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Does Fair Use Survive the License?

Fair Use in the Licensed Landscape: Rights, Risks, and Realities

Abstract

This article explores the complex relationship between copyright's fair use doctrine and the restrictive licensing agreements that increasingly shape access to digital content in libraries, archives, museums, and the visual arts. As cultural institutions shift toward licensed content, platforms, and proprietary databases, a pressing legal question emerges: can fair use still be exercised within environments governed by licensing? Drawing on case law, scholarly analysis, and real-world applications, the article argues that fair use remains a viable and essential legal right—even in the presence of a functioning licensing market. It identifies key scenarios where fair use can be harnessed lawfully, including for teaching, scholarship, and digital preservation. It offers practical guidance for navigating the intersection of copyright and contract and calls for renewed confidence in fair use as a safeguard for access, equity, and educational freedom in the licensed landscape.

Keywords

Copyright, Fair Use, Licensing

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I. Introduction

The dominant reality for libraries, archives, and museums is that access to knowledge is increasingly mediated by licenses rather than ownership.¹ Subscriptions, platform agreements, and click-through terms govern the use of journals, eBooks, image repositories, and streaming media. In parallel, scholarship, pedagogy, and collections care have gone digital: text and data mining, computational analysis, and digitization for preservation and access sit at the center of many institutional missions. Against this background, many decision makers have quietly absorbed a dangerous misconception: that because access is granted by *license*, statutory user rights, such as fair use, fall away. The premise of this article is that this assumption is wrong. Fair use can, and does, survive the license. It remains a general right “notwithstanding” the owner’s exclusive rights, anchored in § 107 of the Copyright Act, and designed carefully to keep copyright’s exclusive rights in balance with public-interest uses; especially teaching, research, and preservation.² To work effectively in the licensed landscape, however, information and cultural heritage professionals must understand both the doctrine and licensing, and how courts evaluate the presence of licensing markets in fair-use analysis.

II. The Legal Framework: Fair Use and the Licensed Environment

A precise look at the statutory architecture reveals why fair use endures even when licenses pervade. Section 107 *explicitly* states that fair use is “notwithstanding the provisions of sections 106,” the copyright holder’s bundle of exclusive rights, which signals a carve-out from the rights regime, rather than a mere policy preference.³ In adjacent provisions, Congress created specific exceptions for education, accessibility, and cultural heritage including § 110(2) (the TEACH Act) for distance education; § 121 (as expanded by the Marrakesh Treaty Implementation Act) for accessible formats; and § 108 for library and archives reproduction and preservation.⁴ These provisions coexist with fair use and reinforce a broader statutory pattern: *copyright contains internal limitations that facilitate public-interest uses*. While contracts may bind the parties, federal preemption under § 301 prevents states from creating rights “equivalent” to copyright that would override federally guaranteed limitations; this textual structure, together with courts’ reluctance to permit private ordering to swallow federal policy, forms the baseline against which license terms must be read.⁵

Contemporary fair-use jurisprudence has emphasized two interconnected themes that matter enormously in a world of licenses: *transformation* and *markets*. In *Campbell v. Acuff-Rose*, a music sampling case that established “transformative fair use,” the U.S. Supreme Court rejected categorical rules for or against commercial uses and keyed the first factor to whether the secondary use is “transformative” asking whether it adds something new with a further purpose or different character. That basic insight has been adapted to computational and archival contexts where transformation is functional rather than expressive. At the same time, courts scrutinize the effect on

¹ Ziskina, Juliya, *Toward a New Access Paradigm: Digital Ownership for Libraries and the Public* (2023) at <https://www.libraryfutures.net/post/digital-ownership-for-libraries-and-the-public>

² Fair Use statute, 17 U.S.C. § 107.

³ 17 U.S.C. § 107

⁴ 17 U.S.C. § 110(2) (TEACH Act); 17 U.S.C. § 121 (as amended by the Marrakesh Treaty Implementation Act of 2018); 17 U.S.C. § 108.

⁵ 17 U.S.C. § 301 (preemption).

markets, including “traditional, reasonable, or likely to be developed” markets. The result is not a mechanical test. It is a balancing inquiry that considers licensing but does not make licensing dispositive.⁶

Consider the arc from cases such as *American Geophysical Union v. Texaco* (1995) through *Andy Warhol Foundation v. Goldsmith* (2023). In *Texaco*, the Second Circuit treated the Copyright Clearance Center’s photocopying licenses as evidence of a functioning market, weighing against the fair-use defense for systematic corporate copying of journal articles.⁷ Later, the court in *Princeton University Press v. Michigan Document Services* (1996) reached a similar conclusion for commercial course-pack production.⁸ In *Warhol*, the Supreme Court took this market-centered lens into the visual arts, emphasizing that when the secondary use *supplants a licensing market* for the original, the first factor can weigh against the user even if the use is creative.⁹ Read together, these cases do not say that licensing defeats fair use; rather, they teach that a court looks hard at whether the secondary use competes in or supplants a plausible licensing market for the original. Where the secondary use is functionally transformative and non-substitutive, fair use remains strong, particularly in contexts of search, indexing, preservation, and accessibility.

III. Fair Use in Practice: Libraries, Archives, and the Visual Arts

That last point is borne out by the string of digitization and search cases that have shaped museum and library practice. In *Kelly v. Arriba Soft* (2003) and *Perfect 10 v. Amazon* (2007), the Ninth Circuit found that creating thumbnail images for an image search engine was transformative and that such use did not harm the market for full-size photographs.¹⁰ In the library space, *Authors Guild v. HathiTrust* and *Authors Guild v. Google* held that mass digitization to enable full-text search, access for print-disabled readers, and non-consumptive research was fair use, precisely because these uses did not substitute for reading the books and did not offer expressive substitutes for the originals.¹¹ And in *Field v. Google*, a district court recognized “caching” as a fair use where the function served different purposes (e.g. archival access and indexing) than the author’s expressive aims.¹² These cases collectively mark a robust “zone of fair use” for functions essential to twenty-first-century scholarship and discovery.

Education cases also underscore that the presence of licenses does not automatically negate fair use in the classroom or on digital platforms. The long-running Georgia State University e-reserves litigation involved a nuanced, work-by-work analysis under § 107. The Eleventh Circuit directed careful attention to the amounts used and the availability of licenses without allowing licensing to become “the deciding” reason.¹³

⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

⁷ *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1995).

⁸ *Princeton University Press v. Michigan Document Services, Inc.*, 99 F.3d 1381 (6th Cir. 1996) (*en banc*).

⁹ *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. ____ (2023).

¹⁰ *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

¹¹ *Authors Guild v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014); *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

¹² *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

¹³ *Cambridge Univ. Press v. Patton* (also captioned *Cambridge Univ. Press v. Becker*), 769 F.3d 1232 (11th Cir. 2014), and subsequent proceedings

Further, for education, the TEACH Act provides an additional, independent statutory safe harbor for certain mediated digital performances and displays; it does not displace fair use.¹⁴ For museum staff, librarians, and other instructors, the practical implication is that fair use remains available, especially for limited excerpts used for pedagogical purposes, even where a permissions market exists. Licenses might govern some uses, but they do not erase the statutory baseline.

Recent decisions have also marked limits. In *Fox News v. TVEyes*, the Second Circuit rejected claims that a commercial media-monitoring service’s video-clip archiving and retrieval features were fair use once they enabled subscribers to watch and download TV content in ways that *substituted* for licensed viewing; the transformative indexing function could not justify uses that effectively delivered the originals.¹⁵ And in *Hachette v. Internet Archive*, the Second Circuit affirmed that scanning and lending entire trade books under “controlled digital lending” was not fair use, finding market substitution and pointing, post-*Warhol*, to the weight of licensing markets.¹⁶ Importantly, *neither case declares fair use inapplicable in licensed environments*; they hold that particular uses, at particular scales, and with particular market impacts, were not fair. That is a critical distinction for cultural institutions pursuing digitization for search, accessibility, and preservation, which prior decisions recognize as transformative and non-substitutive.

Software and platform cases provide further guidance on transformation, function, and licensing. In *Sega v. Accolade* and *Sony v. Connectix*, the Ninth Circuit held that intermediate copying to reverse-engineer software interfaces, necessary to achieve interoperability, was fair use, despite robust licensing alternatives; the uses served different ends and did not substitute for the copyrighted games.¹⁷ More recently, the Supreme Court in *Google v. Oracle* found fair use where reimplementing search and organizational structures in an API enabled new creativity for programmers and did not capture the expressive heart of Oracle’s work or its licensing markets.¹⁸ In educational technology, *A.V. v. iParadigms* upheld the transformative archiving of student papers for plagiarism detection.¹⁹ These holdings reinforce that “transformation” can be functional, and that licensing markets do not eclipse fair use where the secondary use targets information about works rather than expressive substitution.

IV. Contract, Copyright, and the Rise of Private Ordering

The platform era has also pressed on the boundary between contract and copyright. Shrink-wrap and click-wrap agreements are generally enforceable under *ProCD v. Zeidenberg*, and some courts have allowed licenses to limit reverse engineering (*Bowers v. Baystate*) or to characterize users as licensees rather than owners, a move that can affect first-sale and § 117 rights.²⁰ At the same time, courts have rejected overreach: *Vault v. Quaid* invalidated a state statute that effectively prohibited reverse engineering as preempted by federal copyright law; *UMG v. Augusto* held that “promotional use only” labels did not prevent first-sale transfers; and *MDY v. Blizzzard* cautioned

¹⁴ 17 U.S.C. § 110(2) (TEACH Act)

¹⁵ *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2d Cir. 2018).

¹⁶ *Hachette Book Group, Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024).

¹⁷ *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992); *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000).

¹⁸ *Google LLC v. Oracle America, Inc.*, 593 U.S. 1 (2021).

¹⁹ *A.V. ex rel. Vanderbye v. iParadigms, LLC*, 562 F.3d 630 (4th Cir. 2009).

²⁰ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996); *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Fed. Cir. 2003); *MDY Industries, LLC v. Blizzzard Entertainment, Inc.*, 629 F.3d 928 (9th Cir. 2010).

that license breaches are not copyright infringement unless they violate conditions tied to exclusive rights.²¹ The lesson for cultural institutions is twofold: contract terms matter and bind the parties, *but they do not invariably rewrite federal copyright policy*, and they cannot be used to create quasi-property rights against the world.

When license terms and technological protection measures converge, the DMCA's § 1201 anti-circumvention regime becomes salient. Section 1201 does not contain a general fair-use defense, and contracts often add clauses forbidding circumvention or even discussion of circumvention. Yet the triennial rulemakings have repeatedly granted exemptions for libraries, archives, and museums to enable preservation, research, and accessibility, including for software, video games in obsolete formats, and audiovisual materials. These regulatory carve-outs, renewed and updated in the most recent 2024 cycle, indicate a policy judgment that preservation and research activities deserve breathing room even in a DRM-cloaked, license-governed environment. Institutions should align preservation workflows with the contours of these exemptions while also evaluating fair use independently where no circumvention is necessary.²²

Visual culture and museum practice put the tension in unusually sharp relief. Some museums present “terms of use” asserting restrictions on reproductions of faithful photographs of public-domain artworks, sometimes insisting on permission or fees for uses that, as a matter of copyright, require none. Courts have been skeptical of such “copyfraud”: *Bridgeman Art Library v. Corel* held that exact photographic reproductions of two-dimensional public-domain works lacked the originality necessary for copyright protection.²³ In parallel, the Visual Resources Association's best-practices statement articulates circumstances in which uses of images for teaching, research, and study fall squarely within fair use.²⁴ The take-away is that contractual restrictions on public-domain materials or on statutorily privileged uses do not create federal copyright claims; at most, they create contractual claims against parties to the contract, and even then may be unenforceable as against public policy or for lack of assent.

If the doctrine supports fair use in licensed spaces, why do so many institutions feel practically constrained? One answer is bargaining power. Large, integrated platforms can and do present take-it-or-leave-it terms that purport to forbid broad classes of use, including text and data mining, interlibrary loan, classroom streaming, and preservation copying. Another is risk perception: the presence of a functioning license market can weigh against fair use, and library, archive, and museum counsel reasonably worry about edge cases after *Warhol* and *TVEyes*. But it is a category mistake to treat any license as a “veto” on fair use. In research contexts, for instance, *HathiTrust* and *Google* illustrate that indexing, accessibility, and non-consumptive analysis are paradigmatic fair uses; likewise, many publishers now offer TDM-specific licenses or APIs not because the activity is always infringing, but to manage traffic and risk. Where a license forecloses such activity, institutions should negotiate savings clauses that preserve statutory rights. Model language developed by library consortia and professional associations provides practical templates for doing so, including the ARL *Code of Best Practices in Fair Use for Academic and Research Libraries*;²⁵ the RUSA *Model Interlibrary Loan*

²¹ *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255 (5th Cir. 1988); *UMG Recordings, Inc. v. Augusto*, 628 F.3d 1175 (9th Cir. 2011).

²² “Exemptions to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies,” 37 C.F.R. § 201.40 (as amended 2024); see 17 U.S.C. § 1201(a)(1)(C).

²³ *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

²⁴ Visual Resources Association, *Statement on the Fair Use of Images for Teaching, Research, and Study* (2011; rev. 2013).

²⁵ Association of Research Libraries, *Code of Best Practices in Fair Use for Academic and Research Libraries* (2012).

License Clause,²⁶ the *LIBLICENSE Model License Agreement*,²⁷ and the California Digital Library's model language and licensing toolkit.²⁸ Surveys of text-and-data-mining policy trends further demonstrate how negotiated terms can coexist with independent fair-use analysis.²⁹

V. Whether Fair Use Survives a License

Practitioners sometimes speak as if a private license displaces fair use entirely, but that assumption misunderstands both the structure of copyright and the role of contract. Fair use is a statutory limitation on the exclusive rights conferred by copyright, expressly framed by Congress as operating “notwithstanding” the owner’s exclusive rights; it is the law’s built-in permission to use without asking when the circumstances warrant it.³⁰ In constitutional terms, the U.S. Supreme Court has identified fair use, together with the idea/expression dichotomy, as one of copyright’s “built-in First Amendment accommodations,” the safety valve that renders the regime compatible with free speech values.³¹ Reading a private contract to erase that safety valve requires a clear waiver and a careful account of the contract’s scope; the mere existence of a license does not, by itself, extinguish fair use. The harder question is not whether fair use continues to exist in the abstract, but how far “private ordering” can narrow user conduct in licensed environments.

Before diving into cases such as *ProCD* and *Bowers* below, it helps to understand what lawyers mean by “private ordering.” Private ordering refers to the ability of private parties, such as publishers and libraries, to create their own rules through contract.³² In the licensed digital environment, these agreements often substitute for the public law default rules of copyright. Through contract, parties can decide who has access, how materials may be used, and what remedies apply if the agreement is breached. In principle, private ordering allows flexibility and innovation; in practice, it can also sidestep the balance Congress intended between copyright owners and users. When licenses restrict activities that would otherwise be lawful under fair use or other statutory exceptions, they illustrate how private ordering can reshape, or even narrow, the public’s rights of access and use.

Section 301 of the Copyright Act broadly preempts state laws that grant rights “equivalent to” copyright’s exclusive rights, but most courts have held that a freely assumed contractual promise supplies an “extra element” that avoids preemption.³³ Thus, courts have enforced “shrink-wrap” or “click-wrap” terms limiting uses that would otherwise be permissible absent contract, as in *ProCD v.*

²⁶ Reference and User Services Association (RUSA), “Model Interlibrary Loan License Clause,” updated 2023, approved 2024 at <https://www.ala.org/rusa/rusa-model-interlibrary-loan-license-clause>

²⁷ LIBLICENSE, *Model License Agreement*, Center for Research Libraries (Revised 2014) at <https://liblicense.crl.edu/licensing-information/model-license/>

²⁸ California Digital Library, “Model License” and “Licensing Toolkit,” University of California at <https://cdlib.org/services/collections/licensed/toolkit/>

²⁹ SPARC, “Developments in Publishers’ Text and Data Mining (TDM) Policy,” Scholarly Publishing and Academic Resources Coalition at <https://sparcopen.org/our-work/developments-in-tdm-policy>

³⁰ 17 U.S.C. § 107, Limitations on Exclusive Rights: Fair Use (“Notwithstanding the provisions of sections 106 and 106A...”).

³¹ *Eldred v. Ashcroft*, 537 U.S. 186, 219–21 (2003) (describing fair use and the idea/expression dichotomy as “speech protective purposes and safeguards”).

³² Niva Elkin-Koren, “Copyright Policy and the Limits of Freedom of Contract,” 12 *Berkeley Tech. L.J.* 93, 95–96 (1997)(defining private ordering as “the contractual allocation of rights and obligations among copyright owners and users that may displace or modify statutory copyright rules.”)

³³ 17 U.S.C. § 301

*Zeidenberg*³⁴, which treated a consumer’s assent to noncommercial-use terms as enforceable contract, and *Bowers v. Baystate*, which sustained a ban on reverse engineering.³⁵ The Ninth Circuit has taken a similar stance in *Altera v. Clear Logic*, expressly approving the view that preemption “leave[s] private contracts unaffected.”³⁶ At the same time, the Second Circuit’s 2022 decision in the *Genius* litigation reflects a more skeptical approach: where browse wrap terms were invoked to curb copying of song lyrics, the court held the contract theory preempted because, on those facts, it was equivalent to the copyright claim.³⁴ The result is not a negation of contract in the digital sphere, but a reminder that enforceability turns on *assent*, *clarity*, and the *relationship* between the promise sued upon and the exclusive rights of copyright.

Against that doctrinal background, the practical question for libraries, archives, museums, and visual-arts users is when fair use “survives” within a licensed environment. The “Does Fair Use Survive?” chart below captures the key interpretive posture courts and negotiators are likely to adopt in assessing typical license clauses across five recurrent patterns: clear prohibitions, limited-scope grants, silence, savings clauses, and ambiguity. Read alongside the case law and professional guidance, the chart reflects not a general nullification of fair use by contract, but a spectrum in which fair use is often preserved unless clearly and specifically waived.

Language type	Example	Fair use consequence
Clear prohibition	“User shall not...” or “User shall not...without additional permission”	License trumps
Limited license	“This license is for personal use only...”	Fair use survives
Silence (nothing in the license explicitly or implicitly addresses your use)	...	Fair use survives
Savings clause	“Notwithstanding any other provision in this contract, nothing shall bar lawful uses....”	Fair use survives
Ambiguity	...	Fair use favored

Language of clear prohibition, such as “User shall not...,” “User agrees not to...,” or similar promises not to engage in specified conduct, is the most likely route by which a user surrenders conduct that might otherwise be defended as fair. When a license expressly designates a particular behavior as out of bounds and the licensee assents, courts have often enforced those terms. The *Bowers* court, for example, treated an express ban on reverse engineering as binding notwithstanding arguments that reverse engineering can, in some circumstances, be a fair use.³⁷ That does not mean every breach of such a clause is automatically copyright infringement; following *MDY Industries v. Blizzard*, it matters whether the restriction is framed as a *condition* on the license (breach triggers infringement) or as a *covenant* (breach sounds only in contract).³⁸ *Jacobsen v. Katzer* likewise turns on

³⁴ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996)

³⁵ *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).

³⁶ *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005).

³⁷ *Bowers v. Baystate Technologies, Inc.*, 320 F.3d 1317 (Fed. Cir. 2003).

³⁸ *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 940-41 (9th Cir. 2010).

whether the term limits the scope of the license or merely imposes a collateral promise.³⁹ But as a matter of contract, a clearly worded “shall not” is the paradigm of a knowing waiver of particular uses.

By contrast, language that merely describes the *scope* of the license, including “for personal use only,” “for classroom use only,” or “for on-site access,” should ordinarily be read to define what the licensor *permits* without speaking to what the law otherwise allows the user to do without permission. Unless the contract goes on to prohibit conduct *outside* that scope, the user has *not* promised to forgo fair use. This conclusion follows familiar canons of contract interpretation: courts resist reading standardized agreements to waive important legal rights absent clear statement, and they construe ambiguous or general terms “against the drafter” under the doctrine of *contra proferentem*.⁴⁰ In other contexts, the Supreme Court has required “clear and unmistakable” language to waive access to statutory rights; while that line of cases concerns labor and arbitration, it expresses a broader reluctance to infer waivers of legal entitlements from general phrasing.⁴¹ In short, a license that says “this grant is for personal use” does not, without more, extinguish fair use.

Contractual silence with respect to fair use similarly leaves statutory rights intact. If a publisher’s standard form does not address, say, computational analysis or classroom excerpts at all, then absent some other clause that functionally prevents the necessary steps, a user remains free to rely on fair use. Where licenses do speak indirectly, for example, by prohibiting “automated harvesting,” “scraping,” or “bulk downloading,” those provisions can operate as *practical* impediments to text and data mining even if the analysis itself would be a fair use. Whether such terms bind turns on notice and assent: browse wrap terms presented via inconspicuous hyperlinks may fail for lack of assent, as in *Specht v. Netscape* and *Nguyen v. Barnes & Noble*, while repeated, conspicuous notice can support enforcement, as in *Register.com v. Verio* and some portions of *Ticketmaster v. Tickets.com*.⁴² In licensed platforms, then, contractual silence favors fair use; indirect restraints must be both enforceable and clearly applicable to close off a fair-use pathway.

Explicit savings clauses place the question beyond doubt. Modern library model licenses increasingly include provisions stating that “Nothing in this Agreement shall be interpreted to diminish the rights of the Licensee or Authorized Users, including fair use under 17 U.S.C. § 107.” Well-drafted forms such as the LIBLICENSE Model License adopt this “no diminution of rights” language, and professional bodies have promulgated parallel model clauses for interlibrary loan and other services.⁴³ Library licensing guides now urge negotiators to press for such clauses as a standard term precisely to avoid accidental waiver of statutory rights.⁴⁴ With a savings clause, potentially restrictive phrasing elsewhere in the agreement must be read in harmony with, and subordinate to, the preservation of fair use.

³⁹ *Jacobsen v. Katzer*, 535 F.3d 1373, 1380–83 (Fed. Cir. 2008).

⁴⁰ *Restatement (Second) of Contracts* § 206 (1981), see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995).

⁴¹ *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70, 79–81 (1998).

⁴² *Specht v. Netscape Communications Corp.*, 306 F.3d 17, 28–30 (2d Cir. 2002); *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179–80 (9th Cir. 2014); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 401–04 (2d Cir. 2004); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 U.S. Dist. LEXIS 6483 (C.D. Cal. Mar. 7, 2003).

⁴³ LIBLICENSE, *Model License Agreement* § 3.3 (“No Diminution of Rights... including fair use”) and Reference & User Services Association, *Model Interlibrary Loan License Clause* (rev. 2024).

⁴⁴ Katie Zimmerman et al., *E Resource Licensing Explained*, ch. 5 (“Fair Use Savings Clauses”) (UC Berkeley Pressbooks, 2023).

When license text is genuinely ambiguous, several interpretive considerations are pushed in favor of preserving fair use. *Contra proferentem* directs courts to adopt the meaning that operates against the drafting party, typically the vendor, particularly in non-negotiated, standardized agreements.⁴⁵ The constitutional status of fair use as part of copyright's free-speech accommodation counsels against lightly reading boilerplate to extinguish it.⁴⁶ And the modern treatment of standard-form contracts, together with centuries-old hostility to hidden or surprising terms, favors clarity when an agreement purports to displace a user's default legal privileges.⁴⁷ In short, ambiguity is not the licensor's friend.

V. Remedies, Risks, and Institutional Realities

Breaking a contract is not the same thing as infringing copyright, and the difference really matters. Courts in *MDY Industries v. Blizzard* and *Jacobsen v. Katzer* explained that if you violate a promise in a license, that's a contract issue. But, if you violate a term that limits what the license actually allows, it can be treated as infringement.⁴⁸ That distinction matters because many licenses empower vendors to impose nonjudicial remedies, most notably, suspending or terminating institutional access upon notice of suspected breach, without any court proceeding at all. Model license terms typically contemplate a notice-and-cure process, followed by the power to shut off access if the breach is not cured.⁴⁹ For example, in high-volume environments, text and data mining activity can resemble a security incident, prompting conservative vendor responses and temporary lockouts even where the underlying scholarship is defensible as fair use.⁵⁰ For research institutions, the operational risk of service interruption can be as consequential as any abstract liability.

What does this mean, concretely, for teaching and research? Consider electronic course reserves. The Georgia State University litigation over e-reserves resulted in a decade of opinions concluding, after repeated work-by-work analysis, that many short, non-substitutive excerpts for enrolled students constituted fair use.⁵¹ Licensing can define what is pre-authorized, but it does not erase the possibility that a particular excerpt is a lawful fair use even if it falls outside the license's enumerated "authorized uses." A savings clause removes doubt; in its absence, the inquiry returns to first principles: purpose and character (nonprofit, pedagogical), nature of the work, amount taken in relation to the pedagogical purpose, and market effect, including careful attention to whether a ready-to-license excerpt actually exists. Where a vendor's business model relies heavily on "no redistribution" norms, institutions can mitigate risk by authenticating access behind course walls, limiting the size and duration of excerpts, and documenting factor-by-factor analyses. None of those risk-management choices are a condition of fair use; they are prudential means of aligning institutional practice with both the license and the law.⁵²

⁴⁵ *Restatement (Second) of Contracts* § 206 (1981) (*contra proferentem*).

⁴⁶ *Golan v. Holder*, 565 U.S. at 327; *Eldred v. Ashcroft*, 537 U.S. at 219–21.

⁴⁷ Eric Zacks, "The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts," 7 *Wm. & Mary Bus. L. Rev.* 733 (2016).

⁴⁸ *MDY Industries, LLC v. Blizzard Entertainment, Inc.*, 629 F.3d 928, 940–41 (9th Cir. 2010); see also *Jacobsen v. Katzer*, 535 F.3d 1373, 1380–83 (Fed. Cir. 2008).

⁴⁹ LIBLICENSE Model License Agreement § 6.4 (notice, cure, termination for breach).

⁵⁰ SPARC, "Developments in Publishers' TDM Policy," and ARL/SPARC guidance on contractual limits to TDM and AI uses.

⁵¹ *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

⁵² LIBLICENSE Model License Agreement § 3.3 and § 3.2 (relationship between enumerated "authorized uses" and preserved statutory rights).

VI. Comparative Policy and the Path Forward

Comparative policy points to a path forward. In the United Kingdom, post-2014 reforms protect many copyright exceptions from contractual override, ensuring that private terms cannot nullify statutory user rights. In the European Union, the 2019 Copyright in the Digital Single Market Directive created mandatory exceptions for text and data mining, teaching, and preservation, and insulated some of these from contracting out; while Article 4 permits rightsholders to “opt out” of TDM by reservation of rights, Article 3 for nonprofit research organizations is non-waivable. These reforms recognize that private ordering should not nullify democratically chosen user rights essential to research and cultural memory. The United States has not adopted an anti-override rule, but library and archive communities have called attention to contractual override as a policy problem ripe for legislative attention, especially as AI and large-scale computational research magnify the stakes.⁵³

Against that backdrop, practical guidance for institutions working under licenses comes into focus. First, treat fair use as a live option in teaching, scholarship, and preservation. For teaching, narrowly tailored excerpts aligned to pedagogical purpose and not substituting for licensed consumption remain strong candidates for fair use, and the TEACH Act provides an additional path for digital transmission where its narrow conditions are met. For scholarship and research, uses that enable search, indexing, non-consumptive analysis, accessibility, and reproducibility are favored under the logic of the leading cases. For preservation, § 108 and the § 1201 exemptions together support format migration and repair for at-risk materials, particularly where access copies are limited, time-bounded, or otherwise controlled to avoid substitution.

Second, negotiate the contract. Include a rights-savings clause preserving all uses “permitted by copyright law,” explicit TDM permissions where appropriate, clarity around ILL consistent with § 108 and professional codes and carve-outs for accessibility and preservation.

Third, design workflows with the case law in mind: decouple discovery from delivery; expose snippets and features rather than full text where feasible; prefer opt-out modalities where supported; and keep detailed logs showing that uses target information about works and do not substitute for the works themselves. Finally, remember that contracts bind their parties: where a researcher uses materials outside the license—relying on fair use to quote a figure or include a small image in a dissertation—that researcher is accountable to copyright law, not the institution’s subscription agreement.

Of course, not every claim of fair use will succeed. *Capitol Records v. ReDigi* reminds us that recreating identical files for resale is not transformative and can fail under both reproduction and market-harm analyses. *TVEyes* and *Hachette* caution that even putatively research-oriented services will lose fair use if their delivery functions supplant licensed access or eject the rightsholder from a core licensing market. But the lesson from those defeats is not that fair use evaporates in a licensed ecosystem; it is that fair use is bounded by substitution risk. When libraries and researchers design uses to avoid that risk—when they take only what is necessary to enable search, preservation, accessibility, or analysis, and refrain from serving the original expressive content—they stand on solid ground.

⁵³ *Directive (EU) 2019/790 on Copyright and Related Rights in the Digital Single Market*, arts. 3–6; Libraries and Archives Copyright Alliance (UK), briefing on “contractual override” and the 2014 reforms to copyright exceptions.

VII. Conclusion: Fair Use as the Law's Safety Valve

Returning to first principles, fair use is the doctrinal engine that keeps copyright's instrumental goals aligned with public needs. Licensing is a powerful tool for facilitating access, but it is not a constitutional value; it is a business arrangement. When licenses dovetail with fair use, by enabling classrooms, scholarship, preservation, and interoperability, we should celebrate the complementarity. When licenses attempt to erase user rights and restrict socially vital practices, institutions should push back in negotiations, lean on best-practices frameworks, structure uses to avoid substitution, and, when necessary, rely on fair use. The case law demonstrates that courts know how to distinguish transformation from substitution and are prepared to protect uses that make our scholarly and cultural infrastructure work. Fair use survives the license because it must: without it, the promise of access, equity, and educational freedom in the digital age would be hollow.

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