

**A PUBLIC SERVICE ROLE FOR DIGITAL LIBRARIES:  
THE UNEQUAL BATTLE AGAINST (ONLINE) MISINFORMATION THROUGH  
COPYRIGHT LAW REFORM AND THE EMERGENCY ELECTRONIC ACCESS TO  
LIBRARY MATERIAL**

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*This article analyzes the role of copyright doctrine and case law in preserving the institutional function of libraries—both on- and offline—as trusted and, in principle, neutral hubs equalizing access to credible information and knowledge in societies with structural inequalities. In doing so it examines the ongoing Hachette v. Internet Archive litigation before the US District Court of the Southern District of New York in the context of earlier copyright cases, finding that there is a persistent need for electronic access to library material online.*

*Libraries have traditionally served an important role as reserved spaces for legally permissible distribution of books outside of markets. Copyright law, however, has the potential to hinder the function of libraries and other cultural heritage institutions particularly in equalizing access to knowledge. While there exist some exceptions and limitations that partially alleviate this, their applicability in the digital environment is still contested. Two novel challenges are interfering: first, an unmet and contentious need for emergency access to electronic library material to be granted online, and second, the need to counteract historical biases and misinformation, both of which multiply when spread within a hyper-connected and digitized society. In order to ensure electronic access to credible information and knowledge, policymakers must address these challenges strategically and reassess the needs of subjects and institutions that are currently subject to copyright exceptions.*

*Hachette v. Internet Archive follows a string of copyright cases that involved challenges to digitization without permission and to providing electronic access to digitized library material. The plaintiffs in Hachette v. Internet Archive, four publishers, brought copyright claims against the Internet Archive for the latter’s operation of a “National Emergency Library” within the context of the COVID-19 pandemic. The case introduces a new dimension to existing debates around electronic access to library material, particularly around e-lending, raising the question: Can emergencies justify additional exceptions to copyright laws covering electronic access to library material, and if so, under what circumstances?*

*After analyzing the relevant settled case law and the ongoing litigation against the Internet Archive and then looking back into the history of and rationale for copyright laws, the article advances a normative claim—that copyright should provide better support to libraries and digital libraries in particular (broadly defined) as the institutional safeguards of our literary treasures. Libraries have a public service mandate to preserve, curate, and provide access to a plurality of original and authoritative sources, and thus ultimately aspire not to compete in the marketplace but to become trusted hubs that equalize access to knowledge. In the context of a society currently struggling to fight historical biases and (online) misinformation, providing libraries with the legal support needed to fulfill this mandate will enable them to more effectively safeguard and provide*

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*equal access to (at least relatively) credible information and knowledge, including in the digital environment.*

## INTRODUCTION

On June 1, 2020, four publishing houses, Hachette Book Group, Inc., HarperCollins Publishers LLC, John Wiley & Sons, Inc., and Penguin Random House LLC, filed a copyright claim against the Internet Archive (hereinafter “IA” or “the Archive”), a non-profit organization dedicated to building an Internet Library, for the IA’s operation of what it called a “National Emergency Library.”

The IA’s primary mandate is—as its name indicates—to create an archive of the Internet, essentially copying and retaining backups of webpages to preserve Internet content. It is a massive programming project aimed at archiving our digital history. The Archive was founded in 1996 by Brewster Kahle, computer engineer and digital librarian, who shaped it as a digital library project.<sup>1</sup> Besides archiving Internet content, the IA is also an electronic library of literary works. Since 2005 it has been collaborating with libraries, mostly in North America, to build digital collections. Today, after almost three decades of successful operation, it collaborates with institutions, such as the Library of Congress, the Smithsonian, and universities and libraries in the United States, Canada, and other parts of the world, and offers access to a significant number of collections. The Archive reports that it contains 475 billion webpages, 28 million books and texts, 14 million audio recordings, 6 million videos, 3.5 million images, and 580,000 software programs.<sup>2</sup> The IA has also created a system of controlled lending for copyrighted works, while also offering free public access to 2.5 million public domain books.

On March 17, 2020, the American Library Association Executive Board recommended closing the nation’s physical libraries to the public in response to the COVID-19 pandemic:

To protect library workers and their communities from exposure to COVID-19 in these unprecedented times, we strongly recommend that academic, public and school library leaders and their trustees and governing bodies evaluate closing libraries to the public and only reopening when guidance from public health officials indicates the risk from COVID-19 has significantly subsided. It is very difficult for us to put forward this recommendation. Libraries pride themselves on being there during critical times for our communities. We are often the only institutions to remain open during times of crisis. Service and stewardship to our communities are core to our profession. We have weighed the situation of our country and what has happened in other countries around the world. The health of our library workers and the communities we serve is of utmost and equal importance. Libraries are by design unable to practice social distancing to the

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<sup>1</sup> See Heidi Benson, *A Man’s Vision: World Library Online - Brewster Kahle Hopes to Realize his 25-year Dream of an International Book Archive*, SAN FRANCISCO GATE (Nov. 22, 2005), <http://www.sfgate.com/news/article/A-MAN-S-VISION-WORLD-LIBRARY-ONLINE-Brewster-2593527.php>.

See also Dan Gillmor, *The Creator of the Internet Archive Should Be the Next Librarian of Congress*, SLATE (Sep. 10, 2015, 2:03 PM), [http://www.slate.com/blogs/future\\_tense/2015/09/10/brewster\\_kahle\\_creator\\_of\\_the\\_internet\\_archive\\_should\\_be\\_the\\_next\\_librarian.html](http://www.slate.com/blogs/future_tense/2015/09/10/brewster_kahle_creator_of_the_internet_archive_should_be_the_next_librarian.html).

<sup>2</sup> *About the Internet Archive*, INTERNET ARCHIVE, <https://archive.org/about/> (last visited Feb. 27, 2021).

degree recommended by the Centers for Disease Control and Prevention and other health authorities. Keeping libraries open at this time has the potential to harm communities more than help ...<sup>3</sup>

In this announcement the American Library Association also praised libraries for “responding creatively and proactively to th[e] crisis,” mentioning that public and academic libraries provide online services and were making electronic resources available.<sup>4</sup>

Following the above developments, on March 24, 2020, the IA announced the temporary operation of a “National Emergency Library” (NEL) to support “emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries were closed due to COVID-19.”<sup>5</sup> Quoting their announcement:

To address our unprecedented global and immediate need for access to reading and research materials, as of today, March 24, 2020, the Internet Archive will suspend waitlists for the 1.4 million (and growing) books in our lending library by creating a National Emergency Library to serve the nation’s displaced learners. This suspension will run through June 30, 2020, or the end of the US national emergency, whichever is later. During the waitlist suspension, users will be able to borrow books from the National Emergency Library without joining a waitlist, ensuring that students will have access to assigned readings and library materials that the Internet Archive has digitized for the remainder of the US academic calendar, and that people who cannot physically access their local libraries because of closure or self-quarantine can continue to read and thrive during this time of crisis, keeping themselves and others safe.<sup>6</sup>

Furthermore, the IA’s announcement called on authors and publishers to support the effort, which would ensure “temporary access to their work in this time of crisis.”<sup>7</sup> It also provided an

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<sup>3</sup> ALA News, *ALA Executive Board Recommends Closing Libraries to Public*, AMERICAN LIBRARY ASSOCIATION, (Mar. 17, 2020), <http://www.ala.org/news/press-releases/2020/03/ala-executive-board-recommends-closing-libraries-public>.

<sup>4</sup> *Id.*

<sup>5</sup> Internet Archive Blogs, *The National Library*, INTERNET ARCHIVE, <https://blog.archive.org/national-emergency-library/> (last visited Feb. 22, 2021).

<sup>6</sup> Chris Freeland, *Announcing a National Emergency Library to Provide Digitized Books to Students and the Public*, INTERNET ARCHIVE (Mar. 24, 2020), <http://blog.archive.org/2020/03/24/announcing-a-national-emergency-library-to-provide-digitized-books-to-students-and-the-public/>.

Quoting more parts of the announcement:

This is a response to the scores of inquiries from educators about the capacity of our lending system and the scale needed to meet classroom demands because of the closures. Working with librarians in the Boston area, led by Tom Blake of Boston Public Library, who gathered course reserves and reading lists from college and school libraries, we determined which of those books the Internet Archive had already digitized. Through that work we quickly realized that our lending library wasn’t going to scale to meet the needs of a global community of displaced learners. To make a real difference for the nation and the world, we would have to take a bigger step.

<sup>7</sup> *Id.*

opt-in option for authors that wanted to donate their books to the National Emergency Library, and an opt-out option for authors who wanted to remove their book from the library. Meanwhile, the IA continued to offer free public access to 2.5 million public domain books (online access to which is perpetual and does not require a waitlist).<sup>8</sup> The NEL collection closed on June 16, 2020, and the IA returned to the previous system of controlled lending of copyrighted works.

The National Emergency Library offered electronic access to copyrighted material that before was only accessible under a model of “controlled digital lending” (CDL).<sup>9</sup> In “normal” (non-emergency) times, the Archive lends books participating in CDL through its “Open Library,” interpreting the fair use doctrine as allowing libraries, including digital libraries, to engage in not-for-profit lending activities. The argument is that libraries have always been engaging in controlled lending under existing copyright exceptions and limitations and under the first sale doctrine.<sup>10</sup> Although CDL remains a relatively controversial issue, most scholars and policymakers, in addition to libraries themselves, have supported the legality of libraries engaging in CDL under the current US copyright framework.<sup>11</sup> Not all stakeholders agree—a significant number of authors’ and publishers’ associations have expressed concerns about the legality of CDL under US law.<sup>12</sup> As we will see below in the analysis of the complaint, CDL is also at the heart of the dispute in *Hachette v. Internet Archive*, with the plaintiffs claiming that not only did the NEL infringe their copyrights, but that CDL also does so.

Returning to the sequence of events leading to the complaint—on March 30, 2020, the IA published another announcement explaining why it created the NEL and explaining the legal basis supporting the initiative. In the meantime, the Association of American Publishers, in a March 27, 2020 statement, had condemned the IA’s NEL initiative as an “unlawful[] and opportunistic attack

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<sup>8</sup> *Id.*

<sup>9</sup> Lila Bailey et al., *Statement on Controlled Digital Lending*, CONTROLLED DIGITAL LENDING BY LIBRARIES, <https://controldigitallending.org/statement> (last updated Sep. 2018).

<sup>10</sup> David R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, CONTROLLED DIGITAL LENDING BY LIBRARIES, <https://controldigitallending.org/whitepaper> (last visited Feb. 22, 2021). Unlike in the EU, where a recent ECJ case *Vereniging Openbare Bibliotheken v Stichting Leenrecht* (C-174/15) clarified that some version of controlled digital lending is not an infringement of copyright as it falls under the European public lending exception of the EU Rental and Lending Rights Directive (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), rules around e-lending are not as clear in the US. *Capitol Records v. ReDigi* clarified only that the first sale doctrine does not apply in the context of commercial digital resale of electronic goods. See *Capitol Records, LLC v. ReDigi Inc.*, 934 F.Supp.2d 640 (S.D.N.Y. 2013) and *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018).

<sup>11</sup> U.S. Copyright Office, *A Report of the Register of Copyrights Pursuant to §104 of the Digital Millennium Copyright Act*, 104-105 (2001) (addressing library specific issues); U.S. Department of Commerce Internet Policy Taskforce, *White Paper on Remixes, First Sale, and Statutory Damages* (2016), <https://perma.cc/RJ7Z-5REZ>; Brief of Amici Curiae American Library Association, Association of College and Research Libraries, Association of Research Libraries, and Internet Archive in Support of Reversal, *Capitol Records, LLC v. Redigi Inc.*, Case No. 16-2321-cv (2d Cir. 2016), <https://perma.cc/79AL-649N>; Michelle M. Wu, *Piece by Piece Review of Digitize-and-Lend Projects Through the Lens of Copyright and Fair Use*, 36 LEGAL REF. SERV. Q. 51 (2017); Michelle M. Wu, *Revisiting Controlled Digital Lending Post-ReDigi*, Forthcoming in 24 FIRST MONDAY, GEORGETOWN LAW FACULTY PUBLICATIONS AND OTHER WORKS. 2134. (2019); Severine Dusollier, *A Manifesto for an E-Lending Limitation in Copyright*, 5 JIPITEC, 1-23 (2014); Sarah E. McCleskey and Courtney Selby, *Tried and True: Fair Use Tales for the Telling*, 3 JOURNAL OF COPYRIGHT IN EDUCATION & LIBRARIANSHIP, HOFSTRA UNIV. LEGAL STUDIES RESEARCH PAPER NO. 2018-13. 1-31 (2018).

<sup>12</sup> *Control Digital Lending (CDL): An appeal to readers and librarians from the victims of CDL*, NATIONAL WRITERS UNION (Feb. 2019), <https://nwu.org/wp-content/uploads/2019/08/CDL-Appeal-15AUG2019-v104.pdf>.

on the rights of authors and publishers in the midst of the novel coronavirus pandemic.”<sup>13</sup> Earlier, on March 24, 2020, when the NEL started operating, the National Writers Union had also protested:

Using the coronavirus pandemic as an excuse, the Internet Archive has — without permission or payment — removed all limits on how many people can simultaneously “borrow” digital copies of some of its bootleg e-book editions scanned from printed books.... So much for authors’ incomes in a time of crisis. Do librarians and archivists really want to kick authors while our incomes are down?<sup>14</sup>

On June 1, 2020, the four publishing houses filed their complaint claiming copyright infringement on the part of both the Archive’s Open Library and the NEL in the US District Court for the Southern District of New York. This article examines the pending *Hachette v. Internet Archive* litigation, placing it in the context of earlier copyright case law that dealt with challenges to digitization without permission and to providing electronic access to library works, namely *Authors Guild v. HathiTrust*, *Authors Guild v. Google*, and *Cambridge University Press v. Becker*. It then reflects on the role of copyright doctrine and case law in preserving the institutional function of libraries—both on- and offline—as trusted and, in principle, neutral places dedicated to equalizing access to credible information and knowledge in societies with structural inequalities and biases.

Looking back into the history of and rationale for copyright laws, the article advances a normative claim—that copyright should provide better support to digital libraries (broadly defined) as the institutional safeguards of our literary treasures. Libraries have a public service mandate to preserve, curate, and provide access to a plurality of original and authoritative sources, and thus ultimately are trusted hubs that equalize access to knowledge. In the context of a society currently struggling to fight historical biases and (online) misinformation, providing libraries with the legal support needed to fulfill this mandate will enable them to more effectively safeguard and provide equal access to (at least relatively) credible information and knowledge, including in the digital environment.

The policy argument about copyright support for libraries requires a delicate and difficult balancing of rights and interests of all parties involved: the public, authors, publishers, other market stakeholders, and libraries. In addition, policy choices that actively support libraries as gatekeepers and access hubs for knowledge, including that contained in copyrighted works, must be made on the basis of some normative benchmark, i.e., some normative goal or purpose that libraries are more apt to satisfy than other—public or private—institutions. The benchmark must explain why libraries are to be preferred over other actors, including authors, publishers and their associations, or private companies, and in particular why they are to be given a more favorable treatment by copyright law. To identify such a benchmark, the article looks to the history of copyright and the rationale for creating a market for books, thus going back to the Statute of Anne

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<sup>13</sup> AAP Press Release, *Comment from AAP President and CEO Maria Pallante on the Internet Archive’s “National Emergency Library”*, ASSOCIATION OF AMERICAN PUBLISHERS (Mar. 27, 2020), <https://publishers.org/news/comment-from-aap-president-and-ceo-maria-pallante-on-the-internet-archives-national-emergency-library/>.

<sup>14</sup> *Id.*

from the early 1800s, as well as the rationale underlying the inception of copyright and for reserving a special status for libraries and what they are permitted to do with books.

Indeed, while library privileges date as far back as the inception of copyright, in each relevant jurisdiction they evolved into copyright exceptions or limitations guaranteed by statutes, doctrines such as fair use, and/or international rules in copyright treaties. Looking into historical and theoretical explanations that are also predominantly enshrined in the copyright discourse, as illustrated in the preambles of international copyright treaties or in national provisions, one can identify a commonly expressed theme: the goal of encouraging learning and advancing knowledge. If the normative benchmark is to encourage learning and to advance knowledge, then for a number of reasons libraries are most fit for the job, including in the digital space.

Finally, the importance of electronic access to library material is constantly being highlighted by various factors including sustainability and a clear preference of digital native generations to access material online. For digital native generations, access to digital material and learning are becoming inseparable; for a digital native, if the material cannot be accessed online, then it basically does not exist.<sup>15</sup> This brings us to one of the central themes of this article: the nexus of digitization and access. On the one hand, the distinction between digitization and access is essential for analytical purposes and thus is followed throughout the paper. On the other hand, there is a strong argument that ultimately the two concepts are inseparable.<sup>16</sup>

The COVID-19 crisis further highlighted the importance of electronic access when physical access is not possible or recommended. *Hachette v. Internet Archive* is now asking the court—once more, if we think back to the Google Books saga and to *Cambridge University Press v. Becker*—to decide on the role and legal privileges of libraries, including digital libraries. Interestingly, this case also brings together two very different circumstances and considers whether CDL is allowed during “normal,” non-emergency, times, in addition to considering whether (less controlled) digital lending is also allowed provided that there is an emergency justifying it.

The remainder of the article is structured as follows: Part I reviews the first book digitization initiatives and the creation of the first digital libraries in the United States, some of which faced copyright complaints in US courts. This part centers around the history of the Google Books saga, starting in 2002 and covering the cases that the Authors Guild, initially partnering with a number of publishers, brought against Google and the HathiTrust Digital Library, respectively. This part brings to the forefront the role that the Internet Archive played during that litigation and connects it with later developments including the latest case, *Hachette v. Internet Archive*.

Part II examines in detail the parties’ pleadings in *Hachette*, concentrating particularly on both sides’ arguments related to emergency. This part poses a number of questions. Could emergencies justify additional or special exceptions to copyright laws applicable to electronic access to library material? If not, why, and, if so, on what legal basis? Should there be a legal justification, would it need to be found within or outside of copyright law? Within the broader context of legislative and judicial developments in other parts of the world, this part also explores the relevance of *Cambridge University Press v. Becker* in the debate around electronic access to

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<sup>15</sup> See JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES (2013).

<sup>16</sup> For example, in the words of Jeremy York, HathiTrust librarian speaking on behalf of the library consortium in 2012, there is a commonly shared “philosophical belief” among librarians that “the value of preservation is gained through access.” See Jeremy York, *A Preservation Infrastructure Built to Last – Preservation, Community, and HathiTrust*, in Proceedings of the Memory of the World in the Digital Age: Digitization and Preservation. An International conference on permanent access to digital documentary heritage (2013).

copyrighted library material and concludes by situating *Hachette v. Internet Archive* in the context of the precedent previously reviewed.

Part III moves to a broader discussion depicting the functional and symbolic roles of libraries as non-profit institutions that have historically been granted privileges to enable them to make knowledge accessible more equitably and, as the first copyright law statute, the Statute of Anne, put it, to “encourage learning” not only by the few belonging to elite classes at the time (England, 1710) but also by less privileged parts of society. The fourth and final part concludes by laying out the normative claim of the paper that libraries deserve additional protection and support with further exceptions to copyright laws better fitting their proclaimed needs in the digital age. The argument rests on three pillars: first, on the historical account of copyright laws and their original rationale as discussed in Part III; second, on a balancing exercise that is inspired by theories in law and economics and that supports further de-commodification of books in digital environments; and third, on pressing contemporary calls to battle misinformation in our—mostly integrated—physical and digital environments.

### I. DIGITAL LIBRARIES BEFORE COURTS: THE ROAD TO *HACHETTE V. INTERNET ARCHIVE*

Book digitization and electronic access to books have both been thorny issues in copyright law. To give the backdrop for a long line of litigation over digital access to library material, one must start with digitization. In the past five decades there have been a number of important digitization initiatives and digital library projects. Some of them have had direct links with “brick and mortar” libraries and others indirect links. First was Michael Hart’s Project Gutenberg, which began in 1971, much before the advent of the Internet.<sup>17</sup> Project Gutenberg, which proudly claims that it was the first provider of free electronic books—or e-books—can be considered the pioneering digital library project. As the story goes, Hart was given access to a Xerox Sigma V mainframe computer at the Materials Research Lab at the University of Illinois and obtained an account containing a virtually unlimited amount of computer time, valued by him as worth “\$100,000,000 of computer time.”<sup>18</sup> Hart’s idea for using this time was to take items that can be entered into a computer and then replicate them so that an infinite number of copies can be made available and everyone in the world can access them. As he saw it, “[e]veryone in the world, or even not in this world (given satellite transmission) can have a copy of a book that has been entered into a computer.”<sup>19</sup> In general, the project prompted digitization in text format and concentrated

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<sup>17</sup> Project Gutenberg’s history and philosophy is tied to the work and vision of its founder, the late Michael Hart, who invented electronic books in 1971. Hart is also credited as one of the first information providers of ARPANET. See Jack Schofield, *More About Project Gutenberg’s Michael Hart, RIP*, ZD NET (Sep. 14, 2011, 4:16PM), <http://www.zdnet.com/article/more-about-project-gutenbergs-michael-hart-rip/>.

<sup>18</sup> See the history of the project available at its webpage: *Background, History, and Philosophy of Project Gutenberg*, PROJECT GUTENBERG (last accessed Feb. 28, 2021), <https://www.gutenberg.org/about/background/>.

<sup>19</sup> *Id.* Hart started typing in works, which he then made available online. The first work that he typed in was the US Declaration of Independence. The goal was to make material available in forms that most computers and programs can read and also to make the text searchable. Therefore, texts needed to be presented in “Plain Vanilla ASCII” which is e-text, or else plain text file. The features of Project Gutenberg’s digital library are fairly simple. The website, where the library is located, is accessible freely by all Internet users and no subscription is required. The works are available to view and read in digital form, and now in audio form. The input of works is based on an open distributed network of volunteers who can contribute as distributed proofreaders. “Distributed Proofreaders provides a web-based method to ease the conversion of Public Domain books into e-books. By dividing the workload into individual pages, many

on books that were already in the public domain.<sup>20</sup> Project Gutenberg reached the milestone of 50,000 e-books in 2015, by which time Google, as we will shortly see, had entered the business of mass digitization and had digitized millions of books.<sup>21</sup>

Subsequently, there have been several digitization projects to build nationwide (and aspiringly global) online libraries, some of them ongoing. In the United States these projects include the Internet Archive, Google Books, the older Open Content Alliance (which had appeared as a competitor to the Google Books project), the HathiTrust Digital Library,<sup>22</sup> the Digital Public Library of America (DPLA),<sup>23</sup> and the World Digital Library of the Library of Congress.<sup>24</sup>

This part will explore in more detail the two initially competing projects of Google Books and the Open Content Alliance, the latter of which brought together the Internet Archive, Yahoo, Microsoft, Amazon, and others. It will start with the unfolding of the Google Books saga and how

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volunteers can work on one book at the same time, which significantly speeds up the creation process.” (*Site Concept*, DISTRIBUTED PROOFREADERS (last updated Oct. 29, 2020), <https://www.pgdp.net/c/>).

<sup>20</sup> *Id.* As Hart explained: “Our eventual goal is to provide Public Domain Etext editions a short time after they enter the Public Domain. Of course, the period before a copyrighted work entered the Public Domain was extended from 28 years (with a 28-year extension available) to 50 years more than the life of the author, so this put a kink, to put it mildly, into our plans.”

The term digitization is used here *lato sensu* to include the manual typing in of text to make it readable on a computer and by a computer. While Hart digitized works by literally typing them into his computers, today the term usually refers to works that exist in paper form and are then digitized (or ‘digitalized’) with advanced scanning technology. It is worth noting that most works these days are actually born-digital and exist in various digital forms and in paper as they are printed.

<sup>21</sup> Nate Hoffelder, *Milestone: Project Gutenberg Releases eBook #50,000*, THE DIGITAL READER (Oct. 5, 2015), <http://the-digital-reader.com/2015/10/05/milestone-project-gutenberg-releases-ebook-50000/>.

For the progress of digitization and the relevant statistics see the project’s blog with data as of July 20, 2011: Project Gutenberg News, *Statistics*, THE GUTENBERG.ORG BLOG (last updated Jul. 20, 2011), <http://www.gutenbergnews.org/statistics/>. See also Marie Lebert, *The Project Gutenberg EBook of Project Gutenberg (1971-2009)*, GUTENBERG.ORG, (2010), <http://www.gutenberg.org/files/31632/31632-0.txt>.

<sup>22</sup> HathiTrust was created from a partnership of university libraries that began in 2008 as a collaborative project between what is now the Big Ten Academic Alliance Universities (formerly the Committee on Institutional Cooperation) and the University of California with a goal of creating a common repository for their digitized collections. Many more research libraries partnered along the way, including all Ivy League universities and most state universities, making HathiTrust perhaps the biggest and most important library consortium of its kind. HathiTrust is relevant also to the Google Books project, as the libraries forming the consortium had partnered with Google for their digitization purposes, and like Google found themselves against the Authors Guild in copyright litigation. See the information available at the consortium’s website (*Our Membership*, HATHITRUST DIGITAL LIBRARY (last accessed Feb. 28, 2020), <https://www.hathitrust.org/partnership> and *Member Community*, HATHITRUST DIGITAL LIBRARY (last accessed Feb. 28, 2020), <https://www.hathitrust.org/community>).

<sup>23</sup> The DPLA is a nation-wide digital library project that began in Cambridge, Massachusetts, with a meeting of interested academics at Harvard University and developed as a collaboration of scholars from various academic fields. The initial base was Harvard’s Berkman Center at Cambridge but there was also, for example, a project funded in Berkeley Law that concentrated on the copyright issues. It is now physically based in Boston at the premises of the public library and still developing, with a significant growth rate, working on the basis of a strategic plan towards its ambitious goal: “[to] bring [...] together the riches of America’s libraries, archives, museums, and cultural heritage sites, and making them freely available to students, teachers, researchers, and the general public.” See *Strategic Roadmap 2019-2022*, DPLA (last accessed Feb. 28, 2021), [http://dp.la/info/wp-content/uploads/2015/01/DPLA-StrategicPlan\\_2015-2017-Jan7.pdf](http://dp.la/info/wp-content/uploads/2015/01/DPLA-StrategicPlan_2015-2017-Jan7.pdf). Besides cultural heritage institutions, the DPLA collaborates with many other digital library initiatives examined so far, notably the Internet Archive and HathiTrust, and in 2016 announced a more systematic collaboration with the Library of Congress: LIBRARY OF CONGRESS, *Digital Public Library of America To Form New Collaboration, Library of Congress* (Nov. 29, 2016), <https://www.loc.gov/item/prn-16-207/>.

<sup>24</sup> See *Library of Congress*, WORLD DIGITAL LIBRARY (last accessed Feb. 28, 2021), <https://www.wdl.org/en/institution/library-of-congress/>.

the two resultant cases, *Authors Guild v. Google*<sup>25</sup> and *Authors Guild v. HathiTrust*,<sup>26</sup> provide important context for *Hachette v. Internet Archive*. Finally, this part will also review later activities of the Internet Archive that gave rise to debates around the legality of e-lending practices that were ongoing even before *Hachette v. Internet Archive* was filed.

#### A. Copyright Exceptions for Libraries in the Post-Google Books Era

Let us start with the high-profile Google Books saga, Google's mass digitization project that led to the ten-year-long litigation in *Authors Guild v. Google*<sup>27</sup> and in *Authors Guild v. HathiTrust*.<sup>28</sup> Google announced its "Google Print Service" at the Frankfurt Book Fair in 2004.<sup>29</sup> The plan was to incorporate books into its search service, and by 2005, Google had renamed the project "Google Books." Google Books, as it is known today, consists of two projects. One is the "Library Project," under which Google partnered with university libraries, initially Harvard University, Stanford University, University of Michigan, and Oxford University, as well as the New York Public Library, to digitize their collections. Since then, many more library partners have joined.<sup>30</sup> Many publishers have also joined after developing an interest in the program.<sup>31</sup> In addition to the Library Project, Google Books has a "Partner Program" under which copyright-holders provide Google with a printed copy of their book for scanning and decide how much of their work Google is permitted to display.<sup>32</sup> Initially, Google displayed advertisements in

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<sup>25</sup> *Authors Guild et al. v. Google Inc.*, 770 F. Supp. 2d 666 (S.D.N.Y. 2011), *Authors Guild, Inc. v. Google Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013), *Authors Guild et al. v. Google, Inc.*, No. 13-4829 (2d Cir. 2015), *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012) and *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

<sup>26</sup> There are two judicial decisions in the case against HathiTrust: one at first instance and one at the appellate level: *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 448 (S.D.N.Y. 2012) [hereinafter: *Authors Guild, Inc. v. HathiTrust— 2012 District Court Opinion*] & *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014) [hereinafter: *Authors Guild, Inc. v. HathiTrust— 2014 Second Circuit Opinion*].

<sup>27</sup> *Supra* note 25.

<sup>28</sup> *Supra* note 26.

<sup>29</sup> See News from Google, *Google Checks out Library Books*, GOOGLE (Dec. 14, 2004), <http://googlepress.blogspot.com/2004/12/google-checks-out-library-books.html>. At the same note see also Edward Wyatt, *New Google Service May Strain Old Ties in Bookselling*, *The New York Times* (Oct. 8, 2004), <https://www.nytimes.com/2004/10/08/technology/new-google-service-may-strain-old-ties-in-bookselling.html>.

<sup>30</sup> Google says that it now works with over forty libraries around the world to digitize their collections. On its website, it provides a sample of its partners.

Here are some of the additional to the initial partners: Austrian National Library, Bavarian State Library, Columbia University, CIC library partners, Cornell University Library, Ghent University Library, Keio University Library, Lyon Municipal Library, University of California, The National Library of Catalonia, Princeton University, Stanford University, University Complutense of Madrid, University Library of Lausanne, University of Virginia, University of Texas at Austin, University of Wisconsin – Madison.

See *Library Partners*, GOOGLE BOOKS (last accessed Feb. 28, 2021), <http://books.google.com/intl/en/googlebooks/library/partners.html>.

<sup>31</sup> For the history of Google Books see *Google Books History*, GOOGLE BOOKS (last accessed Feb. 28, 2020), <https://www.google.com/googlebooks/about/history.html>.

According to this page the first publishers to join the program were: Blackwell, Cambridge University Press, the University of Chicago Press, Houghton Mifflin, Hyperion, McGraw-Hill, Oxford University Press, Pearson, Penguin, Perseus, Princeton University Press, Springer, Taylor & Francis, Thomson Delmar and Warner Books.

<sup>32</sup> On the basis of Google's submissions to the district court for the *Authors Guild, Inc. v. Google Inc.* case we know that as of early 2012 the partner program included approximately 2,5 million books with the consent of 45,000 right-holders. See *Authors Guild, Inc. v. Google Inc.*, *supra* note 26, District Court Opinion, 5-6.

connection with the books and shared the revenues with the copyright-holders, but in 2011 stopped using advertisements as part of the program.<sup>33</sup>

On the basis of its agreements with libraries, Google digitized their collections and in return gave the libraries a digital copy of each scanned book. HathiTrust, for example, was a consortium of libraries that partnered with Google under the Library Project.<sup>34</sup> As part of its process, Google was creating more than one digital copy of each book on its backup servers. Some of the libraries that Google partnered with allowed the company to scan only their public domain books, while others allowed Google to scan copyrighted books as well. Participating libraries were not granted access to digitized works from the other libraries and had to agree to abide by copyright laws in their uses of the digital copies of their own works. Google, on the other hand, owns the digital corpus that it has digitized.<sup>35</sup> To this day Google Books is a free service for Internet users. It provides the user with an index, a digital catalogue of the scanned books, matches search terms with books, and then, for each book, according to the copyright status or the agreement with the copyright-holder, provides access to full, partial, or no content.<sup>36</sup>

Very soon after Google Books was announced, Google and its partner HathiTrust Digital Library consortium both faced lawsuits alleging major copyright infringements. More specifically, in 2005, an American association of authors, the Authors Guild, along with three individual authors, brought a class action against Google alleging copyright violations.<sup>37</sup> Publishers McGraw-Hill Companies, Pearson Education, Penguin, Simon & Schuster, and John Wiley brought a simultaneous action against Google also alleging copyright violations.<sup>38</sup> In 2011 the Authors Guild brought another action, this time against HathiTrust.<sup>39</sup> All plaintiffs in the cases mentioned thus far claimed that the digitization of works without permission, as well as the display of snippets in the case of the Google Books search platform, constituted copyright infringement.<sup>40</sup> While the publishers sued in their own right, the Authors Guild claimed to speak for a significant number of authors, besides three that were actually involved in the suit. The lawsuit brought by the publishers was settled along the way and only the Authors Guild continued to litigate their case, which would become known as the Google Books litigation. The scholarly ink spilled writing about the various copyright and antitrust law dimensions of the case against Google, in particular, is significant—unsurprising for a high-profile legal battle that lasted a decade (from 2005 until 2015).<sup>41</sup> Indeed,

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<sup>33</sup> *Id.* at 5.

<sup>34</sup> *Supra* note 22.

<sup>35</sup> James Somers, *Touching the Modern-Day Library of Alexandria*, THE ATLANTIC (Apr. 20, 2017), <https://www.theatlantic.com/technology/archive/2017/04/the-tragedy-of-google-books/523320/>.

<sup>36</sup> Each book includes an “About this book” page that provides basic bibliographic information and links which direct the user to online or offline bookstores and libraries where the book is available. Besides the cases where full view is allowed, limited view allows access to some pages. In other words, snippet view allows a number of snippets to be displayed after a certain term search. Finally, no preview only reveals card catalogue information.

<sup>37</sup> Complaint, Authors Guild et al. v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011) (No. XX), <https://www.authorsguild.org/wp-content/uploads/2008/10/Authors-Guild-v-Google-09202005.pdf>.

<sup>38</sup> Publishers’ initial complaint: Complaint, McGraw Hill vs. Google (initial complaint, 19 Oct. 2005)

<sup>39</sup> *Supra* note 26.

<sup>40</sup> As seen above, the company’s plan was to bring books into its search service and then allow Internet users to search the texts of the digitized books and see displays of parts, known as ‘snippets’, of the corresponding texts. It proceeded with the two programs that were already presented: the *Partner Program* and the *Library Project*. Meanwhile, Google was creating more than one digital copy of the books on its back-up servers.

<sup>41</sup> As far as the procedural history of the *Authors Guild v. Google* litigation goes, there have been two decisions in the first instance, two unsuccessful settlement attempts, a federal appeals court decision, and an unfruitful appeal to the US Supreme Court. The petition was filed in December 2015. The Supreme Court, however, did not grant certiorari,

when the first case against Google reached the courts, its importance rose far beyond the main parties involved. Besides the publicity and the length of the case, the sheer number of intervening parties submitting objections or *amicus curiae* briefs over the course of the litigation is indicative.<sup>42</sup>

While reviewing how Google Books works, the first district court opinion in *Authors Guild v. Google*, the opinion that rejected the proposed settlement, had discussed the benefits of the related Library Project, and as a result, the digitization agreements with the libraries.<sup>43</sup> That opinion enumerated five benefits.<sup>44</sup> First, it noted that Google Books is a new and efficient search and reference tool that became essential to researchers and librarians; second, that it promotes data mining and text mining, methods that open up new research opportunities; and third, that it expands access to books, especially by (i) benefiting print-disabled groups<sup>45</sup> and (ii) enhancing the search capabilities of “remote and underfunded libraries that need to make efficient decisions as to which resources to procure for their own collections or through interlibrary loans.”<sup>46</sup> The fourth benefit that the judgement described was that Google Books as a service enables the preservation of books and also “give[s] them new life”<sup>47</sup> (referring to out-of-print books that were until their digitization “buried in library stacks”).<sup>48</sup> This phrase reads as an affirmative endorsement of digitization—characterizing it as a worthwhile process for the sake of the searchability and readability of books. Preservation and accessibility are two notable benefits in their own right, especially when books’ print versions are close to becoming obsolete. The fifth benefit was that, by helping readers and researchers identify books, the Google Books service ultimately benefits authors and publishers. The “About the book” page that appears with the search results offers links to sellers and/or libraries where the book is available. Thus, the judgement had noted that Google Books generates new audiences and ultimately creates new sources of income-making works more visible and to a broader public.<sup>49</sup>

Most importantly, the final decision at first instance, issued in November 2013 engaged in a legal assessment of the fair use requirements as applied to Google’s case. Under US copyright law, the fair use exception releases what would be a *prima facie* copyright infringement from liability. There are four requirements to be assessed by the courts, which are codified in the US Copyright Code: (i) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as

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putting an end to the case in April 2016. *See* Petition, The Authors Guild, et al., Petitioners v. Google, Inc., No. 15-849 (2<sup>nd</sup> Cir. 2015).

<sup>42</sup> For example, the 2011 district court decision cites “approximately 500 submissions” (Authors Guild et al. v. Google Inc., 770 F. Supp. 2d 666 (S.D.N.Y. 2011), Opinion Rejecting the Settlement, 10).

<sup>43</sup> *Id.* at p. 9 *et. seq.*

<sup>44</sup> *Id.* pp. 9-13.

<sup>45</sup> *Id.* p. 11. On this issue the court cited a letter from Marc Maurer, President of the National Federation for the Blind, saying the following: “Google books provides print-disabled individuals with the potential to search for books and read them in a format that is compatible with text enlargement software, text-to-speech screen access software, and Braille devices. Digitization facilitates the conversion of books to audio and tactile formats, increasing access for individuals with disabilities.”

<sup>46</sup> *Id.* In the judge’s words: “Google Books facilitates the identification and access of materials for remote and underfunded libraries that need to make efficient decisions as to which resources to procure for their own collections or through interlibrary loans.” Here the judge cites the *amicus curiae* brief of the American Library Association.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* p.12: “Older books, many of which are out-of-print books are falling apart buried in library stacks, are being scanned and saved.”

<sup>49</sup> *Id.*

a whole; and (iv) the effect of the use on the potential market for or value of the copyrighted work.<sup>50</sup> US copyright case law has consistently placed the most emphasis on the first and fourth criteria since they, particularly with regard to the first criterion, implicitly recognize transformative uses (uses where the original work is being transformed in a manner that adds new value to it and transforms it into new expression).<sup>51</sup> In accordance with this framework, the decision focused particularly on whether Google Books' use of the copyrighted works was transformative,<sup>52</sup> finding it "highly transformative" mainly in light of the abovementioned benefits of the service created.<sup>53</sup> Based on this reasoning, the court found that the fair use defense applied in Google's favor.

The Authors Guild appealed to the US Court of Appeals for the Second Circuit,<sup>54</sup> which issued its decision in October 2015.<sup>55</sup> Similar to the district court, the Second Circuit concluded that Google's digitizing of copyright-protected works without permission, creation of a search functionality, and display of snippets from those works are non-infringing fair uses. Nor is Google's provision of digitized copies to the libraries that supplied the books an infringement of copyright, the circuit court found.<sup>56</sup> Writing for the court, Judge Leval homed in on the central issue at the outset, stating that "[t]his copyright dispute tests the boundaries of fair use."<sup>57</sup> The federal judgment reiterated the beneficial elements of both the Google Books service and the Library Project, emphasizing, *inter alia*, the fact that the search tool is highly innovative.<sup>58</sup> Eventually the federal court, like the district court decision, found that "the Google Books service does not substantially harm the market of the digitized works." Instead, it found that the service amounts to a transformative use of the digitized copies, providing search capabilities that allow the identification of information about originals that is otherwise unavailable. Thus, the judges both at the trial and appellate level held that, because the Google Books service does not substantially harm the market of the digitized works, the project satisfies the fair use exception criteria and thus Google is not liable for copyright infringement.

In the parallel case brought by Authors Guild against HathiTrust, the district and federal courts also ruled conclusively in favor of the digital library consortium. In a nutshell, the Authors

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<sup>50</sup> 17 U.S.C. § 107 (2010).

<sup>51</sup> Of seminal importance for the establishment of the criterion of 'transformativeness' has been the Supreme Court decision *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (6<sup>th</sup> Cir. 1994). See Pamela Samuelson, *Possible futures of fair use*, 90 WASH. L. REV. 815 (2015).

<sup>52</sup> He also made the analogy with the thumbnail images of copyrighted photographs in *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1168 (9<sup>th</sup> Cir. 2007) and in *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9<sup>th</sup> Cir. 2003), and with small sized display of images of posters in *Bill Graham Archives*, 448 F.3d 605 (2<sup>d</sup> Cir. 2006) all cases that found transformative use of displays similar to that of the Google Books snippets. *Authors Guild, Inc. v. Google Inc.*, *supra* note 14 - 2013 Summary Judgment, at 19-20.

<sup>53</sup> *Authors Guild, Inc. v. Google Inc.*, *supra* note 14 - 2013 Summary Judgment, at 19.

<sup>54</sup> They appealed on five grounds: (1) that the digital copying of entire books is not transformative use in the meaning of *Campbell v. Acuff-Rose Music, Inc.*, (2) that Google's commercial profit motivation precludes fair use, (3) that plaintiff's derivative rights in search functions are in any case infringed, (4) that Google's storing of digital copies exposes to hacking risks, and (5) that Google's distribution of digital copies to participant libraries risks loss of copyright revenues from licensing these libraries.

See *Authors Guild, Inc. v. Google Inc.*, *supra* note 14 - 2015 Second Circuit Opinion, at 3-4.

<sup>55</sup> It is noteworthy that this judge is also a distinguished expert in fair use cases, having written the highly influential 1990 Harvard Law Review article *Toward a fair use standard*. See Pierre N. Leval, *Toward a fair use standard*, 103 HARV. L. REV. 1105, 1105-1136 (1990).

<sup>56</sup> *Authors Guild, Inc. v. Google Inc.*, *supra* note 14 - 2015 Second Circuit Opinion, at 46.

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at 7. To emphasize the enhanced search capabilities of the service, he noted that "this identifying information instantaneously supplied would otherwise not be obtainable in lifetimes of searching."

Guild asserted claims for copyright infringement for unauthorized reproduction and unauthorized distribution of books owned by the defendants which were all university libraries.<sup>59</sup> As the district court opinion then noted “the HathiTrust partnership is in the process of creating a shared digital repository that already contains almost 10 million digital volumes, approximately 73% of which are protected by copyright.”<sup>60</sup> The district judge, the late Harold Bear Jr., found that all four factors of the fair use exception were satisfied. Noting that Google’s use of the digital works was the subject of a separate lawsuit, Judge Bear had defined the scope of his decision as limited to the uses made by the HathiTrust Digital Library.

The copyright infringement claim concerned, first, HathiTrust’s “Orphan Works Project” and, second, HathiTrust’s uses of the digitized corpus that Google made available to them after digitizing their collections. The Orphan Works Project aimed at making full copies of orphan works, meaning works whose copyright holders (their ‘parents’ or ‘guardians’) are not traceable anymore, available through HathiTrust to students, faculty and library staff.<sup>61</sup> When the litigation started, the project was in its initial stages and was still investigating processes to determine which works could be included as orphans. Thus, at the time of the decision, the district court considered the claim against the project unripe; it was a claim that the project *would* infringe copyrights of the plaintiffs and others and was therefore deemed non-justiciable.<sup>62</sup> Regarding the uses of the digitized books, the court focused on the three kinds of uses that the HathiTrust Digital Library allowed: (i) full-text searches, (ii) preservation, and (iii) access for people with certified print disabilities. The importance of the third use had a huge bearing on the case. Blind scholars together with the National Federation of the Blind demonstrated how beneficial the HathiTrust Digital Library had been to them. Thanks to the library, people with disabilities could read digital texts independently through special software, navigate texts, and above all access more material than ever before.<sup>63</sup> For all these reasons, HathiTrust claimed that the project was shielded by the fair use defense. Indeed, the courts, both in the first instance and on appeal, explicitly embraced the digitization project from the perspective of the libraries, recognizing the benefits that come with it, and ruled in favor of HathiTrust, finding that the fair use criteria were met.

The *Authors Guild v. HathiTrust* case was revolutionary at least with respect to its ruling on preservation, pushing the boundaries of the US Copyright Act exception under section 108, which provides for special exceptions for libraries and archives. Importantly, the case clarified that libraries can benefit from the fair use exception even if there is another provision designated to provide a special exception for them in section 108. Thus, libraries are basically able to invoke the fair use defense in section 107 in addition to the special library exceptions under section 108.

The exceptions in section 108 are quite tightly defined. From a contemporary perspective, the section reads like an older text concerned with earlier methods of copying. It allows employees of libraries and archives “acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work ... without any purpose of direct or indirect commercial advantage ....” There are a number of additional conditions that must be met for this one copy to

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<sup>59</sup> Supra note 22.

<sup>60</sup> *Authors Guild, Inc. v. HathiTrust*– 2012 District Court Opinion, at 2.

<sup>61</sup> The Orphan Works Project was intended to investigate the available author and publisher information about potential orphan books. If neither the author nor the publisher could be located and contacted for a book and the book was out of print, it would be flagged as potentially orphan. If at any time a copyright owner was identified and located, the book would consequently be removed from the list of orphan candidates. The universities had announced that they would then make these identified orphans available for full view to their communities.

<sup>62</sup> *Authors Guild, Inc. v. HathiTrust*– 2012 District Court Opinion, pp. 11-12.

<sup>63</sup> *Authors Guild, Inc. v. HathiTrust*– 2012 District Court Opinion, pp. 3-4.

be allowed, including that the collections of the library or archive be open to the public and available to researchers in general and also that the reproduction or distribution include a copyright notice. There is also a provision allowing for three copies to be reproduced or distributed, but this primarily applies to unpublished works and must be “solely for purposes of preservation and security or for deposit of research use in another library or archives.” Moreover, digital reproductions are not to be distributed in digital format or made available in any way outside the premises of the library or archive. The three-copies exception also applies to works that are damaged, deteriorating, lost or stolen, or that exist in a format that has become obsolete. Again, the requirements around the exception are quite strict, including a “reasonable effort” to “determine[] that an unused replacement cannot be obtained at a fair price.” If the user makes a request and meets certain requirements (mostly for purposes of private study, scholarship, or research), section 108 allows “no more than one article or other contribution to a copyrighted collection or periodical issue, or to a copy or phonorecord of a small part of any other copyrighted work.” The law, however, does not impose liability on librarians who have no reason to believe that the use of the copied work will be other than private study, scholarship, or research.

The US Copyright Office has acknowledged that some of these rules are outdated and need review, especially after the mass digitization projects and the corresponding case law that they triggered. In June 2016 there was an official inquiry calling on interested parties to discuss how to revise section 108 “with a goal to updating the provisions to better reflect the facts, practices, and principles of the digital age and to provide greater clarity for libraries, archives, and museums.”<sup>64</sup> The Copyright Office has recognized that section 108, passed in 1976, was intended to address the use of print-based analog technology and that the current technological developments were not anticipated. In the words of the 2016 notice of inquiry issued by the office, “the exceptions in section 108 therefore are stuck in time.”<sup>65</sup> Earlier, in 2008, the Copyright Office had appointed an independent study group, the “Section 108 Study Group” to work on the issue. That group’s report had pointed to the changes in users’ needs and expectations regarding the reproduction and distribution of copies of library material.<sup>66</sup> In 2017, after the 2016 official inquiry, the Copyright Office released the “Section 108 Discussion Document” which reiterates the Office’s longstanding “belief that section 108 needs to be updated so that libraries, archives, and museums have a robust, comprehensible, and balanced safe harbor to fulfill their missions.”<sup>67</sup> Annexed to this document is a model statutory language reflecting the Office’s suggestions for reforms to Title 17 Section 108 of the Copyright Act which includes the following excerpt:

(g) REPRODUCTION, DISTRIBUTION, PUBLIC DISPLAY, AND PUBLIC PERFORMANCE PURSUANT TO USER REQUESTS.—

(1) ONE ARTICLE OR SMALL PART OF WORK. If a user requests a copy of one article or other contribution to a copyrighted collection or periodical issue, or a small part of any other copyrighted work, an institution eligible under subsection

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<sup>64</sup> Section 108: Draft Revision of the Library and Archives Exceptions in U.S. Copyright Law, 81 Fed. Reg. 36594 (published Jul. 6, 2016),

<https://www.federalregister.gov/documents/2016/06/07/2016-13426/section-108-draft-revision-of-the-library-and-archives-exceptions-in-us-copyright-law>.

<sup>65</sup> *Id.*

<sup>66</sup> Section 108 Study Group, *The Section 108 Study Group Report*, SECTION108.GOV (2008), <https://www.section108.gov/docs/Sec108StudyGroupReport.pdf>.

<sup>67</sup> Section 108 of Title 17, A DISCUSSION DOCUMENT OF THE REGISTER OF COPYRIGHTS (2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf>.

(a) may reproduce, distribute, publicly display, or publicly perform a single copy to the user.

(2) ENTIRE WORK OR SUBSTANTIAL PART OF WORK. If a user requests a copy or phonorecord of an entire work or a substantial part of a work, an institution eligible under subsection (a) may reproduce, distribute, publicly display, or publicly perform a single copy or phonorecord to the user, after having first made a reasonable determination that a usable copy or phonorecord of the work cannot be accessed by the user through purchase or license at a fair price.

(3) CONDITIONS.

(A) The source copy or phonorecord must come from the collections of either the eligible institution where the user makes his or her request, or from the collections of another eligible institution;

(B) the eligible institution must have no notice that the copy or phonorecord will be used for any purpose other than private study, scholarship, or research;

(C) the eligible institution must display prominently, at the place where orders are accepted, and include on its order form, a notice of copyright in accordance with requirements that the Register of Copyrights shall prescribe by regulation;

(D) *electronic distribution, display, or performance of digital copies or phonorecords of audio-visual works and musical works may be made to only one user at a time, for a limited time;* and

(E) the eligible institution, or its employee, must have no knowledge or substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group.

(4) USER REQUESTS: NUMBER OF TEMPORARY, INCIDENTAL COPIES OR PHONORECORDS. The exceptions in this subsection allow a limited number of temporary, incidental copies or phonorecords as reasonably necessary to result in the distribution, public display, or public performance of a single copy to the user... [emphasis above added]<sup>68</sup>

We must note again here that the text above is model statutory language. The actual text of Section 108 has not yet been updated and there have not been any concrete plans for reform from the legislator.<sup>69</sup> The Copyright Office's proposed updates reflect the need for Section 108 to explicitly address the making and the making available by libraries of electronic copies of their works, including the contested—as we will see in more detail under Part II—matter of digital lending. Before we discuss digital lending under the lenses of the current *Hachette v. Internet Archive* case, the next sections add some further context explaining how the IA was part of an

<sup>68</sup> *Id.* Appendix A, Model Statutory Language: § 108 – Limitation on exclusive rights: use by libraries, archives, and museums.

<sup>69</sup> 17 U.S.C. § 107 (2010). For a consolidated version of Title 17 of the US Code, including the *current* legal provision of Section 108, see Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code, *US Copyright Office* (2020), <https://www.copyright.gov/title17/title17.pdf>.

older mass digitization project competing Google Books, namely the Open Content Alliance, and how in 2017 the Archive invoked a specific exception under Section 108(h) of the Copyright Act.

*B. The Internet Archive Makes Headline Copyright News: The Open Content Alliance and the 2017 'Liberation' of Books from 1923 to 1941.*

In 2005 Microsoft and Yahoo partnered with the Internet Archive and other stakeholders in a project called Open Content Alliance. The alliance included other members as well: public universities, like the University of California and the University of Toronto, and other content providers, such as the National Archives of the United Kingdom and the European Archive.<sup>70</sup> The project followed in the footsteps of Google Books, aiming to digitize books and make them available and searchable online. The alliance was announced around the time that the Authors Guild filed their lawsuit against Google for copyright infringement. Thus, the fear of liability and the general lack of clarity on the applicable copyright issues were also obvious concerns for the Open Content Alliance's initiative. The Open Content Alliance partners announced a more cautious approach compared to Google's approach, seeking the permission of authors while of course digitizing the public domain books of their partners. The approach was "collection focused" with an overall mandate to also "fill gaps" of existing digital collections in a manner complementary to existing projects of partners and third parties.<sup>71</sup>

The alliance planned to operate as follows: the Internet Archive would host the material digitized by the Archive itself or by other partners. Yahoo would partially fund the digitization projects and then index the digitized material. The University of Toronto and other partners, such as the publishing company O'Reilly, would provide book content. There were additional industry stakeholders connected to the project. Adobe and Hewlett Packard provided scanning technology. After launching the alliance, Microsoft also got involved in sponsoring the digitization project and joined it with its "Live Search Book" project, which launched in 2006 and ended in 2008.<sup>72</sup> The announced target was full-text accessibility to everyone, clearly a different target than Google's, which even though—or, rather, because—it scanned full copyrighted material, restricted its availability to the public. The Open Content Alliance was characterized by the press as a project led by Yahoo, probably in order to emphasize the rivalry between Yahoo and Google.<sup>73</sup> The initiative, however, was apparently led by the Internet Archive as evident by the same initial announcement by Yahoo and by the Internet Archive founder in October 2005.<sup>74</sup>

<sup>70</sup> Peter Suber, *The Open Content Alliance*, 91 SPARC OPEN ACCESS NEWSLETTER (Nov. 2, 2005), [https://dash.harvard.edu/bitstream/handle/1/4552008/suber\\_oca.htm?sequence=1](https://dash.harvard.edu/bitstream/handle/1/4552008/suber_oca.htm?sequence=1).

<sup>71</sup> Katie Hafner, *In challenge to Google, Yahoo will scan books*, THE NEW YORK TIMES (Oct. 3, 2015), <https://www.nytimes.com/2005/10/03/business/in-challenge-to-google-yahoo-will-scan-books.html>.

See also Suber, *supra* note 65. Suber explains: "The rivalries among Yahoo, Microsoft, and Google are not only real, but interesting enough to soak up news attention. But reporters who focus on the rivalries are missing half the full story. The OCA project and Google Library are compatible and complementary. Both teams take the position that "the more, the merrier" and they're both right to do so. Both teams work to minimize duplication among the scanned books."

<sup>72</sup> Michael Arrington, *Microsoft to shut Live Search Books*, TECHCRUNCH (May 23, 2008), <https://techcrunch.com/2008/05/23/microsoft-to-shut-live-search-books/>. See also Microsoft's announcement: Satya Nadella, *Book search winding down*, MICROSOFT BING BLOGS (May 23, 2008), <https://blogs.bing.com/search/2008/05/23/book-search-winding-down>.

<sup>73</sup> Hafner, *supra* note 71.

<sup>74</sup> Suber, *supra* note 70. Brewster Kahle, *Announcing the Open Content Alliance*, YAHOO SEARCH BLOGPOST (Oct. 2, 2005), <http://www.ysearchblog.com/2005/10/02/announcing-the-open-content-alliance/>.

The Internet Archive, which had already a comprehensive and fully functioning digitization program, set out the targets and standards with an expressed emphasis on openness and collaboration. In the initial announcement, Kahle explained that the three biggest obstacles the partners needed to overcome were: (i) the costs, (ii) the legal rights issues, and (iii) establishing guidelines for sharing.<sup>75</sup> The involved industry partners would be able to offset some of the costs. Also, Yahoo's involvement would have the added value of making the scanned works available online via the Yahoo search engine but also, in stark contrast to the Google Books project, had promised to share the digitized corpus with more search engines, thus providing more search engines the ability to make use the digitized content, for example to enhance search functions.<sup>76</sup> Indeed, Google's monopoly access to the digital corpus created with their own digitization project was a thorny issue in the Google Books case mostly discussed in the context of the failed Google Books Settlement.<sup>77</sup>

The Open Content Alliance did not maintain a presence separate from the Internet Archive. The project now seems to be terminated and the Archive displays the Open Content Alliance collection along with the many other large collections it maintains.<sup>78</sup> Among the Internet Archive collections are also the works scanned by Microsoft before the Live Search Book project was terminated.<sup>79</sup>

The next time, after the Google Books saga and the attempt of the Open Content Alliance, that the Internet Archive made headline news with regard to copyright was on October 10, 2017, when the Archive announced that it will be “now leveraging a little known, and perhaps never used, provision of US copyright law, Section 108h, which allows libraries to scan and make available materials published 1923 to 1941 if they are not being actively sold.”<sup>80</sup>

The Archive, citing the work of Elizabeth Townsend Gard, claimed a “Library Public Domain” exception to make available works that were not actively being sold and were published between 1923 and 1941. It is an interpretation of a generally forgotten or little-used provision of the Copyright Act, section 108(h), which provides for limitations on exclusive rights to reproduction and certain exceptions for libraries and archives. Section 108(h) states that “during the last 20 years of any term of copyright of a published work, a library or archives, including a

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* This was also in stark contrast to the Google Books project, and particularly the (rejected from the Courts) Google Books Settlement proposal.

<sup>77</sup> See among many James Grimmelman, *The Elephantine Google Books Settlement*, J. 58 COPYRIGHT SOC'Y USA 497 (2010) and Randal Picker, *The Google Book Search Settlement: A New Orphan-Works Monopoly?*, 5 JOURNAL OF COMPETITION LAW AND ECONOMICS 383 (2009).

<sup>78</sup> The Open Content Alliance collection is now available at <https://archive.org/details/opencontentalliance>. Writing about the Open Content Alliance in 2005, Peter Suber provided an extended commentary about the differences between the alliance and Google Books. Before providing the quote, let us note that the commentary came at a stage when the legality of the Google Books project was still unclear and highly contested. Suber comments:

Unlike Google Library, the OCA [Open Content Alliance] will only scan copyrighted books when it has the copyright-holder's consent. As a result, publisher groups that criticized Google Library (AAP, AAUP, ALPSP) have endorsed the OCA.

[...] all OCA's digitizing, copying, and indexing will be non-exclusive. If other organizations want to copy and host the texts, they may. If other search engines want to index them, they may. Yes, that includes Google (Suber, *supra* note 70).

<sup>79</sup> Miguel Helft, *Microsoft Will Shut Down Book Search Program*, THE NEW YORK TIMES (May 24, 2008), [https://www.nytimes.com/2008/05/24/technology/24soft.html?\\_r=1&ref=technology&oref=s](https://www.nytimes.com/2008/05/24/technology/24soft.html?_r=1&ref=technology&oref=s).

<sup>80</sup> Brewster Kahle, *Books from 1923 to 1941 Now Liberated!*, INTERNET ARCHIVE BLOGS (Oct. 10, 2017), <https://blog.archive.org/2017/10/10/books-from-1923-to-1941-now-liberated/>.

nonprofit educational institution that functions as such, may reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research, if such library or archives has first determined, on the basis of a reasonable investigation, that none of the conditions set forth in subparagraphs (A), (B), and (C) of paragraph (2) apply.” For that reason, it is called the “Last 20” exception. The subparagraphs add the conditions: “No reproduction, distribution, display, or performance is authorized under this subsection if—(A) the work is subject to normal commercial exploitation; (B) a copy or phonorecord of the work can be obtained at a reasonable price; or (C) the copyright owner or its agent provides notice pursuant to regulations promulgated by the Register of Copyrights that either of the conditions set forth in subparagraphs (A) and (B) applies. (3) The exemption provided in this subsection does not apply to any subsequent uses by users other than such library or archives.”<sup>81</sup>

The aforementioned scholar, Elizabeth Townsend Gard, has indeed published a scholarly article on the topic explaining in detail how this exception has not been utilized by libraries and archives in part because of uncertainty over some of the definitions, especially the definition of “normal commercial exploitation.”<sup>82</sup> This uncertainty has already been extensively discussed with regard to the orphan works that were also an important part of the digitized from Google collections and at the center of *Authors Guild v. Google* and *HathiTrust* cases.<sup>83</sup>

In its announcement explaining that it would make use of this exception, the Archive encouraged more libraries to do so as well.<sup>84</sup> Reactions to this initiative were relatively limited with most commentators praising the IA for bringing the exception to the forefront and using it.<sup>85</sup>

The initiatives, litigation, and other developments described above were the background in which *Hachette v. Internet Archive* started unfolding during the pandemic. The following part examines the legal action that Hachette and other publishers brought against the Archive and the Archive’s response. The case is significant not only as a continuation to the line of cases brought against libraries and other stakeholders challenging digitization and electronic access to library books but also because of the questions invoked by the emergency context, which form the additional focus of Part II.

## II. LIBRARIES AND COPYRIGHT LAW “IN THE TIME OF CHOLERA”: *HACHETTE V. INTERNET ARCHIVE*

Reading the complaint that Hachette Book Group, Inc. and three other publishers filed against the Internet Archive, one quickly understands that the plaintiffs are angry.

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<sup>81</sup> 17 U.S. C. § 108 (2010).

<sup>82</sup> Elizabeth Townsend Gard, *Creating a Last Twenty (L20) Collection: Implementing Section 108(h) in Libraries, Archives and Museums*, SSRN (Oct. 2, 2017), <https://ssrn.com/abstract=3049158>.

<sup>83</sup> See among many: David R. Hansen & Kyle K. Courtney, *A white paper on controlled digital lending of library books*, HARVARD LIBRARY (2018), and Hansen’s earlier works on the topic.

<sup>84</sup> Brewster Kahle, *supra* note 74.

<sup>85</sup> See Jennifer Howard, *The Copyrights Mavrick*, SLATE (Nov. 30, 2017, 2:55PM), <https://slate.com/technology/2017/11/the-sonny-bono-memorial-collection-fights-copyright-creep.html> See also *The “Sonny Bono Memorial Collection” and U.S. Copyright Terms*, AUTHORS ALLIANCE, (Nov. 7, 2017), <https://www.authorsalliance.org/2017/11/07/the-sonny-bono-memorial-collection-and-u-s-copyright-terms/> and Marina Lewis, *More than 100 years of Editor & Publisher Now Fully Accessible Online on the Internet Archive*, INTERNET ARCHIVE BLOGS (Jan. 20, 2021), <http://blog.archive.org/2021/01/20/more-than-100-years-of-editor-publisher-now-fully-accessible-online-on-the-internet-archive/> (note: self-selected reporting from the IA).

Defendant IA is engaged in willful mass copyright infringement. ... The scale of IA's scheme is astonishing: At its "Open Library," located at [www.openlibrary.org](http://www.openlibrary.org) and [www.archive.org](http://www.archive.org) (together, the "Website"), IA currently distributes digital scanned copies of over *1.3 million* books. And its stated goal is to do so for millions more, essentially distributing free digital copies of every book ever written. Despite the "Open Library" moniker, IA's actions grossly exceed legitimate library services, do violence to the Copyright Act, and constitute willful digital piracy on an industrial scale.<sup>86</sup>

The complaint first focuses on the IA's actions before the pandemic, including its controlled digital lending practices prior to its launching the National Emergency Library. The publishers contend that the rules of CDL "have been concocted from whole cloth and continue to get worse" and that "no provision under copyright law offers a colorable defense to the systematic copying and distribution of digital book files simply because the actor collects corresponding physical copies."<sup>87</sup>

The complaint then turns to the launch of the NEL. It quickly returns to CDL but links the initiatives (CDL and the NEL) together as lacking any legal basis under copyright law.<sup>88</sup> The publishers consider the NEL illegitimate: "Under whatever guise IA attempts to frame its massive infringement—whether adopting the invented CDL theory or filling the self-appointed role as "National Emergency Library"—its actions find no support in the Copyright Act."<sup>89</sup> They accuse the Archive of opportunism and of falsely claiming that it serves educational purposes while disrupting the business model whereby authors and publishers "create the books of scholarship and literature for educators, students, and other readers."<sup>90</sup>

Regarding CDL, the publishers disagree with the IA's treatment of digital copies of books as physical and accuse the IA of an "aggressive and unlawful end-run."<sup>91</sup> Non-rivalry and effortless distribution across borders, according to the publishers, make digital copies very different from hard copies. Furthermore, the publishers reject any fair use defense for the "systematic mass copying or distribution of entire books for the purpose of mass reading, or put another way, for the purpose of providing to readers the very thing that publishers and authors provide in the first place through lawful and established channels."<sup>92</sup> Finally, they also interpret the first sale doctrine of section 109 of the Copyright Act as inapplicable to digital copies.<sup>93</sup>

Most of the complaint concentrates on the book publishing ecosystem, including the functioning of e-book markets outside of crises. First, paragraphs 49–51 discuss the pandemic as

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<sup>86</sup> Complaint, Hachette Book Group, Inc. et al. v. Internet Archive et al. (S.D.N.Y. 2020) (No. XXX), paragraph 3.

<sup>87</sup> *Id.*, paragraph 8.

<sup>88</sup> *Id.*, paragraph 9.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*, stating:

...while IA claims to serve an educational purpose, education has long been a primary mission and market of publishers. It is authors and publishers who create the books of scholarship and literature for educators, students, and other readers; IA creates nothing. IA plays no role in the hard work of researching, writing, or publishing the works or, for that matter, in creating or sustaining the overall publishing ecosystem and its distinct partnerships and markets.

<sup>91</sup> *Id.*, paragraph 10.

<sup>92</sup> *Id.*, paragraph 11.

<sup>93</sup> *Id.*

a period during which “publishers and libraries have engaged in numerous emergency-related initiatives to ensure that readers retain access to books while nationwide stay-at-home orders remained in effect.”<sup>94</sup> Later, in paragraphs 114–118, they argue that the NEL is “tantamount to asserting an emergency copyright act unilaterally and by private action.”<sup>95</sup>

In its answer, the IA first defends its identity as a library, which is questioned by the complaint (“The Internet Archive does what libraries have always done: buy, collect, preserve, and share our common culture.”<sup>96</sup>) and states its mission as a non-profit organization to “democratize access to information.”<sup>97</sup> The answer presents the CDL process as fundamentally the same process as traditional library lending, emphasizing the enhanced capacities of digital lending to serve previously underserved library patrons, particularly those facing “distance, time, cost, or disability [that] pose daunting and sometimes insurmountable barriers to accessing physical books.”<sup>98</sup> The Archive insists that CDL is carefully constructed to be lawful under the fair use doctrine.

The Archive’s take on the NEL is noteworthy. Referring to the early days of the pandemic and the first period of lockdown, the Archive presents the initiative as a temporary response to “urgent pleas from teachers and librarians whose students and patrons had been ordered to stay at home”; “[t]he Internet Archive called this program the ‘National Emergency Library’ and planned to discontinue it once the need had passed. Twelve weeks later, other options had emerged to fill the gap, and the Internet Archive was able to return to the traditional CDL approach.”<sup>99</sup> It seems that the Archive is emphasizing the emergency, and, correspondingly, fast, nature of its actions during that time. Indeed, with regard to the NEL, the IA answer refers to an April 7, 2020 blog post by Brewster Kahle stating that “[w]e moved in ‘Internet Time’ and the speed and swiftness of our solution surprised some and caught others off guard. In our rush to help we didn’t engage with the creator community and the ecosystem in which their works are made and published.”<sup>100</sup>

The IA’s answer to the complaint concludes with a list of affirmative defenses, including that any of its uses of copyrighted materials are protected by the fair use doctrine and that plaintiffs’ claims are barred by the first sale doctrine, the safe harbor provision under 17 U.S.C. § 512(c), and some by statutes of limitations. In addition, the Archive raises a final affirmative defense based on the doctrine of laches.

This final defense is perhaps the most interesting for our purposes. The common law doctrine of laches—a doctrine of equity—allows defendants to assert that the plaintiff is unreasonably delayed in asserting its rights. There seems to be a solid basis for the application of this doctrine in this case. Indeed, most of the claims put forward by the plaintiffs address the overall operation of the IA’s digital library functions *before* the pandemic. The NEL seems like an almost minor concern in light of the attention that the publishers’ complaint gives the other digital library activities. In spite of the surrounding context when the case was brought before the courts, reading the pleadings from each party (which are all that has been filed so far) it seems to me that the NEL is not the primary issue in the case. Should the court later accept the doctrine of laches defense, the CDL arguably drops out of this controversy, at least as it is playing out in the litigation. If that happens, then the focus might concentrate on the NEL.

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<sup>94</sup> *Id.*, paragraph 49.

<sup>95</sup> *Id.*, paragraph 114.

<sup>96</sup> Answer, Hachette Book Group, Inc. et al. v. Internet Archive et al. (S.D.N.Y. 2020) (No. XXX), at 1.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*, at 2.

<sup>99</sup> *Id.*, at 3.

<sup>100</sup> *Id.*, at 20.

Can the novel legal arguments for an emergency library hold? As the case progresses, we can expect a more elaborate argumentation from the IA and its legal team. Further on, one would expect that, as flagged in their initial answer to the complaint, the Archive's main line of defense is the fair use doctrine. In case that the NEL with its less controlled digital lending scheme is found *prima facie* infringing copyright, the question is whether an emergency situation would justify fair use criteria.<sup>101</sup> Can the granting of electronic access to copyrighted library books be justified in view of the temporary and emergency nature of the use, bearing in mind that the use from the IA is already for non-profit educational purposes? Can the granting of temporary electronic access to copyrighted library books be justified by the temporary (or perhaps minor) effect on the potential market or value of the work? If the answer to both is yes, in other words if the first and the fourth fair use criteria are met, following the precedent of the *Authors Guild v. Google* and *Authors Guild v. HathiTrust* cases there is a high chance that the NEL is also shielded by fair use. If Google's mass copying and use was ultimately considered fair, the IA, a library with a clear non-profit and educational purpose, stands a solid chance to also benefit from the fair use doctrine.

Focusing on the educational use justification for the NEL, there is additional case-law that we must consider, primarily the 12-yearlong litigation *Cambridge University Press et al. v. Patton et al.* - later known as *Cambridge University Press v. Becker*.<sup>102</sup> The case, was brought in 2008 by three publishers, Cambridge University Press, SAGE Publications, and Oxford University Press, against Georgia State University. The publishers claimed that Georgia State University systematically infringed copyright by making available copyrighted works (mostly assigned book chapters) through its e-reserves system. At first instance, the US District Court for the Northern District of Georgia found that most cases of the alleged infringements were in fact fair use.<sup>103</sup> On appeal the 11<sup>th</sup> Circuit partly reversed and remanded the case to the district court which again found most of the University's uses fair.<sup>104</sup> The final judgment was handed in December 2020 with a total of 37 out of 48 claims of copyright infringement confirmed by the court to be fair use.<sup>105</sup> The final judgment, as also the numerous judgements preceding, engages in an analysis of the fair use factors for each specific infringement claim, looking at the portion of the book made available and also the effect on the market for that specific book, examining specifically the net sales revenue for each work.

Educational use copyright has been and remains, after *Georgia State* case, controversial.<sup>106</sup>

As discussed earlier, in its March 24, 2020 announcement the IA maintained that the NEL aimed to support "emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries were closed due

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<sup>101</sup> 17 U.S.C. § 107 (2010).

<sup>102</sup> *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012) and *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

<sup>103</sup> *Cambridge University Press v. Becker*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012).

<sup>104</sup> *Cambridge University Press v. Becker*, 371 F. Supp. 3d 1218 (N.D. Ga. 2016).

<sup>105</sup> *Cambridge University Press v. Becker*, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).

<sup>106</sup> Pamela Samuelson, JUSTIFICATIONS FOR COPYRIGHT LIMITATIONS AND EXCEPTIONS, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS*. CAMBRIDGE UNIVERSITY PRESS (Ruth L. Okediji ed., 2017). See also WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* (1985) and Margaret Chon, *Intellectual Property "From Below": Copyright and Capability for Education*, 40 U.C. DAVIS LAW REVIEW 803.

to COVID-19.”<sup>107</sup> Will this justification suffice to uphold fair use? Should the court in *Hachette* proceed in a similar analysis to *Georgia State* it will likely need to assess each case of a copyrighted work made available from the NEL separately and evaluate the fair use criteria along with the harm to the market requesting and looking into net sales revenue data for those works. Although in *Hachette* books were made available in their entirety, the facts are slightly different, as the making available was temporary, invoking an emergency situation, and in the context of a digital lending scheme which was initially controlled as regards the number of copies made available to patrons. The NEL essentially temporarily suspended the waitlists for patrons to access electronic copies.

Finally, and to place *Hachette* in a broader context of legislative and judicial developments in other parts of the world, we must mention a sequence of European cases ruling on digital lending from university and other libraries. The EU offers a rich body of laws and case law relevant to our discussions thus far.<sup>108</sup> In chronological order the relevant cases are: the German *Technische Universität Darmstadt v. Eugen Ulmer KG*<sup>109</sup> which found that access to a digital copy of a library book through dedicated terminals within the library premises is not an infringement of copyright – the case added that patrons cannot store the copies on a USB stick; the Dutch case *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*<sup>110</sup> which clarified that under EU Copyright law the concept of lending covers digital lending and that some version of a CDL scheme is within the boundaries of the law; and the French case *Marc Soulier & Sara Doke v. Premier ministre & Ministre de la Culture et de la Communication*<sup>111</sup> which referred to the authorizing of uses of ‘out-of-print’ books by collecting societies. There are more relevant cases on fair use in educational contexts around the world, such as for example the *University of Oxford v. Rameshwari Photocopy Service*<sup>112</sup> case in India, where a photocopy center serving the needs of students at the University of Delhi successfully argued that their copying of course packs is shielded by fair use -actually, in that case fair dealing under Indian common law.

With this in mind, Parts III and IV of this article will discuss the role of libraries in both physical and digital contexts. What is this role and what kind of legal treatment does it warrant under copyright law? Both parties in *Hachette v. Internet Archive*, the publishers and the IA, presented their own interpretations of what libraries are, what they can and cannot do. They also both commented on the original purpose of copyright law and briefly referred to copyright history, which seems likely to be relevant to the analysis in this case.<sup>113</sup> Looking back to the English origins

<sup>107</sup> Internet Archive Blogs, *The National Library*, INTERNET ARCHIVE, <https://blog.archive.org/national-emergency-library/> (last visited Feb. 28, 2021).

<sup>108</sup> Argyri Panezi, *Europe's New Renaissance: New Policies and Rules for Digital Preservation and Access to European Cultural Heritage*, 24 COLUM. J. EUR. L. 596 (2017).

<sup>109</sup> Technische Universität Darmstadt v. Eugen Ulmer KG, (Case C-117/13), ECLI:EU:C:2014:2196.

<sup>110</sup> Vereniging Openbare Bibliotheken v. Stichting Leenrecht, (Case C-174/15), ECLI:EU:C:2016:856.

<sup>111</sup> Marc Soulier & Sara Doke v. Premier ministre & Ministre de la Culture et de la Communication, (Case C-301/15), ECLI:EU:C:2016:878.

<sup>112</sup> (2016) 160 DRJ (SN) 678. Court:High Court of Delhi at New Delhi.

<sup>113</sup> Complaint, *supra* note 86, paragraph 5:

The publishing ecosystem not only depends upon copyright law, it is historically intertwined with the founding of the United States. In 1787, the Framers adopted the Copyright Clause of the Constitution, explicitly authorizing 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.” U.S. Const., Art. I, §8, cl. 8. In 1790, the First Congress enacted the first Copyright Act, focused on incentivizing both the creation *and legal dissemination* of books, maps,

of the US and other copyright systems, Part III considers what the original purpose of the copyright laws was, especially regarding the relationship between the market and libraries.

### III. BEYOND EMERGENCIES: LIBRARIES AS PART OF A MUCH OLDER STRUGGLE TO MAKE KNOWLEDGE ACCESSIBLE MORE EQUITABLY

While library privileges date as far back as the inception of copyright, in each jurisdiction they evolved into copyright exceptions or limitations guaranteed by statutes, doctrines such as fair use, and international rules in copyright treaties. Looking into historical and theoretical explanations that are also predominantly enshrined in the copyright discourse, as illustrated in the preambles of international copyright treaties or in national provisions, one can identify a commonly expressed theme: the goal of encouraging learning and advancing knowledge. If the normative benchmark is to encourage learning and advance knowledge, in the broadest sense of the meaning, then for a number of reasons libraries are most fit for the job, including in the digital space. In fact, the primary mandate of libraries is preserving, organizing, and providing access to literary works, all *sine qua non* to encourage learning and succeed in the advancement of knowledge.

This part utilizes various sources to discover the history and rationale behind the distinct treatment of books and libraries by early copyright laws.

#### A. *What Is So Special About Books?*

One of the oldest texts in which we can find a normative justification for the exclusive rights that copyright affords books is the *Lectures of Jurisprudence* by Adam Smith, which reproduces lectures saved by one of his students at the University of Glasgow.<sup>114</sup> To be precise, Smith was referring to the exclusive rights afforded to booksellers. Smith discussed the concept of exclusive privileges, such as monopolies and privileges of corporations, as a category of “real rights” in civil law—thus property rights, as opposed to “personal rights” subject to contract law. He did not support monopolies, quite the contrary. He argued that when the law assigns exclusive privileges and thus creates monopolies in the market, it runs the risk that those afforded such privileges will collude to raise prices. As an example, he mentioned the privilege of butchers to exclusively sell meat. His argument in favor of competition and against cartelization of the market

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and charts. Congresses ever since have carefully balanced copyright amendments to advance the public good and for more than 200 years have prescribed to authors a suite of enforceable exclusive rights to their writings—which publishers, in turn, encourage, invest in, license, and distribute to readers through bookstores, libraries, and a multitude of e-commerce platforms.

To this part of the complaint the IA’s answer states (Answer, *supra* note 96, paragraph 35):

The Internet Archive admits that the first Copyright Act was passed in 1790, that there is a Copyright Clause in the Constitution, and that a subsequent Copyright Act was passed in 1976. The remaining allegations in this paragraph are legal conclusions to which no response is required. To the extent any response is required, the Internet Archive denies the allegations in this paragraph.

<sup>114</sup> Adam Smith, *Lectures On Jurisprudence*, 5 GLASGOW EDITION OF THE WORKS AND CORRESPONDENCE OF ADAM SMITH (R. L. Meek, D. D. Raphael and P.G. Stein ed., 1978).

is similar to how it is articulated in contemporary competition law: “When a number of butchers have the sole privilege of selling meat, they may agree to make the price what they please, and we must buy from them whether it be good or bad.”<sup>115</sup> The harm caused by monopolies is ultimately against a public good: “But the great loss is to the public, to whom all things are rendered less comeatable, and all sorts of work worse done.” Exclusive privileges of butchers to sell meat are, therefore, against the interests of a public that needs good quality meat and low meat prices.

There are other goods that do have an exclusive privilege, which according to Smith is “not so bad.” “The privilege of vending a new book or a new machine for fourteen years,” says Smith, “has not so bad a tendency, it is a proper and adequate reward for merit.”<sup>116</sup> What makes the trading of books, and new machines, different from the trading of meat? The text of the lectures does not provide any further explanation, but we can try to ascertain the qualitative differences implied by Smith’s comparison. Why can exclusive privileges be awarded *for merit* to vendors of books and not to butchers? By putting books and new machines in the same category, Smith gives us a clue as to why he differentiates them from meat. There is a creative process associated with the making of books and new machines, but not with the efforts of butchers when they cut and sell meat. There may also be a greater societal benefit to rewarding authors and inventors than to rewarding butchers. Or maybe there are more complex economic reasons dictating the differential treatment, for example, butchers have adequate incentives to supply the market with meat but the same is not true in the case of authorship or invention. To try to make the most out of the sparse argument found in Smith’s lectures, let us focus on two more clues: first, the privilege is limited to fourteen years and, second, it is characterized as a proper and adequate reward for some sort of “merit.”

There are several reasons this text warrants close attention. First, Adam Smith is cited as the first economist to touch on the rationale for intellectual property protection, which is based on this brief passage. Interestingly, elaborate theories that justify intellectual property rights can be traced back to Smith’s scant text. Second, the significance of his views on goods that are now regulated by intellectual property law is clear when they are taken in the context of his overall political economy analysis that has been foundational to our (Western) understanding of free markets. As will become apparent in the following discussion, even within our modern conceptions of free markets books are not treated like meat. Arguably, the reasons for that are not fundamentally different from those that Smith taught and wrote about.

Today, books are goods that are traded in free markets. Copyright law ensures the marketability of books while assigning limited property rights to authors, publishers, and their heirs. In the book market, regular laws of competition but also other laws, such as taxation, apply. Once we accept that copyright law helps ensure the creation of a market, the difference between books and meat is not substantial. Economists and copyright lawyers tend to focus on the so-called incentives/access trade-off. Copyright is a monopoly that restricts access to intellectual creations, but it is the price we need to pay to create this market in the first place.

Economists who are generally skeptical about monopolies have for a long time rationalized this trade-off as a necessary evil.<sup>117</sup> Copyright’s anticompetitive effects are tolerated for a particular period of time and for specific reasons. As a statutory monopoly, copyright enables the

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> For a classic analysis of the tradeoff and the difficult relationship between intellectual property and competition see for example RICHARD A. POSNER & WILLIAM M. LANDES, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW*, HARVARD UNIVERSITY PRESS (2003).

See also the rich literature review of Ruth Towse, Christian Handke and Paul Stepan, *The economics of copyright law: A stocktake of the literature*, 5 *REVIEW OF ECONOMIC RESEARCH ON COPYRIGHT ISSUES* 1, 3 (2008).

right-holders of a book to charge a price above the marginal cost in order to recover the fixed costs of creation. Thus, copyright laws ensure that there are sufficient monetary incentives for authors to take up the costs of creation in the first place. In this sense, being a statutory monopoly, copyright is understood as a system of public financing for intellectual production. In the words of Thomas Babington Macaulay at the House of Commons in England in 1841, copyright is “a tax on readers for the purpose of giving a bounty to writers.”<sup>118</sup> In his view, copyright is necessary, but should be carefully kept at length and price levels that reward writers sufficiently.

It is important to note that this economic analysis prioritizes the incentives side of the trade-off over the access side. Most contemporary copyright theories rooted in either economic or moral reasoning tend to overemphasize the role of the law in maintaining the incentives. Copyright theories are, roughly speaking, grouped into two categories that correspond to two schools of thought: the utilitarian school, attributed to the Anglo-Saxon world, and the moral theories school, attributed to continental Europe.<sup>119</sup> At the same time, the value generated by broad access to books is comparatively underdeveloped as a concept, at least in the existing copyright scholarship. This qualitative value of access to books is predominantly related to freedom of expression, and its mirroring freedom of information, both which are important to keep in mind when examining how books are treated by the legal system. In other words, copyright law or competition law, which are sets of rules designed for markets, cannot, standing alone, adequately explain why books are not treated like meat or other market products.

Historically speaking, copyright laws, vesting right-holders with certain privileges, aimed at creating a marketplace for books and at sustaining incentives for intellectual creation while putting an end to censorship. In spite of these initial intentions, the relationship between copyright laws and freedom of expression is idiosyncratic. There is thus some tension between creating a marketplace for books and simultaneously maintaining a marketplace of ideas. The first copyright legislation, the English Statute of Anne, was intended to create a marketplace for books and concurrently give specific rights to selected libraries. Yet, the position that libraries had enjoyed under the Statute of Anne would soon be revoked with regard to public libraries. The Statute of Anne as emerged in its particular historical context is celebrated in almost every contemporary copyright textbook. It is, therefore, helpful to return to the time and place where the first discussions of copyright protection and of the rights or privileges of libraries occurred in order to understand the context within which this law emerged and spot the inconsistencies in contemporary copyright doctrine that rely on this history.

### *B. The Statute of Anne: “An Act for the Encouragement of learning”*

Looking back at the history of the first copyright act, and the intellectual battles against censorship taking place around the time it was enacted, we will see how copyright protection and freedom of expression have had a long and complex relationship. Even though the enactment of the Statute of Anne is celebrated as a triumph against censorship, a careful look at the history

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<sup>118</sup> See 8 THOMAS BABINGTON MACULAY, THE WORKS OF LORD MACAULAY COMPLETE, BOMBAY, LONGMANS, GREEN, AND CO. (Hannah More Macaulay Trevelyan ed., 1875).

<sup>119</sup> We will discuss the justifications for copyright protection with a focus on books (literary production) in chapter two of this thesis. Brad Sherman and Lionel Bently have offered an exemplary historical account of the debates leading to the assignment of property to mental labor: Brad Sherman & Lionel Bently, *The Making of Modern Intellectual Property Law: the British Experience, 1760 – 1911*, 4 CAMBRIDGE UNIVERSITY PRESS 1,11-35 (2003).

indicates that the line between censorship by government rules and censorship by market rules is thin.

Before the Statute was passed, authorized printers from the Stationer's Company had the royal approval to print books. The so-called Licensing Act, or Printing Act, vested the Stationer's Company with a monopoly over publishing, which, despite earlier opposition, was renewed at least for a period of time.<sup>120</sup> Moreover, the church was granted powers to prohibit the printing of books that contradicted the faith.<sup>121</sup> John Milton and John Locke were among those who loudly protested against the censorship practices that resulted from the Stationer's Company monopoly. Their respective texts illustrate the context in which the first English copyright laws were drafted to replace the existing monopoly.<sup>122</sup>

Printed in 1644, John Milton's *Aeropagitica* is a prose written in the form of a speech, which was directed at the English Parliament and entitled "For the Liberty of unlicenc'd Printing." Milton was expressly writing against the Licensing Order of 1644.<sup>123</sup> In this piece, Milton discusses the wisdom found in books and the evils of censorship. He writes about ancient Athens and Rome and how the absence of censoring practices in those societies left us a legacy of great works. In his text we can see how licensing was clearly associated with Catholicism and the censorship of texts was considered blasphemous. Milton makes a strong case against licensing, essentially defending free dissemination of truths and ideas. He argues:

I cannot set so light by all the invention, the art, the wit, the grave and solid judgement which is in England, as that it can be comprehended in any twenty capacities how good soever, much lesse that it should not passe except their superintendence be over it, except it be sifted and strain'd with their strainers, that it should be uncurrant without their manuall stamp. Truth and understanding are

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<sup>120</sup> Justin Hughes, *Locke's 1694 Memorandum (and More Incomplete Copyright Historiographies)*, 27 *CARDOZO ARTS & ENT. LJ* 555 (2010).

<sup>121</sup> *Id.*

<sup>122</sup> On this topic see also: John Feather, *The book trade in politics: The making of the copyright act of 1710*, 8 *PUBLISHING HISTORY* 19 (1980); Niva Elkin-Koren, *Cyberlaw and social change: A democratic approach to copyright law in cyberspace*, 14 *CARDOZO ARTS & ENT. LJ* 215 (1996); Mark Rose, *The Public Sphere and the Emergence of Copyright: Aeropagitica, the Stationers' Company, and the Statute of Anne*, 12 *TUL. J. TECH. & INTELL. PROP.* 123 (2010) (also in Ronan Deazley, Martin Kretschmer, & Lionel Bently, *Privilege and property: essays on the history of copyright*, OPEN BOOK PUBLISHERS (2010)).

<sup>123</sup> *June 1643: An Ordinance for the Regulating of Printing*, in *ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660*, *BRITISH HISTORY ONLINE* 184, 184-86 (C H Firth and R S Rait ed., 1911), <http://www.british-history.ac.uk/no-series/acts-ordinances-interregnum/pp184-186>

See in particular the following excerpt:

It is therefore Ordered by the Lords and Commons in Parliament, That no order or Declaration of both, or either House of Parliament shall be printed by any, but by order of one or both the said Houses: Nor other Book, Pamphlet, paper, nor part of any such Book, Pamphlet, or paper shall from henceforth be printed, bound, stitched or put to sale by any person or persons whatsoever, unless the same be first approved of and licensed under the hands of such person or persons as both, or either of the said Houses shall appoint for the licensing of the same, and entered in the Register Book of the Company of Stationers, according to ancient custom, and the Printer thereof to put his name thereto ...

not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards.<sup>124</sup>

Much more than Milton's parliamentary speech, the views of John Locke against the same practices are cited as highly influential to the debates of the time. Locke's 1693 letter to Edward Clarke presents some of his views. It was followed by a memorandum written around 1694 and submitted to the British Parliament. This memorandum, apparently shared with parliamentary members, is considered to have helped end the monopoly of the Stationer's Company and contributed to the drafting of the Statute of Anne.<sup>125</sup> It reads as a commentary to what appears to be a version of the text of the Licensing (or Printing) Act, which vested the Stationer's Company with a printing monopoly. His comments convey his irritation with the state of the book market that resulted from the monopoly and, most notably, he compares the English market to the Dutch market at the time. Locke maintains:

... our printing is so very bad, and yet so very dear in England: they who are hereby privileged to the exclusion of others, working and setting the price as they please, whereby any advantage that might be made to the realm by this manufacture is wholly lost to England, and thrown into the hands of our neighbours; the sole manufacture of printing bringing into the Low Countries great sums every year. But our Ecclesiastical laws seldom favour trade, and he that reads this act with attention will find it upse [highly] ecclesiastical. The nation loses by this act, for our books are so dear, and ill printed, that they have very little vent among foreigners, unless now and then by truck for theirs, which yet shows how much those who buy the books printed here are imposed on, since a book printed at London may be bought cheaper at Amsterdam than in Paul's Church-yard, notwithstanding all the charge and hazard of transportation: for their printing being free and unrestrained, they sell their books at so much a cheaper rate than our booksellers do ours, that in truck, valuing ours proportionably to their own, or their own equally to ours, which is the same thing, they can afford books received from London upon such exchanges cheaper in Holland than our stationers sell them in England. *By this act England loses in general, scholars in particular are ground, and nobody gets, but a lazy, ignorant Company of Stationers, to say no worse of them ...*<sup>126</sup>

In this passage, Locke hints at an understanding of the book market that has strong normative undertones. One normative position he advances is that the monopoly afforded to the Stationer's Company resulted in high prices. For Locke, this is obviously bad. Second, he attributes this market failure to the fact that the licensing of copies is not free. He points out that in the Netherlands, where the licensing of book copies is not restricted, there is a better market where even English books are cheaper. We can see that Locke's arguments are based on primarily economic factors. Just as Adam Smith's notes that monopolies can raise meat prices, Locke maintains that the same can happen to books. The economic arguments, however, are ultimately

<sup>124</sup> JOHN MILTON, AREOPAGITICA (Jebb ed., 1644).

<sup>125</sup> See Hughes, *supra* note 120.

<sup>126</sup> John Locke, *Letter from John Locke to Edward Clarke*, in THE CORRESPONDENCE OF JOHN LOCKE AND EDWARD CLARKE 366, 381 (Benjamin Rand ed., 1927) [emphasis added].

met with a broader rationale with regard to cheap availability of books and why it is vital for society. England loses overall, he argues, from a monopoly on books. The country loses its scholars, while those who win are a bunch of lazy and ignorant traders. The comment alluding to the loss of scholars is the one that needs further attention. There is a recognizable value implied here ascribed to the maintenance of an environment with fair and easy access to materials for those who wish to study them and further advance learning.

The text of the Statute of Anne, as adopted in 1710, seems to follow Locke's rationale. The Statute's very title sends out a clear message with respect to its purpose: "An act for the encouragement of learning, by vesting the copies of printed books in the authors or purchasers of such copies, during the times therein mentioned." The first significant change is the prominent position of authors, who are vested with a limited right to control the printing and circulation of copies of their books. Paragraph II of the Statute specifies that this right lasts for fourteen years for books that were in not print at the time, and twenty-one years for books already in print. The remainder of paragraph II, along with a few additional paragraphs of the Statute, provide further detail with regard to the purchasing of copies from printers and other issues related to the book market, such as foreign books. Paragraph V of the Statute is of utmost importance. It stipulates an obligation to deposit nine copies of each book to the Stationer's Company, "upon the best paper," to be available to the following list of libraries: "the royal library, the libraries of the universities of Oxford and Cambridge, the libraries of the four universities in Scotland, the library of Sion College in London, and the library commonly called the library belonging to the faculty of advocates at Edinburgh respectively." If not forthcoming, these libraries are entitled to demand their respective copy. The Statute imposes penalties on "proprietors" who do not obey the requirement. In addition to a fee for every copy that is not delivered, the proprietor who fails to deposit the book has to pay for the value of each copy.

The above provision about the copies of new books reserved for the libraries is, I contend, as important as the reform of the printing market, which was the original purpose behind the Statute. The Statute first achieves the transformation from a restrictive system of licensing and vesting a particular guild with printing monopolies to a system of limited tradable rights for the authors of books, and thus helps foster a free market for books. As Locke argued, this was a way to lower the prices of books but also end the debilitating censorship that resulted from the previous system. While transforming or rather liberating the market the Statute stays true to its primary purpose: the encouragement of learning. Not only were books to be traded freely and more cheaply, but their availability in a number of important libraries around the country was guaranteed. All libraries on the list but the royal library are academic institutions. When speaking of the Statute of Anne as the first copyright law, which influenced the spread of copyright laws in many more jurisdictions,<sup>127</sup> we must not forget the Statute's explicit rationale, or its revolutionary provisions: not only authors but also certain libraries were vested for the first time with special *rights* over copies of books.

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<sup>127</sup> The American Copyright Act, for example, first introduced in 1790, was modeled after the Statute of Anne and is similarly titled "An Act for the Encouragement of Learning, by Securing the Copies of Maps, Charts, and Books to the Authors and Proprietors of Such Copies, During the Times Therein Mentioned.", Copyright Act of 1790 online available at <https://copyright.gov/about/1790-copyright-act.html>. On the influence that British copyright law has had to more jurisdictions see also Kenneth Crews, *Study on Copyright Limitations and Exceptions for Libraries and Archives*, SCCR/17/2, WIPO 7, 25 (2008), [http://www.wipo.int/edocs/mdocs/copyright/en/sccr\\_17/sccr\\_17\\_2.pdf](http://www.wipo.int/edocs/mdocs/copyright/en/sccr_17/sccr_17_2.pdf).

*C. Market vs. Knowledge and the Forgotten Original Purpose of Copyright*

If market rationales do not sufficiently explain the different status of books in the eyes of legislators, perhaps other justifications can shed light on the question of what makes books so special. One such justification is the free flow of ideas as celebrated by modern democracies and other societies. Books are the primary medium for carrying ideas that find expression in writing. One of the most powerful rationales for high-level protection of books can be found in the notion of the marketplace of ideas, particularly as it has developed in American case law around freedom of expression and based on the First Amendment to the US Constitution. Historically, the free flow of books in a marketplace of ideas is valuable for democracies because words are powerful and when they compete, valuable truths arise. Borrowing from the arguments of Supreme Court Justice Oliver Holmes in his famous dissent in *Abrams v. United States*, rights that guarantee freedom of expression are based on a trust in a world of “fighting faiths” competing for the truth—in other words, a pluralistic world. Allowing ideas to compete in a free market is a good thing, or, as Holmes put it, it is our only hope to reach some kind of imperfect truth.<sup>128</sup> The rationale applies to written ideas as much as it does to ideas that are orally transmitted; what is more, ideas expressed in writing have the advantage that when preserved, they remain part of a cultural heritage. To a certain extent, copyright rules have been designed in a way that ensures that the free flow of ideas is not suppressed. The exclusivity copyright affords to right-holders applies to the expression and not on the ideas themselves. Nonetheless, if access to a book is restricted or difficult due to copyright rules, it actually affects the free flow of ideas and ultimately hinders the quest for truth.

The relationship between the two bodies of law, freedom of expression and copyright, is complex. While freedom of expression ensures a marketplace of ideas, copyright ensures a marketplace of books, where expressed ideas are protected with exclusive privileges. At first glance, the marketplace of books and the marketplace of ideas are complementary concepts. There is an underlying paradox, however, which makes their relationship far more complicated. The primary focus in the marketplace of books is on production and, therefore, on the rights of authors and publishers. In the marketplace of ideas, however, the audience is as important as the speaker. With that in mind, one might observe that today the rights of readers, the audience in the marketplace of ideas, are at times neglected.<sup>129</sup> As a legal monopoly afforded to authors and

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<sup>128</sup> *Abrams v. United States*, 250 U.S. 616 (1919). See Holmes’ dissent at pp.630-1:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power, and want a certain result with all your heart, you naturally express your wishes in law, and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care wholeheartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year, if not every day, we have to wager our salvation upon some prophecy based upon imperfect knowledge.

<sup>129</sup> See mostly Jessica Litman, *Readers' Copyright*, 58 JOURNAL OF THE COPYRIGHT SOCIETY OF THE USA 325 (2011). Readers are more frequently discussed today as part of a broader user community in the digital space: See most

publishers, copyright restricts the dissemination of speech to some extent, even if the restriction is less severe if it is regulated by market rules that are not imposed by governments or other sources of power.

Fast-forwarding a couple of centuries, copyright evolved into a body of rules that promoted the economic rights of certain parties while simultaneously moving away from its “original” purpose of encouraging learning. This is not to say that we must adhere to originalism, but it is necessary to rethink whether there are good reasons for maintaining the benchmark that the Statute of Anne expressly protected and that the Statute’s advocates, like John Milton and John Locke, also endorsed. In any case, we must first acknowledge the actual alienation from the original benchmark and assess the consequences that contemporary copyright laws have for books and their production, accessibility, and use. Another observation is that modern copyright laws do not celebrate libraries in the way that the Statute of Anne did. It is important to note here that as copyright law evolved it grew further and further from the previous market versus censorship debates. This article aims to revisit these debates through the lens of a different binary: market versus misinformation (*infra*, Part IV).

Mark Rose explains how modern analyses of copyright readily draw on the Statute of Anne but tend to neglect how its broader rationale was based on a different conception. He explores the nature of the transformation that copyright aimed to bring about and observes how economic factors were only the means to a non-monetary objective: the emergence of a public sphere.<sup>130</sup> Those who protested against the old censoring regime wanted to see the authors, rather than the monopolist printers, at the center.<sup>131</sup> As described above, a public sphere is essentially what Locke advocated for: a space where books can be available (cheaply) and where learning and scholarship is encouraged. By Locke and his peers, it was then understood that the interests worth protecting are not those of the printers but of the authors, which serve to advance learning and generate benefits associated with the dissemination of knowledge. To quote Rose’s analysis of Milton:

Milton was concerned with liberty and the advancement of knowledge; the company was concerned with propriety and the maintenance of order. As the controversialist Henry Parker put it in *The Humble Remonstrance of the Company of Stationers*, published in 1643 as part of the campaign for the reinstatement of licensing, the issue as the company saw it was *not merely the advancement of knowledge but “the advancement of wholesome knowledge.”*<sup>132</sup>

The advancement of knowledge and the advancement of “wholesome knowledge” are two different goals. Rose notes that while Milton was concerned with the advancement of knowledge as a result of a liberty afforded to authors, the Stationer’s Company “was concerned with propriety and the maintenance of order.”<sup>133</sup> I emphasize the difference because this analysis of Milton and Locke and, subsequently, the Statute of Anne reveals a particular benchmark against which we can

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recently, Niva Elkin-Koren, *COPYRIGHT IN A DIGITAL ECOSYSTEM: A USER RIGHTS APPROACH*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS*. CAMBRIDGE UNIVERSITY PRESS (Ruth L. Okediji ed., 2017).

<sup>130</sup> Rose, *supra* note 122. Rose cites more scholars who have invoked the Habermasian notion of a public sphere with respect to copyright.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*, p. 133 citing Stationers’ Company, *The humble remonstrance of the Company of Stationers to the High Court of Parliament, London 1643*, PRIMARY SOURCES ON COPYRIGHT (1450-1900) (last accessed Feb. 28, 2021), [http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record\\_uk\\_1643](http://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_uk_1643).

<sup>133</sup> *Id.*, at 133.

evaluate the introduction and evolution of copyright laws. To repeat the wording of the Statute, this benchmark was “the encouragement of learning.” The development of copyright laws, particularly those applied to books, has, in my judgment, alienated itself from this benchmark. This is a crucial observation when it comes to libraries, and their operation, within the copyright framework. The encouragement or advancement of learning is a normative goal. I contend that it begs for regulation that supports institutions dedicated to that goal and prioritizes their needs. If we are to sustain this normative benchmark, libraries should always enjoy privileged treatment, since they are traditionally the institutions dedicated to preserving and providing access to learning materials.

If we look at the rules that apply to libraries in contemporary copyright legislation, we notice a difference from the rhetoric and rationale expressed in the Statute of Anne. Originally granted with concrete *rights* over copies of books, libraries now only enjoy special treatment in the form of copyright *exceptions*. The Statute of Anne which was granting rights to certain libraries was, in a sense, the product of a renegotiation of the relationships among the following parties: the state, the printers/booksellers, the authors, and the reading public.<sup>134</sup> They all had their own interests in books even before the Statute was enacted; however, the prioritization of interests is substantially different under the Statute of Anne and the preceding Licensing Act. The previous regime was a product of a two-way bargain—between the state and the printers/booksellers.<sup>135</sup> With the new copyright law, the authors’ interests got explicit recognition together with those of the reading public. The role of the state had changed radically, moving from the forefront to the background. With the passing of the Statute, the state willingly positioned itself in a more passive role, where it supervised a free market for books and their collection and preservation within libraries. The reading public benefited from both the market and the non-market arrangements created by the new Statute: lower prices that resulted from the book market and a cultural record that resulted from the libraries’ keeping a copy of each book printed.

How did the approach of modern copyright law shift away from the centrality of libraries? Let’s begin with the fact that at the time the Statute of Anne was enacted, the listed libraries that benefited from the law were not publicly accessible. They were only accessible by certain elites. The right to establish public libraries was granted to municipal boroughs in the United Kingdom over a century later when the Public Libraries Act of 1850 was enacted. This Act was preceded by a number of legislative reforms, including the Poor Law Amendment Act of 1834, the so-called “New Poor Law.”<sup>136</sup> It is impossible to understand the reason why the legislative treatment of libraries changed at a time when libraries became more publicly accessible without linking this development to the social context: the division between the elites granted library access under the Statute of Anne in 1710 and the rest of society, the poor.<sup>137</sup> As mentioned elsewhere, in 1710,

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<sup>134</sup> RONAN DEAZLEY, *ON THE ORIGIN OF THE RIGHT TO COPY: CHARTING THE MOVEMENT OF COPYRIGHT LAW IN EIGHTEENTH CENTURY BRITAIN (1695-1775)* (2004).

<sup>135</sup> Rose, *supra* note 122, at 139.

<sup>136</sup> On the Poor Law Reform see the documents online available at Poor Law Reform, UK PARLIAMENT (last accessed Feb. 28, 2021), <https://www.parliament.uk/about/living-heritage/transformingsociety/livinglearning/19thcentury/overview/poorlaw/>.

<sup>137</sup> Alistair Black, *Skeleton in the cupboard: social class and the public library in Britain through 150 years*, 16 LIBRARY HISTORY 3, 3-12 (2000); Kathleen D.L.P McCook, *Poverty, democracy and public libraries*, LIBRARIES & DEMOCRACY: THE CORNERSTONES OF LIBERTY 28, 28-46 (2001). For more contemporary discussions focused on American public libraries see also: LESLIE E. HOLT & GLEN E. HOLT, *PUBLIC LIBRARY SERVICES FOR THE POOR: DOING ALL WE CAN* (2010); CHRISTINE PAWLEY, *READING PLACES: LITERACY, DEMOCRACY, AND THE PUBLIC LIBRARY IN COLD WAR AMERICA* (2010).

when the Statute of Anne passed, it explicitly mentioned nine libraries as the beneficiaries.<sup>138</sup> At the time, none of these libraries could be accessed by the poor. Only much later in history were public libraries thought of as a medium to remedy social exclusion.<sup>139</sup> It is worth noting that raising taxes for public libraries was controversial, and financial support for libraries predominantly came in the form of charity. Once the libraries benefiting from the law were no longer reserved for an exclusive social class but became open and public, the language in the law changed along with this shift: (public) libraries do not enjoy rights, but rather are granted some exceptions. Is it possible to argue that the change in the conception of what function libraries serve and, consequently, what kind of treatment they deserve under copyright law also caused a change in the purpose of copyright? Is the underlying rationale no longer the advancement of learning, as enshrined in the 1710 Statute, but rather (merely?) the advancement and maintenance of a market?

#### *D. Public Libraries and “the Needs of the Poor”*

To conclude the historical account of copyright legislation for libraries, we must also study the first piece of legislation that allowed for the establishment of public libraries accessible to all citizens, the Public Libraries Act of 1850. Some historians have examined the heated parliamentary debates that were part of the bill’s legislative history, documenting that its final text was a product of substantial compromise and concessions.<sup>140</sup> The studies, for example, of Stanley Max and W.J. Murison demonstrate that the proponents of the Public Libraries Act were strongly motivated by a desire to counter the effects of poverty. The reformative role of libraries was perhaps more important to them than the educational role.<sup>141</sup> In their eyes, the tranquilizing effects of books could bring order to the working class, particularly those in cities, seen as having restless tendencies. The appointed parliamentary committee, the Select Committee on Public Libraries, proposed the bill as a measure that would promote “the temperate and moral habits of the working classes.”<sup>142</sup>

Max emphasizes the effectiveness of the opposition to the bill, which was first advanced by William Ewart.<sup>143</sup> The conservatives who opposed the bill did not succeed in killing it but managed to narrow its scope significantly. As Max explains, the ultimate passage of the bill was groundbreaking not so much because of its scope—it was very limited—but because it was the first time that the necessity of public intervention for popularized access to knowledge was recognized. Prior to this, libraries were private, and the poor relied on private voluntary initiatives and charity to gain access to books and educational material. Opponents to the bill argued that establishing reading or lecture rooms for the poor “might give rise to an unhealthy agitation.”<sup>144</sup> As Max describes the debates, William Ewart, who introduced the bill, together with his supporters had to argue against a general reluctance to spend tax money to benefit the poor. The debates over

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<sup>138</sup> See *infra* B. *The Statute of Anne: “An Act for the Encouragement of Learning”*.

<sup>139</sup> See ED D'ANGELO, *BARBARIANS AT THE GATES OF THE PUBLIC LIBRARY: HOW POSTMODERN CONSUMER CAPITALISM THREATENS DEMOCRACY, CIVIL EDUCATION AND THE PUBLIC GOOD* (2006).

<sup>140</sup> Stanley M. Max, *Tory Reaction to the Public Libraries Bill, 1850*, 19 *THE JOURNAL OF LIBRARY HISTORY* (1974-1987) 504, 504-524 (1984) and W.J. MURISON, *THE PUBLIC LIBRARY: ITS ORIGINS, PURPOSE AND SIGNIFICANCE* (1988).

<sup>141</sup> *Ibid.*, Max, at 504.

<sup>142</sup> Great Britain House of Commons, *Report from the Select Committee on Public Libraries; together with the Proceedings of the Committee, Minutes of Evidence and Appendix*, HATHITRUST DIGITAL LIBRARY (1849), <https://catalog.hathitrust.org/Record/011254579>.

<sup>143</sup> Max, *supra* note 140, at 506 et. seq.

<sup>144</sup> *Id.*, at. 505.

the use of tax revenue to create public libraries also gave rise to more progressive arguments with respect to the effects of libraries. Against the background of an accepted and very explicit class division in seventeenth-century English society, Parliamentarians like John Bright argued that the “diffusion of intelligence” would not only bring order but also “open discussion, among all classes.”<sup>145</sup>

Overall, the bill that William Ewart was struggling to pass was already of very limited scope. It “would permit town councils to adopt the prospective act and levy a rate of no more than a half penny in the pound (that is, a ratio of 1:240) for library support.”<sup>146</sup> It did not even provide for the fund to purchase books; the libraries would have to hope for book donations. Therefore, while books were rightfully reserved by law for the advancement of learning for individuals with access to the royal library and certain university libraries, public libraries were not meant to enjoy a similar status. Books available in public libraries would, at best, have a tranquilizing effect on the agitated poor.

This historical discussion has served to highlight another paradox. The official rhetoric supported libraries as institutions dedicated to learning while at the same time discriminating against communities that belong to a certain “public” and therefore marginalizing their access to the institution. The historical debates, of course, reflect societies where social divisions were much more explicit. To this day, however, our copyright laws to some extent retain the paradox: while access to information is recognized as an important right of all citizens in democratic societies, access to material is not guaranteed.<sup>147</sup> Nominally, the copyright doctrine does not allow for information to be proprietized; it is only the expression that gets “locked” into property rules for a certain period of time. It is, however, difficult to completely separate access to information and access to material (expressions that are copyrightable). There are many instances when the application of intellectual property rules has arisen exactly where these lines blur.<sup>148</sup> In fact copyright, especially considering its protracted and at times unnecessary protection, contributes to keeping works from the public’s reach.<sup>149</sup> Therefore, when public libraries are not supported in providing access and copyrighted materials *to those who cannot afford market access*, it is a problem that ultimately affects freedom of information and the circulation of credible information and knowledge. Publicly accessible libraries have the potential to fully contribute to more equal access to knowledge. Policies and laws that do not support public libraries in this role are practically endorsing, or at least tacitly accepting, unequal access to knowledge for many disadvantaged groups in society – a reality that was perhaps tolerated and even supported by older societies, but not, at least in theory, by ours.

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<sup>145</sup> *Id.*, at. 512.

<sup>146</sup> *Id.*, at. 508.

<sup>147</sup> Besides copyright and its scope, there are different ways in which regulation tries to achieve freedom of information. Further forms of regulation that are relevant in this respect are subsidized prices for books and, also, public service broadcasting. The rationale behind these forms of regulation is complementary to that of sustaining publicly accessible libraries. The analysis of these forms of regulation is beyond the scope of this thesis – it remains, however, relevant to keep the bigger picture in mind.

<sup>148</sup> See Timothy J. Brennan, *Copyright, property, and the right to deny*, 68 CHI. KENT L. REV. 675 (1992) and Pamela Samuelson, *Information as property: Do Ruckelshaus and Carpenter signal a changing direction in intellectual property law*, 38 CATH. U. L. REV. 365 (1988).

<sup>149</sup> Mark Lemley, *Disappearing Content*, SSRN (2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3715133](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715133); See also the older piece from Kevin Outterson, *The vanishing public domain: antibiotic resistance, pharmaceutical innovation and intellectual property law* 67 U. PITT. L. REV. 67 (2005).

#### IV. LIBRARY SUPPORT AND BOOK COMMODIFICATION AS STRATEGIC WEAPONS IN THE FIGHT AGAINST MISINFORMATION

This part focuses on the importance of libraries as designated places that are lawfully permitted to distribute books outside of markets. The first section outlines some of the most important functions of libraries and explain the significance of library space as well as accessibility to a public space and public services. The next section proceeds with an analysis of the institution's positive externalities and unpacks what it means to maintain such public service within a society. Ultimately, I emphasize the role that libraries play in book de-commodification and conclude discussing how this links to the current need to fight disinformation both on- and offline.

##### A. Functional and Symbolic Roles of Libraries

In the context of a society currently struggling to fight historical biases and (online) misinformation,<sup>150</sup> providing libraries with the legal support needed to fulfill such mandates will enable them to more effectively safeguard and provide equal access to (at least relatively) credible information and knowledge, including in the digital environment.<sup>151</sup>

Libraries are usually praised for their vital role within a democratic society: they serve as an independent and public space for lifelong learning, irrespective of patrons' income and access to formal education.<sup>152</sup> Libraries are welcoming, study-friendly environments that provide users learning spaces and resources. They also provide professional help to navigate the resources and space not only for individual work but for collaborative endeavors. It is little wonder that libraries have been traditionally recognized spaces for scholarship, creation, and innovation.<sup>153</sup> Libraries hold collections that are curated, systematized, and span a historical continuum. When accumulating their collections, libraries prioritize usefulness and plurality over popularity and marketability. Finally, libraries, especially national ones, hold historical and rare collections that they preserve for generations, past and future, and thus carry out an archiving and gatekeeping function on behalf of knowledge and history.

The history of libraries can be told as a story about culture, ideas, and fantasy. According to historians, we inherited the idea of a library from the ancient Mediterranean and Near Eastern worlds.<sup>154</sup> Since ancient times, libraries have been built and maintained as institutions combining functions and symbols.<sup>155</sup> The functions of a library include the collection, organization, storage,

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<sup>150</sup> See Mutale Nkonde et al. *Disinformation Creep: ADOS and the Strategic Weaponization of Breaking News*, 1 THE HARVARD KENNEDY SCHOOL MISINFORMATION REVIEW 1 (2021). See also INNOCENT E. CHILUWA AND SERGEI A. SAMOILENKO. HANDBOOK OF RESEARCH ON DECEPTION, FAKE NEWS, AND MISINFORMATION ONLINE. INFORMATION SCIENCE REFERENCE/IGI GLOBAL (2019).

<sup>151</sup> We must also be aware of limitations to libraries' and other memory institutions' credibility and neutrality. Memory institutions are subject to historical biases just like the humans that build them and use them. Particularly on the geographical bias of the IA see Mike Thelwall and Liwen Vaughan, *A Fair History of the Web? Examining Country Balance in the Internet Archive*, 26.2 LIBRARY & INFORMATION SCIENCE RESEARCH 162 (2004). See also similarly Joseph Reagle and Lauren Rhue, *Gender Bias in Wikipedia and Britannica*, 5 INTERNATIONAL JOURNAL OF COMMUNICATION 21 (2011).ion

<sup>152</sup> JOHN PALFREY, BIBLIOTECH: WHY LIBRARIES MATTER MORE THAN EVER IN THE AGE OF GOOGLE 58 (2015).

<sup>153</sup> Andrew Pettegree, *The Renaissance Library and the Challenge of Print*, in THE MEANING OF THE LIBRARY: A CULTURAL HISTORY (Alice Crawford ed., 2015).

<sup>154</sup> ALICE CRAWFORD, THE MEANING OF THE LIBRARY: A CULTURAL HISTORY (2015).

<sup>155</sup> John Wilkin, *Meanings of the library today*, in THE MEANING OF THE LIBRARY: A CULTURAL HISTORY (Alice Crawford ed., 2015).

and preservation of documented knowledge in the form of books, journals, and other similar media as well as the provision of access, restricted or more open, to these works. Traditionally, the works that libraries have held have been literary works in the broadest sense of the term, which in a historical context included scrolled papyrus, and then shelved books, and, later, media content.

The core functions of libraries have evolved over time. In the words of John Wilkin, librarian and previous executive director of the HathiTrust consortium, libraries have always preserved the cultural record as well as providing access and ensuring use of that record.<sup>156</sup> What this “preserving a cultural record” means precisely has evolved as the collections and spaces that libraries occupy have evolved. Wilkin distinguishes four pillars of activities that are clearly library functions according to our understanding of what constitutes a modern “brick” library. These pillars are: (i) curation: the selection, preservation, maintenance, collection, and archiving of, and provision of access to, materials pertaining to the cultural record, which is mostly books and manuscripts, but also images and audiovisual items; (ii) engagement with research and learning; (iii) publishing; and (iv) creation and management of spaces for users and collections.<sup>157</sup> Not all libraries are engaging with all four pillars of activity with the same intensity; the categories, however, more or less cover the principal functions of most libraries.

Because the library collects and preserves our cultural record, itself a sum of valuable resources, by extension the library is in its own right valuable as a resource and is greater than the sum of its parts. The library’s wealth is its collections. They constitute the main occupation of librarians and attract patrons, thus making the libraries useful. Depending on the library, the collection can be broad or specialized in a specific field or science. Library collections have become more complex than in the past, going beyond print works and manuscripts to images, audiovisual materials, and e-resources such as electronic journals and periodicals. At the same time, the data and metadata that contemporary libraries have to deal with are massive. Thus, the nature of the curating function has changed substantially.<sup>158</sup>

While performing their functions, libraries have maintained a significant symbolic role within societies, which continues to be celebrated in often ambitious words: we attribute to libraries mandates amounting to the “preservation of the memory of mankind” or the storing of the “sum of human knowledge.” Thus, they transform to almost mythical places where one can engage with the pursuit of knowledge and find the *truth*.<sup>159</sup> Libraries have also been associated with legends, which tend to tell stories about their destruction. All myths and stories associated with the world’s greatest libraries suggest that the creation of libraries has been understood as a self-evident good and their ruin as a real disaster. The story of the library of Alexandria, well known for being burned down by a fire started by Julius Caesar in 48 BC, is the most cited example.

It is safe to say that the existence and functioning of libraries has historically been widely appreciated as something positive for society. As institutions, libraries still enjoy respect and appreciation for their symbolic and actual functions within the communities they serve. Of course,

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<sup>156</sup> *Id.*, at 236. Notably, Wilkin adds that libraries are increasingly involved also in the creation of the cultural record.

<sup>157</sup> *Id.*, at 237.

<sup>158</sup> See also the discussions about libraries and big data and concerns about privacy. Since November 2016 the New York Public Library, for example, published its new privacy policy regarding the data it is gathering: *About NYPL’s Privacy Policy*, NEW YORK PUBLIC LIBRARY (Nov. 30, 2016), <https://www.nypl.org/help/about-nypl/legal-notices/privacy-policy/intro>.

<sup>159</sup> If we link this to the Socratic idea that knowledge has a moral value, we can see how the pursuit of knowledge and truth has been established as a noble cause already since ancient times.

library skeptics have made their voice heard.<sup>160</sup> Umberto Eco famously expressed his critical views on libraries on several occasions, including in a speech at the Bibliotheca Comunale di Milano in 1981.<sup>161</sup> Eco's particular relationship with libraries has been seen as critical, especially as observed in the *Name of the Rose*.<sup>162</sup> We will discuss Eco again later, when we analyze what is meant by his criticism of "bad libraries" (la biblioteca cattiva) for, *inter alia*, "hiding material."<sup>163</sup> Indeed, starting as far back as Socrates, many philosophers are known for having particular views on documenting knowledge, on mainstream ambitions to "gather the sum of human knowledge," and perhaps also on the hypocrisy of intellectual elitism when it comes to fancy collections and fancy buildings, particularly when they are not publicly available .

### B. Libraries' Role in Book De-commodification

Founding scholars of law and economics have explained how the production and distribution of goods can be implemented through either the market or command structures. While copyright helps the production and distribution of books and other intellectual goods via markets, there are exceptions to copyright that allow institutions, like libraries, to operate in a space that is outside both the market and the command structure. The book is apparently a good that is not successfully optimized either by pure market or by pure command structures making it, economically speaking, hard to handle.<sup>164</sup> Furthermore, libraries have distributive effects that regulation has, to a certain extent, aimed to support. These distributive effects are considered valuable externalities in economic terms, as will be outlined below.

Given their functional and symbolic roles, libraries are important to a broader part of society than those who actually use them. There are a great deal of positive externalities associated with the institutional role of the library; its value goes beyond the value of the sum of its parts as well as the benefits it generates to its immediate users. We understand this value as including the positive attributes of literacy, scientific progress, and the *advancement of knowledge* in general. Without preservation of a cultural record and without access to the material preserved, new production of knowledge could not easily rely on and be built upon knowledge already produced.

To better understand the value that societies assign to libraries, we need to think further about why the maintenance of libraries as institutions is useful. Does it serve just a few people, perhaps only library users that benefit each time from working in library spaces or checking out a book, or does it serve a general purpose? The social value that library users derive from libraries can vary, as can their uses. Having addressed some of the uses and the social role of libraries in the lives of patrons, let us now discuss the issue of positive externalities.

Libraries have an institutional role that differentiates them from other public spaces, such as squares or parks. In economic terms, the institutional dimension of a library is perhaps closer to

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<sup>160</sup> As for example Umberto Eco (see in particular *The Name of the Rose*) or Michel Foucault (*The Archeology of Knowledge*). See also Edith M. Hall, *Adventures in ancient Greek and Roman Libraries*, in *THE MEANING OF THE LIBRARY: A CULTURAL HISTORY* (Alice Crawford ed., 2015), at 23: "Libraries might have killed innovation and experiment in Greek poetry but offered a fertile ground for other genres such as biographies and sciences such as geography and astronomy to advance."

<sup>161</sup> Michael F. Winter, *Umberto Eco on Libraries: A Discussion of "De Bibliotheca"*, 64 *THE LIBRARY QUARTERLY* 117, 117-129 (1994).

<sup>162</sup> Jeffrey Garrett, *Missing Eco: On Reading "The Name of the Rose" as Library Criticism*, 61 *THE LIBRARY QUARTERLY* 373 (1991).

<sup>163</sup> Winter, *supra* note 161.

<sup>164</sup> GUIDO CALABRESI, *THE FUTURE OF LAW AND ECONOMICS, ESSAYS IN REFORM AND RECOLLECTION* 137 (2016).

that of a public utility. Economists define public utilities as organizations that maintain the infrastructure<sup>165</sup> for a public service.<sup>166</sup> First, as we saw already, libraries offer a service to the public: preservation of knowledge materials and access to intellectual resources. Second, they offer an infrastructure for the service, consisting of publicly accessible spaces, resources, and catalogues to navigate the resources, as well as professionals who provide the service, both working with the materials—acquiring, organizing and curating collections—and collaborating with patrons. Public utilities are generally lifeline services offered at low rates or, most often, for free, and have wide availability and a redistributive character. This is traditionally reflected in their pricing policies, which ensure that the services are available and affordable to different members of society.<sup>167</sup> Their broad availability is based on the principle of universal service.

Connected to the abovementioned positive externalities that libraries generate is their role in the de-commodification of books and, thus, the generation of equalizing effects: the rich can access books at their convenience but publicly accessible libraries also allow the poor to have access. As institutions that provide public access to knowledge on the basis of objective and egalitarian criteria, libraries ultimately enable social mobility by encouraging lifelong learning. They belong to a broader “education and culture” realm that intersects with but for good reason is distinct from their related market realms: the book market, the publishing market, and the market for education.

To better understand libraries’ importance as reserved spaces operating outside the market, it is perhaps helpful to consider what the societal reaction would be if they were eliminated. What would the elimination of libraries or the full commodification of their available services imply? The biggest moral cost of such elimination would be the loss of the redistributive effect that libraries have. Given that access to knowledge and education has historically been highly unequal, the existence of libraries, especially public libraries, has been compensating at least on a moral level for such inequality. This moral compensation is important in democratic societies that claim to value equal opportunities and social mobility. A second and distinct loss would be that of cultural preservation, a function the book market does not offer. The loss of all the services that libraries provide and are unique to them (meaning that they cannot be easily replaced by other institutions in the book market or in culture and education) would be additional costs.

The moral costs described above are perhaps due to the particular position that books have as goods, which brings them close to a category that Guido Calabresi refers to as “merit goods.” In his recent book *The Future of Law and Economics*, Calabresi defines merit goods as goods whose commodification is costly or whose commodification is possible but highly undesirable to a large section of society. In both cases the moral costs of placing such goods on markets are high.<sup>168</sup> In other words, there are goods, for example life, whose “too obvious pricing is painful to

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<sup>165</sup> The term infrastructure generally refers to structures or facilities, usually technical, essential for the production and communication of goods, services, or whatever society considers as valuable. For our purposes here I use the term infrastructure, quite broadly defined, as a set of structures that facilitate communication of value - be it physical and non-physical resources, information resources, and even human resources. More specifically, I follow Brett Frischmann’s definition of infrastructure as a particular set of resources defined functionally in terms of the manner in which they create value: BRETT FRISCHMANN, *INFRASTRUCTURE – THE SOCIAL VALUE OF SHARED RESOURCES* (2012).

<sup>166</sup> JOHN BLACK, NIGAR HASHIMZADE, AND GARETH MYLES, *A DICTIONARY OF ECONOMICS*. (4 ed. 2017); Richard Geddes, *Public Utilities*, in *ENCYCLOPEDIA OF LAW AND ECONOMICS 1161*, 1165-67 (Boudewijn Bouckaert & Gerrit De Gees eds., 2000).

<sup>167</sup> STEPHEN BROWN AND DAVID SIBLEY, *THE THEORY OF PUBLIC UTILITY PRICING* (1986).

<sup>168</sup> Calabresi, *supra* note 164. Calabresi thinks that these moral costs, which are external and often indirect, are not properly captured by Coasean transactions as traditional externalities (at 28).

many in our society.”<sup>169</sup> The important claim made by Calabresi is that not only commodification but also commandification of these goods is problematic. Putting a price on life is difficult, but equally difficult is the idea that a command/structure authority, like the state, would make decisions balancing the value of people’s lives. Beyond life, we feel similar qualms about goods like bodily organs, military service, and to a certain degree education, health care, and even environmental protection.<sup>170</sup> In all such cases, as Calabresi clarifies, pure market or pure demand solutions are costly. In order to get around the obvious costs, mixed market/command methods are employed.<sup>171</sup> For example, if we look at tort law and its rules on accidents, we see that the general rules avoid putting a price on lives and safety, but by choosing certain compensation schemes they ultimately engage in indirect pricing or valuing.<sup>172</sup>

The pricing of merit goods is then connected to inequality. Pricing can result in moral costs because wealth distribution is highly unequal, meaning that some can afford the prices of some goods while many others cannot. Calabresi presumes that the general aversion to the commodification of certain goods would be far less present in a world where wealth was distributed equally.<sup>173</sup> One way in which society has dealt with this problem, he explains, is by modifying command structures, market structures, or both.<sup>174</sup> Calabresi makes his point with a number of examples ranging from the financing of the military and the allocation of goods during wartime to the markets for body parts or the limits on political contributions during elections. He employs these examples in order to demonstrate how certain goods are “special” or societies treat them as such, and he invites more refined thinking on how to deal with such goods, highlighting:

... what we can do—and what we, in fact, already do—to remove some goods from the prevailing wealth distribution or to attenuate the influence of this distribution on the allocation of such goods. The analysis of how best to do that, as to what goods in which societies, is exactly the work that I hope sophisticated lawyer-economists will undertake.<sup>175</sup>

This is where education comes into play. Basic education is generally thought of as a merit good that governments regulate by command: the first years of schooling are compulsory in most

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<sup>169</sup> *Id.*, at 30.

<sup>170</sup> *Id.*, at 43.

<sup>171</sup> *Id.*, at 35-40.

<sup>172</sup> *Id.*, at 37. See also GUIDO CALABRESI & PHILIP BABBITT, TRAGIC CHOICES: THE CONFLICTS SOCIETY CONFRONTS IN THE ALLOCATION OF TRAGICALLY SCARCE RESOURCES (1978).

<sup>173</sup> *Id.*, at 45. He also gives what he calls a more “utilitarian” explanation: “such sales may perhaps be prohibited because the very presence of such sales tells the rest of us something about how unequal our wealth distribution is, something that we are, literally, pained to hear.” The examples in this part of the text are the fact that people are not permitted to sell themselves into slavery or forego a minimum level of education and health.

<sup>174</sup> *Id.* Calabresi gives the example of central decisions on who is to be drafted for war and the possibility of exceptions that allow for some to buy their way out of the draft (see at 50). He explains how variables matter: the level of local, regional or national command decision reflects not only the wealth distribution of a community but also the distribution of power. The variables will determine which commands will have the lowest external moral costs and make the decisions acceptable. The three categories also analyzed in his work with Babbitt, *Tragic Choices*, are: (a) system akin to rationing as used in World War II (the system of food allocation in the US during the war, color tagging certain goods in the market); (b) tax or subsidy structured, (relatively) wealth distribution-neutral market; and (c) a market in which the medium of exchange is not money but some other widely held good, such as time.

<sup>175</sup> *Id.*, at 70.

societies.<sup>176</sup> There is something that societies value with regard to the production and distribution of knowledge and the process of education that leads to it being treated differently than the production and distribution of, say, borrowing from Calabresi, shoes and bananas. This is because “there are sets of goods and bads whose optimization through pure market and pure command is counterproductive, impossible even.”<sup>177</sup> These “goods and bads” are usually both a means and an end. It is an end in itself for societies to have a standard of education. At the same time, it is a means for educated citizens to be more productive and less prone to criminal behavior, and so forth. This dual nature is key to understanding the value that societies place on merit goods such as education.

It is important to note that the line between market and command structures is not clear-cut. Calabresi in particular stresses “the existence and utility of the interplay of nontraditional or semi-markets and of nontraditional or decentralized command structures to the proper allocation of goods and bads.”<sup>178</sup> Overall, he believes that we need to have a more nuanced understanding of the relationship between command and market structures within the law. This is arguably the strongest claim in *The Future of Law and Economics*. Calabresi encourages legal scholars to engage in law and economics analysis in the way that institutional economists have been doing for a long time.<sup>179</sup> Subsequently, he urges legal scholars to study the command/market interplay and take it into account when assessing the desirability of (existing) legal structures.<sup>180</sup>

The preceding discussion set the framework for assessing the laws applicable to books when they are in the market and when they are in libraries. Because they are distributed both within and outside of market structures, the case of books is difficult, like that of several other goods that preoccupied foundational law and economics scholarship, from the allocation of goods during wartime to the allocation of radio spectrum. Allowing the coexistence of book markets and libraries, the legal system encourages these goods to be treated as market goods and merit goods at the same time. The library’s role in this equation is to guarantee a certain degree of de-commodification that is considered essential. Again, flipping the question around, the moral cost associated with the elimination of libraries and their privilege of operating outside of markets is large exactly because access to knowledge, and also to education and essential educational material, is still generally unequal. Thus, libraries compensate for this inequality by providing access to knowledge to a broader public that might not have access to the services that come with the library infrastructure as a package or, particularly, to knowledge materials in the broader market—because of age, income, social background, or any other reason. This explanation also fits well with a general appreciation of the importance of a knowledgeable society and goes back to our normative benchmark for evaluating the rationale behind the copyright law that are also applicable to libraries: the encouragement of learning.

## CONCLUSION

Recent case-law confirms that electronic access to library material remains controversial. Nevertheless, current circumstances have revealed a persistent need to broaden such electronic

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<sup>176</sup> *Id.* at 93. In this case, according to Calabresi, the command is much more like persuasion, meaning that certain behavior is not strictly commanded but promoted.

<sup>177</sup> *Id.*, at 102 and 115.

<sup>178</sup> *Id.*, at 22.

<sup>179</sup> *Id.*, at 17-21.

<sup>180</sup> *Id.* at 23.

access. These circumstances include emergency requests to fully adapt library services to our digital context, and a constant necessity to find accurate information both on- and offline.<sup>181</sup>

Over the past two decades, courts have had the chance to decide what kind of electronic access is permissible under copyright law and what is not. So far, they have done so at times pushing the boundaries of current copyright laws and perhaps restoring copyright's original purpose, which according to the first known copyright Statute, the Statute of Anne, was to encourage learning. US courts will soon have another chance to define electronic access in *Hachette v. Internet Archive*. This case presents two important, but separate questions related to the electronic access to library works; first, it raises questions around the legal practice of digital lending, and second, it asks whether emergency use of copyrighted material might be fair use.

Relating to exceptions and limitations benefiting libraries, and in conjunction with the recent case-law, the outdated provisions in Section 108 of the US Copyright Act can be seen as good reasons to rethink and perhaps reform the current copyright framework as applicable to libraries. This article argued that libraries' public service role is well worth preserving in our digital environments. The access that libraries guarantee traditionally is not just to knowledge, but specifically to organized knowledge—an infrastructure of systematic collection of books. One needs to distinguish between books as merit goods in general (they can enjoy special treatment when they are distributed in markets, for example with subsidized pricing) and *books in libraries*, as part of library collections. The latter are special merit goods in their own right: they have the added value of being part of a systematic library collection. This article emphasized how library books are meant to be available outside the market—not in a standalone capacity, but as part of a package together with other books placed around them. Fulfilling their traditional public service roles, and free from market constraints, digital libraries can further systematize knowledge in a relatively neutral manner. This is, ultimately, how libraries and their books can further assist us in battling online misinformation and in our endless quest for trusted sources and for knowledge.

Finally, it is important to remember that our copyright laws, including our decisions on how to apply or reform these laws, are now disproportionately affecting digital native generations who seem to be, by default, opting to use only digital access to any type of information or knowledge. Thus, harder (for the market) policy choices and subsequent legislative reforms might become a necessary precondition to any meaningful access to knowledge, not only for libraries to remain socially valuable but also for future generations to keep having equal access—or opportunities to access—a plurality of original sources and, hopefully, truths.

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<sup>181</sup> Nkonde et al., and Chilwa et al, *supra* note 150.