

# 23-1260-CV

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## United States Court of Appeals *for the* Second Circuit

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HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS L.L.C.,  
JOHN WILEY & SONS, INC., PENGUIN RANDOM HOUSE LLC,

*Plaintiffs-Appellees,*

– v. –

INTERNET ARCHIVE,

*Defendant-Appellant,*

DOES 1-5, inclusive,

*Defendants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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### **BRIEF OF *AMICI CURIAE* NINE LIBRARY ORGANIZATIONS AND 218 LIBRARIANS IN SUPPORT OF DEFENDANT-APPELLANT**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici curiae* certifies that the nine *amici* organizations on this brief are non-profits. None has a parent corporation, and no publicly held corporation holds 10% or more of any stock in these *amici curiae*.

December 22, 2023

Respectfully submitted,

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### **INTERESTS OF *AMICI CURIAE*<sup>1</sup>**

*Amici* are the following nine organizations and 218 librarians, archivists, directors, deans, professors, and library staff from across the U.S. who bring their combined expertise and perspective on the library lending issues raised by this case (individuals are listed in the Addendum). As leaders and experts in the field, *amici* have a significant and substantial interest in assisting the Court’s consideration of this case.

eBook Study Group is a non-profit grassroots organization dedicated to working with libraries to ensure equitable access to information. Our coalition includes a diverse array of individuals, libraries, library consortia, and non-profit organizations that are committed to supporting the ability for libraries to continue to loan their collections to patrons in the digital era.

Library Futures Project (“LFP”), part of New York University’s Engelberg Center on Innovation Law and Policy, is one of the leading digital library policy and advocacy organizations, uncovering and confronting the fundamental policy issues that threaten libraries in the digital age.

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<sup>1</sup> All parties consented to the filing of this brief. No party’s counsel authored this brief in whole or in part, and no party or its counsel contributed money that was intended to fund preparing or submitting this brief. Nor did any other person contribute money that was intended to fund preparing or submitting this brief.

The EveryLibrary Institute (“ELI”) is a public policy and tax policy research and training organization focusing on issues affecting the future of public, academic, and school libraries and the profession of librarianship in the United States and abroad.

ReadersFirst is a non-profit organization of nearly 300 libraries representing 200 million readers dedicated to ensuring access to free and easy-to-use ebook content.

The Scholarly Publishing and Academic Resources Coalition (“SPARC”) is a non-profit advocacy organization that supports systems for research and education that are open by default and equitable by design. Its members include about 250 libraries and academic organizations across North America.

The Association of Southeastern Research Libraries (“ASERL”) is a non-profit library consortium serving 38 research libraries in 11 southeastern U.S. states. Founded in 1956, it is based at Emory University Libraries. ASERL is a leader in research library cooperation, providing important programs and services to support member libraries, the scholarly process, and the library profession.

The Boston Library Consortium (“BLC”) is a non-profit organization that empowers a coalition of libraries in the northeastern United States to share knowledge, infrastructure, and resources at scale. BLC’s diverse membership



network includes public and private universities, liberal arts colleges, special libraries, a state library, and a large public library.

The Partnership for Academic Library Collaboration & Innovation (“PALCI”) Board of Directors is the Board of the nonprofit 501(c)(3) membership organization that originated in 1996 and was incorporated in 1998 as the Pennsylvania Academic Library Consortium, Inc. Today, PALCI’s membership has grown to include more than 75 academic and research libraries in Pennsylvania and contiguous states. PALCI’s mission is to enable cost-effective and sustainable access to information resources and services. PALCI is known for its highly-regarded EZBorrow consortial interlibrary loan (ILL) service and its strategic content licensing programs. PALCI serves over 800,000 students, faculty, and staff through its member organizations, focusing on collaborative collections, resource sharing services, and innovative technology projects and approaches to library services.

Urban Librarians Unite (“ULU”) is a professional organization dedicated to supporting library workers in large urban centers with a special emphasis on worker rights, working conditions, and advocacy.

Individual *amici*, listed in the Addendum, are librarians, archivists, directors, deans, professors, and library staff from across the U.S., including individuals from public libraries, academic libraries, library consortia, archives, special collections,

law libraries, state libraries, as well as other unique libraries and archives, who have a professional interest in the ability of libraries to lend their digital collections.

Based on *amici*'s broad knowledge and expertise in the library world, *amici* are able to provide information that is important to the Court's consideration of how this litigation will affect the ability of libraries to continue to provide open, non-discriminatory access to books and other materials for their readers.

The *amici* have a unique perspective on the issues presented in the case, especially since they have: (1) knowledge of how a modern digital library loaning system works, (2) insight into the use and adoption of digital library loaning, and (3) researched, developed, and published papers and policies advocating for continuing the library's mission in the modern digital era.

### **SUMMARY OF ARGUMENT**

Controlled Digital Lending ("CDL") is a library practice that allows patrons to borrow digitized versions of physical books that are already owned by the library. It has strong legal foundations grounded in copyright law and fair use. CDL consists of making a scanned copy of a book the library already owns and lending it out on a strict 1:1 basis utilizing rights management software. There are hundreds of institutions and companies around the world that utilize CDL, including libraries, software companies (such as ExLibris), and consortia.

CDL is based in copyright law and respects the rights of copyright holders by acquiring the works legally, while also broadening access to the books that library systems purchase to build their collections. CDL is a well-established practice in the library community. It is a programmatic tool that represents a reasonable, productive, and viable pathway for libraries to focus on their traditional and well-established role in providing access to their acquired collections.

The district court’s finding that books loaned via CDL would replace the market for commercially licensed ebooks was flawed. Books loaned via CDL have distinct features and purposes and are not a substitute for commercially licensed ebooks.

The district court erred in its finding that the Internet Archive’s Open Libraries program is a “commercial activity” for purposes of fair use. Instead, a library is a non-profit organization that provides access to knowledge and cultural heritage, which is the distinctly non-commercial mission of all libraries.

## **ARGUMENT**

### **I. CDL and its history are based in copyright law and CDL respects the rights of copyright holders by facilitating the lending of legally acquired books.**

CDL enhances a library’s ability to share works with its patrons and is firmly grounded in copyright law. This aspect of the library mission has been understood for centuries—from common law, through the current Copyright Act,

and within the crucial copyright statutory exceptions. The library mission relies equally on the ability to acquire creative works, thereby serving the economic purpose of copyright, and on the ability to distribute those works to the public “[t]o promote the Progress of Science and useful Arts.” U.S. Const. art. I, § 8, cl. 8. In this way, library loaning programs are a core part of copyright law. Library practices reflect a commitment to both the economic and access goals of copyright: purchasing books from publishers, vendors, and authors; adding them to collections; and establishing loaning programs to provide open, non-discriminatory access to the copyrighted content that is legally purchased or acquired, and preserving that work for future generations.

In CDL, the purchased physical book is sequestered from the public as the digital surrogate is loaned to one patron at a time, keeping a 1:1 ratio of owned to loaned materials. The balance described above replicates the carefully protected activity encapsulated in one of the core functions of the library mission: loaning legally acquired books.

The district court inaccurately states that CDL was “invented in 2018 by a group of librarians.” *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-CV-4160 (JGK), 2023 WL 2623787, at \*2 (S.D.N.Y. Mar. 24, 2023). In fact, the idea for shared digital collecting was first explored in the pioneering article, “Building a Collaborative Digital Collection: A Necessary Evolution in Libraries,” by Michelle

Wu, Professor of Law and former Law Library Director at Georgetown University School of Law.<sup>2</sup> Wu developed the concept initially in 2002 to protect her library’s print collection from natural disaster—an imperative she faced in rebuilding a library destroyed by flooding. In 2010, the Internet Archive (“IA”) partnered with the Boston Public Library and other libraries to begin lending out digitized versions of physical library books to one reader at a time—an early implementation of the practice that would later be called Controlled Digital Lending. Geoffrey A. Fowler, *Libraries Have a Novel Idea*, Wall Street Journal (June 29, 2010).<sup>3</sup> During the first decade that libraries employed CDL practices (initially known as “format shifting” or “digitized lend”), these practices were largely uncontroversial because the collective consensus was that the copyright analysis was a logical outgrowth of fair use and technology available.

The legal underpinnings of the CDL method were then refined, named, and detailed in “A White Paper on Controlled Digital Lending of Library Books,” by leading copyright attorneys and scholars, Kyle K. Courtney and David R. Hansen in 2018.<sup>4</sup> The White Paper was written in support of the “Statement on the Controlled Digital Lending of Books,” which was not written by a “group of librarians,” but rather by numerous nationally recognized lawyers, legal scholars,

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<sup>2</sup> 103 Law Libr. J. 527-551 (2011), available at <https://perma.cc/3TV3-9SJR>.

<sup>3</sup> Available at <https://perma.cc/6EA5-8ECG>.

<sup>4</sup> Available at <https://perma.cc/4QME-JUER>.

copyright experts, and professors.<sup>5</sup> In 2020—18 years after the concept of CDL was established and 10 years after libraries first started utilizing it—the Publishers sued the non-profit library Internet Archive during a global pandemic that closed the doors of the vast majority of physical libraries in the United States.

## **II. CDL is a well-established practice in the library community.**

CDL has become a critical part of library practice in the United States because it provides a reasonable way to offer digital access to libraries' legally acquired collections. Over 100 libraries across the United States rely on a CDL program to distribute their collections, particularly for out-of-print works, reserves, or for works that are less frequently circulated.

CDL library programs have also been enhanced by funding from local, state, and federal organizations. In 2023, the Institute for Museum and Library Services, the independent federal agency that provides library grants, museum grants, policy development, and research, awarded to the Boston Library Consortium (“BLC”) a \$249,221 National Leadership Grant for Libraries to support the BLC's

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<sup>5</sup> Some of these experts include, but are not limited to: Mary Minow (intellectual property attorney, library law expert, and Presidential Appointee to the National Museum and Library Services Board); Jason Schultz (Professor of Clinical Law, Director of New York University's Technology Law & Policy Clinic, and Co-Director of the Engelberg Center on Innovation Law & Policy and former Senior Advisor at the at the White House Office of Science and Technology Policy), and Michelle Wu (Professor of Law and Law Library Director at Georgetown University Law Center, Emeritus).

“Controlled Digital Lending for Libraries and Library Consortia” project.<sup>6</sup> BLC has also received funding from the Davis Educational Foundation, which awarded a two-year \$215,000 grant for BLC to accelerate the implementation of CDL. Both these federal and private grants support the CDL plans described in BLC’s groundbreaking CDL report, “Consortial CDL: Implementing Controlled Digital Lending as a Mechanism for Interlibrary Loan.”<sup>7</sup>

Since the COVID-19 pandemic, dozens of libraries have developed in-house CDL systems to increase access to textbooks, reserves, and research materials. These include: NYU Shanghai Library’s CDL system, documented in Qinghua Xu et al., *Implementing Controlled Digital Lending with Google Drive and Apps Script: A Case Study at the NYU Shanghai Library*, 6 *International Journal of Librarianship* 37-54 (2021);<sup>8</sup> Caltech’s DIBS (“Digital Borrowing System”);<sup>9</sup> University of Florida Libraries’ Textbook-focused CDL program;<sup>10</sup> and Miami University in Ohio’s LOLA (“Limited Online Library Access”).<sup>11</sup> Notably, HathiTrust, a consortium of university libraries, employed a digital loaning solution for its member libraries, called the Emergency Temporary Access Service

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<sup>6</sup> Available at <https://perma.cc/EWK3-R7BV>.

<sup>7</sup> Available at <https://perma.cc/K9TY-H6H4>.

<sup>8</sup> Available at <https://perma.cc/RHM7-NDGK>.

<sup>9</sup> Available at <https://perma.cc/XY7Z-7MTE>.

<sup>10</sup> Available at <https://perma.cc/ZRU9-4EAK>.

<sup>11</sup> Available at <https://perma.cc/D9L8-AAKA>.

(“ETAS”),<sup>12</sup> that was hailed as a successful solution to the access-related problems created by pandemic closures.

Libraries’ expanded use of CDL was followed by a rapid formation of new library organizations dedicated to supporting communities to engage with CDL, such as: the Controlled Digital Lending Implementers (“CDLI”);<sup>13</sup> Consortial Approaches to Controlled Digital Lending<sup>14</sup> and the CDL Co-op.<sup>15</sup> These organizations have run monthly seminars, maintained active listservs, published papers, and generally provided a supportive network for the community interested in CDL.

Vendors, software developers, and standards organizations have also framed controlled digital lending as the new baseline for digitized access, and have since been writing grants, developing software, and streamlining systems for CDL integration into library work. For example, the Ex Libris Group, a division of Clarivate (a for-profit, publicly traded international corporation) has begun development of a software system to integrate CDL into their customers’ libraries. See Kun Lin, *Controlled Digital Lending With Existing Tools In The Toolbox: Alma Digital* (2018).<sup>16</sup>

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<sup>12</sup> Available at <https://perma.cc/N28E-NDUZ>.

<sup>13</sup> Available at <https://perma.cc/7HXC-YC5K>.

<sup>14</sup> Available at <https://perma.cc/46PK-D3HF>.

<sup>15</sup> Available at <https://perma.cc/5FDK-N4UN>.

<sup>16</sup> Available at <https://perma.cc/8PLG-U4VK>.



The National Information Standards Organization (“NISO”), a nonprofit membership organization that identifies, develops, maintains, and publishes technical standards, has nearly completed the development of a consensus framework for technical standards to build and implement CDL in libraries. The Andrew W. Mellon Foundation awarded NISO a grant of \$125,000 in 2021 to move this CDL framework forward. *NISO Awarded Mellon Funding for Controlled Digital Lending Project*, NISO (last visited July 11, 2022).<sup>17</sup> This working group is composed of practitioners from a number of leading institutions including Columbia University, University of California, Yale University, Lehigh University as well as vendors and publishers such as EBSCO, Ex Libris, and OCLC.<sup>18</sup>

In January 2023, the University of California libraries launched a landmark research project—Project LEND (“Library Expansion of Networked Delivery”)—to investigate the potential for expanded lawful, nonconsumptive use of digitized books held by academic and research libraries. The project seeks to analyze all aspects of a digital access program and is funded by the Mellon Foundation. *Project LEND*, UC Libraries (last visited Nov. 16, 2023).<sup>19</sup>

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<sup>17</sup> Available at <https://perma.cc/L3YX-PYH8>.

<sup>18</sup> Available at <https://perma.cc/5EZ5-GJFH>.

<sup>19</sup> Available at <https://perma.cc/L7Z4-29BQ>.

### **III. The licensed digital lending market prevents libraries from fulfilling their mission of preservation and providing equitable access to information.**

While the district court found that “there is a thriving ebook licensing market for libraries,” *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-CV-4160 at \*2, most librarians and consumers would say otherwise. It is estimated that Amazon controls more than 85 percent of the ebook market, and a single vendor (OverDrive, Inc.) provides ebooks to over 95 percent of libraries around the country. OverDrive is owned by private equity firm KKR. *KKR Completes Acquisition of OverDrive*, OverDrive Blog (June 9, 2020).<sup>20</sup>

Negotiation for ebook access is virtually nonexistent for libraries. With digital content, publishers control not only the production but also the distribution of materials. Within this power structure, publishers have routinely denied libraries access to content, which is highly uncommon in the analog world. Often, ebook licenses offered to libraries come with many restrictions on use, or worse, are unavailable to libraries at any price. David Moore, *Publishing Giants Are Fighting Libraries on E-Books*, Sludge (Mar. 17, 2022).<sup>21</sup> When they are available, ebooks can cost a library three to 10 times the consumer prices for the same ebook. Jenny Rothschild, *Hold On, eBooks Cost How Much? The Inconvenient Truth About*

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<sup>20</sup> Available at <https://perma.cc/4YWU-LQ8Q>.

<sup>21</sup> Available at <https://perma.cc/3BFJ-6W69>. See also Shawnda Hines, *ALA turns to Congress as Macmillan ignores public call to reverse library eBook embargo*, ALA News (Nov. 1, 2019), <https://perma.cc/G4YL-WG6R>.

*Library eCollections*, Sm@rt B\*t(c)hes Trashy Books (Sept. 6, 2020).<sup>22</sup> In fact, the Publishers charge libraries between a 44 percent (HarperCollins) and a 298 percent (Hachette) markup on licenses for ebooks, as compared with physical books. *Publisher Price Watch*, ReadersFirst (last visited Dec. 18, 2023).<sup>23</sup>

Virtually all libraries hold physical books in their collections that are as old as their own existences, with collections spanning decades. Michelle M. Wu, *The Corruption of Copyright and Returning It to Its Original Purposes*, *Legal Reference Services Quarterly* 16 (Aug. 24, 2021).<sup>24</sup> These materials were obtained through gift or for a one-time fee and have been loaned continually since. The only “added” cost during the years of ownership were repair and maintenance. *Id.* Currently, all ebook licenses offered by the top publishers—including those who are parties to this case—expire either after 24 months or 26 checkouts. *Publisher Price Watch*.<sup>25</sup> Most books last significantly longer than 26 uses through standard maintenance and repair, and libraries replace only a very small number of titles. Michelle M. Wu, *The Corruption of Copyright and Returning It to Its Original Purposes*, *Legal Reference Services Quarterly* 16 (Aug. 24, 2021). To quote Connecticut State Librarian Ellen Paul: “Imagine if all our roads completely disappeared after two years and the Department of Transportation had to build

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<sup>22</sup> Available at <https://perma.cc/KYK5-TNV8>.

<sup>23</sup> Available at <https://perma.cc/8HRM-SRCC>.

<sup>24</sup> Available at <https://perma.cc/6W6C-J4EY>.

<sup>25</sup> Available at <https://perma.cc/8HRM-SRCC>.

them all over again... those are the terms and conditions that public libraries... are forced to accept every day...for ebooks.” Ellen Paul, *Libraries need fair eBook contract terms*, CT Mirror (Apr. 3, 2023).<sup>26</sup>

The problems with licensed ebook lending especially came to light during the COVID-19 pandemic, when many libraries lacked the ability to lend the physical books they already owned in their collections. According to librarians in Rhode Island, the children’s classic *Charlotte’s Web* was entirely unavailable in their state due to publisher ebook licensing restrictions. *Testimony on Rhode Island Bill*, ReadersFirst (May 3, 2022).<sup>27</sup> One school library reported paying \$27 per student per year for a digital copy of *The Diary of Anne Frank*. Jennie Rose Halperin, *Publishers Are Using E-books to Extort Schools and Libraries*, The Daily Beast (Apr. 18, 2021).<sup>28</sup> The same title can be purchased in print by a library for a one-time price, used without limit, and repaired until the book wears out. In addition, in October 2020, the National Education Association reported that nearly a quarter of students did not have what they needed for online learning. Cindy Long, *One-Quarter of U.S. Students Don’t Have What They Need for Online Learning*, NEA News (Oct. 21, 2020).<sup>29</sup> Without CDL, libraries were forced to

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<sup>26</sup> Available at <https://perma.cc/MEL5-VM8X>.

<sup>27</sup> Available at <https://perma.cc/8MHA-6R9G>.

<sup>28</sup> Available at <https://perma.cc/VR6A-DJBK>.

<sup>29</sup> Available at <https://perma.cc/5HS2-G2WS>.

abandon their print collections and try to replicate those collections by finding licensing options—in effect paying for these collections again.

With the consolidation of the publishing industry, big publishers have virtually no incentive to offer competitive rates and terms to libraries. A 2023 report from researchers at New York University underscores this claim, finding that both publishers and platform aggregators have circumvented copyright law and centuries of precedent to control and extort the reading public and libraries to maximize profit, often at the expense of authors themselves, who do not see the benefits of these costly licenses. Sarah Lamdan, et al., *The Anti-Ownership Ebook Economy How Publishers and Platforms Have Reshaped the Way We Read in the Digital Age*, NYU School of Law (July 2023).<sup>30</sup> When setting prices, there is no negotiation process. See Katelyn Mirabelli, *The Consolidation of Book Publishing in the U.S.: A Network Graph Study*, Pratt Institute (May 11, 2021).<sup>31</sup> As a result, many libraries face financial and practical challenges in making ebooks available to their patrons and are constrained or unable to develop their own digital collections. Iantha Haight & Annalee Hickman Pierson, *The E-Book Wars*, State

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<sup>30</sup> Available at <https://perma.cc/3CKU-RX9P>.

<sup>31</sup> Available at <https://perma.cc/G52F-NRFT>. See also Daniel A. Gross, *The Surprisingly Big Business of Library E-Books*, *The New Yorker* (Sept. 2, 2021), <https://perma.cc/D4YZ-7SEJ>.

*Legislation, and the Protection of Robust Library Collections*, Law Library Journal (forthcoming), BYU Law Research Paper No. 23-09 (June 29, 2023).<sup>32</sup>

**A. Conflating books loaned via CDL with licensed ebooks results in a false equivalence and mischaracterizes the relevant market.**

Throughout its opinion, the district court frequently refers to CDL scans of physical books as “ebooks,” but this is a factual mischaracterization. This is not merely semantics, but is rather a crucial distinction, particularly in light of the market analysis. For instance, the district court asserts that IA “simply scans the Works in Suit to become ebooks.” *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-CV-4160 at \*6. But CDL scans are not “ebooks.” They are CDL scans.

***1. Patrons use CDL scans differently than ebooks.***

The quality between licensed ebooks and books available via CDL differs significantly, and therefore impacts the potential users of each. Licensed ebooks feature crisp text, customizable font size and layout, and interactive features such as hyperlinks. By contrast, CDL scans lack many of the features and characteristics in licensed ebooks that consumers may seek out. Effectively, a CDL scan is a picture of a book that is used for reference or preservation, while an ebook aims to provide a reading experience that is similar to that of a print book. This makes it more likely that the book will be used primarily by researchers out of necessity, or only briefly, rather than supplanting the reading market for the licensed ebook. A

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<sup>32</sup> Available at <https://perma.cc/QF5Z-R477>.

researcher may need to consult a particular past edition of a book, or a specific copy might have scholarly significance that can only be effectively shared via scanning the print book. For example, a digitized print version of a work from a public figure’s personal book collection might contain noteworthy marginalia that offers valuable insight into their thoughts, unavailable anywhere else. *See, e.g.*, Mark O’Connell, *The Marginal Obsession with Marginalia*, New Yorker (Jan. 26, 2012).<sup>33</sup> A researcher cannot use a licensed ebook in the same way. The low-quality scans (in addition to the digital rights management protections) also make it less likely that downstream bootleggers will make copies of the work.

The crux of the district court’s finding was that “it is difficult to compete with a product offered for free,” *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-CV-4160 at \*14, referring to the court’s assumption that books scanned via CDL risk “eviscerating the rights of authors and publishers to profit.” *Id.* at \*11. However, much like the myriad examples of free products and services that do not preclude a highly profitable market for their cost-based counterparts, CDL books do not unreasonably impede on the licensed ebook market. For example, despite the broad availability of open source office software, Microsoft and Apple iOS remain highly profitable businesses. This is because products that are free often offer a different user experience than those that are not.

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<sup>33</sup> Available at <https://perma.cc/R7CU-PSVD>.

***2. CDL scans serve vital library functions in a way that licensed ebooks do not.***

The current licensing regime makes it impossible for libraries to perform typical library activities, which distinguishes a licensed ebook from a CDL scanned book. CDL provides public benefits beyond merely providing access to libraries' legally acquired collections. The district court mischaracterized the public benefit of CDL by claiming it makes books "widely accessible." *Id.* at \*15. However, library systems and their CDL programs provide numerous public benefits beyond access to books, such as: driving economic efficiency by maximizing returns on tax dollars, expanding reliable and equitable education, promoting civil rights for marginalized communities, and many more. *See Controlled Digital Lending: Unlocking the Library's Full Potential*, Library Futures (last visited Nov. 17, 2023).<sup>34</sup> Libraries also place high importance on the need for preserving and maintaining access to works regardless of consumer demand. *White Paper On Remixes, First Sale, And Statutory Damages: Copyright Policy, Creativity, And Innovation In The Digital Economy*, Dept. Com. Internet Policy Task Force 49 (2016).<sup>35</sup>

Because libraries do not own the licensed ebooks that they acquire, publishers often reserve the right to alter or revoke books at will, implicating

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<sup>34</sup> Available at <https://perma.cc/LR6Q-VN3Q>.

<sup>35</sup> Available at <https://perma.cc/LQ7R-D92W>.



serious preservation and censorship concerns. Annalee Newitz, *Amazon Secretly Removes “1984” from the Kindle*, Gizmodo (July 18, 2009, 7:00 PM).<sup>36</sup> CDL gives libraries more control over the integrity of their collections, ensuring their books are not surreptitiously edited or revoked. In the case of a service disruption, having multiple sources of information availability also better ensures that the materials are consistently and reliably available. *Preservation Principles*, LOCKSS (last visited Nov. 17, 2023).<sup>37</sup> In recent years, online misinformation has become rampant, and it is more essential than ever to have access to reliable sources of information. See Argyri Panezi, *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*, 31 Cornell J.L. & Pub. Policy (2021).<sup>38</sup>

Further, in systems like OverDrive, the long-practiced and legally protected lending practice of interlibrary loan cannot be actualized with licensed ebooks. Most libraries cannot hold onto every book—they have limited budgets and space, and frequently are unable to buy books that are out of print. Interlibrary loan, a practice where libraries lend to one another through a shared catalog, is one of the key methods by which materials are transferred and loaned between libraries and

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<sup>36</sup> Available at <https://perma.cc/38SA-AQ3X>.

<sup>37</sup> Available at <https://perma.cc/R34U-UHWQ> (discussing importance of both distribution and decentralization).

<sup>38</sup> Available at <https://perma.cc/R9EQ-G8GH>.

provided to the scholars, researchers, students, and other patrons. Due to strict publisher terms in licensing agreements, libraries often cannot lend ebooks to other libraries through interlibrary loan. Lauren, *Libraries and eBooks: An Introduction*, Denver Public Library (Oct. 30, 2019).<sup>39</sup> By fully restricting digital interlibrary loan, all communities face an unnecessary loss of access to a broader range of materials. CDL brings the economic benefits of libraries to the communities most in need. See Joanna Sei-Ching, *Disparities in Public Libraries' Service Levels Based on Neighborhood Income and Urbanization Levels: A Nationwide Study*, 45 *Am. Soc'y for Inf. Sci. & Tech.* 1 (Jan. 2008).<sup>40</sup>

Library-lent CDL scans are not the same market as licensed ebooks. CDL is a feature of ownership, not a substitute for licensing. It is not intended to replace or circumvent a library's existing ebook holdings, but it can serve as a powerful tool for bridging the gap between print and electronic resources for readers and researchers.

#### **IV. The district court mischaracterized non-profit library activities as commercial uses, resulting in an improper fair use analysis.**

The first fair use factor directs courts to consider whether the secondary use “is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. § 107(1). Here, the district court found that IA's use was commercial because,

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<sup>39</sup> Available at <https://perma.cc/CED2-7NEB>.

<sup>40</sup> Available at <https://perma.cc/R5JL-7WJW>.

“although it does not make a monetary profit, IA still gains ‘an advantage or benefit from its distribution and use of’ the Works in Suit,” such as “using its Website to attract new members, solicit donations, and bolster its standing in the library community.” *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-CV-4160 at \*9. It found that virtually any “advantage or benefit,” regardless of profit motive, can be “profit.” *Id.*

Through its flawed analysis, the district court effectively erases any practical distinction between “benefit” and “profit.” Virtually every secondary user making fair use of copyrighted material seeks to “benefit” in some way. The district court presumes that any kind of benefit can be a profit, and therefore any profit can weigh towards a finding of commerciality against fair use. This renders the commercial/non-profit distinction entirely meaningless within the context of the fair use analysis. Indeed, “attracting new members, soliciting donations, and bolstering standing in the library community” (*id.*) all constitute activities that libraries regularly engage in—and it is wholly irrational to characterize such typical library activities as “commercial.”

Even if, for the sake of argument, IA sought to financially profit from its activities, it serves numerous important educational purposes that cannot be discounted from the analysis. *See, e.g., Sega Enterprises Limited v. Accolade, Inc.*, 977 F.2d 1510, 1522–23 (9th Cir.1992) (finding first factor in favor of for-profit

company, even though ultimate purpose of copying was to develop competing commercial product, because immediate purpose of copying computer code was to study idea contained within computer program).

*Financial* profit is core to the definition of “profit” within the commercial/non-profit distinction. The district court categorically fails to cite *Am. Geophysical Union v. Texaco Inc.*, a case from this Court that instructs on commerciality within the fair use analysis: “The commercial/nonprofit dichotomy concerns the unfairness that arises when a secondary user makes unauthorized use of copyrighted material to *capture significant revenues* as a direct consequence of copying the original work,” and “the greater the *private economic rewards* reaped by the secondary user (to the exclusion of broader public benefits), the more likely the first factor will favor the copyright holder and the less likely the use will be considered fair. 60 F.3d 913, 922 (2d Cir. 1994) (emphasis added) (citing *Harper & Row*, 471 U.S. at 562, 105 S.Ct. at 2231 (“The crux of the profit/nonprofit distinction is ... whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”)).

The district court failed to properly consider the nature and objectives of IA. This Court in *Texaco* cautioned that “it is overly simplistic to suggest that the “purpose and character of the use” can be fully discerned without considering the nature and objectives of the user.” 60 F.3d at 922. *See also MCA, Inc. v. Wilson*,

677 F.2d 180, 182 (2d Cir.1981) (court is to consider “whether the alleged infringing use was primarily for public benefit or for private commercial gain”). The district court admitted that IA does not “make a monetary profit.” *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-CV-4160 at \*9. But IA, as a library, not only does not make monetary profit, IA does not *seek* to make monetary profit.

The library mission is inherently a public service one: to facilitate equitable and non-discriminatory access (not merely access) to knowledge, absent any profit motive. Such a purpose, providing access to library materials for the public, is inherently non-commercial. By its very nature and privileged status within copyright law, the public service mission of libraries is distinct from that of corporate entities. Thus, libraries like IA require a more nuanced analysis if the court is to rely on copyright case law that involves for-profit entities.

Even so, the commercial/noncommercial distinction the law draws centers not on whether a user intends to line their own pockets, but rather on “whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.” *Harper & Row*, 471 U.S. at 562, 105 S.Ct. 2218. Here, the Internet Archive, as other libraries and nonprofits across the U.S., receives donations of books or funds to aid their mission. The “customary price” has been previously paid to the rights holder when the book was initially purchased.

The district court allows the presence of the licensing market to improperly foreclose a library's fair use of the materials for which it has paid the customary price and already owns. Such a result runs contrary to this Court's guidance that "a copyright holder cannot prevent others from entering fair use markets merely 'by developing or licensing a market.'" *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 614-15 (2d Cir. 2006).<sup>41</sup> In doing so, the district court commits the fallacy of the circular market theory: because some people pay, everyone should pay, even if some people are eligible to claim fair use. Wendy J. Gordon, *The 'Why' of Markets: Fair Use and Circularity*, *The Yale Law Journal Pocket Part* (2007).<sup>42</sup>

## CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the district court and protect CDL. Libraries have a long-standing history of supporting the public's access to books. As technology evolves, libraries continually adapt their services to provide access in innovative ways to better serve their patrons, and CDL is such an innovation. Each time libraries have embraced access-expanding innovations, the courts have acknowledged how these practices benefit the public.

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<sup>41</sup> See also *Comedy III Prod., Inc., v. New Line Cinema*, 200 F.3d 593, 595 (9th Cir. 2000) (declaring that "[T]he fact that other film producers choose to pay Comedy III a fee that they may not have to does not obligate New Line to follow suit, if it is not legally obliged to do so").

<sup>42</sup> Available at <https://perma.cc/MH4S-VEK7>.

CDL is the next chapter of upholding access and should persist for a new generation of patrons.

Dated: December 22, 2023

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1) and Fed. R. App. P. 29(a)(4)(G), I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) and Local Rule 29.1(c) because it contains 5,338 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared using Microsoft Word for Mac (Version 16.78.3) in 14-point Times New Roman font, a proportionally spaced typeface.

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