



# Copyright and Higher Education BYU Copyright Symposium 2017

Catherine Zaller Rowland  
Senior Advisor to the Register of Copyrights

“We have long recognized that, given the important purpose of public education and the **expansive freedoms of speech and thought associated with the university environment**, universities occupy a special niche in our constitutional tradition”

*Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)

“[T]he Framers intended copyright itself to be the **engine of free expression**”

*Harper & Row Pubs., Inc. v. Nation Enters.*  
471 U.S. 539, 558 (1985)

# Fair Use

17 U.S.C. § 107



Digitizing collections . . . and making them available



Using excerpts of casebooks . . . without additional payment

Enabling libraries and archives to preserve—within the digital age

# TEACH Act

17 U.S.C. § 110(2)

TEACH Act attempted to “update the distance education provisions of the Copyright Act for the 21st Century. The act allows students and teachers to benefit from deployment in education of advanced digital transmission technologies like the Internet, while introducing safeguards to limit the additional risks to copyright owners that are inherent in exploiting works in a digital format.”

H. Rep. No. 107-687 (2002)

Distance education is becoming more common and accepted; should the TEACH Act change?

# Orphan Works

17 U.S.C. 106, 107, 108 ...

“When a copyright owner cannot be identified or is unlocatable, potential users abandon important, productive projects, many of which would be beneficial to our national heritage.”

Marybeth Peters, Former Register of Copyrights

“We readily acknowledge the difficulties would-be users of copyrightable materials may face in identifying or locating copyright owners . . . [and it] afflicts, for instance, U.S. libraries that attempt to catalogue U.S. books.”

*Golan v. Holder*, 565 U.S. 302, 334 (2012)

Interplay with fair use—lack of commercial availability and impact on analysis

# Digital Millennium Copyright Act

17 U.S.C. § § 512, 1201

Colleges and universities interact with anticircumvention provisions, and recent triennial rulemakings have tackled exemption requests

Institutions of higher education “occupy a unique space” in Section 512’s Notice and Takedown environment; they are major producers of content, users of content, and recipients of numerous takedown notices



# Library and Archive Exception

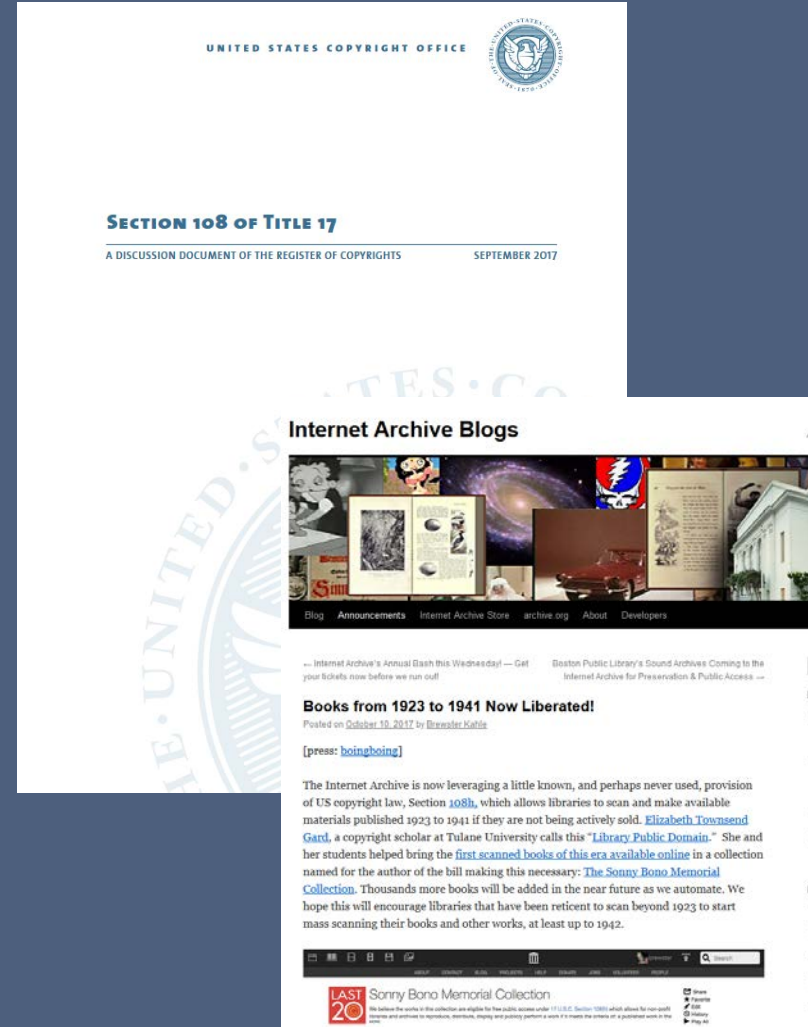
17 U.S.C. § 108

Limited reproduction and distribution of certain copyrighted works for preservation, replacement, and research

Years of study, exception lags behind technology

Another intersection with fair use—and importance of fair use savings clause

How is this being used—news from the Internet Archive?



and for the students . . .

## First Sale

17 U.S.C. § 109

(Slip Opinion)

OCTOBER TERM, 2015

1

### Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

### SUPREME COURT OF THE UNITED STATES

### Syllabus

KIRTSAENG, DBA BLUECHRISTINE99 v. JOHN WILEY & SONS, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 15–375. Argued April 25, 2016—Decided June 16, 2016

In *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U. S. \_\_\_, this Court held that petitioner Supap Kirtsaeng could invoke the Copyright Act’s “first-sale doctrine,” see 17 U. S. C. §109(a), as a defense to the copyright infringement claim filed by textbook publisher John Wiley & Sons, Inc. Having won his case, Kirtsaeng returned to the District Court to seek more than \$2 million in attorney’s fees from Wiley under the Copyright Act’s fee-shifting provision. See §505. The District Court denied Kirtsaeng’s application because, it reasoned, imposing a fee award against a losing party that had taken reasonable positions during litigation (as Wiley had done) would not serve the Act’s purposes. Affirming, the Second Circuit held that the District Court was correct to place “substantial weight” on the reasonableness of Wiley’s position and that the District Court did not abuse its discretion in determining that the other factors did not outweigh the reasonableness finding.

*Held:*

1. When deciding whether to award attorney’s fees under §505, a district court should give substantial weight to the objective reasonableness of the losing party’s position, while still taking into account all other circumstances relevant to granting fees. Pp. 3–11.

(a) Section 505 states that a district court “may . . . award a reasonable attorney’s fee to the prevailing party.” Although the text “clearly connotes discretion” and eschews any “precise rule or formu-

Books resold in all college bookstores

Much ado about nothing (territory-wise)?

Digital sale issues looming?







# Copyright and Higher Education

Jack Bernard

University of Michigan

Friday, November 3, 2017

BYU Copyright Symposium

A photograph of a UFO in a landscape with trees and mountains, overlaid with a yellow diagonal banner.

TRUE THINGS

**WANT TO  
BELIEVE**

# Finish This Statement:

**The purpose of U.S. © law is to:**

- A) Reward authors for their creative efforts
- B) Provide an economic incentive to write & publish
- C) Advance public learning
- D) Provide legal remedies for infringement

# Finish This Statement:

**The purpose of U.S. © law is to:**

- A) Reward authors for their creative efforts
- B) Provide an economic incentive to write & publish
- C) Advance public learning (about 3% guess this)
- D) Provide legal remedies for infringement



The purpose of copyright is etched  
right into the Constitution.

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;

---U.S. Const. Art.1 § 8 cl. 8



# What is the purpose of copyright?

“...copyright law ultimately serves the purpose of enriching the general public through access to creative works...” *Fogerty v. Fantasy, Inc.* 510 U.S. 517, 527 (1994)

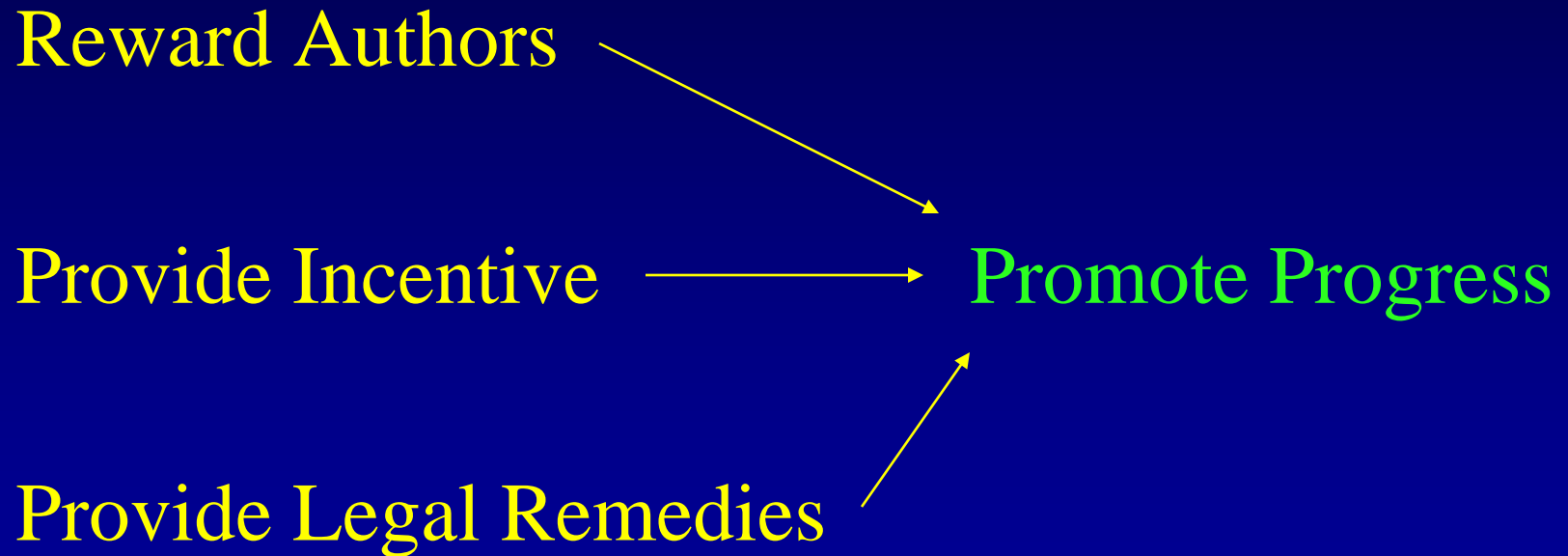
“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.” *Sony. v. Universal City Studios*, 464 U.S. 417 (1984)

# What is the purpose of copyright?

“...it should not be forgotten that the Framers intended copyright itself to be the engine of free expression. By establishing a marketable right to the use of one’s expression, copyright supplies the economic incentive to create and disseminate ideas.” *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985)

“...monopoly created by copyright thus rewards the individual author in order to benefit the public” *id.* at 546

Means----->Ends



# Copyright Is Counterintuitive

- Many think about copyright as if it were exclusively within the purview of the commerce clause.
  - To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;--U.S. Const. art.1 § 8 cl.3
- Are we supposed to treat © like ordinary commerce?
  - No! Otherwise why would the framers have created the progress clause U.S. Const. art.1 § 8 cl.8?
- The balance inherent in US © law is built right into the © act and is integral to our democracy<sup>18</sup>

# Copyright law codifies a constant balancing act



**rights, needs, and desires among:**

- authors and copyright holders
- publishers and distributors
- users and the public

## § 106 Rights of © Holder to do and authorize ...

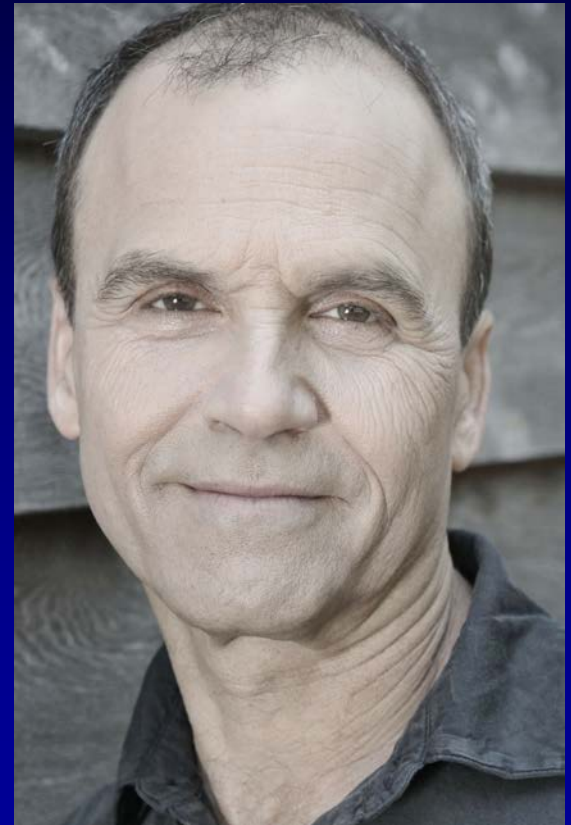
- **Reproduction** of the work in whole or in part
- Preparation of **derivative** works
  - e.g., translations, musical arrangements, dramatizations, sound recordings, & second editions
- **Distribution** of copies of the work to the public by sale, gift, rental, loan, or other transfer
- **Public performance** of the work
- **Public display** of the work



## It is not infringement if . . .

- You are the copyright holder
- You have express permission
- You have an implied license
- The work you are using is uncopyrightable or otherwise in the public domain
- The use falls outside the § 106 rights or if specific statutory **limitations** apply
  - e.g. What you are doing is “fair use”

Detractors have a lot to say.





**The unauthorized reproduction or distribution of this copyrighted work is illegal. Criminal copyright infringement including infringement without monetary gain, is investigated by the FBI and is punishable by up to 5 years in federal prison and a fine of \$250,000.**

# **§ 106 Exclusive Rights in Copyrighted Works**

*Notwithstanding sections 107  
through 122, the owner of  
copyright under this title has  
the exclusive right to make and  
to authorize all uses including  
the following:*

# § 106 Exclusive Rights of © Holders

- **Reproduction** of the work in whole or in part;
- Preparation of **derivative works**;
- **Distribution** of copies of the work to the public by sale, lease, rental, loan; or other transfer of ownership;
- **Public performance** of the work;
- **Public display** of the work.



# **§ 106 Exclusive Rights in Copyrighted Works**

*Notwithstanding sections 107  
through 122, the owner of  
copyright under this title has  
the exclusive right to make and  
to authorize all uses including  
the following:*



# **§ 106 Exclusive Rights in Copyrighted Works**

*Subject to sections 107 through  
122, the owner of copyright  
under this title has the  
exclusive rights to do and to  
authorize any of the following:*

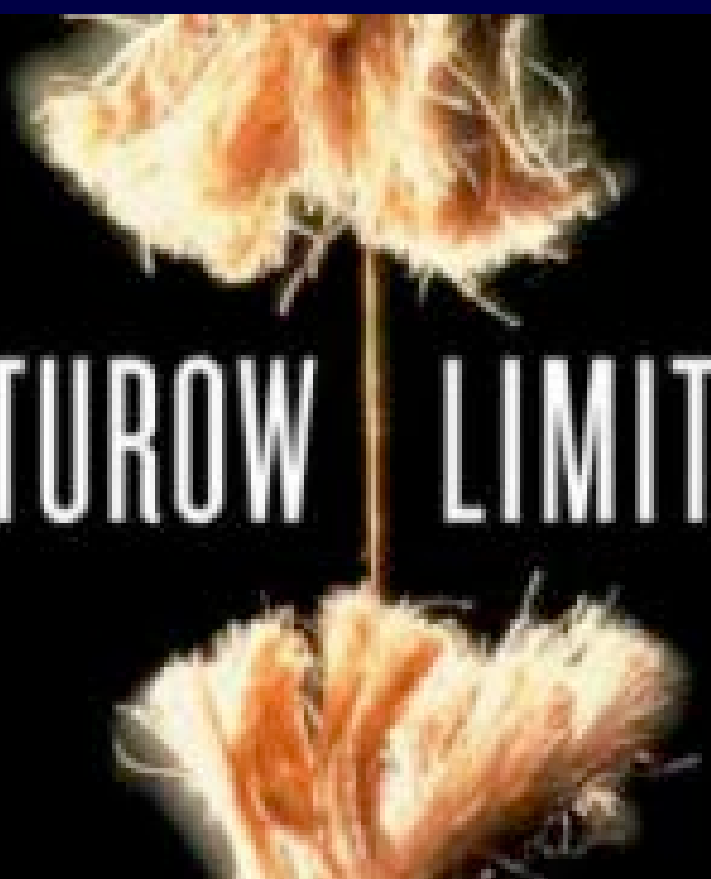
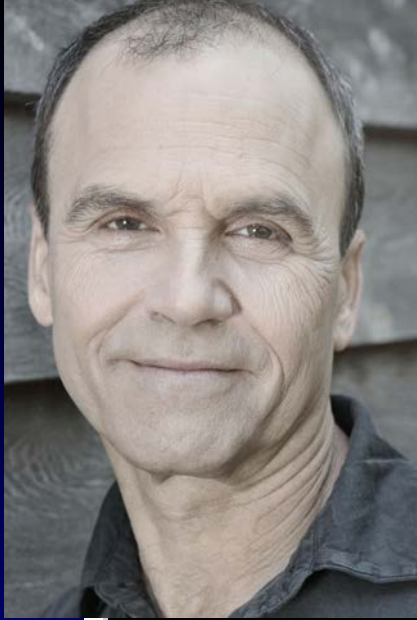
# Compare

*Notwithstanding sections 107 through 122, the owner of copyright under this title has the exclusive right to make and to authorize all uses including the following: (false)*

*Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (true)*

There is a lot of misinformation  
being consumed!!



A close-up photograph of two dandelion seed heads, one above and one below the text, with a single seed head in the middle. The seed heads are yellow and orange, and the background is black.

# SCOTT TUROW LIMITATIONS

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by Scott Turow

★★★★☆ (52)

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by Scott Turow

★★★★☆ (111)

Look Inside This Book

- Copyright protection “has never accorded the copyright owner complete control over all possible uses of his work. ... All reproductions of the work, however, are not within the exclusive domain of the copyright owner; some are in the public domain. Any individual may reproduce a copyrighted work for a ‘fair use’; the copyright owner does not possess the exclusive right to such a use.” *Sony. v. Universal City Studios*, 464 U.S. 417 (1984)



# A Useful Framework

- Copyright exists at the confluence of the Progress Clause and the First Amendment
- Copyright holders get the rights “to do and to authorize” certain uses in § 106.
- Those rights are limited by and exist “subject to” the rights of the public in §§ 107-122.
- Fair use, § 107, is meant to be a broad and flexible right/limitation to facilitate the balance that copyright seeks in promoting progress.

# Fair Use -- § 107

“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. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—” . . . the four factors

# Fair Use -- § 107

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# Fair Use -- § 107

- Fair is not an infringement, an exception, a privilege, an exemption, special affordance, a courtesy, or a modest deference.
- Fair use is a right . . . a congressionally codified right that inheres in the fabric of copyright.
- 17 USC § 108(f)(4) says: “Nothing in this section—in any way affects the right of fair use as provided by section 107 . . .”
- Fair uses fall outside the ambit of the copyright holder’s rights and are right protected by the First Amendment.

# A Useful Framework

- In § § 108-122 Congress authorized specific rights for and uses by the public that fall into essentially two buckets.
  - Uses that would otherwise be fair uses, but which Congress wants the public to make without the uncertainty of the fair use analysis and
  - Uses that would likely not be fair uses, but which Congress wants to the public to make without seeking the authorization of the copyright holder.
  - All of these authorized uses fall outside the ambit of the copyright holder's right to authorize.

# You Cannot Read § 106 alone...

- § 106.3 Distribution of copies of the work to the public by sale, lease, rental, loan; or other transfer of ownership;
- § 109 -- “First Sale” Limitation



# Rights You Should Know

- Although any of the limitations in § § 107-122 may arise on a college campus, these are among the most salient:
- § 107: fair use
- § 108: uses for libraries and archives
- § 109: first sale uses
- § 110: certain performance and display uses
- § 121: uses to make print materials accessible to people who have disabilities

# Please Don't Forget

- Over 4000 college libraries spend billions of dollars *each year* on acquisitions.
- Colleges “inspire” 20 million students to spend an average of \$1,200.00 each year on textbooks.
- Colleges also spend billions of dollars each year on all sorts of licenses: public performance, software, mechanical grand, synchronization, broadcasting, reproduction, translation, publication . . .
- And these are only the non-profit institutions



Caltech

Carnegie Mellon University



Duke University



HARVARD UNIVERSITY



Stanford University



TEXAS A&M UNIVERSITY



## AAU?

- A D.C.-based association representing the presidents of 60 top public & private (R1) research universities in the U.S. (plus 2 in Canada)
- Our U.S. member universities earn the majority of competitively awarded federal funding for academic research.
- We work with our members to shape federal law and policy on higher education, science, and innovation.



University of Colorado Boulder



Yale

# AAU



Association  
of American  
Universities

# AAU's Copyright Advocacy

- We prepare *congressional testimony* on behalf of the higher education community.
- We represent the higher education community in *amicus briefs* on copyright and corollary issues (e.g., BMG v. Cox Communications).



# AAU's Copyright Advocacy

- We represent the collective positions of our member universities in comments on the Copyright Office's and other federal agencies' proposed regulations.
- For example:
  - Copyright Office Notice of Inquiry re Section 108 of the Copyright Act
  - Copyright Office NPRM re Section 1201 of the DMCA
  - Copyright Office NPRM re Section 512 of the DMCA
  - Department of Education NPRM on Open Licensing Requirement for Direct Grant Programs



# AAU's Copyright Advocacy

- And AAU has a Copyright Working Group, comprising representatives from our member campuses, including provosts, librarians, attorneys, IT experts, and law professors.
- The members of this group as advisors to AAU as we develop comments, testimony, etc.

# Contact Me



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