"UNIVERSAL ACCESS TO KNOWLEDGE" AND THE NEED FOR EQUITABLE E-BOOK LENDING PRACTICES

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INTRODUCTION

Libraries have long served as essential institutions for accessing information and supporting education through the various materials and services they offer.[1] The rise of digital libraries has helped further advance these goals by making access to library resources more equitable, particularly for those who cannot travel to brick-and-mortar locations or otherwise access physical materials.[2] The Internet Archive (the "Archive") is one such example of a digital, nonprofit library that provides free access to millions of texts, movies, music, and more to the general public as part of its mission to provide "universal access to all knowledge."[3]

The Archive's practices are not without controversy.[4] In 2023, four book publishers sued the Archive for copyright infringement because the Archive scanned print books and loaned those digital copies to its patrons without the publishers' permission.[5] The Archive raised a fair use defense to justify its alleged use of controlled digital lending ("CDL").[6] CDL allows libraries to lend digitized versions of physical books in an "owned-to-loaned" ratio, where the number of patrons who can borrow the digitized version of a text must be the same as the number of physical copies owned by the library.[7] The Archive's activities diverged from traditional CDL practices in reality,[8] but both the U.S. District Court for the Southern District of New York and

[1] Stephen Wolfson, *Hachette Book Group v. Internet Archive and the Future of Controlled Digital Lending*, PENN LIBRARIES (Feb. 21, 2024), https://www.library.upenn.edu/news/hachette-v-internet-archive [https://perma.cc/633R-42UM]; *see also* Lila Bailey, Kyle K. Courtney, David Hansen, Mary Minow, Jason Schultz & Michelle Wu, *Position Statement On Controlled Digital Lending By Libraries*, https://controlleddigitallending.org/statement [https://perma.cc/69J3-HHVD] ("One of the most fundamental and socially beneficial functions of libraries is providing broad access to information by lending books and other materials to their communities.").

[2] DAVID R. HANSEN & KYLE K. COURTNEY, A WHITE PAPER ON CONTROLLED DIGITAL LENDING OF LIBRARY BOOKS 2-3 (2018), https://www.controlleddigitallending.org/whitepaper [https://perma.cc/W6AM-3XVE].

[3] *About The Internet Archive,* INTERNET ARCHIVE, https://archive.org/about [https://perma.cc/9LK3-7ZMQ]. The Internet Archive is also the host of the Wayback Machine, an online archive of almost 30 years of old webpages created to preserve internet history.

[4] Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 370 (S.D.N.Y. 2023); Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 163 (2d Cir. 2024).

[5] *Hachette Book Grp*., 664 F. Supp. 3d at 374.

[6] *Id.* at 374-75; *Hachette Book Grp*., 115 F.4th at 174-76.

[7] Bailey et al., *supra* note 1.

[8] Joe Hernandez, *A Judge Sided with Publishers in a Lawsuit Over the Internet Archive's Online Library*, NPR (Mar. 26, 2023), www.npr.org/2023/03/26/1166101459/internet-archive-lawsuit-books-library-publishers [https://perma.cc/Y2AX-6M8C]. CDL "enables a library to circulate a digitized title in place of a physical one in a controlled manner. Bailey et al., *supra* note 1. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation." *Id.*

the Second Circuit Court of Appeals ruled in favor of book publishers.[9] In particular, both courts took issue with the broader doctrine of CDL as unauthorized copying that usurped publishers' place in the library e-book licensing market, not just the Archive's version of it.[10] However, this rejection of CDL reinforces the validity of the inequitable terms on which publishers transact with libraries, barring libraries from finding less financially burdensome means of serving their patrons' needs.

This Note examines how courts can support more equitable access to information by expanding their fair use analyses to better reflect the original intent of the Copyright Clause in promoting the progress of the arts and sciences.[11] This would strengthen the legal foundation for CDL and give libraries greater latitude to provide resources to the public. Part I provides background information on CDL, the Archive's use of CDL, the financial strain e-book licensing places on libraries, and the relevant legislative and case-law history about Section 108 of the Copyright Act and *Hachette v. Internet Archive*. Part II examines how courts' tendency to rule in favor of publishers disrupts the balance established by the Copyright Clause between promoting the progress of the arts and sciences and granting authors exclusive rights for a limited time. Part III suggests that courts should expand their analyses of fair use defenses to account for scenarios in which copyright owners' exercise of exclusive rights significantly hinders the public interest. As such, when the rights of publishers and authors compromise the interests of libraries and the general public, fair use analyses should factor in whether precluding libraries from practicing CDL harms the public interest. Alternatively, e-book equity legislation—intended to decrease the disproportionate burden placed on libraries by publishers through the terms of their licensing agreements—acts as another legally justifiable means by which greater equity may be secured for libraries and their patrons.

I. BACKGROUND

A. The Need for Digital Libraries

For hundreds of years, libraries have promoted the public interest by providing broad access to information and supporting education and learning, particularly by lending books and other materials to their communities.[12]

[9] *Hachette Book Grp*., 664 F. Supp. 3d at 374; *Hachette Book Grp*., 115 F.4th at 173.

[10] *Hachette Book Grp*., 664 F. Supp. 3d at 386; *Hachette Book Grp*., 115 F.4th at 183-84.

[11] U.S. CONST. art. I, § 8, cl. 8.

[12] Stephen Wolfson, *supra* note 1; *see also* Bailey et al., *supra* note 1 ("One of the most fundamental and socially beneficial functions of libraries is providing broad access to information by lending books

Traditionally, libraries were only able to operate and serve patrons through their brick-and-mortar locations.[13] Physical lending, however, can be impractical because of issues with accessibility, and lack of infrastructure.[14] Going beyond impracticability, requiring physical access can also hinder efficient research and learning, especially for those who are unable to physically travel to a library.[15] Advances in technology—particularly the internet—have begun to overcome these limitations by leveraging the digital space to greatly expand accessibility of library resources.[16] Ultimately, by utilizing digital platforms, libraries increase equitable access to information.[17]

As book bans become more widespread,[18] digital library resources have emerged as a vital tool for equitably disseminating information and expanding access for individuals in affected communities.[19] For example, in 2022, the New York Public Library (NYPL) partnered with Hachette Book Group, Macmillan Publishers, and Scholastic to give readers across the United States (rather than only within the New York City area) access to a curated selection of commonly banned books in e-book format.[20] These books were made available through the NYPL's SimplyE reading app and did not require a library card or any wait time in order to borrow.[21] At the same time, the Brooklyn Public Library (BPL) also offered young adults nationwide, between the ages of thirteen to twenty-one, the opportunity to apply for a BPL eCard that would give them access to the library's entire collection of e-books for one year.[22] These efforts support intellectual freedom by giving readers across the country equal access to diverse

and other materials to their communities. . . . Traditional library lending has been common practice for hundreds of years . . . .").

13 Wolfson, *supra* note 1.

14 HANSEN & COURTNEY, *supra* note 2, at 5-6.

15 *Id.* at 5.

16 Wolfson, *supra* note 1.

17 HANSEN & COURTNEY, *supra* note 2, at 2-4.

18 Shaye Weaver, *NYC Libraries Are Offering Free Digital Library Cards to People Across the U.S.*, TIMEOUT (Apr. 13, 2022), https://www.timeout.com/newyork/news/nyc-libraries-are-offering-free-digital-library-cards-to-people-across-the-u-s-041322 [https://perma.cc/NNM9-8X6L]. Recent book bans in the U.S. are predominantly driven by political pressure by lawmakers and interest groups. *What Is a Book Ban? And More Frequently Asked Questions,* PEN AMERICA, https://pen.org/book-bans/book-bans-frequently-asked-questions/ [https://perma.cc/3MGC-SL5B].

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

perspectives and ideas, especially those living in areas where books with those ideas have been banned or otherwise suppressed.[23]

As a completely digital library, the Archive has become a particularly invaluable online resource due to its vast collection of digitized materials—most notably books, but also movies, music, software programs, and more.[24] In April 2024, the country of Aruba even partnered with the Archive to host its digital heritage portal, which now houses over 100,000 Aruban artifacts.[25] Beyond this, the Archive is also the host of the Wayback Machine, an archive of over 835 billion webpage snapshots that the organization has collected since 1996,[26] which serve as valuable source checking tools for lawyers gathering evidence published on the internet at any point from 1996 to the present.[27] Thus, the downfall of the Archive would not simply affect those accused of "pirating"—it could also have ripple effects across the legal field itself.[28] 1.5 million users visit the Archive daily, highlighting the importance of its digital library and archival services in supporting a vast variety of patron needs.[29]

B. The Harsh Realities of E-Book Licensing

Where individual consumers typically pay a one-time price for perpetual e-book access, libraries face a barrage of publisher-imposed licensing models that vary widely in cost and user access.[30] The "Big Five"[31] publishers—Hachette, Penguin Random House ("Penguin"), HarperCollins, Macmillan, and Simon & Schuster—use a "one copy, one user" model, under

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[23] *Id.*

[24] *About The Internet Archive, supra* note 3.

[25] Caralee Adams, *Aruba Launches Digital Heritage Portal, Preserving Its History and Culture for Global Access,* INTERNET ARCHIVE BLOGS (Apr. 8, 2024), https://blog.archive.org/2024/04/08/aruba-launches-digital-heritage-portal-preserving-its-history-and-culture-for-global-access/ [https://perma.cc/DMB7-XWR8].

[26] *About The Internet Archive, supra* note 3.

[27] *Internet Archive Wayback Machine® Helps Lawyers Go Back in Time to Strengthen Cases*, LEXISNEXIS INSIGHTS (Oct. 9, 2019), https://www.lexisnexis.com/community/insights/legal/b/thought-leadership/posts/internet-archive-wayback-machine-helps-lawyers-go-back-in-time-to-strengthen-cases [https://perma.cc/64J5-HQS5].

[28] *Id.*; Nitish Pahwa & Emma Wallenbrock, *Could the Internet Archive Go Out Like Napster?*, SLATE (Sept. 12, 2022), https://slate.com/technology/2022/09/internet-archive-national-emergency-library-lawsuit.html [https://perma.cc/8VGU-35Z7].

[29] Pahwa & Wallenbrock, *supra* note 28.

[30] *Hachette Book Grp.*, 664 F. Supp. 3d, 370, 374-75 (S.D.N.Y. 2023).

[31] The Big Five publishers control approximately 80% of the trade book market. Hallie Rich, *5 Questions with the Big 5: Jonathan Karp, Simon & Schuster*, LIBR. J. (Aug. 19, 2024), https://www.libraryjournal.com/story/5-questions-with-the-big-5-jonathan-karp-simon-schuster [https://perma.cc/2ZZH-NP85]. Three of the Big Five publishers—Hachette, Penguin, and HarperCollins—were plaintiffs in the suit against the Internet Archive for copyright infringement.

which libraries pay a single fee for an e-book that patrons may check out one at a time.[32] These licenses, however, are also subject to Digital Rights Management ("DRM") restrictions, which is software embedded in many digital products, such as e-books, that allow publishers to prevent unauthorized copying or distribution.[33] Although these publishers offer perpetual licenses to academic libraries, their standard public library licenses are typically limited either by time or number of circulations.[34]

For example, Hachette and Penguin issue one- or two-year licenses, during which there is no limit on the number of times an e-book can be read, but after which the library is required to purchase a new license.[35] HarperCollins, by contrast, only allows libraries to circulate an e-book twenty-six times before the license expires.[36] HarperCollins and Penguin also offer a Pay-Per-Use model, under which a title may be circulated once to a single patron at a reduced fee.[37] These licenses are priced at notably higher prices than their physical or retail e-book counterparts.[38] The American Library Association (ALA) has stated that "libraries often pay $55 for one copy that expires after two years."[39] Library e-book licenses generate around $59 million per year for Penguin, while HarperCollins earned around $46.91 million between 2015 and 2020.[40] These details shed light on the significant financial burdens that publishers impose on libraries through their e-book licensing agreements.[41]

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[32] Kim S., *The Real Costs of Digital Content: eBook and Digital Audiobooks*, TIMBERLAND REG'L LIBR. (Apr. 24, 2024), https://trl.org/blogs/post/the-real-costs-of-digital-content-ebook-and-digital-audiobooks/ [https://perma.cc/PS7K-295F]; *Hachette Book Grp*., 664 F. Supp. 3d at 375.

[33] *Hachette Book Grp*., 664 F. Supp. 3d at 375; *Digital Rights Management (DRM)*, DUKE SCHOLARWORKS, https://scholarworks.duke.edu/copyright-advice/copyright-faq/digital-rights-management-drm/ [https://perma.cc/HV9N-UPPN].

[34] *See* Kim S., *supra* note 32; Robert Roose, *The True Cost of eBooks and Audiobooks for Libraries*, SPOKANE PUB. LIBR. (Jan. 14, 2025), https://www.spokanelibrary.org/the-true-cost-of-ebooks-and-audiobooks-for-libraries/ [https://perma.cc/2W5C-BTS8]; *A Behind-the-Scenes Look at Library eBook*, DANIEL BOONE REG'L LIBR. (July 7, 2025), https://www.dbrl.org/news/a-behind-the-scenes-look-at-library-ebooks [https://perma.cc/Z5BM-3YT9].

[35] *Hachette Book Grp*., 664 F. Supp. 3d at 375.

[36] *Id.*

[37] *Hachette Book Grp*., 664 F. Supp. 3d at 375.

[38] *See* Kim S., *supra* note 32; Roose, *supra* note 34. Spencer Stevens, *Behind the Scenes: Overdrive and Libby*, LYNNFIELD PUB. LIBR. (Feb. 23, 2024), https://lynnfieldlibrary.org/behind-the-scenes-overdrive-libby/ [https://perma.cc/966F-LKET]; *A Behind-the-Scenes Look at Library eBook*, *supra* note 34.

[39] *ALA Disappointed in New York Governor's Rejection of Ebook Equity Legislation*, AM. LIBR. ASS'N (Jan. 3, 2022), https://www.ala.org/news/2022/01/ala-disappointed-new-york-governors-rejection-ebook-equity-legislation [https://perma.cc/J7F3-QBHN].

[40] *Hachette Book Grp*., 664 F. Supp. 3d at 374-75.

[41] *Id.*

E-book licensing allows publishers to exert far greater level of control over their catalogue than was traditionally possible.[42] Digital distribution can enable publishers to track consumers' reading habits, limit the resale market, remain in control of distribution channels, and even change the contents of books retroactively or delete them from readers' digital libraries entirely.[43] Purchasers, whether they are libraries or individual people, never truly "own" the e-books they pay for as a result.[44] They only buy the right to access, and in the case of libraries, disseminate those e-books under limited terms.[45] This also severely undercuts libraries' ability to engage in the archival preservation of digital texts for the benefit of future readers.[46] In these ways, publishers' attack on CDL is not just a financial issue for libraries.[47] Denying libraries the ability to practice CDL creates privacy and ownership concerns for current readers, while also posing barriers to the preservation of texts in their original forms for future readers.[48]

C. Controlled Digital Lending

In response to the inequities associated with current e-book licensing policies, many libraries are seeking alternative means of providing their patrons with digital materials, particularly through CDL.[49] In recent years, many libraries have begun to digitize their pre-existing physical collections—in other words, scanning and uploading their physical media for online access.[50] As early as 2005,[51] the Archive started the Open Library program, in which the Archive scanned, digitized, and lent out hundreds of thousands of both public domain and copyrighted books.[52] Many other libraries have since adopted this model and partnered with the Archive to lend digitized copies.[53] These partners range from large library systems like the Boston Public Library to smaller, specialized institutions such as the Allen County Public Library, which houses the nation's largest genealogical

[42] SARAH LAMDAN, JASON M. SCHULTZ, MICHAEL WEINBERG & CLAIRE WOODCOCK, THE ANTI-OWNERSHIP EBOOK ECONOMY 8-9 (2023), https://www.nyuengelberg.org/outputs/the-anti-ownership-ebook-economy/ [https://perma.cc/HJ5Y-CUB9].

[43] LAMDAN ET AL., *supra* note 42, at 4.

[44] *Id.*

[45] *Id.* at 4-5.

[46] Wolfson, *supra* note 1.

[47] LAMDAN ET AL., *supra* note 42, at 53-56.

[48] *Id.*

[49] HANSEN & COURTNEY, *supra* note 2, at 38.

[50] *Id.*

[51] *About The Internet Archive, supra* note 3.

[52] HANSEN & COURTNEY, *supra* note 2, at 2-3.

[53] *Id.*

collection among public libraries.[54] The legal bases for CDL was first explored in the 2011 article, "Building a Collaborative Digital Collection: A Necessary Evolution in Libraries," by Michelle Wu, Professor and Law Library Director at Georgetown University School of Law.[55]

Despite being fully digital, the Open Library Program operates similarly to a real, brick-and-mortar library by allowing scanned books to be checked out by one user at a time.[56] In other words, it also functions through the practice of CDL.[57] According to the "Position Statement On Controlled Digital Lending By Libraries," co-authored by the Archive's Policy Counsel Lila Bailey alongside several other digital rights and copyright lawyers and activists, CDL "enables a library to circulate a digitized title in place of a physical one in a controlled manner."[58] Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation."[59] In other words, libraries lend digitized versions of physical books in an "owned-to-loaned" ratio, where the number of patrons who can borrow the book in any format must be the same as the number of physical copies owned.[60] The owned-to-loaned ratio is a crucial aspect of legal justifications for CDL under the fair use doctrine.[61] The "Position Statement On Controlled Digital Lending By Libraries" explicitly describes certain practices that would not fall within the scope of CDL, the most relevant being a situation in which "[a] library owning one print copy of an in-copyright book digitizes it and makes it available to multiple users simultaneously, with or without DRM."[62]

Although copyright owners' exclusive rights are often seen as a hurdle to libraries' efforts to modernize and expand access beyond physical locations,[63] the origins and history of copyright law in the United States cut the other way. From its origins, copyright has been structured to promote the public interest, and library digitization projects are consistent with that original aim.[64]

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[54] *Id.*

[55] *Id.*

[56] Bailey et al., *supra* note 1.

[57] *Id.*

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 L. LIBR. J. 527, 536 (2011).

[64] *Id.* at 536-37.

American copyright law traces its roots English legal precedent.[65] In 1710, Parliament enacted the Statute of Anne to encourage learning by "Vesting the Copies of Printed books in the Authors or Purchasers of such Copies."[66] Years later, the Framers drew on the Statute of Anne when drafting the Copyright Clause.[67] Like its English predecessor, the Clause frames exclusive rights as a means to a public end, empowering Congress "[t]o promote the progress of Science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."[68] Both the Statute of Anne and the U.S. Constitution's Copyright Clause share the same basic structure: emphasizing the promotion of the public good—the encouragement of learning and advancement of the sciences and arts—as their ends, and the vesting of time-limited exclusive rights in authors over their works as the means of achieving those ends.[69]

U.S. Supreme Court precedent has also repeatedly reinforced this view that between protecting authors by granting them exclusive rights over their work and promoting the public interest, the latter should take priority.[70] In *Fox Film Corp. v. Doyal*, the Court stated that "[t]he sole interest of the United States and the primary object in conferring the monopoly [to authors] lie in the general benefits derived by the public from the labors of authors."[71] Later in *Sony Corp. of Am. v. Universal City Studios, Inc.*, the Court further asserted:

> The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.[72]

A few years after this, in *Feist Publications, Inc. v. Rural Telephone Service Co.*, the Court again held that "[t]he primary objective of copyright is not to reward the labor of authors, but '[t]o promote the Progress of Science and useful Arts.'"[73] These cases remain good law and show the Court's clear

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[65] *Id.* at 536.

[66] *Id.*

[67] *Id.*

[68] *Id.*; U.S. CONST. art. I, § 8, cl. 8.

[69] Wu, *supra* note 63, at 537.

[70] Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429-32 (1983); Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).

[71] *Fox Film Corp.*, 286 U.S. at 127.

[72] *Sony Corp. of Am.*, 464 U.S. at 429.

[73] *Feist Publ'ns, Inc.*, 499 U.S. at 349.

and consistent interpretation that the primary motivation for rewarding authors with exclusive rights—which allows authors to derive fair profits from the fruits of their labor—is to promote the public good by incentivizing future creative and intellectual advancements.[74]

Additionally, Section 108 of the Copyright Act of 1976—enacted to address the development of photocopying—allows libraries and other archives to create exact copies that would otherwise be considered infringement so long as they meet certain criteria.[75] These criteria are as follows: (1) libraries or archives must make no more than one copy of a work, (2) that copy must be made without any purpose of commercial advantage,[76] (3) the library's collections must remain open to the public or at least broadly to any researcher within a certain specialized field, and (4) there must be notice regarding the copyright on the copy as specified.[77] By carving out a specific protection for libraries and archives against infringement claims, Section 108 gives deference to and highlights the distinct, important role that these institutions play in furthering copyright law's goal of advancing public knowledge and progress.[78]

Fair use analyses under Section 107 of the Copyright Act of 1976—used as defenses against copyright infringement—necessarily involve the same balancing act outlined in the Copyright Clause between granting authors exclusive rights for limited time to their works and promoting the progress of the arts and sciences (and thereby the public interest).[79] Thus, such analyses should similarly prioritize the latter in accordance with the origins, history, and overarching goals of U.S. copyright law.

D. Hachette v. Internet Archive

Although the Archive began digitizing books through their Open Library program in 2005,[80] publishers did not take any legal action against the Archive until the COVID-19 pandemic.[81] During the pandemic, the

[74] *Fox Film Corp.*, 286 U.S. at 127; *Sony Corp. of Am.*, 464 U.S. at 429-32; *Feist Publ'ns, Inc.*, 499 U.S. at 349-50.

[75] Laura N. Gasaway, *Amending the Copyright Act for Libraries and Society: The Section 108 Study Group*, 70 ALB. L. REV. 1331, 1332 (2007).

[76] "[W]ithout any purpose of commercial advantage" means that libraries and archive must avoid earning money from photocopies.

[77] 17 U.S.C § 108.

[78] *See generally* Gasaway, *supra* note 75, at 1332.

[79] *See* Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 178-79 (2d Cir. 2024); 17 U.S.C § 107.

[80] *About The Internet Archive, supra* note 3.

[81] *See* Aaron Moss, *As Publishers Beat Internet Archive, Are Libraries the Real Losers?*, COPYRIGHT LATELY (Sept. 8, 2024), https://copyrightlately.com/as-publishers-beat-internet-archive-are-libraries-the-

Archive saw an uptick in demand for digitized materials[82] as libraries nationwide were forced to shut down, leaving millions of print books inaccessible.[83] In response, it launched a temporary program called the National Emergency Library in March 2020.[84] The program drew sharp criticism for diverging from traditional CDL practices, instead allowing up to 10,000 users to checkout a single book at once.[85] Many prominent writers, publishing companies, and authors' associations such as the Authors Alliance, argued that this practice "devalued authors' works" and "deprived them of potential earnings."[86] As a result, two months into the National Emergency Library's run, four publishing houses—Hachette Book Group, HarperCollins, Penguin Random House, and John Wiley & Sons—sued the Archive for mass copyright infringement.[87] In doing so, publishers challenged the legitimacy of CDL as a concept.[88] This is especially troubling not just for the Archive, but for libraries in general, as CDL has been viewed as a potential solution to the high costs associated with e-book licensing.[89]

Both the Southern District of New York and the Second Circuit sided with publishers and noted that the Archive's National Emergency Library diverged from CDL by allowing multiple users to check out a single book simultaneously.[90] The primary issue with this is that publishers and the courts have not only attacked the National Emergency Library, but also the Archive's Open Library, its digital lending program based on CDL.[91] In its decision granting summary judgment to the publishers that sued the Archive, the Southern District of New York held, "[Internet Archive] argues that its digital lending makes it easier for patrons who live far from physical libraries to access books and that it supports research, scholarship, and cultural

real-losers/ [https://perma.cc/G5R5-92BM]; Andrew Albanese, *Internet Archive Copyright Case Ends Without Supreme Court Review*, PUBLISHERS WKLY. (Dec. 5, 2024), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/96657-internet-archive-copyright-case-ends-without-supreme-court-review.html [https://perma.cc/7572-GH8M].

[82] Chris Freeland, *Announcing a National Emergency Library to Provide Digitized Books to Students and the Public*, INTERNET ARCHIVE BLOGS (Mar. 24, 2020), https://blog.archive.org/2020/03/24/announcing-a-national-emergency-library-to-provide-digitized-books-to-students-and-the-public/ [https://perma.cc/Y694-XQZX].

[83] *See* Moss, *supra* note 81.

[84] Hernandez, *supra* note 8.

[85] Moss, *supra* note 81; Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 377 (S.D.N.Y. 2023).

[86] Hernandez, *supra* note 8.

[87] Pahwa & Wallenbrock, *supra* note 28.

[88] *Hachette Book Grp*., 664 F. Supp. 3d at 386; Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 183-84 (2d Cir. 2024).

[89] Pahwa & Wallenbrock, *supra* note 28.

[90] *Hachette Book Grp*., 664 F. Supp. 3d at 374-77; *Hachette Book Grp*., 115 F.4th at 176-79.

[91] *Hachette Book Grp*., 664 F. Supp. 3d at 390-91; *Hachette Book Grp*., 115 F.4th at 179.

participation by making books widely accessible on the Internet. But these alleged benefits cannot outweigh the market harm to the Publishers."[92] Ultimately, the court's analysis does not comport with the history of U.S. copyright law, which has prioritized the public interest and enriched authors specifically for that purpose.[93] Although the S.D.N.Y. and Second Circuit both discussed how CDL poses potential market harm to publishers,[94] it did not weigh this against the actual harms that e-book licensing poses against libraries and their patrons.[95] The court also failed to factor in how CDL combats these actual harms by fostering more equitable access to information and thus the progression of public education and knowledge.[96]

II. PROBLEM

Fair use is an affirmative defense to copyright infringement.[97] As a legal standard rather than an explicit rule, fair use analyses grant courts discretion when applying a subjective set of criteria to determine whether there is infringement on a case-by-case basis.[98] Section 107 of the Copyright Act codified four such criteria, which were meant to reflect the common law understanding of fair use at the time it was written—not change, narrow, or enlarge it.[99]

Section 107 states that uses of a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."[100] In determining whether a particular use is fair, courts should consider: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the

[92] *Hachette Book Grp*., 664 F. Supp. 3d at 390.

[93] *Hachette Book Grp*., 115 F.4th at 178.

[94] Despite taking issue with CDL, the court did not dispute the Archive's account that physical and e-book sales did not decrease while the works at issue were on the Archive's website. *Hachette Book Grp*., 664 F. Supp. 3d at 389; *Hachette Book Grp*., 115 F.4th at 190-95.

[95] *Hachette Book Grp*., 664 F. Supp. 3d at 390.

[96] Gary Price, *Statement: ALA "Expresses Concern" Over Hachette Book Group Ebook and Audio Book Lending Model Changes*, LIBR. J. (June 17, 2019), https://www.infodocket.com/2019/06/17/statement-ala-expresses-concern-over-hachette-book-group-ebook-and-audio-book-lending-model-changes/ [https://perma.cc/L6NY-HPW2].

[97] *See, e.g.,* Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 459 (9th Cir. 2020) (quoting *Campbell v. Acuff-Rose Music, Inc.,* 510 U.S. 569, 590 (1994)).

[98] H.R. REP. NO. 94–1476, at 65 (1976).

[99] *Id.* at 65-66.

[100] 17 U.S.C. § 107.

portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.[101]

Analyses of the fourth factor in particular have emphasized that it "focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy [rather than] the original."[102] The alleged market harm need not be actual harm or even certain future harm.[103] It is enough to show, by a preponderance of the evidence, that the use, if widespread enough, is likely to cause potential harm to the copyright holder's potential market.[104] However, even if a defendant cannot disprove market harm (as the Second Circuit determined in *Hachette v. Internet Archive*), the court must still "balance the benefit the public will derive if the use is permitted [against] the personal gain the copyright owner will receive if the use is denied."[105] In other words, analyses of the fourth fair use factor weigh (1) how permitting a use may harm the relevant market of the copyright owner, (2) how denying a use may benefit the copyright owner, and (3) how permitting a use benefits the public.[106]

This standard notably does not account for how denying a use may harm the public. While the S.D.N.Y. and Second Circuit in *Hachette v. Internet Archive* analyze how the Archive's practices deprive publishers of library e-book license revenues, they do not account for how denying its practices may harm the public interest,[107] as publishers' unreasonably burdensome licensing agreements with libraries deprive patrons of timely, equitable access to the resources and materials they need.[108]

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[101] 17 U.S.C. § 107.

[102] Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 (2d Cir. 2024) (quoting *Authors Guild v. Google, Inc.,* 804 F.3d 202, 223 (2d Cir. 2015)).

[103] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1983).

[104] *Sony Corp. of Am.*, 464 U.S. at 451; Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590-91(1994).

[105] *Hachette Book Grp*., 115 F.4th at 195 (quoting *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 48 (2d Cir. 2021)).

[106] *Id.* at 189.

[107] Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370, 388 (S.D.N.Y. 2023); *Hachette Book Grp*., 115 F.4th at 190.

[108] *See generally* Kim S., *supra* note 32 (arguing that library can only provide robust collection of digital materials to patrons with short wait times if publishers offer more reasonable licensing terms with lower prices and fewer restrictions); *see also* Roose, *supra* note 34 (explaining how library cannot afford to buy enough e-books to meet patron demand); *see also A Behind-the-Scenes Look at Library eBook*, *supra* note 34 (explaining that high licensing prices interfere with library efforts to minimize patron wait times).

III. PROPOSAL

The legal justification for CDL should not only rest on its ability to increase public access to information, which the Supreme Court struck down as insufficient to outweigh market harm.[109] Courts should also account for how rejecting CDL deprives libraries—and subsequently the patrons they serve—of a cost-effective alternative means for meeting patron needs. In other words, fourth factor analyses of fair use defenses raised by libraries and archives should be expanded to address potential harms to the public.

Although the Second Circuit in *Hachette v. Internet Archive* briefly acknowledged the Archive's claim that preventing the Archive from practicing CDL would harm patrons,[110] the court did not factor it into their determination of whether the Archive was justified in its use. Specifically, they stated that "[w]hile [the Archive] claims that prohibiting its practices would harm consumers and researchers, allowing its practices would—and does—harm authors."[111] In other words, the harm posed to the public was treated as irrelevant relative to the alleged harms experienced by publishers and the authors associated with them. Adding this prong of public harm to the fourth factor test would make fair use analyses more consistent with the overarching purpose of the Copyright Clause, which prioritizes the granting of copyright protection for the express purpose of promoting the progress of the arts and sciences.[112]

In the absence of adding this prong to fourth factor analyses, e-book equity legislation should be pursued as an alternative way to reduce the disproportionate burdens e-book licenses place on libraries and create a more equitable relationship between libraries and publishers. Several states, including Maryland and New York,[113] have attempted such measures, but efforts failed due to concerns about federal preemption and violations of copyright owners' exclusive distribution rights.[114] The issue of preemption could be circumvented through federal legislation created by Congress, though neither the Copyright Office nor the Supreme Court have explicitly

[109] *See* Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 557-59 (1985).

[110] *Hachette Book Grp*., 115 F.4th at 195-96.

[111] *Id.* at 195.

[112] U.S. CONST. art. I, § 8, cl. 8.

[113] S.B. 2890, 2021-2022 Leg. Sess. (N.Y. 2021); Assemb. B. 5837, 2021-2022 Leg. Sess. (N.Y. 2021); S.B. 432, 2021 Reg. Sess. (Md. 2021); H.B. 518, 2021 Reg. Sess. (Md. 2021).

[114] Andrew Albanese, *Hochul Vetoes New York's Library E-book Bill*, PUBLISHERS WKLY. (Dec. 30, 2021), https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html [https://perma.cc/N9FR-JZR8]; *ALA Disappointed in New York Governor's Rejection of Ebook Equity Legislation*, *supra* note 39.

barred states from creating such laws.[115] Intentional drafting language could also limit the scope of regulations placed on publishers such that only their distribution rights are impacted when they unreasonably burden libraries.[116]

A. Factoring Harm to the Public Interest in Fourth Factor Analyses

To see what including harm to the public interest in the fourth factor analysis of fair use,[117] particularly as it relates to libraries' practice of CDL, could look like in practice, it is helpful to examine how a previous decision that hinged significantly on this factor would change. For example, if the Second Circuit's analysis of *Hachette v. Internet Archive* centered the harm that the public would experience if libraries cannot use CDL, the decision would likely skew in favor of the Archive.

CDL exists as one of the few alternative means by which libraries may secure and provide access to digital materials to their patrons.[118] Prohibiting CDL or any alternative means of allowing library patrons to access digital materials only ratifies a system that overly enriches publishers and impedes the free flow of ideas by disadvantaging libraries.[119] In this system, libraries have little choice but to obtain needed e-book access by entering into licensing agreements with publishers no matter how inequitable the terms may be.[120] One of the clearest examples of this inequity is the vast difference in pricing between the costs of books in their physical formats and e-book formats for consumers versus libraries.[121] For example, whereas one copy of *James* by Percival Everett costs $17.00 in its physical format and $14.99 in its e-book format at retail,[122] libraries must pay either $27.50 per copy for a 12-month license or $55.00 per copy for a 24-month license.[123] While some small publishers and self-published authors offer libraries standard retail

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[115] Letter from Shira Perlmutter, Register of Copyrights and Dir., U.S. Copyright Off., to Thom Tillis, Ranking Member, Subcommittee on Intell. Prop. 8-9 (Aug. 30, 2021), https://www.copyright.gov/laws/hearings/2021-08-30-Response-to-Senator-Tillis-on-eBook-Licensing.pdf [https://perma.cc/KT3V-D8C6].

[116] *See, e.g.*, S.B. 2890; Assemb. B. 5837; S.B. 432; H.B. 518.

[117] 17 U.S.C. § 107.

[118] *See generally* Bailey et al., *supra* note 1.

[119] *See generally* Kim S., *supra* note 32; Roose, *supra* note 34; Stevens, *supra* note 38; *A Behind-the-Scenes Look at Library eBook*, *supra* note 34.

[120] Andrew Albanese, *DPLA, IPG Team Up to Offer Libraries an E-Book Ownership Option*, PUBLISHERS WKLY. (Aug. 16, 2024), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/95735-dpla-ipg-team-up-to-offer-libraries-an-e-book-ownership-option.html [https://perma.cc/QHC6-SNL3].

[121] Kim S., *supra* note 32.

[122] *Id.*

[123] *Id.*

rates, this significant pricing differential reflects what many publishers currently charge libraries for temporary e-book access,[124] amounting to millions in license subscription fees over time for some library systems.[125] Because libraries can only purchase licenses for limited periods of time and thus lack permanent access to e-books, they never truly own e-books in the way that they might own those titles' physical counterparts, or the way that individual consumers may own both physical and e-book versions of a title.[126]

Publishers could argue that these terms reflect the natural obsolescence of physical materials, which inevitably requires libraries to purchase new copies after a period of time, unlike e-books which do not wear out. However, the turnover rate for e-book licenses is substantially disproportionate to the rate at which a physical book would reasonably deteriorate.[127] While a physical book can be circulated numerous times for years before needing replacement (unless lost or otherwise not returned), e-book licenses force libraries to pay an already heightened price every year or every other year to retain the material, even though a comparable physical version would not reasonably need to be replaced over the same period of time.[128] Additionally, as technology advances, the platforms, software, and devices used to access e-books can also become obsolete. Publishers could argue that their licensing models allow them to ensure the e-books they offer libraries remain up to date, but it then becomes unclear why libraries must license instead of being allowed to shoulder the costs of those advancements if and when they occur (as is the case with e-books sold at retail).

This licensing model is not representative of traditional transactions between publishing houses and libraries for e-books.[129] When many libraries began offering e-books to patrons in the 2000s and early 2010s,[130] they were able to purchase digital titles with no term limits.[131] For example, Hachette only replaced the perpetual licenses they originally offered to libraries with a two-year access model for e-book and digital audiobooks starting in July

[124] *Id.*; Roose, *supra* note 34; Stevens, *supra* note 38; *A Behind-the-Scenes Look at Library eBook*, *supra* note 34.

[125] *See, e.g.*, Roose, *supra* note 34.

[126] LAMDAN ET AL., *supra* note 42, at 30-32.

[127] Kim S., *supra* note 32.

[128] *Id.*

[129] Matt Enis, *Publishers Change Ebook and Audiobook Models; Libraries Look for Answers*, LIBRARY J. (July 17, 2019), https://www.libraryjournal.com/story/publishers-change-ebook-and-audiobook-models-libraries-look-for-answers [https://perma.cc/YFF4-PKDY]; Price, *supra* note 96.

[130] Roose, *supra* note 34; *A Behind-the-Scenes Look at Library eBook*, *supra* note 34; LAMDAN ET AL., *supra* note 42, at 30-32.

[131] Roose, *supra* note 34.

2019.[132] Alan Inouye, the American Library Association's executive director of public policy and advocacy, noted that these heightened prices result from publishers' "'fear [that] unlimited access to eBooks would damage sales.'"[133] But even when libraries absorb these costs to meet patron demand, term-limited licensing creates a compounding and unsustainable financial burden.[134] Libraries must purchase licenses for new materials while continually repurchasing expiring licenses for older titles.[135] The resulting compromise is that libraries cease renewing licenses for certain titles despite continued patron demand because scarce funds must be redirected elsewhere.[136] In other words, the public ultimately "pays" through diminished access to digital materials, even where demand persists, because of the inequitable terms publishers impose on libraries.[137]

Even if libraries transact with publishers in this way to obtain digital materials—which they are necessarily required to do in the absence of CDL or other such alternative practices—some publishers have further restricted libraries by imposing embargoes that prevent libraries from purchasing more than one license for a single title during certain periods of high demand.[138] For example, Macmillan's controversial 2019 embargoes applied to the first two months following publication of its new releases, when demand for such titles are highest.[139] By forcing libraries to wait before they can purchase additional licenses, publishers increase patron demand for titles subject to embargoes through artificial scarcity, as libraries only have a single copy to circulate in the interim.[140] This increases the likelihood that libraries will purchase additional licenses after the waiting period has passed,[141] and patrons may even purchase the titles directly from publishers. Maintaining

[132] Enis, *supra* note 129; Price, *supra* note 96.

[133] Roose, *supra* note 34.

[134] Enis, *supra* note 129.

[135] Kim S., *supra* note 32.

[136] *Id.*; Roose, *supra* note 34.

[137] Roose, *supra* note 34; *A Behind-the-Scenes Look at Library eBook*, *supra* note 34.

[138] Sponsor Memo, S.B. 2890, 2021-2022 Leg. Sess. (N.Y. 2021).

[139] Gennie Gebhart, *Publishers Should Be Making E-Book Licensing Better, Not Worse*, ELEC. FRONTIER FOUND. (Nov. 7, 2019), https://www.eff.org/deeplinks/2019/11/publishers-should-be-making-e-book-licensing-better-not-worse [https://perma.cc/Q2RL-9XTE]; *ALA Delivers #eBooksForAll Petition, with 160,000+ Signatures, to Macmillan Publishers*, AM. LIBR. ASSOC. (Oct. 30, 2019), https://www.ala.org/news/press-releases/2019/10/ala-delivers-ebooksforall-petition-160000-signatures-macmillan-publishers#:~:text=NEW%20YORK%20%E2%80%93%20Today%20American%20Library,'%20access%20to%20e%2Dbooks [https://perma.cc/Q4DD-9TJG].

[140] Sponsor Memo, S.B. 2890.

[141] *Id.*

multiple licenses of the same title only further contributes to the financial burden on libraries and, subsequently, their patrons.[142]

Despite these economic barriers preventing libraries from adequately serving the needs of their patrons, the Second Circuit in *Hachette v. Internet Archive* emphasized the importance of protecting the works of authors because the resulting increase in their motivation to produce new works ultimately benefits the public.[143] In particular, the Second Circuit stated that "[t]he monopoly created by the Copyright Act (Act) rewards the individual author in order to benefit the public . . . private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts."[144] While it may be true that weakening copyright protection could reduce authors' incentives to create new works, preserving those incentives need not come at the expense of institutions like libraries that exist to serve the public, particularly given the court's own recognition that copyright protection's ultimate purpose is public benefit.[145] Public libraries also provide value to publishers and authors by helping readers discover new writers and by effectively marketing to patrons.[146] Additionally, the "private motivation" of authors which the court aims to preserve should not merely encompass existing creators, but also future creators who may depend on access to library resources to inspire the creation of their own works. In this way, enabling libraries to practice CDL not only eases the financial burdens of libraries, but also supports the work of authors. Consequently, prohibiting libraries from practicing CDL not only harms the public interest, but also limits authors' exposure by reducing ways their works can be discovered and disseminated to readers who may not have otherwise encountered them.

Including harm to the public interest in fourth factor fair use analyses would also not be contrary to fair use's status as an affirmative defense. In *Dr. Seuss Enters. v. ComicMix*, the defendant attempted to argue that fair use was not an affirmative defense and that the burden shifted to the plaintiff to prove potential market harm.[147] The Ninth Circuit emphasized that *Campbell* forecloses that argument and requires defendants to carry the burden of showing that their use has favorable market effects.[148] Weighing public

[142] Kim S., *supra* note 32.

[143] Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163 at 196 (2d Cir. 2024).

[144] *Hachette Book Grp*., 115 F.4th at 196.

[145] *Id.*

[146] Enis, *supra* note 129.

[147] Dr. Seuss Enters., L.P. v. ComicMix LLC, 983 F.3d 443, 459 (9th Cir. 2020).

[148] *Dr. Seuss Enters., L.P.*, 983 F.3d at 459 (quoting Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 590 (1994)).

harm, however, would not necessarily shift the burden of proof on to plaintiffs or allow defendants to avoid proving any of the current elements included under fourth factor analyses (how permitting the use benefits the public or harms the relevant market of the copyright owner, and how denying it benefits the copyright owner)—it would merely add another element for courts to consider and create a balance more aligned with the goals of the Copyright Act.[149]

B. E-Book Equity Legislation

Several states have also introduced bills to regulate the terms on which publishers license e-books to libraries, though they have largely failed to pass into law.[150] However, New York and Maryland's e-book equity bills, which greatly mirror each another in language, remain particularly notable for raising questions within the Copyright Office about whether states could regulate e-book license agreements and, if so, to what extent.[151]

New York's Senate Bill S2B90B (the "N.Y. E-Book Equity Bill"), introduced in 2021, would have required publishers to offer e-book licenses to libraries on "reasonable terms."[152] Although the N.Y. E-Book Equity Bill stated that "reasonable terms" included limitations on libraries as to the number of patrons who can check out a single e-book at a time and the number of days patrons can borrow a title for, it also prohibited publishers from restricting how many licenses a library could purchase for an e-book during a certain period of time.[153] In other words, as noted in the N.Y. E-Book Equity Bill's sponsor memo, it was specifically intended to eliminate library e-book embargoes.[154] If passed, the N.Y. E-Book Equity Bill would have lifted a significant impediment on libraries' abilities to provide their patrons—many of whom face financial or other such barriers to alternative means of information access—with timely, equitable access to digital library materials.[155] It also would have eased financial burdens on libraries forced to purchase additional licenses due to increased patron demand, which publishers exacerbate by creating artificial scarcity through embargoes.[156]

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[149] *Hachette Book Grp*., 115 F.4th at 196; U.S. CONST. art. I, § 8, cl. 8.

[150] *See, e.g.*, S.B. 2890, 2021-2022 Leg. Sess. (N.Y. 2021); Assemb. B. 5837; S.B. 432, 2021 Reg. Sess. (Md. 2021); H.B. 518, 2021 Reg. Sess. (Md. 2021).

[151] Letter from Shira Perlmutter, supra note 115, at 1-2; S.B. 2890; Assemb. B. 5837; S.B. 432; H.B. 518.

[152] S.B. 2890; Assemb. B. 5837.

[153] *Id.*

[154] Sponsor Memo, S.B. 2890.

[155] *Id.*

[156] *Id.*

In June 2021, the N.Y. E-Book Equity Bill passed in the New York State Senate and Assembly with significant bipartisan support (62-1 in the Senate and unanimous in the Assembly).[157] However, on December 29, 2021, Governor Kathy Hochul vetoed the bill despite stating that its goals were "laudable" on the grounds that its provisions were preempted by federal copyright law.[158] This veto could also be viewed as a reaction to the Association of American Publishers (AAP)'s federal lawsuit on December 9, 2021, which aimed to stop the implementation of a similar law in Maryland.[159] The AAP claimed that the Copyright Act "governs the disposition of literary works in commerce" and that Maryland's law was thus "void and unenforceable because it is preempted by federal law and unconstitutional."[160] Although Maryland subsequently revised the bill to encompass all "electronic literary products" rather than strictly e-books, and it eventually passed it into law in January 2022,[161] the Maryland District Court ultimately sided with the AAP in June 2022, stating that Maryland's e-book law violated the Supremacy Clause and "forced publishers to forgo their exclusive rights to decide when, to whom, and on what terms to distribute their copyrighted works."[162]

In other words, the Maryland District Court viewed the statute as compelling publishers to transact with libraries, dictating the exact terms of those licensing agreements.[163] However, the text of Maryland's law, which is paralleled in similar e-book equity legislation, indicates otherwise.[164] For example, the N.Y. E-Book Equity Bill, which uses much of the same language as Maryland's law, frames its purpose as requiring publishers to offer libraries e-book licenses with "reasonable terms."[165] It is thus not compelling publishers to license e-books to libraries; rather, it seeks to

[157] Albanese, *supra* note 114; *ALA Disappointed in New York Governor's Rejection of Ebook Equity Legislation*, *supra* note 39.

[158] Albanese, *supra* note 114; *ALA Disappointed in New York Governor's Rejection of Ebook Equity Legislation*, *supra* note 39.

[159] Albanese, *supra* note 114; Andrew Albanese, *Maryland Library E-book Bill Becomes Law*, PUBLISHERS WKLY. (June 1, 2021), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/86528-maryland-library-e-book-bill-becomes-law.html [https://perma.cc/9ZM7-MP9F]; Jim Milliot, *AAP Sues to Block Maryland, New York Library E-book Laws*, PUBLISHERS WKLY. (Dec. 9, 2021), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/88092-aap-sues-to-block-maryland-new-york-library-e-book-laws.html [https://perma.cc/X8NG-XSBC]; S.B. 432, 2021 Reg. Sess. (Md. 2021); H.B. 518, 2021 Reg. Sess. (Md. 2021).

[160] Milliot, *supra* note 159.

[161] *Maryland Library E-book Bill Becomes Law*, *supra* note 159.

[162] Ass'n of Am. Publishers, Inc. v. Brian E. Frosh, 607 F. Supp. 3d 614, 617 (D. Md., 2022).

[163] *Frosh*, 607 F. Supp. 3d at 616-17.

[164] S.B. 2890; Assemb. B. 5837; S.B. 432; H.B. 518.

[165] S.B. 2890; Assemb. B. 5837.

regulate the content of licensing agreements only to the extent necessary to prevent publishers from imposing unreasonable burdens on libraries.

This is further supported by the inclusion that "any publisher who offers to license electronic books to the public shall offer to license such books to libraries in the state on reasonable terms that would permit the libraries to provide their users with access to such electronic books."[166] It could be argued that this provision means that any publisher who sells an e-book to the general public must also necessarily sell licenses for that same title to libraries. However, it could alternatively be read as merely requiring that, if publishers sell an e-book to the public, and if they subsequently choose to transact with and license that same title to libraries, the terms of those licenses should be written such that they do not unreasonably restrict library patrons from accessing the e-book in ways that readers who directly purchase it from publishers are not restricted. This returns again to the intent of the N.Y. E-Book Equity Bill as outlined in its sponsor memo—to combat the practice of publishers placing embargos on the number of licenses that a library can purchase at once, thereby ultimately disadvantaging library patrons.[167] Whereas those with the ability to pay for e-books have instantaneous access to their titles, those who do not are forced to wait due to the artificial scarcity created by publishers' embargoes.

The language of the N.Y. E-Book Equity Bill also does not indicate that publishers entering into licensing agreements with libraries are restricted from incorporating provisions beyond what is listed in its included "reasonable terms" section.[168] This is supported by the fact that there is actually only one term which the N.Y. E-Book Equity Bill explicitly seeks to restrict—"a limitation on the number of licenses for electronic books libraries may purchase at the same date available to the public."[169] The N.Y. E-Book Equity Bill is not all-inclusive and does not require publishers to completely forgo their exclusive rights to decide the terms by which they choose to distribute their works.[170] Instead, it only seeks to rectify the way in which publisher embargoes unreasonably disadvantage libraries and the patrons they serve.[171] From a policy standpoint, allowing such embargoes only serves to overly enrich publishers and impede the free flow of ideas by disadvantaging libraries, as there is no other choice for libraries who require e-books to obtain access except by entering into licensing agreements with

166 *Id.*

167 Sponsor Memo S.B. 2890.

168 S.B. 2890; Assemb. B. 5837.

169 *Id.*

170 *Id.*

171 Sponsor Memo S.B. 2890.

publishers regardless of how inequitable the terms may be.[172] This is particularly the case when alternative practices such as CDL are prohibited. Thus, the N.Y. E-Book Equity Bill and similar legislation introduced in states such as Maryland do not by their terms alone violate copyright law.

A federal e-book equity law passed by Congress would be the most straightforward way to avoid preemption concerns that have plagued state efforts. In a letter responding to North Carolina Senator Thom Tillis, who requested an analysis of the recent state e-book equity bills, the Copyright Office noted that it was likely that a court reviewing such bills would find them to be preempted,[173] providing the following rationale:

> Because the Maryland and New York legislation require publishers to grant a license, rather than regulating the terms of a license that has already been granted, the legislation is closer in kind to the state law found to be preempted in Orson, which "require[d] the distributor to expand its distribution after forty-two days by licensing to another exhibitor in the same geographic area."[174]

Yet, as stated previously, the N.Y. E-Book Equity Bill and other states' bills mirroring its language do not necessarily require publishers to transact with libraries.[175] It instead should be read to require that, if a publisher sells an e-book to the public and subsequently chooses to license that title to libraries, the resulting licensing terms may not unreasonably restrict library patrons' access in ways that do not apply to individual purchasers. Such state legislation that does not force publishers to grant licenses to libraries but merely regulates the terms that can be included in such licenses (perhaps in clearer, more definitive terms than the N.Y. E-Book Equity Bill), would be less likely viewed as preempted by a court under the Copyright Office's rationale.

At the same time, the Copyright Office also noted that neither the Supreme Court nor the relevant states' circuit courts have actually held that state e-book equity bills are preempted.[176] As such, the Copyright Office has not concretely foreclosed the possibility that potential state laws regulating the licensing agreements between publishers and libraries could survive a conflict-preemption challenge.[177] That leaves open the possibility that a court

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172 Albanese, *supra* note 120.

173 Letter from Shira Perlmutter, *supra* note 115, at 9.

174 *Id.* at 8.

175 S.B. 2890; Assemb. B. 5837.

176 Letter from Shira Perlmutter, *supra* note 115, at 8-9.

177 *Id.*

could uphold such regulation if it serves a state interest that is "sufficiently compelling and distinct from the Copyright Act's purposes."[178]

CONCLUSION

Libraries and archives are crucial to the preservation of knowledge, sharing of information, and the promotion of arts and science. The availability of digital materials allows more equitable access to these resources beyond their previous physical limitations. However, current e-book licensing agreements place significant financial burdens on libraries and ultimately threaten the common good by limiting information sharing. Expanded fair use analyses that weigh how copyright owners' exercise of exclusive rights affects the promotion of the public interest would better align copyright law with its underlying goals. Alternatively, promoting e-book equity legislation that encourages publishers to transact more fairly with libraries when constructing the terms of their licensing agreements acts as another means by which greater equity may be potentially secured for libraries and their patrons.

[178] *Id.* at 9.