

THE INTERNET ARCHIVE'S NATIONAL EMERGENCY LIBRARY: IS THERE AN EMERGENCY FAIR USE SUPERPOWER?

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ABSTRACT—On March 24, 2020, the Internet Archive announced that it would create a National Emergency Library offering no-waitlist borrowing of all of the books in its collection. In effect, this allowed unlimited, if temporary, downloads of copyrighted works. The National Emergency Library was presented as a response to the current national and global public health crisis; however, nothing in either the Copyright Act, 17 U.S.C. § 108 or the aspirational documents of ControlledDigitalLending.org provides a legal basis for a library to lend out more copies of a work at one time than it actually owns. Nor does the case law support an “emergency exception” to copyright law.

The only possible legal justification for no-waitlist lending is fair use under 17 U.S.C. § 107. This Article discusses the statutory and case law governing online libraries, with special attention to two related cases on fair use and online libraries: *Authors Guild, Inc. v. HathiTrust* and *Authors Guild, Inc. v. Google, Inc.* Ultimately neither the case law nor the language of the statute itself supports the National Emergency Library’s no-waitlist policy, and this Article concludes that no-waitlist e-book lending is, at least in the case of copyrighted works otherwise readily available and whose authors have not granted permission for the copying, in violation of the Copyright Act.

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I. THE NATIONAL EMERGENCY LIBRARY

The current public health crisis is likely to have significant impacts on a wide variety of areas of law, including health care, privacy, First Amendment rights, and more. The impact on copyright law may be less far-reaching, but it is not insignificant. The closing of schools, libraries, and bookstores has led to expanded use of e-books, which will inevitably lead to an increase in unauthorized copying and violation of license terms.

The Internet Archive, a digital library, provides an invaluable role in ensuring at least some permanence in the otherwise ephemeral world of internet content. Its Wayback Machine, for example, archives past versions of web pages, making possible everything from site restoration and research support to an instant fact check on political figures who delete offensive tweets.¹ It also operates a more conventional library, lending books online as many other libraries do. In a rather astonishing move, on March 24, 2020, the Internet Archive announced that it would “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.”² The announcement made no mention of any copyright concerns.³ The only acknowledgement of the rights of authors was rather unconvincing:

We recognize that authors and publishers are going to be impacted by this global pandemic as well. We encourage all readers who are in a position to buy books to do so, ideally while also supporting your local bookstore. If they don’t have the book you need, then Amazon or Better World Books may have copies in print or digital formats. We hope that authors will support our effort to ensure temporary access to their work in this time of crisis.⁴

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¹ See, e.g., Andrew Kaczynski & Nathan McDermott, *Top HHS Spokesman Repeatedly Directed Sexually Crude and Sexist Tweets at Women*, CNN (May 1, 2020, 11:17 AM), <https://www.cnn.com/2020/05/01/politics/michael-caputo-sexist-tweets/index.html> [https://perma.cc/SW5X-UAMW] (“KFile reviewed several thousand deleted tweets from Caputo in 2019 and 2020, which were available on the Internet Archive’s ‘The Wayback Machine.’”).

² Chris Freeland, *Announcing a National Emergency Library to Provide Digitized Books to Students and the Public*, INTERNET ARCHIVE BLOG (Mar. 24, 2020), <http://blog.archive.org/2020/03/24/announcing-a-national-emergency-library-to-provide-digitized-books-to-students-and-the-public/> [https://perma.cc/E87D-B7TD].

³ See *id.*

⁴ See *id.*

It is not through the passage of time alone that law evolves. Law evolves not at a steady pace without regard to events in the outside world, but rather in response to incidents and catastrophes. And this incident has been regarded as a catastrophe by many authors and publishers. The threat to authors' incomes and intellectual property rights, as well as the unilateral nature of the announcement and the apparent disingenuousness of the "support your local bookstore" language, provoked an immediate response. Author and Dartmouth professor Alexander Chee pointed out that "this is not freedom, this is piracy,"⁵ adding "[a]s a reminder, there is no author bailout, booksellers bailout, or publisher bailout. The Internet Archive's 'emergency' copyrights grab endangers many already in terrible danger."⁶ On March 27, the Authors Guild issued a statement to a similar effect, accusing the Internet Archive of "using a global crisis to advance a copyright ideology that violates current federal law and hurts most authors,"⁷ adding that "[d]espite giving off the impression that it is expanding access to older and public domain books, a large proportion of the books on Open Library are in fact recent in-copyright books that publishers and authors rely on for critical revenue. Acting as a piracy site—of which there already are too many—the Internet Archive tramples on authors' rights by giving away their books to the world."⁸ On the same day, Maria Pallante, CEO of the Association of American Publishers, declared "[w]e are stunned by the Internet Archive's aggressive, unlawful, and opportunistic attack on the rights of authors and publishers in the midst of the novel coronavirus pandemic," echoing a statement made on March 24, 2020 by Edward Hasbrouck, co-chair of the National Writers' Union book division. Hasbrouck had accused the Internet Archive of "using the coronavirus pandemic as an excuse[.]"⁹ In *Ars Technica*, Timothy Lee quoted Cornell law professor James Grimmelmann

⁵ Alexander Chee (@alexanderchee), TWITTER (Mar. 27, 2020, 1:06 PM ET), <https://twitter.com/alexanderchee/status/1243585316105191425>. Less ambiguously piratical, albeit arguably equally well-intentioned, shadow libraries are a related problem discussed in, e.g., Balázs Bodó et al., *Open Access is Not a Panacea, Even if It's Radical – an Empirical Study on the Role of Shadow Libraries in Closing the Inequality of Knowledge Access*, AMSTERDAM L. SCH. RSCH. PAPER NO. 2020-39, June 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628326 [<https://perma.cc/6BZV-9WUQ>] (click "Download This Paper").

⁶ Alexander Chee (@alexanderchee), TWITTER (Mar. 27, 2020, 1:04 PM ET), <https://twitter.com/alexanderchee/status/1243584733369503746>.

⁷ Andrew Albanese, *Authors Guild, AAP Outraged by IA's 'National Emergency Library'*, PUBLISHERS WEEKLY (Mar. 30, 2020), <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/82861-authors-guild-aap-outraged-by-ia-s-national-emergency-library.html> [<https://perma.cc/23JG-ETPU>].

⁸ *Id.*

⁹ *Id.*

as saying, “[t]here is no specific pandemic exception’ in copyright law[.]”¹⁰ *Publishers’ Lunch* was yet more acerbic, with a headline reading: “Internet Archive Grants Itself Emergency Copyright Powers for Uncontrolled Digital Lending[.]”¹¹ referring to the Internet Archive’s apparent indifference to the lack of any governmental authorization for this “emergency library.”

Many other authors were as horrified as Professor Chee. The Internet Archive had provided itself with a copyright fig leaf, allowing authors to request that their works be removed from the National Emergency Library. Many did so, such as Sage Blackwood, author of the *Jinx* trilogy,¹² who instructed the National Emergency Library to “[r]emove my books immediately, please. Neither I nor my publishers authorized this use.”¹³ The Internet Archive replied two days later—an eternity in internet download time—to say that it had complied with Blackwood’s request.¹⁴

A copyright challenge of this magnitude was unlikely to go unchallenged, and on June 1, 2020 four publishers—Hachette Book Group, HarperCollins, John Wiley & Sons, and Penguin Random House—filed suit in the Southern District of New York seeking declaratory and injunctive relief, as well as damages.¹⁵ The attached list of specific copyrighted works included 127 titles.¹⁶ While some of these titles may not have been borrowed through the Internet Archive at all, others, like *The Catcher in the Rye*, *Lord of the Flies*, or *Their Eyes Were Watching God*, are perennial school reading list staples, and might each have been borrowed tens of thousands or even hundreds of thousands of times. The statutory damages sought in the complaint could conceivably run into the hundreds of millions of dollars,

¹⁰ Timothy B. Lee, *Internet Archive Offers 1.4 Million Copyrighted Books for Free Online*, ARS TECHNICA (Mar. 28, 2020, 8:30 AM), <https://arstechnica.com/tech-policy/2020/03/internet-archive-offers-thousands-of-copyrighted-books-for-free-online/> [https://perma.cc/UV2R-PRXR].

¹¹ Michael Cader, *Internet Archive Grants Itself Emergency Copyright Powers for Uncontrolled Digital Lending*, PUBLISHERS’ LUNCH (Mar. 26, 2020), <https://lunch.publishersmarketplace.com/2020/03/internet-archive-grants-itself-emergency-copyright-powers-for-uncontrolled-digital-lending/> [https://perma.cc/XQ8G-Q8U3].

¹² See SAGE BLACKWOOD, *JINX* (Katherine Tegen Books 2013); SAGE BLACKWOOD, *JINX’S MAGIC* (Katherine Tegen Books 2014); SAGE BLACKWOOD, *JINX’S FIRE* (Katherine Tegen Books 2015).

¹³ Email from Sage Blackwood to the Internet Archive, National Emergency Library Removal Request (Mar. 28, 2020) (on file with author).

¹⁴ Email from the Internet Archive to Sage Blackwood, Re: National Emergency Library Removal Request (Mar. 30, 2020) (on file with author).

¹⁵ Complaint at 51–52, *Hachette Book Group, Inc. v. Internet Archive*, No. 1:20-cv-04160 (S.D.N.Y. June 1, 2020), ECF No. 1; see also Timothy B. Lee, *Lawsuit Over Online Book Lending Could Bankrupt Internet Archive*, ARS TECHNICA (June 1, 2020 7:02 PM), <https://arstechnica.com/tech-policy/2020/06/publishers-sue-internet-archive-over-massive-digital-lending-program/> [https://perma.cc/5YSZ-B2HM].

¹⁶ Complaint, *supra* note 15, at Ex. A; Report on the Filing or Determination of an Action or Appeal Regarding a Copyright, *Hachette Book Group, Inc. v. Internet Archive*, No. 1:20-cv-04160 (S.D.N.Y. June 1, 2020), ECF No. 4.

crushing the Internet Archive.¹⁷ The publishers, perhaps reluctant to shut down a nonprofit organization providing an essential service, also offered a gentler alternative to statutory damages: “Alternatively, ordering Internet Archive to render a full and complete accounting to Plaintiffs of Internet Archive’s profits, gains, advantages, or the value of business opportunities received from the foregoing acts of infringement[.]”¹⁸ The primary goal of the suit seems to be to stop the National Emergency Library’s no-waitlist lending rather than to destroy the Internet Archive, and it seems to have been successful: the National Emergency Library was shut down on June 16, 2020,¹⁹ two weeks before the originally-announced earliest possible shutdown date of June 30 (and even farther in advance of the end of “the US national emergency,” which is still ongoing at the time of this writing).²⁰ The publishers’ suit continues nonetheless, with trial currently scheduled to begin on or after November 12, 2021, if the parties have not come to an agreement or the complaint is not otherwise dismissed before then.²¹

Not everyone was horrified at the prospect of unlimited lending, however. *NPR* excitedly announced “‘National Emergency Library’ Lends A Hand—And Lots Of Books!—During Pandemic,”²² prompting author Neil Gaiman to reply with a simple “Guys. Not helpful.”²³ The *New Yorker* was even more enthusiastic, gushing that “The National Emergency Library Is a

¹⁷ Complaint, *supra* note 15, at 52. 17 U.S.C. § 504(c)(1) provides for damages of “not less than \$750 or more than \$30,000 as the court considers just,” while § 504(c)(2) provides that “where . . . infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$150,000.” Each individual download of an infringing work may constitute a separate infringement. *See, e.g.,* Capitol Records, Inc. v. Thomas-Rasset, 692 F.3d 899, 903 (8th Cir. 2012).

¹⁸ Complaint, *supra* note 15, at 52.

¹⁹ *National Emergency Library*, INTERNET ARCHIVE BLOGS, <https://blog.archive.org/national-emergency-library/> [<https://perma.cc/WT8G-KB5V>].

²⁰ The publishers’ lawsuit is ongoing as well. *See* Internet Archive Letter Motion for Extension of Time to File Answer, Hachette Book Group, Inc. v. Internet Archive, No. 1:20-cv-04160-JGK (S.D.N.Y. June 25, 2020), ECF No. 14.

²¹ Civil Scheduling Order, Hachette Book Group, Inc. v. Internet Archive, No. 1:20-cv-04160 (S.D.N.Y. Sept. 1, 2020), ECF. No. 36. The parties are also directed to “notify the Court by 12/01/2020 whether a reference to the Magistrate Judge would be useful for purposes of settlement and whether they consent to trial before the Magistrate Judge.” *Id.* at 2.

²² Colin Dwyer, ‘National Emergency Library’ Lends a Hand — And Lots of Books! — During Pandemic, *NPR* (March 26, 2020, 11:44 AM), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/26/821925073/national-emergency-library-lends-a-hand-and-lots-of-books-during-pandemic> [<https://perma.cc/ERZ7-5GFG>].

²³ Neil Gaiman (@neilhimsel), TWITTER (Mar. 28, 2020, 9:23 PM CST), <https://twitter.com/neilhimsel/status/1244087854063468544> (replying to NPR’s tweet).

Gift to Readers Everywhere.”²⁴ The *New Yorker* article blithely observed that “[n]early all the books in the collection come from the last century or so.”²⁵ Of course, nearly all books published in “the last century or so” are still in copyright.

It is perhaps not surprising that advocates of the philosophy that “information just wants to be free” might seize on a crisis as an opportunity to claw back some of the ground that content owners have gained with the Digital Millennium Copyright Act,²⁶ the Copyright Term Extension Act,²⁷ the *Grokster* decision,²⁸ and more. Since the advent of the mass-internet in the mid-1990s, content owners have won most of the battles, strengthening protections for copyright owners at the expense of consumers and of new would-be content creators. In the past, I have been an advocate of restricting copyright to preserve the rights of those latter two groups;²⁹ however, the National Emergency Library goes too far.

This Article examines, first, the legal environment in which online book lending operates, including the rather hazy rules governing online lending of scanned printed books, and the rather more concrete rules governing the lending of e-books. The Article next discusses prior fair use cases involving online research resources and scanning of printed books, and then examines whether the National Emergency Library’s no-waitlist lending is fair use.

II. ONLINE BOOK LENDING

To explore why and how, we must first examine two related but not identical types of online book-lending. The first and greatest concern is the scanning of printed books, and the subsequent dissemination of those books over the internet. The second is the lending of books that are purchased by or donated to libraries already in e-book format. These e-books are protected

²⁴ Jill Lepore, *The National Emergency Library is a Gift to Readers Everywhere*, NEW YORKER (Mar. 26, 2020), <https://www.newyorker.com/books/page-turner/the-national-emergency-library-is-a-gift-to-readers-everywhere> [<https://perma.cc/FB4M-59ZD>].

²⁵ *Id.*

²⁶ Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998).

²⁷ Copyright Term Extension Act, Pub. L. No. 105-298, 112 Stat. 2827 (1998).

²⁸ *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

²⁹ See, e.g., AARON SCHWABACH, *FAN FICTION AND COPYRIGHT: OUTSIDER WORKS AND INTELLECTUAL PROPERTY PROTECTION* (Ashgate Publishing 2011); AARON SCHWABACH, *Legal Issues in Online Fan Fiction*, in *THE ROUTLEDGE COMPANION ON MEDIA EDUCATION, COPYRIGHT AND FAIR USE* (Renee Hobbs ed., Routledge 2018); AARON SCHWABACH, *Fan Works and the Law*, in *NEW DIRECTIONS IN POPULAR FICTION* (Ken Gelder ed., Palgrave Macmillan 2016); Aaron Schwabach, *Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Parody*, 8 *BUFF. INTELL. PROP. J.* 1 (2012); Aaron Schwabach, *The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright*, 70 *U. PITT. L. REV.* 387 (2009).

against unauthorized copying and use by digital rights management (DRM) software and by licensing agreements included with each book. While these agreements can be complex and are a major concern for libraries, they appear to be of secondary importance as a cause of authors' concerns with the National Emergency Library.

*A. Books Scanned and Digitized from Hard Copy:
Controlled Digital Lending*

Hard copy books can be scanned and digitized; the act of doing so is copying, but may be permissible for archive or backup purposes under 17 § U.S.C. 108(a), which provides that:

(a) Except as otherwise provided in this title and notwithstanding the provisions of section 106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section, if—

(1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;

(2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and

(3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.³⁰

Note that § 108(a) allows the library not only to copy the work, but “to distribute such copy.”³¹ In the case of a rare or fragile book, or an otherwise very expensive one, loaning out a copy rather than the original may make good sense. It seems likely, however, that the drafters of § 108(a) contemplated a physical copy when the language was included in the Copyright Act of 1976,³² the more so as it had its roots in the “Gentlemen’s Agreement” of 1935, under which librarians, publishers, and scholars set out

³⁰ 17 U.S.C. § 108(a).

³¹ *Id.*

³² Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2546, § 108(a) (1976).

what at the time they believed to be acceptable standards of practice.³³ To the extent the lending of a digital (or in 1976, perhaps microform) copy was contemplated, § 108(a) clearly contemplates reproducing and distributing “no more than one copy . . . of a work,”³⁴ so lending multiple copies at the same time would exceed the scope of the exception permitted by the statute. The limitations on the limitation—“except as provided in subsections (b) and (c)”³⁵—permit the making of up to three copies of a work under certain circumstances. Three copies may be made “for purposes of preservation and security or for deposit for research use in another library or archives”³⁶ so long as “the copy or phonorecord reproduced is currently in the collections of the library or archives”³⁷ and “is not otherwise distributed in that format and is not made available to the public in that format outside the premises of the library or archives.”³⁸ And three copies may also be made “solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, or if the existing format in which the work is stored has become obsolete,”³⁹ so long as “an unused replacement cannot be obtained at a fair price”⁴⁰ and, once again, “is not made available to the public in that format outside the premises of the library or archives in lawful possession of such copy.”⁴¹

The National Emergency Library, by removing waitlists, will be allowing a theoretically unlimited number of copies to be lent at one time—more than the one copy permitted by § 108(a), and more than the three copies contemplated by §§ 108(b) and (c). The latter, in any event, are not permitted to be made available to the public anywhere other than on the premises of the library or archive; the statute includes no “pandemic exception.”

The home page of ControlledDigitalLending.org recognizes:

Controlled Digital Lending (CDL) is an emerging method that allows libraries to loan print books to digital patrons in a “lend like print” fashion. Through CDL, libraries use technical controls to ensure a consistent “owned-to-loaned” ratio, meaning the library circulates the exact number of copies of a specific

³³ Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen’s Agreement of 1935*, 53 J. COPY. SOC’Y U.S.A. 545 (2006). For a history of the eventual evolution of the Gentlemen’s Agreement into § 108, see generally U.S. COPY. OFF., § 108 OF TITLE 17 5–9 (2017).

³⁴ 17 U.S.C. § 108(a).

³⁵ *Id.*

³⁶ *Id.* § 108(b).

³⁷ *Id.* § 108(b)(1).

³⁸ *Id.* § 108(b)(2).

³⁹ *Id.* § 108(c).

⁴⁰ *Id.* § 108(c)(1).

⁴¹ *Id.* § 108(c)(2).

title it owns, regardless of format, putting controls in place to prevent users from redistributing or copying the digitized version.⁴²

In other words, Controlled Digital Lending contemplates exactly what § 108(a) apparently permits: the lending of one digital *or* hard copy for each hard copy of a work owned by the library. Even then, the statement falls short of a definitive declaration that the practice complies with § 108: “When CDL is appropriately tailored to reflect print book market conditions and controls are properly implemented, CDL *may* be permissible under existing copyright law.”⁴³ It also notes that “CDL is not intended to act as a substitute for existing electronic licensing services offered by publishers.”⁴⁴ E-books and other digital media will continue to be bound by their licensing agreements.

The site expands upon its copyright law position in a statement (“Position Statement”) authored by six respected copyright scholars.⁴⁵ The Position Statement reiterates that:

[A] library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an “owned to loaned” ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time.⁴⁶

A white paper (“White Paper”) authored by two of the authors of the Position Statement provides yet more in-depth analysis, supporting essentially the same conclusion. The White Paper explains that CDL is intended mainly to address “the 20th century book problem,”⁴⁷ familiar to anyone who has tried to find an even slightly obscure book from the past ninety-five years. Books that are out of print and not old enough to be in the public domain, yet not new enough to be easily located through Amazon Marketplace sellers or, for those fortunate to have access to one, the neighborhood used bookshop, can be devilishly hard to get hold of. Even when a copy can be located in some

⁴² *Controlled Digital Lending by Libraries*, CONTROLLED DIGITAL LENDING, <https://controlleddigitallending.org/> [<https://perma.cc/TTU7-98GV>].

⁴³ *Id.* (emphasis added)

⁴⁴ *Id.*

⁴⁵ Lila Bailey et al., *Position Statement on Controlled Digital Lending*, CONTROLLED DIGITAL LENDING (Sept. 2018) [hereinafter “Position Statement”], <https://controlleddigitallending.org/statement> [<https://perma.cc/U8JK-RTBJ>].

⁴⁶ *Id.*

⁴⁷ David R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, CONTROLLED DIGITAL LENDING (2018) [hereinafter “White Paper”], <https://controlleddigitallending.org/whitepaper> [<https://perma.cc/5DDE-PZ8B>].

far-off library, that library may be reluctant to lend out its copy through interlibrary loan, precisely because it is rare (though not necessarily valuable; demand may be as limited as supply). CDL does indeed provide an excellent solution to the problem, and the authors of the White Paper argue that using CDL in this manner is permissible under the rights of first sale⁴⁸ and fair use.⁴⁹ Referring back to the CDL Position Statement, the White Paper states:

[L]ibraries should:

1. ensure that original works are acquired lawfully;
2. apply CDL only to works that are owned and not licensed;
3. limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintain an “owned to loaned” ratio);
4. lend each digital version only to a single user at a time just as a physical copy would be loaned;
5. limit the time period for each lend to one that is analogous to physical lending; and
6. use digital rights management to prevent wholesale copying and redistribution.⁵⁰

While leading copyright scholars have spoken approvingly of CDL,⁵¹ even this definition of CDL, taking into account market effects and aiming only

⁴⁸ 17 U.S.C. § 109.

⁴⁹ 17 U.S.C. § 107; see also Jonathan Band, *The Impact of Substantial Compliance with Copyright Exceptions on Fair Use*, 59 J. COPY. SOC'Y U.S.A. 453 (2012); Jonathan Band, *The Impact of Specific Exceptions on Fair Use: An Update*, 63 J. COPY. SOC'Y U.S.A. 325 (2016).

⁵⁰ White Paper, *supra* note 47, at 2.

⁵¹ Digitization has been beneficial not only for the creation and dissemination of new works, but also in extending the “long tail” of in-copyright works that previously would have faded from public view as they went out of print. Mass digitization of books from research institutions has enabled older works to be rediscovered and used in novel ways. By digitizing millions of books from research library collections, indexing them, and serving up snippets of the books in response to search queries, Google made it possible for researchers to discover books relevant to their work and provide information on where copies of those books could be located. The HathiTrust digital library, which was formed by Google’s library partners pooling digital copies of books from their collections, now allows researchers from consortium members to conduct searches across a corpus of more than 16 million books to find ones that are relevant. Barlow would have been pleased by this development and would have supported the initiative of some libraries to engage in controlled digital lending of books that libraries initially acquired in physical form, following the lead of the Internet Archive with its online Open Library.

Pamela Samuelson & Kathryn Hashimoto, *The Enigma of Digitized Property: A Tribute to John Perry Barlow*, 18 DUKE L. & TECH. REV. 103, 125–26 (2019) (citations omitted).

to preserve access to hard-to-find works while complying with copyright law, has its opponents:

Under CDL, a library (or a nonprofit, like the Internet Archive's Open Library) scans a print copy of a book they have legally acquired, then makes the scan available to be borrowed in lieu of the print book, using a DRM protected one user/one copy model, and, crucially, taking the corresponding print book out of circulation while the digital copy is on loan. Notably, the AAP [Association of American Publishers], AG [Authors Guild], NWU [National Writers Union], and dozens of other groups around the world have maintained that the practice of CDL was illegal before suspending its controls on lending.⁵²

The National Emergency Library, however, is not CDL; it is digital lending without the "controlled" element, at least as it has previously been defined by CDL's proponents. In its response to the criticisms raised in response to its initial announcement, the Internet Archive posted a list of FAQs justifying its position, including the following statement: "Internet Archive has suspended our waitlists temporarily. This means that multiple readers can access a digital book simultaneously, yet still by borrowing the book, meaning that it is returned after 2 weeks and cannot be redistributed."⁵³ This is in effect an admission that the terms of CDL set forth in the White Paper are no longer being adhered to:

But the National Emergency Library is not Controlled Digital Lending, the IA [Internet Archive] concedes in an FAQ on the site, because "waitlists are suspended" during the pandemic. "Once the US national emergency is over and waitlists are back to their normal capacity, the service will return to full controlled digital lending."⁵⁴

Rather than an argument that CDL, already of uncertain legal status, is justified by the pandemic, the National Emergency Library seems to be arguing that the pandemic justifies removing the controls—or not even arguing, but simply presenting this as established fact.

B. Books Initially Obtained by Libraries in E-book Format

E-book lending by libraries, while apparently not an issue with the National Emergency Library, provides a clear example of the difference between technical limits and legal limits on distribution of information and

⁵² Albanese, *supra* note 7.

⁵³ Chris Freeland, *Internet Archive Responds: Why We Released the National Emergency Library*, INTERNET ARCHIVE BLOGS (Mar. 30, 2020), [https://perma.cc/GEU6-SQLX]; see also Andrew Albanese, *Internet Archive Respond, Says National Emergency Library is Legal*, PUBLISHERS WEEKLY (Mar. 30, 2020), https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/82869-internet-archive-responds-says-national-emergency-library-is-legal.html [https://perma.cc/56VR-CGG3].

⁵⁴ Albanese, *supra* note 7.

also provides useful background on online lending. If a library purchases or otherwise obtains a copy of a physical book, it can lend that book to one patron at a time. The patron has the use of the book for a limited period of time, and during that time no other patron can borrow the book. It is physically impossible for another patron to do so, because the book is no longer in the library. When the patron returns the book to the library, another patron may then borrow that same physical copy. Over time the copy may be lost or damaged; even if it is not, it will eventually wear out.

If a library obtains a copy of an e-book, that copy is recorded on some device owned by or under the control of the library. Unless the library is going to loan out the device itself, the only way to “loan” the e-book is to make a copy of it on a device owned or controlled by the patron. It is technically possible to make an unlimited number of copies, without the need for one copy to be “returned” before another is made. Nor does the loss or destruction of one copy limit the ability to make more copies. A single copy in a single library could supply the entire world with copies of the book.

This is where copyright law, contract law, and DRM software come in. Making a copy onto a patron’s device is not “lending.” It is copying. Copyright is, quite literally, the right to make copies.⁵⁵ The right to lend the copyrighted work is also an exclusive right of the copyright holder,⁵⁶ but copies purchased by or for the library may be lent under the right of first sale.⁵⁷ To lend a copy of an e-book, the library must have permission from the copyright holder to make copies, or the copying must be fair use⁵⁸ or otherwise authorized. While libraries are authorized to make copies for backup and archival use,⁵⁹ unlimited copying of the work for purposes of

⁵⁵ See 17 U.S.C. § 106(1) (“Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords[.]”)

⁵⁶ 17 U.S.C. § 106(3).

⁵⁷ 17 U.S.C. § 109(a); see also, e.g., H.R. REP. NO. 94-1476, at 79 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5693 (“A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.”) Library lending without payment to the copyright holder is not without its critics, however. See, e.g., Daniel Y. Mayer, *Literary Copyright and Public Lending Right*, 18 CASE W. RES. J. INT’L L. 483 (1986). Public lending right statutes, in many countries, provide for payments to authors each time a book is borrowed, in a manner analogous to the payments made to the holders of copyrights in musical works each time the recording is played on the radio. See, e.g., Directive 2006/115, 2006 O.J. (L 376) 28 (EC); Public Lending Right Act, 1979, ch. 10 (U.K.). The National Emergency Library runs the risk of a backlash: unlimited online lending could become a pretext for the imposition of a public lending right, a measure the U.S. has so far resisted, which would significantly alter the position and operation of public libraries.

⁵⁸ See 17 U.S.C. § 107.

⁵⁹ See *id.* § 108.

lending would undermine the market for the work and fall outside the scope of fair use.⁶⁰

Thus, for libraries to be able to lend e-books, they must either load their original copies of the e-books onto e-book readers and lend out the physical devices, which is expensive and impractical (especially if each book must be loaded on to a separate device, making it a more complicated and more expensive substitute for a printed book); or they must make copies of the e-books. In order to make these copies, leaving aside for the moment the question of fair use, they must have permission from the copyright holder. This permission comes in the form of a license, typically self-enforcing through DRM software inextricably bundled with the e-book. It is, of course, possible to circumvent the DRM software, but doing so would violate the prohibition on circumvention of technological protective measures⁶¹ and on removal or alteration of copyright management information,⁶² subjecting the library to both civil liability⁶³ and criminal penalties.⁶⁴

Licenses to libraries for e-book lending can take several forms; typically, they limit the total number of times a copy can be lent as well as the number of copies that can be lent at once. If the license permits a book to be lent to only one user at a time, it is a non-concurrent license. If it permits the work to be lent to multiple users at a time, it is a concurrent license, which is generally more expensive than a non-concurrent license for the same work as it is the functional equivalent of purchasing multiple hard copies of the work. Licenses may be limited in time, in total number of loans permitted, or both. Licenses limiting both are disfavored by libraries due to the fact that the time limit may expire before the permissible number of loans is used up.⁶⁵ Libraries serving smaller populations are especially likely to be disadvantaged in this way. Though there is a wide variety of licenses available, a typical limited-loan license allows in the range of twenty to twenty-six loans.⁶⁶

A no-waitlist policy, such as the National Emergency Library's, would allow an unlimited number of patrons to borrow each book simultaneously if applied to licensed e-books. This would probably violate all single-user

⁶⁰ See *id.* § 107.

⁶¹ *Id.* § 1201.

⁶² *Id.* § 1202.

⁶³ *Id.* § 1203.

⁶⁴ *Id.* § 1204.

⁶⁵ See MARIBEL RIAZA & JAVIER CELAYA, A GUIDE TO EBOOK LICENSES PURCHASE MODELS FOR LIBRARIES AND PUBLISHERS 4 (Annabelle Prats trans.), <http://www.dosdoce.com/wp-content/uploads/2015/11/Guide-to-Ebook-Licensing-Purchase-Models-Bookwire-and-Dosdoce.pdf> [<https://perma.cc/A3Z7-DGSW>].

⁶⁶ *Id.* at 4–6.

licenses and all or nearly all multiple-user licenses. In addition, it might use up the limited number of permitted loans, and it would not be possible without circumventing the DRM software. The National Emergency Library cannot lend copyrighted, licensed e-books without violating both the contract (that is, the license) and the anticircumvention provisions of the Digital Millennium Copyright Act.⁶⁷

III. SOME SIGNIFICANT PRIOR DISPUTES OVER ONLINE LENDING

The Authors Guild has long opposed CDL; their struggle against it has led to two Second Circuit decisions: *Authors Guild, Inc. v. HathiTrust*⁶⁸ and *Authors Guild, Inc. v. Google, Inc.*⁶⁹

A. *Authors Guild, Inc. v. HathiTrust*

In 2008, the libraries of the University of California System, of the member universities of Committee on Institutional Cooperation, and of the University of Virginia collaborated to form the HathiTrust, a nonprofit research archive.⁷⁰ The name comes from *hathi*, the Hindi word for elephant, an animal with a proverbially powerful memory.⁷¹ Hathi is also the name of a famous fictional elephant from a work now out of copyright, Rudyard Kipling's *The Jungle Book*.⁷² HathiTrust set about digitizing millions of books in the collections of the participating universities' libraries, as well as those of others that joined later. HathiTrust had three purposes. The first was to create a searchable full-text database⁷³ so that someone who, say, remembered a fictional elephant named Hathi but could not remember in which text that elephant resided could run a search for "Hathi" and "elephant" and quickly find the result. More sophisticated Boolean search

⁶⁷ See 17 U.S.C. §§ 1201–04.

⁶⁸ 755 F.3d 87 (2d Cir. 2014); see also Rebecca McClain, Recent Case, *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014), 19 INTELL. PROP. L. BULL. 115 (2014); Caitlin A. Buxton, Note, *Bridgeman Art Library, Ltd. v. Corel Corporation Revisited: Authors Guild v. HathiTrust and the New Frontier of Fair Use*, 11 OKLA. J. L. & TECH. 77 (2015). On the underlying district court decision, see James Aaron, Note, *The Authors Guild v. HathiTrust: A Way Forward for Digital Access to Neglected Works in Libraries*, 16 LEWIS & CLARK L. REV. 1317 (2012); Angel Siegfried Diaz, Note, *Fair Use & Mass Digitization: The Future of Copy-Dependent Technologies After Authors Guild v. HathiTrust*, 28 BERKELEY TECH. L.J. 683 (2013).

⁶⁹ 804 F.3d 202 (2d Cir. 2015).

⁷⁰ *Welcome to HathiTrust!*, HATHITRUST, <https://www.hathitrust.org/about> [<https://perma.cc/7LRR-63VZ>]; *Help - General*, HATHITRUST, https://www.hathitrust.org/help_general [<https://perma.cc/4373-LKQX>] (click on "What is HathiTrust?").

⁷¹ *Help - General*, *supra* note 70 (click on "What does the name 'HathiTrust' mean?")

⁷² RUDYARD KIPLING, *THE JUNGLE BOOK* 51 (The Century Co. 1894); RUDYARD KIPLING, *THE SECOND JUNGLE BOOK* 13 (The Century Co. 1895).

⁷³ *Authors Guild, Inc.*, 755 F.3d at 91.

options are not available, so a fair number of false positives are returned, including several Indian government documents mentioning elephants in both English and phonemic romanized Hindi. However, different versions of *The Jungle Book* and *The Second Jungle Book* appear multiple times in the first twenty search results.⁷⁴ The full-text database searches produce only the titles and other identifying information of the books satisfying the search, as well as the page numbers on which the search terms appear. No text excerpts appear for works in copyright, or for that matter for the out-of-copyright *Jungle Books*.⁷⁵

The second purpose was to create fully accessible works for the disabled, including blind and partially-sighted users, as well as those with physical challenges making it difficult or impossible to hold or turn the pages of a physical book.⁷⁶ The third purpose was to preserve the works in digital format, which would also provide insurance against the destruction of the physical copies in the event a replacement copy was unavailable at a fair price, as permitted by § 108.⁷⁷ A related project, the Orphan Works Project (OWP) was designed to make full-text versions of orphan works (those still in copyright but of limited, if any, availability and for which an author or copyright holder cannot be identified or located) available to the public. This project was abandoned before the Authors Guild lawsuit came before the Second Circuit, and the court concluded “that the OWP claims are not ripe for adjudication.”⁷⁸

The Authors Guild headed a list of plaintiffs immediately seeking to enjoin HathiTrust from digitizing the millions of works in the collaborating university libraries' collections. The plaintiffs brought suit in the Southern District of New York against HathiTrust, Cornell University, and the presidents of four other member universities seeking declaratory and injunctive relief, claiming that HathiTrust's digitizing of copyrighted works and the proposed uses of those digital copies violated the authors' copyrights.⁷⁹

⁷⁴ See *Search Results*, HATHITRUST <https://babel.hathitrust.org/cgi/ls?field1=ocr;q1=%22Hathi%22%20and%20%22elephant%22;a=srchls;lm=ft> [<https://perma.cc/Z248-6B5F>] (showing search results for the terms “Hathi” and “elephant”).

⁷⁵ See, e.g., *Authors Guild, Inc.*, 755 F.3d at 91 (including a screenshot of search result). The editions returned by the search described in the preceding footnote contained forewords or illustrations created after 1925 and thus still in copyright, although the body of the text is not. It did return the full text of W.A. FRASER, *THE SA'ZADA TALES* (Charles Scribner's Sons 1905). The less-famous Hathi of this work resides in a zoo, unlike Kipling's Hathi, who escaped captivity and returned to the wild.

⁷⁶ *Authors Guild, Inc.*, 755 F.3d at 91.

⁷⁷ See also *id.* at 92.

⁷⁸ *Id.* at 92, 104–05.

⁷⁹ See *id.* at 92.

The district court denied the plaintiffs' motion for summary judgment on the grounds that the three proposed uses—full-text searching, access for persons with disabilities, and backup for replacement purposes—were protected as fair use under 17 U.S.C. § 107.⁸⁰ The court found it unnecessary to consider whether the third use (backup) was protected by § 108, as “it unquestionably fits within the definition of fair use.”⁸¹ There was also discussion, at both the district court and circuit court levels, of standing and ripeness issues. While interesting, these are tangential to the central copyright issues. The district court went to some lengths to characterize all three uses as transformative,⁸² apparently in the belief that transformativeness was a requirement of fair use.

On appeal, the Second Circuit agreed that the first two uses (full-text searching and access for the disabled) were protected as fair use.⁸³ At the same time, the court identified transformativeness as a quality to be assessed when weighing the first fair use factor,⁸⁴ which considers “the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes[.]”⁸⁵ With regard to the first use, the court agreed that “the creation of a full-text searchable database is a quintessentially transformative use[.]”⁸⁶ On the second use, however, the circuit court disagreed with the district court's conclusion that “[t]he use of digital copies to facilitate access for print-disabled persons is also transformative.”⁸⁷ The district court had relied, in something of a stretch, on

⁸⁰ *Authors Guild, Inc. v. HathiTrust*, 902 F. Supp. 2d 445, 460–64 (S.D.N.Y. 2012).

⁸¹ *Id.* at 464 n.32; *see also id.* 456–57.

⁸² *Id.* at 459–64. The district court stated that:

The argument that preservation on its own is a transformative use is not strong. *See Texaco*, 60 F.3d at 924 (“[T]he predominant archival purpose of the copying tips the first factor against the copier.”). However, the Supreme Court's decision in *Sony Corp. of America v. Universal City Studios, Inc.*, a case in which the Court held that private copying of television broadcasts for later viewing was a protected fair use, focused on the noncommercial nature of the use. 464 U.S. 417, 449, 454, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984). Likewise, the preservation purposes of the Defendants are noncommercial in nature. *See H.R.Rep. No. 94-1476*, at 73 (1976), 1976 U.S.C.A.N. 5659, 5687 (“The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of ‘fair use.’”).

Id. at 459 n.19.

⁸³ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 105 (2d Cir. 2014).

⁸⁴ *Id.* at 96.

⁸⁵ 17 U.S.C. § 107(1).

⁸⁶ *Authors Guild, Inc.*, 755 F.3d at 97.

⁸⁷ *Id.* (quoting *Authors Guild, Inc.*, 902 F. Supp. 2d at 461).

Perfect 10,⁸⁸ a case unrelated to access for disabled readers. It had also relied on a more on-point statement from legislative history cited in *Sony*⁸⁹: “Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of a fair use, with no suggestion that anything more than a purpose to entertain or to inform need motivate the copying.”⁹⁰ The circuit court pointed out, quite logically, that “[t]his is a misapprehension; providing expanded access to the print disabled is not ‘transformative.’”⁹¹ It was nonetheless fair use; the district court’s apparent assumption that transformativeness was necessary for fair use was incorrect. “While a transformative use generally is more likely to qualify as fair use, ‘transformative use is not absolutely necessary for a finding of fair use.’”⁹² Nonetheless, the use qualified as fair use because, as the district court had already pointed out (albeit without realizing that the use was not necessarily transformative), “the Supreme Court has already said so” in *Sony*.⁹³ The legislative history relied upon by the court in *Sony* provides further support:

The House Committee Report that accompanied codification of the fair use doctrine in the Copyright Act of 1976 expressly stated that making copies accessible “for the use of blind persons” posed a “special instance illustrating the application of the fair use doctrine. . . .” The Committee noted that “special [blind-accessible formats] . . . are not usually made by the publishers for commercial distribution.” In light of its understanding of the market (or lack thereof) for books accessible to the blind, the Committee explained that “the making of a single copy or phonorecord by an individual as a free service for a blind persons [*sic*] would properly be considered a fair use under section 107.” We believe this guidance supports a finding of fair use in the unique circumstances presented by print-disabled readers.⁹⁴

The Second Circuit further observed that the legislative purpose expressed in the House Committee Report has remained a consistent part of U.S. legislative policy:

Since the passage of the 1976 Copyright Act, Congress has reaffirmed its commitment to ameliorating the hardships faced by the blind and the print

⁸⁸ *Authors Guild, Inc.*, 902 F. Supp. 2d at 461 (citing *Perfect 10, Inc. v. Amazon.com*, 508 F.3d 1146, 1165 (9th Cir. 2007)).

⁸⁹ *Id.* (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984)).

⁹⁰ *Id.* (quoting *Sony Corp. of Am.*, 464 U.S. at 455 n.40).

⁹¹ *Authors Guild, Inc.*, 755 F.3d at 101.

⁹² *Id.* at 101–02 (quoting *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014)).

⁹³ *Id.* at 102 (citing *Sony Corp. of Am.*, 464 U.S. at 455 n.40).

⁹⁴ *Id.* (citing H.R. REP. NO. 94-1476, at 73 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5686) (alterations in original).

disabled. In the Americans with Disabilities Act, Congress declared that our “Nation’s proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals.” Similarly, the Chafee Amendment illustrates Congress’s intent that copyright law make appropriate accommodations for the blind and print disabled.⁹⁵

Section 121, cited by the Second Circuit, specifically permits the reproduction of copies of copyright-protected works “in accessible formats exclusively for use by eligible persons.”⁹⁶ “Eligible persons” include those who are blind, visually impaired, or are “otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading[.]”⁹⁷ It seems as though the Second Circuit could have led with this reasoning; the statute expressly authorizes the second purpose of HathiTrust’s digitization. Instead, the court noted in a footnote that “[i]n light of our holding, we need not consider whether the disability-access use is protected under the Chafee Amendment, 17 U.S.C. § 121.”⁹⁸ On the issue of the reproduction of images as well as text in accessible format for users with disabilities other than complete blindness, the court seemed to rely largely on common sense in concluding that for these readers the image files would be perceptible, useful, and “necessary to perceive the books fully. Consequently, it is reasonable for the Libraries to retain both the text and image copies.”⁹⁹ Perhaps to slyly illustrate this point, the court’s opinion includes an image file—a screenshot of an HathiTrust Digital Library full-text search.¹⁰⁰

The third use (preservation) would, like the second, seem to be protected by a separate statute (in this case § 108(a)), even if it were not fair use. However, the court did not reach the merits of this issue, concluding that “we do not believe plaintiffs have standing to bring this claim, and this concern does not present a live controversy for adjudication.”¹⁰¹

HathiTrust, then, sees fair use in creating a full-text searchable database and in providing access to persons with disabilities, neither of which is what the National Emergency Library is doing.

⁹⁵ *Id.* (quoting 42 U.S.C. § 42101(7)) (citation omitted).

⁹⁶ 17 U.S.C. § 121(a).

⁹⁷ *Id.* § 121(d)(3).

⁹⁸ *Authors Guild, Inc.*, 755 F.3d at 105 n.7.

⁹⁹ *Id.* at 103.

¹⁰⁰ *Id.* at 91.

¹⁰¹ *Id.* at 104.

B. Authors Guild, Inc. v. Google, Inc.

*Authors Guild, Inc. v. Google, Inc.*¹⁰² involved roughly similar facts, with some important differences. Google, which unlike HathiTrust is a for-profit company, cooperated with libraries to digitize books for search purposes and preservation purposes, much as HathiTrust had. Unlike HathiTrust, search results included snippets of text, and access for the disabled was not discussed as an issue in the case:

Through its Library Project and its Google Books project, acting without permission of rights holders, Google . . . made digital copies of tens of millions of books, including Plaintiffs', that were submitted to it for that purpose by major libraries. Google has scanned the digital copies and established a publicly available search function. An Internet user can use this function to search without charge to determine whether the book contains a specified word or term and also see "snippets" of text containing the searched-for terms. In addition, Google has allowed the participating libraries to download and retain digital copies of the books they submit, under agreements which commit the libraries not to use their digital copies in violation of the copyright laws.¹⁰³

Like HathiTrust, Google defended its search database and backup service as fair use under § 107. With *HathiTrust* before it, Authors Guild necessarily focused on the narrow differences between the two searchable database projects, especially Google's use of snippets and the fact that Google was ultimately motivated by profit, and the preservation issue, which the *HathiTrust* court had declined to address. Rather self-referentially, the court pointed out that "[o]ur court's exemplary discussion in *HathiTrust* informs our ruling."¹⁰⁴ The snippet view made the search function more useful without rendering the use non-transformative: "Snippet view . . . adds importantly to the highly transformative purpose of identifying books of interest to the searcher."¹⁰⁵ Furthermore, Google had taken precautions to prevent snippet view from being used to reveal all of the text in a book:

[S]nippet function does not give searchers access to effectively competing substitutes. Snippet view, at best and after a large commitment of manpower,

¹⁰² 804 F.3d 202 (2d Cir. 2015). For more in-depth discussion, see Timothy J. Busse, *Crossing the Digital Rubicon: Google Books and the Dawn of an Electronic Literature Revolution*, 18 Hous. Bus. & Tax. L.J. 119 (2018); Victoria Campbell, *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202 (S.D.N.Y. Oct. 16, 2015), 27 DEPAUL J. ART, TECH. & INTELL. PROP. L. 59 (2016); Varsha Mangal, *Is Fair Use Actually Fair? Analyzing Fair Use and the Potential for Compulsory Licensing in Authors Guild, Inc. v. Google*, 17 N.C. J.L. & TECH. 251 (2016); Yong Wan, *Similar Facts, Different Outcomes: A Comparative Study of the Google Books Project Case in China and the United States*, 63 J. COPYRIGHT SOC'Y U.S.A. 573 (2016).

¹⁰³ *Authors Guild, Inc.*, 804 F.3d at 207.

¹⁰⁴ *Id.* at 217.

¹⁰⁵ *Id.* at 218.

produces discontinuous, tiny fragments, amounting in the aggregate to no more than 16% of a book. This does not threaten the rights holders with any significant harm to the value of their copyrights or diminish their harvest of copyright revenue.¹⁰⁶

No significant harm was not the same thing as no harm at all:

We recognize that the snippet function can cause some loss of sales. There are surely instances in which a searcher's need for access to a text will be satisfied by the snippet view, resulting in either the loss of a sale to that searcher, or reduction of demand on libraries for that title, which might have resulted in libraries purchasing additional copies. But the possibility, or even the probability or certainty, of some loss of sales does not suffice to make the copy an effectively competing substitute that would tilt the weighty fourth factor in favor of the rights holder in the original. There must be a meaningful or significant effect "upon the potential market for or value of the copyrighted work."¹⁰⁷

Thus, the court concluded, "Google's making of a complete digital copy of Plaintiffs' works for the purpose of providing the public with its search and snippet view functions (at least as snippet view is presently designed) is a fair use[.]"¹⁰⁸ The court also decided that the search with snippet view did not infringe on the copyright owners' right to prepare derivative works.¹⁰⁹

Nor did the fact that Google, unlike HathiTrust, was a for-profit entity make the use other than fair:

While we recognize that in some circumstances, a commercial motivation on the part of the secondary user will weigh against her, especially, as the Supreme Court suggested, when a persuasive transformative purpose is lacking, we see no reason in this case why Google's overall profit motivation should prevail as a reason for denying fair use over its highly convincing transformative purpose, together with the absence of significant substitutive competition, as reasons for granting fair use. Many of the most universally accepted forms of fair use, such as news reporting and commentary, quotation in historical or analytic books, reviews of books, and performances, as well as parody, are all normally done commercially for profit.¹¹⁰

Finally, the preservation function was fair use, because it would have been permissible for the contributing libraries to have made copies for such a purpose themselves:

¹⁰⁶ *Id.* at 224.

¹⁰⁷ *Id.* at 224 (quoting 17 U.S.C. § 107(4)).

¹⁰⁸ *Id.* at 225.

¹⁰⁹ *Id.* at 225–27.

¹¹⁰ *Id.* at 219 (citing *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)) (citation omitted).

If the library had created its own digital copy to enable its provision of fair use digital searches, the making of the digital copy would not have been infringement. Nor does it become an infringement because, instead of making its own digital copy, the library contracted with Google that Google would use its expertise and resources to make the digital conversion for the library's benefit.¹¹¹

The court did acknowledge the existence of a risk that Google's database of digitized texts could be hacked, but noted that stringent security measures were in place and no theft of digitized texts from either Google or the contributing libraries had yet occurred.¹¹²

IV. IS THE NATIONAL EMERGENCY LIBRARY'S NO-WAITLIST LENDING FAIR USE?

As Timothy Lee points out in the *Ars Technica* article mentioned above, even the legality of the Internet Archive's ordinary e-book lending, limited to the number of copies in the library, is not unequivocally accepted.¹¹³ As Lee opines, analogizing to *Capitol Records, LLC v. ReDigi Inc.*,¹¹⁴ "it seems unlikely that the first sale doctrine would apply to book lending." In the case of ordinary library lending, however, this does not seem to be true. Lending of print or even electronic books is quite different from the act at issue in *ReDigi*; Capitol Records had complained of ReDigi's resale of digital music files, not library lending of text files. It is not at all clear that the court's holding would apply to nonprofit library lending, especially as Judge Leval, who wrote the opinion in *ReDigi*, also wrote the library-friendly opinion in *Google*. More pragmatically, libraries nationwide seem to lend e-books on terms similar to those set for scanned books in the CDL White Paper.¹¹⁵ E-book lending is now a commonplace service offered by public libraries, often through the Rakuten OverDrive network or a competing platform.¹¹⁶ Such lending is limited to the number of copies in a library's collection (a

¹¹¹ *Id.* at 229.

¹¹² *Id.* at 228–29.

¹¹³ Lee, *supra* note 10.

¹¹⁴ *Capitol Records, LLC v. ReDigi Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013), *affirmed*, 910 F.3d 649 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 2760 (2019). On the analogy between sale of music recordings, as in *ReDigi*, and sale of e-books, see Shubha Ghosh & Péter Mezei, *Elusive Quest for Digital Exhaustion in US and EU: The CJEU's Tom Kabinet Ruling as Milestone or Millstone for Legal Evolution*, 8 HUNGARIAN YEARBOOK OF INTL. L. & EUROPEAN L. 249 (2020).

¹¹⁵ White Paper, *supra* note 47.

¹¹⁶ See, e.g., *Central Arkansas Library System*, <https://cals.overdrive.com> [<https://perma.cc/7Y5T-UJTE>]; *San Diego County Library*, <https://sdcl.overdrive.com> [<https://perma.cc/LUZ9-9SUT>]; *eLibrary, CITY OF SAN DIEGO*, <https://www.sandiego.gov/public-library/elibrary> [<https://perma.cc/8LV5-KNY3>].

one-to-one “owned to loaned” ratio), in accordance with the CDL Position Statement and White Paper.

This makes the National Emergency Library’s departure from the CDL Position Statement and White Paper limits, as well as those limits set by prior court cases and noted by library law scholars,¹¹⁷ all the more puzzling. The CDL Position Statement and White Paper ultimately rest on first sale (§ 109) and the special rights of libraries (§ 108). By removing the “controlled” aspect of controlled digital lending, the National Emergency Library went beyond the limits of §§ 108 and 109, which leaves only one possible fallback as justification for its actions: fair use under § 107.

Jill Lepore, writing for the *New Yorker*, asserts that “[a]s the copyright lawyer Kyle Courtney has pointed out, libraries have copyright superpowers that they can use in an emergency like this one.”¹¹⁸ However, it does not appear—at least in the White Paper—that Professor Courtney has said any such thing.¹¹⁹ The *New Yorker* was referring specifically to a blog post titled “Covid-19 Crisis: COVID-19, Copyright, & Library Superpowers (Part I).”¹²⁰ An actual reading of the blog post gives quite a different impression. Rather than condoning lending to the public at large in excess of the number of copies in a library and outside the bounds of the CDL, Professor Courtney warns that “[w]e have a lot of space to support our communities in this moment as long as we’re being thoughtful, *providing good copyright information when asked*, and limiting our activities to the specific, *time-bound needs* of instructors and students for the rest of the semester.”¹²¹ The post is a balanced, well-informed discussion of fair use (the “superpower” of the title) rather than an argument that libraries are unbounded by copyright. In other words, the superpower is something libraries have already been using, not a new power granted to it by some mysterious pandemic exception to the usual rules of copyright law. Nor does the follow-up Part II post, which addresses § 108, suggest that the current health crisis permits copying in excess of that allowed by the statute.¹²²

¹¹⁷ See, e.g., Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 L. LIBR. J. 527 (2011); see also 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).

¹¹⁸ Lepore, *supra* note 24.

¹¹⁹ White Paper, *supra* note 47.

¹²⁰ Kyle K. Courtney, *COVID-19, Copyright, & Library Superpowers (Part I): Fair Use and Exigent Circumstances*, KYLECOURTNEY.COM (Mar. 11, 2020), <https://kylecourtney.com/2020/03/11/covid-19-copyright-library-superpowers-part-i/> [https://perma.cc/J25K-9V43].

¹²¹ *Id.* (emphasis in original). The italicized phrase “*providing good copyright information when asked*” is repeated later in the post.

¹²² Kyle K. Courtney, *COVID-19, Copyright, & Library Superpowers (Part II)*, KYLECOURTNEY.COM (Mar. 16, 2020), <https://kylecourtney.com/2020/03/16/covid-19-copyright-and-library-superpowers-part-ii/> [https://perma.cc/Y8RN-BW5W].

A. *The Four Factors*

The test for fair use is set forth in 17 U.S.C. § 107, which provides in relevant part:

In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.¹²³

This four-factor test is notoriously imprecise and difficult to apply, making it difficult to know with any certainty in advance whether a proposed use is fair or not. “The statute ‘calls for case-by-case analysis’ and ‘is not to be simplified with bright-line rules.’”¹²⁴ In this instance, however, it seems possible to conduct that analysis in advance.

1. *The Purpose and Character of the Use, Including Whether Such Use is of a Commercial Nature or is for Nonprofit Educational Purposes*

The Internet Archive is a nonprofit organization, and the use—library lending—is ostensibly for educational purposes, at least in part: it is intended to support “emergency remote teaching, research, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries are closed.”¹²⁵ While some of these are educational purposes, “intellectual stimulation . . . while libraries are closed”¹²⁶ seems like another way of saying “entertainment . . . without having to pay for a book.” Libraries serve an important educational function, but it is far from their only function; entertainment is another important one. Even after many authors had already requested that their books be removed from the National Emergency Library, the top-searched works still included many that were probably downloaded for entertainment rather than education. As of April

¹²³ 17 U.S.C. § 107. For an interesting look at the background of fair use and its relationship with patent law, see Wendy J. Gordon, *Fair Use in Oracle: Proximate Cause at the Copyright/Patent Divide*, 100 B.U. L. REV. 389 (2020).

¹²⁴ *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202, 213 (2d Cir. 2015) (quoting *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 577 (1994)).

¹²⁵ *National Emergency Library*, INTERNET ARCHIVE, <https://archive.org/details/nationalemergency-library?tab=about> [https://perma.cc/H4RG-XZP9].

¹²⁶ *Id.*

23, 2020, the most-viewed work was Dean Koontz's *The Eyes of Darkness*, while other top choices visible on the first screen included J.R.R. Tolkien's *The Fellowship of the Ring*, Stephen King's *The Stand*, and Terry Pratchett's *Pyramids*. It also seems unlikely that *Letters to Penthouse IV*, visible on the first screen, is assigned on many school reading lists.

In addition, this use—lending out more copies of a book than they had arguably been permitted to do under the standards set out in the White Paper—is not transformative; it is just the same use, repeated. As Justice Blackmun pointed out in his dissent in *Campbell*:

Although such transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."¹²⁷

In this case, the new work is not transformative at all, which means more weight should be given to the remaining three factors. Nor do the nature and character of the use unequivocally suggest fair use; while many of the texts available are undoubtedly educational and most likely being used for educational purposes (the third most viewed text on April 23, for example, is an essay on Reconstruction by W.E.B. DuBois¹²⁸), many are not. At best, this factor weighs neither for nor against fair use, although it seems more likely, especially with regard to works downloaded for entertainment purposes, to weigh against.

2. *The Nature of the Copyrighted Work*

The four factors have not historically been given equal attention in fair use discussions, and the second factor has received relatively short shrift, perhaps because most of the works over which fair use disputes have originated have been those which copyright is most intended to protect. The *Google* court notes that discussion of transformativeness “inevitably involves the second factor as well,”¹²⁹ but as there is no difference here between the works loaned out subject to the one-copy-at-a-time limit and those loaned out without a waitlist, there is no transformativeness.

The Supreme Court has noted in passing that “[t]he law generally recognizes a greater need to disseminate factual works than works of fiction

¹²⁷ *Campbell*, 510 U.S. at 579 (Blackmun, J., dissenting) (citing *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984); *id.* at 478–80 (Blackmun, J., dissenting)) (citations omitted).

¹²⁸ W.E.B. DUBOIS, *BLACK RECONSTRUCTION* (1935).

¹²⁹ *Authors Guild, Inc.*, 804 F.3d at 220.

or fantasy[.]”¹³⁰ although even in the case of works of fact, the author’s expression of those facts is protected.¹³¹ A novel, even one assigned for a high school English class,¹³² is exactly the type of work copyright traditionally and typically seeks to protect. Although the facts in a work of non-fiction are not protected by copyright, the author’s expression of those facts, including their original arrangement and the author’s ideas about their meaning, is protected.¹³³ Thus the facts that W.E.B. DuBois collected in his essay on Reconstruction may freely be used by anyone, including students writing an essay of their own for a class. However, DuBois’s original selection and arrangement of the material in a particular way is protected, and most of all his seven hundred and some pages of ideas and explanations of the meanings of those facts, and their historical consequences, are protected. This factor seems to weigh against finding the National Emergency Library’s no-waitlist policy to be fair use.

3. *The Amount and Substantiality of the Portion Used in Relation to the Copyrighted Work as a Whole*

This scarcely seems to require analysis; the copying here is not like taking a single frame of Gene Wilder from a film made up of more than 128,000 frames and attaching text to it.¹³⁴ Millions of books have been copied in their entirety, and an unknown number have been lent out, in their entirety, in excess of one copy at a time. This factor weighs against fair use.

4. *The Effect of the Use upon the Potential Market for or Value of the Copyrighted Work*

Most analysis of this factor focuses on whether a part of a work will substitute for the entire work in the marketplace, like the excerpt from former president Gerald Ford’s autobiography in *Harper & Row*¹³⁵ or the snippet view in *Google*.¹³⁶ Transformativeness is an important consideration in these determinations; this is the reasoning behind allowing critical reviews of a

¹³⁰ *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 563 (1985).

¹³¹ 17 U.S.C. § 102 (2018).

¹³² CHINUA ACHEBE, *THINGS FALL APART* (1958), also available on the top page of most-viewed items on April 23, 2020.

¹³³ 17 U.S.C. § 102; *see also, e.g., Harper & Row, Publishers, Inc.*, 471 U.S. at 547 (“[N]o author may copyright facts or ideas.”).

¹³⁴ *Condescending Wonka*, KNOWYOURMEME, <https://knowyourmeme.com/memes/condescending-wonka-creepy-wonka> [<https://perma.cc/M89T-U5PH>] (describing The Condescending Wonka meme, an image macro meme based on a frame from *WILLY WONKA & THE CHOCOLATE FACTORY* (Paramount Pictures 1971)).

¹³⁵ *Harper & Row, Publishers, Inc.*, 471 U.S. at 542–43, 563. The portion reprinted by *The Nation* dealt with Ford’s presidential pardon of his predecessor, Richard Nixon, which was most likely the portion of greatest interest to audiences at the time.

¹³⁶ *Authors Guild, Inc. v. Google, Inc.*, 804 F.3d 202, 223–25 (2d Cir. 2015).

work. If, for example, I use excerpts from the cloyingly unwatchable film *Pretty Woman*¹³⁷ (inspired by the song that gave rise to *Campbell v. Acuff-Rose*¹³⁸) in an online review urging everyone to avoid watching the film or any other film made by anyone involved with it in any way, I am intending to harm the market for the original work. To the extent that my audience is influenced by my review, I am actually harming the market. Yet this is permissible under the fourth factor, which aims not at bare harm, but at competitive harm.

The fourth fair use factor, “the effect of the [copying] use upon the potential market for or value of the copyrighted work,” focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that potential purchasers may opt to acquire the copy in preference to the original.¹³⁹

Here the copying is total and there is no transformativeness. There is an argument to be made, albeit a tenuous and untested one, that the no-waitlist copies do not compete in the marketplace with those original works that are orphan or semi-orphan works (this is the question the court declined to address in *HathiTrust*¹⁴⁰). All of the works discussed above are currently available for download from Amazon as audiobooks, Kindle e-books, or both. Many of them are available for free Kindle download, suggesting that these authors are also willing to have these particular works downloaded from the National Emergency Library. Amazon has also expanded its free audiobook downloads during the coronavirus crisis. However, many are not free; a download of *Things Fall Apart* currently costs \$10.99.¹⁴¹ To the extent that the book is being required for English literature classes, there may be an educational necessity for these copies to be made available; however, a no-waitlist download simply shifts the cost from the school system (which would otherwise have to find another way to make copies available) to the copyright holder (presumably Chinua Achebe’s literary estate). While it is undeniable that schools in the United States are underfunded, most authors are not exactly wallowing in wealth either, making this a morally questionable shifting of the burden. In the case of *Things Fall Apart*, it also

¹³⁷ *PRETTY WOMAN* (Buena Vista Pictures 1990).

¹³⁸ 510 U.S. 569, 569 (1994). The song providing the inspiration is presumably Roy Orbison’s smarmy but hugely successful original “Oh, Pretty Woman” (1964) and not the 2 Live Crew parody “Big Hair Woman” (1989), released a few months before filming began.

¹³⁹ *Authors Guild, Inc.*, 804 F.3d at 223.

¹⁴⁰ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 92, 104–05 (2d Cir. 2014).

¹⁴¹ *Things Fall Apart (African Trilogy, Book 1) Kindle Edition*, AMAZON, https://www.amazon.com/gp/product/B004478AS4?notRedirectToSDP=1&ref_=dbs_mng_calw_0&storeType=ebooks [<https://perma.cc/PJ67-TCXA>].

raises the worrying specter of digital copyright colonialism; is the U.S.-based National Emergency Library unilaterally expropriating the intellectual property of a Nigerian author?

More to the point, there is no legal basis for it; nothing in § 107 asks whether the copyright holder, the copier, or some third party is best able to pay the cost of any market harm resulting from the copying. The use of an opt-out rather than an opt-in—authors have to affirmatively request that their works be removed, rather than affirmatively granting permission to have the National Emergency Library loan their works without waitlist—seems likely to impose a burden on those rights holders least able to afford to bear it. Writers who are currently alive, living in the United States, and actively engaged in the marketplace are much more likely to become aware of the National Emergency Library and to take action to preserve their rights. The heirs of a deceased writer, or one economically or geographically not connected to the current literary marketplace in the United States, may not yet be aware of the National Emergency Library's existence and may thus be losing revenue without even being aware of the threat. For all these reasons, this factor weighs fairly heavily against a finding of fair use, at least with respect to those works not currently being offered elsewhere for free.

5. On Balance, the National Emergency Library is Not Fair Use

Many of the works are most likely being made available for educational purposes, and all of the National Emergency Library's uses are nonprofit. Thus, the first factor may weigh in favor of fair use with respect to these works—the DuBois essay, for example. However, it seems likely that many are being made available purely for entertainment purposes. And for nearly all works, whether novels, short story collections, or thoughtful historical monographs, the second factor weighs against fair use, while the third factor weighs against fair use with regard to any work made available in its entirety. The fourth factor weighs against fair use with regard to those works not being made available elsewhere for free. Although it seems possible that some works are both being used primarily for nonprofit educational purposes while simultaneously being offered elsewhere for free by the content owner, there are surely others that do not meet those criteria. Thus, even if those two factors are enough to tip the balance in favor of fair use for those particular works that do meet the criteria, that will not make the violation of other copyrights fair use.¹⁴² The question is not whether some of the uses of works

¹⁴² Even accepting, for a moment, the argument that this can be viewed as a case of vicarious or contributory infringement because it is the borrowers, rather than the National Emergency Library, making the copies (as they are made on the borrower's device); the "staple article of commerce" doctrine borrowed from patent law in *Sony* does not apply here; even though the National Emergency Library is capable of substantial noninfringing uses, a library is in no sense a staple article of commerce. See *Sony*

in the library are fair use. After all, there are a great many works in the National Emergency Library that are not protected by copyright at all; during this social distancing period many people will finally get around to reading *Northanger Abbey*, available for download on the National Emergency Library and many other places, and no copyright will be infringed upon.

The question that matters is whether some of the no-waitlist downloads are not fair use. It seems almost certain that, especially in the early days of the National Emergency Library, copyrighted works were downloaded in their entirety, for entertainment purposes, as a substitute for purchasing the same works, without the permission of the copyright holder. Even now, because permission is presumed unless copyright holders affirmatively opt out (which requires that they be aware that their books are being loaned without a waitlist), there may be many copyright holders who would opt out but have not done so simply because they are unaware that their works are being offered.¹⁴³

CONCLUSION

The decades following the advent of the mass internet have seen copyright law, formerly a relatively neglected backwater of the profession, become a battlefield. The shock of this change a quarter century ago has created stresses to which the system is still adjusting. If past experience is any guide, this adjustment could take well over a century: Over two centuries elapsed between William Caxton's publication of the *Canterbury Tales*¹⁴⁴ and the Statute of Anne.¹⁴⁵ If the current adjustment to a radically new

Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 440 (1984) (citing 35 U.S.C. § 271(c)); see also *id.* at 442, 456; *cf id.* at 490, 498 (Blackmun, J., dissenting).

¹⁴³ Very belatedly it occurred to me to check for my own works. Somewhat to my chagrin, only one book was available: AARON SCHWABACH, INTERNATIONAL ENVIRONMENTAL DISPUTES (2005) (search performed April 26, 2020). It may well be that diligent publishers have sent takedown requests on my behalf. I decided neither to grant permission nor to send a takedown request; I'm curious to see what happens. One of the consequences of having an unusual surname is that a search for my own name doubles as one for family members; while my more prolific sister has requested that her works be removed (see, e.g., KAREN SCHWABACH, THE HOPE CHEST (2008), a middle grades historical novel about the 19th Amendment), the search did turn up one by my father—an investment software guide from the early 1990s: ROBERT SCHWABACH, BUSINESS WEEK GUIDE TO GLOBAL INVESTMENTS USING ELECTRONIC TOOLS (1994).

¹⁴⁴ GEOFFREY CHAUCER, CANTERBURY TALES (William Caxton ed. 1476). The first book printed in English is generally acknowledged to have been RAOUL LEFÈVRE, RECUYELL OF THE HISTORIES OF TROYE (William Caxton trans. 1473–74), <https://discover.libraryhub.jisc.ac.uk/search?m=24&ti=recuyell+troye&sort-order=rank> [<https://perma.cc/RPV7-2NHL>]. However, this was printed outside England, most likely in Bruges though possibly in Ghent, and outside English law. Caxton brought his printing operation to London in 1476, and the *Canterbury Tales*, by then nearly a century old, was his first book-length publication.

¹⁴⁵ Copyright Act of 1710, 8 Ann. c. 21, 8 Ann. c. 19. U.K. copyright law is, of course, as subject to the effects of the pandemic as that of the U.S. or any other country. For an examination of the possible

information dissemination technology is going to require a similar timespan, we are still at the very beginning of the process.

Most of the battles in this new copyright era have been won by content owners; consumer rights victories like *Sony*¹⁴⁶ and creator-rights victories like *Campbell*¹⁴⁷ have seemed increasingly isolated, fading into the distance of the pre-mass-internet age. In such an environment it is unsurprising that consumers and entry-level content creators will seek to push the boundaries of copyright law, hoping to gain back some of the ground that has been lost. For several years I have gently argued for the expansion of the definition of transformativeness as a way to protect the rights of consumers and content creators, especially fan authors, to prepare derivative works, as a necessary way to achieve the goals of the Constitution's Patent and Copyright Clause: "To promote the progress of science and useful arts[.]"¹⁴⁸ But the potentially unlimited online lending of copyrighted works by the National Emergency Library is not the preparation of a derivative work. This is just out and out copying. Like expanding print access to the disabled in *HathiTrust*, it is not transformative.¹⁴⁹ Unlike that use, it is not authorized by statute or prior case law or anticipated in the legislative history of §§ 107 or 108.

As we have seen, even the legality of controlled digital lending is not unequivocally established. If we take the CDL Position Statement and White Paper as representing current law, a central tenet of CDL is the one-to-one owned-to-loaned ratio: At any one time a library may loan out, whether in person or online, no more than the total number of copies of a work that it owns. The National Emergency Library's no-waiting-list loans have the potential to exceed this limit and are thus merely digital lending, not controlled digital lending. As compelling as the arguments in favor of the legality of CDL may be, they are inapplicable here.

Nor does prior case law support the idea of an "emergency exception." The uses in *HathiTrust* and *Google*—enabling full-text searching (with or without snippet view) and access for disabled users and making archival or backup copies for the member libraries—are far less intrusive on the fundamental right of the copyright holder: the right to make copies for distribution to the general public.

effects on library and educational use in the U.K., see Emily Hudson & Paul Wragg, *Proposals for Copyright Law and Education During the Covid-19 Pandemic*, 71 N. IR. LEGAL Q. OA35, <https://ssrn.com/abstract=3617720> [<https://perma.cc/GPK8-WP36>].

¹⁴⁶ *Sony Corp. of Am.*, 464 U.S. at 417.

¹⁴⁷ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 569 (1994).

¹⁴⁸ U.S. CONST. art. I, § 8, cl. 8.

¹⁴⁹ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 101 (2d Cir. 2014).

The National Emergency Library has taken a fundamentally new step in claiming the right to make a potentially unlimited number of copies for temporary lending purposes. The only way this can be justified, legally, is as fair use under § 107. As we have seen, the first, second, and fourth factors of the fair use test seem likely to weigh against a finding of fair use for most of the works loaned, while the third factor will weigh against fair use for all works. Even if the copying of some works qualifies as fair use, it seems likely that there are far more works that do not.

During these shut-in times reading is on the increase, which is a good thing, but there is no reason to deprive authors and other copyright holders of their income, especially during an economic crisis. The National Emergency Library appears to have been a project undertaken with the best of intentions, but for the most part it fixes a problem that may not actually have existed, at the expense of many who can ill afford the loss. The no-waitlist lending program was originally set to run “through June 30, 2020, or the end of the US national emergency, whichever is later.”¹⁵⁰ Unpermitted no-waitlist lending of copyrighted works was a grave mistake. It would have been a mistake to extend it beyond June 30, and its end on June 16 was a welcome resolution. There is undeniably a current national emergency, but it does not seem to be one that requires copyright infringement as a solution.

¹⁵⁰ *National Emergency Library FAQs*, INTERNET ARCHIVE, (Mar. 24, 2020), https://help.archive.org/hc/en-us/articles/360042654251-National-Emergency-Library-FAQs#h_9f4ab385-1db3-4d20-8fb3-f2207d3d97a0 [https://perma.cc/4QX7-46L3].

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