ARTICLES

Reimagining Digital Libraries

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Public libraries are among the most cherished institutions in our society, and most Americans use and love them. However, many are unaware of the crisis that libraries face nowadays. The gradual shift towards digital distribution of copyrighted goods, a trend greatly accelerated by the COVID-19 pandemic, challenges both the role and operation of libraries in our society.

Specifically, libraries face a difficult digital lending problem. While in the realm of printed works, libraries operate in the shadow of well-established exemptions from copyright liability, those exemptions do not apply in the same way in the digital world. As a result, libraries secure specific licenses from the publishers to acquire and lend digital content. This development has left libraries at the mercy of publishers and their restrictive and expensive licenses, which drain libraries' resources, shrink their catalogs, and hamper their ability to fulfill their mission. Changes in the post-COVID world, including various proposed state statutes and a recent important case, Hachette Book Group, Inc. v. Internet Archive, put the issue front and center.

So far, courts have failed to appreciate the unique role libraries play in our society and the need to partly shield them from market forces. At the same time, legal scholars have largely ignored this crisis, leaving libraries to fend for themselves.

This Article seeks to begin closing this surprising gap in legal literature by analyzing the digital lending problem from legal, comparative, and economic and social justice perspectives. It explains why it is highly problematic to let libraries—which have always operated alongside the market—be completely subject to the publishers' powerful commercial

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interests. The Article instead offers several alternative frameworks to balance libraries' role in providing access to knowledge with the publishers' role in supporting the creation of new works. While some of them require federal legislation, many do not and can be implemented by state and local governments or even by libraries themselves. Copyright law and copyright markets have always evolved in response to new technologies. They now need to adapt to address libraries' crisis and their role and needs in our growingly digitized world.

TABLE OF CONTENTS

INTRODUCTION

Even in our highly divided society, Americans of all political creeds share their love of public libraries.[1] Since President Eisenhower proclaimed, in 1958, the first National Library Week,[2] the nation has been celebrating this event every spring. Prominent leaders, regardless of their party affiliations, similarly applaud libraries. Barack Obama said that "the library represents a window to a larger world . . . . At the moment that we persuade a child, any child, to cross . . . that magic threshold into a library, we change their lives forever, for the better. It's an enormous force for good."[3] Jill Biden declared, "In big cities and small towns, libraries fulfill a purpose that almost nothing else does . . . . They're a place of information for all."[4] Laura Bush, a former librarian, commented that "the most valuable item in my wallet [is] my library card,"[5] and Ivanka Trump tweeted that

1. *See, e.g.*, A.W. Geiger, *Most Americans – Especially Millennials – Say Libraries Can Help Them Find Reliable, Trustworthy Information*, PEW RSCH. CTR. (Aug. 30, 2017), https://www.pewresearch.org/short-reads/2017/08/30/most-americans-especially-millennials-say-libraries-can-help-them-find-reliable-trustworthy-information [https://perma.cc/K8NE-HW7D] (summarizing a survey that found that "[a]bout eight-in-ten adults (78%) feel that public libraries help them find information that is trustworthy and reliable and 76% say libraries help them learn new things," as well as that "56% believe libraries help them get information that aids with decisions they have to make").

2. Proclamation No. 3226, 23 Fed. Reg. 1853, 1853 (Mar. 20, 1958).

3. Barack Obama, U.S. Senator, Bound to the Word, Keynote Opening Address at the American Library Association Annual Conference (June 23, 2005), *in* AM. LIBRS, Aug. 2005, https://americanlibrariesmagazine.org/bound-to-the-word [https://perma.cc/NCW2-7GFD].

4. Lindsey Simon, *Why First Lady Jill Biden Loves Libraries*, I LOVE LIBRS. (Jan. 28, 2021), https://ilovelibraries.org/article/why-first-lady-jill-biden-loves-libraries [https://perma.cc/5FHD-KNEB].

5. Laura Bush, Mrs. Bush's Remarks for National Library Week Celebration and American Library Association's '@ Your Library' Event (Apr. 3, 2001) (transcript available at https://georgewbush-whitehouse.archives.gov/news/releases/2001/04/20010403-12.html [https://perma.cc/QZ9H-WFCZ]).

"we honor our libraries and librarians for opening our eyes to the world of knowledge, learning and reading!"[6]

But, in recent years, many public libraries have faced a multitude of compounding crises. In some parts of the country, library budgets are being cut.[7] In a few states, school libraries, and at times even public libraries, are caught in the culture-war crossfire as they face heavy political pressure, and even laws, designed to prevent them from including certain books, especially those concerning so-called LGBTQ content, in their collections.[8] However, above all, a more fundamental issue lies at the heart of the entire project: public libraries (and society) are still figuring out their role in an increasingly digitized world.[9]

Considering the importance of public libraries to our lives, education, collective knowledge, shared culture, democracy,[10] and even economy—the annual

6. @IvankaTrump, X (Apr. 13, 2017, 5:03 PM), https://twitter.com/IvankaTrump/status/852673521822126080 [https://perma.cc/K3M7-ZTE9].

7. *See, e.g.*, Claire Woodcock, *Public Library Budgets Are Being Slashed. Police Have More Cash than Ever*, VICE (Jan. 12, 2023, 10:00 AM), https://www.vice.com/en/article/akemgz/public-library-budgets-are-being-slashed-police-have-more-cash-than-ever [https://perma.cc/RRV4-RXSC].

8. *See, e.g.*, Elizabeth Blair, *Report: Last Year Ended with a Surge in Book Bans*, NPR (Apr. 16, 2024, 3:32 PM), https://www.npr.org/2024/04/16/1245037718/book-bans-2023-pen-america [https://perma.cc/5C2J-TVP2]; Hannah Natanson, *Objection to Sexual, LGBTQ Content Propels Spike in Book Challenges*, WASH. POST (June 9, 2023, 6:15 PM), https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challengers; Book People, Inc. v. Wong, 91 F.4th 318, 340–41 (5th Cir. 2024) (affirming a preliminary injunction against enforcing Texas's book-banning statute on First Amendment and Fourteenth Amendment grounds); Jensen Rehn, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405, 1406–08 (2023) (exploring recent attempts to ban books).

While this Article focuses on the less salient but more harmful digital lending problem and not on book banning, the two issues impact each other, at least at the margins. For example, some public libraries from more liberal states offer digital access to banned books to readers, especially young ones, from more conservative states. *See, e.g.*, *The New York Public Library to Launch Nationwide "Books for All: Protect the Freedom to Read" in Response to Unprecedented Rise in Censorship*, N.Y. PUB. LIBR. (Sept. 28, 2023), https://www.nypl.org/press/new-york-public-library-launch-nationwide-books-all-protect-freedom-read-response [https://perma.cc/NCE4-J56K]. These initiatives are relatively limited in scope. If they expand, they might create a host of challenges, including some that this Article discusses, such as the economic burden faced by public libraries.

9. While this Article touches upon various types of libraries, its focus is on non-academic public libraries. Academic libraries function differently, largely due to their operation in a niche market of high-cost materials like scientific journals, targeted at a specific audience. They have a more central role in this market compared to non-academic libraries in the broader trade book market. Indeed, the academic publishing sector is characterized by specialized sellers and buyers with unique licensing practices. *See* Guy Pessach, *The Role of Libraries in A2K: Taking Stock and Looking Ahead*, 2007 MICH. ST. L. REV. 257, 261 & n.11; *infra* note 135 and accompanying text (addressing the pricing decisions of the publishing industry). A full analysis of the challenges of academic libraries is therefore outside the scope of this work.

10. *See, e.g.*, *infra* note 13 (discussing the importance of public libraries to their communities and our collective knowledge and culture); *infra* note 231 (discussing libraries' impact on education); *infra* text accompanying notes 233–38 (discussing libraries' role in advancing readership); *infra* note 304 (discussing libraries' contribution to our democratic society). The social benefits of libraries' operations do not end here. They also include, *inter alia*, promotion of books, especially by less known authors; improved access; and reduced environmental waste. *See infra* notes 124–25 and accompanying text (discussing those benefits).

budget of public libraries is more than $13 billion[11]—it is surprising that their operation and the massive challenges they face in the digital world have received extremely limited attention in legal scholarship.[12] This Article aims to start closing this gap by focusing on what is probably libraries' most central role and one that is being significantly challenged nowadays—distributing knowledge, primarily by lending books.[13]

Libraries' main challenge—one that this Article names "the digital lending problem"—though rooted in the intricacies of the Copyright Act, is straightforward to grasp, yet, as this Article highlights, difficult to solve. The Act allows anyone who buys or owns a copy of a copyrighted work, such as a printed book,

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11. Dimitrije Curcic, *Library Funding Statistics*, WORDSRATED (Mar. 8, 2023), https://wordsrated.com/library-funding-statistics [https://perma.cc/52JW-ZB7D].

12. Related issues, such as Google's mass digitization of printed books, received significant attention in both legal scholarship and the case law. *See, e.g.*, Authors Guild v. Google, Inc., 804 F.3d 202, 206–08 (2d Cir. 2015) (considering the legality of Google's project); Pamela Samuelson, *Google Book Search and the Future of Books in Cyberspace*, 94 MINN. L. REV. 1308, 1308 (2010) (describing the project as "[o]ne of the most significant developments in the history of books"); Matthew Sag, *Copyright and Copy-Reliant Technology*, 103 NW. U. L. REV. 1607, 1609, 1620–22 (2009) (applying fair use doctrine to the project). However, the challenges of public libraries, especially in the last decade, are barely mentioned by legal scholars. Controlled Digital Lending, for example, is discussed by dozens of non-legal articles and hundreds of websites, *see infra* Section IV.A, and was extensively covered by the media. *See, e.g.*, David Streitfeld, *The Dream Was Universal Access to Knowledge. The Result Was a Fiasco.*, N.Y. TIMES (Aug. 17, 2023), https://www.nytimes.com/2023/08/13/business/media/internet-archive-emergency-lending-library.html. But as of January 2024, I could find only twelve law review articles that even mentioned the term. Maryland's Library eBook Fairness Law, which librarians and publishers closely followed while it was considered, debated, passed, litigated, and eventually held unenforceable, *see infra* Section IV.C, was previously discussed (or even just mentioned) in only one law review article. Elizabeth Townsend Gard, *Nine Copyright Things Every Library and Archive Should Know in 2023*, 41 CARDOZO ARTS & ENT. L.J. 485, 511–20 (2023).

13. While libraries have existed for thousands of years, *see* Barbara Krasner-Khait, *Survivor: The History of the Library*, HIST. MAG., Oct.–Nov. 2001, https://web.archive.org/web/20210323180027/http://www.history-magazine.com/libraries.html?utm_source=twitterfeed&utm_medium=twitter [https://perma.cc/RX6A-G87J], the commitment to provide access to knowledge to the masses has been the primary driving force behind American public libraries since the nineteenth century. *See* JOHN PALFREY, BIBLIOTECH: WHY LIBRARIES MATTER MORE THAN EVER IN THE AGE OF GOOGLE 1–2 (2015).

It is important to note that libraries provide other services to their communities. For example, public libraries are places where members of the community can meet; they are also spaces where internet access is provided for free, in addition to guidance as to how to use digital and printed resources, and libraries are institutions that preserve our collective knowledge and culture for generations to come. Some of those services require libraries to be physical spaces open to the public, where they (together with parks, neighborhood bars, beaches, and so on) provide what sociologist Ray Oldenburg famously called a "third place"—a place that is neither home nor work where diverse groups of people from the community meet and interact with one another. RAY OLDENBURG, THE GREAT GOOD PLACE 21–22 (Berkshire Publ'g Grp. LLC 2023) (1989). Oldenburg and others explained that such spaces, *inter alia*, "help[] nurture democratic values" and "build social capital and decrease atomization." Sarah Schindler, *The "Publicization" of Private Space*, 103 IOWA L. REV. 1093, 1101 (2018). For some patrons, the library provides such a space, although, even in the physical world, many patrons use it merely to (quickly) replace borrowed read books with books that they still have not read, with that exchange often happening via a drive-through. The gradual move to digital readership naturally challenges the library's role as a physical gathering place. While, as briefly noted, the borrowing of digital books and libraries' other roles are not entirely separate challenges, this Article focuses on the former and not the latter.

to freely transfer it to others.[14] This principle, known as the first sale doctrine or copyright exhaustion, supports libraries in acquiring copyrighted materials from various resources (including retail markets and donations) and in lending them to patrons.[15]

The digital world, however, works differently. Transferring digital files creates new copies on the recipients' hard drives,[16] and the first sale doctrine does not apply to such reproductions.[17] Therefore, most libraries assume they must obtain dedicated licenses from publishers to both acquire and lend digital content. This gives publishers enormous power over libraries' operations, which they do not have in the physical world. Book publishers capitalize on this reality and use their market power to extract high licensing fees—about three to five times the cost of retail prices[18]—and restrictive terms for digital lending. This, in turn, drains libraries' digital catalogs and their budgets[19]—budgets that would otherwise support a host of socially desirable and community-improving activities.[20] Consequently, instead of being partly shielded from market forces, libraries find themselves bowing down to them.

Developments in recent years have put the digital lending problem front and center, necessitating a comprehensive response from the law (and legal scholars). The COVID-19 pandemic exacerbated the problem by significantly curtailing libraries' ability to perform their traditional duty of providing access to printed resources.[21] More and more readers discovered eBooks, and libraries sought

14. 17 U.S.C. § 109(a).

15. See *infra* notes 73–74 and accompanying text (discussing how the mere possibility of using retail markets, like Amazon, prevents the publishers from separating individuals from libraries and thus keeps prices low).

16. In other words, when a file is being sent from one computer to another, the result is the creation of another copy thereof on the recipient's computer, which is an action that the Copyright Act considers reproduction, and which typically requires authorization from the copyright owner. 17 U.S.C. § 106(1); *see* text accompanying notes 184–187 (discussing the definition of reproduction under the Copyright Act).

17. *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 659 (2d Cir. 2018) (holding that a digital resale is not shielded by the first sale doctrine and "violates the rights holder's exclusive reproduction rights . . . unless excused as fair use"); *infra* Section III.A.1. This issue and, more broadly, the legal challenges of digital distribution have been explored in legal literature. *See, e.g.*, Jacob Noti-Victor, *Copyright's Law of Dissemination*, 44 CARDOZO L. REV. 1769, 1786–87 (2023); Kristelia A. García, *Copyright Arbitrage*, 107 CALIF. L. REV. 199, 214–15 (2019); Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741, 801–06 (2015); Ariel Katz, *The First Sale Doctrine and the Economics of Post-Sale Restraints*, 2014 BYU L. REV. 55, 65–66; Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 890–91 (2011); *see also infra* Section II.A (introducing the digital lending problem).

18. *See infra* notes 45, 139 and accompanying text.

19. *See infra* notes 142–44 and accompanying text.

20. *See supra* note 13 (discussing the host of roles that libraries play and some of the services they provide).

21. *See* Dan Cohen, *Libraries Need More Freedom to Distribute Digital Books*, ATLANTIC (Mar. 30, 2023), https://www.theatlantic.com/ideas/archive/2023/03/publishers-librarians-ebooks-hachette-v-internet-archive/673560 (documenting the dramatic increase in demand for digital books during the pandemic and how "[l]ibraries have dramatically increased their spending on ebooks but still cannot come close to meeting demand"); Yohanna Anderson & Cathal McCauley, *How the Covid-19 Pandemic Accelerated an E-Book Crisis and the #Ebooksos Campaign for Reform*, INSIGHTS, 2022, at 1, https://insights.uksg.org/articles/10.1629/uksg.586 [https://perma.cc/8EEL-5WSM].

ways to better serve these needs.[22] As the pandemic dust settled, libraries were left at a crossroads, needing to decide how to cater to their readers' evolving preferences.

At the same time, the law—both the caselaw and statutory law—finally started to address the digital lending problem more directly. In September 2024, the Second Circuit published its important decision in *Hachette Book Group, Inc. v. Internet Archive*.[23] In this dispute, a group of major publishers sued a prominent website, Internet Archive, self-defined as a digital library, for scanning millions of books and lending them to its users.[24] The website implemented a lending scheme called Controlled Digital Lending (CDL), where in return for removing printed books from circulation, the digital books are being lent to one user at any given time.[25] The Second Circuit decided that this practice was not fair use and thus infringed on the publishers' copyright.[26] As the first case concerning the application of CDL, and considering that many libraries implement or wish to implement comparable schemes, the litigation drew significant attention from legal and non-legal commentators, librarians, authors, and publishers.[27] In December 2024, Internet Archive decided not to pursue a Supreme Court review of the Second Circuit decision.[28] The case has the potential to profoundly impact libraries' ability to create digital versions of printed books, and, more broadly, might "change the very nature of libraries—how they operate, their finances, whom they are able to serve, and the breadth of their collections."[29]

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22. *See* Cohen, *supra* note 21; Anderson & McCauley, *supra* note 21, at 1; *see also Ebook and Audiobook Usage Surges in Academic Libraries During Pandemic*, OVERDRIVE (Apr. 13, 2021), https://company.overdrive.com/2021/04/13/ebook-and-audiobook-usage-surges-in-academic-libraries-during-pandemic/ [https://perma.cc/8GLS-EZ6C] (documenting massive increase in use of eBooks by academic libraries during the pandemic).

23. Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 (2d Cir. 2024).

24. *Id.* at 173–76.

25. *See id.*; *infra* Section IV.A.2 (discussing CDL and the dispute concerning its legality).

26. *Hachette*, 115 F.4th at 174.

27. *See, e.g.*, Cohen, *supra* note 21 (commenting that the case "is likely to shape how we read books on smartphones, tablets, and computers in the future"); Streitfeld, *supra* note 12 (noting that because of this litigation, "[o]wning a book means something different now"); Erin Mulvaney & Jeffrey A. Trachtenberg, *Online-Books Lawsuit Tests Limits of Libraries in Digital Age*, WALL ST. J. (Mar. 19, 2023, 7:00 AM), https://www.wsj.com/articles/online-books-lawsuit-tests-limits-of-libraries-in-digital-age-ae53bbe6 (explaining that the case "raises novel questions about digital-library rights"). Seventeen amicus briefs were filed before the Second Circuit, some signed by dozens of professors or various organizations. *Hachette*, 115 F.4th at 172.

28. Chris Freeland, *End of Hachette v. Internet Archive*, INTERNET ARCHIVE BLOGS (Dec. 4, 2024), https://blog.archive.org/2024/12/04/end-of-hachette-v-internet-archive.

29. Cohen, *supra* note 21. *See* Brief of Amicus Curiae HathiTrust in Support of Neither Party at 3–7, *Hachette*, 115 F.4th 163 (No. 23-1260) (examining the practices of various libraries, the legality of which could be called into question depending on the Second Circuit's decision in this case.); *infra* Section IV.A (discussing the case and its implications).

In recent years, libraries are also increasingly lobbying legislators to intervene and support their operations in the digital realm.[30] While Congress does not currently show an inclination to step in, state legislatures across the country do, and numerous bills facilitating digital lending have been enacted in recent years or are under consideration.[31] On an international level, the United States delegation to the World Intellectual Property Organization (WIPO) recently encouraged other countries to "ensure that libraries . . . can preserve and provide access to information and materials developed and/or disseminated in digital form."[32]

Those developments have put two pivotal players in the copyright law ecosystem—public libraries and the publishing industry—on a collision course. Both are essential if copyright law is to fulfill its constitutional mandate to "promote the Progress of Science."[33] The publishing industry provides authors with resources to encourage them to engage in the creation of new works.[34] It also markets and distributes the works created.[35] These works are typically protected by copyright, allowing the publishers to charge supracompetitive prices for the right to access them.[36] This, however, prices out those who cannot or are unwilling to pay, resulting in the famous deadweight loss problem.[37] Excluding potential consumers reduces access to the work, which undermines "the Progress of Science."

This is where libraries come into play. By offering free access to copyrighted works, they make these works available to those who cannot or will not pay the publishers' prices. However, libraries' services extend beyond just those unable or unwilling to pay. They also cater to individuals who simply prefer free access. For them, libraries substitute the market, thus impairing the publishers' revenue. This, in turn, might hamper the publishers' ability to compensate authors. Indeed, this is yet another aspect of copyright law's core challenge: striking a balance between incentives and access.[38]

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30. *See infra* note 329.

31. *See infra* Section IV.C.

32. Delegation of the U.S. to the World Intell. Prop. Org. [WIPO], Standing Comm. on Copyright and Related Rts., *Updated Version of the Document "Objectives and Principles for Exceptions and Limitations for Libraries and Archives,"* at 4, SCCR/44/5 (Nov. 2, 2023).

33. U.S. CONST. art. I, § 8, cl. 8 (empowering Congress to enact laws concerning copyright in order to "promote the Progress of Science").

34. *See* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 546–47 (1985) (discussing the relationships between authors and publishers in the production of creative works and the role of copyright law in those relationships).

35. *Id.*

36. *See* Adi Libson & Gideon Parchomovsky, *Toward the Personalization of Copyright Law*, 86 U. CHI. L. REV. 527, 542 (2019) (exploring the impact of copyright on prices).

37. *See, e.g.*, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1578 (2009) (discussing how a deadweight loss is created because copyright allows prices "at a monopoly level," thus "reduc[ing] access to those . . . users willing to pay a price lower than that charged . . . but above the marginal cost of producing it").

38. *See*, *e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. 197, 204 (2016) (explaining that copyright law "strik[es] a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work"); *infra* note 69 and accompanying text (discussing the incentives–access tradeoff).

This Article explores this tension between public libraries and publishers in the physical and digital realms from legal, comparative, and economic and social justice perspectives. Part I focuses on the tangible world. It explains that publishers and libraries operate in an equilibrium. Various countries adopt different approaches to balance the interests of the publishers and authors with those of libraries and readers. In the United States, for example, libraries are free to lend purchased books to authors, while in most European countries they need to pay for those actions.[39] Other countries adopted yet other balancing points, for example by requiring libraries to pay government-set royalties for their lending activities.[40] However, the laws in most countries provide libraries with a preferential treatment that allows them to operate without the need to purchase dedicated licenses from the publishers.[41] Nevertheless, notwithstanding those laws, physical constraints prevent libraries from substituting the publishers' markets.[42] Specifically, while some readers rely on libraries for all or most of their needs, others, particularly the wealthy, may find them too inconvenient, opting instead to purchase books.[43] Indeed, this is a well-balanced system where access is provided both through the market and outside of the market, and those two methods operate without cannibalizing one another.

Part II presents the digital lending problem and explains the challenges in tackling it. As noted, at its core, the issue arises because the Copyright Act explicitly shields from liability the distribution of tangible copyrighted goods but not digital ones.[44] As a result, libraries arguably must secure specific licenses from the publishers. These licenses are notably restrictive and, more importantly, very expensive. While libraries typically purchase *printed books* from the publishers' vendors for slightly less than their retail price, a two-year digital *eBook* lending license typically costs libraries three to five times (!) more than a perpetual license costs individuals.[45] The result of placing libraries at the mercy of publishers' market power is that eBook licenses heavily strain public libraries' budgets and restrict their catalogs.[46]

Solving the digital lending problem is exceptionally challenging, partly because any effective solution will need to encompass the entire lifecycle of library collections from acquisition to patron access. Libraries can acquire digital materials by either scanning printed materials, which, this Article argues, is likely legal under certain conditions, or by redistributing digitally formatted works provided by publishers.[47] The latter approach is the only one that can apply to

39. *See infra* Sections I.A, I.B.
40. *See infra* text accompanying notes 77–97 (discussing the laws of the European Union concerning public libraries' lending).
41. *See infra* Section I.B.
42. *See infra* Section I.C.
43. *See infra* text accompanying notes 116–23.
44. *See supra* text accompanying note 17.
45. *See infra* notes 133, 139 and accompanying text.
46. *See infra* notes 142–44 and accompanying text.
47. *See infra* text accompanying notes 146–49.

resources that are only available in digital format, but it entails complex legal hurdles, including overcoming the publishers' restrictive licensing terms and encryption, potentially making it outright illegal under existing law.[48] Part II concludes by highlighting the challenges in formulating a comprehensive solution by examining, as a case study, recent rulings from the Court of Justice of the European Union, which attempted but failed to fully resolve the digital lending problem.[49]

Part III delves into and dismisses two polar solutions. The first—full digital exhaustion—suggests mirroring the laws of the physical world in the digital domain. It argues that libraries should be allowed to purchase eBooks, including, if needed, in retail markets, and lend them freely to patrons.[50] However, this approach overlooks a key difference between digital and physical realms: the lack of "frictions"—the physical world's inherent slowness and inefficiencies—in the digital arena. As a result, library services under this model could become so attractive that they will displace eBook markets, potentially greatly harming publishers' revenues and undermining their ability to support authors and creativity.[51]

The second misguided solution—favored by publishers and, unfortunately, endorsed, at least implicitly, by some courts, including the Second Circuit—suggests that the market alone can address the digital lending problem without legal intervention.[52] This viewpoint argues that libraries can simply purchase the lending licenses they need.[53] However, not only are the current licenses restrictive and prohibitively expensive, but this approach also overlooks the crucial societal role of libraries and their function in addressing numerous market failures. Besides mitigating the deadweight loss problem—the limitations on readers' access inherent to copyright protection—mentioned above, libraries also generate significant positive societal and industry externalities.[54] For example, libraries cultivate readership, particularly among young patrons, which is a public good often underprovided by the market.[55] Indeed, just like in the physical realm, relying solely on market mechanisms in the digital space is unlikely to lead to an efficient equilibrium.

Part IV presents various frameworks to preserve the societal functions of both publishers and libraries. Foremost among these—and at the heart of the *Hachette Book Group, Inc. v. Internet Archive* litigation—is the possibility that scanning and digitally lending copyrighted printed materials might be protected under copyright law's fair use doctrine.[56] As noted,[57] the Controlled Digital Lending

48. *See infra* text accompanying notes 155–57.
49. *See infra* Section II.C.
50. *See infra* text accompanying note 174.
51. *See infra* Section III.A.2.
52. *See infra* text accompanying notes 216–18.
53. *See infra* text accompanying note 216.
54. *See infra* text accompanying notes 219–38.
55. *See infra* text accompanying notes 233–38.
56. *See infra* Section IV.A.2.
57. *See supra* text accompanying notes 23–25.

(CDL) framework suggests that libraries may scan and lend digital copies of their printed books, provided they remove the physical copies from circulation and lend the digital versions to only one reader at a time.[58] However, in *Hachette*, the Second Circuit recently ruled that Internet Archive's implementation of CDL, and likely any other potential implementation, falls outside the scope of fair use.[59] This Article critiques that broad decision, arguing that the Second Circuit overlooked the essential function of fair use.[60] The fair use doctrine has been recognized, including by Congress and the Supreme Court, as a way to adapt copyright law to new technologies, thereby maintaining its constitutional balance.[61] The Article posits that fair use can and should restore the balance that Congress created in the physical world that digital technology disrupted.[62]

The Article then steps outside the CDL framework to propose and analyze other approaches to tackling the digital lending problem. One such approach, one that would require federal legislation, involves allowing libraries to operate freely in the digital realm while compensating the publishers using taxpayer funds.[63] However, due to the convenience of digital lending, libraries might end up disproportionately serving wealthier populations.[64] This raises difficult questions about the justification of using taxpayer money to support such activities.

Another strategy—or rather, a framework—to address the digital lending problem involves segmenting readers by identifying specific groups or specific circumstances that warrant preferential treatment from public libraries.[65] The group of potential readers can be separated using multiple criteria, including by economic status, prioritizing less affluent readers; by timing, prioritizing borrowers of older works; and by usage, prioritizing certain activities such as scholarship.[66] The Article calls on state-owned libraries to spearhead such innovative digital lending practices. Largely protected from copyright liability under the Eleventh Amendment, these libraries (unlike libraries owned by local governments or privately owned libraries) are in a unique position to experiment with and expand the boundaries of digital lending.[67]

Part IV concludes by demonstrating how elements from various approaches can work in tandem to address the digital lending problem.[68] For example, a public library might implement a highly restrictive CDL scheme for the general population and a significantly less restrictive one for low-income patrons or for

58. *See infra* text accompanying notes 242–45.
59. Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 174 (2d Cir. 2024).
60. *See infra* Section IV.A.2.
61. *See infra* text accompanying notes 261–64.
62. *See infra* text accompanying notes 279–83.
63. *See infra* Section IV.B.1.
64. *See infra* text accompanying notes 302–04.
65. *See infra* Section IV.B.2.
66. *Infra* Section IV.B.2. This is not a closed list, and other criteria, for example disability status, may also be taken into account. *See infra* note 314 and accompanying text.
67. *See infra* Section IV.C.
68. *See infra* Section IV.D.

scholarship. This would alleviate much of the tremendous economic burden on public libraries and allow them to continue to fulfill their missions and serve the needs of their patrons and our society at large.

I. THE PHYSICAL WORLD EQUILIBRIUM

The law of library lending, like copyright law itself, needs to balance two conflicting and legitimate interests.[69] On the one hand, it is crucial to incentivize authors by compensating them for their creative works. The publishing industry plays a vital role in that payment scheme and in the distribution of works. On the other hand, public libraries are vital in providing access to creative works. This Part explores how the law balances the interests of publishers and public libraries in the physical world. Section I.A explains how U.S. copyright law supports libraries' operation through the first sale doctrine, which allows the free transfer of purchased books. Section I.B shows that while different jurisdictions chose different ways to balance those interests, in most countries, public libraries received a preferential treatment that exempts them from the need to secure lending licenses. Section I.C explains the logic of those schemes by showing that even the most library-friendly laws, such as those enacted by the U.S. Congress, are balanced by the physical restriction of tangible lending in a way that preserves the equilibrium between publishers and libraries.

A. THE LAWS OF LIBRARY LENDING IN THE UNITED STATES: THE FIRST SALE DOCTRINE

American law supports libraries' operation in the physical world, primarily by having minimal restrictions on the transfer of books from one person to another. The Copyright Act states that copyright owners get to control the distribution of copyrighted materials.[70] However, that right is limited by the doctrine of copyright exhaustion, also known as the first sale doctrine. Under that principle, legally purchased copies of copyrighted works can be freely transferred from one person to another without the authorization of the copyright owner.[71] In other words, under this doctrine, the copyright owner's right to control the downstream distribution of a copy of their works is eliminated—exhausted—once the copy is first legally sold.[72]

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69. This well-established principle is known in copyright literature as the incentive–access tradeoff. *See, e.g.*, Kirtsaeng v. John Wiley & Sons, Inc., 579 U.S. 197, 204 (2016) (explaining that copyright law "strik[es] a balance between two subsidiary aims: encouraging and rewarding authors' creations while also enabling others to build on that work"); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) (describing copyright as requiring "a difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand"); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 20–21 (2003) (describing the tradeoff).

70. 17 U.S.C. § 106(3).

71. *Id.* § 109(a).

72. *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 524 (2013); Rub, *supra* note 17, at 749–50.

The first sale doctrine frees books from the control of the copyright owners and thus benefits libraries when they acquire and lend them.[73] For example, due to the first sale doctrine, any book owner can freely donate books to a library. Libraries can also acquire books in retail markets (for example, Amazon), where they are offered for a relatively cheap price.[74] And, most importantly, as long as the books in their collection were originally legally sold, libraries are free to lend them to their patrons.

On top of the first sale doctrine—which is a general doctrine that applies to all owners of copyrighted goods—public libraries are granted additional special rights, such as reduced damages for innocent infringements.[75] Those rights are not the focus of this work.

B. A COMPARATIVE VIEW OF THE LAWS OF LIBRARY LENDING

This Section places the law of the United States in the context of other legal systems and the ways they balance the interests of publishers and authors vis-à-vis libraries and their patrons. The legal treatment of public libraries is one of a few topics within copyright law that was never unified by international treaties.[76]

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73. *See Kirtsaeng*, 568 U.S. at 541 (discussing the importance of the first sale doctrine to the operation of libraries).

74. As further explained below, *infra* notes 136–37 and accompanying text, libraries rarely purchase printed books in retail markets, but by making that option viable, the first sale doctrine facilitates libraries' operation at low costs. Consider, for example, the dispute between some movie studios and prominent *for-profit* libraries in the United States, such as Redbox. At some point, the studios tried to impose restrictions on those commercial libraries by refusing to sell them DVDs. In response, the commercial libraries started purchasing DVDs at Wal-Mart and renting them to their patrons. *See* Redbox Automated Retail LLC v. Universal City Studios LLLP, No. 08–766, 2009 WL 2588748, at *2 (D. Del. Aug. 17, 2009); Eddins v. Redstone, 35 Cal. Rptr. 3d 863, 871–72 (Cal. Ct. App. 2005); *see also* Mark A. Lemley, *Contracting Around Liability Rules*, 100 CALIF. L. REV. 463, 481–82 (2012) (describing the leverage that the first sale doctrine gives to libraries); *infra* notes 133–37 and accompanying text (discussing the economic implications of the availability of retail markets).

75. *See* 17 U.S.C. § 504(c)(2) (denying statutory damages for copyright infringement by a library or its employees if they had "reasonable grounds for believing that [their] use of the copyrighted work was a fair use"); *see also* Karyn Temple Claggett & Chris Weston, *Preserving the Viability of Specific Exceptions for Libraries and Archives in the Digital Age*, 13 I/S 67, 68–69 (2016) (discussing the special treatment of libraries under U.S. copyright law). The most significant library-specific exception (as opposed to general exceptions such as fair use) under U.S. copyright law has to do with their ability to reproduce and distribute copyrighted materials in order to preserve works or to support research and scholarship. *See* 17 U.S.C. § 108(e)(1); KARYN TEMPLE CLAGGETT, U.S. COPYRIGHT OFF., SECTION 108 OF TITLE 17: A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS 6–9 (2017) (analyzing the exception). As this Article focuses on libraries' action in providing access to copyrighted works to the masses, that narrowly targeted exception is beyond the scope of this work.

76. As further explained below, the legal treatment of libraries is intertwined with the copyright exhaustion doctrine. However, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) states that "nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." Agreement on Trade-Related Aspects of Intellectual Property Rights art. 6, Apr. 15, 1994, 108 Stat. 4809, 1869 U.N.T.S. 299. Other international treaties, including the all-important Berne Convention for the Protection of Literary and Artistic Works and the comprehensive World Intellectual Property Organization Copyright Treaty, do not address copyright exhaustion at all. The only broadly adopted international treaty that deals with exhaustion is the Marrakesh Treaty to Facilitate Access to Published Works to Visually Impaired Persons, codified in the United States as 17 U.S.C. § 121A, which allows the free movement of books accessible to the blind (mostly books in

It is, therefore, left for individual countries to set forth their own balance between the conflicting interests of publishers and authors and public libraries and their patrons.

As this Section shows, as a result of the lack of international harmonization, different countries chose different ways to balance these conflicting interests, but most of them adopted laws that are library friendly. While all legal regimes require libraries to purchase the books they lend to their patrons, and while each regime differs in what additional restrictions, if any, libraries might face, in most countries explored, libraries are not required to routinely purchase dedicated licenses for their operation in the physical world.

At one end of the spectrum are members of the European Union and the United Kingdom,[77] where the law gives copyright owners exclusive rights to control the rental and lending of copyright-protected works.[78] The law in the European Union encompasses the activities of both for-profit libraries and not-for-profit public libraries, although individual transfer of possession without profit (for example, lending to a friend) is not subject to the authors' rental and lending rights.[79]

European law, however, also allows (but does not require) each member state to exempt public (and only public) libraries from this exclusive right.[80] Such an exemption is conditioned on "at least authors obtain[ing] a remuneration for such lending," with each state being "free to determine this remuneration taking account of their cultural promotion objectives."[81]

This possibility creates a split (albeit a small one) within the European Union. At one end of the spectrum, a few—very few—European countries do not exempt their public libraries from European rental and lending rights. In those countries—Bulgaria and Romania, to be exact[82]—public libraries need to secure a license from

braille), but its scope is obviously quite narrow. *Cf.* Orit Fischman Afori, *The Battle over Public E-Libraries: Taking Stock and Moving Ahead*, 44 INT'L REV. INTELL. PROP. & COMPETITION L. 392, 409–12 (2013) (calling for the creation of an "international norm" concerning the lending of eBooks).

77. While the United Kingdom is not part of the European Union anymore, its copyright laws, and specifically those concerning public libraries, were formed before Brexit, while it was part of the European Union. *See* Public Lending Act 1979, c. 10 (U.K.), https://www.legislation.gov.uk/ukpga/1979/10. Therefore, this Article discusses the situation in the United Kingdom as part of the regimes within the European Union.

78. Directive 2006/115/EC, art. 3, of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, 2006 O.J. (L 376) 28, 29.

79. *Id.* art. 2 (defining "rental" as the "making available [of a copyrighted work] for use, for a limited period of time and for direct or indirect economic or commercial advantage," and defining "lending" as the "making available [of a copyrighted work] for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public").

80. *Id.* art. 6.

81. *Id.*

82. *Schemes in Development*, PUB. LENDING RIGHT INT'L, https://plrinternational.com/indevelopment [https://perma.cc/HHL4-MJLG] (last visited Oct. 23, 2024) (Bulgaria, Romania). In addition, Portugal did not establish a PLR scheme that would allow its public libraries to be exempted from the EU's lending rights, but Portuguese law nevertheless exempts them. For this, the Court of

the copyright owners if they lend copyrighted materials, such as books and CDs, to their patrons.

Most European countries (as well as the United Kingdom), however, balance the interests of publishers and authors on one hand and libraries and their patrons on the other hand quite differently. Those countries chose to exempt their public libraries from European lending rights by establishing a mechanism—commonly called "Public Lending Rights" (PLR)—that compensates the author and/or the publishers for libraries' activities based on a statutorily set formula.[83] Therefore, in all those countries, either the local governments or public libraries need to pay rightsholders for the high-volume use of purchased books, but at the same time, public libraries are not subject to the publishers' market power because the price for lending is determined by law.

PLR schemes are, however, to quote the World IP Organization, "patchy"[84] and differ significantly from one country to another. All PLR schemes allow public libraries to lend books (and, in many countries—for example, Germany and Estonia—other copyrighted materials) to patrons.[85] The most significant differences between them have to do with the amount paid and the ways it is calculated. In many countries, like Austria and Belgium, payment is based on the number of books loaned.[86] In others, such as Denmark, it is based on the number of books in the library's collection.[87] Some countries, most notably France and Spain, use complex formulas that consider, for example, the number of books purchased, the number of loans in each establishment, and the number of library users.[88]

PLR schemes differ in many other ways. In some countries, Ireland and the United Kingdom, for example, those schemes are handled by governmental entities,[89] while in others, like Italy and the Czech Republic, they are managed by

Justice of the European Union held that Portugal had failed to fulfill its obligations as a member state. *See* Case C-53/05, Comm'n v. Portuguese Republic, 2006 E.C.R. I-6217, I-6231; *see also Portugal in Hot Water over Library Royalties*, BILLBOARD (July 6, 2006), https://www.billboard.com/music/music-news/portugal-in-hot-water-over-library-royalties-1352663/ [https://perma.cc/B5VQ-SPRJ].

83. *See* Jim Parker, *The Public Lending Right and What It Does*, WIPO MAG. (June 2018), https://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html [https://perma.cc/AB6W-7ECT].

84. *Id.*

85. The information about PLR schemes is based, unless indicated otherwise, on *Established Schemes*, PUB. LENDING RIGHT INT'L, https://plrinternational.com/established [https://perma.cc/5PL9-L63Q] (last visited Oct. 23, 2024).

86. *See Bibliothekstantieme*, LITERAR MECHANA, https://www.literar.at/nutzer-innen/bibliothekstantieme [https://perma.cc/5LNT-76VS] (last visited Oct. 23, 2024) (Austria); *see also Public Libraries*, REPROBEL, https://www.reprobel.be/en/public-libraries/ [https://perma.cc/3HAU-3NFG] (last visited Oct. 23, 2024) (Belgium).

87. *See* PUB. LENDING RIGHT INT'L, *supra* note 85 (Denmark).

88. *See Droit de Prêt*, SOFIA, https://www.la-sofia.org/droits-geres/droit-de-pret [https://perma.cc/7EPV-JHQV] (last visited Oct. 23, 2024) (Fr.); *Gestión del Préstamo Público*, CEDRO, https://www.cedro.org/cedro/funciones/gestion-prestamo-publico [https://perma.cc/2PLX-RAL4] (last visited Oct. 23, 2024) (Spain).

89. *See Outline of the PLR Process*, PUB. LENDING REMUNERATION OFF., https://www.plr.ie/about-plr/outline-of-the-plr-process [https://perma.cc/4PYN-8NY8] (last visited Oct. 23, 2024) (Ir.); *Welcome to Public Lending Right*, BRIT. LIBR., https://www.bl.uk/plr [https://perma.cc/X6SG-UV3H] (last visited Oct. 23, 2024) (U.K.).

collection societies or trade organizations.[90] In most countries, the government's budget pays the authors, but in some, like the Netherlands, libraries themselves are paying.[91] Finally, and importantly, the recipients of the payments vary. In some countries, for instance Spain, only those who are considered authors are paid.[92] Some countries, for example Belgium, define "authors" as those who created the work,[93] while others, like Hungary, explicitly note that the term includes "writer[s], translator[s] [and] editor[s]."[94] Other countries have an even broader class of beneficiaries, like the United Kingdom, where "author[s], illustrator[s], editor[s], translator[s] [and] audiobook narrator[s]" are entitled to PLR payments.[95] In some countries, like Poland, the publishers also receive a share of the PLR royalties.[96] Finally, some countries, such as Austria and Italy, transfer some or all the money collected to funds that support creativity and authors more generally.[97]

Next on the spectrum are a few countries outside of the European Union that chose to selectively provide compensation for public lending. Those countries include some European countries that are not part of the European Union, such as Norway and Iceland, and a few common law countries outside of Europe, including Canada, Australia, Israel, and New Zealand.[98] These schemes are often less generous and more restrictive than those common within the European Union. All these countries restrict the authors who are eligible for payment: in Canada, Australia, and New Zealand, only those who are citizens or residents are paid;[99] in Norway, the book must be in Norwegian or Sámi and published in Norway;[100] in Israel, the author must meet both the language requirement and the residency

90. *See Prestito Bibliotecario*, FUIS, https://www.fuis.it/prestito-bibliotecario/ [https://perma.cc/LT96-WGW4] (last visited Oct. 23, 2024) (It.); *Pro Autory*, DILIA, https://www.dilia.cz/pro-autory [https://perma.cc/2Z99-PTFK] (last visited Oct. 23, 2024) (Czech).

91. Parker, *supra* note 83.

92. *See* CEDRO, *supra* note 88.

93. *You Are an Author or Publisher*, REPROBEL, https://www.reprobel.be/en/vous-etes-auteur-ou-editeur/ [https://perma.cc/6ULF-EYVF] (last visited Oct. 23, 2024).

94. *About Us*, MISZJE, http://miszje.hu/en/main-page/ [https://perma.cc/P6V5-SX8K] (last visited Oct. 23, 2024).

95. BRIT. LIBR., *supra* note 89.

96. *Authors Dept.*, COPYRIGHT POLSKA, https://www.copyrightpolska.pl/en/3/0/276/Authors-Dept [https://perma.cc/FYB4-X23Y] (last visited Oct. 23, 2024) ("75% of the PLR fund is granted to authors, translators and illustrators . . . while the remaining 25% is granted to publishers.").

97. *See Allgemeine Informationen*, LITERAR MECHANA, https://www.literar.at/nutzer-innen/allgemeine-informationen [https://perma.cc/D7MK-LTAX] (last visited Oct. 23, 2024) (Austria); FUIS, *supra* note 90.

98. PUB. LENDING RIGHT INT'L, *supra* note 85.

99. *Eligibility*, PUB. LENDING RIGHT PROGRAM, https://publiclendingright.ca/eligibility [https://perma.cc/P42G-L2TS] (last visited Oct. 23, 2024) (Can.); *Australian Lending Rights Schemes (ELR/PLR)*, OFF. FOR THE ARTS, DEP'T OF INFRASTRUCTURE, TRANSP., REG'L DEV., COMMC'NS & THE ARTS, AUSTL. GOV'T, https://www.arts.gov.au/funding-and-support/australian-lending-right-schemes-elrplr [https://perma.cc/VAS9-8BC7] (last visited Oct. 23, 2024) (Austl.); PUB. LENDING RIGHT INT'L, *supra* note 85 (New Zealand).

100. PUB. LENDING RIGHT INT'L, *supra* note 85 (Norway).

requirement.[101] Finally, in Iceland, the authors must be citizens or residents of countries within the European Economic Area, provided they did not transfer the copyright in the work.[102] The payment in those countries depends on the government's annual budget allocation for its PLR scheme.[103] In fact, in Canada and Israel, the relevant statute does not require any compensation for public lending, and the scheme is merely based on an administrative decision, potentially making it even more vulnerable to frequent adjustments.[104] In Israel, for example, PLR payments are unavailable in some budgetary years.[105] In conclusion, those countries chose to balance the rights of the publishers and authors on the one hand and libraries and the public on the other hand quite similarly to those European Union countries that implement a PLR scheme, except that the payment for lending is typically more modest and is not guaranteed by international norms, such as a European Union directive.

Finally, at the other end of the spectrum are countries whose laws allow libraries to freely lend copyrighted materials without compensating the author and that, in practice, do not compensate them. As Section I.A shows, this is the law in the United States. However, many other countries, including India and Japan, are part of this rather large group.[106] While the copyright laws in those countries give the copyright owners exclusive control over the distribution of copies of their works, that right is restricted by the doctrine of copyright exhaustion, which permits the free transfer of copies of copyrighted works that were legally purchased.[107] Like in the United States, libraries in all those countries are therefore

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101. *See id.* (Israel). Because EU law allows its members to "determine [authors'] remuneration taking account of their cultural promotion objectives," *supra* text accompanying note 81, similar restrictions are likely allowed in the EU as well. However, while a few EU countries include such restrictions in their PLR schemes—Denmark, for example, only compensates for the lending of books written in Danish—most EU countries include much more relaxed restrictions based on nationality or language, and many, Germany and Italy for instance, do not have any such restrictions in place. PUB. LENDING RIGHT INT'L, *supra* note 85.

102. Literary Act (Act No. 137/2012) (Ice.), art. 7, https://www.government.is/media/menntamalaraduneyti-media/media/frettir2014/Thyding-log-um-bokmenntir-april-2015-Lokagerd-a-vef.pdf [https://perma.cc/Y8G8-HAQW].

103. PUB. LENDING RIGHT INT'L, *supra* note 85.

104. *See id.*

105. *See* Matan Hermoni, *Nobody Decries the Theft of the Authors' Royalties*, HAARETZ (June 16, 2020), https://www.haaretz.co.il/gallery/opinion/2020-06-16/ty-article/.premium/0000017f-f122-dc28-a17f-fd37db290000 (explaining how funds for PLR payments in Israel might be available one year and unavailable in the next one).

106. *See* Aishwarya Chaturvedi, Digital Libraries, Copyright and the COVID-19 Pandemic: A Comparative Study of India and the United States 6–8, 19–20 (Jan. 25, 2022) (unpublished manuscript), https://ssrn.com/abstract=3965155 [https://perma.cc/6F36-2QGC]; *Case Study: Library & Copyright*, COPYRIGHT RSCH. & INFO. CTR., https://www.cric.or.jp/english/qa/cs03.html (last visited Nov. 16, 2024). It should be noted that attempts have been made—and rejected—since at least 1985 to introduce PLR into federal U.S. law. *See, e.g.*, Herbert Mitgang, *Authors Seek Pay for Loan of Books*, N.Y. TIMES (Jan. 2, 1985), https://www.nytimes.com/1985/01/02/books/authors-seek-pay-for-loan-of-books.html (describing proposed federal legislation to explore the introduction of PLR mechanism into U.S. federal law).

107. *See* Chaturvedi, *supra* note 106, at 7–8 (exploring the copyright exhaustion doctrine in India); Shubha Ghosh, The Implementation of Exhaustion Policies: Lessons from National Experiences 30–70

free to lend any books (or other tangible objects subject to copyright) in their possession, assuming, of course, that they were initially legally purchased.

C. THE ECONOMICS OF TANGIBLE LENDING

The discussion in the previous Section results in a possible puzzle. On the one hand, it is well established that the law needs to balance the interests of authors and publishers and those of public libraries and their patrons—all of them, after all, play a vital role in our copyright ecosystem. On the other hand, most jurisdictions chose to provide public libraries with an extensive set of rights. In the United States, in particular, the conundrum goes even further because it seems that Congress, which has "been assigned the task of defining the scope of the limited monopoly that should be granted to authors,"[108] did not adopt a balanced approach at all but instead gave public libraries almost any defense imaginable, to the point of close to exempting them from significant segments of copyright law altogether. One may therefore wonder whether this unbalanced system operates properly. In other words, aren't the interests of the publishers completely sacrificed in a way that would inefficiently harm their abilities to play their role within the copyright ecosystem and specifically to provide proper incentives for creation?

This Section explains why the answer is no.[109] While looking at the law in isolation might create the impression of an unbalanced system, laws do not operate

(Feb. 13, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390232 [https://perma.cc/D2H7-83XU] (exploring the principles of exhaustion under U.S., European Union, Canadian, Indian, Japanese, Brazilian, and Chinese laws).

108. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984).

109. Two preliminary notes are in order concerning the main prism this Article uses. This Section, and the Article as a whole, primarily employs an economic utilitarian framework, which aligns with the common U.S. objective and the Constitution's mandate to "promote the Progress of Science." U.S. CONST. art. I, § 8, cl. 8; *see, e.g.*, Balganesh, *supra* note 37, at 1576–77 (discussing the utilitarian framework). The analysis might be different from a more moralist perspective. For example, English poet Maureen Duffy, a leading advocate for PLR, noted in a much-quoted statement that "[f]irst and foremost PLR upholds the principle of 'no use without payment'. This is the basis for the concept of 'fair remuneration' . . . . It is based on the Universal Declaration of Human Rights, by which we are entitled to receive income from any exploitation of our work." PLR INT'L, PUBLIC LENDING RIGHT (PLR): AN INTRODUCTORY GUIDE 3 (2018), https://plrinternational.com/public/storage/resources-languages/October2018/rBWbz6qOAbxyEM7b2CsM.pdf [https://perma.cc/DG9E-YTKV]. While this statement is not without doubts—as any fair use case exemplifies, copyrighted works are *extensively* used without compensation—this Article does not engage with this moralist perspective.

A second related preliminary point concerns U.S. legislators. This Section suggests that the broad lending authority granted to libraries in the physical realm under U.S. law is probably efficient. However, it stops short of claiming that Congress explicitly conducted a detailed cost–benefit analysis in enacting these laws. Such a strong claim is unnecessary for this Article's argument. It is also complex to prove, as it involves delving into the political economy of copyright legislation and its historical evolution, topics only briefly touched upon in this work. Copyright laws in the United States have typically been shaped by negotiations among interest groups. *See* JESSICA D. LITMAN, DIGITAL COPYRIGHT 23 (2006). Since at least 1905, representatives from both the publishing industry and libraries have been part of these discussions. *See id.* at 23–26, 39. Thus, the current U.S. copyright law and its efficient allocation of rights among those groups might reflect their bargaining power and strategic decisions during the legislative process. Furthermore, the development and codification of the copyright exhaustion doctrine, including its first inclusion in the Copyright Act of 1909, have been

in a vacuum. As Lawrence Lessig famously explained, there are other forces outside of the law that impact human behavior.[110] Lessig categorized them as social norms, the market, and the architecture, meaning the de facto restrictions, typically physical or technical, on human behavior.[111] When it comes to public libraries, while the law, at least in the United States, seems to allow libraries to significantly undermine the publishers' markets, the architecture does not.

Indeed, public libraries are subject to built-in physical restraints that significantly mitigate the possible harm that can be inflicted on the publishing industry. For this reason, while they might seem inefficient, they are surprisingly socially desirable.

The main limitation on the operation of libraries is their slowness.[112] If readers want to use the library to gain free access to copyrighted works (for example, books), they need, at a minimum, to get to the library. Many works are not available at every library, meaning that even if they are available in another location, the reader will need to either commute far to get them or wait even longer to have them shipped to a closer location. If the work is popular, potential readers will likely need to be placed on a long waiting list and possibly wait weeks or months before they gain access to the work.[113]

In addition to speed, the works that libraries lend to their patrons often offer compromised physical quality.[114] Because library books change so many hands, and because their possessors are not their long-term owners and are likely to care less about their preservation, over time library books tend to be of lower physical quality. Moreover, some books get so damaged that the library needs to purchase a replacement copy, thus providing the publishers with additional income.[115]

Therefore, when potential readers decide whether to purchase a work or borrow it from a public library, they do not consider merely the price difference, which clearly makes libraries more attractive. Reasonable readers also consider the differences in speed and availability, quality, convenience, the need to finish

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influenced by both legislative and judicial decisions, such as the Supreme Court's ruling in *Bobbs-Merrill Co. v. Straus* just a year earlier. *See* 210 U.S. 339, 350 (1908) ("The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again . . . ."); *infra* text accompanying notes 188–99 (discussing some of the history of the copyright exhaustion doctrine and its 1909 codification).

110. *See* LAWRENCE LESSIG, CODE: VERSION 2.0 121–25 (2d ed. 2006).

111. *See id.* at 123.

112. *See* Rebecca Tushnet, *My Library: Copyright and the Role of Institutions in a Peer-to-Peer World*, 53 UCLA L. REV. 977, 989 (2006) ("Popular works at libraries have been controlled by rationing . . . .").

113. At the time of writing, the number one nonfiction book on the *New York Times* Best Sellers list is *American Prometheus* by Kai Bird and Martin J. Sherwin. The Columbus Public Library system has four copies thereof and forty readers on its waiting list. The New York City Public Library system has eighteen copies and 421 patrons on its waiting list. For $15.99, Amazon will deliver this book to my doorstep tomorrow.

114. *See, e.g.*, MARYBETH PETERS, U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT 82 (2001), https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf [https://perma.cc/W4U9-RB44] ("Physical copies of works degrade with time and use, making used copies less desirable than new ones.").

115. The Copyright Act allows libraries to create their own copy of a damaged book only when purchasing a new copy is virtually impossible. *See* 17 U.S.C. § 108(c).

reading the book quickly and return it to the library or pay a fine, and their desire to keep the book on their bookshelf in perpetuity, all of which makes libraries less attractive.[116] Those inconveniences—often referred to collectively as "frictions"[117]—nudge potential readers to purchase books instead of borrowing them from a public library, thus mitigating the potential harm to the publishing industry.

Interestingly, the frictions create an additional efficient phenomenon, one which economists call second-degree price discrimination or versioning. In general, price discrimination, also known as market segregation, is the practice of offering two units of the same or similar good (or similar services) at different prices to capture consumers' different willingness to pay.[118] The term is used to describe various pricing strategies.[119] One such strategy, versioning, is the practice of offering slightly different versions of one's products or services for different prices to all consumers.[120] The small variations between the versions are evaluated differently by different consumers and constitute a self-selection tool to help identify those with a higher willingness to pay.[121] For example, airlines offer cheaper economy-class tickets and expensive business-class ones.[122] At their core, both services are the same—they get all passengers to their destination—but one is more convenient than the other. Customers then choose whether to buy the expensive and convenient product or the cheaper and less luxurious one. Those with a high willingness to pay, typically the wealthier, will often choose the former, while others will choose the latter. Versioning thus provides access to slightly different variations of the product to people who significantly differ in their preferences and willingness to pay.

The unavoidable built-in frictions in the ways that libraries operate create a similarly efficient scheme. Readers can either buy a relatively expensive and very convenient book or get a free and less convenient product—a borrowed library book. Like with flight tickets, people of different wealth respond differently to

116. *See, e.g.*, PETERS, *supra* note 114, at 82–83 (discussing the importance of those inconveniences to libraries' ability to replace the publishers' markets); Rachel Ann Geist, *A "License to Read": The Effect of E-Books on Publishers, Libraries, and the First Sale Doctrine*, 52 IDEA 63, 74 (2012) (describing these frictions, and noting that "the inconvenience caused by waiting gave readers an incentive to purchase the book themselves").

117. *See, e.g.*, Andrew Albanese, *Macmillan CEO John Sargent: 'We're Not Trying to Hurt Libraries,'* PUBLISHERS WKLY. (Oct. 30, 2019), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/81596-macmillan-ceo-john-sargent-we-re-not-trying-to-hurt-libraries.html (referring to a letter from Mr. Sargent wherein he describes the inefficiencies of physical lending as "friction[s]").

118. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 133 (1988).

119. *See* Guy A. Rub, *Contracting Around Copyright: The Uneasy Case for Unbundling of Rights in Creative Works*, 78 U. CHI. L. REV. 257, 261 (2011).

120. *See* TIROLE, *supra* note 118, at 135, 142–43; *see also* MICHAEL E. WETZSTEIN, MICROECONOMIC THEORY: CONCEPTS AND CONNECTIONS 418 (Routledge 2013) (2005) (providing an example of versioning).

121. *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 39, 53–81 (1999).

122. *See id.* at 40.

such choices, with (all else being equal) wealthier consumers often opting for the expensive and convenient product—in this case, purchasing a book.

This means that libraries naturally serve less affluent populations.[123] This not only makes them valuable from a social justice perspective, but it also minimizes the harm they cause to publishers. Weaker populations have a lower willingness to pay, and therefore they would not have purchased many books even without the existence of public libraries. Indeed, providing access to those who would have otherwise not purchased such access from the publishers is a pure form of desirable social good.

The analysis so far shows that the economic harm that publishers suffer from the operation of libraries in the physical space is quite minimal. The friction pushes many, especially the wealthy, to buy books, and therefore the reduction in sales (and therefore in the publishers' income and, indirectly, in incentives) is low. The social benefits, on the other hand, are significant. Libraries buy books (and, at times, buy additional books to replace the damaged ones), thus generating income for the publishers. They provide access to copyrighted (and non-copyrighted) goods, primarily to those who cannot (or will not) purchase them. In addition, libraries create a culture of readership, especially among young patrons, and thus encourage them to be the readers—and even the book buyers—of tomorrow.[124] Libraries help publishers and authors, especially the lesser-known ones,

123. *See* Michelle M. Wu, *Restoring the Balance of Copyright: Antitrust, Misuse, and Other Possible Paths to Challenge Inequitable Licensing Practices*, 114 LAW LIBR. J. 131, 137 (2022) ("[M]any readers lack the funds to purchase [books], and it is those readers who most heavily rely on libraries . . . ."). Survey data from 2015 indicate that those who earned $30,000–$50,000 were the heaviest library users. JOHN HORRIGAN, PEW RSCH. CTR., LIBRARIES AT THE CROSSROADS 12 (Sept. 15, 2015), https://www.pewresearch.org/wp-content/uploads/sites/9/2015/09/2015-09-15_libraries_FINAL.pdf [https://perma.cc/B89K-BHPJ]; *see also* Tushnet, *supra* note 112, at 1000 (describing libraries as "major service providers, especially for economically and educationally disadvantaged populations"); Noti-Victor, *supra* note 17, at 1831 (discussing the role of libraries in promoting distributive justice). Libraries are especially impactful in servicing economically disadvantaged rural communities. *See* Michele Statz, Hon. Robert Friday & Jon Bredeson, *"They Had Access, but They Didn't Get Justice": Why Prevailing Access to Justice Initiatives Fail Rural Americans*, 28 GEO. J. ON POVERTY L. & POL'Y 321, 363–64 (2021); *cf.* Michael Carlozzi, *If You Build It, They Might Not Come: The Effects of Socioeconomic Predictors on Library Activity and Funding*, 6 OPEN INFO. SCI. 116, 116–17 (2022), https://doi.org/10.1515/opis-2022-0135 [https://perma.cc/T8MW-KLUU] (exploring data that suggest that public libraries are primarily "middle class institution[s]").

124. *See Impact on Reading and Literacy*, AM. LIBR. ASS'N, https://web.archive.org/web/20231208125803/https://www.ala.org/tools/research/librariesmatter/category/impact-reading-and-literacy (last visited Oct. 23, 2024) (collecting multiple studies on the ways in which public libraries develop strong reading skills, increase reading achievement, and help develop a love for books); Kathryn Zickuhr, Lee Rainie & Kristen Purcell, *Parents, Children, Libraries, and Reading*, PEW RSCH. CTR. (May 1, 2013), https://www.pewresearch.org/internet/2013/05/01/parents-children-libraries-and-reading-3/ [https://perma.cc/6B8C-9R3L] (finding that 84% of parents who say libraries are important cite the inculcation of their children's love of reading as a major reason why); Dave Smith, *Actually, Teens Love Print Books, Libraries, and Bookstores*, BUS. INSIDER (Dec. 15, 2014, 5:47 PM), https://www.businessinsider.com/actually-teens-love-print-books-libraries-and-bookstores-2014-12 (citing a survey that found physical browsing in libraries is the third (of fifteen) most influential way teens select books). In addition to creating general habits of readership, libraries also promote specific books and authors and help spread their reputation, thus promoting, at least to a degree, sales. *See* Rachel Kramer Bussel, *How Libraries Help Authors Boost Book Sales*, FORBES (Apr. 12, 2019, 12:56 PM), https://www.

by freely advertising their works. Increasing access, of course, creates additional social benefits, such as helping to have a more educated and well-informed population.[125] Finally, from an environmental perspective, because so many readers use each library book, libraries achieve this additional access while creating minimal physical waste.

Overall, in the physical space, public libraries serve a goal that is undoubtedly socially desirable. They provide significant access to creative works, inform their patrons, and create a culture of readership. Because much of this access does not substitute purchases in the physical world, it does so with minimal harm to the publishers' incentives. Like fair use,[126] allowing such activities is precisely the type of norm within our copyright law ecosystem that is socially desirable and should be encouraged.

II. THE DIGITAL LENDING PROBLEM

When it comes to the tangible world, the law is able to craft a system that, together with existing physical restraints, efficiently and effectively balances the conflicting interests of authors and publishers with those of public libraries and their patrons. That balance, however, is challenged by new models of distribution—in particular, digital ones. Section II.A explains why the system fails in the United States and the impact of this failure on public libraries' operations. Section II.B zooms in on one aspect of this problem and focuses on the challenge of libraries in acquiring digital books that can be distributed to patrons. Section II.C shows how, by failing to address the acquisition problem, the European Union's law was unable to resolve the digital lending problem and protect its public libraries in the digital world.

A. CURRENT DIGITAL LENDING PRACTICES IN THE UNITED STATES

The previous Part explains that the broad first sale doctrine, as it exists in the United States, allows public libraries to freely lend any copyright-protected works to their patrons as often as they like. That doctrine, however, does not work smoothly in the digital world.

Section 109(a) of the Copyright Act—the first sale doctrine—states that it is an exception to the copyright owners' right to control the *distribution* of their works.[127] It says nothing about shielding users against the copyright owners' right

forbes.com/sites/rachelkramerbussel/2019/04/12/how-libraries-boost-book-sales; Wu, *supra* note 123, at 135.

125. *See* Gregory Gilpin, Ezra Karger & Peter Nencka, *The Returns to Public Library Investment*, AM. ECON. J., May 2024, at 78, 78–80 (finding that public library capital investments increase children's engagement with their local library, which in turn improves test score measures in local school districts); Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 286 (2007).

126. *See* Wendy J. Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the* Betamax *Case and Its Predecessors*, 82 COLUM. L. REV. 1600, 1614–22 (1982) (showing how fair use can similarly tackle market failures by allowing activities that generate significant access and other social benefits without meaningfully impacting the publishers' market).

127. *See* 17 U.S.C. § 109(a).

to control the *reproduction* of their works.[128] The problem is that digital distribution entails the creation of new copies.[129] In other words, even if a library has a digital file of a copyright-protected work, for example, an eBook, it cannot transfer this copy, even temporarily, to a patron without creating a copy of the work on the patron's hard drive. Creating that copy prima facie violates the copyright holder's reproduction rights,[130] and the library cannot use the first sale doctrine as a defense against such an action.[131]

The result is that it is widely assumed that libraries need a license to distribute digital copyrighted works to their patrons.[132] As explained below, that legal conclusion has a dramatic impact on the operation of public libraries, their budget and collection, and their ability to serve their patrons and communities.

Libraries can purchase printed books simply and cheaply. In the physical world, copyright owners cannot price discriminate between public libraries and individual buyers.[133] If the publishers demand a high price from libraries—which might reflect libraries' possibly higher willingness to pay and their intensity of book usage—libraries will simply buy those works in the retail markets (or have individuals donate them).[134] In other words, because arbitrage is so easy, publishers can effectively set only one price for their goods: either a relatively lower price that will attract individuals or a higher price that might be begrudgingly acceptable to libraries but that will also price out individuals from the market. Because the market for individuals is so much bigger, publishers set prices to maximize their income from the retail markets.[135] As a practical matter, libraries rarely buy books using retail markets but instead purchase them in bulk from vendors connected with the publishers.[136] However, because of the threat of using retail channels, the prices that libraries pay are comparable to—and in fact, they are often slightly cheaper than—the price charged in retail markets.[137]

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128. *See id.*

129. *See* Rub, *supra* note 17, at 801; *infra* Section III.A.1.

130. *See* 17 U.S.C. § 106(1).

131. Some argue that the library's actions in such cases can be shielded by other defenses, particularly the fair use doctrine. Those claims will be analyzed *infra* Parts III and IV.

132. *See, e.g.*, Cohen, *supra* note 21.

133. *See* Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367, 1373–74 (1998) (explaining how copyright law, and specifically the first sale doctrine, allows some forms of price discrimination but not others).

134. Retail markets, in this context, means those venues by which individuals purchase books and other copyrighted goods. The prime example of such a market is Amazon. *See supra* note 74 (explaining how Redbox used retail markets when movie studios tried to bind it to undesirable terms in wholesaling markets).

135. *See* Rub, *supra* note 119, at 269–71 (explaining such pricing choices).

136. *See* Sarah Moore, *The Book Acquisition Process for Public Libraries*, AUTHOR LEARNING CTR., https://www.authorlearningcenter.com/publishing/distribution-sales/w/libraries/7088/the-book-acquisition-process-for-public-libraries [https://perma.cc/6K94-MM6Y] (last visited Oct. 24, 2024).

137. One 2020 study found that libraries paid on average $14.14 per book sold on Amazon for an average of $16.77 each, which is about a 15% discount. Jennie Rothschild, *Hold On, eBooks Cost HOW Much? The Inconvenient Truth About Library eCollections*, SBTB (Sept. 6, 2020, 2:00 AM), https://smartbitchestrashybooks.com/2020/09/hold-on-ebooks-cost-how-much-the-inconvenient-truth-about-library-ecollections [https://perma.cc/2QSS-KS6W].

The reality in the digital world is dramatically different. Because libraries cannot transfer digital books without a license, retail markets cannot satisfy their needs. Consequently, the publishers can—and do—price discriminate between individuals and libraries. For individuals, eBooks are, on average, slightly cheaper than printed books.[138] Libraries, however, typically pay about three to five times more than retail![139] Moreover, while individuals get a permanent license for any eBook they buy, libraries are typically granted a limited license for two years, during which they can loan the book to one patron at a time.[140] After that period, if the library wants to keep the eBook in its collection, it must purchase another two-year license.[141]

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138. In that same 2020 study, *see id.*, books that were available on Amazon for $16.77 on average were available in digital format on Amazon for $12.77, a 24% discount. *Id.*

139. The most comprehensive dataset I could find on prices was published by ReadersFirst, an organization of nearly 300 libraries worldwide. The dataset encompasses twenty-seven American publishers, including the largest five publishers, who together control over 80% of the trade-book business in the United States. ReadersFirst did not compare the price of retail eBooks to that of library eBooks but rather the price of retail books to that of library eBooks. Four of the big five publishers offer a twenty-four-month license, for which they charge from 216%–298% more than their retail price for books. On average, the current markup is 257%. Considering that the price of retail eBooks is about 76% that of retail printed books, the markup between retail eBooks and library eBooks is about 340%, meaning that libraries pay about 3.4 times more for a two-year license than individuals pay for permanent licenses. *See Publisher Price Watch: Comparative Analysis of the Digital Book Prices and License Models Larger Publishers Offer to Libraries*, READERSFIRST, https://www.readersfirst.org/publisher-price-watch [https://perma.cc/3DWH-6P8K] (last visited Oct. 24, 2024). Similar studies found comparable results. In the 2020 study discussed above, *see supra* notes 137–38, digital books that were available on Amazon for $12.77 were sold to libraries for $45.75, which is about a 358% markup. Rothschild, *supra* note 137. *Compare* Michael Blackwell, Catherine Mason & Micah May, *Ebook Availability, Pricing, and Licensing: A Study of Three Vendors in the U.S. and Canada*, INFO. TODAY, INC. (Nov. 2019), https://www.infotoday.com/cilmag/nov19/Blackwell-Mason-May–Ebook%20Availability-Pricing-and-Licensing.shtml [https://perma.cc/ZMB8-6DKH] (noting that in the researchers' sample, the cost of eBooks was "more than three times the cost . . . for print"), *with* Imke C. Reimers & Joel Waldfogel, *The First Sale Doctrine and the Digital Challenge to Public Libraries* 8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 30392, 2022), https://www.nber.org/papers/w30392 [https://perma.cc/J2AT-YT4C] (reporting on a study finding that "ebook circulation costs libraries four times what print costs per borrowing instance").

140. *See* Rothschild, *supra* note 137.

141. *See id.* The two-year license, while common, is not the only one publishers use. Some publishers, most prominently HarperCollins, offer a twenty-six-circulations license. Such a license allows the library to lend the eBook up to twenty-six times, but it does not restrict how many patrons can read it at the same time. *See* READERSFIRST, *supra* note 139. Some publishers offer less common licenses, including permanent licenses that allow the library to lend it to one user at a time in perpetuity. *See id.* Some libraries use Hoopla for some of their eBook catalogs, a service which charges for every loan by a patron until the library's monthly budget is consumed. *See* Samantha Sied, *What Is Hoopla and How Does It Work?*, MAKEUSEOF (Sept. 28, 2022), https://www.makeuseof.com/what-is-hoopla [https://perma.cc/VEE7-545W]. All those licenses, like the more common two-year license, are extremely expensive.

It should be noted that while, in the past, prominent publishers refused to license their digital content to libraries—an issue that received significant media attention a few years ago, *see, e.g.*, AM. LIBR. ASS'N, COMPETITION IN DIGITAL MARKETS 2 (Oct. 15, 2019), https://www.ala.org/sites/default/files/news/content/mediapresscenter/CompetitionDigitalMarkets.pdf [https://perma.cc/2ZZV-TP4E]—nowadays, all major publishers license their full digital collection. *See, e.g.*, Matt Enis, *Macmillan Ends Library Ebook Embargo,* LIBR. J. (Mar. 18, 2020), https://www.libraryjournal.com/story/macmillan-ends-library-ebook-embargo [https://perma.cc/AKZ6-MRG2]. According to one study, 98.5% of all

As one can expect, those high prices drain libraries' budgets.[142] Moreover, they compel public libraries to be extremely selective with respect to the type of digital content they offer.[143] Under this monetary pressure, libraries are forced to cut out other services, and, even still, many of them can only offer their patrons the most popular bestselling eBooks, often only after requiring them to spend many months on waiting lists.[144] This phenomenon naturally harms libraries and their patrons, the taxpayers whose taxes finance libraries, and lesser-known authors, who are denied both the royalties from libraries' purchases and the possibility of readers discovering them through library access. Indeed, while in the physical world the law shields libraries from the publishers' market power, in the digital world libraries must face its full force, undermining their ability to perform their core mission.

B. THE CHALLENGE OF DIGITAL CONTENT ACQUISITION

The digital lending problem is not merely a problem with libraries' ability to transfer digital files to their patrons. Instead, this problem touches on all stages of the lifecycle of libraries' collections, from acquisition to patron access. In particular, tackling this challenge requires a viable approach that allows libraries both to acquire (meaning, gain access to) digital works and to lend (meaning, transfer that access) to patrons. As the next Section demonstrates, focusing on just one aspect of this problem will not do much.[145]

Libraries can acquire digital content in two ways: by digitalizing (meaning, scanning) printed materials and by directly obtaining digital content from publishers. Each method has its pros and cons. Scanning leads to a relatively more legally secure, albeit limited, digital catalog, whereas acquiring digital content offers a broader collection but comes with a minefield of practical and legal complexities.

Acquiring printed books for scanning is relatively straightforward and cost-effective.[146] Once scanned, these books become eBooks that can be lent to

bestsellers were available in digital form in libraries in 2020. *See* Rothschild, *supra* note 137. The issue is therefore not a complete refusal to license but the highly restrictive terms of those licenses and their high price.

142. *See, e.g.*, Daniel A. Gross, *The Surprisingly Big Business of Library E-books*, NEW YORKER (Sept. 2, 2021), https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books (describing some of the impact of the shift to eBooks on public libraries); Heather Kelly, *E-Books at Libraries Are a Huge Hit, Leading to Long Waits, Reader Hacks and Worried Publishers*, WASH. POST (Nov. 26, 2019, 7:00 AM), https://www.washingtonpost.com/technology/2019/11/26/e-books-libraries-are-huge-hit-leading-long-waits-reader-hacks-worried-publishers (same).

143. *See* Cohen, *supra* note 21 (discussing the high costs of digital lending, and noting that "public libraries have highly constrained budgets, and in the pursuit of shorter hold queues, this spending will naturally gravitate toward multiple copies of the same ebooks, a sliver of the book market—high-demand genres, recently released books, and best sellers—thereby reducing the library's scope").

144. *See id.*

145. *See infra* Section II.C (discussing how the European Union failed to solve the digital lending problem by addressing only the lending challenge).

146. *See supra* text accompanying notes 133–37.

patrons. Later Parts of this Article will delve into the legality of this process,[147] but at this stage, it suffices to note that under certain conditions and subject to specific limitations, these actions should be considered fair use, thus exempting them from copyright liability. However, scanning can be costly, particularly if high-quality output is desired,[148] and it doesn't provide access to materials exclusively available in digital format (often known as "born-digital" content).

As an alternative to scanning, libraries can acquire digital content originally created and distributed by publishers, including exclusively digital resources. Libraries can, of course, access and lend this content by purchasing specific licenses, but these are often prohibitively expensive and restrictive.[149]

The difficult question is whether libraries can lend eBooks purchased from platforms like Amazon, or accept eBook donations, without buying dedicated—and expensive—licenses from the publishers. As further explained below, as a practical matter, because acquired digital content is provided with strings attached—both legal and technological—under current law, the answer is probably no.

Redistributing a publisher's digital content might be fair use,[150] but publishers often ensure that it will be restricted by contractual and technical limitations. Starting with contractual restrictions, publishers may include clauses preventing large-scale redistribution in their standard form agreements, enforceable through breach of contract claims. However, contract law's effectiveness in controlling the mass distribution of information goods is limited.[151] For instance, a library might receive an eBook from a third party, such as a donor, without being bound by the original purchase contract. Moreover, when it comes to mass distribution of information goods, it can be quite challenging for the distributor (meaning, the publishers) to meet their evidentiary burden and prove that a library accepted the terms of a contract.[152] Finally, even if the formation of such contracts can be proved, and even if they are enforceable, which is questionable,[153] the remedies

147. *See, e.g.*, *infra* Section IV.A.2.

148. To keep costs at bay, libraries can collaborate with one another and with commercial entities to scan printed materials on a large scale. *See, e.g.*, Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 90–92, 105 (2d Cir. 2014) (describing one such initiative involving Google and holding it legal as fair use).

149. *See supra* text accompanying notes 138–41.

150. It does not seem to matter, from a fair use perspective, whether the digitalization is done by libraries or publishers. *See infra* Sections IV.A, IV.B (discussing various solutions to the digital lending problem and their legality under the fair use defense).

151. The discussion on contractual limitations in this paragraph is based on Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contract Conflict*, 103 VA. L. REV. 1141, 1208–15 (2017) (explaining why "contracts are not an effective tool to exercise tight control on a large scale over information and information goods").

152. *See, e.g.*, Shake Shack Enters. v. Brand Design Co., 708 F. Supp. 3d 515, 523–26 (S.D.N.Y. 2023) (rejecting a breach of contract claim because the plaintiff couldn't show when and who, if any, within the defendant organization consented to its standard form agreement).

153. *See* Guy Rub, X Corp. v. Bright Data *Is the Decision We've Been Waiting for*, TECH. & MKTG. L. BLOG (May 17, 2024), https://blog.ericgoldman.org/archives/2024/05/x-corp-v-bright-data-is-the-decision-weve-been-waiting-for-guest-blog-post.htm [https://perma.cc/3WCG-XBMU] (discussing the latest developments on this question and whether such contracts can be unenforceable due to the conflict

for breach of contract are often limited.[154] Indeed, on their own, libraries might be able to operate regardless of the publishers' contractual restrictions.

The second limitation—and the more challenging of the two—involves encryption. Publishers commonly use encryption-based Digital Rights Management (DRM) tools to technically restrict the use of digital content, completely preventing redistribution even by purchasers.[155] This encryption hinders actions like eBook donations to libraries or redistributing materials to patrons. Libraries lack the technical knowledge and means to circumvent DRMs, and seeking third-party assistance is legally precarious because the Digital Millennium Copyright Act ("DMCA") prohibits creating or distributing tools to circumvent them.[156] With few exceptions, courts are reluctant to exempt such actions, even if they are intended for fair use under the Copyright Act.[157]

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preemption doctrine); Guy A. Rub, *Copyright and Copying Rights*, 98 N.Y.U. L. REV. ONLINE 342, 349–52 (2023) [hereinafter Rub, *Copyright and Copying Rights*], https://nyulawreview.org/online-features/copyright-and-copying-rights/ [https://perma.cc/L7F3-JWF5] (describing the circuit split on the application of the express preemption doctrine to such contracts, which widened following the Second Circuit decision in *ML Genius Holdings LLC v. Google LLC*, No. 20-3113, 2022 WL 710744 (2d Cir. Mar. 10, 2022)).

154. *See* Rub, *supra* note 151, at 1213–15.

155. *See* Niva Elkin-Koren, *The Changing Nature of Books and the* Uneasy Case for Copyright, 79 GEO. WASH. L. REV. 1712, 1719 (2011) (discussing the limitations that DRMs place on eBook usage). In practice, both libraries and individuals typically access the publishers' digitized content through vendors who are hosting it, the most popular of which, by far, is OverDrive. *See What Are the Different Reading Options for eBooks on My Library's OverDrive Website?*, OVERDRIVE: HELP (Sept. 3, 2024, 1:05 PM), https://help.overdrive.com/en-us/0012.html [https://perma.cc/CY6F-PZT7] (describing all the DRMs that are at play when using the company's services to access digital content). The use of those third parties to gain access raises, *inter alia*, privacy concerns. *See* Brief for *Amici Curiae* Center for Democracy & Technology et al. in Support of Defendant-Appellant and Reversal at 21–26, Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 (2d Cir. 2024) (No. 23-1260). Indeed, while OverDrive explicitly states that it will not sell its users' data, *OverDrive Privacy Policy*, OVERDRIVE, https://company.cdn.overdrive.com/policies/privacy-policy.htm [https://perma.cc/93FY-N9VA] (last visited Oct. 25, 2024), and while in many cases it does not have access to the readers' name but only to their library ID number, *id.*, at a minimum, that company and others like it lack the historic tradition, the experience, and the framework, often backed by laws, of libraries in fighting for their readers' privacy. *See* Brief for *Amici Curiae* Center for Democracy & Technology et al. in Support of Defendant-Appellant and Reversal, *supra*, at 9 (explaining that "[l]ibraries' longstanding role as guardians of reader privacy is reflected in law and in established library principles and practices"). Granted, states can use their police power to regulate the operation of those third parties to guarantee the readers' privacy much as they did with libraries—a freedom they lack when it comes to regulative licensing markets. *See infra* Section IV.C. A full analysis of those options and the impact of digital lending, through libraries and outside of libraries, on readers' privacy is beyond the scope of this work.

156. *See* 17 U.S.C. § 1201(b).

157. *See* Green v. U.S. Dep't of Just., 111 F.4th 81, 87, 93–94 (D.C. Cir. 2024) (noting that "[a]n individual who circumvents technological protection measures on a copyrighted work to make fair use of the work is immunized by the fair use defense from liability for infringing the copyright[, b]ut . . . her conduct may nonetheless violate the DMCA's anticircumvention provision," and going on to hold that the DMCA is nevertheless not unconstitutional); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000) ("Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so . . . ."), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001). This approach is not accepted by all courts. *Compare* Chamberlain Grp., Inc. v. Skylink Techs., Inc., 381 F.3d 1178, 1204 (Fed. Cir. 2004) (suggesting that actions that do not infringe on the plaintiff's copyright do not violate

The encryption problem makes it impractical for libraries to use the publishers' digital content without purchasing a dedicated (and expensive) license. Therefore, unless Congress amends the law—a possibility explored in Part IV below—libraries will only consider using digital content without a dedicated license if it was digitized by them or on their behalf and is free of DRMs.

C. A CASE DTUDY: THE FAILURE OF EUROPEAN UNION LAW

The preceding Section emphasized that a comprehensive solution to the digital lending problem must enable libraries to both acquire and distribute digital content. This Section will explore the European Union's experience, illustrating how any less complete approach is bound to fail.

There is a common misconception that European Union law solved the digital lending problem.[158] It did not. Indeed, as European librarians will attest, while the European Union laws pertaining to digital lending are quite different from those of the United States, the reality that libraries face is remarkably similar.

The reason for this misconception has to do with the 2016 celebrated decision of the Court of Justice of the European Union in *Vereniging Openbare Bibliotheken v. Stichting Leenrecht* (*VOB*).[159] In that case, a Dutch library placed an eBook on its server and allowed users to "borrow" a copy by downloading it.[160] The scheme was based on a model called "one copy, one user," which allows only one user to access the eBook at any time.[161] Once the lending period expired, the patron's copy was disabled, and the eBook could be transferred to another.[162] The Court of Justice ruled that this scheme is similar to the lending of printed books, and therefore the law of the relevant country (here, the Netherlands) may permit such lending under its PLR system.[163]

The opinion in *VOB* was celebrated, and still is,[164] as a great win for libraries' e-lending. Commentators suggested that "[l]ibraries can now lend e-books."[165] A prominent blog noted, "CJEU says that EU law allows e-lending."[166] A

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the DMCA), *with* MDY Indus., LLC v. Blizzard Ent., Inc., 629 F.3d 928, 943–52 (9th Cir. 2010) (rejecting this approach). *See also Green*, 111 F.4th at 96 n.1 (describing the split of authorities).

158. *See infra* notes 165–68 and accompanying text.

159. Case C-174/15, Vereniging Openbare Bibliotheken v. Stichting Leenrecht, ECLI:EU: C:2016:856 (Nov. 10, 2016).

160. *See id.* ¶ 52.

161. *See id.*

162. *See id.*

163. *See id.* ¶ 14, 53–54; *see also* Lothar Determann, *Digital Exhaustion: New Law from the Old World*, 33 BERKELEY TECH. L.J. 185, 219–21 (2018) (analyzing *VOB*). For an explanation of the EU's PLR scheme, see *supra* text accompanying notes 83–97.

164. Internet Archive recently argued that the decision in *VOB* shows that the practice of Controlled Digital Lending (CDL) is permitted under international law. *See* Defendant Internet Archive's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment at 29–32, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023) (No. 20-cv-04160), *aff'd*, 115 F.4th 163 (2d Cir. 2024). CDL and this case will be discussed at length in Section IV.A. below.

165. Margaret Gray & Nicholas Saunders, *Libraries Can Now Lend e-Books*, BRICK CT. CHAMBERS (Feb. 12, 2016), https://www.brickcourt.co.uk/news/detail/libraries-can-now-lend-e-books [https://perma.cc/XJ7Q-V95Q].

166. Eleonora Rosati, *Breaking: CJEU Says that EU Law Allows e-Lending*, IPKAT (Nov. 10, 2016), https://ipkitten.blogspot.com/2016/11/breaking-cjeu-says-that-eu-law-allows-e.html [https://perma.cc/FJ3F-GKP7].

multinational law firm summarized the case, stating that "the lending of an electronic book (an e-book) may, under certain conditions, be treated in the same way as the lending of a traditional book."[167] The Federation of European Publishers, however, stated that it was shocked by the decision.[168]

But those sentiments were mostly exaggerated. While the decision in *VOB* might theoretically support e-lending, its practical implications are minimal. *VOB* concerns solely the rights of public libraries with respect to copies of eBooks they own, but it completely ignores the acquisition problem. In other words, it says nothing as to how a public library might get to own such a copy.

The 2019 decision of the Court of Justice of the European Union in *Tom Kabinet* removed any doubts about the minimal practical significance of *VOB*.[169] Tom Kabinet was sued by groups of publishers for operating an online marketplace for "used" eBooks.[170] The Court of Justice sided with the publishers, holding Tom Kabinet's actions were infringing on their copyright because the principles of copyright exhaustion do not apply to eBooks.[171]

The combination of the two decisions, *VOB* and *Tom Kabinet*, creates a peculiar legal Catch-22. *VOB* gives public libraries broad latitude to lend eBooks they own, while *Tom Kabinet*, by rejecting digital exhaustion, means that the *only* way for libraries to own eBooks is by transacting with the publishers.[172] The European publishers, much like their American counterparts, charge prices that reflect libraries' intense use of those digital books. Therefore, not surprisingly, in Europe, like in the United States, libraries face significant issues in lending eBooks—for example, refusal to license, embargoes on new releases, short-term contracts, and high prices—that do not exist in the physical world.[173]

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167. Charlotte Hilton & Rebecca Pakenham-Walsh, *CJEU Lends Itself to the Digital Age*, FIELDFISHER (Nov. 22, 2016), https://www.fieldfisher.com/en/services/intellectual-property/intellectual-property-blog/cjeu-lends-itself-to-the-digital-age [https://perma.cc/2RWV-XPZ7].

168. *Id.*

169. Case C-263/18, Nederlands Uitgeversverbond v. Tom Kabinet Internet BV, ECLI:EU:C:2019:1111 (Dec. 19, 2019).

170. *See id.* ¶ 2; Seth Niemi, *Managing Digital Resale in the Era of International Exhaustion*, 30 IND. J. GLOB. LEGAL STUD. 375, 384 (2023).

171. *See* Case C-263/18, *Nederlands Uitgeversverbond*, ECLI:EU:C:2019:1111 ¶ 72; Robert Rose, *Does the Principle of Exhaustion Apply to Digital Media? The CJEU Provides Clarity*, BIRD&BIRD: MEDIAWRITES (Jan. 17, 2020), https://mediawrites.twobirds.com/post/102j3qk/does-the-principle-of-exhaustion-apply-to-digital-media-the-cjeu-provides-clarit [https://perma.cc/T2JY-33V9].

172. It should be noted that European Union law explicitly allows libraries to digitalize their printed collection, *see* Case C-117/13, Technische Universität Darmstadt v. Eugen Ulmer KG, ECLI:EU:C:2014:1795, ¶ 59(2) (June 5, 2014). However, as the Court of Justice of the European Union also clarified, libraries may provide access to those digitized files through dedicated terminals in the library. As this ruling is rooted in a specific exception under the European Union's main copyright directive, it is doubtful that granting online access to those files would be legal. *See* Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) 10, 16–17 (providing exception, under certain conditions, for access on "dedicated terminals" within "libraries, educational establishments or museums").

173. *See, e.g.*, EBLIDA EGIL, FIRST EUROPEAN OVERVIEW ON E-LENDING IN PUBLIC LIBRARIES 11 (June 2022), http://www.eblida.org/News/2022/first-european-overview-elending-public-libraries.pdf [https://perma.cc/6QUE-UWMA]; DAN MOUNT, A REVIEW OF PUBLIC LIBRARY E-LENDING MODELS 17

Indeed, the European Union failed because it eased the restrictions on the redistribution of digital content but not on the acquisition thereof. The following Parts consider various approaches that tackle both.

III. REJECTING THE EXTREME APPROACHES

Both libraries and publishers have very strong—and conflicting—views of the digital lending problem. Many librarians deeply believe that eBooks should be treated exactly like books, meaning that once offered for sale, they can change hands as freely as books can. Most publishers, on the other hand, think that the law, without limitations, should just enforce their exclusive rights under copyright and let the market—more specifically, the publishers' licenses—determine who gets to use eBooks and how. This Part explores those two approaches and explains that both are unbalanced and misguided from a social welfare perspective. Once those simplistic solutions are rejected, the next Part will explore different, more balanced approaches for this challenging problem.

A. UNBALANCED APPROACH I: UNRESTRICTED DIGITAL EXHAUSTION

Many librarians and a few scholars argue that the solution to the e-lending problem is to treat eBooks like books and have a right to a "digital first sale."[174] A full digital exhaustion regime would mean that once eBooks are offered to the public, their purchasers will be allowed to transfer them freely as long as no additional copies are created. Under such a rule, the publishers, much like in the physical world, would be unable to charge libraries a different price than that charged to individuals. If a publisher tried to charge a library more or impose any additional terms thereof, libraries could simply use retail markets, for example, Amazon, to buy eBooks and lend them to patrons. This Section explains why this approach is inconsistent with black letter law and is problematic from a policy perspective.

1. The First Sale Doctrine Currently Does Not Apply to Digital Lending

As noted in Section I.A, public libraries in the United States (as well as in many other countries) are operating in the shadow of the first sale doctrine, now

(2014), https://www.kirjastot.fi/sites/default/files/content/Rapporten-Public-Library-e-Lending-Mode ls.pdf [https://perma.cc/MVC4-P9CH].

174. *E.g.*, Andrew Albanese, *OverDrive CEO: Publishers, Librarians Still Searching for Fair e-Book Lending Models*, PUBLISHERS WKLY. (Feb. 26, 2021), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/85694-overdrive-ceo-publishers-librarians-still-searching-for-fair-e-book-lending-models.html (quoting Michael Blackwell, the Director of St. Mary's County Library in Maryland). Some libraries argue that the first sale doctrine already covers digital distribution, although they ask for clearer language to be added to the Copyright Act. PETERS, *supra* note 114, at 45; *see also* Ariel Katz, *Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge*, 13 I/S 81, 84, 88–95 (2016) (arguing for the "plausibility of digital exhaustion"); Clark D. Asay, Kirtsaeng *and the First-Sale Doctrine's Digital Problem*, 66 STAN. L. REV. ONLINE 17, 21–23 (2013) (arguing that the first sale doctrine should shield digital transfers and that the market will be able to resolve the challenges that it entails).

codified in § 109(a) of the Copyright Act.[175] That doctrine, however, does not allow libraries to distribute digital works.[176]

Any time a digital file is being sent, a new copy is stored on the recipient's computer. Therefore, technically, digital files are not transferred from one device to another, but they are being copied—"reproduced" in copyright law lingo.[177] The Copyright Act provides copyright owners with an exclusive right to control their reproduction—the creation of new copies—separate from the right to control the distribution—the transfer of possession of such copies.[178] Section 109(a), the Copyright Act's first sale doctrine provision, opens with "[n]otwithstanding the provisions of section 106(3) [the distribution right],"[179] making it crystal clear that it provides a defense only against an alleged infringement of the distribution right.[180] Therefore, sending a digital file that embodies a copyright-protected work exposes the sender to liability for creating a new copy on the sender's device.[181]

Those who argue that the copyright exhaustion doctrine applies to digital transfers often make two arguments.[182] The first suggests that sending a digital file does not entail its reproduction, at least not if the sender simultaneously deletes the copy from its own device.[183] That claim, however, is inconsistent with the text of the Copyright Act. Section 106(1), the reproduction right section, states that the copyright owner has an exclusive right "to reproduce the copyrighted

175. 17 U.S.C. § 109(a).

176. While this Section focuses on the inapplicability of the first sale doctrine in the digital space, as noted in Section II.B.1, the unrestricted digital exhaustion approach is also challenging because publishers add additional restrictions on the use of digital content through contracts and encryption.

177. *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 659 (2d Cir. 2018) (holding that digital distribution entails reproduction).

178. *See* 17 U.S.C. § 106(1) (providing copyright owners with "the exclusive rights . . . to reproduce the copyrighted work"); *id.* § 106(3) (providing copyright owners with "the exclusive rights . . . to distribute copies . . . of the copyrighted work").

179. 17 U.S.C. § 109(a).

180. This Part explains that the main obstacle to applying the first sale doctrine to digital distribution is that such transfers entail reproduction. A different argument, which is quite common especially in the library literature, is that the first sale doctrine does not apply because publishers distribute eBooks under agreements that both restrict lending and classify the transactions as licenses and not sales, and the first sale doctrine, as the name suggests, applies only to sales. *See, e.g.*, Wu, *supra* note 123, at 140–42. As popular as this claim is, it is mostly misguided. As I explain at length elsewhere, regardless of the language of the contract, a transaction that has the features of a sale is a sale, especially as far as copyright law is concerned. *See* Guy A. Rub, *Against Copyright Customization*, 107 IOWA L. REV. 677, 710–11 (2022). Thus, from this perspective, as a matter of copyright law's distribution rights, a user that purchased a digital book could donate it to a library. The real problem—the one that this Article focuses on—is that (regardless of what any contract provides) such a donation entails reproduction.

181. *See ReDigi Inc.*, 910 F.3d at 659. This does not mean that *any* digital distribution is *automatically* infringing. It might be shielded by other defenses, in particular, the fair use doctrine. That possibility is discussed *infra* in Section IV.A. However, fair use is fact specific, while the first sale doctrine provides a broad defense for entire classes of use. That broad defense, this Section explains, does not apply to digital distribution.

182. *See, e.g.*, Katz, *supra* note 174, at 92–93.

183. *See* Brief and Special Appendix for Defendants-Appellants [Redacted] at 24–25, *ReDigi Inc.*, 910 F.3d 649 (No. 16-2321).

work *in copies*."[184] The Copyright Act defines "copies" as "material objects . . . in which a work is *fixed*."[185] A work is considered "fixed" when "its embodiment . . . is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[186] When a digital book is saved on a device, it can immediately be opened and read (that is, "perceived"), which makes it fixed on the hard drive. This, in turn, means that the saved file itself is a copy of the copyrighted work. Digital transmission creates a different physical file in another material object (that is, on the recipient's hard drive), an act that, under § 106(1), is within the copyright owner's exclusive right of reproduction. Indeed, as far as the Copyright Act is concerned, the mere fact that the work is saved on the recipient's device is enough to trigger the prima facie right of reproduction, regardless of what happens with the sender's copy.[187]

The second argument—the more significant of the two—is that the first sale doctrine, as codified in § 109(a) of the Copyright Act, is just a part, possibly a small one, of a broader copyright exhaustion doctrine. That doctrine, the argument goes, gives owners of copies of a work a set of rights incidental to personal property ownership, including the right to transfer those copies to others freely.[188]

This argument is supported by a historical account of the development of the first sale doctrine. The Supreme Court famously noted that "[t]he 'first sale' doctrine is a common-law doctrine with an impeccable historic pedigree," referring to the centuries-old notion of "common law's refusal to permit restraints on the alienation of chattels."[189] The argument is that when Congress first codified the first sale doctrine in 1909, courts already recognized broader rights that owners of copies got in their purchased goods, and those rights should impact the current scope of the doctrine.[190] For example, in 1901, the Seventh Circuit held that the "right of ownership in the book carries with it and includes the right to maintain the book as nearly as possible in its original condition" and therefore a book owner is entitled to restore it, including by reproducing and replacing a damaged cover.[191]

That argument is not without doubt as a historical matter and seems wrong as a matter of black letter law. Despite what the Supreme Court suggested in the statement quoted above, I have elsewhere shown that the common law probably did not include a clear, unlimited prohibition on post-sale control and, even more so,

184. 17 U.S.C. § 106(1) (emphasis added).

185. *Id.* § 101 (emphasis added).

186. *Id.*

187. *See ReDigi Inc.*, 910 F.3d at 656–64 (reaching a similar conclusion with respect to digital music files).

188. *See* Perzanowski & Schultz, *supra* note 17, at 892 ("Rather than accepting section 109 as the sole embodiment of copyright exhaustion, we argue that exhaustion is deeply rooted in a common law tradition that embraces the first sale rule and extends beyond it.").

189. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 538 (2013).

190. *See* Perzanowski & Schultz, *supra* note 17, at 912–13 ("These early cases . . . reveal an exhaustion principle much broader than first sale's limitation on the distribution right.").

191. Doan v. Am. Book Co., 105 F. 772, 777 (7th Cir. 1901).

that the rationale for any common law limitations, to the extent they existed, is not easily applicable to digital distribution of copyright-protected goods.[192]

Relying on copyright opinions that predated the 1909 codification of the first sale doctrine is also problematic for two reasons.[193] First, those opinions, and there are only a handful of them,[194] seem rather narrow in scope because none of them clearly state that owning a copy entails an unlimited right to reproduce it. Granted (and importantly), some of them saw a right incidental to ownership that is broader than the codified first sale doctrine—like the Seventh Circuit recognition of the right to repair a damaged book—but they did not state that ownership of a copy of a copyrighted work entails an unrestricted right to create more copies, even temporarily.[195]

More crucially, even if one concludes that restraining the transfer of digital files is somehow inconsistent with the common law, it is hard to see how that would overcome the Copyright Act's clear language. It is well established that if Congress wants to depart from common law principles, the statute "must 'speak directly' to the question."[196] Therefore, if possible, federal statutes are interpreted to be consistent with the common law.[197] However, since its first codification in

192. In claiming that the common law would reject post-sale restrictions on copyright-protected goods, the Supreme Court heavily relied on a seventeenth-century statement by Lord Coke suggesting that restraints on sold chattel are unenforceable. *See Kirtsaeng*, 568 U.S. at 538–39. But that reliance is highly problematic. Lord Coke's reasoning for refusing to enforce restrictions on sold chattel relied exclusively on such restraints being "repugnant to the nature of a fee." *See* Rub, *supra* note 17, at 760. That reasoning, however, was heavily criticized by later prominent common law commentators as unsatisfactory. *See id.* Moreover, if "the nature of [the] fee" makes post-sale restrictions on chattel unenforceable, that does not automatically mean that restrictions that are part of intellectual property law should be treated the same—"the nature of [the] fee" is, after all, quite different. *See id.* In fact, the common law treatment of restraints on alienation can better be explained as an attempt to promote certain public policies related to the concentration of land in feudal England. *See id.* at 760–61. Finally, even if one can conclude that the common law was indeed hostile to post-sale IP-related restrictions on the transferability of chattel, it is not obvious that the same logic applies to digital goods, the distribution of which does not entail any transference of chattel. In other words, the Supreme Court already seems to have extended the logic of the common law beyond its original scope, but expanding it further to encompass digital distribution is a non-trivial broadening that the historic evidence does not support. For a more detailed analysis of the common law position and its application to digital distribution, see *id.* at 760–62 and Sean M. O'Connor, *The Damaging Myth of Patent Exhaustion*, 28 TEX. INTELL. PROP. L.J. 443, 445–48 (2020), which questions the common conception concerning the historical pedigree of IP exhaustion doctrines.

193. A similar (although not identical) argument was recently rejected by the Southern District of New York. *See* Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 385 (S.D.N.Y. 2023), *aff'd*, 115 F.4th 163 (2d Cir. 2024). That decision, as well as the Second Circuit opinion in this case, will be discussed in greater length in Section IV.A.2 below.

194. *See* Perzanowski & Schultz, *supra* note 17, at 912–22 (discussing those decisions).

195. The Seventh Circuit similarly saw it as a rather narrow right, stating that "[i]t is unnecessary, as we think, to consider the limitations of that right." *Doan*, 105 F. at 777.

196. United States v. Texas, 507 U.S. 529, 534 (1993) (quoting Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978)).

197. *See* Ariel Katz, Aaron Perzanowski & Guy A. Rub, *The Interaction of Exhaustion and the General Law: A Reply to Duffy and Hynes*, 102 VA. L. REV. ONLINE 8, 10–17 (2016) (discussing this rule of interpretation and its application in the context of the first sale doctrine).

1909,[198] the Copyright Act's first sale doctrine has "[spoken] directly to the question" by stating clearly and unambiguously that the first sale doctrine is only a defense against violations of the right to distribute copies.[199] Arguing that, notwithstanding this provision, Congress meant to preserve a highly similar parallel exemption to the right of reproduction without ever codifying it, seems highly unreasonable.

In conclusion, as the Second Circuit also held,[200] it is hard to see how the Copyright Act, as currently drafted, permits full digital exhaustion, where the purchaser of a digital file is allowed to transfer it to others without the permission of the copyright owner.

2. As a Matter of Policy, Expanding the First Sale Doctrine Is Problematic

The previous Section, which focuses on the text of the Copyright Act, might appear overly formalistic. By prioritizing legal technicalities over substance, it arguably eradicates an important copyright law principle by applying statutory language written decades ago when the realities of twenty-first-century digital distribution were unimaginable. However, even if one is a staunch critic of formalism, it is oversimplified and, this Section argues, wrong to assume that applying the first sale doctrine to digital distribution will just transfer the balance that Congress fashioned in the physical world to the digital one.

Part I explained that while the law in the United States is highly supportive of libraries, especially public libraries, that generosity does not significantly harm the publishing industry because it is balanced by restrictive architecture, especially the frictions within that system—the inconvenience of using physical libraries.[201] One cannot understand the law without understanding the architecture. But that architecture is fundamentally different in the digital world in at least two respects.[202] First, digital distribution is instantaneous, and second, it does not meaningfully deteriorate in quality over time. As this Section explains, those two features profoundly affect the economics of digital distribution.

If unrestricted digital distribution was legal, its speed could have undermined sales in ways that do not exist in the physical world. Consider, for instance, a popular work in high demand. While many individuals might want to access the work, many fewer people want to access it *simultaneously*. Penguin Random House sold millions of copies of Barack Obama's 2020 memoir, *A Promised Land*, in the United States, including thousands that were purchased or licensed

198. The Copyright Act of 1909, Pub. L. No. 60-349, ch. 320, § 41, 35 Stat. 1075, 1084 (noting that the Act does not "forbid, prevent, or restrict *the transfer* of any copy of a copyrighted work the possession of which has been lawfully obtained" (emphasis added)).

199. *See supra* text accompanying notes 178 and 181.

200. *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 655–60 (2d Cir. 2018).

201. *See supra* Section I.B.

202. *See* Brief of 24 Former Government Officials, Former Judges, & IP Scholars as *Amici Curiae* in Support of Plaintiffs-Appellees at 4, Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 (2d Cir. 2024) (No. 23-1260) ("Physical and digital copies simply are different, and it is not an accident that first sale applies only to the distribution of physical copies.").

by public libraries.[203] But how many readers have read the book at any given moment in time? Significantly fewer. When a library buys *a printed copy* of a book, it will typically lend it to one reader at a time for a period of two to three weeks.[204] Most of this time, the book will be in a patron's possession but not read or otherwise used. Under this scheme, potential readers might need to wait months to read the book. Many of them will give up and buy the book or pressure the library to buy additional copies. The wear and tear on such a popular book will similarly cause the library to purchase additional copies.[205]

But a digital library can (in theory) work very differently. If a library is allowed to create copies of the eBook and lend them freely—a position that even the strongest library advocates do not support—it can, of course, buy one copy to serve all its patrons. But even if libraries preserve the one-copy-one-reader principle, meaning that each purchased eBook will be accessible to only one reader at any given time—a common position among some library advocates[206]—they can use the speed of digital distribution to have each eBook serve a much larger population than a printed book.

For example, if digital exhaustion exists, a library can decide that one can borrow an eBook for no more than an hour or two. A library can also set forth a system that considers the eBook returned once the patron is not actively reading it.[207] Patrons will then borrow and hold eBooks only when they actually read them. This can be done automatically to make it possible for ten digital copies to serve the needs of hundreds of patrons. Interlibrary loans, which are instantaneous in the digital world, would further reduce the need to purchase additional eBooks. The New York public library system, for instance, would be able to let a Los Angeles public library system use some of its eBooks when its patrons are asleep. This scheme is great for libraries but disastrous for publishers[208]: First, libraries will purchase many fewer eBooks than books. Second, getting those eBooks to

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203. *See* A Promised Land *by Barack Obama Sells More than 3.3 Million Units in U.S. and Canada in Its First Month of Publication*, PENGUIN RANDOM HOUSE (Dec. 17, 2020), https://global.penguinrandomhouse.com/announcements/a-promised-land-by-barack-obama-sells-more-than-3-3-million-units-in-u-s-and-canada-in-its-first-month-of-publication [https://perma.cc/Q6UK-RFYZ]; Gross, *supra* note 142 (documenting the hundreds of copies of the book purchased by the New York Public Libraries system).

204. *See, e.g., Borrowing Materials*, N.Y. PUB. LIBR. (Sept. 1, 2010), https://www.nypl.org/help/borrowing-materials [https://perma.cc/9SUJ-VLBQ] (noting most of the library's books may be borrowed for two or three weeks at a time); *Borrower Services*, L.A. PUB. LIBR., https://www.lapl.org/about-lapl/borrower-services [https://perma.cc/W77F-F5TA] (last visited Oct. 25, 2024) ("Most library materials are loaned for 3 weeks.").

205. *See supra* text accompanying note 115.

206. *See supra* note 174 and accompanying text.

207. Libraries might currently lack the technical knowledge to operate such a system, but if such a system were legal, private companies would offer it, and libraries might learn how to implement it. The illegality of such a system under current law explains why those systems have not been developed or implemented, and it prevents us from empirically proving or even measuring the claims made in this Section.

208. *Cf.* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 917–18 (2002) (comparing file-sharing services like Napster to "geographically located, paper-text librar[ies]," which "effectively serve[] a limited number of people").

patrons would be easy, convenient, and, most importantly, fast, as the waiting lists would be short. This would, of course, dramatically impact the patrons' buying–borrowing decisions. Why would patrons buy an eBook when they can instantly get the exact same product for free? Third, as eBooks do not wear and tear, the publishers will not get to sell additional copies to libraries after the initial sale to replace damaged ones.

As a case study, consider the market for law school casebooks.[209] Typically, these books, especially for mandatory courses, sell well since each student needs a personal copy. Relying on libraries isn't practical because it would require them to buy as many casebooks as there are students, an unrealistic expectation. Indeed, in the physical world, students cannot share their casebooks, both because of the time it would take to transfer the books and because law students tend to severely damage their poor innocent casebooks.

However, in a hypothetical scenario where digital exhaustion is permissible, the dynamics change significantly. Libraries could purchase a limited number of digital copies and lend them out based on students' immediate needs. Since not every student reads the casebook simultaneously, the number of copies required would drop substantially. This is especially true if libraries, particularly across different time zones, collaborate and share their digital resources (as they do for printed resources), thus drastically reducing the total number of digital copies needed compared to the student population. While this approach could be advantageous for libraries and students, it poses a significant threat to publishers and authors. It would fundamentally alter the ecosystem, creating a landscape vastly different from that of the physical book market.

Indeed, while the frictions of the physical world explain and justify the generosity of the law, the lack of meaningful frictions in the digital world does not allow the law to be as permissive.[210] Otherwise, libraries will serve almost the entire demand for eBooks. Unrestricted digital lending is just too efficient and too attractive, such that it will cannibalize and overpower the publishers' selling market.[211]

The conclusion in this Section is consistent with those of two comprehensive studies conducted by the United States Copyright Office in 2001 and the

209. *See* Rub, *supra* note 17, at 804–05 (discussing this example). Of course, casebooks, like any other subset type of books, have their unique features. For example, maybe casebooks are being read at different hours than other books. Nevertheless, this example demonstrates the issue of legally unrestricted digital distribution.

210. *See* Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211, 1259–60 (2015) ("[W]e cannot simply port the exhaustion rules of the analog world over to the digital marketplace."); Rub, *supra* note 17, at 803 ("[D]igital exhaustion might cause more harm than good, especially because it has the potential to cause massive damage to incentives.").

211. The publisher might respond to such a situation in a variety of ways. For example, they can raise prices dramatically, which might allow them to sell only to libraries while excluding private buyers. Such a scheme seems to be obviously undesirable. *See* Rub, *supra* note 17, at 770–73 (discussing such pricing decisions when market segregation is precluded); *see also infra* Section IV.B.1 (discussing the problem of replacing the private markets for eBooks with a fully publicly financed system).

Department of Commerce, through the United States Patent and Trademark Office, in 2016.[212] The two agencies determined that the first sale doctrine does not currently allow digital dissemination.[213] More importantly, both agencies concluded that the Copyright Act should not be amended to add a comprehensive digital first sale. The Copyright Office explained, in a much-cited section, that

> [p]hysical copies of works degrade with time and use, making used copies less desirable than new ones. Digital information does not degrade, and can be reproduced perfectly on a recipient's computer. . . . Time, space, effort and cost no longer act as barriers to the movement of copies, since digital copies can be transmitted nearly instantaneously anywhere in the world with minimal effort and negligible cost. The need to transport physical copies of works, which acts as a natural brake on the effect of resales on the copyright owner's market, no longer exists in the realm of digital transmissions.[214]

In other words, the Copyright Office points out the lack of meaningful friction in digital markets as a reason to deny digital exhaustion. The Department of Commerce similarly stated that "[a]pplying Section 109 to digital transmissions could risk causing substantial harm to the primary market for creative works (and to the income of creators as well as copyright owners)."[215]

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212. The Copyright Office Report was triggered by § 104 of the DMCA, enacted in 1998. That section required the Copyright Office to "evaluate . . . the relationship between existing and emergent technology and the operation of [17 U.S.C.] section[] 109" and to submit a report to Congress within twenty-four months, which would include "any legislative recommendations." Digital Millenium Copyright Act of 1998 (DMCA), Pub. L. No. 105-304, § 104, 112 Stat. 2860, 2876–77. The Copyright Office received thirty-four written comments concerning § 109 (including from the American Library Association and the Association of American Publishers) and heard dozens of witnesses. *See* PETERS, *supra* note 114, at 33–34, app. 5. On August 29, 2001, it issued its 166-page "DMCA Section 104 Report." *Id.*

The process conducted by the Department of Commerce was similarly extensive. In July 2013, the Department's Internet Policy Task Force, led by the United States Patent and Trademark Office (USPTO) and the National Telecommunications and Information Administration (NTIA), issued a Green Paper on Copyright Policy, Creativity and Innovation in the Digital Economy. INTERNET POL'Y TASK FORCE, U.S. DEP'T OF COM., WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES, at i (Jan. 2016), https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf [https://perma.cc/TJP2-JP3N]. The Department then engaged in an elaborate commenting process. *See id.* at iii. It received comments from more than sixty organizations and forty individuals. *See id.* at 101–03 app. I. More than seventy individuals participated in the four roundtables that were held as part of this process. *See id.* at 104–07 app. II. In January 2016, the Department of Commerce released its 100-page White Paper on Remixes, First Sale, and Statutory Damages. *Id.* at iii.

213. PETERS, *supra* note 114, at 78–80 ("The ultimate product of one of these digital transmissions is a new copy in the possession of a new person. . . . This copying implicates the copyright owner's reproduction right as well as the distribution right. . . . Section 109 provides no defense to infringements of the reproduction right.").

214. *Id.* at 82–83.

215. INTERNET POL'Y TASK FORCE, *supra* note 212, at 66. It should be noted that both reports discussed at length the risk of piracy. The concern was that digital distribution of copyright-protected goods would not really be subject to the one-copy-one-reader principle because patrons would illegally create copies of the work. A related concern, which was raised with respect to Google's mass digitalization project, Samuelson, *supra* note 12, at 1327–28, has to do with the possibility of hacking the centralized repository of digital books. Those concerns about the potential "Napsterization" of

B. UNBALANCED APPROACH II: IN THE MARKET WE TRUST

The second approach is the exact opposite of the first one. It suggests that in the digital world libraries can buy a license that allows them to engage in whatever activities they desire.[216] The American Association of Publishers, for example, stated that it was "unaware of any demonstrated, pervasive market failure" in the eBook market.[217] This Section explains that it should be aware of some and that public libraries are designed to target those profound market failures.

The publishers' approach has its intuitive appeal—and it undoubtedly impacts judges[218]—but it is misguided. Libraries operate in a market (or a submarket) encumbered by significant, well-recognized market failures, including a deadweight loss, positive externalities, and public goods. In such an environment, the market is unlikely to produce socially desired results.

The first market failure—probably the most heavily discussed in the economics of intellectual property law literature—is the deadweight loss problem.[219] By limiting competition, copyright law allows right holders to charge supracompetitive prices—prices that are artificially higher than the marginal costs (which are close to zero in the digital world).[220] With those prices, potential readers whose willingness to pay is above the marginal costs and below the charged prices are priced out of the market and denied access to the work.[221] In digital markets, this problem is exacerbated because without digital copyright exhaustion, there is no

books, *see* Randall Stross, *Will Books Be Napsterized?*, N.Y. TIMES (Oct. 3, 2009), https://www.nytimes.com/2009/10/04/business/04digi.html, are understood, partly because in the past some initiatives that purported to create a one-copy-one-reader scheme could have been extremely easily circumvented. *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 658 (2d Cir. 2018). Nevertheless, nowadays, these problems seem solvable. All major publishers provide libraries' patrons access to their digital works. That access is subject to the publishers' DRM encryption tools. In other words, the publishers seem to be content with the current state of encryption technology to satisfactorily mitigate the piracy problem.

216. Complaint ¶ 48, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023) (No. 20-cv-04160), *aff'd*, 115 F.4th 163 (2d Cir. 2024) ("There is a vibrant market for selling and licensing ebooks to libraries to provide their patrons with lawful copies of ebooks."). It should be noted that libraries and their advocates vehemently disagree with this statement, pointing out certain actions, such as long-term preservation, that all major publishers categorically refuse to license. *See, e.g.*, Brief of *Amici Curiae* Nine Library Orgs. & 218 Librarians in Support of Defendant-Appellant at 12, *Hachette*, 664 F. Supp. 3d 370 (No. 20-cv-04160) (discussing the history of CDL and claiming that "[t]he licensed digital lending market prevents libraries from fulfilling their mission of preservation"). However, because this Article focuses on libraries' lending activities and because all major publishers sell lending licenses to libraries, the lack of other licenses, such as preservation licenses, is outside the scope of this work.

217. AAP Letter of Opposition to SB432: Hearing Before the H. Ways & Means Comm., 117th Cong., at 3 (Mar. 24, 2021), https://publishers.org/wp-content/uploads/2021/03/SB432_AAP_Opposition.pdf [https://perma.cc/473T-MDNX].

218. *See infra* note 289 and accompanying text.

219. *See, e.g.*, William W. Fisher III, *Reconstructing the Fair Use Doctrin*e, 101 HARV. L. REV. 1659, 1701–02 (1988).

220. *See* Wallace v. Int'l Bus. Machs. Corp., 467 F.3d 1104, 1107 (7th Cir. 2006); Thomas B. Nachbar, *Qualitative Market Definition*, 109 VA. L. REV. 373, 410 (2023).

221. *See* LANDES & POSNER, *supra* note 69, at 16–21 ("[W]hen the marginal cost of using a resource is zero, excluding someone (the marginal purchaser) from using it by charging a positive price for its use creates a deadweight loss . . . .").

effective market for cheap used eBooks.[222] This is a market failure (and a well-documented one) because it denies society all the surplus that could have been generated from providing access to all those potential readers.[223]

Public libraries are built to mitigate this market failure in the physical world. As discussed above, public libraries generate significant social welfare in that world by effectively and efficiently serving those who would have otherwise not bought the work or gained access to it.[224] That population is disproportionately poor (as well as elderly and disabled).[225]

The e-lending problem directly targets the public libraries' ability to mitigate this market failure in the digital world. As noted, the high prices that publishers charge public libraries for eBook licenses deflate libraries' resources and prevent them from effectively offering all their services.[226] This means, *inter alia*, that libraries' catalogs of eBooks are much smaller, and gaining access to them often entails a long wait time.[227] Indeed, the current practices in this market aggravate the deadweight loss problem.

On top of the deadweight loss problem, libraries also generate positive social externalities that markets often fail to adequately produce.[228] Access to information by itself is known to generate such positive social externalities, or spillovers.[229] Specifically, better-educated and better-informed individuals are more valuable members of society. Providing this access to lower-income readers is especially crucial as it helps mitigate the education gap (and the opportunity gap) in our society.[230] Educating the public has been the declared goal of American public libraries since their inception, almost 200 years ago.[231] The eBook

222. *See* R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 586–87 (2003) (exploring the connection between the first sale doctrine and secondary market in copyrighted goods).

223. *See* LANDES & POSNER, *supra* note 69, at 17.

224. *See supra* text accompanying notes 118–23.

225. *See supra* note 123 and accompanying text.

226. *See supra* note 144 and accompanying text. It should be noted that the publishers do not show any interest in providing cheap eBooks to poor patrons. Moreover, even if such patrons can be granted cheap access, this balance would be quite different from the one existing in the physical world, thus providing over-incentives. *See infra* Section IV.A.1 (explaining how the balance created by Congress needs to be preserved in the digital world).

227. *See, e.g.*, Cohen, *supra* note 21.

228. Gordon, *supra* note 126, at 1630–31 (discussing positive externalities and noting that when they exist "the market cannot be relied upon as a mechanism for facilitating socially desirable transactions").

229. *See* Frischmann & Lemley, *supra* note 125, at 258–61 (exploring spillovers of information goods).

230. *See* LEA SHAVER, ENDING BOOK HUNGER: ACCESS TO PRINT ACROSS BARRIERS OF CLASS AND CULTURE 5–6 (2019) (explaining how the lack of access to books harms children of lower-income families); Susan B. Neuman & Donna Celano, *Access to Print in Low-Income and Middle-Income Communities: An Ecological Study of Four Neighborhoods*, 36 READING RSCH. Q. 8, 11 (2001) (reviewing the literature on the long-term impact of access to books on development).

231. *See* PATRICK WILLIAMS, THE AMERICAN PUBLIC LIBRARY AND THE PROBLEM OF PURPOSE 1–8 (1988) (describing the ideology and efforts that went into establishing the first modern library in the United States in Boston in 1854). *See generally* Gilpin et al., *supra* note 125 (finding that public library capital investments increase children's engagement with their local library, which in turn improves test score measures in local school districts).

problem, which pushes libraries to focus their highly limited purchasing power on bestsellers,[232] undermines their ability to do so.

Beyond the general social positive externalities that access itself creates, libraries generate extremely valuable externalities that the publishers enjoy by fostering the habits and culture of readership.[233] Young Americans use public libraries even more than adults.[234] Time and again, studies showed that today's young library patrons will be the book readers—and the book buyers—of tomorrow.[235] Readership habits are what economists call a public good,[236] and it is well established that markets fail to adequately provide public goods because individuals do not want to invest enough resources in developing goods that others will later enjoy.[237] Similarly, an individual publisher might not want to invest in creating a culture of readership, knowing that all publishers will enjoy it. It is typically the role of public institutions to supply public goods,[238] and that is exactly where public libraries operate, especially when it comes to young readers.

There is something appealing, especially in our capitalist society, in assuming that the market can correct itself. In many cases it can, or at least it can do better than other institutions, such as the government. For that reason, not every imperfection in the market justifies outside intervention, including by the legal system. But intervention can be justified when significant built-in market failures dominate a certain market segment. Public libraries are institutions that were designed to and actually do target those profound market failures. Therefore, curtailing their activities, as the eBook market problem does, should raise serious social welfare concerns. The willingness of publishers to license their eBooks to libraries—for exorbitant prices—does not address those concerns.

As noted, balancing incentives and access is the cornerstone of a robust copyright policy.[239] It was explained that a robust copyright law system needs to promote those two goals—incentivizing new works and granting access to existing ones—by choosing legal mechanisms that balance the conflicting interests. In many respects, the two approaches explored in this Part focus on just one side of the equation while completely ignoring the other. The full digital exhaustion

232. *See supra* note 144 and accompanying text.

233. *See supra* note 124 and accompanying text.

234. Kathryn Zickuhr, Lee Rainie & Kristen Purcell, *Younger Americans' Library Habits and Expectations*, PEW RSCH. CTR. (June 25, 2013), https://www.pewresearch.org/internet/2013/06/25/younger-americans-library-services [https://perma.cc/GG4N-PVDN].

235. *See supra* note 124 and accompanying text.

236. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 40–41 (6th ed. 2012). Public goods share two features: nonrivalry in consumption and lack of exclusivity. Readership presents them both: First, Alice's inclination to read books does not harm Bob's inclination to read them, so their readership habits are nonrivalrous. Second, once Connie learns to love to read, she will read books from all publishers and not just from those who got her hooked on them, thus not allowing those who invest in developing readership habits to exclude others from enjoying them.

237. *Id.*

238. *See* Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989, 995 (1997).

239. *See supra* note 38 and accompanying text.

argument focuses on access and ignores incentives. Fully trusting the licensing market does the exact opposite. Not surprisingly, both fail to offer a reasonable, balanced, and efficient solution to the eBook problem. The next Part explores more nuanced and delicate approaches to this problem.

IV. EVALUATING BALANCED APPROACHES

This Part presents and evaluates more balanced approaches to digital lending, moving away from the extremes of overemphasizing either access or incentives. Section IV.A explores how copyright's fair use doctrine might replicate the balance of the physical world in the digital realm. Section IV.B proposes methods for forming new and improved equilibriums in the digital environment. Section IV.C examines the dual role of states as regulators and consumers in potentially mitigating the digital lending issue. Finally, Section IV.D presents combinations of strategies aimed at promoting social welfare by preserving the core interests of both libraries and publishers.

A. REPLICATING THE PHYSICAL WORLD: FAIR USE AND CONTROLLED DIGITAL LENDING

Fair use, "one of the most important and well-established limitations on the exclusive right of copyright owners,"[240] necessitates a detailed "case-by-case analysis."[241] This Section examines whether this flexible defense can harmonize the interests of public libraries and publishers in the digital world, focusing on one specific and important scheme: Controlled Digital Lending (CDL).

CDL, a framework a library may implement based on the fair use defense, involves scanning owned printed books.[242] Then, for each physical book removed from circulation, the library can lend a corresponding digital copy to one patron at a time, thus adhering to the "'owned to loaned' ratio" principle.[243] The implementing library also needs to apply a DRM tool to ensure that access to the

240. H.R. REP. NO. 94-1476, at 65 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659, 5678.

241. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577 (1994).

242. *See* DAVID R. HANSEN & KYLE K. COURTNEY, A WHITE PAPER ON CONTROLLED DIGITAL LENDING OF LIBRARY BOOKS 25 (2018), http://nrs.harvard.edu/urn-3:HUL.InstRepos:42664235 [https://perma.cc/PS8Y-X4B6] ("CDL . . . allow[s] a change of the format in which that lend is made."). The idea behind CDL is attributed to a 2011 article by Michelle Wu, based on a concept developed as early as 2002. *See* Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 LAW LIBR. J. 527, 535–36 (2011). The name—"Controlled Digital Lending"—was coined in 2018 as part of a Position Statement signed by dozens of libraries. *See* Lila Bailey, Kyle K. Courtney, David Hansen, Mary Minow, Jason Schultz & Michelle Wu, *Position Statement on Controlled Digital Lending by Libraries*, LIBR. FUTURES: CONTROLLED DIGIT. LENDING, https://controlleddigitallending.org/statement [https://perma.cc/J9WM-42JP] (last visited Oct. 26, 2024). That position statement was accompanied by a white paper authored by David Hansen and Kyle Courtney, focusing on the legality of this scheme. HANSEN & COURTNEY, *supra*, at 25; *see also* Brief of *Amici Curiae* Nine Library Orgs. & 218 Librarians in Support of Defendant-Appellant, *supra* note 216, at 6–8 (discussing the history of CDL).

243. HANSEN & COURTNEY, *supra* note 242, at 25. This principle is also known as "one copy, one user." *See, e.g.*, *supra* text accompanying note 161 (discussing the use of this term by the Court of Justice of the European Union).

eBook expires after the loan period.[244] Finally, the library should "limit the time period for each lend to one that is analogous to physical lending."[245]

While libraries' use of CDL for part of their collections started more than a decade ago and notably expanded during the pandemic,[246] *Hachette Book Grp., Inc. v. Internet Archive*, recently decided by the Second Circuit, is the first case to test the legality of one such scheme.[247] This Section will first explore the role that fair use plays in allowing copyright law to adapt to new technologies. It will then zoom in on the more specific question and inquire whether fair use may shield CDL schemes from copyright liability.

1. Copyright, Disruptive Technologies, and Fair Use

Copyright law does not evolve in a vacuum. As the Supreme Court precisely observed, "[f]rom its beginning, the law of copyright has developed in response to significant changes in technology."[248] Indeed, it is impossible to understand the existence, scope, and changes in copyright law without considering the emergence of disruptive technologies, especially those impacting the creation and dissemination of information goods.[249]

Those new technologies, by their very nature, disrupt copyright's "balance of competing claims upon the public interest"—namely, the desire to encourage new creativity and to provide broad access to existing materials.[250] The Supreme Court has cautioned that when such disruption occurs, and until Congress revises the Copyright Act in response thereto, "the Copyright Act must be construed in light of this basic purpose."[251]

The core provisions of the Copyright Act—including those dealing with the exclusive rights of reproduction and distribution, as well as its first sale doctrine[252]—have remained unchanged since their enactment in 1976, following a legislative process that started in 1955.[253] In 1981, Barbara Ringer, considered

244. *See* HANSEN & COURTNEY, *supra* note 242, at 3, 25.

245. *Id.* at 3.

246. *See* Brief of *Amici Curiae* Nine Library Orgs. & 218 Librarians in Support of Defendant-Appellant, *supra* note 216, at 8–9 (discussing the spread of CDL and noting that "[o]ver 100 libraries across the United States rely on a CDL program to distribute their collections, particularly for out-of-print works, reserves, or for works that are less frequently circulated").

247. 115 F.4th 163 (2d Cir. 2024).

248. Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 430 (1984); *see also* H.R. REP. NO. 94-1476, *supra* note 240, at 47 (noting that "[s]ince [1790] significant changes in technology have affected the operation of the copyright law").

249. *See* Brad A. Greenberg, *Rethinking Technology Neutrality*, 100 MINN. L. REV. 1495, 1503–06 (2016) (describing the impact of new technology on the scope of copyright law and noting that "[i]n copyright's story, [it] has played the part of both hero and villain").

250. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

251. *Id.*

252. 17 U.S.C. §§ 106(1), (3); *id.* § 109(a).

253. *See* MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, at 1:1–1:2 (1977), https://www.copyright.gov/reports/guide-to-copyright.pdf [https://perma.cc/9HHN-EFKD] (explaining how that process started "in 1955 when Congress appropriated the funds for a comprehensive program of research which produced a series of 35 studies" about copyright).

the main drafter of the Copyright Act of 1976, famously said that it is "a good 1950 copyright law."[254]

Indeed, reflecting on the technological landscape of that era is revealing: In the mid-1970s, personal computers were virtually nonexistent in American homes, with less than 0.1% owning one (a stark contrast to over 90% today).[255] IBM's first PC only came to market in 1981,[256] the Internet was birthed in 1983,[257] and the World Wide Web and web browsers were still over a decade away.[258] Consequently, the concept of a digital file, like an eBook, being instantly and flawlessly distributed globally at negligible cost was, at that time, nothing short of science fiction.

How can one possibly expect a statute crafted during the technological stone age to remain relevant in a world transformed by technology nearly half a century later? The answer lies in the inherent flexibility of copyright law, which contains mechanisms enabling courts to adapt it—what the Supreme Court called "constru [ing]"[259]—in response to evolving technologies. Without those mechanisms, copyright law would not be able to achieve its constitutional objective of "promoting the Progress of Science."[260]

The primary mechanism enabling copyright law to fulfill its constitutional mandate of promoting progress in the face of technological disruptions is the fair

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254. Barbara Ringer, *Authors' Rights in the Electronic Age: Beyond the Copyright Act of 1976*, 1 LOY. L.A. ENT. L.J. 1, 4 (1981).

255. *See* Jeremy Reimer, *Total Share: 30 Years of Personal Computer Market Share Figures*, ARS TECHNICA (Dec. 14, 2005, 11:00 PM), https://arstechnica.com/features/2005/12/total-share/3. Apple, for example, started to sell its first computer, Apple I, in 1976. It lacked a screen or a keyboard and cost $666 (more than $3,500 in 2024, inflation adjusted). The company manufactured 200 and sold 175 units thereof. *See* Jack Guy, *Apple-1 Computer Goes on Sale, with Bids Expected to Reach $600,000*, CNN BUS. (Nov. 9, 2021, 10:31 AM), https://www.cnn.com/2021/11/09/tech/apple-1-computer-auction-scli-intl/index.html [https://perma.cc/33GU-24YE]; *An Apple-1 Personal Computer*, Christie's (Sept. 10, 2024), https://www.christies.com/en/lot/lot-6495022. Compare those figures with MICHAEL MARTIN, U. S. CENSUS BUREAU, DEP'T OF COM., COMPUTER AND INTERNET USE IN THE UNITED STATES: 2018, at 2 (2021), https://www.census.gov/newsroom/press-releases/2021/computer-internet-use.html [https://perma.cc/GD6Q-LDXT] (reporting that as of 2018, 92% of American households had a computer—a desktop, laptop, tablet, or smart phone—a number that has probably since increased, especially during the COVID-19 pandemic).

256. *Timeline of Computer History*, COMPUT. HIST. MUSEUM, https://www.computerhistory.org/timeline/1981 [https://perma.cc/3KAZ-8ES3] (last visited Oct. 26, 2024).

257. While communication between computers existed for decades, the TCP/IP protocol, which offers computers a standardized way to communicate and thus allowed for the development of the Internet, was adopted only in 1983. *See A Brief History of the Internet: Sharing Resources*, ONLINE LIBR. LEARNING CTR., https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml [https://perma.cc/WRT6-VEJM] (last visited Oct. 26, 2024).

258. *See Where the Web Was Born*, CERN, https://home.cern/science/computing/birth-web/short-history-web [https://perma.cc/ZYM4-KWHQ] (last visited Oct. 26, 2024) (exploring the World Wide Web and browsers' development in the early 1990s).

259. *See supra* text accompanying note 251.

260. *See supra* note 33 and accompanying text. These mechanisms, collectively, relate to the attempt to draft the Copyright Act of 1909, and even more so the Copyright Act of 1976, as technologically neutral—meaning statutes that automatically adapt to new technologies by "regulat[ing] behavior, not technology." Greenberg, *supra* note 249, at 1512. Greenberg is quite critical of that attempted neutrality. A full analysis concerning the desirability thereof is beyond the scope of this work, which takes that attempt, and Congress's framework, as given.

use doctrine. This concept, occasionally overlooked by some judges,[261] is neither new nor controversial. It has been endorsed by Congress, the Supreme Court, and legal scholars.[262]

The House Report leading to the enactment of the current Copyright Act explains:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis.[263]

This is also how the Supreme Court understands the role of fair use, recently stressing that it "can carry out its basic purpose of providing a context-based check that can help to keep a copyright monopoly within its lawful bounds" and that "just as fair use takes account of the market in which scripts and paintings are bought and sold, so too *must it consider the realities of how technological works are created and disseminated*."[264] Legal scholars celebrate fair use as allowing copyright law to quickly "evolve in response to new challenges" and new technologies[265] and to "address questions posed by new technologies or other developments that the legislature could not or did not contemplate."[266]

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261. *See infra* text accompanying notes 284–89; *cf.* Noti-Victor, *supra* note 17, at 1837 (noting that the mechanisms within copyright law that support dissemination "ha[ve] failed to keep up with technological changes").

262. *But see* Brief of *Amici Curiae* Professors and Scholars of Copyright Law in Support of Plaintiffs and in Opposition to Internet Archive at 4, 15–16, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023) (No. 20-cv-04160), *aff'd*, 115 F.4th 163 (2d Cir. 2024) (claiming that "[i]t is up to Congress to review and consider potential changes to the Copyright Act"); Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 664 (2d Cir. 2018) (suggesting that if digital redistributors "have persuasive arguments in support of the change of law they advocate, it is Congress they should persuade," and proceeding to "reject the invitation to substitute our judgment for that of Congress"). However, as this Section explains, those statements are inconsistent with the traditional and modern role of the fair use doctrine and, more generally, with the principle of technology neutrality. *See* Greenberg, *supra* note 249, at 1513–14 (noting that the Copyright Act "push[es] questions arising from new technologies away from legislatures, to courts and administrative agencies" and that "[t]echnology neutrality recognizes that legislatures often take too long and may lack the expertise to frequently update a law in light of new technologies").

263. H.R. REP. NO. 94-1476, *supra* note 240, at 66.

264. Google LLC v. Oracle Am., Inc., 593 U.S. 1, 22–23 (2021) (emphasis added).

265. Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMMS. & TECH. L. REV. 381, 404–05, 411 (2005) (describing fair use's function as "to enable copyright law to evolve in response to new challenges without necessitating legislative intervention," and explaining "the doctrine is meant to be used as a flexible standard through which the judiciary can determine the application of copyright in response to social and technological changes").

266. *Compare* Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2602 (2009), *with* Greenberg, *supra* note 249, at 1533 (criticizing the place of the doctrine within the Copyright Act's framework as "tak[ing] on an outsized role" and adding uncertainty).

Indeed, while disruptive technologies challenge copyright law, it can meet that challenge, even without congressional intervention (which is typically much slower than the pace of technological changes), as long as courts use its built-in flexible mechanisms—and especially fair use doctrine—to constantly tweak and adapt it.

2. The Fair Use of Controlled Digital Lending Schemes

Technological advancements can unsettle the equilibrium between copyright's conflicting interests, yet the fair use doctrine often can—and must—restore it. As the previous Parts of this Article showed, digital distribution is one such disruptive technology. The advent of effortless digital distribution of eBooks has significantly altered the traditional balance between publishers' interests and those of public libraries, leading to a system remarkably different from the one envisaged by Congress in the physical realm.[267]

This leads to a pivotal question: Can fair use fulfill its traditional role of preserving the balance of interests in the face of a novel technology? Traditionally, that balance in the physical world hinges on two principles:[268] First, libraries can purchase books through retail markets, where prices are geared towards modest individual use, offering affordable (though not free) access. Second, inherent limitations in the physical world's architecture, known as frictions, prevent libraries from undermining the book market. Therefore, a scheme that replicates these principles preserves the balance established by Congress.

CDL is not a detailed scheme but a general framework that libraries can implement in multiple ways. Because fair use is fact-specific, the legality of CDL can only be considered in the context of a specific implementation.[269] With that important caveat in mind, there is no principal reason why a library's

267. *See infra* text accompanying note 279.

268. *See supra* Part I.

269. This important point escaped the Second Circuit in *Hachette*—as well as the district court, some of the parties, and some of the amici—which erroneously chose to discuss the legality of CDL as such instead of the legality of the defendant's, Internet Archive's, implementation.

The Second Circuit, for example, framed the question before it as "is it 'fair use' for a nonprofit organization to scan copyright-protected print books in their entirety and distribute those digital copies online, in full, for free, subject to a one-to-one owned-to-loaned ratio . . .?" Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 174 (2d Cir. 2024). But that question, which goes beyond the facts of Internet Archive's implementation, is too broad for this specific case. There are multiple examples where the Second Circuit focused on Internet Archive and its specific implementation and not CDL—a much broader concept. For example, when the Second Circuit analyzed the fourth fair use factor, the harm to the publishers' market, it concluded that the defendant failed to "disprove market harm." *Id.* at 190–95. But even accepting that Internet Archive failed to meet its burden in this case, which is quite doubtful, *see infra* note 289, this does not mean that others who implement CDL won't cause less or no harm or that they will not be able to "disprove market harm."

Cf. Brief of Amicus Curiae HathiTrust in Support of Neither Party, *supra* note 29, at 3–7 (distinguishing CDL and Internet Archive's implementation thereof by noting that "[p]erhaps the most pervasive flaw in the district court's reasoning is that it uses . . . Internet Archive's . . . specific conduct as a proxy for a broader range of practices under the rubric of 'controlled digital lending' . . . to encapsulate [libraries] lawfully lending to their patrons works that were digitized from their collections," and showing the multiple contexts in which libraries engaged in such lending activities).

implementation that preserves the physical world's balance in the digital realm would not be legal.

CDL clearly imitates one aspect of the physical world equilibrium. Since most books are available in physical format and libraries can acquire them at retail prices (or less),[270] they can scan them to produce digital versions at an inexpensive price, but not for free.[271]

The critical question then becomes whether CDL can imitate the second feature of the physical world, meaning creating comparable levels of artificial friction. It is hard to see why not. As highlighted earlier, a key difference between physical and digital lending is the speed of distribution.[272] Allowing digital books to circulate instantaneously among patrons would significantly reduce the need for libraries to purchase multiple copies, as well as undercut one of the main advantages that the market offers to potential readers.[273] Therefore, for a library's digital lending to qualify as fair use, it must implement a system that deliberately slows down the lending process to a pace akin to physical book circulation.[274] Fortunately, libraries have decades of experience in physical lending and should possess detailed data on the movement of printed books within their institutions.[275]

The frictions of the physical world go beyond speed. For example, assume that a library concludes that, on average, due to wear and tear, once a printed book is loaned thirty times, it needs to be replaced. In that case, the library can imitate the

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270. As analyzed, *supra* Section II.B.1, because CDL is based on digitization of printed materials by libraries themselves, it does not provide a solution to those materials that are only distributed digitally.

271. The Second Circuit's rhetoric in *Hachette* often obscured this reality. Time and again, the court emphasized the "free" nature of Internet Archive's services without acknowledging, or perhaps even considering, that libraries—including those implementing CDL—pay for the printed books they later scan. For instance, the court stated that "[i]f authors and creators knew that their original works could be copied and disseminated for free, there would be little motivation to produce new works." *Hachette*, 115 F.4th at 195. However, this statement is both misleading and, in the context of CDL, incorrect. It is misleading because, while dissemination under CDL is free, the use as a whole is not, as authors (or more accurately, their publishers) are compensated when the books are initially purchased. The statement is also incorrect in this context because, for hundreds of years—and still today—authors are only compensated when their physical works are first acquired, not when they are later redistributed by the purchasers. If authors find sufficient "motivation to produce new works" under this model for printed books, why would that motivation suddenly disappear in the digital realm when they are similarly paid only at the point of original purchase?

272. *See supra* text accompanying notes 112–13.

273. *See supra* text accompanying note 208.

274. *Cf.* HANSEN & COURTNEY, *supra* note 242, at 26–27 ("[T]he Copyright Act does not grant rightsholders a right to transactional friction . . . . [W]hile transactional friction may not be necessary for CDL, an implementation that added it could reduce risk for libraries.").

275. There are multiple ways to make sure that the speed of a CDL scheme is comparable to that of the physical world. For instance, if, hypothetically, a library observes that a borrowed printed book typically returns to circulation within seven to fourteen days, averaging ten days, it can replicate this timeframe in the digital realm. Similarly, when a digital eBook is borrowed, the library might set a policy that the eBook cannot be considered returned in less than a day. If data shows that a popular printed book often takes an average of two days from its return to being borrowed by the next person on the waiting list, a similar delay should be applied to digital loans. Finally, if a library intends to lend an eBook to another library, it would be wise to mirror the usual duration of physical inter-library loans.

physical world's balance by buying a new physical copy after the digital book was loaned thirty times. In this way, the publishers' profits will not be harmed by the transition to digital distribution.

Fair use is ultimately about preserving the balance between libraries and publishers, rather than the frictions themselves. Therefore, libraries are not obliged to create artificial frictions that *exactly* mimic the physical world. The essential requirement is that a library's CDL scheme impacts the publishers' eBook market in comparable ways to the traditional impact of libraries on the publishers' printed-books market. For instance, it makes little sense to require libraries to deliberately gradually degrade the quality of digital files over time to simulate physical book wear and tear. If this aspect significantly affects patrons' experience in the physical world, libraries could substitute it with another form of friction, such as further slowing their digital lending process. Indeed, libraries have multiple levers to pull to create a system that, as a whole, imitates the physical world's balance created by Congress.

A library's CDL implementation that properly mimics the traditional impact of libraries in the physical world should typically be considered fair use. While fair use is a multi-factor inquiry,[276] some factors are considered especially important, with the Supreme Court famously stating that the effect of the use on the plaintiff's market "is undoubtedly the single most important element of fair use."[277]

While assessing the market effect of a defendant's use is often nontrivial,[278] that inquiry is more straightforward when it comes to digital lending. In the

276. Those factors, now codified in 17 U.S.C. § 107, include the purpose and character of the defendant's use, the nature of the plaintiff's work, the amount used by the defendant and its substantiality, and the effect of the defendant's use on the plaintiff's market, although courts are free to consider other factors in their fair use inquiry.

277. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985). In its latest fair use decision, the Supreme Court suggested that inquiring whether the defendant's actions substituted the plaintiff's market should also be taken into account under the first fair use factor, the one dealing with the purpose and character of the defendant's use. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 528 (2023) ("[T]he first factor relates to the problem of substitution—copyright's bête noire."). While a majority opinion has not restated (or rejected) that the most important factor has to do with the plaintiff's market harm in the last thirty years, three concurring and dissenting opinions from recent years, supported by six different Justices on the Court, also called that factor the most important one. *Id.* at 555. (Gorsuch, J., joined by Jackson, J., concurring); *id.* at 569 (Kagan, J., joined by Roberts, C.J., dissenting); Google LLC v. Oracle Am., Inc., 593 U.S. 1, 52 (2021) (Thomas, J., joined by Alito, J., dissenting); *see also* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.05[A][4] (Matthew Bender & Co., Inc. rev. ed. 2021) (1963) (calling the fourth factor the "most important, and indeed, central fair use factor" (footnotes omitted)).

278. Because fair use is, by definition, free use, plaintiffs often argue that the use denies them their potential for licensing fees. Courts have struggled in treating this argument in a consistent and uniform way. *Compare* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1267 (11th Cir. 2014) (finding that denying academic publishers licensing fees for copying articles' excerpts into coursepacks is market harm under the fair use framework), *and* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) (finding that denying publishers of scientific journals licensing fees for making copies of specific articles is market harm), *with* Bell v. Eagle Mountain Saginaw Indep. Sch. Dist., 27 F.4th 313, 325 (5th Cir. 2022) (holding no market harm for posting a copyrighted passage on social media), *and* Núñez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000) (holding no market harm for using a copyrighted photograph in news reporting).

physical world, Congress has already established a system allowing public libraries to access and lend copyrighted materials at merely their retail cost. Given that American public libraries have been lending books since the nineteenth century and the active involvement of both the publishing industry and library representatives in the drafting of the Copyright Act,[279] it's improbable that Congress was oblivious to the existing balance in the physical world when it enacted the Act, thereby blessing this equilibrium. Indeed, Congress made it clear that the publishers' market and expected income do not encompass a right to price discriminate by selling targeted, separated, and expensive licenses to libraries.

Since there's no evidence Congress intended a different balance in the digital world,[280] that market is just not part of copyright law's grant to publishers.[281] Without fair use, the current system allows publishers to price discriminate in a way that was never recognized before, a fact that even they, at least implicitly, admit.[282] Denying publishers this power and this source of additional income, therefore, is simply not the market harm that the fair use framework requires courts to consider.[283]

In its recent decision in *Hachette Book Group, Inc. v. Internet Archive*, the Second Circuit missed that point and overlooked the role that fair use plays in our copyright law ecosystem.[284] Internet Archive (IA), a non-profit organization, implemented its own form of CDL. Together with a network of affiliated libraries, IA has scanned millions of printed books, withdrawn them from circulation, and made their digital versions available online.[285] In June 2020, four major publishers sued IA for copyright infringement. On September 4, 2024, the Second Circuit affirmed the decision of the Southern District of New York and held that IA's actions are not shielded from liability under the fair use doctrine.[286] In December 2024, Internet Archive decided not to pursue a Supreme Court review of the Second Circuit decision.[287]

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279. *See* LITMAN, *supra* note 109, at 23–26, 39.

280. As noted, *see supra* text accompanying notes 253–58, Congress clearly did not envision twenty-first century digital distribution when enacting the Copyright Act of 1976.

281. *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 552 (2013) (noting that copyright law does not guarantee a right to earn maximum income by segmenting the market among different types of buyers); Gordon, *supra* note 133, at 1374–75 (explaining that copyright law fosters certain types of market segmentation and prohibits others).

282. *See* Brief for Plaintiff-Appellees [Redacted] at 9, Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 (2d Cir. 2024) (No. 23-1260) (noting that "the Publishers impose financial terms that . . . balance the public interest in library ebooks against the danger that library ebooks will cannibalize the consumer ebook market," while ignoring the fact that the publishers do not have that power in the physical world). The publishers' amici similarly argue that CDL denies them income that they never receive in the physical world. *See* Brief for *Amici Curiae* the Authors Guild et al. in Support of Appellees at 14–15, *Hachette*, 115 F.4th 163 (No. 23-1260) (explaining that CDL denies publishers the income from older books (known as backlist books), while ignoring the fact that in the physical world libraries buy new books and keep them).

283. *See* Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 591–92 (1994) (noting that not any harm to the plaintiff's market is "a harm cognizable under the Copyright Act").

284. *See Hachette*, 115 F.4th 163.

285. *See id.* at 175–76.

286. *See id.* at 174.

287. *See* Freeland, *supra* note 28.

The Second Circuit's decision is highly problematic, especially in its treatment of the publishers' market and its harm. Throughout its opinion, the Second Circuit assumed, without much explanation, that the publishers are entitled to the massive income they currently generate from licensing eBooks to libraries.[288] But, as noted, that assumption is misguided because it fundamentally deviates from the balance designated by Congress in the physical world.[289]

While the Second Circuit's opinion is highly problematic, this Article does not take a position concerning the ultimate fair use determination in *Hachette*. To make that determination, IA's specific scheme needs to be evaluated against the benchmark created by Congress in the physical world and not against the publishers' licensing market potential. Once that perspective, which is consistent with fair use's traditional contours, is adopted, IA's scheme needs to be closely examined to see if it preserves Congress's balance.

IA's chosen implementation of CDL was distinct, particularly in setting unique artificial friction mechanisms, differing significantly from many public libraries' schemes.[290] IA's scheme facilitated rapid lending, enabling, for instance, immediate borrowing of digital books across the entire country[291]—a process that would take days in the physical realm. On the other hand, IA added significant friction

288. *E.g.*, *Hachette*, 115 F.4th at 192 (framing the publishers' market harm as the "lost eBook licensing fees" and noting that those markets are "reasonable and developed"). The same faulty logic previously appeared in the District Court's opinion on this matter. *See* Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 388 (S.D.N.Y. 2023), *aff'd*, 115 F.4th 163 (discussing the "'thriving ebook licensing market for libraries' in which the Publishers earn a fee whenever a library obtains one of their licensed ebooks," and explaining that "[t]his market generates at least tens of millions of dollars a year for the Publishers" and that "IA supplants the Publishers' place in this market"); Brief for Plaintiff-Appellees [Redacted], *supra* note 282, at 3, 10 (discussing "the Publishers' thriving market for authorized library ebooks").

289. The Second Circuit's reasoning concerning market harm is problematic for other reasons. For example, the Second Circuit placed the full and heavy burden of proving the lack of market harm on the defendant, but that is in tension with Supreme Court precedent. In the only Supreme Court opinion regarding noncommercial fair use (and thus similar to *Hachette*), the Supreme Court held that "[w]hat is necessary is a showing by a preponderance of the evidence that *some* meaningful likelihood of future harm exists. If the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated." Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984). This suggests that it is likely *the plaintiff's* burden to show "by a preponderance of the evidence that *some* meaningful likelihood of future harm exists" when the defendant's use is noncommercial. *Id.* In *Hachette*, the Second Circuit assumed that the burden is on the defendant without considering the Supreme Court holding on this matter in *Sony*. *See Hachette*, 115 F.4th at 191.

290. *See, e.g.*, Brief of Amicus Curiae HathiTrust in Support of Neither Party, *supra* note 29, at 3–7 (providing multiple examples for different implementations of CDL schemes); *cf. supra* note 269 (criticizing the Second Circuit for commingling the discussion about the legality of Internet Archive's use with a much broader question concerning the legality of all CDL schemes).

291. *Hachette*, 115 F.4th at 176 (discussing Internet Archive's "Open Libraries Project," which facilitated this nationwide scheme).

by not scanning new titles,[292] which is the publishers' most important source of income in retail markets.[293]

As noted, fair use is a fact-specific inquiry. In the context of CDL, a fair use analysis should focus on the details of a specific implementation to make sure that it does not harm the affected publishers' market in a way that is fundamentally different from the operation of libraries in the physical world, as blessed by the Copyright Act. Regrettably, in *Hachette*, the Second Circuit did not conduct such an inquiry and did not thoroughly examine whether IA's implementation decisions created a scheme that is comparable to the physical world.

B. FINDING NEW EQUILIBRIA

The previous Section considered how libraries can implement a system—feasible under current law—of scanning and restricted digital lending that mirrors the balance Congress established in the physical world. However, there are other approaches to addressing the digital lending problem.

This Section explores two such alternative frameworks, aiming to strike a new equilibrium between the competing interests of publishers, authors, libraries, and readers. The first draws inspiration from the European Union's approach to physical lending, where libraries freely lend copyrighted materials but authors receive compensation. The second proposes that in the digital realm, categorizing readers in novel ways could yield substantial societal benefits with minimal harm. Three such categorization strategies are considered: segmenting readers based on their use, the types of works lent, and, more controversially, their wealth.[294]

1. Digital Public Lending Rights (ePLR)

As noted, when it comes to lending digital content, public libraries in the European Union face challenges comparable to their American counterparts.[295]

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292. *See Hachette*, 664 F. Supp. 3d at 387 (noting that Internet Archive refrained from scanning books for the first five years after their publication).

293. *See, e.g.*, Burcu Yucesoy, Xindi Wang, Junming Huang & Albert-László Barabási, *Success in Books: A Big Data Approach to Bestsellers*, EPJ DATA SCI., 2018, at 1, 16 (explaining that in the sample explored "for the . . . fiction bestsellers[,] . . . 96% of the sales took place in the first year," and "[s]imilarly, 94% of the sales of . . . nonfiction bestsellers also happen in the first year").

294. A third possible approach, which is not further explored in this Article, is for libraries to abandon digital content, such as eBooks, and instead focus their limited resources on acquiring access only to physical materials, such as printed books. This approach has some advantages. Physical materials are, after all, much cheaper than digital ones, *see supra* note 139, and are not subject to similar use restrictions, *see supra* text accompanying note 140. Furthermore, printed and digital books can serve as partial substitutes for one another, meaning many library patrons may be satisfied with borrowing printed books if eBooks are unavailable. Reimers & Waldfogel, *supra* note 139, at 15 (exploring the substitution between the two formats). Nevertheless, this approach, on its own, is problematic because the two formats are not *perfect* substitutes, meaning that some readers clearly prefer one over the other. Focusing exclusively on physical content will thus hurt those patrons who prefer digital content. With the increased popularity of digital distribution, *see supra* text accompanying note 22, the number of readers who will have such strong preferences for digital formats is likely to rise. That said, libraries can balance between the advantages and disadvantages of those formats and decide to refrain from purchasing access to certain digital content.

295. *See supra* Section II.C.

However, for printed content, most EU countries have adopted a Public Lending Rights (PLR) scheme, a model worth considering for digital books.[296] Under PLR, libraries can lend books freely, while authors and publishers are compensated, typically through taxpayer funding.[297]

Congress could introduce a similar system for eBook lending in the United States. Such a system would allow libraries full digital exhaustion rights, enabling them to acquire eBooks in retail markets (or through donations) and lend them to patrons without being subject to copyright liability, the publishers' contractual restrictions, or their DRM-based constraints.[298] Publishers would be compensated by royalties, determined not by the market but by a public body (for example, an administrative agency or a court) to offset potential revenue loss.[299]

This approach has its merits. It views access to information goods as a public good, supported by our progressive tax system. If implemented effectively, libraries could continue serving all patrons, including those unable to afford access, while safeguarding the publishers' interests through royalties. However, as digital lending wouldn't be free, libraries would be unlikely to engage in the type of unrestricted massive lending that can significantly undercut the publishers' markets.[300]

Nevertheless, this proposed scheme, though innovative, faces several challenges, particularly when scaled up. In the physical world, it's already difficult to quantify the exact impact of library lending on the publishing industry. It's hard to discern how many library transactions replace potential sales (for which publishers should be compensated) versus serving those who wouldn't buy the book anyway.[301]

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296. *See supra* text accompanying note 85. It should be noted that some European countries have been experimenting in recent years with extending their PLR scheme to eBooks. *See, e.g.*, Dep't for Digit., Culture, Media & Sport & The Right Honorable Michael Ellis KC, *Government Extends Public Lending Right Scheme to eBook Authors* (June 7, 2018), https://www.gov.uk/government/news/government-extends-public-lending-right-scheme-to-ebook-authors [https://perma.cc/6FKC-37DU].

297. *See supra* text accompanying note 91.

298. Allowing public libraries to circumvent the publishers' DRM under certain circumstances should be within Congress's authority. International copyright law treaties allow Congress to add certain restrictions to the publishers' rights under copyright and to the law's anti-circumvention provision. *See* Eric J. Schwartz, *An Overview of the International Treatment of Exceptions*, 57 J. COPYRIGHT SOC'Y 473, 482 (2010) (describing under what conditions countries can add "exceptions to the exclusive rights of authors"); *id.* at 489 ("It is clear that exceptions to the prohibitions on circumvention . . . are permissible . . . ."). Indeed, while a full analysis of the U.S. obligations under international copyright law is beyond the scope of this work, there is no reason to assume that they would preclude Congress from addressing the digital lending problem, if it wishes to do so.

299. While such a scheme would be dramatically different from the current one, in other contexts, the Copyright Act includes comparable compulsory licensing mechanisms, under which a public entity sets mandatory licensing rates. *See, e.g.*, 17 U.S.C. § 114(d)(2) (setting compulsory licenses for publicly performing digital sound recordings); *id.* § 115 (setting compulsory licenses for reproducing and distributing music compositions); Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 918–19 (2020) (exploring those licenses and their justifications).

300. *See supra* Section III.A.2 (discussing the risk of unlimited and free digital lending).

301. *See supra* text accompanying notes 84–88 (discussing the rather complex and chaotic system for adjusting PLR royalties rates for printed books in the European Union).

Calculating the exact market impact of digital lending is not going to be easier, and it will present unique challenges from a distributive justice perspective. We saw that the inconveniences of physical borrowing—its frictions—often push wealthier readers to purchase books.[302] Because the frictions are greatly reduced in the digital space,[303] library access is expected to be relatively more appealing to the wealthy. If a greater portion of libraries' activities serve those readers, this might overburden their budgets and inadvertently disadvantage less affluent patrons who currently rely more on library services.

More profoundly, this model raises difficult questions about the use of public funds. Implementing it would make digital lending more expensive than physical lending, as libraries will need to pay royalties in addition to the initial purchase price. A significant portion of these additional costs might subsidize access for those who can afford to buy these eBooks but opt for free library access instead. While readership—like education—has societal benefits that can justify public support and subsidization, it's contentious whether public funds should *fully* support these benefits for all, regardless of their wealth.[304] Readership—again, like education—also confers private benefits, like personal enjoyment or improved job prospects, making it debatable if taxpayers should bear the full cost for these for everyone, rich or poor, in society.

2. Identifying Readers' Subgroups for Preferential Access

The digital lending problem can be seen as a failure of a market segmentation scheme. As noted,[305] in the physical world, public libraries enable a form of second-degree price discrimination by offering two options: free but less convenient library access and immediate, convenient access at home for a price. Generally, those with less willingness to pay prefer to use the library, while those who can afford it choose personal ownership. In that way, libraries operate side-by-side with the publishers' market without one dominating the other.

However, such segmentation models fail if the differences between the free and paid services are minimal, leading to unreliable consumer self-selection. For example, if the seats in economy class are too comfortable and the food is too good (not a realistic concern for most contemporary American airlines), even wealthy passengers might not upgrade to business class. Similarly, if borrowing an eBook from a library is almost as convenient as buying one, the model breaks down, and the paid market is seriously threatened.

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302. *See supra* Section I.B.

303. *See supra* Section III.A.2.

304. *See* Lisa Grow Sun & Brigham Daniels, *Mirrored Externalities*, 90 NOTRE DAME L. REV. 135, 170–71 (2014) (discussing the need to subsidize activities that generate positive social externalities, like public education); John Cirace, *An Economic Analysis of the "State-Municipal Action" Antitrust Cases*, 61 TEX. L. REV. 481, 495 (1982) (discussing the positive externalities from, for example, public education and libraries); WHITE HOUSE CONF. ON LIBR. & INFO. SERVS., INFORMATION FOR THE 1980'S: FINAL REPORT 46 (1979) (discussing how "publicly supported libraries are institutions of education for democratic living").

305. *See supra* text accompanying notes 118–23.

Yet, there are other market segmentation strategies that can promote social welfare by imperfectly categorizing groups of readers for preferential treatment.[306] This Section explores three such approaches: segmentation by time, usage, and, more radically, wealth. These strategies, as further discussed below, are not mutually exclusive.

Time-based segmentation, another form of second-degree price discrimination, is already employed in some creative industries. The film industry, for instance, often segments viewers based on the timing of movie releases.[307] New releases are typically initially available only in theaters at a higher price.[308] Consumers can choose between this premium, early access, or wait for more affordable options like pay-per-view, later a Netflix subscription, and eventually free network broadcasts.

Applying this model to digital books would mean limiting access to new titles and offering broader access to older ones.[309] Since publishers make the most profits from new releases,[310] this approach, while benefiting patrons, is unlikely to meaningfully impact sales. Interestingly, Internet Archive adopted a similar strategy by refraining from scanning books in their first five years of publication.[311]

Market segmentation by usage targets specific uses that might deserve distinct preferential treatment. This approach focuses on activities that either minimally affect publishers' revenues or offer significant social benefits. Scholarly use is a prime example. Scholars typically don't purchase books but use them mainly for reference, and they produce notable societal value through their work. Facilitating easier access for them is thus socially beneficial.[312] In fact, under certain conditions and restrictions, academic libraries already use digitized copies of their printed collections to provide scholars online access—a feature that became especially valuable during the COVID-19 pandemic.[313]

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306. This Section focuses on ways to identify those readers and those actions that should be given preferential treatment. A separate question is what such preferential treatment would entail. There are many ways to implement such a scheme. For example, a library could relax the artificial friction that is part of its CDL scheme. *See supra* text accompanying note 274 (explaining the need for artificial friction). Thus, when the work is newer and the reader is richer, the work will be distributed to the next person on the waiting list slowly, while older titles or those that are read by low-income patrons will be offered at a faster pace. *See infra* Section IV.D (discussing additional ways to implement market separation schemes).

307. *See* Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 110 (2001).

308. *Id.*

309. While the scheme set forth in this Section is not in use yet, in the physical world, the book industry does use timing to create another form of price discrimination by offering expensive hardcover books early and reduced-price paperback versions later. *Id.* at 73.

310. *See* Yucesoy et al., *supra* note 293, at 16.

311. *See* Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 387 (S.D.N.Y. 2023), *aff'd*, 115 F.4th 163 (2d Cir. 2024).

312. Gordon, *supra* note 126, at 1630 (discussing the positive externalities from scholarship and research).

313. *See* Brief of Amicus Curiae HathiTrust in Support of Neither Party, *supra* note 29, at 8–9. The most famous entity that provides such services to academic libraries is HathiTrust (affiliated with the University of Michigan), whose digitization project was held to be fair use in *Authors Guild, Inc. v.*

Finally, libraries can use a different type of market segmentation scheme, one that hinges on identifying specific reader groups for special treatment based on their external attributes.[314] This method, known as third-degree price discrimination, involves offering the same product to different consumer subgroups at varying prices.[315] Common examples include discounts for seniors or students.

Public libraries can leverage this strategy to enhance their mission of promoting readership, particularly among economically disadvantaged patrons, by offering preferential digital access to those below a certain income or wealth threshold. Such a scheme will target individuals who are less likely to allocate their scarce resources to purchasing eBooks. Consequently, this approach is unlikely to significantly affect sales.[316] Essentially, this method directly and broadly targets readers less likely to influence the market, aligning with the library's goal of inclusive access to knowledge.

Wealth-based segmentation, though socially beneficial in promoting readership among the economically disadvantaged, presents distinct challenges. It conflicts with one of the core principles of American public libraries: providing equal, free access to knowledge for all.[317] For close to 200 years, American public libraries have strived to democratize access to knowledge by expanding it beyond just scholars, government officials, and the wealthy.[318] While targeting economically disadvantaged groups reflects this redistributive impact, it simultaneously compromises the ideal of equal access. Implementing such a strategy is not only practically difficult[319] but also politically sensitive, as it risks alienating middle-class patrons and jeopardizing public support, potentially reducing libraries to being perceived as welfare institutions (which, unlike libraries, frequently face intense political controversy).

HathiTrust, 755 F.3d 87, 103 (2d Cir. 2014). As noted, *supra* note 9, an in-depth discussion of academic libraries is beyond the scope of this work, but it is important to note that HathiTrust and similar services do not provide free-for-all, unrestricted access to digitized works, a fact that played a vital role in holding the project fair use.

314. This approach is not completely foreign to copyright law. In fact, one identified group—the visually impaired—already receives special treatment both under the fair use doctrine and outside of it. *See* 17 U.S.C. § 121A (allowing limited reproduction and distribution of copyrighted works in a format designed for the visually impaired); *HathiTrust*, 755 F.3d at 103 ("[T]he doctrine of fair use allows the Libraries to provide full digital access to copyrighted works to their print-disabled patrons.").

315. *See* TIROLE, *supra* note 118, at 135, 137; Meurer, *supra* note 307, at 69–71.

316. Such a scheme will naturally increase the risk of arbitrage and piracy, and therefore it will need to rely on effective DRM tools. However, as noted, *supra* note 215, those tools are available.

317. PALFREY, *supra* note 13, at 1–2.

318. *Id.*

319. The practicability of such a scheme largely depends on implementation specifics. Nevertheless, a key challenge in targeting low-income earners is the resources required for their identification. Additionally, their limited access to computers (a broader social issue) could hinder the distribution of digital information, including eBooks. Libraries are already addressing this challenge as part of their commitment to universal information access. *See, e.g.*, Carrie Smith, *Devices on the Go: Tech Lending Options to Support Digital Equity*, AM. LIBRS. (Mar. 1, 2022), https://americanlibrariesmagazine.org/2022/03/01/devices-on-the-go [https://perma.cc/T6QJ-PQGQ] (examining how "many libraries now lend equipment to increase internet access and help close the digital divide").

Nevertheless, there may be middle grounds worth exploring where libraries will offer improved preferential access to low-income patrons while still serving every reader regardless of class. Indeed, suggesting that libraries cannot support low-income patrons without political repercussions is perhaps an overstatement. Libraries already offer services like internet access and tablet lending, predominantly used by less-affluent patrons.[320] Moreover, the public education system—which provides universal access yet offers specific services like need-based grants solely to lower-income individuals—exemplifies societal backing for such approaches.[321] Thus, while prioritizing low-income readers carries risks, libraries can still explore strategic ways to offer them additional services without undermining their broader mission and their public support.

In summary, libraries can use various strategies to segment their readers, which will allow them to extend digital resource access without notably impacting the publishers' profits and legitimate interests under copyright law.

While congressional support for such strategies would be ideal, [322] its absence does not preclude their implementation. With their minimal harm to the

320. Granted, while those existing services are rarely used by the middle class and wealthy patrons, the scheme explored in this Section goes a step further by *prohibiting* them from using certain services, such as faster digital lending.

321. While public support for higher education has eroded in recent years, it is still remarkably high. *See, e.g.*, NOAH D. DREZNER & OREN PIZMONY-LEVY, AMERICAN HIGHER EDUCATION WIDELY VIEWED AS A WORTHWHILE INVESTMENT BENEFITING INDIVIDUALS AND SOCIETY 3 (2023), https://academiccommons.columbia.edu/doi/10.7916/zkm5-kp68/download [https://perma.cc/SGA5-4UGD] (reporting that 69% of Americans "say public spending on higher education in the United States has been an excellent or good investment," a decrease from 76% in 2017). *But see* Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, GALLUP: NEWS (July 11, 2023), https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx [https://perma.cc/3A5J-JFU9] (reporting that only 36% of Americans have a "great deal" or "quite a lot" of confidence in higher education, compared to 57% in 2015, while 22% have "very little" confidence, as compared to 9% in 2015). The reasons for this erosion, however, likely have little to do with need-based scholarships (which have existed for many decades). In fact, the high cost and high debt of higher education, the perception of a political bias, and legacy admissions are often listed as the main factors contributing to this phenomenon. *See, e.g.*, Hannelore Sudermann, *The Way Ahead for Higher Ed*, U. WASH. MAG. (Mar. 2023), https://magazine.washington.edu/feature/in-a-challenging-time-for-higher-ed-institutions-try-to-restore-public-trust [https://perma.cc/7F6A-7LAM]; Peter Kanelos, Opinion, *The Public Is Losing Confidence in Higher Ed — Here's Why*, THE HILL (Oct. 19, 2018, 1:30 PM), https://thehill.com/opinion/education/411924-the-public-is-losing-confidence-in-higher-ed-heres-why/.

322. Legislation supporting public libraries in the digital realm has garnered significant bipartisan support at the state level throughout the country, *see infra* text accompanying notes 332–35, yet Congress has remained inactive, a trend that might not easily change. As Jessica Litman famously showed, Congress typically amends the Copyright Act when there is a consensus among relevant stakeholders, LITMAN, *supra* note 109, at 23—an unlikely scenario in the foreseeable future when it comes to publishers and public libraries. Interestingly, the Copyright Office's 2001 report, while recommending against adding a digital first sale doctrine to the Copyright Act, acknowledged the potential challenges for public libraries. PETERS, *supra* note 114, at 102–05. It proposed some mitigation measures and noted that additional measures might be needed if they prove ineffective. *Id.*

publishers' market and substantial societal benefits, these strategies are likely to be considered fair use.[323]

However, the lack of explicit congressional approval presents two significant challenges. First, as noted,[324] while fair use, under some circumstances, permits the scanning and digital distribution of printed works, it likely does not extend to the redistribution of publisher-provided digital content, particularly if it is DRM protected. Therefore, barring changes to federal law, libraries remain bound by publishers' restrictive and costly licensing for purely digital content.

Second, even when scanning is feasible (and it typically is), those schemes venture into uncharted territory, and considering the recent case law rejecting CDL,[325] they are quite risky. Given libraries' known risk aversion,[326] legal ambiguity could cause hesitation. Despite this, the following Section suggests that state-run libraries should confidently pursue these strategies to enhance access, even amidst potential legal uncertainties.

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323. A full analysis of the fair use question depends on the implementation details. Nonetheless, a well-designed scheme can qualify as fair use. The main argument against fair use is the arguable lack of transformability. Since the landmark Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc.*, transformability has become a crucial factor in fair use analysis. 510 U.S. 569, 578–80 (1994). Traditionally, a use was considered transformative, and thus more likely to be fair, if it added something new or repurposed the original work. *Id.* at 579. The schemes explored in this Part are less likely to meet this standard.

However, for two reasons, these schemes are nevertheless likely fair use. First, non-transformative use can be fair, especially when taken for non-profit purposes. *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984) (holding a borderline non-transformative use fair use partly because "[a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."). Second, as noted, *supra* note 277 and accompanying text, in its fair use analysis, the Supreme Court stresses above all the question of substitution between the defendant's use and the plaintiff's market. In its recent fair use decision, the Court went a step further and held that substitution should not just be balanced against transformability but rather should be a crucial part in the transformability analysis itself. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 598 U.S. 508, 527–28 (2023).

This Section emphasized that a properly implemented segmentation scheme by libraries should not significantly encroach on publishers' markets. Given the importance of substitution in fair use analysis, and considering the noncommercial nature of public libraries, such use should be considered fair.

324. *Supra* Section II.B.1.

325. *See supra* Section IV.A.2.

326. *See, e.g.*, Miriam Marcowitz-Bitton, Orit Fischman-Afori & Hillel Billauer, *The Future of Criminal Enforcement of Copyright: The Promise of Civil Enforcemen*t, 30 GEO. MASON L. REV. 463, 487 (2023) (describing librarians as "typical risk-averse users"); Maria A. Pallante, *Orphan Works & Mass Digitization: Obstacles & Opportunities*, 27 BERKELEY TECH. L.J. 1251, 1257 (2012) ("[Libraries are] very risk averse . . . —in other words they cannot risk fair use."); Katie Fortney, *Ending Copyright Claims in State Primary Legal Materials: Toward an Open Source Legal System*, 102 LAW LIBR. J. 59, 60 (2010) (describing libraries as "risk-averse institutions"); Nicholas Joint, *Applying General Risk Management Principles to Library Administration*, 56 LIBR. REV. 543, 543 (2007) ("[L]ibrarians are famously 'risk-averse'.").

C. STATES AS REGULATORS AND CONSUMERS

Since the country's inception, copyright law has been part of federal law.[327] However, states and local governments have an important role to play within this system, as the operation of public libraries demonstrates. Public libraries are primarily financed by local governments.[328] The digital lending problem, therefore, burdens their budgets. Moreover, and relatedly, as further explored below, in recent years, unlike Congress, state legislators in multiple states seem willing to tackle the digital lending problem, partly in response to growing lobbying efforts by libraries.[329] This Section takes a closer look at the role of the state and local governments, both as potential market regulators and as actors within those markets.

1. States as Regulators

Maryland has made the most meaningful attempt to tackle the digital lending problem. In April 2021, the state passed the Library eBook Fairness Law.[330] The statute required any publisher who already licenses digital eBooks or audiobooks in the state to "offer to license the electronic literary product to public libraries in the State on reasonable terms that would enable public libraries to provide library users with access to the electronic literary product."[331] The bill received broad bipartisan support and was passed unanimously by both the Maryland Senate and House of Delegates.[332] In June 2021, a similar bill unanimously passed the New York Assembly and passed the state Senate with only one senator objecting.[333] But on December 29, 2021, New York Governor Kathy Hochul vetoed it, claiming that it was preempted by the federal Copyright Act.[334] Comparable bills were considered at the time or have been since introduced in eight other states.[335]

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327. *See* Rub, *Copyright and Copying Rights*, *supra* note 153, at 344–47 (exploring the changing role of the states within the copyright law ecosystem).

328. *See* Curcic, *supra* note 11 (noting that, nationwide, over 86.55% of the entire income of libraries comes from local government funding, 6.68% from state government funding, and 0.63% from federal government funding).

329. *See* Shawnda Hines, *ALA Denounces Amazon, Macmillan in Response to Congressional Inquiry on Competition in Digital Markets*, AM. LIBR. ASS'N (Oct. 23, 2019), https://www.ala.org/news/press-releases/2019/10/ala-denounces-amazon-macmillan-response-congressional-inquiry-competition [https://perma.cc/474R-9B6Y] (quoting the Senior Director of Public Policy and Government Relations of the American Library Association as saying that "we believe it is time to take legislative action"); *see also* Gard, *supra* note 12, at 512–13 (describing the circumstances leading to the enactment of Maryland's Library eBook Fairness Law).

330. *See* Gard, *supra* note 12, at 511–14 (describing the circumstances that led to the enactment of the law).

331. MD. CODE ANN., EDUC. § 23-702(a) (West 2023).

332. Matt Enis, *AAP Sues Maryland Over Law Requiring Publishers to License Ebooks to Libraries Under "Reasonable Terms,"* LIBR. J. (Dec. 9, 2021) [https://perma.cc/YM7Q-8RWF].

333. *See* Andrew Albanese, *Hochul Vetoes New York's Library E-book Bill*, PUBLISHERS WKLY. (Dec. 30, 2021), https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html.

334. *See id.*

335. Those states are Rhode Island, Missouri, Illinois, Tennessee, Connecticut, Massachusetts, Hawaii, and Virginia. *See State eBook Licensing Bills Threaten Creators and Copyright*, COPYRIGHT

Maryland's Library eBook Fairness Law, indeed, raised a host of serious preemption questions. It targeted the publishers' licensing markets and imposed de facto compulsory licenses, a power traditionally reserved to the federal Copyright Act, thus directly impacting the publishers' exclusive rights under federal law over the distribution of copyrighted works. Furthermore, the act aimed to recalibrate the relationship between publishers and public libraries in order to promote goals, such as added accessibility, that are central to federal copyright law. As such, preemption was foreseeable.[336]

Unsurprisingly, in February 2022, the United States District Court for the District of Maryland held the Maryland Act preempted and enjoined its enforcement.[337] The court held that the Act "strips publishers of their exclusive right to distribute their copyrighted work—a right that necessarily includes the right to decide whether, when, and to whom to distribute."[338] Maryland decided not to appeal this decision.[339]

2. States as Consumers

Even if states face significant restrictions in exercising their police power over eBook markets, they are also major players in these markets. State and local governments own the vast majority of public libraries, and neither the Copyright Act nor the Sherman Act restricts their ability to use this market power to exercise favorable terms.[340]

States, therefore, can decide that their libraries (and local libraries in the state) will only enter certain agreements (for example, only permanent licenses) and not others (for example, two-year licenses). Some states are currently considering such legislation. While such a scheme is clearly within state power, it has two main drawbacks. First, a publisher does not have to agree to those terms,

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ALL., https://copyrightalliance.org/trending-topics/state-ebook-licensing-bills [https://perma.cc/S9XZ-J8ZS] (last visited Oct. 27, 2024); Andrew Albanese & Jim Milliot, *With New Model Language, Library E-Book Bills Are Back*, PUBLISHERS WKLY. (Feb. 23, 2023), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/91581-with-new-model-language-library-e-book-bills-are-back.html.

336. It is well established that state law cannot "stand[] as an obstacle to the . . . objectives of Congress," Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 163 (2016) (quoting Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000)), but applying this standard in the context of copyright law has proven to be exceptionally complex and unpredictable. *See, e.g.*, Rub, *Copyright and Copying Rights*, *supra* note 153, at 344–47 (describing the intricate relations between federal and state laws in regulating reproduction of information goods). However, as vague as this area of the law is, the Maryland Act seemed to have been comfortably outside the scope of the state police power. Moreover, the Act's issues were not solely concerning federal preemption; it also deferred crucial decisions, offering no guidance as to what are "reasonable terms." This question is extremely complex, as illustrated throughout this Article.

337. Ass'n of Am. Publishers, Inc. v. Frosh, 586 F. Supp. 3d 379, 383, 398 (D. Md. 2022).

338. *Id.* at 389.

339. Ass'n of Am. Publishers, Inc. v. Frosh, 607 F. Supp. 3d 614, 617 (D. Md. 2022) (noting that the state declared that it "has not and will not enforce the Maryland Act").

340. *See* Parker v. Brown, 317 U.S. 341, 350–51 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

potentially leaving the public libraries in the state without access to its titles.[341] Second, this approach does not assist privately owned libraries—primarily libraries of private universities—in tackling the digital lending problem.

3. States' Sovereign Immunity

Being owned by the state can provide public libraries with another advantage, and a very significant one: sovereign immunity. In 2020, the Supreme Court held that Congress failed to abrogate states' immunity under the Eleventh Amendment regarding claims under the federal Copyright Act.[342] As a result, state-owned libraries (although not local-owned ones)[343]—including those owned by public universities—cannot be sued for damages for copyright infringement unless their state waives its immunity.[344]

There are still two ways for copyright owners to implicate state-owned libraries. First, they can try to sue library employees for damages for copyright infringement in their personal capacity. But such a claim is unlikely to succeed. Identifying the exact employee that allegedly infringed might be challenging, and, more importantly, courts agree that the doctrine of qualified immunity applies to copyright claims against public employees.[345] Under that doctrine, public employees are immune when "a particular area of copyright law was not

341. It is extremely difficult to predict whether publishers would license their eBooks with such restrictions. Public libraries contribute about 9% to publishers' revenue. Jane Friedman, *What Do Authors Earn from Digital Lending at Libraries?* (July 18, 2023), https://janefriedman.com/what-do-authors-earn-from-digital-lending-at-libraries [https://perma.cc/BD8R-Z3XJ]. If a state bans libraries from accepting specific terms, publishers will need to choose between offering alternative terms or declining, potentially forfeiting this income source, at least temporarily. Since no state has yet adopted this approach, forecasting publishers' reactions is speculative, but it's likely they will resist, at least initially, to avoid setting a precedent, especially if this initiative is first adopted by a relatively smaller state.

342. Allen v. Cooper, 589 U.S. 248, 266–67 (2020).

343. Under the Eleventh Amendment "only States and arms of the State possess immunity from suits authorized by federal law." N. Ins. Co. of N.Y. v. Chatham Cnty., 547 U.S. 189, 193 (2006). The Supreme Court "has consistently refused to construe the [Eleventh] Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a slice of state power." Lake Country Ests., Inc. v. Tahoe Reg'l Plan. Agency, 440 U.S. 391, 401 (1979) (internal citation omitted); *see also* Fred Smith, *Local Sovereign Immunity*, 116 COLUM. L. REV. 409, 412–13 (2016) (discussing the development of the doctrine). While the exact scope of "arms of the State" and the ways in which cities and municipalities can avoid the full impact of federal law might be unclear at the margin, Smith, *supra*, at 412–15, it is also clear that libraries owned and financed by local governments (and their employees) are not entitled to this type of sovereign immunity. Obviously, libraries that are owned by private institutions, such as libraries of private universities, are also not entitled to sovereign immunity from federal law claims.

344. While many states have waived their sovereign immunity in some circumstances and subject to certain procedures, most of those waivers are limited to tort and/or contract claims, thus leaving in place the immunity against copyright claims. REG. OF COPYRIGHTS, U.S. COPYRIGHT OFF., COPYRIGHT AND STATE SOVEREIGN IMMUNITY app. E (2021) (exploring the waivers of immunity by each state).

345. *See, e.g.*, Reiner v. Canale, 301 F. Supp. 3d 727, 741 (E.D. Mich. 2018); Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n, No. CV 16-4781, 2016 WL 9223889, at *5–6 (C.D. Cal. Dec. 22, 2016); Issaenko v. Univ. of Minn., 57 F. Supp. 3d 985, 1012–16 (D. Minn. 2014).

clearly established" or "when their conduct was 'objectively reasonable.'"[346] Courts have repeatedly ruled that public employees, as such, cannot be liable under copyright law when it is unclear if their actions constitute fair use.[347]

Consequently, unless there is clear infringement, which is relatively rare in fair use cases,[348] copyright owners can only sue state entities under the *Ex parte Young* doctrine.[349] It allows all lawsuits against state actors as long as the remedies are limited to injunctions.[350] Injunctions in copyright cases, however, require the plaintiff not only to prove infringement but also to meet a multi-factor test, including showing that an injunction is in the public interest,[351] which might be challenging when it comes to public libraries.

For those reasons, sovereign immunity under the Eleventh Amendment, while only applicable to the small subset of libraries owned by states, provides these libraries with a powerful shield against copyright claims. It should therefore give state-owned libraries significant leeway to take actions that might be borderline copyright infringement. Libraries and librarians are notoriously risk averse,[352] but the risk here seems truly small. Even if publishers decide to sue a state-owned library, which is likely to damage their reputation[353]—public libraries are, after all, loved by most Americans[354]—the likely worst possible outcome for such a library is an order forcing it to change course going forward.

D. OPTIMIZING DIGITAL LENDING BY EMPLOYING MULTIPLE STRATEGIES

The preceding Sections have examined a variety of overarching strategies to address the challenges inherent in digital lending. These include adopting a Controlled Digital Lending (CDL) model that mirrors physical lending practices, compensating publishers for digital loans (ePLR), expanding access to older

346. *Tresona*, 2016 WL 9223889, at *6 (quoting Ass'n for Info. Media & Equip. v. Regents of the Univ. of Cal., No. 10-cv-09378, 2012 WL 7683452, at *5 (C.D. Cal. Nov. 20, 2012) and Campinha-Bacote v. Bleidt, No. 10-3481, 2011 WL 4625394, at *3 (S.D. Tex. Oct. 3, 2011)).

347. *E.g.*, *Reiner*, 301 F. Supp. 3d at 743; *Tresona*, 2016 WL 9223889, at *8.

348. *See supra* note 323 (discussing some of the complexities around the fair use question). Nevertheless, the decision in *Hachette Book Group, Inc. v. Internet Archive*, 115 F.4th 163 (2d Cir. 2024), makes it more likely that courts, especially within the Second Circuit's jurisdiction, will find a CDL-based scheme so clearly illegal that they will impose liability on public employees engaged in this practice.

349. *Ex parte* Young, 209 U.S. 123, 159–62 (1908).

350. Reed v. Goertz, 598 U.S. 230, 234 (2023) ("[T]he *Ex parte Young* doctrine allows suits . . . for declaratory or injunctive relief against state officers in their official capacities.").

351. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (establishing the four-factor test under patent law); Salinger v. Colting, 607 F.3d 68, 73–75 (2d Cir. 2010) (applying the test in a copyright litigation); Pamela Samuelson, *Withholding Injunctions in Copyright Cases: Impacts of* Ebay, 63 WM. & MARY L. REV. 773, 827–30 (2022) (exploring the role of the public interest in granting injunctions for copyright infringement).

352. *See supra* note 326.

353. Indeed, while repeat players within our copyright ecosystem—such as publishers, movie studios, software companies, and internet providers—are often parties to copyright litigation, lawsuits against (or by) libraries are exceedingly rare. *See* Brief of *Amici Curiae* Nine Library Orgs. & 218 Librarians in Support of Defendant-Appellant, *supra* note 216, at 7–8.

354. *See supra* notes 1–6 and accompanying text.

works or for scholarly purposes, offering preferential treatment to specific groups like low-income patrons, coordinating efforts among state libraries, and leveraging the immunity offered by the Eleventh Amendment.

These strategies, each with its own merits and drawbacks, are not mutually exclusive and need not be applied on their own or uniformly to all digital loans. It's conceivable to employ a mix of these approaches to optimize digital lending. For instance, a state-owned library could scan its collection and digitally lend it to patrons following a stringent CDL scheme. To mitigate market disruption and strengthen its fair use position, such a scheme would deliberately and significantly slow the rate of unlicensed digital lending. Simultaneously, the library might offer less restrictive (for example, quicker) borrowing to its low-income patrons, especially for older works. While this approach carries some legal risks, the Eleventh Amendment could provide sufficient assurances to encourage those libraries to experiment with it.[355]

Alternatively, Congress could devise a system that permits libraries to buy eBooks in retail markets and lend them to patrons while compensating publishers through a Public Lending Right (PLR) scheme for borrowing by wealthy and middle-class readers. This program could be further tweaked, for example, by reducing the rate of PLR royalties in cases of young borrowers, on the assumption that such an activity generates significant positive externalities.[356] Furthermore, to address the publishers' legitimate interests, Congress might introduce additional restrictions, such as excluding new titles to avoid significant market disruption.

Those are, of course, just a few examples of many possible solutions to the digital lending problem. The aim of this Section (and the Article as a whole) is not to exhaustively list every combination of strategies or to enumerate any possible implementation scheme. It instead offers an analytic framework to consider such strategies. Indeed, it's vital to acknowledge that once extreme solutions, including reliance on the current market status quo, are set aside, a range of viable options emerges. These options can enhance access to copyrighted materials, foster positive externalities, and safeguard publishers' revenue and their capacity to stimulate creativity.

CONCLUSION

As digital distribution becomes increasingly prevalent, the digital lending problem will likely worsen. This unresolved matter is casting a growing shadow

355. While such a scheme, this Article argues, is fair use, Congress can also remove the uncertainty surrounding it by codifying it. Interestingly, this notion seems to be strongly supported by librarians nowadays, which wasn't the case in the past. *Compare* LILA BAILEY & MICHAEL LIND MENNA, SECURING DIGITAL RIGHTS FOR LIBRARIES: TOWARDS AN AFFIRMATIVE POLICY AGENDA FOR A BETTER INTERNET 11 (2022) (noting that more than 78% of survey and workshop participants—leading experts from libraries, academia, and civil society—supported codifying CDL), *with* CLAGGETT, *supra note* 75, at 11, app. B (noting the opposition among some librarians to legislative reform, fearing it will weaken their position).

356. *See supra* text accompanying notes 233–38.

on the ability of public libraries to fulfill their missions and serve their communities effectively. Courts and Congress, so far, do not seem to fully grasp the nature and magnitude of this challenge.

The digital lending problem is complicated to resolve, which might explain why it is troubling libraries worldwide. Tackling it entails multifaceted issues concerning the law, technology, markets, and equality, as well as difficult questions as to the role of authors, publishers, libraries, and readers in the production and dissemination of knowledge and, more broadly, within our democratic—and growingly digital—society.

Legal literature has ignored this challenge and this crisis for far too long. This Article aims to bridge this gap by analyzing the impact of libraries in both the physical and digital worlds. It examines several frameworks, which are not mutually exclusive, to facilitate library operations in the digital domain. Some of those frameworks are based on scanning printed books and distributing them under a Controlled Digital Lending (CDL) model, compensating publishers for digital loans, expanding access to older works or for scholarly purposes, offering preferential treatment to specific groups, or coordinating efforts among state libraries. As the Article explains, a few of those frameworks require federal legislation, but many of them do not, and they can be implemented by state and local governments and public libraries themselves.