A Case for Libraries' Survival in the Internet Age: Mass Digitization of Literary Works and the Legality of Controlled Digital Lending

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INTRODUCTION

In the United States, copyright law rests upon a delicate balancing act. Our system aims to maximize both incentives for right holders to create and public access to creative works under a constitutional mandate to "[p]romote the Progress of Science and useful Arts."[1] Forces of technology and globalization have compounded the complexities of striking that balance, making it far easier for a physical literary work to be scanned, digitized, and shared around the world—often without the author's express permission. In turn, the digitization of creative works offers widespread benefits for the maximization of public accessibility: A work can reach the hands of countless students and scholars who would not otherwise have the funds, resources, or accommodations to read it.

Such public benefits are not always zero-sum in favor of readers at the expense of authors. For one, the ability to access written works on the Internet can plausibly increase readership for a book whose physical copy sits untouched on the shelf amidst eras of online schooling and the rise of a "generation of digital natives."[2] Still, the issues of author permission and potential market supplantation remain. In the United States, the clash of interests arising from the expansion of online access to books continues to engender litigation by and among publishers, authors, archives, libraries, and corporations over the legal viability of digital libraries. This litigation illustrates a case study of American fair use in the modern internet era and an ever-changing legal landscape for those who seek to consume or distribute literary resources.

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1. U.S. CONST. art. I, § 8, cl. 8.

2. JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (2008).

Through the lenses of the prior mass digitization cases, fair use precedents, and the recent Internet Archive ("IA") litigation—with its appeals process transpiring in the Second Circuit at the time of writing[3]—this Note will examine the controversy surrounding digital libraries and question what makes controlled digital lending ("CDL") "fair" or "unfair" for authors, readers, and publishers. Part I will provide a brief overview of U.S. copyright law, the judicial development of the fair use doctrine and its steadfast focus on notions of transformativeness, and the historical role of physical and digital libraries within the copyright law regime. Part II will introduce, compare, and contrast two mass digitization disputes: the Google Books saga and the IA's descent into heated litigation. Part III will examine the IA's loss in federal district court and argue that future cases should not foreclose the fair use defense for libraries employing a more tailored CDL scheme than the IA.

Ultimately, while the transformativeness and inherent limitations of Google Books (that is, providing full, limited, or no internal content from a book depending on a work's copyright status or agreements with right holders) saved that project from legal demise, the IA's controlled digital lending scheme may well meet a different fate. On the surface, the IA's comparatively uncapped and untailored provision of digital copies looks more like pure format-shifting and supplantation of the e-book market than innovative transformation. However, when future cases arise concerning libraries with more tailored scanning practices than the IA, courts must take into close consideration the overarching goals of copyright law if libraries are to maintain their fundamental role in facilitating equitable public access to literary and academic resources in an increasingly digital age.

I. BACKGROUND INFORMATION

A. UNITED STATES COPYRIGHT LAW

Copyright protection originates in the U.S. Constitution, which empowers Congress to enact intellectual property legislation in order to "[p]romote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

3. Since the time of writing, the Second Circuit has affirmed the district court's decision in Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 (2d Cir. 2024), ruling in favor of the publishers.

As predicted, the Second Circuit found that the IA itself went too far with its own CDL scheme. The Second Circuit rejected a finding of transformativeness for the IA's CDL practices, largely agreeing with the format-shifting rationale of the district court (laid out in detail *infra*). *Id.* at 181–82. On its face, this reasoning could plausibly apply to any library, archive, or other such entity engaging in CDL. However, of course, the Second Circuit's decision was tailored to the facts and parties on the record in front of it. This Note will explore why libraries employing a more tailored CDL scheme than the IA should retain a viable fair use defense in light of functional transformativeness, non-commercial and educational purposes, and the history of U.S. copyright law.

Further, although the publishers still came out victorious, the Second Circuit's holding that the IA's use was non-commercial—disagreeing with the district court's finding of commerciality—aligns with this Note's argument that nonprofit CDL by libraries should not be deemed commercial by courts. *See id.* at 185–86.

the exclusive Right to their respective Writings and Discoveries."[4] The text of this "IP Clause" signals the primarily utilitarian justifications underlying our copyright doctrine—it centers "[p]rogress" and "useful[ness]" as it confers a "limited" monopoly for creators.[5] This utilitarian tone set the landscape for the subsequent codification of copyright doctrine into a statutory scheme. As Justice Stewart put it in *Twentieth Century Music Corp.*, the limited scope of copyright's statutory monopoly "reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[6] In other words, American copyright law was not structured for the benefit of publishers or for the purpose of profit: While the "immediate effect" of copyright law is to secure a return on labor for creators, the "ultimate aim" is to stimulate that creativity for the public good.[7]

B. FAIR USE DOCTRINE AND TRANSFORMATIVENESS

Today, the Copyright Act of 1976 (the "Copyright Act") constitutes the modern system of liability premised on copying. This system of liability maintains a number of statutory "escape valves" for certain forms of *acceptable* copying, which "provide ample space for artists and other creators to use existing materials to make valuable new works."[8] One such "escape valve" is the judge-made doctrine of fair use, which Congress codified within § 107 of the Copyright Act.[9] Fair use doctrine permits a party to use a copyrighted work without the right holder's permission for certain productive purposes.[10] Fair use "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[11] In doing so, the doctrine aims to strike the same delicate balance as copyright law writ large, tasking courts with the oft-difficult job of "defin[ing] the boundary limit of the original author's exclusive rights in order

4. U.S. CONST. art. I, § 8, cl. 8.

5. *Id.*

6. Twentieth Century Music Corp. v. Aiken, 95 S. Ct. 2040, 2044 (1975).

7. *Id.*

8. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1287 (2023). *See also id.* ("Finally, copyright law is replete with escape valves: the idea-expression distinction; the general rule that facts may not receive protection; the requirement of originality; the legal standard for actionable copying; the limited duration of copyright; and, yes, the defense of fair use, including all its factors, such as whether the amount taken is reasonable in relation to the purpose of the use.").

9. 2 PETER S. MENELL ET AL., INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGY AGE: 2023, at 801–03 (2023).

10. *What Is Fair Use?*, COPYRIGHT ALL., https://copyrightalliance.org/faqs/what-is-fair-use/ [https://perma.cc/4BTF-88Q9] [https://web.archive.org/web/20250206180529/https://copyrightalliance.org/faqs/what-is-fair-use/] (last visited Feb. 6, 2025).

11. *Warhol*, 143 S. Ct. at 1274 (quoting Stewart v. Abend, 110 S. Ct. 1750, 1768 (1990)).

to . . . expand public learning while protecting the incentives of authors to create for the public good."[12]

As the drafters of the Copyright Act explained in its legislative history, Congress sought in § 107 to "restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way."[13] Section 107 includes a non-exhaustive list of enumerated categories including criticism, news reporting, scholarship, research, and teaching. Seemingly, most library activities should cleanly fit under at least one of these categories. Case closed, right? Not exactly, or this Note would be much shorter. While these examples provide "general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses" prior to enacting § 107, they are *not* automatic exceptions.[14] In practically every single copyright case, regardless of whether a use falls under an enumerated category, courts run through each of § 107's four codified factors: the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and the potential market effects for the copyrighted work.[15]

In the seminal case of *Campbell v. Acuff-Rose Music*, Justice Souter drew on Judge Pierre Leval's influential law review article, *Toward a Fair Use Standard*, and Justice Story's formulation of fair use in order to articulate a transformative use variant of the four-factor doctrine.[16] Addressing the purpose and character factor of § 107, Justice Souter explained that the central purpose of the fair use inquiry is to bifurcate uses that "merely supersede" the original and those that add new meaning, "with a further purpose or different character, altering the first with new expression, meaning, or message."[17] Lower courts took this guidance seriously: The aftermath of *Campbell* led to a de facto stampeding of the other fair use factors by "transformativeness," such that when courts found *transformative* use, the overwhelming majority then concluded with a finding of *fair* use.[18]

In the spring of 2023, fair use scholars watched closely as the Supreme Court took up the *Warhol* case.[19] In 1981, *Newsweek* commissioned the *Warhol* plaintiff, photographer Lynn Goldsmith, to capture photographs of the then-"up and coming"

12. Authors Guild v. Google, Inc., 804 F.3d 202, 213 (2d Cir. 2015).

13. H.R. REP. NO. 94-1476, at 66 (1976).

14. Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1170 (1994).

15. *See* Brief of Professors Peter S. Menell, Shyamkrishna Balganesh, and Jane C. Ginsburg as Amici Curiae in Support of Respondents at 16–17, Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1287 (2023) [hereinafter, Menell et al. Amicus Br.] ("*eBay* . . . emphasized that each of the factors needed to be independently considered and applied, despite Congress merely referencing them in its adoption of 'principles.'"); *see also* MENELL ET AL., *supra* note 9, at 801–79.

16. *Campbell*, 114 S. Ct. at 1171 (citing Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105 (1990)).

17. *Id.*

18. *See* Menell et al., Amicus Br., *supra* note 15, at 17–18.

19. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258 (2023).

musician (now well known as) Prince.[20] A few years later, Goldsmith licensed the photograph to *Vanity Fair* for an "artist reference" on the condition that the use of her photograph be for "one time only."[21] *Vanity Fair* then hired the already-well-known artist Andy Warhol to make a silkscreen of the photograph, which *Vanity Fair* published with source credit to Goldsmith. The story may have ended there had Warhol not made fifteen additional silkscreens of the photograph. The Andy Warhol Foundation for the Visual Arts, Inc. ("AWF") subsequently licensed one of these silkscreens to Condé Nast for another Prince article in 2016.[22] AWF received $10,000 for the use of the work—with no profit or credit to Goldsmith—and AWF proceeded to preemptively sue Goldsmith after she informed AWF that she believed its use of her photograph infringed on her copyright.[23]

The Supreme Court held for Goldsmith rather narrowly: The ruling turned on the specific instance of AWF's 2016 licensing of "Orange Prince" to *Vanity Fair*. Writing for the majority, Justice Sotomayor took an analytical dive into questions of transformativeness and commerciality under the first fair use factor, arguing that transformativeness goes beyond a changed meaning or message to focus on a further *purpose* or different character, and that this degree of difference must be weighed against a profit (or nonprofit) motive.[24] The Court held that this first fair use factor weighed in Goldsmith's favor: AWF's use of Goldsmith's photograph in Condé Nast (though the photograph was artistically altered by Warhol's iconic style) served substantially the same purpose as Goldsmith's original, and this use was of a commercial nature.[25] Justice Kagan penned a fiery dissent, arguing that the majority completely undervalued the critical transformativeness of Warhol's adaptation, writing: "It will stifle creativity of every sort. It will impede new art and music and literature. It will thwart the expression of new ideas and the attainment of new knowledge. It will make our world poorer."[26]

As will be explored further in Part III, the two justices' analyses (as well as Justice Gorsuch's concurrence) are salient to a court's consideration of whether a library's digital scanning practice constitutes fair use under the first factor. The *Warhol* decision entrenched the importance of the first factor and considerations of "further purpose[s]" and profit motives within a court's analysis of each potentially infringing use. The decision prompts lower courts to incorporate Justice Sotomayor's nuanced understanding of transformativeness, commerciality, and nonprofit/educational

20. Goldsmith herself was a "trailblazer" for women in the male-dominated realm of rock-and-roll photography: "Goldsmith's work appeared in *Life*, *Time*, *Rolling Stone*, and *People* magazines, not to mention the National Portrait Gallery and the Museum of Modern Art. She captured some of the twentieth century's greatest rock stars: Bob Dylan, Mick Jagger, Patti Smith, Bruce Springsteen, and, as relevant here, Prince." *Id.* at 1266.

21. *Id.*

22. *Id.* at 1266.

23. *Id.*

24. *Id.* at 1277.

25. *Id.* at 1287.

26. *Id.* at 1312 (Kagan, J., dissenting).

motivations into their future decisions.[27] And as in the digital library litigation examined by this Note, courts will need to determine how to apply this understanding to factual patterns of first impression in high-stakes fair use cases.

1. Library Exceptions

This Note focuses on a fair use case with major implications for the potential future liability of libraries. As institutions fundamentally geared towards a nonprofit, educational mission, libraries regularly pursue goals that are reflected in copyright's constitutional mandate: to encourage individual learning and to advance the collective knowledge of the populace. Accordingly, libraries have long been subject to exceptions and limitations on liability provided for by statutes, judicial doctrines, and copyright treaties.[28]

Section 108 of the Copyright Act might be read to solve any problem related to copying by libraries, physical or digital, but most have found it inapplicable to current technological developments. Section 108 lays out the limited conditions under which library employees can reproduce copies and phonorecords of works in their possession.[29] For example, the conditions for producing even a *single* copy require a collection to be open to the public and open to researchers, as well as the inclusion of a copyright notice.[30] Another provision permitting up to *three* copies applies principally to unpublished works, "solely for purposes of preservation and security or for deposit for research use in another library or archive[]."[31] In each case, according to the statute, these digital reproductions may not be distributed, circulated, or publicized outside of the library's premises. These restrictions read as rather limiting for a library in the digital age—how can they ever effectively and accessibly lend out any digital copies to patrons' home devices (which, presumably, are not on library premises) under these conditions?

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27. *See, e.g.*, Philpot v. Indep. J. Rev., 92 F.4th 252, 258 (4th Cir. 2024) ("The first fair use factor, the 'purpose and character of the use,' requires us to consider whether the secondary use of the Photo was (a) transformative and (b) of a commercial nature or for nonprofit educational purposes" (citing *Warhol,* 143 S. Ct. at 1258)); Teradyne, Inc. v. Astronics Test Sys., Inc., No. 20 Civ. 2713 (GW) (SHK), 2023 WL 9284863, at *17 (C.D. Cal. Dec. 6, 2023) ("The first fair use factor 'considers the reasons for, and nature of, the copier's use of an original work,' and 'focuses on whether an allegedly infringing use has a further purpose or different character, which is a matter of degree,' with 'the degree of difference . . . weighed against other considerations, like commercialism.'" (citing Warhol, 143 S. Ct. at 1258)); Sedlik v. Drachenberg, No. 21 Civ. 1102 (DSF) (MRW), 2023 WL 6787447, at *2 (C.D. Cal. Oct. 10, 2023) (finding that in light of *Warhol*, differences between two works "must be evaluated in the context of the specific use at issue," and in *Warhol*, the "relevant use was the Foundation's commercial licensing of Orange Prince to appear on the cover of Condé Nast's special commemorative edition not Orange Prince's meaning or aesthetic") (internal punctuation omitted)).

28. Argyri Panezi, *A Public Service Role for Digital Libraries: A Case of Emergency Electronic Access to Library Material and the Unequal Battle Against Misinformation Through Copyright Law Reform*, 31 CORNELL J.L. & PUB. POL'Y 65, 72 (2021).

29. *See* H.R. REP. NO. 94-1476 (1976) (explaining the special library exceptions in 17 U.S.C. § 108).

30. *See* Panezi, *supra* note 28, at 84 (citing 17 U.S.C. § 108(b) (2018)).

31. *Id.* at 83–84.

Well, three points demonstrate why § 108 does not yet have teeth as an enforcement mechanism for digital copyright infringement, with doctrines like fair use or first sale instead taking the mainstage: (1) the restrictions do not impose liability on librarians who do not have a reasonable basis to believe that the copied work will be utilized outside of private study or scholarship; (2) the *HathiTrust* case clarifies that libraries *can* benefit from fair use despite the simultaneous presence of specific provisions like § 108 on the books; and (3) the Copyright Office (the "CO") has itself expressed the need to update § 108 in the face of technological developments and ensuing digitization litigation.[32] The CO concluded that the § 108 exceptions are targeted at older forms of copying equipment and are thus "stuck in time"; to date, § 108 still has not been updated to explicitly address electronic copies of books or digital lending.[33] In its present form, § 108 does not solve the persistent controversy surrounding mass digitization, which has been a growing phenomenon since at least the 1970s. While this may present a ripe opportunity for Congress to step in and strike another balance in copyright law, for now, courts will need to turn to other doctrines to grapple with the fair use issues accompanying the historic rise of digital libraries.

C. A BRIEF INTRODUCTION TO DIGITAL LIBRARIES

The first claimed provider of free e-books was Michael Hart, the founder of Project Gutenberg. In 1971, Hart allegedly used a Xerox Sigma V computer at the University of Illinois to embark on a grand mission: "Everyone in the world, or even not in this world (given satellite transmission) can have a copy of a book that has been entered into a computer."[34] By typing books into text format, Hart's endeavor represented the first step in a mass digitization race that would soon drastically outpace Project Gutenberg. While Hart's project has now reached over 75,000 e-books, newer projects like Google Books and the IA have digitized *millions* of physical books.[35]

The popularity of mass digitization projects has presumably grown for a number of different reasons: general technological advancement and experimentation, efficiency goals, sustainability concerns, corporate information-gathering and advertising interests, and more. The rise of digital native generations, a term defined by John Palfrey and Urs Gasser, is one particularly interesting trend that may act as both an independent and dependent factor affecting digitization litigation: The

32. *Id.*; *see also* Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 94 n.4 (2d Cir. 2014).

33. Panezi, *supra* note 28, at 84–86.

34. *Id.* at 75 (quoting Michael Hart, *The History and Philosophy of Project Gutenberg*, PROJECT GUTENBERG, https://www.gutenberg.org/about/background/history_and_philosophy.html [https://perma.cc/KLY7-2BXL] [https://web.archive.org/web/20250307153526/https://www.gutenberg.org/about/background/history_and_philosophy.html] (last visited Feb. 20, 2025).

35. PROJECT GUTENBERG, https://www.gutenberg.org/ [perma.cc/UK5Y-V9DC] [https://web.archive.org/web/20250212185032/https://www.gutenberg.org/] (last visited Feb. 12, 2025).

increasingly online behavior of these individuals may spook authors and publishers into lawsuits, and these individuals may be adversely affected, or at least forced to change their everyday habits and research methods, if controlled digital lending is ruled to be *prima facie* copyright infringement.[36] A "digital native" is a person who grew up with the internet and has never known a world without the potential to access digital tools at their fingertips.[37] Plausibly, their familiarity and ease with changing technology can help them in important ways, allowing them to capitalize on the educational potential of new developments. However, Argyri Panezi argues that it can hurt in others; to a digital native, Dr. Panezi explains, an important source or piece of information simply does not exist if it cannot be located and accessed online.[38]

One particular archive has made itself the perfect home for a digital native. The Internet Archive—the subject of recent litigation regarding digital scans (discussed in detail *infra*)—began with a recognition by its founder, Brewster Kahle, that content published on the novel and growing medium of the internet was not being saved and preserved.[39] The IA set out on a mission to archive these pages as "cultural artifacts" and, more dramatically, to provide "Universal Access to All Knowledge."[40] The IA operates as a nonprofit institution (a status relevant to its claims to "non-commerciality"), and the state of California has recognized the IA as a library since 2006.[41] Largely by "copying and retaining backups of webpages" and other works in order to preserve their content, the IA has achieved staggering levels of scanning and archiving, at least compared to Project Gutenberg. At the time of writing, the IA claims to contain: 835 billion web pages, 44 million books and texts, 15 million audio recordings (including 255,000 live concerts), 10.6 million videos, and 4.8 million images.[42] Each day, the IA scans 4,400 books in twenty locations across the world.[43] Out-of-copyright works published prior to 1928 are freely available for anyone to download, a rather uncontroversial program. More provocatively, and to be addressed further in Parts II and III, hundreds of thousands of in-copyright books may be borrowed through the IA's Open Library website via digital scans.[44]

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36. PALFREY & GASSER, *supra* note 2, at 137–43.

37. Sachitra Mahendra, *Digital Humanities at the Crossroads*, SUNDAY OBSERVER (Nov. 26, 2023), https://www.sundayobserver.lk/2023/11/26/montage/10606/digital-humanities-at-the-crossroads/ [perma.cc/3UL6-HUK7]
[https://web.archive.org/web/20250212191507/https://www.sundayobserver.lk/2023/11/26/montage/10606/digital-humanities-at-the-crossroads/#google_vignette].

38. Panezi, *supra* note 28, at 73.

39. *About the Internet Archive*, INTERNET ARCHIVE, https://archive.org/about/ [https://perma.cc/CW6S-UW7N] (last visited Feb. 12, 2025).

40. *Id.*

41. Brief for Defendant-Appellant Internet Archive (Public) at 6, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 15, 2023).

42. *About the Internet Archive*, *supra* note 39.

43. *Id.*

44. Panezi, *supra* note 28, at 90–91.

As digital natives have increasingly turned to the internet for their educational, social, and informational needs—and stumbled upon vast digital libraries in their searches—so too have authors and publishers turned to the courts to challenge the digital libraries acting without their permission. Before behemoth publishers turned their ire directly towards the IA, they first faced off against other technology companies in fair use cases that set relevant precedents for the IA litigation and for the legality of digital scanning writ large.

II. THE GOOGLE BOOKS SAGA AND THE IA DISPUTE

A. GOOGLE BOOKS: AN UNLIKELY WIN FOR A COMMERCIAL DIGITAL LIBRARY

In 2005, Google embarked on its own mass digitization project, "Google Books," that would soon prompt years of legal disputes in *Authors Guild v. Google*. A key program within Google Books was the "Library Project," in which Google collaborated with (you guessed it) libraries ranging from the academic collections of Harvard and Stanford University to those of public institutions like the New York Public Library and the Library of Congress.[45] In bilateral partnerships with these libraries, Google scanned around twenty million books—without, however, initially seeking the permission of authors or other right holders to conduct full scans of their work.[46]

This program provided Google with vast amounts of data but strictly limited its distribution to third parties. Within these partnership agreements, Google provided libraries with digital copies of each of their scanned books in return for Google's retention of the digitized collection; thus, only Google had private access to the entire digitized corpus and any participating library would *not* receive scanned copies of works provided by another library.[47] Some libraries only provided public domain works while others, more controversially, permitted Google to digitize their in-copyright books.[48] For each of these in-copyright books, Google would then provide an end-user with access to complete, partial, or no internal content (i.e., only catalog information) in accordance with the copyright status of the work or Google's separate agreement with the right holder.[49]

In 2005, Google promptly encountered major copyright lawsuits alleging mass infringement. A coalition of individual authors and the Authors Guild (America's

45. *Id.* at 77; *see also Library Partners,* GOOGLE BOOKS, https://books.google.com/intl/en_au/googlebooks/partners.html [https://perma.cc/AA7Q-R7TD] [https://web.archive.org/web/20250212200945/https://books.google.com/intl/en_au/googlebooks/partners.html] (last visited Mar. 2, 2025).

46. Kelly Morris, Note, *"Transforming" Fair Use:* Authors Guild, Inc. v. Google, Inc., 15 N.C.J.L. & TECH. ON. 170, 185–86 (2014).

47. Panezi, *supra* note 28, at 78.

48. *Id.*

49. *Id.*

oldest and largest professional writers' organization) brought a class action lawsuit, while publishers simultaneously brought their own action. Although the publishers' action was settled, the *Authors Guild* case was drawn out into a high-profile saga until 2015—notably, parties filed over 500 *amicus curiae* briefs in the first case alone.[50]

In his district court opinion finding fair use of the scanned works, Judge Chin went into great detail on the five core benefits of a digital library like Google Books. First, Google Books created "a new and efficient way" to find books.[51] By making millions of books searchable and providing a searchable index, Google Books became so essential that it was integrated into information literacy curriculums for students of all levels. As an example of functional transformation relevant to the IA litigation and library digital scanning discussed in this Note, Judge Chin emphasized how Google Books made the "process of interlibrary lending more efficient" and facilitated cite-finding and cite-checking for researchers and librarians.[52] These largely procedural or operational functions of Google Books contributed to a finding of transformative use.

Further, Google Books expanded access to literary works, especially for underserved populations. Print-disabled individuals, those with other mobility-related disabilities, or those generally without access to a well-funded, reachable library could all benefit from Google's digitization.[53] More specifically, Google converted books to "audio and tactile formats" and facilitated "identification and access of materials for remote and underfunded libraries" that operated on narrow margins and could only procure what they needed most prior to partnering with Google.[54] These are all laudable functions which serve the purposes of copyright law, and ones which should be taken into account by any court considering fair use in the digital library context.

Pivoting towards a consideration of benefits for authors, Judge Chin then highlighted how Google Books helped to preserve obscure or older books and inject them with new life. The opinion paints a vivid image of books "falling apart buried in library stacks" instead of being scanned and uploaded for renewed consumption and learning.[55] Lastly, speaking directly to authors and publishers, Judge Chin found that Google Books would clearly benefit them—a click on Google's search result for their book would lead users to a page offering links to sellers of the books (including Amazon, Barnes & Noble, and more) or libraries that had the physical book in their collection.[56] These views and clicks were bound to attract not only new reading audiences but also new incomes.[57]

50. *Id.* at 78–79.
51. Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 287 (S.D.N.Y. 2013).
52. *Id.*
53. *Id.* at 288.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id*.

In light of the above factors, it is not surprising that Judge Chin found Google's use of the copyrighted works to be "highly transformative," despite the utter lack of critical commentary, change in meaning, or criticism that one might expect in a traditional fair use case concerning books.[58] The transformation was instead more operational and purposive, centering on notions of accessibility, efficiency, private and public benefits, and the revitalization of forgotten literary works. As in many lower court opinions on fair use, this finding of transformativeness was a core focus of the ultimate holding.

Thus, Google won the first fair use battle, and the Authors Guild quickly appealed their loss. Relying on similar reasoning to that of the district court, the Second Circuit held that Google's digitization, search functionality, and snippets of copyrighted works were indeed fair uses. Judge Pierre Leval wrote for the Second Circuit as a jurist well-renowned for his expertise in and aforementioned scholarship on fair use.[59] Judge Leval echoed many of the benefits put forth by Judge Chin, and the ultimate course of the decision was made evident by his framing of the facts: While Google Books's search results provided only "rudimentary additional" information from within the copyrighted books, "this identifying information instantaneously supplied what would otherwise not be obtainable in lifetimes of searching."[60]

As per usual, the first and fourth fair use factors did the most work in the court's opinion. For the first factor, the court found that Google was engaged in a transformative use through its innovative search function, "augment[ing] public knowledge by making available information *about* Plaintiffs' books without providing the public with a substantial substitute" for the plaintiffs' copyrighted originals *or* any potential derivatives.[61] This language on the first fair use factor undoubtedly spells trouble for the IA, which faces accusations of providing paradigmatic competing substitutes (digital scans) for copyright holders' derivative works (licensed e-books).

However, the court's discussion of the fourth factor—market substitution—may provide more support for a litigant arguing that digital scans can be transformative by providing a different purpose from print books *and* e-books. Rebuking the plaintiffs' argument on Google's usurpation of paid and unpaid licensing markets, Judge Leval emphasized that the plaintiffs' licensing markets would involve "very different functions" from those that Google provided.[62] An author's derivative rights, Judge Leval explained, do not constitute an exclusive right to supply information *about* her works.[63] Most importantly, this inquiry into function considers that a person searching Google Books for specific information or quotes within a book seeks out something different from a person simply purchasing a print book or e-

58. *Id.* at 291.

59. Authors Guild v. Google, Inc., 804 F.3d 202, 206 (2d Cir. 2015). Judge Leval also penned the influential law review article that Justice Souter drew on in *Campbell*, mentioned *supra* note 16.

60. *Id.* at 209.

61. *Id.* at 207.

62. *Id.*

63. *Id.*

book in full. A distinction in function reduces the potential for a substitutive market effect under the fourth fair use factor.

In the court's consideration of the fourth fair use factor, another initial parallel with the nonprofit IA (or any other library) is the status of Google as a profit-motivated entity that, according to plaintiffs, sought to "use its dominance of book search to fortify its overall dominance of the internet search market."[64] The court rejected any argument based on *indirect* profits as dispositive towards a fair use holding.[65] Therefore, in the absence of substitutive market effects and the presence of a highly transformative use, the court was not convinced by appeals to Google's overall profit motive.

With the Second Circuit's finding of fair use, the Google Books model prevailed. A Note by Kelly Morris argues that the Google Books litigation carries important implications for future cases involving digital use of copyrighted print materials, predicting that transformativeness will carry "heavy, if not determinative weight" in determining whether or not a use is truly fair.[66] Like Judge Leval, then, Morris emphasizes the question of whether the proclaimed transformative use is really performing a *different function* than the original.[67] Additionally, Morris predicts that the court's invocation of the public interest or public benefits in the string of Google Books cases will resurface in future digitization cases.[68] The extended Google Books litigation therefore provides lessons on how far a non-author or non-publisher may plausibly venture in scanning and publicizing books without express permission, and this is an insightful candidate for comparison with the recent IA litigation concerning controlled digital lending.

B. THE INTERNET ARCHIVE: A PATH FROM CAUTION TO CONFLICT

As the Google Books litigation took root in 2005, the Internet Archive had recently begun a partnership with Microsoft, Yahoo, and other stakeholders to create the Open Content Alliance ("OCA").[69] The project espoused a similar mission to Google: digitizing books and making them freely searchable and available online to all. However, in the shadow of Google's potential liability, the OCA collaborators initially proceeded with care.[70] Accordingly, while digitizing the public domain books of their library partners, the OCA allegedly sought authors' consent before digitizing in-copyright work.[71] Then, in 2011, the IA also began its system of controlled digital lending. The IA created digital scans only of books that it had purchased or received via donation and allowed patrons to borrow the scans for up

64. *Id.* at 218.
65. *Id*. at 219.
66. Morris, *supra* note 46, at 195.
67. *Id.* at 196.
68. *Id.*
69. Panezi, *supra* note 28, at 86.
70. *Id.* at 86–87.
71. *Id.* at 87.

to fourteen days on a 1:1 owned-to-lent ratio (i.e., if one person checked out the scan, another person could not access it), subject to digital rights management encryption that prevented personal download or printing.[72] In doing so, the IA refrained from lending books published within the past five years out of respect for the fact that book sales "generally peak within the first years of publication."[73] However, the semblance of a more cautious approach by the IA began to take a turn towards greater experimentation and, consequently, greater risk-taking.

In 2018, the IA began the "Open Libraries" project, allowing other libraries to "contribute" their non-circulating books to the IA's number of total copies available for CDL. Basically, if a partner library committed a book to the project, the IA would simply increase the number of available borrows for its digital scan of the book by one.[74] This move raised eyebrows: The IA allegedly does not actively police whether that library's print books actually remain out of circulation while a scan is lent out, and obviously, the IA does not own these books or personally scan the contributing library's physical book—it only increases the number of its own pre-existing scans of the book upon receipt of a proverbial "contribution." This risk-taking behavior then escalated in 2020 during a period of global crisis.

As the COVID-19 pandemic spread rapidly across the United States, the IA took a dramatic move that quickly drew legal scrutiny towards its lending practices. This scrutiny would soon be targeted at not only the IA's emergency measures, but also its regular course of CDL. In March 2020, the Executive Board of the American Library Association urged schools and librarians to shutter physical libraries across the nation.[75] Lamenting the difficulty of closing up an institution that offers solace to communities in times of crisis and unrest, the Executive Board conceded that it could not implement sufficient safety precautions to protect staff and patrons from COVID-19.[76] The statement further praised creative responses to the crisis and mentioned libraries' provision of online services and digital resources.[77]

The IA seemingly picked up on this rhetoric as an urgent, implicit invitation to act, responding with the temporary establishment of its "National Emergency Library" ("NEL"). The NEL was intended to support "emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries were closed due to COVID-19."[78]

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72. Brief for Defendant-Appellant Internet Archive (Public), *supra* note 41, at 6–7.

73. *Id.* at 6.

74. *Id.* at 7.

75. Panezi, *supra* note 28, at 68 (quoting Press Release, ALA Executive Board Recommends Closing Libraries to Public, AM. LIBR. ASS'N (Mar. 17, 2020), http://www.ala.org/news/press-releases/2020/03/ala-executive-board-recommends-closing-libraries-public [https://perma.cc/48XW-YU67] [https://web.archive.org/web/20250303123247/https://www.ala.org/news/2012/01/ala-executive-board-recommends-closing-libraries-public]).

76. *Id.*

77. *Id.*

78. *Id.* at 68–69 (citing *National Emergency Library*, INTERNET ARCHIVE BLOGS, https://blog.archive.org/national-emergency-library [https://perma.cc/HGD8-AMH4]

In practice, the NEL operated by suspending waitlists for the materials in the IA's lending library such that any user could access any of the IA's millions of scanned books without having to wait for anyone else to return it.[79] The IA envisioned that this would allow students to keep up with their remote assignments and patrons to continue to read despite the closure of physical libraries.[80]

The simultaneous reality, though, was that far more digital copies could be lent out than authors or publishers ever intended to permit. In an attempt to alleviate blowback from right holders, the IA included opt-in and opt-out choices in which an author could opt in to donate their book to the NEL or to remove their book from the library altogether.[81] However, it was not long before allegations of bootleg e-booking circulated on social media and flowed en masse towards the IA's legal team. Angry tweets mounted: "This is . . . not a gift for authors or publishers or indie booksellers many of whom are all struggling quite a bit [right now]"; "This is piracy, plain and simple. And your local library can get you ebooks—ones they have paid for"; "Joining the chorus of authors saying not to promote [the NEL]. They have my books, scanned, without any kind of permission of license—it's just piracy."[82] The NEL closed on June 16, 2020, after which the IA returned to its prior system of controlled digital lending. However, legal trouble quickly ensued.

Building controversy over CDL and a system of "digitization without permission" are at the center of the IA litigation that followed, with high-stakes implications for library practices writ large. On June 1, 2020, four major book publishing houses filed suit against the IA, claiming copyright infringement by the NEL *and* the IA's aforementioned Open Library.[83] The plaintiffs claimed infringement of their copyrights in 127 works, which were subject to the IA's practice of scanning and lending to IA users without the plaintiffs' permission, and all of which have licensed e-book derivatives.[84] In the wake of the Google Books saga, the IA, of course, responded that it had made fair use of these works.[85]

Though the triggering event for the litigation was the NEL, the plaintiffs' complaint largely took aim at the IA's regular CDL practices. The publishers alleged that the rules of CDL had been developed out of thin air absent any basis in copyright law or fair use doctrine: "IA not only acts entirely outside any legal framework, it

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[https://web.archive.org/web/20250303123854/https://blog.archive.org/national-emergency-library/] (last visited Mar. 1, 2025).

79. *Id.* at 69.

80. *Id.*

81. *Id.*

82. Nate Hoffelder, *Authors Protest Internet Archive Pirating Their Books*, DIGITAL READER (Mar. 28. 2020), https://the-digital-reader.com/authors-protest-internet-archive-pirating-their-books/ [https://perma.cc/LX8F-AX6L] [https://web.archive.org/save/https://the-digital-reader.com/authors-protest-internet-archive-pirating-their-books/].

83. Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 374 (S.D.N.Y. 2023).

84. *Id.* The publishers were Hachette Book Group, Inc., HarperCollins Publishers LLC, Penguin Random House LLC, and John Wiley & Sons, Inc.

85. *Id.*

does so fragrantly and fraudulently."[86] The publishers wholeheartedly rejected the IA's self-characterization as an educational enterprise, arguing instead that it was authors and publishers for whom "education has long been a primary mission and market."[87]

The complaint also highlighted the effusive nature of digital works: Attributes of non-rivalry and potential for distribution of books across borders meant that digital copies should not be treated the same as physically lent-out books.[88] Digital books could "fly around the world in a second" without potential for physical degradation, and these perpetual risks showed why publishers had developed their own lawfully established e-book markets.[89] This dramatic rhetoric tended to forget the digital rights management and encryption that prevents screenshotting, downloads, and printing of CDL scans. Still, the publishers' ultimate conclusion would soon prevail in district court, which concluded that the IA's negligible transformativeness and the thriving existence of a legal market for e-books provide a textbook case for pure copying and market supplantation.[90]

However, with similar vigor, the IA defended its claimed librarian and educator status and noble mission to "democratize access to information."[91] Instead of the stark dichotomy between CDL and physical book-lending raised by the publishers, the IA instead endeavored to highlight the benefits of allowing the two systems to legally co-exist, because CDL can solve many of the enduring problems and gaps that arise from physical lending. The new benefits offered by CDL include serving library patrons who previously could not have had access whether that was because of "distance, time, cost, or disability."[92] For the IA, this immense public benefit and allegedly controlled system of digital lending amounted to a showing of fair use.[93] In court, however, none of the IA's defenses prevailed.

III. THE IA RULING AND THE PATH FORWARD FOR LIBRARIES

The IA's loss in district court was not a close call. Granting the publishers' motion for summary judgment and denying the IA's cross-motion for summary judgment, Judge Koeltl found that every single fair use factor strongly favored the publishers, concluding that the IA infringed on the publishers' copyrights in all 127 Works in

86. Complaint ¶ 6, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 374 (S.D.N.Y. 2023) (No. 20 Civ. 4160).

87. *Id.* ¶ 8.

88. *Id.* ¶ 10.

89. *Id.*

90. Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 391 (S.D.N.Y. 2023). As discussed *supra*, note 3, the Second Circuit (in a decision issued after the time of writing) also agreed with the publishers that the IA's CDL scans were not transformative. Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 181, 190 (2d Cir. 2024).

91. Panezi, *supra* note 28, at 92.

92. *Id.*

93. *Id.* at 93–94.

Suit.[94] This section will cover the district court's rationale, particularly on the complicated first fair use factor, and respond with an analysis of why future courts addressing library defendants should chart a narrower path of reasoning in order to serve the purposes of copyright law as applied to libraries.[95] This analysis will draw from judicial precedents, the copyright statute, the history of copyright, and the stakeholder insights of the appeals briefing and amici filed.

Ruling on the first factor, the "purpose and character of the [allegedly infringing] use," Judge Koeltl argued that the IA's position had no legal basis in fair use doctrine:

> The crux of IA's first factor argument is that an organization has the right under fair use to make whatever copies of its print books are necessary to facilitate digital lending of that book. But there is no such right, which risks eviscerating the rights of authors and publishers to profit from the creation and dissemination of derivatives of their protected works. IA's wholesale copying and unauthorized lending of digital copies of the Publishers' print books does not transform the use of the books, and IA profits from exploiting the copyrighted material without paying the customary price.[96]

Within this one quotation, the district court has touched on multiple fair use factors and doctrinal flashpoints, including the potential for the IA to "swallow the copyright owner's exclusive right to prepare derivative works"—a concern that the Supreme Court flagged multiple times in *Warhol*.[97] The quotation also highlights the amount and substantiality of the portion used from factor two ("wholesale copying"), the market concerns of factor four ("without paying the customary price"), and, lastly, a strong concern with a lack of transformativeness ("does not transform the use of the books").

At another point in the opinion, the court directly targets the question of the transformativeness of the IA's digital scans of literary works:

> There is nothing transformative about IA's copying and unauthorized lending of the Works in Suit. IA does not reproduce the Works in Suit to provide criticism, commentary, or information about them. IA's ebooks do not "add[] something new, with a further purpose or different character, altering the [originals] with new expression, meaning or message." IA simply scans the Works in Suit to become ebooks and lends them to users of its Website for free.[98]

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94. *Hachette*, 664 F. Supp. 3d at 388.

95. I choose to focus on the conceptual and legal arguments surrounding the first fair use factor in this Note through considerations of transformativeness, nonprofit uses, and commerciality. Any fourth factor analysis certainly addresses commerciality as well, but a worthwhile fourth factor examination requires data and market research in each individual case. This case-by-case analysis goes beyond the scope of what I seek to argue regarding libraries' use of CDL in the abstract.

96. *Hachette*, 664 F. Supp. 3d at 386 (internal citations omitted).

97. *See* Andy Warhol Found. For the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1282 (2023); *see also* Menell et al., Amicus Br., *supra* note 15, at 14.

98. *Hachette*, 664 F. Supp. 3d at 380 (internal citations omitted).

At the core of this rationale is an assumed equivalence between the IA's digital scans of a copyrighted work and an official e-book of the same. It paints a picture of pure format-shifting—a shift from a non-infringing use (the legitimately purchased print book) to a competing market substitute for its derivative (a licensed e-book made by the publisher or author).

The court's formulation of the lack of transformativeness also fed directly into the fourth fair use factor, "the effect of the use upon the potential market for or value of the copyrighted work." Indeed, once the equivalence between the IA's digital scans and an official e-book had been established, widespread market supplantation seemed a foregone result. The publishers pointed to the "thriving ebook licensing market for libraries," which generates tens of millions of dollars a year for publishers ("at least").[99] The IA did itself no favors when it overtly pitched its Open Libraries project to prospective library partners "in part as a way to help libraries avoid paying for licenses"—the presentation boasted, "You Don't Have to Buy It Again!"[100] To the District Court, this behavior encapsulated a clear usurpation of the copyright holders' legitimate market. And, if it became more "widespread," either by IA or other competing archives and libraries, this usurpation would wreak financial havoc on that market.[101] These "bootleg ebooks" would replace sales for any authorized e-book license, for "it is difficult to compete with a product offered for free."[102]

The court next considered the "public benefits [that the IA's] copying will likely produce." But no public benefit could plausibly compete with a use condemned to "bootleg" status. Therefore, to the court, the market harm inevitably outweighed the IA's seemingly persuasive arguments that CDL "makes it easier for patrons who live far from physical libraries to access books and that it supports research, scholarship, and cultural participation by making books widely accessible on the Internet."[103]

Finally, the court swiftly concluded that the same reasoning applies "even more forcefully" to IA's fair use defense of the NEL.[104] Fair enough—if even a CDL scheme with a capped number of scans infringes on copyright, then every uncapped loan on top of that continuously compounds the infringement.[105] And clearly, numerous authors and publishers felt a particular ire towards the removal of the lending cap during a time of acute crisis for those in our nation without a steady income stream who may have been facing economic and/or health emergencies during the pandemic (recall the forceful tweets compiled by Nate Hoffelder, including: "This is . . . not a gift for authors or publishers or indie booksellers many of whom are all struggling quite a bit [right now]").[106] Indeed, the completely

99. *Id.* at 388.
100. *Id.*
101. *Id.* (citing *Warhol* for concern about one infringing action becoming widespread).
102. *Id.* at 389 (quoting Sony BMG Music Ent. v. Tenenbaum, 672 F. Supp. 2d 217, 231 (D. Mass. 2009)).
103. *Id.* at 390.
104. *Id.* at 391.
105. *See supra* text accompanying note 74.
106. Hoffelder, *supra* note 82.

uncapped operation of the NEL likely favors infringement under any formulation of market harm under the fourth fair use factor.

A. THE PURPOSE AND CHARACTER OF THE USE

Ultimately, the district court firmly rejected IA's fair use defenses for both its typical practices of controlled digital lending and the National Emergency Library. However, a renewed analysis of *tailored* CDL by libraries—capped, with a 1:1 physical-digital ratio of owned-to-loaned books, and with digital rights management technology to prevent screenshotting or printing—under the first fair use factor tells a different story. Though it may seem to go without saying, fair use is use-dependent: A court must take into account the who, what, how, and why of each specific use. Justice Sotomayor emphasized this point in *Warhol*, cabining the holding to the specific use of AWF's commercial licensing of Goldsmith's photograph to Condé Nast without extensively analyzing the transformativeness of Warhol's silkscreens and his other artistic works writ large.[107] Therefore, while the IA may well have gone too far with its NEL *and* its Open Library Project—in uncapping loans, distributing scans of physical books that it did not personally own, and failing to regulate whether its partner libraries even kept their print copies out of circulation—future courts should not rule out noncommercial, capped CDL by libraries as unavailing of a fair use defense. This argument is supported by judicial precedent, numerous stakeholders (including authors, librarians, library directors, intellectual property professors, copyright scholars, and more), and the purposes of the copyright system.

Under the first fair use factor, the tailored use of CDL by a library should weigh in favor of fair use for two central reasons: (1) it is transformative in the sense of altered purpose, function, accessibility, and efficiency, and (2) it is patently noncommercial under federal courts' understanding of that term. The publishers and the district court equated CDL scans with licensed e-books to quash any hint of transformativeness. This conclusion does not adequately consider the various distinctions between a digital scan and an e-book to a library patron versus a paying customer. Still, even if these distinctions do not rise to an adequate level of transformation and "the claim to fairness in borrowing from another's work diminishes accordingly . . . other factors, like the extent of its commerciality, *loom larger*."[108]

Accordingly, the district court's conclusion that the IA's CDL system was clearly commercial looms large for any library engaged in controlled digital lending. The notion that the IA's CDL system is commercial because it "uses its Website to attract new members, solicit donations, and bolster its standing in the library community"

107. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1261 (2023) ("Even granting the District Court's conclusion that Orange Prince reasonably can be perceived to portray Prince as iconic, whereas Goldsmith's portrayal is photorealistic, that *difference must be evaluated in the context of the specific use at issue*." (emphasis added)).

108. *Id.* at 1276 (quoting Campbell v. Acuff-Rose Music, Inc., 114 S. Ct. 1164, 1172 (1994)) (emphasis added).

should not be espoused by the Second Circuit or other future circuits addressing the issue.[109] This interpretation broadens the doctrinal definition of commerciality with negative consequences for libraries and archives across the nation. Instead, these nonprofit institutions' use of digital lending to the public should remain presumptively "noncommercial" activity within the fair use analysis.

1. Transformativeness

The Supreme Court's latest explanation of transformativeness encompasses the practice of strictly-tailored CDL by a library. Writing for the *Warhol* majority, Justice Sotomayor explained that the transformative use analysis goes beyond a search for a different meaning or message and instead "focuses on whether an allegedly infringing use has a *further purpose* or different character, which is a matter of degree, and the degree of difference must be weighed against other considerations, *like commercialism*."[110] This degree of change must also "go beyond that required to qualify as a derivative."[111] As an example, Justice Sotomayor re-examined the comparison of parody and satire from *Campbell*: parody has to "mimic an original to make its point, and so has some claim to use the creation of its victim's . . . imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing."[112] The parodist has the stronger claim to fair use because her copying was functionally necessary to realize her new purpose. Even if the satirist used the same portion as her, the satirist's fair use defense is more likely to fail: "[T]he same copying may be fair when used for one purpose but not another."[113] The distinction here displays how an act of copying is inextricably linked to the act's justification, and whether that justification furthers the goals of copyright to promote useful progress without dampening creative incentives.

When a library creates a digital scan of a print book that it already owns, it fulfills numerous new purposes: It enables full text search, increases accessibility for disabled readers, facilitates cite-checking and scholarly research, preserves the physical work from deterioration or destruction, and increases convenience and utility for any and all patrons who are not be able to get to a library in person or to find a particular book in print.[114] A scan of the entire print book is reasonably

109. *Hachette*, 664 F. Supp. 3d at 383. Indeed, as addressed *supra* note 3, the Second Circuit's decision (issued after the time of writing) agreed with this point, finding that the IA's use was noncommercial. Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 185 (2d Cir. 2024). However, the Second Circuit still found that the IA's digital scans were ultimately not transformative. *Id.* at 181.

110. *Warhol*, 143 S. Ct. at 1273 (citing *Campbell*, 114 S. Ct. at 1172) (emphasis added).

111. *Id.* at 1275.

112. *Id.* at 1276 (citing *Campbell*, 114 S. Ct. at 1172).

113. *Id.* at 1277.

114. Brief for Amici Curiae Copyright Scholars in Support of Defendant-Appellant and Reversal at 11, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 18, 2023); Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant at 27–28, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 21, 2023); Brief for Amicus Curiae HathiTrust in Support

necessary to achieve each of these purposes—the digital scan cannot stand on its own two feet and fulfill its new function without a picture of each page from the original. Like the parodist, the librarian scanning her employer's book must mimic the original to facilitate the new purpose.

The different purposes laid out above represent not only the "subjective intent" or stated goals of libraries in creating these digital scans but also the common-sense approach of a reader making objective decisions on whether to buy or loan a print book, an e-book, or a CDL scan.[115] Consider the hypothetical of a law student heading into the last stage of finals before summer break. Likely, they have already spent an exorbitant amount on books that semester, particularly if they purchased any physical textbooks so that they could adorn the pages with four to five different colored highlighters and pencil comments into the margins. They have a research paper due in two weeks, and they would also like to find a novel to read over the summer break.

For the research paper, the student's university libraries, public libraries, and online archives will be indispensable resources, and these institutions' CDL scans provide the ideal method for quickly locating facts and cite-checking references. For the personal novel, the CDL scan is likely the option of last resort—if the student is able, they are more likely to purchase an e-book or print book, or to borrow the same from a library. This would be the likely result because the operational function and aesthetic of a digital scan substantially differs from both the print book *and* the potential derivative of the library-licensed e-book. E-books are more advanced and adaptable, with opportunities to manipulate the pagination, "text size, spacing, and even the color of the text," and they are often interactive, allowing users to click hyperlinks or jump to other parts of the book.[116] The e-book pages easily adjust to fit the frames of a phone, computer, or other e-reader. On the contrary, within a CDL scan, the text often "cannot be magnified without becoming blurry" and cannot be aesthetically manipulated by the user at all.[117] For certain purposes, the rudimentary style of the CDL scan is ideal—the law student cite-checking her research paper wants to be able to ensure that the quotation she seeks truly came from one particular page of a particular edition of a physical book, and the scan of the physical page immediately confirms this. The CDL scan of the *entire* book allows for greater certainty and ability to see the surrounding context of a quotation, facilitating more accurate scholarship. The student would presumably check the CDL scan in and out

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of Neither Party at 7–8, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

115. *See Warhol*, 143 S. Ct. at 1284 ("[W]hether a work is transformative cannot turn merely on the stated or perceived intent of the [accused infringer] . . . . Whether the purpose and character of a use weighs in favor of fair use is, instead, an objective inquiry into what use was made . . . .") (internal citations omitted)).

116. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 25; *see also* Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant at 16, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

117. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 26.

quickly to fulfill this purpose; in fact, the IA consistently reports short checkout times in its usage data.[118]

On the other hand, if the student's eyes are a bit strained from reading too many Federal Courts chapters by summer break, she is likely to opt for the font-enlarging capabilities of an e-book for her novel, which she can either try to borrow from a library or purchase directly. If one of her purposes is to hold onto the novel and pass it around to friends or family, it makes the most sense to invest in a print book—an individual patron cannot lend a library's CDL scan to others because of digital rights management and encryption technology (and each loan is typically very limited in time duration). To put it simply, CDL scans, print books, and e-books all serve different purposes and different functions in the real world.

Clear distinctions also exist between the purposes served by CDL and the realities of e-book licensing practices. The Authors Alliance argues in its amicus brief that CDL scans provide libraries with the necessary freedom to maintain and preserve copies in a way that would be impossible with licensed e-books.[119] For e-book licenses, libraries' content preservation practice is completely at the mercy of the publisher's licensing agreement: "Those terms are entirely inadequate for long term preservation and access, especially as formats change rapidly over time and publishers exit the business."[120] A coalition of librarians' amicus brief echoed the same sentiments: At the time of writing, many major publishers' e-book licenses for public libraries expire either after twenty-four months or twenty-six checkouts.[121] Conversely, CDL scans remain within the libraries' reserves regardless of whether a book is still up for commercial sale by publishers—a licensed e-book that is no longer commercially available would simply vanish from the libraries' digital shelves. Further, libraries can offer their CDL scans to others on interlibrary loans (assuming that they keep both their own scan *and* their physical book out of circulation while doing so), as they regularly do with print books, whereas licensing agreements for e-books typically prevent this practice.[122] In one dramatic example of how e-book licensing works in reality, Wiley (one of the publisher-plaintiffs in the IA Litigation) decided to remove over 1,300 licensed e-books from academic library collections at the beginning of a school year, leaving countless students relying on library textbooks in the lurch and leaving teachers "scrambling to find new texts to assign, redesign syllabi, and otherwise adopt their courses to a loss of access to the Wiley texts, at a moment when their attention should have been focused on teaching and welcoming students."[123] During the COVID-19 pandemic, other examples of the

118. *Id.* at 27.

119. *Id.* at 21.

120. *Id.*

121. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 13.

122. *Id.* at 19–20.

123. *Wiley Removes Over 1,300 Ebooks from Academic Library Collections*, AUTHORS ALL. (Oct. 7, 2022), https://authorsalliance.org/2022/10/07/wiley-removes-over-1300-ebooks-from-academic-library-collections/ [https://perma.cc/884N-UKY3]

difficult practical nature of licensed e-books abounded: *Charlotte's Web* was entirely unavailable in the state of Rhode Island due to publisher e-book licensing restrictions, and one academic library reported having to pay $27 per student per year for each student to have a digital copy of Anne Frank's *The Diary of a Young Girl*.[124] If libraries were instead supported in (or at least not sued for) digitally scanning the print books that they already own and have paid for, they would be able to adapt their collections to changing circumstances, prepare for emergency situations, and ultimately provide access for students to the same extent as they did before being shuttered for the pandemic. This is the type of educational, noncommercial use that broad rulings against tailored CDL would operate to preclude.

Further, to return to the parodist-satirist comparison, it truly matters for the first fair use factor *who* does the copying and *why*. A strictly-controlled digital scan made by a librarian plausibly ensures the following: the scan will be of a print book that the library already owns on its shelves; the scan will be loaned out on a time-limited basis to one corresponding patron at a time; the scan will be subject to DRM encryption technology; the scan will be freely accessible to those who are print-disabled, under-resourced, unable to reach the physical library, or simply unable to find the book elsewhere; and, lastly, the physical book will be out of circulation while the scan is out on digital loan. Surely, the librarian scanned the *entire* book and all of its creative content, and he did not add any new criticism or meaning to its underlying message. However, this surrounding context provides a different justification for the use than if the same scan were made by a publisher, a bookstore owner, or even the good-faith law student who plausibly could not avail herself of all of the above limitations or safeguards.[125] Whereas *Campbell*'s holding was the

[https://web.archive.org/web/20221124053532/https://authorsalliance.org/2022/10/07/wiley-removes-over-1300-ebooks-from-academic-library-collections/].

124. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 14. Schools and teachers may be able to claim an education exception to copyright if they can photocopy excerpts of print books and get that scan to their students, but often they still need to get their hands on the material for each student in a specific format or program that will work on students' tablets or devices. Here, the digital version of this book was only offered as a subscription for $27 per student per year from a private library management system called Destiny. *See* Maria Bustillos, *Billion-Dollar Book Companies Are Ripping Off Public Schools*, NEW REPUBLIC (Dec. 22, 2020), https://newrepublic.com/article/160649/book-companies-follett-overcharge-public-schools [https://perma.cc/X7EU-4HFL] [https://web.archive.org/web/20250109193029/https://newrepublic.com/article/160649/book-companies-follett-overcharge-public-schools]. Some teachers resorted to other methods to get around such expenses: "One teacher took screenshots of every page of a graphic novel and compiled them into a PDF for his class; another reads just one page of a book each day during virtual story time in order to avoid copyright restrictions. Others have gained access to Learning Ally, which provides e-books for the print-disabled, by claiming learning-disabled status for every student they teach." Jennie Rose Halperin, *Publishers Are Using E-Books To Extort Schools and Libraries*, DAILY BEAST (Apr. 18, 2021), https://www.thedailybeast.com/publishers-are-using-e-books-to-extort-schools-and-libraries [https://web.archive.org/web/20250109181550/https://www.thedailybeast.com/publishers-are-using-e-books-to-extort-schools-and-libraries/].

125. If sued, that law student could try to claim a fair use defense for her own use of the scan under the education exception of § 107—unless, of course, she has decided to create a black market for textbook

"culmination of a long line of cases and scholarship about parody's claim to fairness in borrowing," so too should any case on library CDL be a culmination of a long history of statutory exceptions, scholarship, and common-sense support for libraries' claim to fairness in lending.[126]

Of course, if a library is stepping out of these bounds—as it seems the IA may have—by not policing any one of the above limitations, the fair use justification diminishes and a court may step in. This could happen if a library lifts the cap on 1:1 physical-digital loans, fails to regulate whether its physical books are taken out of circulation when a scan is loaned, or allows patrons to keep the scans permanently, download the scans, or print them. These limitations matter to an analysis of the first factor of fair use. Libraries using any such system have a responsibility to ensure the limitations are consistently implemented and monitored in practice, and a court can consider these limitations as it assesses the scope of an alleged fair use.

The idea that a court can assess on a case-by-case basis whether a right to intellectual property is time-limited (i.e., a one-week digital loan that immediately returns to the library) and relational (i.e., only between the library and one patron at a time) is not alien to property case law. In the WWI-era case of *International News Service v. Associated Press*, Justice Pitney developed a quasi-property right for breaking news, a right which was relational between two newspaper competitors for an enumerated period of time. International News Service ("INS") continually took Associated Press ("AP")'s east coast hot-off-the-press wartime news and telegraphed it to its west coast papers, eventually leading to the contentious lawsuit questioning whether AP had any property interest in the news that it had gathered after the instant of its publication.[127] Justice Pitney's equity-tailored remedy decreed that INS was precluded from copying news from AP for twenty-four hours after publication.[128]

One can now respond: Why would this case matter at all for the practice of digital scanning by libraries, when *INS v. AP* (1) seemingly expanded AP's property right at the expense of another entity engaged in one of § 107's enumerated fair uses (news reporting); and (2) was explicitly not about copyright because it protected AP's *facts*, which are typically excluded by the idea-expression dichotomy? It is relevant for two reasons. First, as the Supreme Court balanced considerations of incentive creation, free-riding, free speech, and knowledge dissemination, the Court was able to consider the nuances of the parties' identities, behavior, and profit motives—as well as the public consequences—in crafting its equitable remedy to a limited period of

scans and sell them to others. *Cf.* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 525 (2013) (holding that a defendant *could* re-sell physical textbooks that he *lawfully purchased* abroad under the first sale doctrine).

126. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1282 (2023) (citing *Campbell*). I do not mention any long line of cases against libraries—as the American Library Association notes in its amicus brief, "[g]iven libraries' favored status and conscientious approach to copyright, lawsuits against them are exceedingly rare." Brief for Amici Curiae American Library Association and Association of Research Libraries in Support of Neither Party at 18, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

127. Int'l News Serv. v. Associated Press, 39 S. Ct. 68 (1918).

128. *Id.* at 75.

time between limited parties. Second, the Court cabined this quasi-property right to AP's competitors in order to *protect* the noncommercial news context, arguing that there should be no *in rem* right for AP's breaking news because this could operate as censorship upon public knowledge.[129] The decision shows both the Supreme Court's capacity to be creative and context-dependent in assessing a property right and its duty to consider noncommercial, public interests in setting the boundaries of that right.

Further, if any of this focus on aesthetic, functional, or operational changes to a book (as opposed to artistic or critical transformation) seems far-fetched, it also has clear roots in the Google Books litigation described *supra*. The district court described the benefits of a "new and efficient way" to find books, to make books searchable, to increase information literacy, to facilitate lending, to increase accessibility for underserved populations and those with disabilities, to increase readership for authors, and even to increase profits for authors through a discovery effect of encouraging purchase after encountering the free version.[130] In his Second Circuit opinion, Judge Leval also encouraged this form of inquiry into the difference in function between an infringing use and the copyrighted work or its licensed derivatives.[131] Although the district court here, in *Hachette*, rejected a "discovery effect" argument because it did not see clear evidence in the record of benefit causation to authors by the IA's CDL system, an amicus brief by the Authors Alliance responded directly to the argument: "Authors want their books to be read. . . . [CDL] serves the interests of authors who prioritize seeing their works reach readers so that they have the maximum impact on public discourse," particularly where the use was categorically noncommercial.[132]

Therefore, if a future library's strictly-tailored CDL system is "evaluated in the context of the specific use at issue," as it must be under *Warhol*, a court should find transformative use.[133] However, in the end, the district court found that the harms of the IA's CDL practice outweighed the benefits. The court still saw a digital scan and a licensed e-book as one and the same for purposes of copyright liability. It is fair to say that the difference here is less readily apparent than a Google Books search result versus an equivalent e-book. But such a finding still does not end the first factor inquiry after *Warhol*: Justice Sotomayor advised that in a situation of "similar purposes" or a "risk of substitution," the remaining question is the power or persuasiveness of the justification for copying.[134] For libraries with tailored CDL practices, their fair use justifications are strengthened by the blatant absence of commerciality and the realities of the e-book licensing market as laid out by library and author amici in the IA litigation.

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129. *See id.* at 71 ("The question here is not so much the rights of either party as against the public but their rights as between themselves.").

130. Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282, 287–88 (S.D.N.Y. 2013).

131. Authors Guild v. Google, Inc., 804 F.3d 202, 207 (2d Cir. 2015).

132. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 16.

133. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1284 (2023).

134. *Id.* at 1277.

2. Commerciality

No court should deem a library's practice of controlled digital lending commercial under the first fair use factor. To begin with the text of the first factor, the statute itself bifurcates commerciality from the type of use at question here: "the purpose and character of the use, *including whether such use is of a commercial or is for nonprofit educational purposes*."[135] The commerciality element "loom[s] larger" in a case of similar purposes or low transformativeness.[136] In *Warhol*, the for-profit licensing of the Prince image to Condé Nast played a determinative role in the judicial outcome—it meant that the "copying use [was] of a commercial nature."[137] On the other hand, Justice Gorsuch made an important point in his concurrence that, though it is dicta, would be relevant for any analysis of library CDL: "If, for example, *the Foundation had sought to display Mr. Warhol's image of Prince in a nonprofit museum* or a for-profit book commenting on twentieth-century art, the purpose and character of that use might well point to fair use."[138] In a similar fashion to the transformativeness analysis, this example again shows the importance of *who* does the copying and *why*, introducing the element of profit motives.

In its analysis of the matter, the district court espoused a rather expansive interpretation of commercial use to conclude that the IA's CDL system was commercial because the IA "uses its Website to attract new members, solicit donations, and bolster its standing in the library community."[139] The court asserted that the IA exploited the publishers' works "without paying the customary price" and "gain[ed] an advantage or benefit" from its use of the works without accounting to copyright holders.[140] As will be explored in detail below, if gaining non-monetary benefits, failing to pay licensing prices (which essentially no defendant claiming fair use does, or else they would not be sued), and soliciting donations imputes commerciality, then little, if any, nonprofit activity can be deemed noncommercial.

Within several amicus briefs for the IA's Second Circuit appeal, this language has incited great concern that long-accepted library and nonprofit practices will now be deemed commercial, weighing against a finding of fair use. Recall the nonprofit status of the IA and California's classification of the IA as a library—its mission statement is to "provide Universal Access to All Knowledge."[141] Its "donate" button is not hard to find, but one can easily use the website for years without ever being pressured to donate. The Authors Alliance raised the point that "many if not most" nonprofit organizations include donation links on their websites, and law librarians worry that commonplace activities like public read-aloud hours, digital preservation programs, crowd-sourced transcription projects, placements of books on course

135. 17 U.S.C. § 107.
136. *Warhol*, 143 S. Ct. at 1276.
137. *Id.* at 1273.
138. *Id.* at 1291 (emphasis added).
139. Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 383 (S.D.N.Y. 2023).
140. *Id.* at 384.
141. *About the Internet Archive*, *supra* note 39.

reserves, and more could put libraries at risk of liability for copyright infringement as long as they accept donations or paid memberships. To the concerned amici, this interpretation "seemingly renders every would-be fair use 'commercial' so long as the user benefits in some way from their use."[142]

An expansive definition of "commercial" does not square with Second Circuit precedent on the term. In *American Geophysical Union v. Texaco Inc.*, the Court addressed what distinguishes a commercial from a nonprofit use: "The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to capture significant revenues as a *direct consequence* of copying the original work."[143] Commercial exploitation encompasses situations in which "the copier directly and exclusively acquires conspicuous financial rewards from its use of copyrighted material," as opposed to using the same to "produce[] a value that benefits the broader public interest."[144] The nexus between the copying use and the copier's private financial reward should therefore be direct and apparent. The *Hachette* district court also described this as a "commercial-noncommercial distinction,"[145] whereas § 107 and *Texaco* emphasize that the distinction is between commercial usage and *nonprofit or educational* usage. In the case of a library, it matters not only that the use is noncommercial but also that it fulfills these particular public, educational purposes.

That the IA did not directly profit from its digital scans is undisputed—the scans were offered for free to anyone with an account (and the account itself is also free to make). As one example of a closer case considering indirect profits, return to the Google Books saga: Judge Leval was not convinced by appeals to Google's indirect profit from the Library Program, despite Google's obvious status as a for-profit corporation.[146] In contrast, any library is likely to fall on the opposite side of the spectrum as a nonprofit institution prized for its commitment to accessible education, research, and scholarship. To penalize libraries for seeking voluntary donations or wider membership is to subvert the real focus of "commercial use" as copying for direct financial profit, like the commercial license in *Warhol*.

The Eleventh Circuit case of *Cambridge University Press v. Patton* also provides persuasive precedent for the notion that free educational content is not commercial. In that case, publisher plaintiffs alleged that the unlicensed use of book excerpts in Georgia State University (GSU) course reserves were "for-profit" because GSU "exploited" the works without "paying the customary price"; in *Hachette*, the district court placed a similar emphasis on the notion that the IA has not paid the "customary

142. Brief for Amici Curiae American Library Association and Association of Research Libraries in Support of Neither Party, *supra* note 126, at 3.

143. Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 922 (2d. Cir. 1994) (citing Harper & Row Publishers, Inc. v. Nation Enters., 105 S. Ct. 2218, 2231 (1985)) (emphasis added).

144. *Id.*

145. Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 384 (S.D.N.Y. 2023).

146. Authors Guild v. Google, Inc., 804 F.3d 202, 219 (2d Cir. 2015).

price" for licensed e-books.[147] The *Cambridge* publishers also alleged a similar construction of indirect profit, arguing that GSU indirectly profited from student tuition and from skirting the customary licensing fees. The Eleventh Circuit rejected the circular argument that a failure to license leads to unacceptable indirect profit, because if any failure to pay a licensing fee ("allowing the user to keep his or her money") implies commercial benefits, "no use could qualify as 'nonprofit' under the first factor."[148] The Eleventh Circuit then credited GSU's educational status as a counterweight to the publishers' allegation of commerciality:

> There is no evidence that Defendants capture significant revenues as a direct consequence of copying Plaintiffs' works. At the same time, the use provides a broader public benefit—furthering the education of students at a public university.
>
> Thus, we find that Defendants' use of Plaintiffs' works is of the nonprofit educational nature that Congress intended the fair use defense to allow under certain circumstances.[149]

All in all, Congress could not have intended to imbue nonprofit and educational institutions with a presumption of commercial use for simply seeking to fund their own operations through avenues that have no direct nexus to their copying.

An argument that digital lending by libraries is a commercial practice is particularly troubling given the difficult realities that libraries face in buying works in the first place. The amici draw attention to the prohibitive costs of licensed e-books, for which libraries receive no special discount (and, sometimes, libraries are categorically restricted from licensing).[150] Recall the example above that one school library reported having to pay $27 per student per year to procure a digital copy of *The Diary of a Young Girl* that would work on their students' tablets during the COVID-19 pandemic, while libraries were shuttered and the physical copies that they owned and paid for (at a one-time price that libraries and schools would not have to re-pay each year) sat untouched on the shelves.[151] Big publishers—operating within an industry that has been largely consolidated to a small number of key players—have "virtually no incentive to offer competitive rates and terms to libraries," and the already-set licensing agreements offer virtually no room for negotiation on price.[152]

147. Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1265 (11th Cir. 2014); Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 383 (S.D.N.Y. 2023).

148. *Cambridge Univ. Press*, 769 F.3d at 1265.

149. *Id.* at 1267.

150. Brief for Amicus Curiae Authors Alliance, Inc. in Support of Appellant, *supra* note 114, at 18; *see also* Geoffrey A. Fowler, *Want To Borrow that E-book from the Library? Sorry, Amazon Won't Let You*., WASH. POST (Mar. 10, 2021), https://www.washingtonpost.com/technology/2021/03/10/amazon-library-ebookmonopoly/ [https://web.archive.org/web/20250304004514/https://www.washingtonpost.com/technology/2021/03/10/amazon-library-ebook-monopoly/].

151. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 14.

152. *Id.* at 15.

Therefore, to conclude that libraries and other nonprofit institutions are acting in pursuit of some private financial interest when they seek to fundraise for their own operations and inventories is to add insult to injury.

Ultimately, a determination of commerciality matters towards the final outcome of a fair use case. In *Google LLC v. Oracle America, Inc.*, the Supreme Court explained that commerciality has significant weight in the analysis: "There is no doubt that a finding that copying was not commercial in nature tips the scales in favor of fair use."[153] The district court's finding that the IA's CDL *is* commercial raises red flags not only within the facts of the case but also for future liability against libraries and nonprofit organizations writ large. Therefore, even if the IA's copying practices were not sufficiently transformative, the Second Circuit and other future courts should reject the notion that libraries' use of strictly-tailored CDL is indirectly "commercial" and re-clarify the nexus between the alleged copying and a direct financial reward. The capacity for libraries to freely pursue their mission and provide equitable access to educational resources is at stake in this determination, and to penalize their nonprofit activities with infringement liability goes against the purposes of American copyright law.

IV. CONCLUSION: PURPOSES OF COPYRIGHT

The protection of controlled digital lending by libraries is an essential step in supporting and sustaining the viability of libraries in the digital age. The plethora of amicus briefs filed in support of the IA and of libraries writ large demonstrates the urgency of the matter: Concerned librarians, copyright scholars, law professors, think tanks, free speech advocates, and even authors (whom the publisher-plaintiffs purport to speak on behalf of) worried that a sweeping ruling against the IA would generate far-reaching, negative implications for those beyond the parties in front of the Second Circuit. Even if the IA itself went too far with its relatively uncapped CDL schemes, the prospect of opening up any library using CDL to uncertainty and liability is indeed cause for alarm. Beyond the transformativeness and non-commerciality of strictly-tailored CDL by a library, discussed *supra* in Part III, courts addressing their potential liability would do well to look back at how libraries have served the purposes of copyright throughout history and how they continue to do so today.

Libraries serve the public interest; they expand public accessibility without substantially inhibiting authors' incentives to create. For that, our copyright system should operate to protect and reward them, not to inhibit their technological development and ensure their demise. This argument is rooted in the history and purpose of American copyright law, as "early state and federal government actors were concerned that without copyright the public would not have access to authors' writings"; early authors were hesitant to release their books due to common practices

153. Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1204 (2021).

of piracy not by libraries but by *publishers*.[154] One prominent author and poet, Joel Barlow, wrote a passionate letter to the Continental Congress addressing why he thought that the states needed legal copyright protection:

> I take the liberty of addressing you on a subject in which I conceive the interest & honor of the Public is very much concerned. I mean the embarrassment which bears upon the interests of literature & works of genius in the United States . . . Indeed we are not to expect to see any works of considerable magnitude . . . offered to the Public till [copyright] security be given. There is now a Gentleman in Massachusetts who has written an Epic Poem, entitled "The Conquest of Canaan", a work of great merit, & will certainly be an honor to his country. It has lain by him, finished, these six years, without seeing the light; because the Author cannot risque [sic] the expences [sic] of the publication, sensible that some ungenerous Printer will immediately sieze [sic] upon his labors, by making a mean & cheap improvision, in order to undersell the Author & defraud him of his property.[155]

As a fledgling nation seeking to establish its "literary reputation" and expand its educational system, the United States pursued copyright protection with a core goal of incentivizing the release of new works of great merit, like that of the "Gentleman in Massachusetts," for public consumption.[156] Private profit was a "by-product"—not the "primary justification"—for the earliest time-limited monopolies that copyright protection conferred on authors.[157] Powerful publishers who now seek to flip the narrative and protect authors from public consumption by library patrons might seem to forget why American authors like Barlow advocated for copyright law in the first place (*see* "ungenerous Printer[s]").[158] Barlow also worried that *The Conquest of Canaan* would never see the light of day, just as many print titles may gather dust on the shelves and be forgotten today if libraries cannot harness their technological abilities to make all of their owned print books accessible and borrowable through CDL.[159] Ultimately, though, publishers and libraries simply should not be legal adversaries over the issue of controlled digital scans—as I argue

154. Brief for Former and Current Law Library Directors, Professors, and Academics as Amici Curiae in Support of Defendant-Appellant at 14–15, Hachette Book Grp. Inc. v. Internet Archive, No. 23 Civ. 1260 (2d Cir. Dec. 22, 2023).

155. *Letter from Joel Barlow to the Continental Congress (1783), in* PRIMARY SOURCES ON COPYRIGHT (1450–1900) (Lionel Bently & Martin Kretschmer eds.), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783b [https://perma.cc/8YSY-NSJW] [https://web.archive.org/web/20240519183012/https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783b]. (With all due credit to the law library directors, professors, and academics' brief for pointing me to this helpful primary source, which I quote in greater detail here.)

156. *Id.*

157. Brief for Former and Current Law Library Directors, Professors, and Academics as Amici Curiae in Support of Defendant-Appellant, *supra* note 154, at 17.

158. Letter from Joel Barlow, *supra* note 155.

159. Indeed, the only way that I could find and access Barlow's letter was a digital scan (with a typed transcription to help with the cramped eighteenth-century cursive), although I recognize that this centuries-old source is a quintessential public domain work.

above, these scans are more likely to serve different purposes and different markets than to act as market-ruining substitutes for licensed e-books or print books.

Day in and day out, American libraries are indeed developing their CDL programs with successful results. According to prominent library organizations, over 100 libraries across the country now rely on CDL to distribute their legally owned collections—"particularly for out-of-print works, reserves, or for works that are less frequently [commercially] circulated."[160] Numerous state and federal government bodies have listened to libraries' needs and supported the process, just as they listened to authors' concerns over piracy and incentives for public consumption in those early historical years: For example, in 2023, the federal agency in charge of library grants (the Institute for Museum and Library Services) awarded the Boston Library Consortium with a nearly-$250,000 grant to support the library's "Controlled Digital Lending for Libraries and Library Consortia" project.[161] New library organizations supporting CDL have cropped up to run seminars, conduct research, and connect libraries, while vendors and software developers have joined the fray to assist with "writing grants, developing software, and streamlining systems for CDL integration into library work."[162]

In short, the development of productive frameworks and networks supporting CDL—through both public and private avenues—is well underway. Legal rulings should not operate to impede this innovative inertia and halt libraries in their tracks. Doing so would not square with copyright law's core purposes and its long history of exceptions for education, research, and scholarship. By categorically delineating CDL as commercial and non-transformative, the district court's *Hachette* ruling has brought digital lending technology to the legal forefront and raised real questions about publishers' abilities to impose liability on libraries and chill their efforts to stay accessible and relevant in an increasingly digital age. As long as libraries work diligently to maintain procedural and technological safeguards in their CDL programs—capping lending at 1:1 ratios, keeping print copies out of circulation while scans are lent out, maintaining strong DRM technology on their scans, only scanning physical books that they legally own, and more—courts should allow them to operate these programs without liability or fear thereof. We are experiencing a moment in which libraries face many obstacles—both physical (natural disasters, pandemics) and political (book-banning, lack or revocation of funding). Libraries' continued success as an irreplaceable educational institution may well depend on their capacity to transform and innovate without undue liability.

160. Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant, *supra* note 116, at 8.

161. *Id.* at 8–9.

162. *Id.* at 10.