REIMAGINING DIGITAL LIBRARIES

113 GEO. L. J. (forthcoming, 2024)

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ABSTRACT

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, they 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 the libraries' resources, shrink their catalogs, and hamper their ability to fulfill their mission. Changes in the post-COVID world, including a blockbuster case—*Hachette v. Internet Archive*—that is currently going through our federal judiciary system and proposed statutes in various states, put the issue front and center.

So far, lower 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 the libraries to fend for themselves.

This Article seeks to begin closing this surprising gap in legal the 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 publisher's powerful commercial interests. The Article instead offers several alternative frameworks to balance the libraries' role in providing access to knowledge

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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 the libraries themselves. Copyright law and copyright markets have always evolved in response to new technologies. They now need to adapt to address the libraries' crisis and their role and needs in our growingly digitalized world.

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INTRODUCTION

Even in our highly divided society, Americans of all political creeds share their love of public libraries.[1] 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."[2] Jill Biden declared, "[i]n big cities and small towns, libraries fulfill a purpose that almost nothing else does. They're a place of information for all."[3] Laura Bush, a former librarian, commented that "the most valuable item in my wallet [is] my library card,"[4] and Ivanka Trump tweeted that "we honor our libraries and librarians for opening our eyes to the world of knowledge, learning and reading!"[5] Since President Eisenhower proclaimed, in 1958, the first National Library Week, the nation has been celebrating this event every spring.[6]

But in recent years, many public libraries face a serious crisis. In some parts of the country, library budgets are being cut.[7] In a few states, school libraries are caught in the culture-war crossfire as they face heavy political pressure not to include certain books, especially those concerning so-called "LGBTQ content," in their collections.[8]

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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/ (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. Also, 56% believe libraries help them get information that aids with decisions they have to make.").

2 Barack Obama, *Bound to the Word*, AM. LIBRS. (Aug. 2005), https://americanlibrariesmagazine.org/bound-to-the-word.

3 Lindsey Simon, *Why First Lady Jill Biden Loves Libraries*, I LOVE LIBRS. (Jan. 28, 2001), https://ilovelibraries.org/article/why-first-lady-jill-biden-loves-libraries.

4 Laura Bush, *Mrs. Bush's Remarks for National Library Week Celebration and American Library Association's '@ Your Library' Event*, THE WHITE HOUSE (Apr. 3, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/04/20010403-12.html.

5 Ivanka Trump (@IvankaTrump), X (Apr. 13, 2017, 8:03 PM), https://twitter.com/IvankaTrump/status/852673521822126080.

6 Dwight D. Eisenhower, *Proclamation 3226—National Library Week* (Mar. 15, 1958), https://www.presidency.ucsb.edu/documents/proclamation-3226-national-library-week.

7 *See, e.g.*, Claire Woodcock, *Public Library Budgets Are Being Slashed. Police Have More Cash Than Ever*, VICE (Jan. 12, 2023, 9:00 AM), https://www.vice.com/en/article/akemgz/public-library-budgets-are-being-slashed-police-have-more-cash-than-ever.

8 *See, e.g.*, 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, No. 23-50668, 2024 WL 175946, at *15–16 (5th Cir. Jan. 17, 2024)

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 digitalized world.[9]

Considering the importance of public libraries to our lives, education, collective knowledge and culture, democracy, and even economy—the annual budget of public libraries is more than $13 billion[10]—it is surprising that their operation and the massive challenges they face in the digital world received extremely limited attention in legal scholarship.[11] This Article aims to start closing this gap by focusing on

(issuing 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, 1406–09 (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. 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 the Article touches upon various types of libraries, its focus is on non-academic public libraries. Academic libraries operate 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, 263 (2007) (discussing the role of academic libraries); *infra* note 116 and accompanying text (addressing the pricing decision of the publishing industry). A full analysis of the challenges of academic libraries is therefore outside the scope of this work.

10 Dimitrije Curcic, *Library Funding Statistics*, WORDSRATED (Mar. 8, 2023), https://wordsrated.com/library-funding-statistics.

11 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, 1308–09 (2010) (describing the projects 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, 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 supra* 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).

probably the libraries' most central role, one that is being significantly challenged nowadays—distributing knowledge, primarily by lending books.[12]

The libraries' main challenge—one that this Article calls "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, to freely transfer it to others.[13] 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.[14]

The digital world works differently. Transferring digital files creates new copies on the recipients' hard drives, and the first-sale doctrine does not apply to such reproductions.[15] Therefore, most libraries assume—an assumption that this Article questions—they must obtain licenses from publishers to both acquire and lend digital content. Consequently, instead of being partly shielded from market forces, libraries now need to bow down to them. Book publishers capitalize on this reality and use their market power to extract high licensing fees and restrictive terms for digital lending, thus draining the libraries' digital catalogs and their budgets.[16]

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 the libraries' ability to perform their traditional duties of providing access to printed

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[12] While libraries have existed for thousands of years, Barbara Krasner-Khait, *Survivor: The History of the Library*, HIST. MAG. (Oct.–Nov. 2001), http://www.history-magazine.com/libraries.html, the commitment to primarily provide access to knowledge to the masses has been the driving force behind American public libraries since the 19th century. JOHN PALFREY, BIBLIO TECH 1–2 (2015). Libraries, however, provide other services to their communities. For example, public libraries are a place where members of the community meet; they are also a place where Internet access is provided for free as well as guidance as to how to use digital and printed resources; and libraries are also institutions that preserve our collective knowledge and culture for generations to come.

[13] 17 U.S.C. § 109(a).

[14] *See infra* notes 88–89 and accompanying text (discussing how the mere possibility of using retail markets, like Amazon, prevents the publishers from separating individuals from libraries and thus keep prices low).

[15] 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"). 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 CAL. 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 (2014); Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889, 990–91 (2011). *See also infra* Section II.A. (introducing the digital lending problem).

[16] *See infra* notes 123–125 and accompanying text.

resources.[17] More and more readers discovered eBooks, and libraries sought ways to better serve these needs.[18] As the pandemic dust settled, libraries were left at a crossroads. At the same time, the law finally started to address the digital lending problem more directly.

Indeed, the legal treatment of the digital lending problem has evolved in recent years, driven by developments in both case law and legislation. A major ongoing litigation—*Hachette v. Internet Archive*—is currently litigated before the Second Circuit.[19] Being the first of its kind, the case is drawing significant attention from legal and non-legal commentators, librarians, authors, and publishers,[20] and it, or cases like it, may eventually reach the Supreme Court's docket. The case has the potential to profoundly impact the 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."[21] At the same time, libraries are increasingly lobbying legislators to intervene and support their operations in the digital realm.[22] 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

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[17] *See* Dan Cohen, *Libraries Need More Freedom to Distribute Digital Books*, THE 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 "libraries 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*, UKSG INSIGHTS (July 27, 2022), https://insights.uksg.org/articles/10.1629/uksg.586.

[18] Cohen, *supra* note 17; Anderson & McCauley, *supra* note 17; *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/ (documenting massive increase in use of eBooks by academic libraries during the pandemic).

[19] Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Sept. 12, 2023).

[20] *See, e.g.*, Cohen, *supra* note 17 (commenting that the case "might shape how we read books on smartphones, tablets, and computers in the future"); Streitfeld, *supra* note 11 (noting that because of this litigation "owning 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), 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"). As of January 2024, the briefings before the Second Circuit are in their initial stages. However, 11 amicus briefs have already been filed, some signed by dozens of professors or various organizations. Many more submissions are anticipated in the coming months.

[21] Cohen, *supra* note 17. *See* Brief of Amicus Curiae Hathitrust in Support of Neither Party at 3–7, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 28, 2023), 2023 WL 9062408 (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).

[22] *See infra* note 308.

consideration.[23] 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."[24]

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."[25] The publishing industry provides authors with resources to encourage them to engage in the creation of new works.[26] It also markets and distributes the works created.[27] These works are typically protected by copyright, allowing the publishers to charge supercompetitive prices for the right to access them.[28] This, however, prices out those who cannot or are unwilling to pay, resulting in the famous deadweight loss problem.[29] 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 publisher's ability to compensate authors. Indeed, this is yet another aspect of copyright law's core challenge: striking a balance between incentives and access.[30]

This Article explores this tension between public libraries and publishers in the physical and digital realms, from legal, comparative, and economic and social justice

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[23] *See infra* Section IV.C.

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

[25] U.S. CONST. art. I, § 8, cl. 8.

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

[27] *Id.*

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

[29] *See, e.g.*, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1578 (2009) (discussing the deadweight loss problem); Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485, 523–24 (2004) (same).

[30] *See, e.g.*, Kirtsaeng v. John Wiley & Sons, 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").

perspectives. Part I focuses on the tangible world. It explains that publishers and libraries operate in an equilibrium. While laws in most countries favor libraries, physical constraints prevent them from substituting the publishers' markets.[31] 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.[32] Indeed, this is a well-balanced system where access is provided both through the market and outside of the market.

Part II presents the digital lending problem. 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.[33] 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 publisher's 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.[34] The result of placing the libraries at the mercy of the publishers' market power is that eBook licenses heavily strain public libraries' budgets and restrict their catalogs.[35]

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.[36] The latter approach is the only one that can apply to 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.[37] Part II concludes by highlighting the challenges in formulating a comprehensive solution by examining, as a case study, recent rulings from the European Court of Justice, which attempted but failed to fully resolve the digital lending problem.[38]

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31 *See infra* text accompanying notes 91–94.

32 *See infra* text accompanying notes 99–104.

33 *See supra* text accompanying note 15.

34 *See infra* note 120 and accompanying text.

35 *See infra* notes 123–125 and accompanying text.

36 *See infra* text accompanying notes 127–130.

37 *See infra* text accompanying notes 136–140.

38 *See infra* Section II.B.2.

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.[39] 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 the eBook markets, potentially greatly harming publishers' revenues.[40]

The second misguided radical solution, favored by publishers and, unfortunately, endorsed, at least implicitly, by some courts, suggests that the market alone can address the digital lending problem without legal intervention.[41] This viewpoint argues that libraries can simply purchase the lending licenses they need.[42] 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 the deadweight loss problem mentioned above, they generate significant positive societal and industry externalities.[43] For example, libraries cultivate readership, particularly among young patrons, which is a public good often under-provided by the market.[44] 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 the heart of the *Hachette v. Internet Archive* ongoing litigation—is the possibility that scanning and digitally lending copyrighted printed materials might be protected under copyright law's fair use doctrine.[45] The key framework, known as "Controlled Digital Lending" (CDL), 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.[46] However, the Southern District of New York recently ruled that a particular implementation of CDL fell outside the scope of fair

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39 *See infra* text accompanying note 157.

40 *See infra* Section III.A.2.

41 *See infra* text accompanying note 200.

42 *Id.*

43 *See infra* text accompanying notes 201–218.

44 *See infra* text accompanying notes 214–219.

45 *See infra* Section IV.A.2.

46 *See infra* text accompanying notes 223–226.

use.[47] This article critiques that broad decision, now on appeal, arguing that the District Court overlooked the essential function of fair use.[48] 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.[49] The article posits that fair use can and should restore the balance that Congress created in the physical world that digital technology disrupted.[50]

The Article then steps outside the CDL framework to propose and analyze other approaches to tackle 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.[51] However, due to the convenience of digital lending, libraries might end up disproportionately serving wealthier populations. 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.[52] 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; or by usage—prioritizing certain activities, such as scholarship.[53] The Article calls on state-owned libraries to spearhead such innovative digital lending practices. Largely protected from copyright liability under the 11th Amendment, these libraries are in a unique position to experiment with and expand the boundaries of digital lending.[54]

Part IV concludes by demonstrating how elements from various approaches can work in tandem to address the digital lending problem.[55] 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 scholarship. This would alleviate much of the tremendous economic burden on public libraries and allow them

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

48 *See infra* Section IV.A.2.

49 *See infra* text accompanying notes 242–245.

50 *See infra* text accompanying note 260.

51 *See infra* Section IV.B.1.

52 *See infra* Section IV.B.2.

53 *Id.* This is not a closed list and other criteria, for example disability status, may also be taken into account. *See infra* note 293 and accompanying text.

54 *See infra* Section IV.C.

55 *See infra* Section IV.D.

to continue to fulfill their missions and serve the needs of their patrons and our society at large.

PART I: THE PHYSICAL WORLD EQUILIBRIUM

Nobody can seriously doubt that it is crucial to compensate authors for their creative works and that the publishing industry plays a vital role in that payment scheme and in the distribution of works. At the same time, 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.

A. A Comparative View of the Laws of Library Lending

The legal treatment of public libraries is one of a few topics that was never unified by international treaties.[56] It is, therefore, left for individual countries to set forth their own balance between the conflicting interests of publishers and public libraries. And indeed, different countries chose different ways to achieve this balance.

At one end of the spectrum are the members of the European Union and the United Kingdom,[57] where the law gives copyright owners exclusive rights to control the rental and lending of copyright-protected works.[58] Rental, as used in this context, means the "making available [of a copyrighted work] for use, for a limited period of time and for direct or indirect economic or commercial advantage," while lending means 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

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[56] 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 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, 410–12 (2013) (calling for the creation of an "international norm" concerning the lending of e-books).

[57] While the United Kingdom is not part of the European Union anymore, its copyright laws, and in specific those concerning public libraries, were formed before Brexit while it was part of the European Union. Therefore, this Article discusses the situation in the United Kingdom as part of the regimes within the European Union.

[58] Directive 2006/115/EC 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) 29.

through establishments which are accessible to the public."[59] This means that the law encompasses the activities of both for-profit libraries and not-for-profit public libraries, while the individual transfer of possession without profit (for example, when an individual lends a copy to a friend) is not subject to the authors' rental and lending rights.

European law, however, also allows (but does not require) each member state to exempt public (and only public) libraries from this exclusive right.[60] 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."[61]

This possibility creates a split (albeit a small one) within the European Union. At one end of the spectrum, a few European countries do not exempt their public libraries from European rental and lending rights. In those countries—Bulgaria and Romania, to be exact[62]—public libraries need to secure a license from 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 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 the libraries' activities.[63]

All Public Lending Rights schemes allow public libraries to lend books (and, in many countries, for example, Germany and Estonia, other copyrighted materials) to patrons.[64] Those schemes, however, are, to quote the World IP Organization,

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[59] *Id.* at art. 1.

[60] *Id.* at art. 6.

[61] *Id.*

[62] *Schemes in Development*, PUB. LENDING RIGHT INT'L, https://plrinternational.com/indevelopment (last visited Jan. 30, 2024) (Bulgaria, Romania). In addition, Portugal did not establish a PLR scheme that would allow its public libraries to be exempted from EU's lending rights, but Portuguese law nevertheless exempts them. For this, the European Court of Justice held that Portugal have failed to fulfill its obligations as a member state. Case C-53/05, Comm'n v. Portuguese Republic, 2006 E.C.R. I-06215. *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/.

[63] *See* Jim Parker, *The Public Lending Right and What It Does*, WIPO MAG., 3/2018 (June), https://www.wipo.int/wipo_magazine/en/2018/03/article_0007.html.

[64] The information about public lending rights schemes is based, unless indicated otherwise, on *Established Schemes*, PUB. LENDING RIGHT INT'L, https://plrinternational.com/established (last visited Jan. 30, 2024) [hereinafter PLR SCHEMES].

"patchy,"[65] and they differ significantly from one country to another. The most significant differences 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.[66] In others, such as Denmark, it is based on the number of books in the library collection.[67] Some countries, most notably France and Spain, use complex formulas that consider, among others, the number of books purchased and the number of library users.[68]

PLR schemes differ in many other ways. In some countries, Ireland and the United Kingdom for example, those schemes are handled by governmental entities,[69] while in others, like Italy and the Czech Republic, they are managed by collection societies or trade organizations.[70] In most countries, the government's budget pays the authors, but in some, like the Netherlands, the libraries themselves are paying for it.[71] Finally, and importantly, the recipients of the payments vary. In some countries, for instance, Spain and Hungary, the publishers and/or the authors of the books are being paid,[72] while in others, like Slovenia and Croatia, other creators, such as illustrators and translators, are being compensated as well.[73] Some countries, such as Austria and Italy, transfer some or all the money collected to funds that support creativity and authors more generally.[74]

Next on the spectrum are a few countries outside of the European Union that chose to provide compensation for public lending. Those countries include some European countries that are not part of the European Union, such as Norway and Iceland,[75]

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65 Parker, *supra* note 63.

66 *Bibliothekstantieme*, LITERAR MECHANA, https://www.literar.at/nutzer-innen/bibliothekstantieme (last visited Jan. 30, 2024) (Austria); *Public Libraries*, REPROBEL, https://www.reprobel.be/en/public-libraries/ (last visited Jan. 30, 2024).

67 PLR SCHEMES, *supra* note 64 (Denmark).

68 *Droit de prêt*, SOFIA, https://www.la-sofia.org/droits-geres/droit-de-pret/ (last visited Jan. 30, 2024) (Fr.); *Gestión préstamo público*, CEDRO, https://www.cedro.org/cedro/funciones/gestion-prestamo-publico (last visited Jan. 30, 2024) (Spain).

69 *Outline of the PLR Process*, PUB. LENDING REMUNERATION OFF., https://www.plr.ie/about-plr/outline-of-the-plr-process/ (last visited Jan. 30, 2024) (Ir.); *PLR Payments*, BRITISH LIBR., https://www.bl.uk/plr/plr-payments (last visited Jan. 30, 2024).

70 *Prestito Bibliotecario*, FUIS, https://www.fuis.it/prestito-bibliotecario/ (last visited Jan. 30, 2024) (It.); *Pro autory*, DILIA, https://www.dilia.cz/pro-autory (last visited Jan. 30, 2024) (Czech).

71 Parker, *supra* note 63.

72 *Gestión préstamo público*, *supra* note 68; *About Us*, MISZJE, http://miszje.hu/en/main-page/ (last visited Jan. 30, 2024) (Hung.).

73 PLR SCHEMES, *supra* note 64 (Slovenia, Croatia).

74 *Bibliothekstantieme*, *supra* note 66; *Prestito Bibliotecario*, *supra* note 70.

75 PLR SCHEMES, *supra* note 64.

and a few common law countries outside of Europe, including Canada, Australia, Israel, and New Zealand.[76] 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 based on nationality and the language of the work: in Canada, Australia, and New Zealand, only those who are citizens or residents are paid;[77] in Norway, the book must be in Norwegian or Sami and published in Norway;[78] in Iceland, the author must meet either the language requirement or the residency requirement;[79] in Israel, the author must meet both.[80] Moreover, the payment in those countries entirely depends on the government's annual budget allocation for its PLR scheme.[81] 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.[82] In Israel, for example, PLR payments are unavailable in some budgetary years.[83]

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. India, Japan, and the United States are prominent countries in this rather large group.[84] While the copyright laws in those countries

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[76] *Id.*

[77] Canada Council for the Arts, *Eligibility*, PUB. LENDING RIGHT PROGRAM, https://publiclendingright.ca/eligibility (last visited Jan. 30, 2024); *Australian Lending Rights Schemes (ELR/PLR)*, AUSTRALIAN GOV'T OFF. FOR THE ARTS, https://www.arts.gov.au/funding-and-support/australian-lending-right-schemes-elrplr (last visited Jan. 30, 2024; PLR SCHEMES, *supra* note 64 (New Zealand).

[78] PLR SCHEMES, *supra* note 64 (Norway).

[79] *Id.* (Iceland).

[80] Because EU law allows its members to "determine [the authors'] remuneration taking account of their cultural promotion objectives," *supra* text accompanying note 61, similar restrictions are likely allowed in the EU as well. However, while a few EU countries include such restriction in their PLR schemes, Denmark for example only compensates for the lending of books written in Danish, PLR SCHEMES, *supra* note 64, most EU countries include much more relaxed restriction based on nationality or language, and many, Germany and Italy for instance, do not have any such restrictions in place. *Id.*

[81] PLR SCHEMES, *supra* note 64.

[82] *Id.*

[83] 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 (Isr.) (explaining how funds for PLR payments in Israel might be available one year, and unavailable in the next one).

[84] *See* Aishwarya Chaturvedi, *Digital Libraries, Copyright and the COVID-19 Pandemic: A Comparative Study of India and the United States* (Jan. 25, 2022), https://ssrn.com/abstract=3965155, 6–8 (discussing India), 19–20 (discussing the United States); *Case Study: Library & Copyright*, COPYRIGHT RSCH. AND INFO. CTR., https://www.cric.or.jp/english/qa/cs03.html (discussing Japan). It should be noted that attempts were made—and rejected—since at least 1985 to introduce PLR into federal U.S. law. *See, e.g.*, Herbert Mitgang, *Authors Seek*

give the copyright owners exclusive control over the distribution of copies of their works,[85] that right is restricted by the doctrine of copyright exhaustion. The copyright exhaustion doctrine—also known as the first sale doctrine—permits the free transfer of copies of copyrighted works that were legally purchased.[86] In other words, under this doctrine, the copyright owners' right to control the downstream distribution of a copy of their works is eliminated—exhausted—once the copy is first legally sold.[87] Libraries are, therefore, free to lend any books (or other tangible objects subject to copyright) in their possession, assuming, of course, that they were initially legally sold.[88] The practical impact of this rule is that libraries can acquire books and other copyrighted materials relatively simply and freely lend them to patrons.[89] In some countries, including the United States, public libraries are granted additional special rights, such as reduced damages for innocent infringements.[90]

B. 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

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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).

85 *See, e.g.*, 17 U.S.C. § 106(3).

86 17 U.S.C. § 109(a). A similar doctrine exists in India as well. *See* Chaturvedi, *supra* note 84, at 7–8.

87 *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 524 (2013); Rub, *supra* note 15, at 749–50.

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

89 It is extremely difficult to interfere with the operation of libraries in countries with strong copyright exhaustion regimes. 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. The commercial libraries started to purchase DVDs at Wal-Mart and rent them to their patrons. *See* Redbox Automated Retail LLC v. Universal City Studios LLLP, No. 08-766 (RBK), 2009 WL 2588748, at *2 (D. Del. Aug. 17, 2009); Eddins v. Redstone, 35 Cal. Rptr. 3d 863, 871–72 (Ct. App. 2005). It should, however, be noted that the law in the United States prohibits for-profit libraries from lending music and software CDs. 17 U.S.C. § 109 (b). *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 commercial libraries).

90 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: J.L. & POL'Y FOR INFO. SOC'Y 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. 17 U.S.C. § 108; U.S. COPYRIGHT OFF., SECTION 108 OF TITLE 17 6–9 (2017) (analyzing the exception). As this Article focuses on the libraries' action in providing access to copyrighted works to the masses, that narrow-targeted exception is beyond the scope of this work.

publishers and those of public libraries—both 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,"[91] did not adopt a balanced approach at all but instead gave public libraries almost any defense imaginable, to the point of 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.[92] While looking at the law in isolation might create the impression of an unbalanced system, laws do not operate in a vacuum. As Lawrence Lessig famously explained, there are other forces outside of the law that impact human behavior.[93] Lessig categorized them as social norms, the market, and the architecture, meaning the de facto restrictions, typically physical or

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

92 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 Constitution's mandate to "promote the Progress of Science." *See, e.g.*, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1576–77 (2009). (discussing the utilitarian framework) The analysis might be different from a more moralist perspective. For example, English poet Maureen Duff, a leading advocate of 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." *See,* Public Lending Right (PLR): An Introductory Guide, PLR INT'L 3, https://plrinternational.com/public/storage/resources-languages/October2018/rBWbz6qOAbxyEM7b2CsM.pdf. 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 are 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 U.S. have typically been shaped by negotiations among interest groups. JESSICA LITMAN, DIGITAL COPYRIGHT 23 (2006). Since at least 1905, representatives from both the publishing industry and libraries have been part of these discussions. *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 influenced by both legislative and judicial decisions, such as the Supreme Court's ruling in Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 350 (1908) ("[t]he purchaser of a book, once sold by authority of the owner of the copyright, may sell it again"), just a year earlier. *See infra* text accompanying notes 172–184 (discussing some of the history of the copyright exhaustion doctrine and its 1909 codification).

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

technical, on human behavior.[94] When it comes to public libraries, while the law, at least in the United States, seems to allow them 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. While, in isolation, they might seem inefficient, they are surprisingly socially desirable.

The main limitation on the operation of libraries is their slowness.[95] If readers want to use the library to gain free access to copyrighted works (e.g., 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.[96]

In addition to speed, the works that libraries lend to their patrons often offer compromised physical quality. 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.[97]

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 the library more attractive. Readers also consider the differences in speed and availability, quality, and convenience, the need to finish 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 the library less attractive. Those inconveniences—often referred to collectively as "frictions"[98]—nudge potential

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94 *Id.*

95 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.").

96 At the time of writing, the number one nonfiction book on The New York Times Best Sellers is American Prometheus by Kai Bird and Martin J. Sherwin. The Columbus Public Library system has four copies thereof and 40 readers on its waiting list. The New York City Public Library system has 18 copies, and 421 patrons on its waiting list. For $15.99, Amazon will deliver this book to my doorstep tomorrow.

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

98 *See, e.g.*, Andrew Albanese, *Macmillan CEO John Sargent: 'We're Not Trying to Hurt Libraries'*, PUBLISHERS WEEKLY (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 "frictions").

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, goods (or similar services) at different prices to capture the consumers' different willingness to pay.[99] The term is used to describe various pricing strategies.[100] One such strategy, versioning, is the practice of offering slightly different versions of one's products or services for different prices to all consumers.[101] 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.[102] For example, airlines offer cheaper economy-class tickets and expensive business-class ones.[103] 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.

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 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.[104] This not only makes them valuable from a social justice perspective, but it also minimizes the harm

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

100 *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).

101 *See* TIROLE, *supra* note 99, at 135, 142–43; MICHAEL E. WETZSTEIN, MICROECONOMIC THEORY 419 (2012).

102 *See* CARL SHAPIRO & HAL R. VARIAN, INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY 39, 53–82 (1999).

103 *Id.* at 40.

104 *See* Michelle M. Wu, *Restoring the Balance of Copyright: Antitrust, Misuse, and Other Possible Paths to Challenge Inequitable Licensing Practices*, 114 L. LIBR. J. 131, 137 (2022) ("many readers lack the funds to purchase [books], and it is those readers who most heavily rely on libraries."). Survey data suggests that those who earn $30K–$50K are the heaviest library users. John Horrigan, *Libraries at the Crossroads*, PEW RSCH. CTR. 12 (Sept. 15, 2015), https://www.pewresearch.org/wp-content/uploads/sites/9/2015/09/2015-09-15_libraries_FINAL.pdf; *see also* Tushnet, *supra* note 95, at 1000 (describing libraries as "major service providers, especially for economically and educationally disadvantaged populations."); Noti-Victor, *supra* note 15, at 1831 (discussing the role of libraries in promoting distributive justice). Libraries are especially impactful

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. 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.[105] Libraries help publishers and authors, especially the less known ones, 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.[106] Finally, from an environmental perspective, because so many readers use each library book, they achieve this additional access while creating minimal physical waste.

Overall, in the physical space, public libraries serve a goal that is undoubtfully efficient and 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

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in servicing economically-disadvantaged rural communities. *See* Michele Statz, 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 (exploring data that suggests that public libraries are primarily "middle class institution[s]").

[105] *Impact on Reading and Literacy*, AM. LIBR. ASS'N, https://www.ala.org/tools/research/librariesmatter/category/impact-reading-and-literacy (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/ (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), https://www.businessinsider.com/actually-teens-love-print-books-libraries-and-bookstores-2014-12 (citing a survey that found physical browsing through 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), https://www.forbes.com/sites/rachelkramerbussel/2019/04/12/how-libraries-boost-book-sales; Wu, *supra* note 104, at 135.

[106] *See* Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 286 (2007).

the publishers' incentives. Like fair use,[107] this is precisely the type of mechanism within our copyright law ecosystem that is socially desirable and should be encouraged.

PART 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. That balance, however, is challenged by new models of distribution, in particular, digital ones.

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.[108] It says nothing about shielding users against the copyright owners' right to control the *reproduction* of their works.[109] The problem is that digital distribution entails the creation of new copies.[110] In other words, even if a library has a digital file of a copyright-protected work, e.g., 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,[111] and the library cannot use the first sale doctrine as a defense against such an action.[112]

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[107] *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 allow activities that generate significant access and other social benefits without meaningfully impacting the publishers' market).

[108] 17 U.S.C. § 109(a).

[109] *Id.*

[110] Rub, *supra* note 15, at 801.

[111] 17 U.S.C. § 106(1).

[112] Some argue that the library's actions in such cases can be shielded by other defenses. Those claims will be analyzed *infra* Parts III and IV.

The result is that it is widely assumed that libraries need a license to distribute digital copyrighted works to their patrons.[113] That legal conclusion has a dramatic impact on the operation of public libraries.

Libraries can purchase printed books simply and cheaply. In that world, copyright owners cannot price discriminate between public libraries and individual buyers.[114] If the publishers demand a high price from libraries, which might reflect their possibly higher willingness to pay and use intensity, the libraries will simply buy those works in the retail markets (or have individuals donate them).[115] 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.[116] As a practical matter, libraries rarely buy books using retail markets but instead purchase them in bulk from vendors connected with the publishers.[117] However, because of the threat of using retail channels, the prices that libraries pay are comparable to—in fact, they are often slightly cheaper than—the price charged in retail markets.[118]

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.[119] For individuals, eBooks are, on average, slightly cheaper than printed books. Libraries, however, typically pay about three to five times more than

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113 *See, e.g.*, Cohen, *supra* note 17.

114 *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).

115 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 also supra* note 89 (explaining how Redbox used retail markets when movie studios tried to bind it to undesirable terms in wholesaling markets).

116 Rub, *supra* note 100, at 269–71 (explaining such pricing choices).

117 Sarah Moore, *The Book Acquisition Process for Public Libraries*, https://www.authorlearningcenter.com/publishing/distribution-sales/w/libraries/7088/the-book-acquisition-process-for-public-libraries (last visited Jan. 30, 2024).

118 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), https://smartbitchestrashybooks.com/2020/09/hold-on-ebooks-cost-how-much-the-inconvenient-truth-about-library-ecollections.

119 In that same 2020 study, *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.*

retail.[120] 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.[121] After that period, if the library wants to keep the eBook in its collection, it must purchase another two-year license.[122]

As one can expect, those high prices drain the libraries' budget.[123] Moreover, it forces public libraries to be extremely selective with respect to the type of digital content they offer.[124] Under this monetary pressure, libraries are forced to cut out other

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[120] The most comprehensive data I could find on prices was published by ReadersFirst, an organization of nearly 300 libraries worldwide. The data encompasses 27 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, rather the price of retail books to that of library eBooks. Four of the big five offer a 24-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 books, the markup between retail eBooks and library eBooks is about 340%, meaning that libraries pay about 4.4 times more for a two-year license than individuals pay for permanent licenses. *Publisher Price Watch*, READERSFIRST, https://www.readersfirst.org/publisher-price-watch (last visited Jan. 24, 2024). Similar studies found comparable results. In the 2020 study discussed above, digital books that were available on Amazon for $12.77 were sold to libraries for $45.75, which is about a 258% markup. Rothschild, *supra* note 118. *See also* Michael Blackwell, Catherine Mason & Micah May, *Ebook Availability, Pricing, and Licensing: A Study of Three Vendors in the U.S. and Canada*, INFO. TODAY (Nov. 2019), https://www.infotoday.com/cilmag/nov19/Blackwell-Mason-May--Ebook%20Availability-Pricing-and-Licensing.shtml (noting that in the researchers' sample, the cost of eBooks was "more than three times the cost . . . for print").

[121] Rothschild, *supra* note 118.

[122] *Id.* The two-year license, while common, is not the only one publishers use. Some publishers, most prominently HarperCollins, offer a 26- circulations license. Such a license allows the library to lend the eBook to 26 times, but it does not restrict how many patrons can read it at the same time. *See Publisher Price Watch*, READERSFIRST, https://www.readersfirst.org/publisher-price-watch (last visited Jan. 24, 2024). Some publishers offer less common licenses, including permanent licenses that allow the library to lend it to one user at a time in perpetuity. *Id.* Some libraries use Hoopla for some of their eBook catalogs, a service which charges for every loan by its patron until the library's monthly budget is consumed. Samantha Sied, *What Is Hoopla and How Does It Work?*, MAKE USE OF (Sept. 28, 2022), https://www.makeuseof.com/what-is-hoopla. 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.*, *Competition in Digital Markets*, AM. LIBR. ASS'N (Oct. 15, 2019)—nowadays, all major publishers license their full digital collection. Matt Enis, *Macmillan Ends Library Ebook Embargo* (Mar. 18, 2020), LIB. J., https://www.libraryjournal.com/story/macmillan-ends-library-ebook-embargo. According to one study, 98.5% of all bestsellers were available in digital form in libraries in 2020. Rothschild, *supra* note 118. The issue is therefore not a complete refusal to license, but the highly restrictive terms of those licenses and their high price.

[123] *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), https://www.washingtonpost.com/technology/2019/11/26/e-books-libraries-are-huge-hit-leading-long-waits-reader-hacks-worried-publishers (same).

[124] Cohen, *supra* note 17 (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

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.[125] This, obviously, harms the libraries and their patrons, the taxpayers whose taxes finance libraries, and less-known authors, who are denied both the royalties from the libraries' purchases and the possibility of readers discovering them through library access.

B. Setting the Stage for a Comprehensive Solution

1. Acquiring Digital Content

The digital lending problem touches on all stages of the lifecycle of libraries' collections, from acquisition to patrons' 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. Focusing on just one aspect of this problem won't do much.[126]

Libraries can acquire digital content in two ways: by digitalizing (i.e., 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.[127] Once scanned, these books become eBooks that can be lent to patrons. Later parts of this work will delve into the legality of this process,[128] 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,[129] and it doesn't provide access to materials exclusively available in digital format.

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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.").

[125] *Id.*

[126] *See supra* Section II.B.2 (discussing how the European Union failed to solve the digital lending problem by addressing only the lending challenge).

[127] *See supra* text accompanying notes 114–118.

[128] *See, e.g.*, *infra* Section IV.A.2.

[129] To keep cost 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 v. HathiTrust, 755 F.3d 87, 90–92 (2d Cir. 2014) (describing one such initiative involving Google and holding it legal as fair use).

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.[130] The difficult question is whether libraries can lend eBooks purchased from platforms like Amazon, or accept eBook donations, without such licenses. Practically, under current law, the answer is probably no.

Redistributing a publisher's digital content might be fair use,[131] but publishers often wrap it with 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.[132] 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, i.e., the publishers, to meet their evidentiary burden and prove that a library accepted the terms of a contract.[133] Finally, even if the formation of such contracts can be proved, and even if they are enforceable, which is questionable,[134] the remedies for breach of contract are often limited.[135] 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 restrict the use of digital content, preventing redistribution even by purchasers.[136]

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130 *See supra* text accompanying notes 119–122.

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

132 The discussion on contractual limitations in these paragraphs 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").

133 *See* Shake Shack Enters. v. Brand Design Co., No. 22 CIV. 7713 (VM), 2023 WL 9003713, at *3–5 (S.D.N.Y. Dec. 28, 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).

134. *See* Guy A. Rub, *Copyright and Copying Rights*, 98 N.Y.U. L. REV. ONLINE 342, 349–52 (2023) (describing the circuit split on this question, which got wider following the Second Circuit decision in ML Genius Holdings LLC v. Google LLC, No. 20-3113, 2022 WL 710744, at *4 (2d Cir. Mar. 10, 2022)).

135 *See* Rub, *supra* note 132, 1013–15.

136 In practice, both libraries and individuals typically access the publishers' digitalized 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 (last visited Jan. 28, 2024),

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 prohibits creating or distributing tools to circumvent them.[137] With few exceptions, courts are reluctant to exempt such actions, even if intended for fair use under the Copyright Act.[138]

Congress has the power to amend the law, enabling libraries to redistribute the publishers' digital content under certain conditions.[139] This possibility is explored below in Part IV. However, without congressional intervention, it is simpler and safer for libraries to digitize printed materials themselves and distribute them under specific conditions. These conditions, which will also be discussed below,[140] could render such actions as fair use.

2. A Case Study: The Failure of European Union's 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.

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https://help.overdrive.com/en-us/0012.html (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. Brief of Amici Curiae Center for Democracy & Technology, Library Freedom Project, and Public Knowledge in Support of Defendant-Appellant and Reversal at 21–26 Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 20, 2023), 2023 WL 8891417 (discussing those concerns). Indeed, while OverDrive explicitly state that it will not sale its users' data, *OverDrive Privacy Policy*, OVERDRIVE, https://company.cdn.overdrive.com/policies/privacy-policy.htm (last visited Feb. 1, 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. Brief of Amici Curiae Center for Democracy & Technology, at 9–12 (describing the "[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.

137 17 U.S.C. § 1201(b).

138 *See* WILLIAM F. PATRY, 4 PATRY ON COPYRIGHT § 10:1 (examining the case law).

139 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 United States obligations under international copyright law are 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.

140 *See infra* Section IV.A.2.

There is a common misconception that European Union law solved the digital lending problem.[141] It did not. Indeed, as any European librarian 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 European Court of Justice in *Vereniging Openbare Bibliotheken (VOB) v. Stichting Leenrecht*.[142] In that case, a Dutch library placed an eBook on its server and allowed users to "borrow" a copy by downloading it.[143] The scheme was based on a model called "one copy, one user," which allows only one user to access the eBook at any time.[144] Once the lending period expired, the patron's copy was disabled, and the eBook could be transferred to another.[145] The European 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.[146]

The opinion in *VOB* was celebrated, and still is,[147] as a great win for libraries' e-lending. One commentator suggested that "[l]ibraries can now lend e-books."[148] A prominent blog noted, "CJEU says that EU law allows e-lending."[149] A 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

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[141] *See infra* notes 148–150 and accompanying text.

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

[143] *Id.*

[144] *Id.*

[145] *Id.*

[146] *Id. See also* Lothar Determann, *Digital Exhaustion: New Law from the Old World*, 33 BERKELEY TECH. L.J. 177, 210–12 (2018) (analyzing the case). For an explanation of the EU's PLR scheme, *see supra* text accompanying notes 64–74.

[147] The Internet Archive recently argued that the decision in *VOB* shows that the practice of Controlled Digital Lending (CDL) is permitted under international law. Defendant Internet Archive's Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, Hachette Book Grp., Inc. v. Internet Archive, No. 1:20-CV-04160-JGK, 2022 WL 16789715 (S.D.N.Y. Sept. 2, 2022). CDL and this case will be discussed at length in Section IV.A. below.

[148] *Libraries Can Now Lend e-Books*, CHAMBERS AND PARTNERS (Dec. 2, 2016), https://chambers.com/articles/libraries-can-now-lend-e-books.

[149] 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.

traditional book."[150] The Federation of European Publishers, however, stated that it was shocked by the decision.[151]

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 European Court of Justice in *Tom Kabinet* put an exclamation mark on this practical barrier.[152] *Tom Kabinet* was sued by groups of publishers for operating an online marketplace for "used" eBooks.[153] The European Court of Justice sided with the publishers, holding Tom Kabinet's actions were infringing because the principles of copyright exhaustion do not apply to eBooks.[154]

The combination of the two decisions, *VOB* and *Tom Kabinet*, creates a peculiar legal Catch-22. *VOB* gives public libraries a 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.[155] The European publishers, much like their American counterparts, charge prices that reflect the libraries' intense use of those digital books. Therefore, not surprisingly, in Europe, like in the United States, libraries face significant issues in lending eBooks—e.g., refusal to

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150 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.

151 *Id.*

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

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

154 Robert Rose, *Does the Principle of Exhaustion Apply to Digital Media? The CJEU Provides Clarity*, MEDIA WRITES (Jan. 17, 2020), https://mediawrites.law/does-the-principle-of-exhaustion-apply-to-digital-media-the-cjeu-provides-clarity.

155 It should be noted the European Union law explicitly allows libraries to digitalize their printed collection, Case C-117/13, Technische Universität Darmstadt v Eugen Ulmer KG, ECLI:EU:C:2014:1795 (11 Sept. 2014). However, as the European Court of Justice also clarify, libraries may provide access to those digitalized 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 if online access to those files would be legal. *See* Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001on the harmonisation of certain aspects of copyright and related rights in the information society, Art. 5 (providing exception, under certain conditions, for access on "dedicated terminals" within "libraries, educational establishments or museums").

license, embargoes on new releases, short-term contracts, and high prices—that do not exist in the physical world.[156]

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.

PART 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—the publishers' licenses, to be more specific—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. 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."[157] 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, the

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[156] *See, e.g.*, FIRST EUROPEAN OVERVIEW ON E-LENDING IN PUBLIC LIBRARIES, EBLIDA (June 2022), http://www.eblida.org/News/2022/first-european-overview-elending-public-libraries.pdf; DAN MOUNT, A REVIEW OF PUBLIC LIBRARY E-LENDING MODELS (Dec. 2014), https://www.kirjastot.fi/sites/default/files/content/Rapporten-Public-Library-e-Lending-Models.pdf.

[157] *E.g.*, Andrew Albanese, *OverDrive CEO: Publishers, Librarians Still Searching for Fair e-Book Lending Models*, PUBLISHERS WEEKLY (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. MARYBETH PETERS, U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT, at 45 (2001), https://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf; *see also* 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).

libraries could simply use retail markets, e.g., 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. As a Matter of Black Letter Law, the First Sale Doctrine Does Not Apply to Digital Lending

As noted in Part I,[158] public libraries in the United States (as well as in many other countries) are operating in the shadow of the first sale doctrine, now codified in section 109(a) of the Copyright Act.[159] That doctrine, however, does not allow libraries to distribute digital works.[160]

Technically, digital files are not transferred from one device to another. They are copied—"reproduced" in copyright law lingo.[161] 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.[162] Section 109(a), the Copyright Act's first sale doctrine provision, opens with "[n]otwithstanding the provisions of section 106(3) [the distribution right],"[163] making it crystal clear that it provides a defense only against an alleged infringement of the distribution right.[164] Therefore, sending a digital file that

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158 *See supra* text accompanying notes 85–89.

159 17 U.S.C. § 109(a).

160 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 restriction on the use of digital content through contracts and encryption.

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

162 17 U.S.C. § 106(1) (providing copyright owners with "the exclusive rights . . . to reproduce the copyrighted work"), (3) (providing copyright owners with "the exclusive rights . . . to distribute copies . . . of the copyrighted work").

163 17 U.S.C. § 109(a).

164 This part explains that the main obstacle to applying the first sale doctrine to digital distribution is that such transfers entails reproduction. A different argument, which is quite common especially in the library literature, *see, e.g.*, Wu, *supra* note 104, at 140–42, 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. 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 work focuses on—is that such a donation entails reproduction.

embodies a copyright-protected work exposes the sender to liability for creating a new copy on the sender's device.[165]

Those who argue that the copyright exhaustion doctrine applies to digital transfers often make two arguments.[166] 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.[167] 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 work *in copies*."[168] The Copyright Act defines "copies" as "material objects . . . in which a work is *fixed*."[169] 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."[170] When a digital book is saved on a device, it can immediately be opened and read (i.e., "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 (i.e., on the recipient's hard drive), an act that, under section 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.[171]

The second argument—the more significant of the two—is that the first sale doctrine, as codified in section 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,

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165 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.

166 *See, e.g.*, Ariel Katz, *Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge*, 13 I/S: J.L. & POL'Y FOR INFO. SOC'Y 81, 92–93 (2016).

167 Brief and Special Appendix for Defendants-Appellants (Redacted) at *24–25, Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir. 2018) (No. 16-2321), 2017 WL 562580.

168 17 U.S.C. § 106(1) (emphasis added).

169 17 U.S.C. § 101 (emphasis added).

170 *Id.*

171 *See* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 656–66 (2d Cir. 2018) (reaching a similar conclusion with respect to digital music files).

including the right to transfer those copies to others freely.[172] Relatedly, the Supreme Court famously noted that "[t]he common-law 'first sale' doctrine . . . has an impeccable historic pedigree," referring to the centuries-old notion of "common law's refusal to permit restraints on the alienation of chattels."[173] More specifically, in the context of copyright law, when Congress codified the first-sale doctrine in 1909, courts already recognized certain rights that owners of copies got in their purchased goods.[174] Those sets of rights are similar to the first sale doctrine, but they were broader than merely an exception to the exclusive right of distribution.[175] For example, in 1901, in *Doan v. American Book*, a publisher sued a secondhand book dealer for restoring used books to their original state, including by reproducing and replacing their damaged covers.[176] The Fourth Circuit held that this does not constitute copyright infringement because the defendant's "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, so far, at least, as the cover and binding of the book is concerned."[177]

That argument is not without doubt as a historical matter and seems wrong as a matter of black-letter law. Historically, 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, that the rationale for any such common law limitations, to the extent they existed, is not easily applicable to digital distribution of copyright-protected goods.[178]

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[172] Perzanowski & Schultz, *supra* note 15, 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.").

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

[174] Perzanowski & Schultz, *supra* note 15, at 912–13.

[175] *Id.* ("These early cases . . . reveal an exhaustion principle much broader than first sale's limitation on the distribution right.").

[176] Doan v. Am. Book Co., 105 F. 772, 773 (7th Cir. 1901).

[177] *Id.* at 777.

[178] 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. 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 15, at 760. That reasoning, however, was heavily criticized by later prominent common-law commentators as unsatisfactory. *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. *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. *Id.* at 761. 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, whose distribution does not entail any transference of chattel.

Relying on copyright opinions that predated the 1909 codification of the first sale doctrine is also tricky.[179] Those opinions, and there are only a handful of them,[180] seem rather narrow in scope. Granted (and importantly), the *Doan*'s court perceived the defendant's ownership interest in the printed books he purchased more broadly than the Copyright Act's first sale doctrine. The Fourth Circuit in *Doan* saw it as entailing a right to restore the original work, while the first sale doctrine does not include such a right. However, that "right of repair," as well as other rights that might have been implied in those older cases, seems relatively limited in nature.[181]

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."[182] Therefore, if possible, federal statutes are interpreted to be consistent with the common law. However, since its first codification in 1909,[183] the Copyright Act's first sale doctrine has "[spoken] directly to the question" by stating clearly and unambiguously that the first sale is only a defense against violations of the right to distribute copies.[184] 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.

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 over-formalistic. By prioritizing legal technicalities over substance, it arguably eradicates an important copyright law principle by applying a statutory language written decades ago when the realities of 21st-century digital distribution were

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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; *see also* Sean M. O'Connor, *The Damaging Myth of Patent Exhaustion*, 28 TEX. INTELL. PROP. L.J. 443, 445–48 (2020) (questioning the common conception concerning the historical pedigree of IP exhaustion doctrines).

179 A similar (although not identical) argument was recently rejected by the Southern District of New York. Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 385 (S.D.N.Y. 2023). That decision will be discussed in greater length in Section IV.A.2 below.

180 *See* Perzanowski & Schultz, *supra* note 15, at 912–22 (discussing those decisions).

181 The Fourth 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 v. Am. Book Co., 105 F. 772, 777 (7th Cir. 1901).

182 United States v. Texas, 507 U.S. 529, 534 (1993) (quoting Mobil Oil v. Higginbotham, 536 U.S. 618, 625 (1978)).

183 The Copyright Act of 1909, § 41 (noting that the act does not "forbid, prevent, or restrict *the transfer* of any copy of copyrighted work the possession of which has been lawfully obtained" (emphasis added)).

184 *See supra* text accompanying notes 162 & 165.

unimaginable. However, even if one is a staunch critic of formalism, it is simply 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 the restrictive architecture, especially the frictions within that system—the inconvenience of using physical libraries.[185] One cannot understand the law without understanding the architecture. But that architecture is fundamentally different in the digital world. Digital distribution is instantaneous and does not entail deterioration in quality, which dramatically changes the economics of public lending.

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 by public libraries.[186] But how many readers have read the book at the same 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.[187] Most of this time, the book will be in a patron's possession but not 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 books.[188]

But a digital library can work very differently. If a library is allowed to create copies of the eBook and lend them freely, 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, they can use each eBook to serve a much larger population than a printed book.

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185 *See supra* Section I.B.

186 *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; Gross, *supra* note 123 (documenting the hundreds of copies of the book purchased by the New York Public Libraries system).

187 *See, e.g.*, *Borrowing Materials*, N.Y. PUB. LIBR., https://www.nypl.org/help/borrowing-materials (last visited Jan. 14, 2024) (nothing that books are borrowed for 2–3 weeks at a time); *Borrower Services*, L.A. PUB. LIBR., https://www.lapl.org/about-lapl/borrower-services (last visited Jan. 14, 2024) ("Most library materials are loaned for 3 weeks").

188 *See supra* text accompanying note 97.

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. 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 its eBooks when its patrons are asleep. This scheme is great for libraries but disastrous for publishers:[189] First, libraries will purchase many fewer eBooks than books. Second, getting those eBooks to 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.[190] 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.[191] This is especially true if libraries, especially 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

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189 *Cf.* C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 917–18 (2002) (comparing libraries to file sharing services like Napster but noting that "[h]owever, each geographically located, paper-text library effectively serves a limited number of people.").

190 This example is based on Rub, *supra* note 15, at 804–05.

191 Under current law such a scheme will be illegal. Therefore, it is not surprising that libraries are not engaged in creating such creative sharing models (at least not without the publishers' consent). For that reason, the argument made here is not, and cannot, be supported by sound empirical evidence.

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.[192] 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.[193]

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The conclusion in this Section is consistent with those of two comprehensive studies conducted by the United States Copyright Office in 2001 and the Department of Commerce, through the United States Patent and Trademark Office, in 2016.[194] The two agencies determined the first sale doctrine does not currently protect digital dissemination.[195] 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:

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[192] *See also* Aaron Perzanowski & Jason Schultz, *Reconciling Intellectual and Personal Property*, 90 NOTRE DAME L. REV. 1211, 1259–60 (2015) ("we cannot simply port the exhaustion rules of the analog world over to the digital marketplace"); Rub, *supra* note 15, at 803 ("digital exhaustion might cause more harm than good, especially because it has the potential to cause massive damage to incentives").

[193] The publisher might respond to such a situation in a variety of ways. They, for example, 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 100, 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).

[194] The Copyright Office Report was triggered by section 104 of the Digital Millennium Copyright Act (DMCA), enacted in 1998. That section required the Copyright Office to "evaluate . . . the relationship between existing and emergent technology and the operation of section 109" and to submit a report to Congress within 24 months, which would include "including any legislative recommendations." Copyright Act, Pub. L. No. 105–304, 112 Stat. 2860, 2876 (1998). The Copyright Office received 34 written comments concerning section 109 (including from the American Library Association and the Association of American Publishers) and heard dozens of witnesses. On August 29, 2001, it issued its 166-page report. PETERS, *supra* note 157.

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. The Department then engaged in an elaborate commenting process. It received comments from more than 60 organizations and 40 individuals. More than 70 individuals participated in the four roundtables that were held as part of this process. In January 2016, the Department of Commerce released its 100-page White Paper on Remixes, First Sale, and Statutory Damages. U.S. DEP'T OF COM., WHITE PAPER ON REMIXES, FIRST SALE, AND STATUTORY DAMAGES (2016), https://www.uspto.gov/sites/default/files/documents/copyrightwhitepaper.pdf.

[195] PETERS, *supra* note 157, 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.").

> Physical 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.[196]

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)."[197]

B. 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.[198] The American Association of Publishers, for example, stated

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[196] *Id.* at 82–83.

[197] U.S. DEP'T OF COM., *supra* note 194, 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 11, at 1327–28, has to do with the possibility of hacking of the centralized repository of digital books. Those concerns about the potential "Napsterization" of books, Randall Stross, *Will Books Be Napsterized?*, N.Y. TIMES (Oct. 4, 2009), are understood, partly because in the past, some initiatives that purported to create a one-copy-one-reader scheme were extremely easily circumvented, *see* Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, 658 (2d Cir. 2018). Nevertheless, nowadays, the 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.

[198] Complaint at ¶ 48, Hachette Book Grp., Inc. v. Internet Archive, No. 1:20-CV-04160, 2020 WL 2843972 (S.D.N.Y. June 1, 2020) ("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 Organizations and 218 Librarians in Support of Defendant-Appellant at 12, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 22, 2023), 2023 WL 8933275 (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 the 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.

that it was "unaware of any demonstrated, pervasive market failure" in the eBook market.[199] This Section explains that it should be aware of some.

This approach has its intuitive appeal—and it undoubtfully impacts judges[200]—but it is misguided. Libraries operate in a market (or a submarket) encumbered by significant market failures. In such an environment, the market is unlikely to produce socially efficient results.

The first market failure—probably the most heavily discussed in the economics of intellectual property law literature—is the deadweight loss problem.[201] By limiting competition, copyright law allows right holders to charge supercompetitive prices—prices that are artificially higher than the marginal costs (which are close to zero in the digital world).[202] With those prices, potential readers whose willingness to pay is above the marginal prices and below the charged prices are priced out of the market and denied access to the work.[203] In digital markets, this problem is exacerbated because, without digital copyright exhaustion, there is no effective market for cheap used eBooks.[204] 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.[205]

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.[206] That population is disproportionally poor (as well as elderly and disabled).[207]

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[199] ASS'N OF AM. PUBLISHERS, TESTIMONY IN OPPOSITION TO SB432, 3 (Mar. 24, 2021), https://publishers.org/wp-content/uploads/2021/03/SB432_AAP_Opposition.pdf.

[200] *See, e.g.*, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 388 (S.D.N.Y. 2023) (discussing the "thriving ebook licensing market for libraries [that] has increased in recent years" (internal quotation marks omitted)).

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

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

[203] *See* WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW 16–20 (2003) ("[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.").

[204] 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).

[205] *See* LANDES & POSNER, *supra* note 203.

[206] *See supra* text accompanying notes 99–104.

[207] *See supra* note 104 and accompanying text.

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 the libraries' resources and prevent them from effectively offering all their services.[208] This means, inter alia, that the libraries' catalog of eBooks is much smaller, and gaining access to them often entails a long wait time.[209] Indeed, the current practices in this market aggravate the deadweight loss problem.

There are additional failures in this market. First, access to information goods creates spillovers—positive social externalities.[210] 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 opportunities gap) in our society.[211] Educating the public has been the declared goal of American public libraries since their inception, almost 200 years ago.[212] The eBook problem, which pushes the libraries to focus their highly limited purchasing power on bestsellers,[213] undermines their ability to do so.

On top of the general social positive externalities that access itself creates, libraries generate extremely valuable externalities that the publishers enjoy by fostering habits and culture of readership.[214] Young Americans use public libraries even more than adults.[215] Time and again, studies showed that today's young library patrons will be the book readers—and the book buyers—of tomorrow.[216] Readership habits are what economists call a public good[217]: First, they show non-rivalry in

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[208] *See supra* note 125 and accompanying text. It should be noted that the publishers do not show any interest to provide 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 also infra* Section IV.A.1 (explaining how the balance created by Congress needs to be preserved in the digital world).

[209] *See, e.g.*, Cohen, *supra* note 17.

[210] *See* Frischmann & Lemley, *supra* note 106, at 258–61 (exploring spillovers of information goods).

[211] LEA SHAVE, ENDING BOOK HUNGER 5–6 (2020) (explaining how the lack of access to books harm 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 RES. Q. 8, 11 (2001) (reviewing the literature on the long-term impact of access to books on development).

[212] 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).

[213] *See supra* note 125 and accompanying text.

[214] *See supra* note 105 and accompanying text.

[215] 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/.

[216] *See supra* note 105 and accompanying text.

[217] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 40–41 (6th ed. 2012).

consumption, meaning that Alice's inclination to read books does not harm Bob's inclination to read them. Second, they are also non-exclusive, meaning that 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. The market typically does not adequately provide public goods because individuals do not want to invest enough resources in developing goods that others will later enjoy.[218] 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,[219] 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 and actually do target those profound market failures, and 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.

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As noted,[220] balancing incentives and access is the cornerstone of a robust copyright policy. 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 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.

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218 *Id.*

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

220 *See supra* note 30 and accompanying text.

PART 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 A explores how copyright's fair use doctrine might replicate the balance of the physical world in the digital realm. Section B proposes methods for forming new and improved equilibriums in the digital environment. Section C examines the dual role of states as regulators and consumers in potentially mitigating the digital lending issue. Finally, Section 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,"[221] necessitates a detailed "case-by-case analysis."[222] This Section examines if 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.[223] 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 "one book, one copy" principle.[224] The implementing library also needs to apply a DRM tool to ensure that access to the eBook expires after the loan

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

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

223 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 ("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. Michelle M. Wu, *Building A Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 L. 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. Lila Bailey et al., *Position Statement on Controlled Digital Lending by Libraries*, LIBR. FUTURES, https://controlleddigitallending.org/statement (last visited Jan. 30, 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*; *see also* Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant at 6–8 Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 22, 2023), 2023 WL 8933275 (discussing the history of CDL).

224 HANSEN & COURTNEY, *supra* note 223, at 25.

period.[225] Finally, the library should also "limit the time period for each lend to one that is analogous to physical lending."[226]

While libraries use of CDL for part of their collections started more than a decade ago and notably expended during the pandemic,[227] *Hachette v. Internet Archive*, currently pending before the Second Circuit, is the first case to test the legality of one such scheme.[228] This case raises two key questions: Firstly, how does fair use adapt copyright laws in response to new technologies? Secondly, within this context, may fair use 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, "from its beginning, the law of copyright has developed in response to significant changes in technology."[229] 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.[230]

Those new technologies, by their very nature, disrupt copyright's "balance of competing claims upon the public interest"[231]—namely, the desire to encourage new creativity and to provide broad access to existing materials. 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."[232]

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225 *Id.* at 3.

226 *Id.*

227 Brief of Amici Curiae Nine Library Organizations and 218 Librarians, 2023 WL 8933275, at 8 (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.").

228 Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Sept. 12, 2023).

229 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 221, at 47 (the House Report that led to the enactment of the Copyright Act noting that "[s]ince [1790] significant changes in technology have affected the operation of the copyright law.").

230 *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 it "n copyright's story [it] played the part of both hero and villain").

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

232 *Id.*

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[233]—have remained unchanged since their enactment in 1976, following a legislative process that started in 1955.[234] In 1981, Barbara Ringer, considered the main drafter of the Copyright Act of 1976, famously said that is "a good 1950 copyright law."[235]

Indeed, reflecting on the technological landscape of that era is revealing: In the mid-1970s, personal computers were virtually non-existent in American homes, with less than 0.1% owning one (a stark contrast to over 90% today).[236] IBM's first PC only came to market in 1981,[237] the Internet was birthed in 1983,[238] and the World Wide Web, along with web browsers, were still over a decade away.[239] 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 "construing"[240]—in response to evolving technologies. Without those mechanisms,

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233 17 U.S.C. §§ 106(1), 106(3), 109(a).

234 MARYBETH PETERS, GENERAL GUIDE TO THE COPYRIGHT ACT OF 1976, 1:1–1:2 (1977), https://www.copyright.gov/reports/guide-to-copyright.pdf (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).

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

236 Jeremy Reimer, *Total Share: 30 Years of Personal Computer Market Share Figures*, ARS TECHNICA (Dec. 15, 2005, 12:00 AM), 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 more than $3,000 (inflation adjusted). The company manufactured 200 and sold 175 units thereof. 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. *Cf. Computer and Internet Use in the United States: 2018*, U.S. CENSUS BUREAU (Apr. 21, 2021), https://www.census.gov/newsroom/press-releases/2021/computer-internet-use.html (reporting that as of 2018, 92% of American households had a computer (a desktop, laptop, tablet, or smart phone); that number probably increased, especially during the COVID pandemic).

237 *Timeline of Computer History*, COMPUTER HISTORY MUSEUM, https://www.computerhistory.org/timeline/1981 (last visited Jan. 30, 2024).

238 While communication between computers existed for decades, the TCP/IP protocol, which offers computers a standardized way to communicate thus allowing the development of the Internet, was adopted only in 1983. *A Brief History of the Internet*, ONLINE LIBR. LEARNING CTR., https://www.usg.edu/galileo/skills/unit07/internet07_02.phtml (last visited Jan. 30, 2024).

239 *Where the Web Was Born*, CERN, https://home.cern/science/computing/birth-web/short-history-web (last visited Jan. 30, 2024) (exploring their development in the early 1990s).

240 *See supra* text accompanying note 232.

copyright law would not be able to achieve its Constitutional objective of "promoting the Progress of Science."[241]

The primary mechanism enabling copyright law to fulfill its Constitutional mandate of promoting progress in face of technological disruptions is the fair use doctrine. This concept, occasionally overlooked by some judges,[242] is neither new nor controversial. It has been endorsed by Congress, the Supreme Court, and legal scholars.[243]

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.[244]

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*

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241 *See supra* text accompanying note 25. These mechanism, collectively, relates 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 230, at 1512. Greenberg is quite critical at that attempted neutrality. A full analysis concerning the desirability thereof it beyond the scope of this work, which takes that attempt, and Congress' framework, as give.

242 *See infra* text accompanying notes 260–266. *Cf.* Noti-Victor, *supra* note 15, at 1837 (noting that the mechanisms within copyright law that support dissemination "ha[ve] failed to keep up with the technological changes").

243 *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) (claiming, inaccurately, 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. We reject the invitation to substitute our judgment for that of Congress."). However, as this section explains, those statement 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 230, at 1513–14 (noting that the Copyright Act "pushes] questions arising from new technologies away from legislatures, to courts and administrative agencies. Technology neutrality recognizes that legislatures often take too long and may lack the expertise to frequently update a law in light of new technologies.").

Brad A. Greenberg, Rethinking Technology Neutrality, 100 Minn. L. Rev. 1495, 1513 (2016)

244 H.R. REP. NO. 94-1476, *supra* note 221, at 66.

disseminated."[245] Legal scholars celebrate fair use as allowing copyright law to quickly "evolve in response to new challenges" and new technologies,[246] and "address questions posed by new technologies or other developments that the legislature could not or did not contemplate."[247]

2. The Fair Use of Controlled Digital Lending Schemes

Technological advancements can indeed 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 remarkedly different from the one envisaged by Congress in the physical realm. This leads to a pivotal question: Can fair use fulfill its traditional role of preserving the balance of interest in the face of a novel technology?

Part I highlighted that Congress's balance in the physical world hinges on two principles: Firstly, libraries can purchase books through retail markets, where prices are geared towards modest individual use, offering affordable (though not free) access. Secondly, 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.[248] With that important caveat

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[245] Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1198–99 (2021) (emphasis added);

[246] Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 404–05, 411 (2005) (describing fair use's function "to enable copyright law to evolve in response to new challenges without necessitating legislative intervention . . . 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").

[247] Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537, 2602 (2009); compare with Greenberg, *supra* note 230, at 1533 (criticizing the place of the doctrine within the Copyright Act's framework as taking "outsized role" and adding uncertainty).

[248] This important point escaped the District Court, some of the parties, and some of their amici, in *Hachette v. Internet Archive*, which erroneously chose to discuss the legality of CDL as such instead of the legality of the defendant's, Internet Archive, implementation. *See* Brief of Amicus Curiae Hathitrust in Support of Neither Party at 3–7, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 28, 2023), 2023 WL 9062408 (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).

in mind, there is no principal reason that a library's implementation that preserves the physical world's balance in the digital realm would not be legal.

Firstly, since most books are available in physical format and libraries can acquire them at retail prices (or less),[249] they can scan these books to produce digital versions at an inexpensive price, but not for free. The critical question then becomes whether libraries can create a level of artificial friction similar to that in the physical world. It is hard to see why not.

As highlighted earlier, a key difference between physical and digital lending is the speed of distribution.[250] 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.[251] 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.[252] Fortunately, libraries have decades of experience in physical lending and should possess detailed data on the movement of printed books within their institutions.

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.

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 30 times, it needs to be replaced. In that case, the library can imitate the physical world's balance by buying a new physical copy after the digital book was loaned 30 times.

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

[250] *See supra* text accompanying notes 95–96.

[251] *See supra* text accompanying notes 189–191.

[252] *Cf.* HANSEN & COURTNEY, *supra* note 223, 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.").

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 the library's CDL scheme impacts the publishers' eBooks market in comparable ways to the traditional impact of libraries on the publisher 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.

Fair use analysis typically revolves around four factors, now codified in the Copyright Act: first, the purpose and character of the defendant's use; second, the nature of the plaintiff's work; third, the amount used by the defendant and its substantiality; and fourth, the effect of the defendant's use on the plaintiff's market.[253] Courts typically focus on the first and fourth factors, with the Supreme Court famously stating that the fourth factor, the market effect, "is undoubtedly the single most important element of fair use."[254] However, assessing that effect is often non-trivial. In particular, because fair use, by definition, is free use, courts struggle to determine when the denial of licensing fees from the plaintiff is, in itself, market harm.[255]

However, when it comes to digital lending, assessing market harm is more straightforward. In the physical world, Congress has already established a system allowing public libraries to access and lend copyrighted materials at merely their

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253 17 U.S.C. § 107.

254 Harper & Row Publishers 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. While a majority opinion did not repeat (or reject) this priority rule in the last 30 years, three concurring and dissenting opinions from recent years, supported by six different justices on the Court also called the fourth factor the most important one. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1290 (2023) (Gorsuch, J., joined by Jackson, J., concurring); id. at 1298 (Kagan, J., joined by Roberts, C.J., dissenting); Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1216 (2021) (Thomas, J., joined by Alito, J., dissenting); see also NIMMER ON CONTRACTS 13.05[A] (calling the fourth factor "most important, and indeed, central fair use factor."). The majority in the Supreme Court's most recent decision suggested that the market structure and the substitution impact of the defendant on the plaintiff can be taken into account even under the first factor of the fair use inquiry. Andy Warhol Found., 143 S. Ct. at 1274 ("The first factor relates to the problem of substitution—copyright's bête noire.").

255 *Compare* Cambridge Univ. Press v. Patton, 769 F.3d 1232, 1277–79 (11th Cir. 2014) (denying academic publishers licensing fees for copying articles' excerpts into coursepacks is market harm under the fourth factor), *and* Am. Geophysical Union v. Texaco Inc., 60 F.3d 913, 930 (2d Cir. 1994) (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) (no market for posting a copyrighted passage on social media), *and* Nunez v. Caribbean Int'l News Corp., 235 F.3d 18, 25 (1st Cir. 2000) (no market harm for using a copyrighted photograph in news reporting).

retail cost. Given that American public libraries have been lending books since the 19th century and the active involvement of both the publishing industry and library representatives in the drafting of the Copyright Act,[256] 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,[257] that market is just not part of copyright law's grant to publishers.[258] Denying them this income, therefore, is simply not the market harm that the fourth fair use factor requires courts to consider.[259]

In its recent decision in *Hachette v. Internet Archive*, the Southern District of New York missed that point and overlooked the role that fair use plays in our copyright law ecosystem.[260] 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.[261] In June 2020, four major publishers sued AI for copyright infringement. On March 24, 2023, the District Court ruled that IA's actions are not shielded from liability under the fair use doctrine.[262] An appeal on this decision is currently being considered by the Second Circuit.[263]

The District Court's decision is highly problematic. Throughout its opinion, the District Court assumed, without much explanation, that the publishers are entitled to the massive income they currently generate from licensing eBooks to libraries.[264]

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256 LITMAN, *supra* note 92, at 23–26, 39.

257 As noted, *supra* text accompanying notes 234–239, Congress clearly did not envision 21st century digital distribution when enacting the Copyright Act of 1976.

258 *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 114 (explaining that copyright law fosters certain types of market segmentation and prohibit others).

259 *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.").

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

261 *Id.* at 375.

262 *Id.* at 391.

263 Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Sept. 12, 2023).

264 *E.g.*, *Hachette*, 644 F. Supp. 3d at 388 ("[T]here is a 'thriving ebook licensing market for libraries' in which the Publishers earn a fee whenever a library obtains one of their licensed ebooks. . . . This market generates at least tens of millions of dollars a year for the Publishers. . . . IA supplants the Publishers' place in this market.").

But, as noted, that assumption is misguided because it fundamentally deviates from the balance designated by Congress in the physical world.

The District Court noted that it is "not free to disregard the terms of Section 109(a) [the first sale doctrine],"[265] but with all due respect, this statement shows a lack of appreciation of the role of fair use within copyright law. First, Congress obviously did not intend to address digital distribution when it drafted section 109(a), and therefore, one cannot read into the Copyright Act an actual intent to let copyright owners fully control digital distribution.[266]

Second, the District Court was wrong to suggest that because an action falls just outside of the scope of a specific defense (here, the first sale doctrine under section 109(a)) the more general defense, fair use, is inapplicable. The specific defenses complete rather than conflict with fair use. This principle is evident both in the Congressional report accompanying the Copyright Act's drafting,[267] and in case law, including Supreme Court and Second Circuit decisions concerning the first sale doctrine and libraries.[268] Instead, the Court blatantly disregarded the role of fair use—as recognized by Congress and the Supreme Court[269]—to preserve the balance of interests within copyright law when the technological landscape changes.

This Article does not take a position concerning the ultimate fair use determination in *Hachette v. Internet Archive*. In order to make that decision, IA's specific scheme needs to be evaluated against the benchmark created by Congress in the physical

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265 *Id.* at 386.

266 *See supra* text accompanying notes 234–239.

267 Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. COPYRIGHT SOC'Y 453, 455 (2012) ("A question that came up several times during the hearings was whether the specific exemptions for certain uses . . . should be in addition to or instead of fair use. . . . [W]hile some [specific statutory defenses] may overlap [with] the fair use doctrine, they are not intended to supersede it." (quoting H.R. REP. NO. 83 at 36–37 (1967))).

268 Quality King Distribs., Inc. v. L'anza Rsch. Int'l, Inc., 523 U.S. 135, 150–51 (1998) (noting that the first sale doctrine and fair use need to be considered separately); Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 103 (2d Cir. 2014) (holding that whether or not certain digitalization initiatives of libraries stepped outside the scope of a specific defense—there the defense for the benefits of the visually impaired, 17 U.S.C. § 121—those actions are fair use). Those decisions are not unique, as many copyright defenses overlap, especially with fair use. *See, e.g.*, Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73, 79 (2d Cir. 2014) (noting that part of the plaintiff's claim is barred by a specific defense set forth in 17 U.S.C. § 114 while the other part of its claim is shielded from liability under the fair use doctrine). In fact, some have gone a step further and suggested that if the defendant's actions fell close to but just outside of a specific statutory defense, it should make its fair use defense stronger. Band, *supra* note 267, at 455. Whether one accepts that stronger argument, what the District Court did in *Hachette*—suggesting that falling just outside the scope of a specific defense blocks or weakens a party's fair use defense—is wrong.

269 *See supra* text accompanying notes 242–245.

world and not the publishers' licensing market potential.[270] 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.[271] IA's scheme facilitated rapid lending, enabling, for instance, immediate borrowing of digital books across the entire country—a process that would take days in the physical realm.[272] On the other hand, IA added significant friction by not scanning new titles,[273] which is the publishers' most important source of income in retail markets.[274] Regrettably, the District Court did not thoroughly examine whether IA's implementation decisions properly balanced each other, thus creating 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 address the digital lending problem.

This Section explores two such alternative approaches, aiming to strike a new equilibrium between the competing interests of publishers, 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

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[270] There are, of course, other factors that must be taken into account in this inquiry. For example, the court needs to determine if the use was commercial or not. The District Court determined that the use was commercial. *Hachette*, 664 F. Supp. 3d at 384. While that conclusion is highly questionable, *see* Amicus Curiae Brief of Intellectual Property Law Professors as Amici Curiae in Support of Appellant at 7–12, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 18, 2023), 2023 WL 8933278 (criticizing that conclusion), a full analysis of this question is beyond the scope of this work. Moreover, regardless of that determination in the context of Internet Archive's use, lending by public libraries seems to clearly be non-commercial.

[271] *See, e.g* Brief of Amicus Curiae Hathitrust in Support of Neither Party at 3–7, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 28, 2023), 2023 WL 9062408 (providing multiple examples for different implementations of CDL schemes).

[272] *Hachette*, 664 F. Supp. 3d at 376.

[273] *Id.* at 387 (noting that the Internet Archive refrained from scanning books for the first five years after their publications).

[274] *See, e.g.*, Burcu Yucesoy et al., *Success in Books: A Big Data Approach to Bestsellers*, 7 EPJ DATA SCI. at 16 (2018), available at https://doi.org/10.1140/epjds/s13688-018-0135-y (explaining that is the sample explored "for the [] fiction bestsellers . . . we find that 96% of the sales took place in the first year. Similarly, 94% of the sales of [] nonfiction bestsellers also happen in the first year.")

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.

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.[275] However, for printed content, most EU countries have adopted a Public Lending Rights (PLR) scheme, a model worth considering for digital books. [276] Under PLR, libraries can lend books freely, while authors and publishers are compensated, typically through taxpayer funding.[277]

Congress could introduce a similar system for eBooks 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. Publishers would be compensated by royalties, determined not by the market but by a public body (e.g., an administrative agency, a court) to offset potential revenue loss.[278]

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 in a way that can significantly undercut the publishers' markets.[279]

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)

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275 *See supra* Section II.B.2.

276 *See supra* text accompanying note 64.

277 *See supra* text accompanying note 71.

278 While such a scheme would be dramatically different from the current one, in other contexts, the Copyright Act includes comparable compulsory licensing mechanisms, where a public entity sets mandatory licensing rates. *See, e.g.*, 17 U.S.C. § 114 (setting compulsory licenses for digitally publicly performing sound recordings), § 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).

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

versus serving those who wouldn't buy the book anyway.[280] In the digital realm, these challenges intensify. The inconveniences of physical borrowing—its frictions—which often push wealthier readers to purchase books,[281] are greatly reduced in the digital space.[282] This makes library access more appealing to them, potentially overburdening libraries and inadvertently disadvantaging 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.[283] 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,[284] 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 the library, while those who can afford it choose personal ownership.

However, such segmentation models fail if the differences between the free and paid products are minimal, leading to unreliable consumer self-selection. For example, if the seats in economy class are too comfortable and the food too good (not a realistic

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280 *See supra* text accompanying notes 65–76 (discussing the rather complex and chaotic system to adjust PLR royalties rates for printed books in the European Union).

281 *See supra* Section I.B.

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

283 *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 public education and libraries); *Libraries: The Cornerstone of Democracy*, AM. LIBR. ASS'N, https://www.ala.org/ala/ourassociation/governanceb/pastpresidents/nancykranich/cornerstonedemocracy.htm (discussing the contribution of libraries to our democratic society).

284 *See supra* text accompanying notes 99–102.

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.

Yet, there are other market segmentation strategies that can promote social welfare by imperfectly categorizing groups of readers for preferential treatment.[285] 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, segments viewers based on the timing of movie releases.[286] New releases are initially available only in theaters at a higher price.[287] 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.[288] Since publishers make the most profits from new releases,[289] this approach, while benefiting patrons, is unlikely to meaningfully impact sales while benefiting patrons. Interestingly, the Internet Archive adopted a similar strategy by refraining from scanning books in their first five years of publication.[290]

Market segmentation by usage—another form of second-degree price discrimination—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

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[285] This Section focuses on ways to identify those readers and those actions that should be given preferential treatment. A separate question is what would such a preferential treatment entail. There are many ways to implement such a scheme. For example, a library could do so by relaxing the artificial friction that is part of its CDL scheme, *see supra* text accompanying note 252 (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 also infra* Section IV.D. (discussing additional ways to implement market separation schemes).

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

[287] *Id.*

[288] 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 hard-cover books early and reduced-price paperback version later. *Id.* at 73.

[289] *See* Yucesoy et al., *supra* note 274.

[290] Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 387 (S.D.N.Y. 2023).

for them is thus socially beneficial.[291] In fact, under certain conditions, academic libraries already use digitalized copies of their printed collections to provide scholars online access—a feature that became especially valuable during the COVID pandemic.[292]

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.[293] This method, known as third-degree price discrimination, involves offering the same product to different consumer subgroups at varying prices.[294] 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.[295] 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.[296] 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.[297] While targeting economically disadvantaged groups reflects this redistributive impact, it simultaneously compromises the ideal of equal

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[291] Gordon, *supra* note 107, at 1630 (discussing the positive externalities from scholarship and research).

[292] *See* Brief of Amicus Curiae Hathitrust in Support of Neither Party at 8–9, Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 28, 2023), 2023 WL 9062408. The most famous entity that provides such services to academic libraries is HathiTrurst, affiliated with the University of Michigan, whose digitalization project was held to be fair use in Authors Guild, Inc. v. HathiTrust, 755 F.3d 87, 105 (2d Cir. 2014).

[293] This approach is not completely foreign to copyright law. In fact, one identified group—the visually impaired—already receive special treatment both under the fair use doctrine and outside of it. *See* 17 U.S.C. § 121 (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.").

[294] *See* TIROLE, *supra* note 99, at 135, 137; Meurer, *supra* note 286, at 69–71.

[295] 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 197, those tools are available.

[296] PALFREY, *supra* note 12, at 1–2.

[297] *Id.*

access. Implementing such a strategy is not only practically difficult,[298] 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).

Nevertheless, there may be middle grounds worth exploring. Asserting 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.[299] 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.[300] 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.

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

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298 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*, AM. LIBRS. (Mar. 1, 2022), https://americanlibrariesmagazine.org/2022/03/01/devices-on-the-go (examining how "many libraries now lend equipment to increase internet access and help close the digital divide.").

299 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.

300 While the public support for higher education eroded in recent years, it is still remarkably high. *See, e.g.*, Noah D. Drezner & Oren Pizmony-Levy, A*merican Higher Education Widely Viewed as a Worthwhile Investment Benefiting Individuals and Society*, COLUMBIA TEACHERS COLLEGE, at *3 (July 10, 2023), https://academiccommons.columbia.edu/doi/10.7916/zkm5-kp68/download (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 (July 11, 2023) (reporting that only 36% of American have "great deal" or "quite a lot" of confidence in higher education, compared to 57% in 2015, while 22% have "very little" confidence compared to 9% in 2015). The reasons for this erosion, however, likely has little to do with need-based scholarships (which existed for many decades). In fact, the high cost and high debt of higher education, together with the perception of a political bias, and legacy admissions are often listed at the main factors attributing 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/; Peter Kanelos, *The Public is Losing Confidence in Higher Ed — Here's Why*, THE HILL (Oct. 19, 2018), https://thehill.com/opinion/education/411924-the-public-is-losing-confidence-in-higher-ed-heres-why/.

such strategies would be ideal,[301] its absence does not preclude their implementation. With their minimal harm to the publishers' market and substantial societal benefits, these strategies are likely to be considered fair use.[302]

However, the lack of explicit congressional approval presents two significant challenges. First, as noted,[303] 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,[304] they are quite risky. Given libraries' known risk aversion,[305] legal ambiguity could cause hesitation. Despite this, the following Section suggests that state-run libraries—

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301 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 311–312, yet Congress remained inactive, a trend unlikely to change. As Jessica Litman famously showed, Congress typically amends the Copyright Act when there is a consensus among relevant stakeholders, LITMAN, *supra* note 92, at 23—an unlikely scenario in the foreseeable future when it comes to publishers and public libraries. Interestingly, the Copyright Office's 2008 report, while recommending against adding a digital first sale doctrine to the Copyright Act, acknowledged the potential challenges for public libraries. It proposed some mitigation measures and noted that federal legislation might be needed if they proved ineffective. PETERS, *supra* note 134, at 102–05.

302 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, 510 U.S. 569, 578–80 (1994), transformability became a crucial factor in fair use analysis. Traditionally, a use was considered transformative, and thus more likely to be fair, if it adds something new or repurposes the original work. *Id.* at 579. The schemes explored in this part are unlikely 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, 464 U.S. 417, 451 (1984) (holding a likely 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 254 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 should be a crucial part in the transformability analysis itself. Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1274 (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 non-commercial nature of public libraries, such use should be considered fair.

303 *Supra* Section II.B.1.

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

305 *See, e.g.*, Nicholas Joint, *Applying General Risk Management Principles to Library Administration*, 56 LIBR. REV. 543, 545 (2007) ("librarians are famously 'risk-averse'").

which constitute most public libraries—should confidently pursue these strategies to enhance access, even amidst potential legal uncertainties.

C. States as Regulators and Consumers

Since the country's inception, copyright law has been part of federal law.[306] However, states have an important role to play within this system, as the operation of public libraries demonstrates. Public libraries are primarily financed by local governments.[307] The digital lending problem, therefore, burdens their budget. 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.[308] This Section takes a closer look at the role of the states, both as potential market regulators and as actors within those markets.

Maryland made the most meaningful attempt to tackle the digital lending problem. In April 2021, the state passed the Library Ebook Fairness Law.[309] 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."[310] The bill received broad bipartisan support and passed unanimously by both the Maryland Senate and House of Delegates.[311] In June 2021, a similar bill unanimously passed the New York Assembly and passed the state Senate with only one senator objecting.[312] But on December 29, 2021, New York Governor Kathy Hochul vetoed it, claiming that it was preempted by the federal

306 *See* Rub, *supra* note 134, at 344–47 (exploring the changing roles of the states within copyright law ecosystem).

307 *See* Curcic, *supra* note 10 (noting that nationwide 86.55% of the entire income of libraries comes from local government, 6.68% from state government, and 0.63% from the federal government).

308 *See* Shawnda Hines, *ALA Denounces Amazon, Macmillan in Response to Congressional Inquiry on Competition in Digital Market*, AM. LIBR. ASS'N (Oct. 23, 2019), https://www.ala.org/news/press-releases/2019/10/ala-denounces-amazon-macmillan-response-congressional-inquiry-competition (quoting the senior director of public policy and government relations of the American Library Association statement explaining that "we believe it is time to take legislative action"); *see also* Gard, *supra* note 11, at 512–13 (describing the circumstances leading to the enactment of Maryland's Library Ebook Fairness Law).

309 *See* Gard, *supra* note 11, at 512–14 (describing the circumstances that led to the enactment of the law).

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

311 Matt Enis, *AAP Sues Maryland Over Law Requiring Publishers to License EBooks to Libraries Under "Reasonable Terms,"* LIBR. J. (Dec. 9, 2021), https://www.libraryjournal.com/story/maryland-passes-law-requiring-publishers-to-license-ebooks-to-libraries-under-reasonable-terms.

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

Copyright Act.[313] Comparable bills were considered at the time or since introduced in eight other states.[314]

In February 2022, the United States District Court for the District of Maryland agreed with Governor Hochul by holding the Maryland act preempted and enjoining its enforcement.[315] 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."[316] Maryland decided not to appeal this decision.[317] Indeed, the act raised a host of issues because 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, Maryland's 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.[318]

Nevertheless, even if states face significant restrictions in exercising their police power over eBooks 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.[319] States, therefore, can decide that their libraries will only enter certain agreements (e.g., only permanent licenses) and not others (e.g., two-year licenses). Some states currently consider such legislation. While such a scheme is

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313 *Id.*

314 Those states are Rhode Island, Missouri, Illinois, Tennessee, Connecticut, Massachusetts, Hawaii, and Virginia. *See State eBook Licensing Bills Threaten Creators and Copyright*, COPYRIGHT ALLIANCE, https://copyrightalliance.org/trending-topics/state-ebook-licensing-bills (last visited Jan. 30, 2024); Andrew Albanese & Jim Milliot, *With New Model Language, Library E-book Bills Are Back*, PUBLISHERS WEEKLY (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.

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

316 *Id.* at 389.

317 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 [act]").

318 It is well established that state law cannot "stand[] as an obstacle to the . . . objectives of Congress," Hughes v. Talen Energy Mktg., 578 U.S. 150, 151 (2016), but applying this standard in the context of copyright law has proven to be exceptionally complex and unpredictable. *See, e.g.*, Rub, *supra* note 134, 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 about 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.

319 *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.").

clearly within state power, it has two main drawbacks. First, a publisher does not have to agree to those terms, potentially leaving the state libraries without access to its titles.[320] Second, this approach does not assist privately owned libraries—primarily libraries of private universities—in tackling the digital lending problem.

Being owned by the state provides 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 11th Amendment regarding claims under the federal Copyright Act.[321] As a result, state-owned libraries, including those owned by public universities, cannot be sued for damage for copyright infringement unless their state waives its immunity.[322]

There are still two ways for copyright owners to implicate state-owned libraries.[323] 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. First, identifying the exact employee that allegedly infringed might be challenging. Second, and more importantly, courts agree that the doctrine of qualified immunity applies to copyright claims against public employees.[324] Under that doctrine, public employees are immune when "a particular area of copyright law was not clearly established" or

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[320] It is extremely difficult to predict whether publishers will 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/. 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.

[321] Allen v. Cooper, 140 S. Ct. 994, 1007 (2020).

[322] 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. *Copyright and State Sovereign Immunity*, U.S. COPYRIGHT OFF., Appendix E (2021) (exploring the waivers of immunity by each state).

[323] It is important to note that 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 County, 547 U.S. 189, 193 (2006), and that the Supreme Court "has consistently refused to construe the 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, id., 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, public libraries that are owned by private institution, such as the libraries of private universities, are also not entitled to sovereign immunity from federal law claims.

[324] *See, e.g.*, Reiner v. Canale, 301 F. Supp. 3d 727, 740 (E.D. Mich. 2018); Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n, No. CV 16-4781-SVW-FFM, 2016 WL 9223889, *5–6 (C.D. Cal. Dec. 22, 2016); Issaenko v. Univ. of Minnesota, 57 F. Supp. 3d 985, 1012–16 (D. Minn. 2014).

"when their conduct was 'objectively reasonable.'"[325] Courts repeatedly ruled that public employees, as such, cannot be liable under copyright law when it is unclear if their actions constitute fair use.[326]

Consequently, unless there is clear infringement, which is rare in fair use cases,[327] copyright owners can only sue state entities under the *ex parte Young* doctrine.[328] It allows all lawsuits against state actors as long as the remedies are limited to injunctions.[329] Injunctions in copyright cases, however, require the plaintiff to not only prove infringement but also to meet a multi-factor test, including showing that an injunction is in the public interest,[330] which might be challenging when it comes to public libraries.

For those reasons, the 11th Amendment immunity should give state-owned libraries significant leeway to take actions that might be borderline copyright infringement. Libraries and librarians are notoriously risk averse, but the risk here seems truly negligible. Even if publishers decide to sue a state-owned library, which is likely to damage their reputation—public libraries are, after all, loved by most Americans[331]—the 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 overreaching 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 works or for scholarly purposes, offering preferential treatment to specific groups like low-income patrons,

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325 *Tresona*, 2016 WL 9223889, at *6.

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

327 *See supra* note 302 (discussing some of the complexities around the fair use question).

328 *Ex parte* Young, 209 U.S. 123, 159–61 (1908).

329 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.").

330 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, 74 (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 grating injunction for copyright infringement).

331 Indeed, while repeat players within our copyright ecosystem—such as publishers, movie studios, software companies, or internet providers—are often parties to copyright litigation, lawsuits against (or by) libraries are exceedingly rare. *See* Brief of Amici Curiae Nine Library Organizations and 218 Librarians in Support of Defendant-Appellant at 18 Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023), *appeal docketed*, No. 23-1260 (2d Cir. Dec. 22, 2023), 2023 WL 8933275 (discussing the history of CDL).

coordinating efforts among state libraries, and leveraging the immunity offered by the 11th 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 publicly-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 (e.g., quicker) borrowing to its low-income patrons, especially for older works. While this approach carries some legal risks, the 11th Amendment could provide sufficient assurances to encourage those libraries to experiment with it.[332]

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.[333] Furthermore, to address 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 can enhance access to copyrighted materials, foster positive externalities, and safeguard publishers' revenue and their capacity to stimulate creativity.

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[332] 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*, https://archive.org/details/bailey-menna-securing-digital-rights-for-libraries 11 (Dec. 1, 2022) (noting that more than 78% of libraries support codifying CDL), *with* SECTION 108 OF TITLE 17, *supra* note 90 (noting the opposition among some librarians to a legislative reform, fearing it will weaken their position).

[333] *See supra* text accompanying notes 214–219.

CONCLUSIONS

As digital distribution becomes increasingly prevalent, the digital lending problem will likely worsen. This unresolved matter is casting a growing shadow 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 concerning 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 proposes several frameworks, which are not mutually exclusive, to facilitate library operations in the digital domain. 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.