

Jonathan Band and Brandon Butler

4 Why Libraries Need Limitations and Exceptions

Abstract: Limitations on the exclusive rights granted to authors are essential to maintain a balance between the interests of established creators and new creators, and between copyright holders and the public. Balance in copyright is also crucial to ensuring that libraries can serve their essential functions of collecting, preserving, and making available diverse collections in support of the public interest. Digital technology presents libraries with opportunities and challenges. On the one hand, digital technology facilitates the making of preservation copies, the creation of new research tools like databases for text and data mining, and the transmission of copies to users. On the other hand, it often is unclear how an exception written for a pre-digital world applies to digital technology. An increasing number of countries are prohibiting the enforcement of contractual terms that purport to limit copyright exceptions. Whether libraries can continue to fulfill their missions in the digital era may depend in part on whether they continue to benefit from robust copyright limitations and exceptions. If the law fails to keep up with technology, libraries may find themselves unable to collect, lend, and preserve important cultural materials, and the market power of rightsholders will have grown to the point where copyright no longer serves the public interest from a utilitarian point of view and has become an impediment to the important competing rights claims of libraries and their users from a natural rights point of view.

Keywords: Fair use (Copyright); Library copyright policies; Copyright and digital preservation; Electronic information resources – Fair use (Copyright)

Introduction

The exclusive rights provided by copyright, if they were absolute, would stifle free expression, criticism, and creativity. The issue of exceptions and limitations is fraught with controversy. In the theoretical realm, limitations and exceptions are grounded either in appeals to the public interest in utilitarian frameworks, or to competing fundamental rights and justice claims in natural rights frameworks. In the political realm, rightsholders and libraries are often at odds over the expansion or contraction of limitations and exceptions. Rightsholders often oppose the adoption of exceptions, or seek remuneration for the exercise of exceptions, to maximize their revenue and control over their works. Libraries, in

contrast, often cannot afford the fees rightsholders seek, and believe some uses in the public interest should not be subject to remuneration. Libraries and their users rely heavily on limitations and exceptions. Some general limitations, like first sale or exhaustion, give libraries and the public vital rights to lend, donate, or resell copies they own. Other exceptions or limitations are specifically tailored to library needs, enabling critical services such as making replacement copies, preservation copies, or copies for users.

Fair use and fair dealing provide broader, more flexible protection for anyone working with in-copyright materials and have become especially crucial to libraries as they adapt to the digital age. For example, digital technology provides libraries with the means to digitize their collections and make them available to users during crises such as the Covid-19 pandemic, but the copyright laws in some countries may not permit such activities. Another challenge of the digital era is that many publishers distribute digital content subject to license agreements. The terms of license agreements may prohibit libraries from exercising their rights under limitations and exceptions available under national copyright laws.

The International Framework

Copyright exceptions and limitations are adopted on the domestic level by national legislatures. However, countries are constrained by treaty obligations. The most significant treaty in the copyright space is the [Berne Convention](#), which is administered by the World Intellectual Property Organization (WIPO) and contains exceptions for quotations and education, and permits further exceptions in accordance with the three-step test. The Berne Convention was first adopted in 1886, and the most recent version of the Convention was adopted in 1971. Most countries have joined the Berne Convention and adopted similar exceptions in their national copyright laws. The vast majority include exceptions favoring libraries and research. Article 10(1) contains a mandatory exception for quotations; all countries must permit the making of “quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose....”. Under Article 10(2), countries also are empowered to adopt exceptions for the use of works by way of illustration for teaching.

The Three-Step Test

In addition, Article 9(2) of the Berne Convention sets forth the so-called three-step test for all other exceptions to the reproduction right. The three-step test provides that “it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author”. The vague standards of the three-step test have been the source of much controversy and debate in academic circles but have been applied by an international tribunal only once (World Trade Organization 2000). Accordingly, there is little concrete guidance concerning the meaning of the three-step test and how it should be applied. As a result, the three-step test often is used in a conclusory manner to oppose the adoption of an exception. After all, virtually any exception could be described as conflicting with the normal exploitation of a work and as prejudicing the legitimate interests of the author.

The three-step test in the Berne Convention applies only to the reproduction right. The [Agreement on Trade Related Aspects of Intellectual Property Rights](#) [hereinafter TRIPS] (World Trade Organization n.d.), adopted by the World Trade Organization in 1995, expanded the application of the three-step test to all exclusive rights under copyright and related rights, for example, to public performance or making available to the public. The WIPO [Copyright](#) and [Performances and Phonograms](#) Treaties, adopted in 1996, confirmed that the three-step test applies to all copyrights and related rights. Various free trade agreements also repeat the three-step test, as do the [Marrakesh](#) and [Beijing](#) Treaties. Indeed, the Marrakesh Treaty provides countries with a roadmap for the adoption of a three-step test compliant exception for the benefit of people with print disabilities.

Exceptions provided in national legislation for libraries must comply with the three-step test. Given the three-step test’s vague standards, it is difficult to determine how expansive library exceptions can be before running up against the three-step test. A group of intellectual property scholars convened by the Max Planck Institute issued a declaration stressing the need for considering the interests of all stakeholders when applying the three-step test, not only the interests of rightsholders (Hilty 2010). The Declaration states that the three-step test should be interpreted in a manner that respects the legitimate interests of third parties, including:

- Interests deriving from human rights and fundamental freedoms
- Interests in competition, notably on secondary markets, and
- Other public interests, notably in scientific progress and cultural, social, or economic development.

Further, the Declaration states that “limitations and exceptions do not conflict with a normal exploitation of protected subject matter, if they...are based on important competing considerations....” (Geiger et al 2010).

The three-step test is intended as a guide to legislatures when enacting copyright exceptions. Unfortunately, some national copyright laws incorporate the three-step test as conditions for the exercise of exceptions. For example, the exception for libraries in the [Tunis Model Law on Copyright for Developing Countries](#), which has been adopted by several African countries, permits libraries to make reproductions “provided that such reproduction and the number of copies made are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author”. Inclusion of the three-step test in specific exceptions undermines the utility of the exception. A librarian would have no certainty whether a particular use she seeks to make satisfies the exceptions requirements.

In addition to international treaties, regional agreements also provide a framework for copyright limitations and exceptions. Most notably, directives adopted by the European Union (EU), such as the [Information Society](#) (Directive 2001/29/EC 2001), and the [Digital Single Market](#) (Directive (EU) 2019/790 2019), specify what exceptions to copyright a Member State may adopt. Both directives contain specific provisions relating to libraries and other cultural heritage institutions. While the three-step test is very general, and provides countries with great latitude, the EU directives are quite specific, and provide little flexibility. Nonetheless, Article 2(5) of the Information Society Directive states that exceptions adopted pursuant to the Directive may be applied only in compliance with the three-step test.

General Theoretical Justifications

Just as copyright itself is justified by reference to a variety of normative theories, limitations and exceptions to copyright protection can be grounded in multiple theoretical bases. An influential introduction to leading theoretical bases for intellectual property is provided by William Fisher (2001). A more recent survey, with proposals for future development, is described by Jeremy N. Sheff (2018). At the highest level of abstraction, these theoretical perspectives are the same overarching approaches that dominate ethical theory generally: utilitarianism or consequentialism, and deontological or natural rights theory. Joyce and others describe utilitarian and natural law as competing, inconsistent rhetorics of copyright, with the former driving the development of the law in the US and other common law jurisdictions, while the latter have served as the basis for copyright

systems in France and Germany, and later for the Berne Convention for the Protection of Literary and Artistic Property (2016, 44). The approach to limitations and exceptions in different legal regimes can be informed by the general normative or theoretical approach that underwrites the copyright tradition in each regime.

In the utilitarian or consequentialist approach to copyright, the copyright system is justified because it serves a higher social good, however that good may be defined. This approach is perhaps most clearly embodied in the [US Constitution Section 8, Clause 8](#), which grants the legislature the power “to promote the Progress of Science and Useful arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries.” The “to” and “by” structure suggests a means-end relationship between securing rights and promoting progress; exclusive rights are secured as a way of achieving a social benefit, the promotion of progress (Oliar 2006). The most strident expressions of commitment to the utilitarian view among US founding fathers may be [Thomas Jefferson’s letters to James Madison](#), giving his reaction to early drafts of the Bill of Rights. Jefferson expresses grave concern about all monopolies and suggests placing a ceiling on all copyright and patent terms, or else a complete ban, rather than risk their growing out of proportion to their benefit to the public. A strong articulation of the utilitarian view is found in a [speech by Lord Thomas Babington Macaulay](#) in opposition to a copyright term extension bill before the English House of Commons in February 1841:

It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a [copyright] monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

If copyright is justified as an expedient means of rewarding authors to ensure they produce new work, but at the same time copyright limits access to those works, the copyright system should be carefully calibrated to ensure that incentives for creators are no stronger than necessary to secure reasonable levels of creativity. In the US Supreme Court’s recent decision in [Google v. Oracle](#)¹ Justice Breyer quoted with approval Macaulay’s description of copyright as a “tax on readers for the purpose of giving a bounty to writers,” adding that “Congress, weighing advantages and disadvantages, will determine the more specific nature of the tax, its boundaries and conditions, the existence of exceptions and exemptions, all by exercising its own constitutional power to write a copyright statute”.² Justice

1 Google LLC v. Oracle Am., Inc., 141 S.Ct 1183 (2021).

2 Google LLC v. Oracle America, Inc., 141 S.Ct. at 1195-96.

Breyer further noted that “[C]opyright has negative features. Protection can raise prices to consumers. It can impose special costs, such as the cost of contacting owners to obtain reproduction permission. And the exclusive rights it awards can sometimes stand in the way of others exercising their own creative powers”.³

One justification for copyright limitations and exceptions is that they promote the same goal as copyright’s exclusive rights: encouraging free expression, advancing education, expanding access to knowledge, promoting cultural progress, and maximizing gross domestic product. Any or all of these may be the desired consequences of copyright protection. If protection of exclusive rights is a means to an end rather than an end in itself, and unlimited exclusive rights undermines that ultimate goal, then limitations and exceptions are an essential part of a balanced copyright system. For example, if copyright is meant to “encourage... learning” (as both the Statute of Anne and the first U.S. *Copyright Act* asserted), then copyright law should provide the capacity for libraries to build collections and make them available for free use in support of research and teaching. Otherwise, copyright would make access to broad swaths of knowledge so expensive that it would discourage scholarship and teaching in a wide variety of contexts. Limitations and exceptions thus fit very comfortably into copyright systems based on consequentialist or utilitarian theories, and beneficiaries like libraries can lay claim to equal normative status relative to authors since both derive their claims from the same goal of promoting social good.

In most European legal systems, authors’ rights are viewed as ends in themselves rather than as a means to a social end. The theoretical basis for authors’ rights of this kind may be derived from thinkers like [Hegel](#) and [Kant](#) which are often expressed in terms of protecting the author’s interest in controlling works that are invested with their will or personality, or from John Locke, who argued private property rights arise whenever someone mixes his or her labor with resources held in common. In authors’ rights systems, limitations and exceptions can be understood in several ways. One possibility is that exceptions and limitations are just one way of defining the scope of the author’s exclusive rights (Schauer 1991). The combination of a broad general right of reproduction together with an exception or limitation that permits reproduction of less than a substantial portion of a work is equivalent to the right to reproduce a substantial portion of a work (Borghini 2020). Alternatively, limitations and exceptions may reflect the competing rights of users to self-expression or to access knowledge, which may in some cases supersede the rights of authors or copyright holders. The doctrine of exhaustion, which is explained later in this chapter, may reflect the limits of an author’s right since it does not extend to control of a particular copy once that copy has been law-

3 Google LLC v. Oracle America, Inc., 141 S.Ct. at 1195.

fully distributed, or the intervention of a more fundamental right to personal property for the owner of an individual copy, or even the intervention of the public's right to access knowledge which operates through the encouragement of public libraries and secondary markets for expensive copyrighted goods.

The theoretical basis for limitations and exceptions can be significant in a variety of circumstances. For example, judges and other decision makers may invoke intellectual property theory as the basis for construing limitations narrowly or broadly. Until recently the Court of Justice for the EU has read copyright exceptions as derogations from authors' rights, which must be interpreted strictly (Borghi 2020). Theory may also arise in political battles about law reform, both within and across national borders, as partisans evoke authors' rights or the public interest in support of particular positions. For those working in and for libraries, understanding theory can also be helpful to understanding why exceptions are important, and why taking advantage of limitations and exceptions to pursue the library's mission is as legitimate as respecting copyright's exclusive rights.

Political Battles

Libraries generally seek the broadest possible copyright exceptions and limitations to ensure that they can fulfill the mission to serve their users. Libraries have invested significant, often public, resources in building their collections, and seek a reasonable return on the investment. In particular, libraries believe that taxpayers should receive the benefit of funds spent on their behalf by libraries. Rightsholders, for their part, desire the narrowest possible exceptions to maximize their revenue. Indeed, many rightsholders believe that all, or virtually all, uses should require remuneration. The divergence of interests has often led to pitched policy battles as copyright laws are being updated to address the digital environment.

Battles occur in the various fora in which law reform efforts occur, internationally, regionally, and nationally. The library community participated in the long struggle in WIPO that resulted in the Marrakesh Treaty, which requires countries to adopt exceptions permitting the creation and distribution of copies accessible to people with print disabilities. Libraries will use exceptions adopted pursuant to the Marrakesh Treaty to create and distribution accessible format copies. Libraries attempted to convince WIPO to pursue a treaty establishing minimum standards for exceptions for libraries, archives, and museums (IFLA 2013).

Libraries have engaged at the regional level, particularly in the EU. For example, libraries educated the EU Commission, Council of Ministers, and Parliament on the needs of libraries in connection to preservation and text and data mining. The

engagement resulted in positive provisions in the EU Digital Single Market Directive (Directive (EU) 2019/790 2019). Finally, libraries seek to influence national governments on local copyright legislation. For example, libraries in many countries are working on national implementations of the Marrakesh Treaty and are seeking library exceptions more appropriate for the digital age. Many copyright laws refer to specific forms of frequently outmoded reprographic technology or the making of a limited number of copies and do not accommodate digitization.

Libraries' efforts to secure exceptions often are opposed by organizations representing publishers and authors. The opposition is frequently presented as concern that broader exceptions could lead to piracy, but libraries have always sought to respect copyright and understand that they are part of an ecosystem in which certain classes of creators rely on the economic incentive provided by copyright law. One example of the library perspective is provided by Butler who outlined a letter signed by copyright experts working in libraries. The experts acknowledged "We understand that copyright is a complex ecosystem of people who occupy different roles at different times (and often at the same time), not a zero-sum struggle between opposing sides. That ecosystem thrives in our libraries" (2016). In many cases, the rightsholders' real motivation is a desire to extract additional fees from uses of works for which libraries have already paid, rather than preventing infringement. Unfortunately, libraries are often outdone in policy discussions. The rightsholders typically have deeper pockets and are better positioned for lengthy battles over copyright legislation.

Exhaustion/First Sale

A basic function of many libraries is to circulate books and materials in their collections. In many countries, however, a rightsholder's bundle of rights includes the exclusive right to distribute copies of the work to the public. In some countries, the distribution right is limited to the sale of copies, but in other countries, the distribution right includes sale, rental, or lending. Most countries that have a distribution right impose a limit to the right with respect to a particular copy after the first authorized sale of that copy. In other words, the distribution right with respect to a particular copy is exhausted after the first sale of that copy and is referred to as the exhaustion or first sale doctrine. It is the exhaustion doctrine that typically allows a library to circulate the books in its collection; the distribution right for the books in the collection was exhausted when the publishers sold those books into the stream of commerce, to wholesalers, retailers or directly to libraries.

While most countries recognize the exhaustion doctrine with respect to domestic sales, there is more diversity in the treatment of international sales. That is, if a person in country A purchases a copy of a book from country B, the distribution right in that copy might not be exhausted in country A. This is because some countries believe that the rightsholder should have the ability to control imports into a country. In some countries, the law is ambiguous. For example, for many years it was unclear whether the US *Copyright Act* provided for international exhaustion, and whether the sale of a copy in another country exhausted the distribution right in the United States. The US Supreme Court in 2013 in *Kirtsaeng v. Wiley*⁴ interpreted the statute containing the first sale doctrine as providing for international exhaustion. This is important for libraries because it allows them to circulate materials purchased overseas. Indeed, in its decision, the Supreme Court noted how an international exhaustion rule would benefit US libraries, which contain many books published and purchased outside of the United States.

Some countries have sought to limit the ability of libraries to lend materials by adopting a Public Lending Right (PLR). PLR does not provide a library with the right to lend a book to the public. On the contrary, it provides rightsholders with a payment for the lending of materials by libraries. The theory behind PLR is that library lending leads to the loss of sales by rightsholders. It ignores that libraries help readers discover authors, leading potentially to readers purchasing other titles by those authors, or asking libraries to purchase them. Furthermore, libraries promote literacy, and thereby help create the market for books.

The EU adopted a [Directive](#) requiring Member States to adopt a PLR but left the details to the Member States [hereinafter Rental and Lending Rights Directive] (Directive 2006/115/EC 2006). In some Member States, libraries must pay annual fees to a collecting society for the privilege of lending the works in their collections. In other Member States, the fees are paid by the national government. The Directive does not set the level of fees, so there is a disparity among the Member States. Only a handful of countries outside the EU have enacted a PLR, but rightsholders are actively advocating for broader adoption.

It should be noted that the exhaustion doctrine applies only to the circulation of physical copies of books and other materials. It does not apply to electronic lending, which involves the making of a copy in the user's computer. The exhaustion doctrine typically is viewed as a limitation on the distribution right, or its equivalent, not the reproduction right. When a public library lends an ebook, it typically is doing so under a license from the publisher.

In countries with an open-ended fair use exception, discussed below in greater detail, arguably there are circumstances when the lending of an ebook might be

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

permitted as a fair use. Particularly in the United States, many libraries believe that fair use allows Controlled Digital Lending (CDL), where a library uses technical controls to circulate digitally the exact number of physical copies of a specific title it owns while preventing users from redistributing or copying the digitized version. A [position statement on Controlled Digital Lending](#) prepared in the US in 2018 has many signatories. During the Covid-19 pandemic, academic libraries have relied on various forms of CDL to provide access to works in their collections, even though the libraries have been physically closed, thereby enabling students and faculty to continue essential research and educational activities. Additionally, during the pandemic, the [Internet Archive](#) established the National Emergency Library (NEL) (Internet Archive 2020), under which it suspended the owned to loaned ratio of its Open Library because almost all the libraries in the United States were closed, preventing free public access to many titles. A group of publishers sued the Internet Archive in US federal court for operating the NEL as well as its pre-existing Open Library. The lawsuit was still pending at the writing of this chapter.

Specific Exceptions for Libraries, Archives, and Related Entities

First sale and exhaustion apply to copies lawfully owned by anyone, and fair use and fair dealing, described in detail below, are likewise available to all users. But some exceptions and limitations to copyright are specifically for libraries, archives, and similar institutions. Libraries around the world benefit from a variety of limitations and exceptions. Of the 191 member countries in WIPO, “161 of them have at least one provision in their copyright statutes that explicitly applies to libraries or archives” (Crews 2017). The provisions included refer to preservation, copies for patrons, interlibrary lending, in-class performances and displays, and distance or online learning. Some are treated in detail elsewhere in this book. This section discusses some of the reasons for including specific limitations and exceptions for libraries in copyright law. Here they are discussed briefly, emphasizing the policy goals they serve with respect to libraries and their users.

Preservation

Ensuring the preservation of expressive works has long been a core function of libraries, archives, and related institutions. Some preservation activities do not implicate copyright. Maintaining or repairing physical copies, for example, may

not require copying or other copyright-regulated activities, although sometimes damaged or missing pages in a particular copy may be replaced using facsimiles. Many preservation activities, however, require copying and other regulated activities. Some collection items are rare or fragile, for example, and responsible preservation entails making them accessible for research only by means of a surrogate copy. For example, in the case of *Sundeman v. Seajay Society*⁵ the Society held a rare manuscript and “made the copy so that [scholar] would not damage the fragile original during her analysis”. Preservation of digitized works, or of born-digital works, requires making and storing multiple digital copies, in multiple physical locations if possible. Without copyright limitations and exceptions, these activities would require permission from the copyright holder. Obtaining permission could be a major barrier to library preservation activities. Not surprisingly, specific limitations and exceptions favoring preservation can be found in many jurisdictions (Crews 2017, 9).

One reason to include limitations and exceptions for preservation by libraries and archives is that the market does not typically provide adequate incentives for copyright holders or licensees to preserve works they control. The commercial life of most copyright-encumbered works is much shorter than the term of copyright (Akerlof 2002); most commercial works do not achieve long-lasting success in the marketplace. With little hope for a financial return, commercial copyright holders will predictably, rationally choose not to invest in preserving copies of works that are no longer in commercial circulation.

The history of media is replete with stories of copyright owners destroying copies of old works to make room for new ones or treating works with inadequate care relative to their long-term cultural and historic value. Most films of the silent era are *lost* forever, for example, because studios actively destroyed them, literally throwing them into the ocean, or were not equipped to safely manage volatile nitrate film stock, which can go up in flames when stored at normal room temperature. More recently, a trove of hundreds of master audio and video recordings owned by Universal Music Group was believed to have been destroyed in a fire in 2008 after they were stored for years on a film studio lot near a theme park ride (Rosen 2019). Universal has disputed Rosen’s claims in this article, and a subsequent one, about the extent of the permanent losses from the fire, but the occurrence of the fire and Universal’s role in exposing materials on the studio lot to risk are undisputed.

The relative commercial longevity of musical recordings and motion pictures makes the history of their treatment even more striking. If such materials have been treated so shortsightedly, then even worse treatment for more ephemeral works, such as television programs or video games can reasonably be expected.

5 *Sundeman v. Seajay Society, Inc.*, 142 F. 3d 194 (4th Cir. 1998).

“[In the 1960s and 70s,] erasing and reusing videotapes was standard practice at the BBC and many of the major TV networks here in America. This was, in part, a cost-cutting measure on the part of these companies, as the price of these cassettes at the time was often prohibitive. And since they were producing fresh content and programs at such a rapid clip, it was deemed necessary to keep recycling through these tapes” (Ham 2016). [Atari’s dumping](#) of unsold video game cartridges and hardware into a landfill in New Mexico is another example of disconnect between commercial value and long-term historical value.

From a utilitarian perspective, in the case of preservation, copyright’s exclusive rights clearly fail to serve the long-term societal goal of ensuring access to cultural heritage. From a fundamental rights perspective, authors themselves are better served by a copyright system that ensures their work endures regardless of the vicissitudes of the market. Similarly, the right of the public to have its collective cultural heritage preserved and available for future generations, and the right of those generations to access their heritage, should receive substantial weight relative to the copyright holder’s seemingly slight individual economic interest in most works over the long term. Limitations to copyright in favor of preservation are easily justified under both major theoretical frameworks.

Another reason for specific copyright exceptions favoring preservation is the vast scale of the preservation challenge facing libraries as they wrestle with the explosion of creative works and media formats published in the last century and a half. The challenges range from audio recordings stored on wax cylinders that melt, break, and deteriorate with every play, to radio broadcasts etched on aluminum discs that shed their lacquer coating. Half the titles recorded on cylinder records have not survived (Lukow 2014). During World War II, glass was used in place of aluminum, and many of the discs have been lost to breakage (Council on Library and Information Resources 2010). The concerns continue all the way to modern CDs and DVDs, some of which appear to be subject to disc rot phenomena that render them unreadable decades before the end of their advertised lifespan (Smith 2017). Compounding the problem of storage media fragility is the obsolescence of the playback devices for media. As new formats become popular and old ones fall into disuse, it becomes more difficult to source spare parts to refurbish and repair legacy machines. In addition, as technical experts familiar with older formats retire or pass away, even the knowledge of how to repair old players becomes scarce (Casey 2015).

Limitations and exceptions that favor preservation are thus extremely important to libraries and to the broader culture. Without them, works that form our cultural heritage could be lost forever. Many such works have already been lost. Given the size of the challenge and the numerous barriers to preservation, as well as the strong ethical case for preservation, it is important that copyright recognize and empower institutions dedicated to preservation.

Research and Study

Supporting research and study is a core element of any library's mission. Research is just as central to users of public libraries as to users with formal affiliations to universities or other research institutions. Researcher as used here includes amateur genealogists and curious schoolchildren as well as graduate students or tenured faculty. The limitations and exceptions favoring research and study can be included in the special rights of libraries, as in Section 108(d) and (e) in the US *Copyright Act*, or they may be framed as rights of the researcher, in which case the existence of libraries from which copies are made is assumed. Like preservation, research and study do not always implicate copyright. Research and study use is often enabled by the general first sale/exhaustion principle and does not require a special exception. However, some common recurring activities associated with research do implicate copyright's exclusive rights and could be discouraged if they required payment or permission.

Permitting researchers to make copies for private research and study is one important exception that exists in many copyright systems. Section 108(d) of the US *Copyright Act* permits libraries to provide researchers with copies of articles, chapters, and other portions of published in-copyright works for purposes of private research and study. Section 108(e) goes further, permitting libraries to provide copies of entire published works to patrons on request if the library determines that copies are not available for purchase at a fair price. Finally, Section 108(h), passed as part of the [1998 Copyright Term Extension Act](#), permits libraries to “reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research” as long as the work is not “subject to normal commercial exploitation”, is not available for purchase at a “fair price,” and the copyright owner or its agent has not sent notice to the Copyright Office indicating its objection to such uses. At the time of this writing, no copyright holder has ever provided such a notice to the Copyright Office, which may be an indication of the extremely low commercial value of works in the last 20 years of their term, especially where the other two conditions in 108(h) of no commercial exploitation and no copies available at a fair price are met. A clause in the [Music Modernization Act](#), which created a new public performance right in sound recordings first fixed prior to February 14, 1972, among other things, applies Section 108(h) to certain sound recordings, giving libraries a new right to share old sound recordings that have fallen out of commerce. The provision is new and relatively untested at the time of this writing, however. It remains to be seen how libraries in the US will apply the provision. Exceptions like these affirm the central role of libraries in supporting research and study. Libraries ensure that all researchers have access to a broad

range of resources and to deep, rich collections that no individual scholar could hope to build for themselves. An essential part of making a shared collection work for all its users, however, is enabling the library to provide copies to researchers who need access off-site or for extended periods of time, in contexts where lending would not be sufficient or appropriate. Exceptions for research and study ensure that copyright does not block an essential library function.

Like those for preservation, limitations favoring research and study can be justified under both utilitarian and fundamental rights frameworks. Indeed, the key difference between 108(d) and (e), the additional market check requirement associated with copying entire works, seems to track, albeit imperfectly, the differences in normative justification for each. Allowing the availability of used copies at a fair price to defeat the applicability of 108(e) is inconsistent with both utilitarian and fundamental rights theories, as there is no benefit to the copyright holder and thus no incentive, nor any vindication of fundamental rights from requiring purchase of second-hand copies. The right to copy portions of works is available regardless of market alternatives because in such cases the difficulty and cost associated with either purchasing an entire work, when only part is needed, or else procuring a license for partial copying is likely to do more harm to research than benefit to the copyright holder. In the case of entire works, however, the interests may not be so consistently tilted in favor of the researcher, and a market check may be seen as a way to ensure that the copyright holder is remunerated in cases where doing so is either warranted by the reconciliation of competing rights or justified by the balance of incentives.

Interlibrary Lending

Interlibrary lending is a long-established practice designed to help libraries provide to local researchers access to materials from other institutions. Since no library can afford to buy or license every resource that might be of interest to its users, interlibrary arrangements help libraries work together to ensure researchers can access materials important to their work. When interlibrary lending takes the form of lending physical copies from one institution to a patron at another, first sale or exhaustion will be the key enabling provision. However, as early as the 1970s, when the last major revision of the US *Copyright Act* took place, it was clear that libraries could use copying technologies to fulfill more efficiently researcher requests made at partner libraries. The language in the library and archives provisions in Section 108 of the *Copyright Act* was carefully drafted to ensure that interlibrary lending could take advantage of photocopying and successor technologies to lend or make available partial copies or facsimiles to better serve researchers.

However, the provision was also carefully limited, barring any interlibrary arrangement where a borrowing institution makes requests “in such aggregate quantities as to substitute for a subscription to or purchase of such work”.

Because interlibrary lending facilitates research and preservation, the justification for enabling interlibrary loan without permission or payment is similar. In many cases, if interlibrary lending required an additional charge or procedural step, libraries would not support the practice and researchers would simply have to do without access. From a utilitarian point of view, the copyright holder would not gain any revenue, but the public would lose the benefit of research access, a net social waste. From a competing rights point of view, the author’s right to control the work will have trumped the public’s right to research in a case where there seems to be little benefit to the author; it makes more sense for the public’s right to prevail.

In-class Performance and Display

Exceptions permitting in-class performance and display of visual and audio-visual works may seem on initial examination to be for the benefit of teachers and students rather than libraries, but in fact these exceptions are extremely important to libraries. Most libraries affiliated with schools and other academic institutions have built media collections to support their institutions’ curricular needs, which can diverge sharply from the interests served by the mainstream commercial market. Exceptions favoring in-class performance ensure that library collections can serve one of their core functions. The shorter commercial lives of film and television works means that many works that are of interest to professors of film and media studies are no longer available to purchase or license; it can be even more difficult to identify or locate rightsholders to seek permission. In addition to the justifications already provided above, teaching uses may be susceptible to the argument that they are transformative, a concept used in US fair use jurisprudence and described in more detail below, to describe uses that serve a new, socially beneficial purpose relative to the original purpose of the work, and do not merely substitute for that work in its ordinary consumer context. When instructors show films and clips in class, they are often engaged in their own critical work, repurposing films, and clips in service of their own pedagogical goals and perspectives. Exemptions serve not only to ease the cost burden and friction associated with in-class performances, but also to protect the interests of instructors and society’s interest in fostering new insights, meanings, and messages.

Distance Education

Limitations and exceptions that foster distance education are typically focused on facilitating the kinds of performances and displays that might take place in a classroom in a traditional in-person course and the justification for their applications is more-or-less the same, with the additional element of a kind of media-neutrality principle: that a change in technology, or in the physical location of the students or the instructor, should not create a new copyright obligation for the teacher, the students, the library or parent institution. However, in practice the shape of distance learning exceptions can differ substantially from exceptions for in-person teaching. For example, Section 110(1) of the US *Copyright Act*, which applies to traditional classroom teaching, is a simple, one-paragraph provision that exempts almost all in-class performances and displays from copyright's exclusive rights. Section 110(2), which applies to online distance learning, covers several pages of the codified statute, limits authorized performances to "limited portions" of audiovisual works, and saddles institutions with a long list of technical and policy requirements.

Rightsholders argue for differential treatment of in-person and online learning by alleging a different balance of public benefits and private harm in the online case, tipping the scale in favor of narrower rights for educators. In a physical classroom, the chances of a student retaining, and further distributing, a copy of works shown, are slim to none; however, in an online course, a savvy student could retain and share a digital copy of works made available to her. Another explanation might reference the economic contexts of the drafting of the two provisions: in-class performances were common and rarely or never monetized at the time of Section 110(1)'s adoption, but by the time Section 110(2) was drafted online performances were seen as a potential source of new revenue, as well as a piracy risk.

Fair Use

In addition to the specific exceptions favoring libraries, archives, and related users and activities outlined above, international copyright system permits, and many national regimes include broad, flexible exceptions that are key tools for libraries and archives. The most well-known of these is the fair use doctrine in the US, but similar provisions exist in many legal systems around the world. This section discusses both US fair use and the fair use and fair dealing provisions that exist outside the US.

Fair Use in the US

Fair use is an equitable, common law doctrine first created by judges to ensure that an author's exclusive rights do not frustrate socially beneficial uses, particularly uses that advance the progress-oriented goals of copyright law in the US. Unlike the limitations and exceptions discussed so far, fair use was not written to accommodate specific uses or specific users. Instead, fair use creates a broad user's right that applies equally to giant commercial uses like the automated web-crawling that powers Google's search engine and to small, private uses like recording a television program to view later. Political disagreements over fair use sometimes devolve into semantic debates about whether fair use is a right or a mere defense. Among other reasons, fair use can be considered a right because Section 108 of the *Copyright Act* refers to the right of fair use. In addition, [Section 107](#) explains that: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords 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". The language used in referring to Section 106 and the statement that fair use is "not an infringement," suggests that fair uses are not merely excused infringements but rather are outside the copyright holder's exclusive rights and are reserved as rights of the public.

Libraries and archives in the US have benefited tremendously from fair use because of its flexibility, and in particular its adaptability to new technologies and the challenges and opportunities they present. Where specific exceptions fall short due to unforeseen circumstances, fair use ensures the copyright system does not impact significantly on important cultural activities.

The modern history of fair use in the United States is often traced to Judge Joseph Story's opinion in [Folsom v. Marsh](#)⁶ the first opinion to describe what have become the four statutory factors that courts consider in deciding whether a use is fair:

- The purpose of the use
- The nature of the work used
- The amount used, and
- The market effect of the use.

Story stated: "[L]ook 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 prej-

⁶ Folsom v. Marsh, 9 F. Cas. 342, 2 Story, 100.

udice the sale, or diminish the profits, or supersede the objects, of the original work”. As already noted, fair use was later codified in US law as Section 107 of the *Copyright Act of 1976*. Congress included non-profit, educational use, as well as scholarship, criticism, and commentary, as examples of favored purposes in the statute. The 1976 Act also added a provision at [17 U.S.C. § 504\(c\)\(2\)](#) “to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement”. Congress thus reassured libraries and educational users that their uses were among those that would be found fair under appropriate circumstances and lowered the stakes in cases where non-profit educational users might fear making a mistake.

The four-factor test has been criticized as indeterminate (Butler 2015a), but the courts have added important definition to the doctrine, using the concept of transformative use to drive consistent and predictable outcomes in fair use cases. Judge Pierre N. Leval, then a federal district judge for the Southern District of New York, first described the concept of transformative use in his groundbreaking article “Toward a Fair Use Standard” (1990, 1111). Leval proposed a theory grounded in the utilitarian philosophy of copyright expressed in the Constitution, that copyright’s objective is to “stimulate activity and progress in the arts for the intellectual enrichment of the public” (1107). Judge Leval reasoned that fair use should apply when “excessively broad protection would stifle, rather than advance, [that] objective” (1109).

The Supreme Court gave its imprimatur to Leval’s standard in [Campbell v. Acuff-Rose](#)⁷ quoting with approval Leval’s explanation that transformative uses contribute to the intellectual enterprise by using existing material for a new purpose, adding value, and creating “new information, new aesthetics, new insights and understandings”.⁸ The Supreme Court goes on to say these uses “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright”, and that therefore “the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use”. Scholars have documented the growing dominance of transformative use, concluding that it is by far the most important element of fair use jurisprudence (Asay, Sloan and Sobczak 2020; Netanel 2011; Sag 2012), and that applying transformative use makes fair use a coherent, predictable doctrine that empowers users to exercise their rights without fear (Aufderheide and Jaszi 2018). In its 2021 *Google v. Oracle* decision, the Court again embraced transformative use, describing it as a use that “adds something new and important” to the original work.⁹

⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁸ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

⁹ *Google LLC v. Oracle America, Inc.*, 141 S.Ct. at 1203.

Libraries in the US benefit immensely from fair use. Mass digitization for preservation, search, text and data mining, and other transformative uses, was blessed as fair use in the *Google Books* and *HathiTrust* cases, with the latter case also holding that providing accessible format copies to persons with disabilities was protected by fair use.¹⁰ In another high-profile case, fair use was found to apply to most electronic excerpts from books made available to students as part of their university coursework.¹¹ The victories are worth celebrating, but cases like these garner attention in part because litigation over library fair use is extremely rare; most fair uses are uncontroversial everyday practices like researchers scanning pages from archival collections for future reference, or a teaching assistant taking clips from a library DVD for an instructor to use in a class lecture. Finally, fair use serves as an important safety net when specific exceptions fall short, allowing libraries in the US to continue to meet their missions even as technology challenges aging legal provisions (Band 2011).

One of the most powerful developments in fair use over the past decade has been the growing body of community statements and codes of best practices in fair use described by writers like Aufderheide and Jaszi (2018) and organizations like the *Center for Media and Social Impact*. These documents are facilitated by experts in copyright and community organizing, but they are initiated, developed, and endorsed by the communities they address. The statements identify recurring situations where copyright would create undue barriers to meeting the professional mission of the affected community, and where fair use can be applied to avoid that outcome. Each code identifies the various scenarios and uses principles and limitations to describe community norms for a consensus approach to each. They do not purport to map the entire universe of fair use, or to draw definitive lines beyond which fair use cannot apply; rather, these documents describe a safe harbor of common practice beyond which some practitioners may choose to explore, according to their own needs and reasoning. Documentary filmmakers and scholars, visual art makers and scholars, media studies teachers and authors, and many others have developed the statements, and have documented their salutary impact (Falzone and Urban 2010). Many of the uses identified implicate libraries indirectly, but libraries themselves have participated in the development of several fair use best practices proclamations, including statements for research libraries (Adler et al 2012), collections containing orphan works (Aufderheide et al 2014), dance collections (Dance Heritage Collection 2009), and software preservation (Aufderheide et al 2019).

¹⁰ Authors Guild v. Google, Inc., 804 F. 3d 202 (2d Cir. 2015); Authors Guild, Inc. v. HathiTrust 755 F.3d 87 (2d Cir. 2014).

¹¹ Cambridge Univ. Press v. Becker, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).

Fair Use and Fair Dealing Outside US

The US fair use doctrine, like much of US copyright law, is based on English law. The concept of fair dealing was first developed by courts in England in the 18th century and was codified in 1911. In the UK [Copyright Act](#) legislation, an exception to infringement was provided for fair dealing with a work for the purposes of “private study, research, criticism, review, or newspaper summary”. Fair dealing became incorporated into copyright laws of the former British Imperial territories, now referred to as the Commonwealth countries, like Australia and Canada. Over the past century, however, the fair dealing statutes have evolved in most Commonwealth countries. The primary distinction between fair dealing and fair use has been that fair dealing typically applies to a closed list of specific purposes, while fair use is an open-ended exemption that can apply to unforeseen purposes. Michael Geist pointed out that “the key difference between fair use and fair dealing lies in the circumscribed purposes found under fair dealing” (Geist 2013).

While in some countries, fair dealing remains, as in the UK, restricted to the original purposes of the 1911 Act, in other countries, for example the [Bahamas](#), the purposes have become a non-exclusive list of examples. In still other countries, for example [Australia](#), legislatures have added factors a court must consider in determining fair dealing. Moreover, some countries have replaced the term fair dealing with fair use, for example [Bangladesh](#). Thus, the fair dealing statutes in many countries have over time increasingly come to resemble the fair use statute in the United States, bearing in mind as noted above that fair use in the United States is attributed to Justice Story’s 1841 decision in *Folsom v. Marsh*, which was based on the English fair dealing case law.

Judicial interpretations of fair dealing in countries such as Canada are now similar to judicial interpretations of fair use in the United States. In 2004, the Supreme Court of Canada in [CCH Canadian Ltd. v. Law Society](#) considered copying services provided by a law library. The library provided single copies of legal articles, statutes, and decisions to those who requested them. It also allowed visitors to the library to use photocopiers to make individual copies of works held by the library. The library was sued by publishers for copyright infringement. The Supreme Court ruled in favor of the library based on a broad interpretation of Canada’s fair dealing statute. The Court held that it would take a “liberal approach to the enumerated purposes of fair dealing”. The Court then established six principal criteria for evaluating fair dealing: the purpose of the dealing; the character of the dealing; the amount of the dealing; the alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.¹² As a practical

¹² CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 (CanLII), [2004] 1 SCR 339.

matter, the Law Society decision erased any differences between fair use in the United States and fair dealing in Canada.

Additionally, several countries, such as Israel, Korea, and Taiwan, have replicated the US fair use statute in their copyright act. In Israel, the fair use statute provides the basis for electronic reserves offered by academic libraries (Katz 2013).

More than 40 countries with over one-third of the world's population have fair use or fair dealing provisions in their copyright laws (Band and Gerafi 2015). These countries are in all regions of the world and at all levels of development. The broad diffusion of fair use and fair dealing indicates that there is no basis for preventing the more widespread adoption of the doctrines, with the benefits their flexibility brings to libraries as well as to authors, publishers, consumers, technology companies, museums, educational institutions, and governments.

Digital Challenges and Opportunities

The transition to digital media and digital networks as the primary modes of information storage and distribution has created a series of challenges and opportunities for libraries and the framework of copyright limitations and exceptions on which they depend. This section will briefly introduce some of them and describe why libraries need current or improved limitations and exceptions more than ever to continue their work in the 21st century. The challenges divide roughly into two broad categories: the challenge of bringing analog collections into the digital realm, and the challenge of vindicating analog rights and values in a digital economy. Another way to think of the two categories is on a timeline: libraries are pivoting from acquiring primarily physical materials on an ownership model to acquiring primarily networked digital materials on a licensing model. It remains to be seen whether copyright's limitations and exceptions can ensure copyright continues to serve the public interest and strike the appropriate balance between public and private rights as libraries move through this pivot point. Libraries and librarians have an important role to play in speaking out about these challenges and seizing the opportunities afforded by this pivotal moment.

Bringing the Past into the Future: Digitizing Legacy Collections

Libraries have invested billions of dollars to build and preserve their physical collections, and digital technology creates new opportunities to turn that investment into knowledge and learning. Libraries have not hesitated to leverage those

opportunities, but copyright has been a major concern at every turn. Digitization for preservation, text and data mining, and public access to special collections are three recurring uses that raise copyright issues.

As discussed above, libraries face an urgent need to migrate works stored on deteriorating or obsolescing formats to preserve their content. As legacy formats and the equipment to play them become more inaccessible by the day, digital storage has never been more ubiquitous or affordable, although it is not free, and server farms have real climate impacts. Networked storage of multiple copies in geographically dispersed locations helps guard against loss of content. The copying required for best practices in digital preservation may exceed what was envisioned in specific exceptions like Section 108 of the US *Copyright Act*, which includes a three-copy limit based on best practices for microfilm, yes, microfilm: “The three-copy limit under the current section 108...was based on microfilm preservation practices” (US Copyright Office 2017, 25). Flexibility of fair use is essential to powering mass digitization for preservation in projects like the [HathiTrust Digital Library](#).

Text and data mining promises to create new insights and information from existing collections by exposing texts and other works to analysis by computers. Before any analysis can take place, a target corpus must be created and properly formatted for analysis. The process might include converting analog works to digital formats, but it could also involve modifying digital texts to make them more comprehensible to computers through the addition of metatags and other coding. The changes made create new copies and even, arguably, derivative works, activities that are regulated by copyright laws. Were it not for exceptions and limitations, digital manipulation of content would be extremely difficult, if not impossible. Seeking permission at the scale required for a corpus like the HathiTrust Digital Library, which holds millions of in-copyright works, would be prohibitively expensive, time-consuming, and, in the case of orphan works, whose rightsholders cannot be identified or located, pointless. It would also be unjust.

Text and data mining is a clearly transformative use, and one that powerfully serves the public interest generally and the narrower interest in learning and cultural progress typically associated with copyright. By discovering and freeing facts without providing readers with an alternative mode of full-text access for traditional reading, text and data mining also advances the law’s interest in allowing facts to circulate freely while protecting expressive works that may contain facts, or may give rise to facts, such as the prevalence of a given word or phrase across a corpus, when analyzed in combination with other works (Butler 2015b). Library special collections and archives contain a wealth of material that simply does not exist anywhere else. The content may never have been published or intended for commercial exploitation, and copyright holders may be impossible to identify or locate. Libraries rarely hold copyright in the items. Library

deeds of gift and contracts for sale throughout the 20th Century included broad transfers of *all right, title, and interest* with respect to physical items donated or sold to the library but were typically silent about copyright. The consensus view is that the copyright remains therefore with the donor, in cases where the donor held copyrights or, more commonly, with third parties who were not parties to the transaction. Digitizing materials and making them available on the public web empowers anyone in the world to consult materials that used to be the sole province of scholars at elite institutions and those with the resources to travel to research libraries and archives.

Acquiring Materials Subject to Licenses

Libraries increasingly are acquiring digital content, such as ebooks and ejournals which typically are made available by publishers subject to license agreements. The license agreements often contain terms inconsistent with the exceptions provided under the copyright law. The license terms might prohibit a library from making a preservation copy of an article or providing a copy of an article to a user. License terms frequently prohibit automated and bulk downloading of content, which can be an important first step in text and data mining research. Resolution of the conflict between copyright and contract is one of the most pressing issues currently facing libraries.

Most jurisdictions have yet to address the conflict. The EU, however, has long recognized the need to nullify contractual terms inconsistent with statutory exceptions. For nearly thirty years, the EU has included contract preemption clauses in its directives. It has recognized that it would be pointless to require Member States to adopt exceptions if private parties could simply override them by contract. Such contract preemption clauses can be found in the [Software Directive](#) (Directive 2009/24/EC 1991 updated 2009) and the [Database Directive](#) (Directive 96/9/EC 1996). Of particular relevance to libraries, the EU [Marrakesh Directive](#) (Directive (EU) 2017/1564 2017) provides that the exceptions it mandates to permit authorized entities like libraries to make and distribute accessible format copies cannot be overridden by contract. Similarly, the 2019 [Digital Single Market Directive](#) provides that contractual provisions contrary to the mandatory exceptions for (Directive (EU) 2019/790 2019) preservation and text and data mining and preservation by cultural heritage institutions including libraries shall be unenforceable. All EU Member States must implement the contract preemption provisions in their own laws.

Some Member States have adopted more extensive contract preemption provisions than those required by EU directives. The copyright laws of Germany,

Ireland, Portugal, Montenegro, and Belgium prevent the enforcement of contractual provisions restricting activities permitted by a wide range of exceptions. Likewise, the United Kingdom has declared unenforceable a term of a contract purporting to prevent the making of copies permitted by many of its exceptions, including a library's supply of copies to other libraries, a library's making of replacement copies, and a library supplying a single copy to a user.

In contrast, the US *Copyright Act* does not contain any provisions preempting contract terms inconsistent with copyright exceptions. There are other legal theories that could be employed to invalidate such terms, but the theories are relatively untested, and their effectiveness is unknown. Not surprisingly, rightsholders are not perturbed by a world in which library uses are governed by licenses rather than copyright limitations and exceptions. Given the uneven bargaining strength between large multimedia conglomerates and libraries, rightsholders often are able to impose unfair terms on libraries.

Where license agreements are not in place, such as for analog content in libraries' collections, some rightsholders' preferred solution for libraries' desires to enhance access by digitization is Extended Collective Licensing (ECL) rather than unremunerated exceptions. Under ECL regimes, typically, legislation designates a Collective Management Organization (CMO) as the official licensor for rights with respect to a type of work, for example, performances of musical compositions or reproductions of literary works. Users must pay royalties at rates established by the CMO, and the CMOs distribute the royalties to the rightsholders. Rightsholders can often opt out of the ECL regime. In theory, CMOs provide an efficient means for the payment and distribution of royalties.

Unfortunately, CMOs have a long history of corruption, mismanagement, lack of transparency, and hostility towards users and artists alike (Band and Butler 2013). They often operate with insufficient oversight from government and individual artists. In 2014, the EU adopted a Directive on the [collective management of copyright](#) and related rights (Directive 2014/26/EU 2015). The Directive established rules on transparency and good governance for CMOs. The Member States hoped the Directive would address CMOs' chronic lack of transparency and abusive practices. Likewise, WIPO saw the need to publish a *Good Practice Toolkit for Collective Management Organizations* (WIPO 2018). However, even where CMOs are well-managed, the royalties they impose are burdensome for libraries. To the extent that paying royalties in this way does little to promote creation or distribution of new works, while burdening the public access missions of libraries, licensing schemes are inconsistent with the utilitarian purpose of copyright.

Conclusion

Limitations and exceptions have played a vital role in ensuring that the copyright system serves the public interest and vindicates the rights of authors, distributors, and the public. Libraries have been leading advocates for robust limitations and exceptions, in both theoretical and political disputes. Libraries are among the most vital stakeholders in the copyright system, and their reliance on limitations and exceptions is a testament to the importance of balancing provisions. Fundamental rights like first sale, tailored exceptions for activities like preservation, and flexible, open-ended provisions like fair use all play a role in the daily work of libraries.

The digital transition presents libraries with opportunities to serve their users in new and powerful ways, but it also challenges libraries as they try to perform their most basic functions. Whether libraries can seize new opportunities and maintain basic operations in the digital era will depend in part on whether they continue to benefit from robust copyright limitations and exceptions. Strong and reliable limitations and exceptions could power a golden age of access to information. Weak and marginalized limitations and exceptions will leave libraries unable to collect, lend, and preserve, much less innovate. Where licenses are allowed to trump these legal protections, the market power of rightsholders will override the public interest from a utilitarian point of view and impede the competing rights of libraries and their users from a natural rights point of view. Libraries and librarians should engage vigorously in debates about the future of copyright limitations and exceptions, as their own future hangs in the balance.

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