The first sale doctrine recognizes the right of the purchaser of a copyrighted work to further alienate that specific copy of the work.<sup>15</sup> The library exception, as embedded in the Copyright Act, recognizes the routine work of libraries functioning as a limitation on the exclusive rights granted to the copyright owner.<sup>16</sup> Controlled digital lending is a new and, as yet, untested theory proposed to replicate traditional print lending with its digital equivalent.<sup>17</sup> Part I of this Article explores the statutory devices of fair use, the library exception, the first sale doctrine, and the theory of controlled digital lending. What is the law of copyright in the context of responding to and providing information to users who would ordinarily walk into a library but due to an emergency cannot? What happens in the context of libraries providing information during an emergency where the emergency creates a barrier preventing access to the information routinely used in education, scholarship, and research? How does one breach such a barrier to get access to information when copyright precludes copying of information in all but limited circumstances? Part II constructs a decision matrix that a library or other may employ in making decisions and considers the statutory devices of fair use, the library exception, and the first sale doctrine, as well as the theory of controlled digital lending in the context of providing information in exigent circumstances. Such devices and theory are considered for viability, effectiveness, and applicability of digitization of print works, in part or whole, for use by patrons in support of teaching, research, and scholarship to meet the usual information needs for the temporary period of the emergency situation to the benefit of the public.

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14. See generally *More Information on Fair Use*, COPYRIGHT.GOV, <https://www.copyright.gov/fair-use/more-info.html> (last updated May 2021) [<https://perma.cc/JJC2-AWBS>].

15. See generally PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.6.1 (3d ed. 2020).

16. See generally *Revising Section 108: Copyright Exceptions for Libraries and Archives*, COPYRIGHT.GOV, <https://www.copyright.gov/policy/section108/> [<https://perma.cc/G6VN-ZBJN>].

17. See generally CONTROLLED DIGIT. LENDING BY LIBRS., <https://controldigitalending.org> [<https://perma.cc/BFP8-PWNM>].

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**I. TWO STATUTORY DEVICES AND A THEORY – FAIR USE, THE LIBRARY EXCEPTION, FIRST SALE DOCTRINE AND CONTROLLED DIGITAL LENDING**

**A. Fair Use and Section 107**

**1. History and Development of Fair Use in the United States**

Fair use is an affirmative defense originating in caselaw and later codified in section 107 of the Copyright Act.<sup>18</sup> The development of fair use is described as providing an elasticity in copyright that the Supreme Court characterizes as a “guarantee of breathing space at the heart of copyright.”<sup>19</sup> Fair use at its heart is a balance beam that avoids rigid application of copyright in a manner to impede the very thing, creativity and innovation, that copyright is intended to foster. The question of balance and the related fact-based, equitable analysis is generally at the heart of a fair use analysis. What happens, however, to that balance in the event of extraordinary circumstances?

*i. Folsom v. Marsh*

*Folsom v. Marsh* established fair use in the United States.<sup>20</sup> The question raised in *Folsom* involved whether it was permissible for authors to include letters from another publication in their new publication, where 353 pages of the new work were identical copies of pages from the original work.<sup>21</sup> Circuit Justice Story, in writing for the court, established the doctrine of fair use in the United States.<sup>22</sup> Fair use is a term of art that turns an unauthorized use of copyrighted material to a permissible use.<sup>23</sup> The dispute in *Folsom* centered on use of material published in *Life and Writings of George Washington*, written by Jared Sparks and published by Charles Folsom, Wells, and Thurston.<sup>24</sup> Marsh, Capen, and Lyon published *The Life of Washington* as a two-volume work that made verbatim use of letters of President Washington taken from Plaintiff’s original twelve-volume work.<sup>25</sup> Plaintiff’s twelve-volume work was composed of a one-volume work on the life of George Washington and eleven volumes compiling writings and letters of Washington, enhanced by Sparks’ editorial notes and illustrations. Defend-

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18. 2 THE LAW OF COPYRIGHT § 15:5 (2021).

19. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

20. *Folsom v. Marsh*, 9 F. Cas. 342, 344 (C.C.D. Mass. 1841).

21. *Id.* at 345.

22. *Id.* at 344.

23. 2 THE LAW OF COPYRIGHT § 15:5 (2021).

24. *Folsom*, 9 F. Cas. at 345.

25. *Id.*



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ants' two-volume work consisted of 866 pages of which 388 were identical to the content in plaintiff's work.<sup>26</sup> Story defined the issue as:

[W]hether this is a justifiable use of the original materials such as the law recognizes as no infringement of the copyright of the plaintiffs. It is said that the defendant has selected only such materials, as suited his own limited purpose as a biographer. That is doubtless, true; and he has produced an exceedingly valuable book. But that is no answer to the difficulty. It is certainly not necessary, to constitute an invasion of copyright that the whole of a work should be copied, or even a large portion of it in form or in substance. If so much is taken, that the value of the original is sensibly diminished, or the labors of the original author are substantially to an injurious extent appropriated by another, that is sufficient, in point of law, to constitute a piracy pro tanto. The entirety of the copyright is the property of the author; and it is no defense, [sic] that another person has appropriated a part, and not the whole of any property. Neither does it necessarily depend upon the quantity taken whether it is an infringement of the copyright or not. It is often affected by other considerations, the value of the materials taken, and the importance of it to the sale of the original work . . . . One writer might take all the vital part of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity, but value, that is always looked to . . . . [I]n deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.<sup>27</sup>

Ultimately finding for the plaintiff, Story noted that more than one-third of Defendants' work was appropriated from the plaintiff.<sup>28</sup> Critical to Story's decision was the appropriation of not only entire letters but also those letters "of most interest and value to the public, as illustrating the life, the acts, and the character of Washington."<sup>29</sup> Story's decision, however, recognized instances of use by another of original material may still be justified through an analysis of the "nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."<sup>30</sup> Thus, the judicial concept of fair use was born, lasting until the

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26. *Id.*

27. *Id.* at 348.

28. *Id.* at 349.

29. *Id.*

30. *Folsom*, 9 F. Cas. at 348.

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passage of section 107 of the 1976 Copyright Act codified the concept in statute.<sup>31</sup>

## 2. 17 U.S.C. §107; The Codification of Fair Use

The Copyright Act of 1976 codified the judicial doctrine of fair use.<sup>32</sup> Passed on October 19, 1976, and effective January 1, 1978, fair use as then codified read much as Justice Story originally described 135 years before.<sup>33</sup>

Notwithstanding the provisions [setting forth the exclusive rights of the copyright owner] of sections 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any means specified by that section for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include –

- (1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) The nature of the copyrighted work;
- (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) The effect of the use upon the potential market for or value of the copyrighted work.<sup>34</sup>

As codified, section 107 is an “equitable rule of reason, no generally applicable definition is possible, and each case raising the question must be decided on its own facts.”<sup>35</sup> In codifying the concept of fair use, Congress suggested the possibility of an inexhaustible supply of situations to which fair use might apply, thus precluding an exact and inflexible statement of a rule.<sup>36</sup> Further, the respective House and Senate Reports suggest Congress intended to provide the courts the flexibility to adapt fair use on a case-by-

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31. See 17 U.S.C. § 107.

32. See *id.*

33. Compare *Folsom*, 9 F. Cas. at 344, with H.R. REP. NO. 94-1476, 65 (1976), and S. REP. NO. 94-473, 61 (1975) (Section 107 is the statutory recognition of “[t]he judicial doctrine of fair use . . . an important and well-established limit on the exclusive right of copyright owners.”).

34. Copyrights Pub. L. No. 94-553, § 101, 90 Stat. 2541 (1976) (codified as amended at 17 U.S.C. §§ 101-1511).

35. H.R. REP. NO. 94-1476, 65.

36. *Id.* at 66.

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case basis and in light of an environment of rapidly changing technology.<sup>37</sup> Section 107 was neither an expansion of or limitation on fair use but, rather, a restatement by Congress of the then existing judicial doctrine.<sup>38</sup> The effect of affirming the then-existing judicial doctrine preserved validity of the existing judicial precedents as applicable authority.<sup>39</sup> Similarly, the statement asserting as the will of Congress that the courts continue to adapt the doctrine of fair use is an effective endorsement that fair use will continue to evolve based on the facts of the matter as applied to the law.<sup>40</sup>

Pursuant to section 107, a party invoking the affirmative defense of fair use *shall* consider four factors in an analysis to determine if a use is fair.<sup>41</sup> Regardless of the mandate to consider the four statutory factors, fair use remains an equitable rule with no generally applicable definition that results in each case decided on the basis of its own facts.<sup>42</sup> Caselaw is instructive in understanding when a use is fair or not. Specifically, *Harper & Row Publishers, Inc. v. Nation Enterprises*,<sup>43</sup> *Sony Corp. of America v. Universal City Studios, Inc.*,<sup>44</sup> *Campbell v. Acuff Rose*,<sup>45</sup> and, most recently, the 2021 decision in *Google LLC v. Oracle America, Inc.*<sup>46</sup> are instructive on the fair use calculation.

### 3. The Fair Use Factor Analysis

The preamble to section 107 identifies an illustrative list of uses that are likely to be considered fair use.<sup>47</sup> Such permissible uses include criticism, comment, news reporting, teaching, scholarship, and research.<sup>48</sup> The intentional use of the language “such as” in the preamble makes it clear the list is not exhaustive and expands beyond those six stated uses.<sup>49</sup> Similarly, the four factors in the statute are not exhaustive and may include other factors, as

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37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. 17 U.S.C. § 107.

42. 2 THE LAW OF COPYRIGHT § 15:6 (2021).

43. *See Harper & Row, Publishers., Inc. v. Nation Enters.*, 471 U.S. 539, 540–41 (1985).

44. *See Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455–56 (1984).

45. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 571–572 (1994).

46. *See Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1190 (2021).

47. 17 U.S.C. § 107.

48. *Id.*

49. *Id.*

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suggested by the use of the language *shall include*.<sup>50</sup> While other factors may be considered, a minimum of the four factors listed in the statute must be considered.<sup>51</sup> The four factors that must be considered and balanced by a court are: (1) purpose and character of the use;<sup>52</sup> (2) nature of the copyrighted work;<sup>53</sup> (3) amount and substantiality;<sup>54</sup> and (4) market effect.<sup>55</sup>

The purpose and character factor analysis considers how a defendant uses copyrighted material.<sup>56</sup> Analysis of the second factor, nature of the work, employs a spectrum of the expressive nature of the content, where content that consists primarily of facts is generally most likely to be considered a fair use, and a work that is unique or highly creative is generally an infringing use.<sup>57</sup> The third factor asks the court to look at the amount and substantiality of the copyrighted material used in the allegedly infringing product.<sup>58</sup> Again, on a continuum, the greater the amount used, the less likely a use constitutes fair use.<sup>59</sup> The amount, however, is not always determinative.<sup>60</sup> Even a small proportion of material may be an infringing use, if the infringing material is the *heart* of the original work.<sup>61</sup> The final or fourth factor considered by a court is market effect.<sup>62</sup> The greater the likelihood of a negative impact on the market for the material, the more likely the use is infringing and not fair.<sup>63</sup>

#### 4. A Story of Four Cases

##### *i. Sony Corp. of America v. Universal City Studios, Inc.*

*Sony Corp. of America v. Universal City Studios, Inc.*, better known as the Betamax case, asked if the recording of a television program on a video

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50. *Id.*; see *Roy Export Co. v. CBS*, 503 F. Supp. 1137, 1154 (S.D.N.Y. 1980) (discussing bad faith as a factor in a fair use analysis where permission was repeatedly sought and denied).

51. 17 U.S.C. § 107.

52. § 107(1).

53. § 107(2).

54. § 107(3).

55. § 107(4).

56. § 107(1).

57. § 107(2).

58. § 107(3).

59. *Id.*

60. *Id.*

61. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 540–41 (1985).

62. 17 U.S.C. § 107(4).

63. *Id.*

cassette for later use was an infringement of a copyright owner's right.<sup>64</sup> Best known for introducing the concept of *time shifting*, through use of home recording on video cassette recorders to view materials at a time convenient to the user, the U.S. Supreme Court affirmed the idea that copyright does not accord a copyright owner absolute control over all possible uses of their work but rather grants a set of exclusive rights to use and authorize the use of a work.<sup>65</sup> Key to the fair use analysis were the four statutory factors, with the Court noting the significant likelihood that a substantial number of copyright owners would not object to time-shifting by a private viewer and the absence of significant market harm to a copyrighted work due to time-shifting.<sup>66</sup>

ii. *Harper & Row Publishers, Inc. v. Nation Enterprises*

In *Harper & Row Publishers, Inc. v. Nation Enterprises*, a 1985 U.S. Supreme Court decision, the Court explored the question of the use of 300 to 400 words of verbatim quotes of protected expression from a yet to be published manuscript of President Gerald Ford.<sup>67</sup> Justice O'Connor, writing for the majority, stated the question before the Court as "to what extent the 'fair use' provision of the Copyright Revision Act of 1976 . . . sanctions the unauthorized use of quotations from a public figure's unpublished manuscript."<sup>68</sup> The unique facts involved a former United States president, a national scandal, an unpublished manuscript, a news event, the right of first publication, a contract with a national magazine for the exclusive pre-publication right that was ultimately rescinded, and an unauthorized receipt of a copy of the manuscript and publication of the most interesting part or heart of the manuscript by a rival magazine in a manner designed to scoop the story.<sup>69</sup>

The Court noted that fair use is defined as "a privilege in others than the owner of the copyright to use the copyrighted material in a reasonable manner without his consent."<sup>70</sup> Also confirmed was the intent of Congress to codify the common-law doctrine of fair use in section 107 of title 17, which mandates consideration of four nonexclusive factors.<sup>71</sup> Significantly, the Court found that the four-factor fair use analysis "must always be tailored to the individual case."<sup>72</sup> Engaging in a detailed analysis of the four factors of purpose and character of the use, nature of the copyrighted work, substantiality of the portion used in relation to the entirety of the copyrighted work, and

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64. *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 457 (1984).

65. *Id.* at 432.

66. *Id.* at 446.

67. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985).

68. *Id.* at 541-42.

69. *Id.*

70. *Id.* at 549.

71. *Id.*

72. *Id.* at 552.

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market effect, the majority determined the use not to be fair, stating that publication of the *heart* of an unpublished work in a manner intended to supplant a copyright holder's commercially valuable right of first publication is not fair use.<sup>73</sup>

Key to the outcome of the four-factor analysis, although alone not determinative, were the following facts: (1) the work was unpublished and the associated right to control was the right of first publication; (2) though insubstantial in amount, the 300 to 400 words used amounted to the *heart* of the work; (3) the commercial use of the copyrighted material; and (4) the cancellation of the planned prepublication serialization and refusal to pay the agreed upon funds for the serialization, thus diminishing the market for the copyrighted work.<sup>74</sup> Evaluating these factors, the Court determined that the purpose and character factor did not support a finding of fair use;<sup>75</sup> the act of depriving a copyright holder of the right to first publication was not fair and the publication of the heart of the work was not incidental but in fact supplanted the commercially valuable right of first publication.<sup>76</sup> Secondly, the Court found the factor of nature of use weighed against a finding of fair use as the piece used more than mere facts or isolated phrases, but instead used "excerpted subjective descriptions and portraits of public figures whose power lies in the author's individualized expression."<sup>77</sup> Thirdly, the factor of amount used weighed against a finding of fair use as, though the amount was small, the expression was significant or the *heart* of the work.<sup>78</sup> Fourthly and finally, the factor of market effect weighed against a finding of fair use as there was demonstrable harm to the market for the work with the cancellation of a contract and refusal to honor the agreed upon payment for the work.<sup>79</sup>

iii. *Campbell v. Acuff-Rose Music, Inc.*

In *Campbell v. Acuff-Rose Music Inc.*, the concept of commercial use of a significant part of a work in a commercial parody as a fair use was sanctioned.<sup>80</sup> 2 Live Crew, a rap music group, composed the song *Pretty Woman* as a parody of Roy Orbison's ballad, *Oh, Pretty Woman*.<sup>81</sup> 2 Live Crew's request for a license for *Oh, Pretty Woman* was declined and 2 Live Crew

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73. *Harper & Row*, 471 U.S. at 560–65.

74. *Id.* at 539.

75. *Id.* at 561–62.

76. *Id.*

77. *Id.* at 563.

78. *Id.* at 564–66.

79. *Harper & Row*, 471 U.S. at 567.

80. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 572 (1994).

81. *Id.* at 572.

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proceeded with their creation of the parody.<sup>82</sup> Infringement litigation followed with assertion of fair use as a defense. Justice Souter, writing for the majority, concluded that a commercial parody may constitute fair use.<sup>83</sup> Examining both Story's analysis in *Folsom v. Marsh* and the codification of fair use in section 107 of the Copyright Act, the Court affirmed that each of the four statutory factors must be applied to each claim of fair use and analyzed on a case-by-case basis.<sup>84</sup>

Most instructive is the discussion regarding the first factor of the fair use analysis, purpose and character. The transformative nature of use of the work is key.<sup>85</sup> The more transformative the new work, the less significance accorded the other factors.<sup>86</sup> The commercial nature of the work is but one factor of the purpose and character analysis, affirming the *Sony* decision.<sup>87</sup> The decision also noted the diminished importance of the nature of the copyrighted work factor, factor two, as "the artistic value of parodies is often found in their ability to invariably copy popular works of the past."<sup>88</sup>

In examining the third factor, the amount and substantiality, the Court found the amount used by 2 Live Crew was reasonable in light of the purpose to create a parody, even if it was the heart of the work.<sup>89</sup> In examining the fourth and final factor, market effect, the Court concluded that the nature of a parody is such that it is an unlikely substitute for the original and will serve a different market, thus not diminishing the original market.<sup>90</sup>

*iv. Google LLC v. Oracle America, Inc.*

*Google LLC v. Oracle America, Inc.*, decided in April 2021, is the most recent U.S. Supreme Court discussion of the fair use factors.<sup>91</sup> In a six to two decision,<sup>92</sup> Justice Breyer authored the majority opinion, concluding that the copying of the JAVA API declaring code or naming convention was fair use.<sup>93</sup> At issue was Google's copying of thirty-seven packages of Java pro-

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82. *Id.* at 572–73.

83. *Id.* at 594.

84. *Id.* at 576–78.

85. *Id.* at 579.

86. *Campbell*, 510 U.S. at 579.

87. *Id.* at 583–84.

88. *Id.* at 586.

89. *Id.* at 589.

90. *Id.*

91. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1196–97 (2021).

92. *Id.* at 1189 (noting Justice Barrett did not participate in the decision).

93. *Id.* at 1190.

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programming language for use in their Android platform.<sup>94</sup> Google copied the portion of the Java API that allowed Java programmers to use the task calling system they knew; three of which were fundamental to use of the Java language.<sup>95</sup> Affirming fair use as an “‘equitable rule of reason’ that ‘permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster[,]’” the Court began an analysis of the application of fair use.<sup>96</sup> Describing the four factors of fair use as “general principles, the application of which requires judicial balancing, depending upon relevant circumstances, including ‘significant changes in technology[,]’” the Court reconsidered the four statutory factors.<sup>97</sup> Dismissing the question of the underlying copyright status of the material and summarily concluding that the code was copyrighted material, the Court dispensed with that portion of the case.<sup>98</sup>

Conducting the fair use analysis, the Court rescued factor two, the nature of the copyrighted work, from the obscurity where it languished post-*Campbell*.<sup>99</sup> Beginning with the second factor, nature of the work, the Court characterized the declaring code as embodying a “different kind of creativity,” in this instance names that are intuitively easy to remember.<sup>100</sup> In acceptance of this factor, the Court concluded that the “nature of the copyrighted work” inclined towards fair use.<sup>101</sup> Often described as a transformative use, here the Court stated that in examination of the concept of transformative use, there is a more exacting examination of “purpose and character” of use.<sup>102</sup> This suggests that there is a need to recognize that some

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94. *Id.* at 1193.

95. *Id.* at 1193–94.

96. *Id.* at 1196 (quoting *Stewart v. Abend*, 495 U.S. 207, 236 (1990)).

97. *Google*, 141 S. Ct. at 1196.

98. *Id.* at 1190.

99. *Id.* at 1201.

100. *Id.* at 1202.

They wanted to attract programmers who would learn the system, help to develop it further, and provide reluctant to use another. . . (“Declaring code is user facing. It must be designed and organized in a way that is intuitive and understandable to developers so that they can invoke it.”) . . . Unlike many other programs, its value in significant part derives from the value that those who do not hold copyrights, namely, computer programmers, invest of their own time and effort to learn the API’s system. And unlike many other programs, its value lies in its efforts to encourage programmers to lean and to use the system they will use (and continue to use).

*Id.*

101. *Id.*

102. *Id.* at 1203.



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works are closer to the core of copyright than others.<sup>103</sup> In the view of the Court, the declaring code, if copyrightable at all, is further from the core of copyright than other types of code, such as implementing code.<sup>104</sup> A determination of whether or not a use is transformative requires examination of the “copying’s more specifically described ‘purpose[s]’ and ‘character.’”<sup>105</sup> In this instance, the use of the copied code was in the creation of a new product that offers a “highly creative and innovative tool for a smartphone environment.”<sup>106</sup> Use of the Java API to create a new platform is “consistent with the creative ‘progress’ that is the basic Constitutional objective of copyright.”<sup>107</sup> The Court viewed the purpose and character of Google’s copying as a transformative use that inclines to fair use.<sup>108</sup>

In analysis of the first factor, “purpose and character of the use,” the question considered was if the “copier’s use ‘adds something new, with a further purpose or different character, altering’ the copyrighted work ‘with new expression, meaning, or message.’”<sup>109</sup> Analysis of if a use is transformative requires a precise focus on the specific purpose and character of the copying.<sup>110</sup> In *Google*, the specific use was the creation of a new product that offered a “highly creative and innovative tool for the smartphone environment.”<sup>111</sup> This use was found to be both transformative and creative,<sup>112</sup> with the Court noting creativity is the principle objective stated in Article I, Section 8 of the Constitution.<sup>113</sup> Of importance was the limited use of the copying, since Google only took the minimal amount needed to develop the new platform.<sup>114</sup> The action was defined as “reimplementation[,]” “building of a system . . . that repurposes the same words and syntaxes of an existing system — in this case so that programmers who had learned an existing system could put their basic skills to use in a new one.”<sup>115</sup> The significance of this

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103. *See Google*, 141 S. Ct. at 1203.

104. *Id.* at 1202 (citing *Campbell*, 510 U.S. at 586).

105. *Id.* at 1203.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Google*, 141 S. Ct. at 1202.

110. *Id.*

111. *Id.* at 1203.

112. *Id.*

113. *Id.*; *See also* Feist Publ’ns Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–350 (“The primary objective of copyright is not to reward the labor of authors but ‘[t]o promote the Progress of Science and useful Arts.’” (quoting U.S. CONST., art. I, § 8, cl. 8)).

114. *Google*, 141 S. Ct. at 1204.

115. *Id.* at 1203.

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reimplementation was such that the Court was convinced that the purpose and character of the use, factor one, was transformative and inclined to fair use.<sup>116</sup>

*Google* also explored the concepts of commercial purpose and good faith in the context of the first factor, noting that these are traditional factors in examination of purpose and character.<sup>117</sup> Teaching and scholarship are the traditional examples of accepted copying.<sup>118</sup> Non-commercial uses are ones that tend to tip the analysis in favor of fair use.<sup>119</sup> The converse is not always true. Just because a use is commercial does not result in a de facto determination that the use is not fair.<sup>120</sup> The fact that a use is commercial is not dispositive for the purpose and character, especially where the use is a transformative one.<sup>121</sup>

What is the role of good or bad faith in the analysis of the first factor? *Campbell* initially raised the question of whether or not bad faith is part of the fair use first factor analysis.<sup>122</sup> *Google* acknowledged the skepticism of the *Campbell* decision regarding if bad faith is an appropriate factor for consideration.<sup>123</sup> The Court declined to opine as to if it were helpful to consider instances of good or bad faith, noting that it was not determinative in the context of *Google*.<sup>124</sup>

The third factor of the fair use analysis is amount and substantiality. How does one characterize amount copied? In *Google*, the question framed was—is the amount virtually all of the declaring code, thirty-seven packages, or the entirety of the Java API?<sup>125</sup> Framing of this question is significant, as virtually all of the declaring code was copied but the declaring code was only a small portion of the entire Java API.<sup>126</sup> *Campbell* and *Harper & Row* suggest parameters. In *Harper & Row*, taking the heart of a work, even where the amount is small, was too much.<sup>127</sup> In *Campbell*, taking a larger amount may be fair where the material taken is central to a valid purpose of the

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116. *Id.* at 1204.

117. *See id.* at 1201.

118. *Id.* at 1204.

119. *Id.*

120. *Google*, 141 S. Ct. at 1204.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 1204–05.

126. *Google*, 141 S. Ct. at 1205.

127. *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 564–565 (1985).

copier.<sup>128</sup> The dividing line for substantiality points to fair use when “the amount of copying was tethered to a valid, and transformative purpose.”<sup>129</sup>

Market effect is the fourth factor of consideration in a fair use statutory analysis. The analysis focuses upon the impact or effect of the copying on the market value for the original work.<sup>130</sup> The economic injury to the copyright owner is the singular focus of market effect, with the question of whether the market for the original work is negatively impacted because the new work acts as a substitute for the original.<sup>131</sup> Traditionally, the focus is on a diminution in value of the market for the original work or whether or not the new work acts as a substitute for the original.<sup>132</sup> In *Google*, the Court concluded that loss of or potential loss of revenue is an incomplete story.<sup>133</sup> The complete story to be told looks at the “source of the loss” and the benefit the public receives due to the copying.<sup>134</sup> The benefit to the public analysis suggests we consider the following two non-exclusive questions:

Is the benefit related to the creative production of new expression?

Are the benefits important or unimportant when compared to the likely amount of the loss when considering the nature of the source of the loss?<sup>135</sup>

In weighing the facts, including the “risks of creativity-related harms to the public,” the conclusion for market effect weighed for *Google*.<sup>136</sup> The resulting comprehensive and detailed analysis of each of the four statutory factors concluded with each factor inclined towards *Google* and a finding that *Google*’s use of the thirty-seven packets was a fair use.<sup>137</sup>

## **B. Obsolescence and Section 108; The Library Exception**

### **1. The Library and Archive Exception; Section 108**

The growing roles of the modern library in preserving knowledge, written works, and materials and ensuring access to information for communities large and small for the purposes of education, research, and acquisition of

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128. *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 588 (1994).

129. *Google*, 141 S. Ct. at 1205.

130. *Id.* at 1206.

131. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 99 (2d Cir. 2014); *see also Campbell*, 510 U.S. at 591 (limiting market harm to market substitution).

132. *Google*, 141 S. Ct. at 1206.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 1208.

137. *Id.* at 1209.

knowledge in all forms is long-established and well understood.<sup>138</sup> The library and archival exception as codified in section 108 of the Copyright Act permits libraries and archives to make copies of items found in their collections for the purposes of preservation and repair.<sup>139</sup> The U.S. Copyright Office acknowledges that libraries are so “[central] to the diffusion of knowledge that libraries and archives currently enjoy an exception in the copyright law.”<sup>140</sup> Section 108 “is a recognition that regular and frequent reproduction and distribution of creative works is vital to the mission of libraries and archives.”<sup>141</sup> Section 108 creates a limit on infringement by providing that no copyright infringement occurs when a library or archive makes a copy pursuant to and in compliance with provisions outlined.<sup>142</sup> Section 108 is intended to provide “library-like institutions with a useful, clear, and unambiguous exception that practicing librarians can employ to make decisions about use of copyrighted works in recurring library situations.”<sup>143</sup> Section 108 represents Congress’ vision of a scale balancing the need to incentivize creativity and innovation per the Constitution on one side and access to information and the rights of libraries and their users on the other.<sup>144</sup>

Libraries that seek a section 108 exception for copying traditionally must satisfy four general qualifications:<sup>145</sup>

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138. See Karyn Temple Claggett & Chris Weston, *Preserving the Viability of Specific Exceptions for Libraries and Archives in the Digital Age*, 13 J.L. & POL’Y FOR INFO. SOC’Y 67, 68 (2016).

139. 17 U.S.C. § 108.

140. Claggett & Weston, *supra* note 138, at 68.

141. *Id.*

142. 17 U.S.C. § 108.

143. David R. Hansen, *Copyright Reform Principles for Libraries, Archives, and Other Memory Institutions*, 29 BERKELEY TECH. L.J. 1559, 1563 (2014).

144. LAW OF COPYRIGHT § 5:48 (2021).

145. The Warnings of Copyright for Use By Certain Libraries and Archives states:

The copyright law of the United States (title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material. Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specific conditions is that the photocopy or reproduction is not to be “used for any purpose other than private study, scholarship, or research.” If a user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of “fair use,” that user may be liable for copyright infringement. This institution reserves the right to refuse to accept a copying order if, in its judgment fulfillment of the order would involve violation of copyright law.

Warnings of Copyright for Use by Certain Libraries and Archives, 37 C.F.R. § 201.14(b) (2020). [the text on this row seemed grey not black]

1. The institution is a *permissible institution*, a library or archive.<sup>146</sup>
2. Distribution of the created copy serves neither a direct or indirect purpose of a commercial advantage.<sup>147</sup>
3. The library or archive is open to the public or researchers in specialized fields.<sup>148</sup>
4. Any copy created includes a notice of copyright.<sup>149</sup>

Section 108 is narrowly constructed to permit the specific, traditional, and customary library activities of preservation and lending.<sup>150</sup> The section applies to specific types of libraries meeting the specific characteristics identified in section 108(a) without defining either *library* or *archive*.<sup>151</sup> The statutory requirements that permit use of the exception for permissible institutions (libraries and archives) are:

1. the copy is made by a library or archive or an employee of a library or archive acting within the scope of their employment;
2. creation of a single copy or phonorecord, except as otherwise provided by the statute; and
3. distribution consistent with the other requirements of § 108.<sup>152</sup>

Qualifying as a permissible institution is key, as certain commercial activities are beyond the scope of section 108 protection.<sup>153</sup>

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146. 17 U.S.C. § 108(a).

147. § 108(a)(1); *see* Rasenberger & Weston, *supra* note 9, at 25 (stating that commercial advantage is viewed within the concept of the reproduction not the nature of the institution).

148. § 108(a)(2).

149. § 108(a)(3).

150. *See id.* § 108(a)(1)-(3). The four requirements for reproduction and distribution by a library or archive are:

1. authorization is “to reproduce no more than one copy or phonorecord of a work,”
2. the library or archive may not engage in the distribution of copies or phonorecords for “any purpose of direct or indirect commercial advantage,”
3. the library or archives must be open to the public or to researchers in specialized field, and
4. any reproduction or distribution of a work under 108 must include a notice of copyright.

*Id.*

151. § 108(a).

152. *Id.*

153. *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 503 n.12 (2001) (discussing for-profit subscription electronic databases or “electronic libraries” ineligible for section 108 protection for reproductions included in databases).

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Additional requirements related to lending and preservation or replacement are included in section 108 (b) through (i):<sup>154</sup>

1. Section 108(b) — reproduction and distribution of unpublished works for preservation;<sup>155</sup>
2. Section 108(c) — creation of a replacement copy of a published work for use on the library premises where the original copy is damaged, deteriorating, lost, or stolen, or if the existing format is obsolete but only after the library attempts to obtain a copy at a fair price;<sup>156</sup>
3. Section 108(d) — permission to copy for research and scholarship and inclusion of notice of copyright where the copy becomes the property of the user and the library prominently displays a notice of copyright;<sup>157</sup>
4. Section 108(e) — permission to reproduce an entire work subject to the requirement of determination that a copy may not be obtained at a reasonable price and the requirements of § 108(d) are met;<sup>158</sup>
5. Section 108(f) — limitations on liabilities for reproductions made pursuant to the requirements of 108;<sup>159</sup>
6. Section 108(g) — limitation of 108 to isolated and unrelated reproductions of a single copy of the same or separate occasions;<sup>160</sup>
7. Section 108(h) — reproduction during the final twenty years of a work's copyright term; and<sup>161</sup>
8. Section 108(i) — excludes from section 108 reproduction and distribution of musical works, pictorial, graphic or sculptural work, or a motion picture or other audiovisual work excluding news. Illustrations and the like published as part of the article are covered by the statutory exception.<sup>162</sup>

In the traditional sense, section 108 permits libraries to go about the routine business of providing information to users.<sup>163</sup> The intersection of library collections and the democratization of access to information in a digital era is central to the missions of libraries and archives, making section 108

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154. 17 U.S.C. § 108.

155. § 108(b).

156. § 108(c).

157. § 108(d).

158. § 108(e).

159. § 108(f).

160. § 108(g).

161. § 108(h).

162. § 108(i).

163. *See id.* § 108.

key to providing library services and access to information.<sup>164</sup> In times of normal operation, libraries, archives, and cultural memory institutions seek to preserve and provide access to information and support research.<sup>165</sup> Digitization of information expands the reach of the library collection, serving those with information needs beyond the physical reach of the library. In a discussion of reform of section 108, the then Register of Copyright referenced the continuing need for the balance section 108 provides and supported amendment of section 108 to permit libraries, archives, and museums to make and distribute copies in a manner that did not “unduly harm the valid interests of rights holders.”<sup>166</sup> In times of a national emergency, the relevant questions are: What is routine, and how might a library provide information to its users?

The compromising spirit of section 108 suggests maintaining a balance is critical. Vice President and University Librarian for Columbia University, James G. Neal’s statement before the Committee on House Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet is informative. Mr. Neal characterizes the library exception codified in section 108 as supplemental to versus supplanting fair use in the context of important library services such as preservation.<sup>167</sup> When considering whether amendments to the existing statutory framework were needed, he testified that the existing framework combining the library exception in section 108 with the flexible framework of fair use found in section 107 works well and needs no amendment.<sup>168</sup> Libraries spend in excess of four billion annually on the acquisition of books and other information with the goal of access to and preservation of information as a public benefit.<sup>169</sup> The most recent statistics on acquisitions by academic libraries indicate sixty percent of materials expenditures are for licensed and purchased electronic resources at an estimated cost of 1.6 billion dollars.<sup>170</sup> Inherent in the preservation mission of libraries is the prevention of the loss of cultural, historical, and scholarly resources.<sup>171</sup> He also recog-

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164. See Hansen, *supra* note 143, at 1576.

165. *Id.*

166. Maria Pallente, *Session 1: The Legal Landscape*, 36 COLUM J. L. & ARTS 527, 529 (2013).

167. *Preservation and Reuse of Copyrighted Works: Hearing on Preservation and Reuse of Copyrighted Works Before the Subcomm. on Cts., Intell. Prop. and the Internet of the H. Comm. On the Judiciary*, 113th Cong. 32 (2014) [hereinafter *Testimony of Neal*] (testimony of James G. Neal, Vice President for Info. Servs. and Univ. Libr., Columbia Univ.).

168. *Id.*

169. *Id.*

170. Institution of Education Sciences, *Academic Libraries: 2012*, 12 (2014), <https://nces.ed.gov/pubs2014/2014038.pdf>.

171. *Testimony of Neal*, *supra* note 167, at 32.

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nized the constant change and continuing evolution of the nature of a library collection, consistent with new technologies.<sup>172</sup>

The beauty of section 108 is its consistency and simplicity. Librarians may provide traditional library services without fear of running afoul of copyright or the constant need for legal advice.<sup>173</sup>

Paper-based books and manuscripts have been the mainstay of scholarly communications and library collections for hundreds of years. But in less than two decades, digital information has become integral to research in all disciplines and to the public. . . .Rapidly [digitized] media are forming a substantial part of our cultural record. . . . Websites come and go, documents disappear from websites, hyperlinks get broken, files become corrupted and storage media become obsolete.<sup>174</sup>

But what are the boundaries of that balance in exigent circumstances? Can a library digitize all or a significant portion of a work on course reserve and make the digital copy available to students when the presence of an emergency prohibits or restricts access to print due to contamination, quarantine, shelter in place orders, or the like? A clue to the answer lies in section 108(e) that permits copying of an entire or substantial portion of a work for the purposes of “private study scholarship or research.”<sup>175</sup> It may be asserted that the section 108 requirement that the library previously determine that a copy cannot be obtained at a fair price is satisfied in a time of exigency when the usual business options are disrupted by the same exigent circumstances.

The legislative history on section 108 is instructive here. North Carolina Representative Coble’s material in extension of remarks not spoken by a member on the floor shares the following:

In addition to all of the foregoing, there are a number of amendments that were made in the Senate bill that will be included . . . . These include: an expansion of the exemptions for nonprofit libraries and archives in 17 U.S.C. s108 to cover the making of digital copies without authorization, for the purposes of preservation, security or replacement of damaged, lost or stolen copies; an expansion of section 108 to cover the making of digital copies without authorization in order to replace copies in the collection that are in an obsolete format. . . [A] provision directing the Register of Copyrights to consult with nonprofit libraries and non-

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172. *Id.*

173. Hansen, *supra* note 143, at 1564.

174. *See id.*

175. 17 U.S.C. § 108(e).



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profit educational institutions and submit recommendations on how to promote distance education through digital technologies.<sup>176</sup>

Mr. Neal's testimony is similarly instructive, suggesting Congress enacted section 108 with the specific intent to provide a clear exception to libraries for the reproduction of published works for the purpose of replacing a copy that was damaged, deteriorating, lost, or stolen.<sup>177</sup> Neal's testimony also affirms that section 108(f)(4) does not act as a limitation on a library's assertion of fair use.<sup>178</sup> Sections 108 and 107 work together to foster the important work of libraries. Section 108 provides certainty for activities falling into the specific library exception, bypassing the need for the laborious fair use analysis.<sup>179</sup> Section 107 is another avenue that permits reproduction beyond the 108 exception if the statutory four factor analysis is met.<sup>180</sup> The two provisions effectively work in tandem to provide space for the meaningful work of libraries.

Mr. Neal is also helpful on the question of the replacement copy authorized under 108(c).<sup>181</sup>

Congress indicated that there is a strong public policy interest in libraries making replacement copies. Accordingly, when a library makes a replacement copy that exceeds the specific provisions of 108(c) . . . a court should give great weight to Congress's recognition of the public policy interest in replacement copies when assessing the first fair use factor: the purposes and character of the use . . . [t]o be sure, this "substantial compliance" with section 108

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176. 144 CONG. REC. E1207-08 (1998).

177. *Testimony of Neal, supra* note 167, at 33. *See also* Authors Guild v. Hathitrust, 755 F.3d 87, 97 (2d Cir. 2014) (rejecting a narrow interpretation of 108); H.R. Rep. No. 94-1476 at 78-79 (1976) ("Nothing in section 108 impairs the applicability of the fair use doctrine to a wide variety of situations involving photocopying or other reproductions by a library of the copyrighted material in its collections, where the user requests the reproduction for legitimate scholarly or research purposes.").

178. *Testimony of Neal, supra* note 167, at 33. *See also* H.R. Rep. No. 94-1476, at 74 (1976) ("[T]he language of section 108(f)(4). . . [N]o provision of section 108 is intended to take away any rights existing under the fair use doctrine.").

179. *Testimony of Neal, supra* note 167, at 33.

180. *Id.*

181. *Preservation and Reuse of Copyrighted Works: Hearing on Preservation and Reuse of Copyrighted Works Before the Subcomm. on Cts., Intell. Prop. and the Internet of the H. Comm. On the Judiciary*, 113th Cong. 43 (2014) [hereinafter *Statement of Neal*] (statement of James G. Neal, Vice President for Info. Servs. and Univ. Libr., Columbia Univ.).

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is not outcome determinative. It simply tilts the first factor analysis in favor of the library.<sup>182</sup>

## 2. The Meaning of Obsolete

Focusing on section 108(c) permitting the creation of a copy of a published work<sup>183</sup> for use in the library premises in the event a work is lost or held in an obsolete format, the question becomes: What is obsolete? Obsolete is defined as “[when] 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.”<sup>184</sup> The term *obsolete* first appears in section 108 in S 2037 introduced on May 6, 1998.<sup>185</sup> The term was subsequently adopted in the related House Bill.<sup>186</sup> The previous year, speaking before Congress, Senator Ashcroft noted the purpose of the amendment to section 108 was, in part, to “facilitate the preservation of copyrighted materials by libraries, archives and universities as those institutions represent the cultural heritage of the United States in the best means possible, including digitally.”<sup>187</sup> The intent of the legislation, as expressed by Senator Ashcroft, was to “unlock the teaching potential of the internet and guarantee that the appropriate material is made available, so . . . students can receive a full education while taking advantage of the tremendous strides made in technology.”<sup>188</sup> Senator Ashcroft’s remarks suggest that the omission of the term “obsolete” and the corresponding “obsolete” provisions would hinder libraries, archives, and universities in the preservation of their works and the loss of billions of dollars of content if format-shifting was not permitted.<sup>189</sup>

Section 108(c) contains parameters for creating replacement copies, but the language of the statute omits critical definitions. For example, damaged and deteriorating are not defined and left to the subjective.<sup>190</sup> Absent a controlling definition of the terms, when is a format deteriorating or damaged?

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182. *Id.*

183. 17 U.S.C. § 108(c). It is important to highlight that 17 U.S.C. § 108 distinguishes between published and unpublished works. *See id.* § 108. For example, the provisions of § 108(b) apply exclusively to unpublished works. *Id.* § 108(b).

184. § 108(c).

185. S. 2037, 105th Cong. § 2 (1998).

186. H.R. 2281, 105th Cong. § 2 (1998).

187. 143 CONG. REC. S8723, S8729 (1997).

188. *Id.* at S8729–30.

189. *Id.* at S8729.

190. Howard Besser et al., *Video at Risk: Strategies for Preserving Commercial Video Collections in Libraries*, N.Y. UNIV. LIBRS. 4 (Dec. 2012), [https://guides.nyu.edu/ld.php?content\\_id=24818036](https://guides.nyu.edu/ld.php?content_id=24818036) [<https://perma.cc/96R7-G8GR>].

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Guideline 1 from the Video At Risk (“VAR”) 108 Study Group suggests a work is damaged or deteriorating “if it cannot be viewed in substantially its original condition.”<sup>191</sup> VAR also suggests that it is the individual library that is to make the assessment regarding format, because “the purpose of [section 108(c)] is to allow libraries to replace copies in their collections” that are becoming unusable, thus, where copies are still performing as designed and intended, the statutory justification for invoking section 108(c) is more difficult to assert.<sup>192</sup> The 108 study group also observed that assessment for deterioration or damage is context-dependent.<sup>193</sup> The VAR study and resulting report focuses on video and the natural deterioration and loss of information; however, the general principles provide guidance as to how section 108 is intended to work.<sup>194</sup> Context is one element a library must consider in its assessment before invoking section 108 to permit the replacement copy.<sup>195</sup> Additional guidance suggests that a preemptive copy is impermissible.<sup>196</sup>

Guideline 3 of the VAR study addresses the concept of suitable replacements.<sup>197</sup> The guideline states: “[u]nder §108(c) a suitable ‘replacement’ is a copy that can serve the same educational and scholarly purposes as the original, meaning it contains materially the same content and is equally easy for patrons to access and use.”<sup>198</sup> This suggests that the determination of what qualifies as an acceptable replacement must ask if the suggested copy “could serve the same scholarly or educational purpose as the original.”<sup>199</sup>

### 3. DMCA and Access to Information; Impact on the Library and Archive Section 108 Exception

Effective November 29, 1999, through an amendment to the Copyright Act, the Digital Millennium Copyright Act (“DMCA”), a right of access was added to the list of exclusive rights of the copyright owner, supplementing those conferred in section 106.<sup>200</sup> Under the provisions of the DMCA, copyright owners may assert anti-circumvention protections and, correspondingly, control access to their underlying work.<sup>201</sup> Prior to enacting the DMCA, users

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191. *Id.* at 5 n.5.

192. *Id.* at 15 n.16.

193. *Id.* at 6.

194. *See id.* at 4.

195. *Id.* at 6.

196. Besser, *supra* note 190, at 7.

197. *Id.* at 10.

198. *Id.*

199. *Id.* at 11.

200. *See* 17 U.S.C. §§ 106, 1201.

201. Laura N. Gasaway, *The New Access Right and Its Impact on Libraries and Library Users*, 10 J. INTELL. PROP. L. 269 (2003).

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had multiple ways of accessing information. Direct purchase and borrowing from a library were the primary modes, with licensing of digital materials emerging as a prevalent option.<sup>202</sup> Defining access to information becomes key. One definition of the right of access is:

[p]ermission for a subject to access a particular object for a specific type of operation. An example of an access right is the permission for a process to read a file but not write to it.’ It is also ‘the right to control the manner in which members of the public apprehend the work.<sup>203</sup>

The right of access is important to libraries as providing access to information is central to the core mission of a library.<sup>204</sup> Restrictions on and control of access run counter to this mission and the services libraries provide for the public benefit. The addition of section 1201 with enactment of the DMCA provides a different meaning to right of access, preferring the right of the copyright holder to control access and use of their work over the right of the public to obtain access to a work.<sup>205</sup> This new definition of right of access is at odds with the bargain implicit in the Constitution granting to the creator of a work a set of exclusive rights in exchange for an implied right of access by the public.<sup>206</sup> The Association of Research Libraries Declaration of Keystone Principles goes as far as to identify access to information as a public good.<sup>207</sup>

As discussed above, section 108 contains the library exception that permits reproduction of works under specified circumstances.<sup>208</sup> The DMCA amended the preservation construct of section 108 in the following manner:

1. requiring the copy to include a notice of copyright on the face of the copy or a legend stating that the work may be protected by copyright under § 108(a)(3);<sup>209</sup>

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202. *Id.*

203. *Id.* at 270.

204. *Id.* at 270–71 (“For years, librarians have championed the public’s right of access to government information.”).

205. *Id.* at 271.

206. *Id.* at 271–72. *See also* LYMAN RAY PATTERSON & STANLEY W. LINDBERG, *THE NATURE OF COPYRIGHT: A LAW OF USERS’ RIGHTS* 47–52 (1991).

207. *See* Marianne Gaunt, *The Keystone Principles*, 61 *COLL. & RSCH. LIBRS. NEWS* 103 (2000).

208. *See* 17 U.S.C. § 108.

209. 37 C.F.R. § 201.14(c)(2) (2021) states:

An Order Warning of Copyright shall be printed within a box located prominently on the order for itself, either on the front side of the form or immediately adjacent to the space calling for the name or signature of the person using the form. The notice shall be printed in type and size no smaller than that used predominantly throughout the form, and in no case

2. increasing the number of preservation copies permitted under § 108(b) from one to three;
3. eliminating the word “facsimile” from § 108; and
4. permitting a digital copy.<sup>210</sup>

Of greater significance is the DMCA’s impact on the library exception as a whole and on how a copy might be used. The DMCA’s amendment is more restrictive with regard to unpublished works, restricting use of the digital copy for interlibrary loan and requiring use of the digital preservation copy<sup>211</sup> on the physical premises of the library.<sup>212</sup> The DMCA also amended the replacement section of section 108(c) with regard to published works to include the language “or if the existing format in which the work is stored has become obsolete,” with language as to when a format is obsolete.<sup>213</sup> The amendment added a requirement that the library engage in reasonable investigation to locate a replacement copy at a fair price, but what if the format of the replacement copy is the same obsolete format as the one the library seeks to replace?<sup>214</sup> If the only replacement copy is in the same obsolete format, does one have to purchase the obsolete copy? Experts recognize the fallacy this presents as the replacement copy also would be unusable.

Section 108(c) permits digital replacement copies subject to limitations on distribution to the public.<sup>215</sup> Section 108(c) contemplates circulation in the same manner as the original of reproduction copies made pursuant to such provision, excluding digital copies.<sup>216</sup> Distribution of the digital copy, regardless of if the original is published or unpublished, is limited to the public on

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shall the type size be smaller than eight points. The notice shall be printed in such manner as to be clearly legible, comprehensible and readily apparent to a casual reader of the form.

*Id.*

210. Laura N. Gasaway, *America’s Cultural Record a Thing of the Past*, 40 Hous. L. REV. 643, 652–53 (2003).
211. *See generally* Gasaway, *supra* note 201, at 654 (“Digital versions of analog works are defined as: “electronic photographs scanned from original documents. A digital image can accurately render the information, layout, and preservation of the original including typefaces, annotations, and illustrations.”).
212. *Id.* (noting that 17 U.S.C. § 108(c)(2) restricts use of a digital copy of a published work on the library premises).
213. *Id.* at 657.
214. *See* Notice to Libraries and Archives of Normal Commercial Exploitation or Availability at Reasonable Price, 63 Fed. Reg. 71,785 (proposed Dec. 30, 1998) (to be codified at 37 C.F.R. pt. 201).
215. *See* 17 U.S.C. § 108(c).
216. *Compare* § 108(c) (stating the language of 108(c) refers to the “right of reproduction,” which is a departure from other parts of § 108 which address both the right of reproductions and the right of distribution by libraries), *with* § 108(b), *and* § 108(d)-(e).

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library premises.<sup>217</sup> But VAR Guideline 5 suggests that such restriction does not preclude making such digital copy available to a “faculty member or other designated patron for off-premise use, such as personal study or classroom viewing.”<sup>218</sup> Consideration of the term public in such circumstances is key. VAR Guideline 5 suggests,

§108(c) should not be read as a total ban on off-premises use of digital copies – instead, just a ban on making such copies available “to the public” off-premises. For example, students in a class, watching a digital §108(c) copy of a film their professor obtained from the library, would not likely be considered “the public” for statutory purposes, nor would the showing of the film be considered “making available” of that digital copy to anyone, let alone the public.<sup>219</sup>

Following the VAR Guideline 5 recommendation, “the smaller the number of faculty members and other designated parties with off-premises clearance, and the more tightly restricted such users are as to the purpose for which they may use the digital copies, the fairer the library’s position.”<sup>220</sup> Additionally, recommended is written documentation of the policy of limitations and restrictions, consistency of application of the policy, restrictions on use by those outside the institution, and withdrawal of the original copy from the collection to maintain the same number of copies.<sup>221</sup>

## C. The Right of Distribution and the First Sale Doctrine; Section 109

### 1. The First Sale Doctrine

The right to control the initial distribution of a work to the public by any of sale, gift, loan, or lease is conferred as one of the section 106 exclusive rights bestowed upon the copyright holder.<sup>222</sup> The concept of a transfer lies at the heart of the concept of distribution. In *Hotelling v. Church of Jesus Christ of Latter-Day Saints*, the court signaled a break with the long-standing premise that for the distribution right to be infringed there must be a physical distribution of the copy, noting that a library distributes a work when it cata-

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217. 17 U.S.C. §§ 108(b)(2), 108(c)(2) (It is important to highlight that 17 U.S.C. § 108 distinguishes between published and unpublished works. For example, the provisions of §108(c) apply exclusively to published works.).

218. Besser, *supra* note 190, at 15.

219. *Id.* at 16; *see also id.* at 15–16, n.17–18 (therein regarding “public”).

220. *Id.* at 17.

221. *Id.* (noting that the statute does not address downloading or streaming of a replacement copy).

222. 17 U.S.C. § 106(3).

logs the item and makes it available to the public.<sup>223</sup> This begs the question of the digital copy. *London-Sire Records Inc., v. Doe*, a peer-to-peer file sharing case, attempted to address the question of if actual distribution of a physical object is required by section 106(3).<sup>224</sup> Noting that the issue before the court was the electronic distribution of a sound recording and any object in which a sound recording might be fixed is a material object, the judge concluded that “there is no reason to limit ‘distribution’ to processes in which a material object exists throughout the entire transaction—as opposed to a transaction in which a material object is created elsewhere at its finish.”<sup>225</sup>

The first sale doctrine creates a significant limitation on the section 106(3) right of distribution.<sup>226</sup> The first sale doctrine, as codified in section 109 of the Copyright Act, states:

[T]he owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.<sup>227</sup>

The requirements of section 109 are straightforward, creating a two-prong test for eligibility: the copy must be lawfully made and the transferor must be the owner of that copy.<sup>228</sup> If these threshold requirements are met, the copy may be alienated without the permission of the holder of the copyright.<sup>229</sup> Thus, the owner of a lawfully made copy may sell or otherwise dispose of his copy as it is exempt from copyright.

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223. *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199, 201 (4th Cir. 1997).

224. *London-Sire Records, Inc. v. Doe 1*, 542 F. Supp. 2d 153, 166 (D. Mass 2008).

225. *Id.* at 173.

226. H.R. REP. NO. 94-1476, at 79 (1976) states:

Section 109(a) restates and confirms the principle that, where the copyright owner has transferred ownership of a particular copy or phonorecord of a work, the person to whom the copy or phonorecord is transferred is entitled to dispose of it by sale, rental, or any other means. Under this principle, which has been established by the court decisions and section 27 of the present law, the copyright owner’s exclusive right of public distribution would have no effect upon anyone who owns “a particular copy or phonorecord lawfully made under this title” and who wishes to transfer it to someone else or to destroy it.

*Id.*

227. 17 U.S.C. § 109.

228. See PAUL GOLDSTEIN, GOLDSTEIN ON COPYRIGHT § 7.6.1 (3d ed. 2020) (stating that section 109 requires that the copy be lawfully made not that the copy be made with the consent of the rightsholder thus permitting fair use and other similar permissible copies to fall under the 109 transfer exceptions).

229. *Id.*

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While now codified, the first sale doctrine's origin is in caselaw. *Bobbs-Merrill v. Macy & Co.* involved a dispute over the subsequent sale of copyrighted work. The Second Circuit and the Supreme Court concluded that the purchaser of a book sold with the permission of the copyright owner may dispose of that copy but not copy it.<sup>230</sup> The copyright holder's copyright was *exhausted*<sup>231</sup> in reference to that specific copy. The first sale doctrine was subsequently codified in the Copyright Act of 1909 as section 41.<sup>232</sup>

The first sale doctrine supports secondhand bookstores, transactions on eBay, and, most notably, the core function of libraries—access to information or lending.<sup>233</sup> The other practical effect of the first sale doctrine is a limitation on the distribution right of the copyright owner granted under section 106(3).<sup>234</sup> The legislative history of the adoption of section 109 is informative: “[T]he outright sale of an authorized copy of a book frees it from copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose . . . .”<sup>235</sup> Still, the statute does not sanction the creation of a copy. This begs the question of how broadly the first sale doctrine might be read.

## 2. Digital First Sale Doctrine; Does it Exist?

What of a *digital first sale doctrine*? Does such a creature exist? Might one lawfully make a copy of a work, transmit the work digitally, delete the work from the computer under the present language of section 109 and be within the parameters of the first sale doctrine?

The first sale doctrine does not readily apply in the digital networked environment because the owner of a particular digital copy usually does not sell or otherwise dispose of the possession

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230. *Bobbs-Merrill Co. v. R.H. Macy & Co.*, 210 U.S. 339, 350–51 (1908); *see also* *Harrison v. Maynard, Merrill & Co.*, 61 F. 689, 691 (2d Cir. 1894) (noting that one who transfers copyright restricting use cannot restrain sale of books in violation of agreement).

231. Exhaustion is the principle that the transfer by an owner of a copy for consideration loses the right to control the downstream disposition of that copy. The rightsholder still retains copyright in their work but has no right to the further disposition of the alienated individual copy. *See* Michelle M. Wu, *Revisiting Controlled Digital Lending Post-ReDigi*, *FIRST MONDAY* (May 2019), <https://firstmonday.org/ojs/index.php/fm/article/view/9644/7793> [<https://perma.cc/DCF9-G885>].

232. 17 U.S.C. § 109 (referencing the Copyright Act of 1909).

233. *See* *Indep. News Co. v. Williams*, 293 F.2d 510, 517 (3d Cir. 1961) (noting rightsholder's control over work terminates at the time of a lawful transfer to the first purchaser).

234. 17 U.S.C. § 106(3).

235. H.R. REP. NO. 94-1476, at 79.



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of that copy. Rather, “disposition” of a digital copy by its owner normally entails reproduction and transmission of that reproduction to another person. The original copy may then be retained or destroyed.<sup>236</sup>

Is this the online or modern-day equivalent of a loan, gift, or sale of a physical book, consistent with the principles of the first sale doctrine? But the right of reproduction is a separate and exclusive right reserved to the copyright holder under section 106 not subject to the first sale limitation.<sup>237</sup> Marybeth Peters, Register of Copyrights, notes in her report that the transmission of a work from one to another over the Internet involves a reproduction even when the original copy of the work is deleted subsequent to sending, and it is that act that raises the question of the first sale doctrine.<sup>238</sup> As the right impacted is that of reproduction rather than that of distribution, the first sale doctrine’s limitation is ineffective.<sup>239</sup> The first sale doctrine codified in section 109 adopted the common law restraint of alienation of personal, tangible property.<sup>240</sup> Transmission of a digital file is distinguishable from that of alienation of tangible property.<sup>241</sup> “The digital transmission of a work does not implicate the alienability of a physical artifact. When a work is transmitted, the sender is exercising control over the intangible work through its reproduction rather than common law dominion over an item of tangible personal property.”<sup>242</sup> The report rejects the existence of a digital first sale doctrine as existing within the language of the current version of section 109.<sup>243</sup>

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236. STAFF OF H. COMM. ON THE JUDICIARY, 105TH CONG., SECTION-BY-SECTION ANALYSIS OF H.R. 2281 AS PASSED BY THE UNITED STATES HOUSE OF REPRESENTATIVES ON AUGUST 4, 1998, \*2 (Comm. Print 1998).

237. 17 U.S.C. § 106.

238. U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT, A REPORT OF THE REGISTER OF COPYRIGHTS PURSUANT TO § 104 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT 79 (2001).

239. *Id.* at 79 (noting that the product of the digital transmission is a new copy in possession of a new person which is distinct from the application of the first sale doctrine where the recipient receives the exact same copy with which the transaction began).

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

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**D. Controlled Digital Lending<sup>244</sup>****1. Controlled Digital Lending – The Argument For**

[Proponents of the new, and sometimes controversial, theory called controlled digital lending (“CDL”) advance CDL as a method that] enables a library to circulate a digitized title in place of a physical one in a controlled manner. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. CDL is premised on the maintenance of an “owned to loaned” ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.<sup>245</sup>

CDL is a new theory developed by a group of librarians and others that justifies the digitization of materials and the corresponding lending of the same materials without first obtaining the consent of the copyright owner.<sup>246</sup> The CDL theory is not without critics, including strong voices of opposition from authors and publishers.<sup>247</sup> Librarians view the theory as promoting access to materials and are more accepting of this theory than the critics.<sup>248</sup> CDL remains untested and its ultimate fate unknown.<sup>249</sup> In specific, its advo-

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244. A comprehensive discussion and evaluation of controlled digital lending is beyond the scope of this article. The discussion of controlled digital lending as included in this paper is limited in scope to a discussion of the theory in the provision of resources in situations of emergencies where access to the physical collection is limited and to evaluation of application of the theory for use as a method to provide access to information and support critical library services in times of extremis.

245. DAVID R. HANSEN & KYLE K. COURTNEY, *A WHITE PAPER ON CONTROLLED DIGITAL LENDING OF LIBRARY BOOKS* (2018), <https://controldigitallending.org/whitepaper> [<https://perma.cc/GRP4-JAJE>].

246. *Controlled Digital Lending Is Neither Controlled nor Legal*, AUTHORS GUILD (Jan. 8, 2019), <https://www.authorsguild.org/industry-advocacy/controlled-digital-lending-is-neither-controlled-nor-legal> [<https://perma.cc/R9R3-W7QG>].

247. *See id.*

248. *See id.*

249. *See infra* Section I.D.2 (containing a more detailed discussion of the critics of CDL).

cates promote it as the “digital equivalent of traditional library lending.”<sup>250</sup> The underlying theory, simple on its face, is to replicate the concept of physical lending or circulation of material albeit in a digital manner.<sup>251</sup> The principle underlying the concept of CDL is one of equity stemming from fair use to sanction a digital version of the traditional library act of lending permitted under the first sale doctrine.<sup>252</sup>

CDL is premised on reading fair use and the promotion of Progress of Science and useful Arts language in the Constitution as supporting rather than preventing use and the first sale doctrine as extinguishing the rights of the owner at the time of the sale of the copy.<sup>253</sup> With fair use as the working premise, CDL argues for the natural evolution of lending as the world moves to a digital footprint.<sup>254</sup> CDL also addresses the problems of and inefficiencies of in-person access to physical collections.<sup>255</sup> Not all have the resources or the ability to travel to distant physical locations to use physical collections, even in the best of times.<sup>256</sup>

Essential to CDL are the concepts of control and balance.<sup>257</sup> Proponents of CDL suggest CDL maintains the balance between rightsholders and libraries as required by Congress.<sup>258</sup> In addition to control of the process, there are six specific requirements for CDL:<sup>259</sup> (1) lawful acquisition of the original work; (2) ownership of the work, with licensed works excluded from CDL; (3) observance of the *owned to loaned* ratio; (4) single-user lending, replicating traditional physical lending; (5) limited borrowing period, replicating traditional physical lending rules; and (6) digital rights management to prohibit “wholesale copying and redistribution.”<sup>260</sup>

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250. Lila Bailey et al., *Controlled Digital Lending Fact Sheet*, CONTROLLED DIGIT. LENDING BY LIBRS., <https://controldigitalending.org/faq> [<https://perma.cc/YVH4-CUVZ>].

251. Hansen & Courtney, *supra* note 245, at 3.

252. *Id.*

253. *Id.* at 9.

254. *Id.*

255. *Id.* at 3.

256. *Id.*

257. Hansen & Courtney, *supra* note 245, at 2.

258. *Id.*

259. *Id.* at 2 (“The first sale doctrine, codified in Section 109 of the Copyright Act, provides that anyone who legally acquires a copyrighted work from the copyright holder receives the right to sell, display, or otherwise dispose of that particular copy, notwithstanding the interests of the copyright owner.”); *see* 17 U.S.C. § 109.

260. Hansen & Courtney, *supra* note 245, at 2.

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*i. First Sale Doctrine and CDL*

Promoters of the CDL theory suggest that CDL “mimics the economic transaction” sanctioned by Congress with the codification of the first sale doctrine in section 109.<sup>261</sup> The suggestion is that first sale limits the ability of the copyright owner to control subsequent transfer or disposition of a particular copy and “frees the courts from the administrative burden of trying to enforce restrictions upon difficult-to-trace, readily movable goods.”<sup>262</sup> CDL advocates argue that technological evolutions invite libraries to evolve in a manner that retains the balance as created in section 109 creating user access in modern, digital, formats.<sup>263</sup> The assertion is that the CDL requirements of lawful acquisition of the original and owned to loaned ratios preserve such balance.<sup>264</sup>

*ii. Fair Use and CDL*

The second prong supporting the concept of CDL is that of fair use and, specifically, the purpose and character of the use factor.<sup>265</sup> CDL, it is suggested, is intended to benefit the public and be a non-commercial use.<sup>266</sup> Promotion of research and learning are identified as core purposes of CDL.<sup>267</sup>

Libraries engaging in CDL are doing so to enable broad availability of knowledge for the purpose of promoting research, scholarship and learning. These are uses specifically mentioned as examples of fair use by Congress in the statute, and are at the core of the constitutional purpose of the copyright system.<sup>268</sup>

Market effect is the fourth factor in a fair use analysis.<sup>269</sup> The analysis asks “whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.”<sup>270</sup> As *Campbell* noted, also key to the analysis of market effect is if the market is harmed or would be harmed as a result of “unrestricted and widespread conduct of the sort.”<sup>271</sup> Courts, in

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261. *Id.* at 6.

262. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 539 (2013).

263. Hansen & Courtney, *supra* note 245, at 2.

264. *Id.* at 1.

265. *Id.* at 6.

266. *Id.* at 9.

267. *Id.*

268. *Id.*

269. Hansen & Courtney, *supra* note 245, at 5.

270. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015).

271. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994).

assessing the question of harm to the market, also consider the market for licensing so long as they are “traditional, reasonable, or likely to be developed.”<sup>272</sup> In *Cambridge University Press v. Patton*, the court suggested that an analysis of market effect includes consideration of the purpose of copyright with the question for analysis, posed as, does the use result in “substantial economic harm such that allowing it would frustrate the purposes of copyright by materially impairing incentive to publish the work”<sup>273</sup> Advocates of CDL suggest there is no market effect as the impact on the market is the same as is sanctioned by the first sale doctrine.<sup>274</sup> They go even further, stating that the first sale doctrine is itself a limit on the market that the copyright owner may control.<sup>275</sup> “After the ‘first sale’ of the work, rightsholders may no longer place controls on the resale, lending, or other restraints on alienation of copies transferred.”<sup>276</sup>

## 2. The Counter Argument; the Opposition

In 2020, in response to the creation of the Internet Archive’s Open Library and National Emergency Library proposals,<sup>277</sup> the Hatchett Book Group, HarperCollins, John Wiley & Sons and Penguin Random House filed suit against the Internet Archive targeting the practice of CDL, promising the first test of this theory.<sup>278</sup> The complaint charges “willful mass copyright infringement” and “willful digital piracy on an industrial scale” that is “intentional and systematic” producing “mirror-image copies of millions of

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272. *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 929–30 (2d Cir. 1994) (“It is indisputable that as a general matter, a copyright holder is entitled to demand royalty for licensing others to use its copyrighted work, and that the impact on potential licensing revenues is a proper subject for consideration in assessing the fourth factor.”).

273. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014).

274. Hansen & Courtney, *supra* note 245, at 23.

275. *Id.* at 24.

276. *Id.*

277. See generally Jill Lepore, *The National Emergency Library Is a Gift to Readers Everywhere*, NEW YORKER (Mar. 26, 2020), <https://www.newyorker.com/books/page-turner/the-national-emergency-library-is-a-gift-to-readers-everywhere> [<https://perma.cc/FL7P-LYKJ>] (discussing the National Emergency Library proposed by the Internet Archive in response to the pandemic).

278. Complaint at 4, *Hachette Book Grp., Inc. v. Internet Archive*, No. 1:20-cv-04160 (S.D.N.Y. June 1, 2020), <https://www.courtlistener.com/docket/17211300/hachette-book-group-inc-v-internet-archive> [<https://perma.cc/F646-94XC>]; see also Eileen Bramlet, *Internet Archive’s “Emergency Library”: A Wolf in Sheep’s Clothing*, COPYRIGHT ALL. (Apr. 23, 2020), <https://copyrightalliance.org/internet-archive-emergency-library-for-covid-19> [<https://perma.cc/V27C-LF8Z>] (noting Internet Archive began CDL in 2011 digitizing out-of-print books including works still under copyright).

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unaltered in-copyright works for which it has no rights and distributes them in their entirety for reading purposes to the public for free, including voluminous numbers of books that are currently commercially available.”<sup>279</sup> Critics argue of significance is the failure of the Internet Archive to honor the owned to loaned ratio as is specified by the requirements of CDL.<sup>280</sup> The publishers argue that no reading of fair use supports “the systematic mass copying or distribution of entire books for the purpose of mass reading.”<sup>281</sup> Critics also address the concept of transformative use, noting that nothing new is added and there is no transformative use.<sup>282</sup> Similarly, the question of the first sale doctrine as supporting CDL is challenged, suggesting that the making and distribution of a copy of a lawfully acquired work is outside the scope of the first sale doctrine, which merely permits the owner to dispose of that particular print copy.<sup>283</sup>

The ongoing litigation between *Hatchett Brook Group et al.* and *Internet Archive* is the most overt manifestation of opposition to CDL but is merely the most recent. Authors and publishers, including the American Association of Publishers, The Authors’ Guild, and National Writers Union, long have voiced opposition to the theory.<sup>284</sup> The authors and publisher arguments focus on the market effect factor of fair use, ignoring the distinction between a copy and a work and the inapplicability of the first sale doctrine.<sup>285</sup> As one commentator highlighting the fragility of the CDL argument observed:

In the same discussion thread [on the Library Licensing discussion list in May and June 2020], David Hansen . . . [responded,] “to be very clear to all, we don’t have a fair use case squarely on point that addresses controlled library lending of digitized books, so for now we are making analogies to other fair use cases and the principles they articulate. Fair use is a fact intensive inquiry and so even then, how a court would treat IA’s [Internet Archive’s] implementation of CDL under fair use as compared to other imple-

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279. Complaint, *supra* note 278, at 2.

280. *Id.* at 4 (noting that the Internet Archive initially observed the owned to loaned ratio requirement of CDL but in light of the pandemic “announced with great fanfare that it would remove these already deficient limitations that were purportedly in place.”).

281. *Id.* at 6.

282. *Id.*

283. *Id.*

284. See *Appeal From the Victims of Controlled Digital Lending (CDL)*, NAT’L WRITERS UNION (Feb. 2019), <https://nwu.org/book-division/cdl/appeal> [<https://perma.cc/CAU7-3RD2>] (noting that multiple author and publisher groups jointly opposing controlled digital lending).

285. Hansen & Courtney, *supra* note 245, at 10.

mentations (e.g., how HathiTrust is providing access right now under ETAS) may differ.<sup>286</sup>

The flaws in CDL relate to the as yet not recognized concept of a digital first sale doctrine, the creation of an entire copy of a work that is questionably transformative, and the potential for market effect or harm for widespread copying.<sup>287</sup> Explored first in 2001 by the U.S. Copyright Office and again in 2016 by the Department of Commerce, the concept of a digital first sale doctrine was rejected as exiting in a state of suspended animation due to technology and uncertainty as to how to enforce *owned to loaned ratios*.<sup>288</sup>

Amount and substantiality, or the third fair use factor, is arguably problematic to the CDL premise. In fair use analysis, a rule of thumb is that the greater the amount of original content used in relation to the whole, the less likely the use is fair.<sup>289</sup> The amount used is not viewed in a vacuum but rather in light of the purpose and character of the use.<sup>290</sup> CDL critics note that the use of CDL is not limited to the uses specified in the preamble to § 107, even though such uses are merely illustrative.<sup>291</sup> Courts have sanctioned instances where the entirety of the original is permissibly copied.<sup>292</sup> There is no hiding

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286. Marydee Ojala, *Controlled Digital Lending: Legal Lending or Piracy?*, 45 ONLINE SEARCHER (Jan./Feb. 2021), at 25, 27.

287. See discussion of fair use first factor and concept of transformative use *supra* Section I.A.3.

288. Hansen & Courtney, *supra* note 245, at 9–10.

289. See Goldstein, *supra* note 15, at § 12.2.2.3.

290. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 604 (1985); see also Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 96 (2d Cir. 2014) (“In weighing this factor we assess the quality and value of the material used and whether the amount copied is reasonable in relation to the purported justification under the first factor.”).

291. Hansen & Courtney, *supra* note 245, at 9.

292. See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 460, 449 (1984) (“[T]he fact that the entire work is reproduced . . . does not have its ordinary effect of militating against a finding of fair use.”); Bouchat v. Balt. Ravens LP, 737 F.3d 932, 943 (4th Cir. 2013), *as amended* (Jan. 14, 2014) (noting use of entire work allowable to achieve permissible purpose); A.V. *ex rel.* Vanderhye v. iParadigms, LLC, 562 F.3d 630, 642 (4th Cir. 2009); Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 629 (7th Cir. 2003) (noting “there is no per se rule against copying in the name of fair use an entire copyrighted work if necessary”); Sundeman v. Seajay Soc’y, Inc., 142 F.3d 194, 206 (4th Cir. 1998) (noting amount and substantiality factor weighed in favor when copy provided to researcher was complete copy because for her scholarly work she “needed access to either the original or an “entire copy”); Bill Graham Archives v. Dorling Kindersley Ltd., 448 F.3d 605, 613 (2d Cir. 2006) (finding that the third factor favored the use when displaying “reduced versions of the original images and intermingled these visuals with text and original graphic art . . .

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of CDL's purpose to provide readers a digital, full-text copy of a book accessible online.<sup>293</sup> CDL advocates counter the entirety issue with a two-prong attack suggesting that the third factor of the fair use analysis, amount and substantiality, is either neutral or weighs in favor of fair use.<sup>294</sup> Specifically, they argue that: (1) there is not a per se rule prohibiting a fair use creation of an entire copy;<sup>295</sup> and (2) the requirement of CDL includes both technological and temporal limits on use intended to mirror the activity of physical lending.<sup>296</sup>

The Association of American Publishers registered their disagreement with CDL and the arguments underpinning the theory as espoused in the White Paper supporting CDL,<sup>297</sup> suggesting that the theory:

blurs the line between works and copies in its analysis, ignoring well-established legal distinctions between these terms in the Copyright Act as well as the reality that Congress imposed statutory limitations on library lending. This is a fundamental weakness of the [CDL theory's] first sale argument as well as its market-harm argument under fair use and of . . . the [theory's] general assertion that the law should view CDL as functionally equivalent to hard copy lending. To the contrary AAP finds it highly unlikely under current law that CDL-sanctioned practices would be shielded by either the first sale doctrine . . . or the fair use doctrine. . . because such practices involve making and transmitting new digital copies of print books.<sup>298</sup>

The Association of American Publishers also assert that factor four of the fair use analysis, market effect, undercuts the fair use portion of the CDL theory. The suggestion is that CDL results in cognizable harm to both actual and potential markets of publishers.<sup>299</sup>

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[C]ourts have concluded that [copying an entire work] does not necessarily weigh against fair use because copy the entirety of a work is sometime necessary to make a fair use of the image. [(citation omitted)]. Adopting this reasoning, we conclude that the third-factor inquiry must consider that the 'extent of permissible copying varies with the purpose and character of the use.'").

293. Hansen & Courtney, *supra* note 245, at 22.

294. *Id.* at 3, 22.

295. *See id.* at 22; *Chicago Bd. of Educ.*, 354 F.3d at 629 (“[T]here is no per se rule against copying in the name of fair use an entire copyrighted work if necessary.”).

296. Hansen & Courtney, *supra* note 245, at 3, 22.

297. *Id.*

298. Press Release, Association of American Publishers, Statement on Flawed Theory of “Controlled Digital Lending” (Feb. 4, 2019) (available through State News Service).

299. *Id.*



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Because publishers generally make e-book lending licenses available to libraries for both frontlist and backlist works, and CDL is expressly designed to allow libraries to create their own substitute e-book editions for such works, it is clear that CDL copying would create direct market substitutes for publishers' extensive licensed offerings, not only for digital copies but also for hard copies. The substitutes are not at all transformative of either the copied work or the use of the copied work. Moreover, the Supreme Court has made clear that an actual, present market for a particular derivative use need not exist in order for market harm to be cognizable under the fourth fair use factor, provided that the use is one that 'creators of original works would in general develop or authorize others to develop.'<sup>300</sup>

Publishers take issue with the assumption that the markets for print and e-books are the same and that format is fungible. They argue that the assumption is:

demonstrably not true, as the publishing industry and libraries have over many years created and participated in entirely separate markets for the sale of physical books and the licensing of e-books at different prices and on different terms and conditions . . . CDL is designed to compete with copyright owners' digital market, not some hypothetical physical market, making the "owned to loaned" concept in CDL irrelevant to the application of §109(a) and §107.<sup>301</sup>

Authors and publishers also point to the Second Circuit's 2018 decision in *Capital Records v. ReDigi*, reading the holding as a rejection of the interpretation of section 109 as a statement of broad principles asserted by CDL.<sup>302</sup> The *Author's Guild* argues that:

CDL relies on an incorrect interpretation of copyright's "fair use" doctrine to give legal cover to Open Library and potentially other CDL users' outright piracy—scanning books without permission and lending those copies via the internet. By restricting access to one user at a time for each copy that the library owns, the proponents analogize scanning and creating digital copies to physically lending a legally purchased book. Although it sounds like an appealing argument, the CDL concept is based on a faulty legal argument that has already been rejected by the U.S. courts. In *Capitol Records v. ReDigi*, the Second Circuit held that reselling a digital file without the copyright holder's permission is not fair

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300. *Id.*

301. *Id.*

302. *Id.*

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use because the resales competed with the legitimate copyright holder's sales. It found that market harm was likely because the lower-priced resales were sold to the same customers who would have otherwise purchased new licenses. In this regard, the court emphasized a crucial distinction between resales of physical media and resales of digital content, noting that unlike physical copies, digital content does not deteriorate from use and thus directly substitutes new licensed digital copies. The same rationale applies to the unauthorized resale or lending of eBooks. Allowing libraries to digitize and circulate copies made from physical books in their collection without authorization, when the same books are available or potentially available on the market directly competes with the market for legitimate eBook licenses, ultimately usurping a valuable piece of the market from authors and copyright holders.<sup>303</sup>

The Internet Archive's National Emergency Library initiative ceased to operate on June 16, 2020, two weeks in advance of the stated June 30, 2020 date originally given.<sup>304</sup> Internet Archive founder Kahle announced the early closing due in direct response to the Hachett Group's lawsuit.<sup>305</sup> While the Internet Archive still relies on CDL and the lawsuit continues, it is clear that CDL is as of yet unproven.<sup>306</sup> Opponents of the theory might suggest the early closing reflects the weakness in the CDL theory.

## II. USING STATUTORY DEVICES, THEORIES AND A DECISION MATRIX TO ADDRESS AN EMERGENCY: WHAT WORKS AND WHAT DOES NOT?

As suggested in the introduction to this paper, emergency circumstances arise from many and varied circumstances. Hurricanes and tornados are destructive, resulting in property damage from wind and water. Disruption from fires involves smoke, water, and chemical damage in addition to destruction of property. By contrast, a pandemic is both the same and different. A pandemic may lack the destructive element of fire, hurricane, or tornado, but all have the characteristic of creating barriers to institutions and thus print collections. The hypothetical constructed for evaluation of our *devices and the-*

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303. *Controlled Digital Lending Is Neither Controlled nor Legal*, AUTHORS GUILD (Jan. 8, 2019), <https://www.authorsguild.org/industry-advocacy/controlled-digital-lending-is-neither-controlled-nor-legal> [https://perma.cc/DGP4-DHE4]. *Contra* Wu, *supra* note 231.

304. Andrew Albanese, *Internet Archive to End 'National Emergency Library' Initiative*, PUBLISHERS WKLY. (June 12, 2020), <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/83584-internet-archive-to-end-national-emergency-library-initiative.html> [https://perma.cc/G66U-KER8].

305. *Id.*

306. *Id.*

ory, is that of a pandemic and focuses on providing the information and resources to support students in the pursuit of their courses and faculty in teaching and scholarship.

**A. The Hypothetical Exemplar an Emergency, a Pandemic and University Course Reserves**

Consider the following hypothetical for the purposes of this section:

*A new, highly contagious variant of scarlet fever with a significant instance of hospitalization resulted in the issuance of quarantine mandates and a statewide stay-at home-order. State University transitioned to remote learning. Only those deemed essential personnel are permitted on campus. The president of State University determined classes will move to remote (virtual) learning platforms for the remainder of the semester. The libraries are closed to all but a minimal staff. Students and faculty require access to information in the library collections and course reserves, some of which is only currently available in print. Requests for digital access to study aids, textbooks, and required readings currently on course reserve inundate the library. Members of the faculty are also requesting materials in support of existing research and scholarship from members. Members of the library's public services team were instructed to fill those requests with either materials from existing digital collections, subject to the terms of the license agreement, or arrange for contactless delivery of print materials. This method fills a significant number of requests; however, a small number of requested items are only available in print format in the library's current collection and contactless delivery of the print is insufficient to fill the need. The remaining question is, might the library digitize, on a case-by-case instance, and make available through authenticated access portals selected print materials for use by faculty and students for the specific purposes of research, teaching, and education during the term of the stay at home order for temporary use without the permission of the owner of copyright?*

This discussion identifies the theory of CDL and the existing statutory devices of fair use, the library exception, and the first sale doctrine existing in the current Copyright Act as means to share materials presently falling into copyright without the consent of the rightsholder. Analysis of the statutory devices and the theory of CDL follow.

**B. Fair Use; Section 107**

Analysis of applicability of fair use begins in equity. Fair use is an affirmative or equitable defense asking the court to excuse the infringing act

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due to an inequity.<sup>307</sup> In copyright, equity asks if the copyright bargain is unfair in the specific instance, cubing the creativity and innovation desired and opting for the legitimacy of the infringing copy due to the circumstances. The over-arching question of equity is, does the monopoly granted to the rights holder harm the public interest?<sup>308</sup> Put another way, fair use is a context model requiring a court to embrace flexible application to retain the equitable bargain and maintain the desired balance of monopoly to public benefit.<sup>309</sup> Analysis of the equitable bargain begins with examination of the non-exclusive uses suggested by the preamble to section 107 and then moves to the articulated four factors that shall be considered in a determination of fair use.<sup>310</sup> Each of the four factors is to be considered and balanced in light of the relevant circumstances,<sup>311</sup> although some of the factors may be more important than others in a given analysis due to the context of the use.<sup>312</sup> In the hypothetical emergency circumstance, a fair use analysis requires evaluation of each factor in the context of the nature of the emergency circumstance. Here the analysis considers if a digital reproduction created by scanning an entire work presently under copyright for use in an educational circumstance of a course reserve reading, other teaching use, furtherance of research or scholarship distributed using a password protected and authenticated portal in the context of an existing emergency where access is problematic qualifies as a fair use.

### 1. Section 107 - The Preamble

The preamble to section 107 sets out an illustrative list of uses that constitute permissible fair use of copyrighted material.<sup>313</sup> Included in that list are

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307. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 95 (2d. Cir. 2014) states:

At the same time, there are important limits to an author's rights to control original and derivative works. One such limit is the doctrine of "fair use" which allows the public to draw upon copyrighted materials without the permission of the copyright holder in circumstances (citation omitted) "From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose '[t]o promote the Progress of Science and useful Arts'" . . . (quoting *Campbell*, 510 U.S. at 574).

*Id.*

308. See *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1186 (2021).

309. *Id.*

310. 17 U.S.C. § 107.

311. *Google*, 141 S. Ct. at 1197.

312. *Id.*

313. The preamble states:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or pho-

the uses of teaching, scholarship, and research.<sup>314</sup> The failure to fall into one of the named uses is not fatal, but a use reflecting one of the enumerated categories provides support in favor of a conclusion of fair use.<sup>315</sup> Use for the purpose of teaching, research, or scholarship also factors into the overall equitable equation when balancing the public benefit to that of monopoly, favoring the creator. Sacrifice is an anticipated element of an emergency. Asking those who benefit from a limited monopoly to concede a bit in a time of extremis in a manner that provides significant benefit to the public lies at the very heart of equity.

## 2. Factor One – Purpose and Character of the Use

The first statutory factor focuses on how the copyrighted material is used.<sup>316</sup> Explicit in the how is an examination of whether the use is commercial versus educational or non-profit.<sup>317</sup> While commercial uses are not de facto prohibited, copying of works to be used in the furtherance of teaching, scholarship, and/or research incline towards a finding of fair use.<sup>318</sup> The inclusion of the reading, pre-emergency, in a course reserve for use in a course sanctioned by an educational institution establishes a pre-existing intent that the material is to be used in furtherance of an educational purpose and is valued for such teaching or research purpose. Similar evidence of pre-existing uses for teaching, research, and scholarship also documents the value of the material to such endeavor and the continuing need for the material. Use in the educational environment also favors fair use. If the copyright bargain is represented as a scale, use for education or research and the context of the emergency are weights that incline toward the benefit of the public. The *how* in the hypothetical emergency indicates a non-commercial, teaching, research, or scholarship use which suggests a benefit to the public. A facts and circumstances argument in equity could suggest factor one favors fair use.

The other significant consideration in evaluating factor one is whether or not the new use is transformative.<sup>319</sup> The query's focus is whether or not

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norecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include . . .

17 U.S.C. § 107.

314. *Id.*

315. H.R. REP. NO. 94-1476, at 26 (2019).

316. 17 U.S.C. § 107(1).

317. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

318. Goldstein, *supra* note 15, at § 12.2.2.1.

319. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 95 (2d Cir. 2014) (“An important focus of the first factor is whether the use is transformative. A use is trans-

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the work “adds something new with a further purpose or different character altering the first with new expression, meaning or message.”<sup>320</sup> Mere addition of value is not the focus but, rather, is the new work “one that serves a new and different function from the original work and is not a substitute for [the original?]”<sup>321</sup> The failure to be transformative does not defeat an ultimate finding of fair use, although factor one may weigh against fair use for lack of transformation.<sup>322</sup> The Supreme Court has held that ordinary copies could constitute a fair use in the case of time shifting.<sup>323</sup>

In the emergency hypothetical, the copy is a one-to-one translation. Arguably nothing new is added, suggesting an absence of transformative use. A scanned reproduction of an entire work distributed digitally, even in a limited scope, alone is not transformative. However, when relevant circumstances are added to the evaluation of the factor of transformative use in an equitable balancing, might the factor incline towards fair use? If one considers a scale, the emergency circumstance might act as the additional weight to tip the scale in favor of a transformative use. Even when the frame is posed as a work that serves a new and different function and not a substitute for the original, it is hard to argue that an emergency copy is transformative. In point of fact it is a substitute for the original. But is the correct frame one that recognizes the new as a substitute for an original not otherwise available for a period of time due to the underlying circumstances of the emergency? Does the transformation exist in providing access for teaching, research, or scholarship to that specifically not available due to the emergency? Some believe that the transformative use may be found in the “advancement of knowledge.”<sup>324</sup>

### 3. Factor Two – Nature of the Copyrighted Work

Factor two considers the nature of the use of the copyrighted work.<sup>325</sup> This factor explores if the new work is “of the creative or instructive type that the copyright laws value and seek to foster.”<sup>326</sup> Highly expressive works are more likely to indicate a non-fair use determination than a transformative use of highly factual works. In *Google*, the Court suggested that a determination that a use is transformative must consider the purpose and character of

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formative if it does something more than repackage or republish the original copyrighted work.”).

320. *Campbell*, 510 U.S. at 579.

321. *Authors Guild*, 755 F.3d at 96.

322. *Id.*

323. *See generally* *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

324. Goldstein, *supra* note 15, at § 12.2.2.

325. 17 U.S.C. § 107(2).

326. *Authors Guild*, 755 F.3d at 95.

the use and the relevant circumstances.<sup>327</sup> Also of consideration is whether or not the original work is published or unpublished.<sup>328</sup> A case-by-case evaluation of each work is needed to consider the published or unpublished status of the underlying work. Materials placed on course reserve and used for teaching are likely published and evidence significant expressive content, placing them closer to the core of copyright. But the Court in *Google* urged a deeper analysis of this factor, suggesting that the nature be considered in context of the purpose and character.<sup>329</sup> In emergency circumstances, copying for the explicit purposes of teaching, research, and scholarship to meet the information needs of the circumstances would seem to advance the creativity urged by the Constitution and, perhaps, in consideration of all facts, suggest a fair use.

#### 4. Factor Three – Amount and Substantiality

The third factor considers the quantity and the importance of taken information.<sup>330</sup> As *Harper & Row* and *Campbell* discussed, there is a continuum as to the amount used in a new work.<sup>331</sup> The amount taken can be minimal and deny a fair use claim where the meat or *heart* of a work is taken or all, or substantially all, of a work may be used and support a claim of fair use when central to a valid purpose.<sup>332</sup> *Google* suggests the scale tips to fair use when the amount reproduced is used for a valid and transformational purpose.<sup>333</sup> No absolute rule exists regarding how much of a work may be reproduced and still qualify as a fair use.<sup>334</sup> Specific mathematical guidelines suggested by the National Commission on New Technological Uses of Copyrighted Works were rejected, leaving as a rule of thumb to take the smallest amount needed to effectuate the purpose.<sup>335</sup> The amount taken is dependent upon the purpose and character of the use.<sup>336</sup> This factor depends in part on what the “whole” is for the hypothetical course reserve or other teaching,

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327. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1203 (2021).

328. Goldstein, *supra* note 15, at § 12.2.2.2.

329. *Google*, 141 S. Ct. at 1203.

330. *Authors Guild*, 755 F.3d at 95 (“The third factor asks whether the secondary use employs more of the copyrighted work than is necessary and whether the copying was excessive in relation to any valid purposes asserted under the first factor.”).

331. See discussion *supra* Section I.A.4.

332. See *Authors Guild*, 755 F.3d at 98.

333. *Google*, 141 S. Ct. at 1205.

334. *Authors Guild*, 755 F.3d at 98.

335. See generally National Commission on New Technological Uses of Copyrighted Works (CONTU), *Final Report on the National Commission on New Technological Uses of Copyrighted Works*, 3 COMPUT. L.J. 53 (1981).

336. *Authors Guild*, 755 F.3d at 98.

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research, or scholarship purpose. A portion of a larger work, such as a chapter or article, is an easier call than the entirety of a work weighting in favor of fair use. But what of an entire pamphlet or short work or a text? Is the entirety used for a valid and transformational purpose?<sup>337</sup> Following *Google*, if the amount is used for teaching, scholarship, or research in an emergency circumstance, and the minimal amount needed to satisfy the purpose is the entirety but the benefit to the public great, equity may tip the scale in favor of fair use.<sup>338</sup>

### 5. Factor Four – Market Effect

Market effect is an analysis of the impact of the new work on the market value for the original work:<sup>339</sup> “[a] fair use must not excessively damage the market for the original by providing the public with a substitute for that work.”<sup>340</sup> In simpler terms, the copy may not act as a substitute for the original, thus diminishing the market for the original. In our instance, the market effect is likely to be negligible. The intended audience is limited to that of students, faculty, and researchers of a specific institution. Access to the digital copy is proscribed through the use of an authenticated portal where the user must verify their credentials associating themselves with the institution. The benefit to the public or patron here is significant. Professors assign readings in support of identified learning objectives. The assignment or need for the constituent material was identified prior to the advent of the emergency. Providing access to those, often supplemental, materials furthers the education of students enrolled in the class, on-going research, or scholarship. Specifically, when reviewing course reserve numbers, the expectation is that students would opt to forgo such readings rather than spend additional money to purchase such materials from Amazon or otherwise pay for supplemental materials, thus diminishing their educational experience.<sup>341</sup> In such limited and proscribed instances, it is unlikely that the existence of a new copy, provided in limited and protected circumstances, will act as a substitute for the original in a manner to significantly diminish or obstruct market. In such limited circumstances, it is likely that the market effect factor will point to a fair use.

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337. *Id.* at 95 (“In weighing this factor, we assess the quantity and value of the materials used and whether the amount copied is reasonable in relation to the purported justifications for the use under the first factor.”).

338. *Id.* at 98 (“For some purposes, it may be necessary to copy the entire copyrighted work, in which case Factor Three does not weigh against a finding of fair use.”).

339. *Id.* at 99.

340. *Id.* at 95.

341. See generally Caleb Nichols, *In Defense of Course Reserves: A review of California Programs*, 80 COLL. & RSCH. LIBRS. (2019), <https://crln.acrl.org/index.php/crlnews/article/view/23583/30895> [<https://perma.cc/A47E-ALYH>].



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Considering the role of equity and the statutory factors, the conclusion for our hypothetical emergency suggests that fair use is a viable device to create digital copies of materials for use in an emergency. A case-by-case analysis of the four factors for each work to be copied is required.

### C. Library Exception Section 108

The library and archive exception codified in section 108 of the Copyright Act is narrow and specific.<sup>342</sup> While not written to specifically address an emergency situation, it remains a viable device to support the critical library service of delivery of information in emergencies. Subsections (c) – (e) of section 108 are of particular interest for application in emergencies. Permitting the creation of replacement copies and reproductions specifically for research and scholarship, section 108 is a statutory provision a librarian might use in narrowly circumscribed circumstances that includes a time of extremis.<sup>343</sup> As discussed previously, four general requirements must be met to take advantage of section 108: (1) the institution is a *permissible institution*, a library or archive; (2) distribution of the created copy does not serve either a direct or indirect purpose of a commercial advantage; (3) the library or archive is open to the public or researchers in specialized fields; and (4) any copy created includes a notice of copyright.<sup>344</sup>

The general requirements are easily enough met by the hypothetical library. The institution is clearly defined as a library. As a library attached to a longstanding educational institution, it is unlikely to beg discussion of the first requirement. The second requirement, absence of a direct or indirect commercial advantage, is similarly unlikely to present an issue in an emergency circumstance. The information or work in question that presently exists in the library collection is available to a patron. The barrier is in the ability of the patron to access and use the information. Providing a digital copy through existing authenticated portals for use in support of present research, teaching, or scholarship by an existing faculty member is unlikely to supplant a market for the underlying work but, rather, serves to permit existing, in-progress work to continue unimpeded. Building on the analysis above in the fair use market effect factor analysis, libraries at educational institutions making copies in support of specific, existing research, teaching, and scholarship needs when the dictates of the emergency otherwise create significant and perhaps absolute barriers of access to the print version of the work are unlikely to create any commercial advantage when a digital copy is created to address the specific and temporary need. Inclusion of a notice of copyright should be part of exiting library workflows and satisfy the fourth requirement.

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342. See 17 U.S.C. § 108.

343. § 108(e).

344. § 108(a)(1)–(3).

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More vexing is the third requirement requiring the library to be open to the public or researchers in specific fields. What is open in an instance when the physical manifestation of the library is restricted to all but essential personnel providing the routine library services and functions to their patrons? During the 2020 pandemic the physical spaces of libraries were not accessible by the public, but libraries remained open using technology to meet the information needs of their users. In such situations, there is a strong argument that the library remains open.<sup>345</sup> If the library continues to serve the same group of patrons it served prior to implementing restrictions to its physical space, the suggestion is that the library be viewed as open in the context of this requirement.

Other requirements of section 108 are more problematic. Such requirements should be evaluated in the context of a defined and existing emergency. They include:

1. use of the reproduction on the library premises;
2. display of a notice of copyright where orders are made;
3. original work is damaged, deteriorating, lost, stolen, or exists in an obsolete format; and
4. reasonable investigation and determination that a replacement copy may be obtained at a reasonable price.<sup>346</sup>

Is a library's existence defined by brick and mortar? Even in times of regular operations (non-emergency situations), libraries are no longer defined by brick and mortar. E-book collections and large subscription (digital) database collections made available for off-campus access through authenticated portals and features such as chat and Zoom now extend the library's reach and existence far beyond that of the brick and mortar. One might argue that providing a copy on similar terms as a library customarily provides for use in the same or similar manner is consistent with using the copy within the library premises. Use of a proxy server or similar authentication process to restrict access helps to define the borders of the library's existence.

How does a library seeking the protection of section 108 address the need to display notice of copyright where orders are made? Physical display at a point of service in a building is simple and reflects the traditional expectation at an earlier point in time. Are there other options? Inclusion of the language on a webpage is arguably a suitable alternative. The reality of today's library is that requests for materials are more likely to be made via an online request system using the library's web presence as tied into a library system than in person at a window or desk. Given this reality, the notice of copyright should appear at the online point of request regardless of the presence of an emergency or normal operating procedure.

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345. *See* Am. Geophysical Union v. Texaco, Inc., 60 F.3d 913, 929 (2d Cir. 1994) (construing "open" in the context of for-profit corporate libraries closed to rivals).

346. 17 U.S.C. § 108(e).

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Might the term “obsolete format” include print in certain circumstances? Print is arguably the most stable format, which argues against a conclusion of obsolescence.<sup>347</sup> Section 108 defines “obsolete” in the terms of technology and a work no longer available or capable of perception or no longer commercially available.<sup>348</sup> Does the emergency context argue for a broader reading of the language “not commercially available” where issues such as contamination of print or prohibition of a customary library service such as course reserve support the conclusion that for a temporary time the print format is obsolete? In our hypothetical instance, print fails to provide a suitable response to the specific circumstances. It is the emergency that creates the barrier to the existing print. Replacing print with print leaves the library and the borrower in the exact same place. Contactless delivery might obviate the issue in limited instances but what of the library service of a course reserve reading? Course reserve services are intended to permit multiple patrons to access the material for brief periods of time. Contactless delivery runs counter to the use of multiple patrons for short periods. In such circumstances, print as a format fails to serve its intended purpose and is arguably obsolete for the period of the emergency.

Reasonable investigation for a replacement copy is the final requirement to invoke section 108.<sup>349</sup> The investigation and price of the replacement must both be reasonable.<sup>350</sup> Of note is that the creation of the reproduction cannot replace the ultimate need to purchase.<sup>351</sup> In an emergency circumstance, the need is temporary and the purchase already exists. If the language is read as requiring an additional purchase, then it is a duplication expanding the market rather than retaining the original market. Borrowing from the CDL theory requiring a one-to-one translation would seem to bolster the argument that creation of a digital copy of a published resource presently existing in a library’s print collection would be consistent with the requirements of section 108. Is the requirement to investigate and replace an obsolete format with a duplicate copy in the same obsolete format? Such interpretation seems contrary to the intent of the statute and the inherent copyright bargain. The benefit to the public here is significant given the support of education, research, and scholarship.

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347. See Gasaway, *supra* note 201, at 647 (discussing preservation and stability of print as a format). “Library preservation took on a different complexion. The concern was not that the book would be removed from the collection, but rather, that the physical condition of the work would remain sufficiently stable so that readers could enjoy the work without undue deterioration of that particular copy.” *Id.*

348. 17 U.S.C. § 108(c).

349. § 108(c)(1).

350. *Id.*

351. See Gasaway, *supra* note 201, at 656.

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Digitizing print materials for use within the existing footprint of the library, including its digital reach in a time of emergency to meet the customary and intended services of a library, suggests a viable solution. In the hypothetical situation, there is a traditional library with a brick-and-mortar existence extended by digital services provided through authenticated portals. Notice of copyright is prominently displayed in physical and online systems. The library's physical presence is closed to all but essential members of the library staff, but the library remains open to all users using technology. Digitized reproduction is clearly delineated for temporary use during the time of the emergency and of materials currently owned by the library. The temporary digital copy might even bear a notice to such effect. Reproductions are limited to (1) those needed for teaching, research, and scholarship of patrons and not as a substitute for acquisition of materials generally expected to be purchased and (2) as is necessary to provide traditional library services during the time of and as limited by the circumstances of the emergency. While section 108 is narrowly tailored, using section 108 in narrow instances created by dictates of the emergency to deliver traditional library services is a consistent reading of the statute.

#### **D. The First Sale Doctrine; Section 109**

The first sale doctrine addresses the exclusive rights conferred to the copyright owner under section 106.<sup>352</sup> The distribution right is specifically limited by application of the first sale doctrine, but the reproduction right conferred under section 106 remains unaffected.<sup>353</sup> This proves to be problematic for application of the first sale doctrine as a statutory device for use in our emergency circumstance absent another statutory provision such as fair use or the library exception. Standing alone, the first sale doctrine permits the owner of a copy to further alienate that copy subject to the concept of exhaustion.<sup>354</sup> Alienation is traditionally construed to mean a sale, loan, gift, or other transfer of the physical object.<sup>355</sup> The theory of exhaustion is what permits libraries to provide critical services such as the loan of a book. But might a library create a new copy of a work they own using the concept of exhaustion? To date the concept of a digital first sale doctrine has been rejected.<sup>356</sup> The insurmountable problem is the reproduction right conveyed to the copyright owner under section 106. Creation of a digital copy of an existing work by definition involves a reproduction. Exhaustion provides an exception to the distribution right but fails to offer an exception to the reproduction right. Absent such an exception to address the reproduction, the first

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352. Hansen & Courtney, *supra* note 245, at 7.

353. 17 U.S.C. § 109(a).

354. *Exhaustion-of-Rights Doctrine*, BLACK'S LAW DICTIONARY (11th ed. 2019).

355. *Alienate*, BLACK'S LAW DICTIONARY (11th ed. 2019).

356. *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 664 (2d Cir. 2018); *see also* Wu, *supra* note 231.

sale doctrine seems to be an imperfect statutory device to address emergency needs.

### E. Controlled Digital Lending and Emergencies

Controlled Digital Lending, in theory, presents as an optimal means to address emergencies. CDL suggests six threshold requirements that are easily met by libraries such as the one described in the hypothetical.<sup>357</sup> Lawful acquisition of the original work is met as the library already owns a print copy of the work. Licensed works are not at issue as the library's actions are prescribed by the terms of the license agreement. Librarians are experts at lending materials, thus establishing borrowing periods and limiting access to observe owned to loaned ratios in trusted and expert hands. The question of systematic digitization is real but not relevant when the digitization is on a case-by-case basis to address individual and specific requests in furtherance of teaching scholarship, and research. In the sole matter that has to date challenged the concept of CDL, the language of the plaintiff is illustrative, “[f]or the avoidance of doubt, this lawsuit is not about the occasional transmission of a title under appropriately limited circumstances, nor about anything permitted or in the public domain.”<sup>358</sup> Such language suggests an occasional copy may be acceptable in circumstances such as the hypothetical emergency. Where the reproduction finds permissibility under a theory of fair use or the library exception, CDL appears to create a viable option for the librarian. Where fair use and/or the library exception is not available to sanction the reproduction, reliance on exhaustion and first sale is likely misplaced.

CDL is illuminating in regard to how a library might establish a distribution process that recognizes the copyright bargain. CDL is a system of distribution for digitized copies that recognizes the requirements that the library must, first, lawfully acquire the work and replicate digitally the physical lending service in a system with attributes that acknowledge the rights and labor of the author while balancing the unique circumstances of the situation and the desire to incentivize creativity and innovation, hallmarks of the copyright bargain.<sup>359</sup>

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357. Hansen & Courtney, *supra* note 245, at 3.

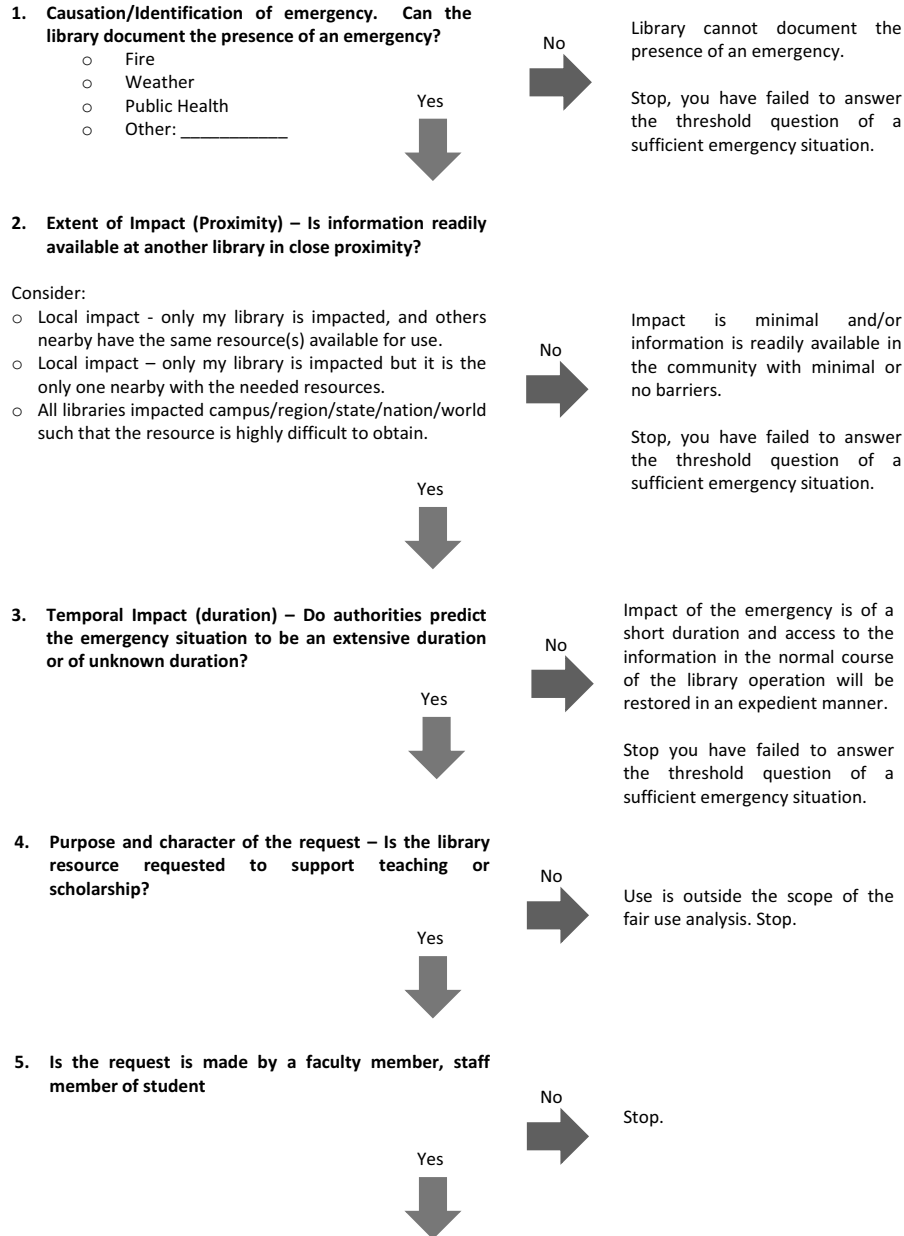
358. Complaint, *supra* note 278, at 3.

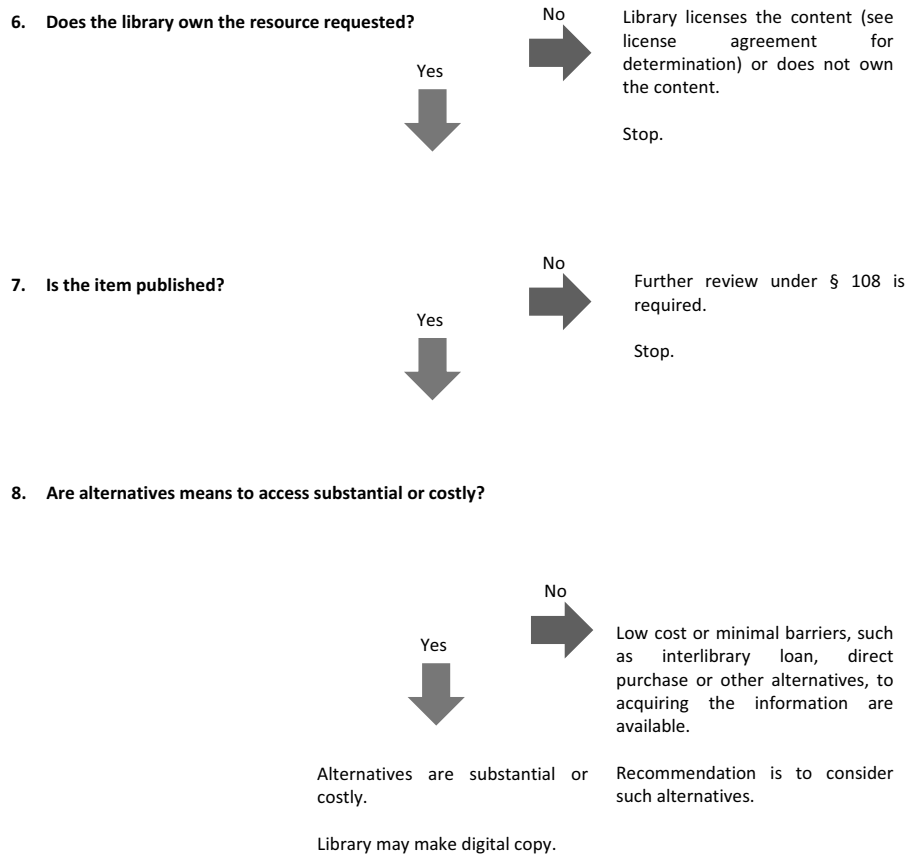
359. Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 94–95 (2d Cir. 2014) (“In short our law recognizes that copyright is ‘not an inevitable, divine, or natural right that confers on authors the absolute ownership of their creations. It is designed rather to stimulate activity and progress in the arts for the intellectual enrichment of the public.’”) (quoting Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990)).

**F. A Decision Matrix**

Establishing and documenting the emergency, its exact nature, and extent of the impact on the library's ability to perform usual and customary library functions is the threshold question to be evaluated prior to any plan of temporary digitization of resources. Examining this threshold question is an essential step given the fact-based nature and analysis underlying the statutory devices. As suggested in the conversation regarding the benefit of section 108, the ability to make decisions without fear of litigation is valuable. A decision matrix promotes the same goal, that of providing a tool to make decisions in situations that are fact-driven. Creation and use of a decision matrix promote consistent and systematic analysis, resulting in decisions made on specific, consistent, and relevant criteria. A decision matrix for making digital copies in the hypothetical emergency might look like the one below.

### A Decision Matrix

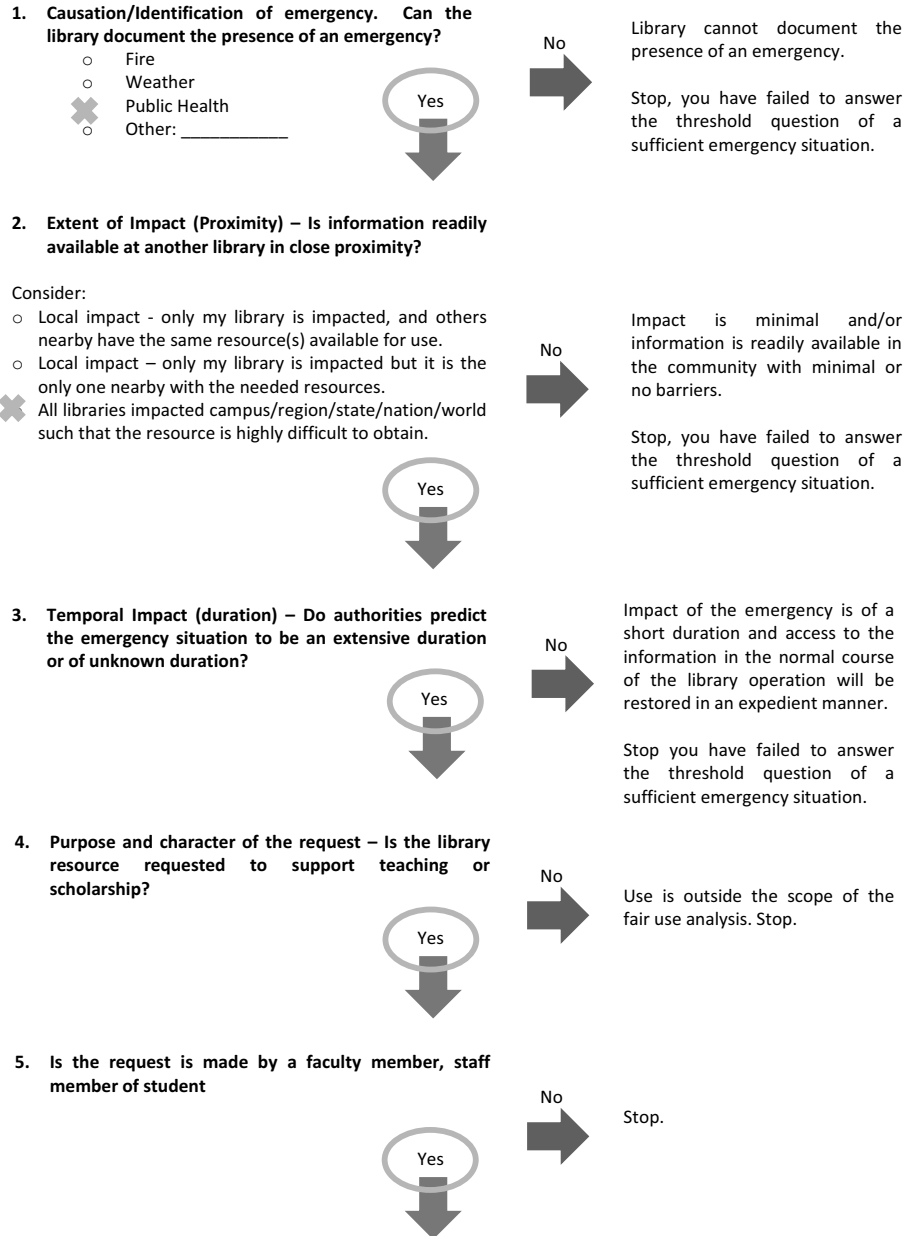


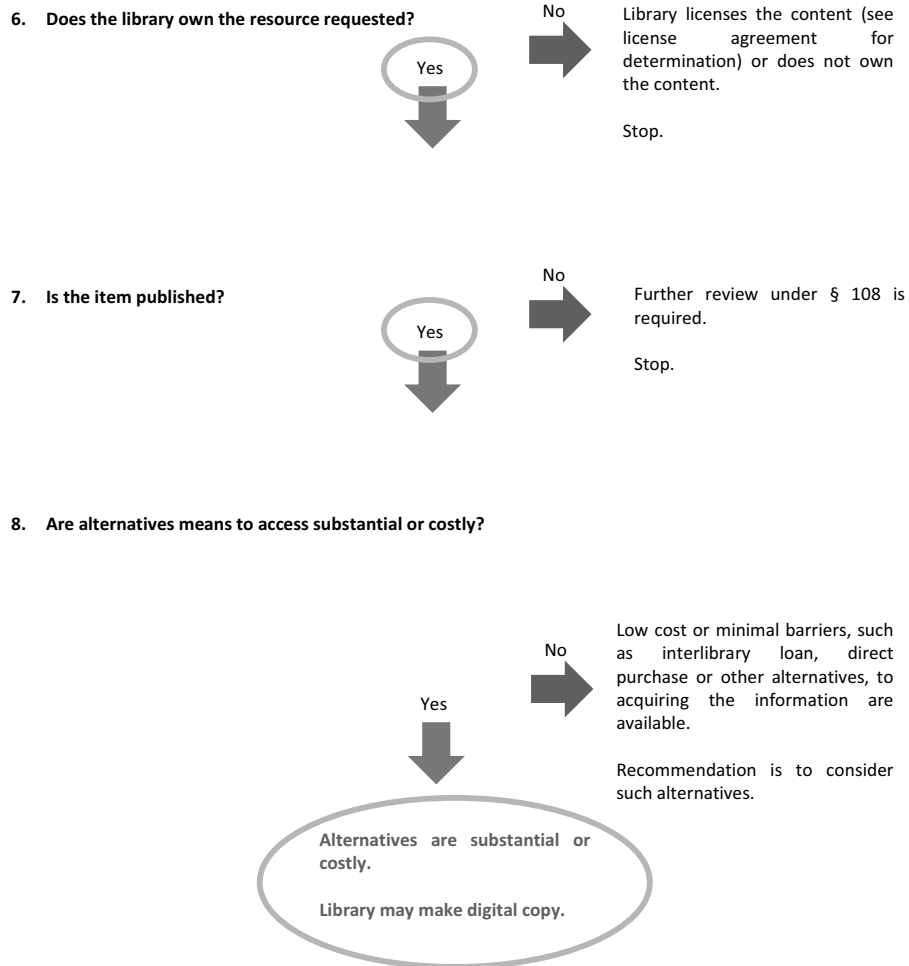


In the hypothetical emergency outlined above a completed decision matrix might look like the analysis below.



### A Completed Decision Matrix





### III. CONCLUSION

Destructive events such as hurricanes and tornados, incidents of wild-fires, and now pandemics are, unfortunately, all too common occurrences in our lives. The impact of such events is immediate and consequential. Temporary interruption of life and common services is the expected consequence of such emergencies. Still, life goes on and those who provide services are expected to adapt. Consider how higher education managed to move the entire system from a physical point of delivery to an online point of delivery using technology in a matter of a few weeks. This is the expected response. This is the new normal.

Libraries are vital to the information ecosystem. Academic libraries support the educational and research missions of our world and provide the vital service of supplying both information and access to information that underpins the educational experience in addition to research that supports innovation and the entrepreneurial spirit. Natural disasters that create emergency

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situations and disruptions to customary library services present situations that require out-of-the-box solutions and creativity. Innovative solutions to eliminate barriers to information are required.

Copyright is often an impediment to meeting the information needs in emergencies. Innovative solutions require librarians to address questions of copyright in the context of the copyright bargain and in light of the circumstance of the emergency. Innovation is consistent with principles of equity and the grand copyright bargain with, as *Google* suggests, being mindful of the benefit to the public and the need to stimulate creativity and innovation while respecting the need to reward the creator for their labor.

Librarians possess limited means to address even the temporary disruption of services, but such disruptions invoke significant consequences, including potential harm to the public. Librarians must address copyright with an eye to finding solutions to the impediments raised in emergencies. Fair use is sufficiently elastic given its equitable history to permit librarians to furnish information to users after a consideration of the traditional four factors, which, post *Google*, one might conclude should include circumstance and benefit to the public. The library and archive exception codified in section 108 is and remains narrow but again is a useful device to support providing information to users. Section 108 is not a free pass. Reading of section 108 requires recognition that a library is more than brick and mortar and the place of the library exists online. Librarians may tailor their responses to the demands of the emergency using the statutory devices of fair use and the library exception to effectively limit the hardships imposed by the absence of information.