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Hachette v. Internet Archive: How and Why the Courts Broke Copyright

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(Earlier title: Hachette v. Internet Archive: How and Why the Courts Finally Broke Copyright's Social Contract[1])

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[1] The earlier draft of this paper discussed not only the case but related issues. In submitting to a law journal, though, I narrowed the scope to case analysis only. While this version does not match exactly the one submitted and accepted for publication, parts I, II, and most of III are substantially the same. (The other pieces remaining in this repository copy, less about the case and more about libraries and post-decision responses, are there in case they may be useful to libraries).

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Introduction

Probably the most peculiar aspect of copyright is that it is more honored in the breach than in application. It would, indeed, be surprising to find anyone today who has not "infringed" on the exclusive rights listed in §106: reproduction, distribution, making derivative works, public performance, and public display. Forwarded an article? That's reproduction and distribution. Participated at a sing-along at a tailgate? That is a public performance. Writing fan fiction? That's a derivative work.

Readers familiar with copyright may be inclined to call foul, saying that copyright was not intended to apply to these activities, that no copyright owner would sue for these uses, or that fair use protects them. But it is undeniable that the statutory text defines these activities as infringing (§501), and that a copyright owner may sue against these uses so long as they have met the statutory prerequisites for suit (§411). The instinctual rejection of copyright's applicability in these instances highlights the unspoken social contract that underlies copyright: that copyright would be exercised only in very limited circumstances. The rights were not intended to empower copyright owners to undermine the multitude of reasonable uses of copyrighted works that make society productive. For centuries, this social contract has held, with rightsholders exercising restraint in pursuing reasonable uses and courts protecting as fair use the few reasonable uses reaching them.

The Court of Appeals for the Second Circuit's (Court) decision in *Hachette v. Internet Archive* (*Hachette*)[3] on September 4, 2024 broke this social contract and fundamentally changed the meaning of copyright. The case involved Internet Archive's (IA) implementation of controlled digital lending (CDL)[4]. In CDL, a library digitizes a copy of print book that it owns and circulates the e-copy in its place. The e-copy is controlled through digital rights management (DRM) so that it cannot be freely copied or shared with others, and the library uses only simultaneously the number of copies it owns. In this way, every rightsholder has been paid for the number of copies in use. All the library has done is change the format of the book. Four publishers sued, claiming that IA's form of CDL (as well as some other activities) infringed on the rights of copyright holders. The Court agreed, denying IA's claim of fair use. Through its reasoning, it removed the long-standing implied protections for reasonable use.

It did so by deciding that where a commercial alternative exists to a use, a purchaser of a copy of the work used is entitled to no greater deference than someone who has made no purchase. The consequences of this reasoning are more easily explained through illustration. Consider the two following activities relating to any music album commercially available in multiple formats:

> User 1: Buys the LP, rips the LP to mp3, and uses the mp3 instead of the LP
> User 2: Downloads and uses an mp3 from a pirate site

[3] Hachette Book Grp., Inc. v. Internet Archive, No. 23-1260, 2024 WL 4031751 (2024).
[4] David R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, https://controlleddigitallending.org/download-statement/.

The activity that violates the rightsholder's exclusive rights in both cases is identical: unauthorized reproduction of the album. However, it has long been accepted that User 1 has greater protection because they purchased the music. Even judges, in dicta, have suggested that reproduction by such a buyer would be fair use.[5] Under *Hachette*, that deference disappears. In both examples above, a commercial alternative exists in the form of streaming or licensing the mp3. Because each user has chosen to reproduce the music instead of acquiring the mp3 version through commercial means, they have created identical market harm.

Hachette does not recognize any rights of use attached to purchase beyond ownership and use of a physical container. This interpretation narrows the opening for reasonable uses by a buyer, making it possible to find infringement even in instances where there is no proof that the defendant is using more copies than it paid for.

Part I of this paper discusses why the social contract is necessary for copyright to retain its legitimacy. Part II looks at how human nature, mental shortcuts, and novelty interact in copyright, creating an environment unfavorable to the social contract. Part III analyzes the decision in *Hachette* and highlights how the Court's blindspots led to the rewriting of copyright's core purpose. Part IV considers possible ways for libraries to respond.

Exclusive Rights and the Social Contract

The exclusive rights reserved to a copyright owner are defined in §106:

> 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;
> **(2)** to prepare derivative works based upon the copyrighted work;
> **(3)** to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
> **(4)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
> **(5)** in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
> **(6)** in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[6]

[5] Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, fn 16 (2018).
[6] 17 U.S.C.A. § 106 (West)

The exclusive rights reserved to a copyright owner are defined in §106, and today, with technological advances, it is easier to find someone who "violates" one or more §106 rights daily than it is to find someone who does not. Home recording, using an image from the web in a Powerpoint presentation, printing or downloading an article, and converting an LP to an mp3 are just a few examples. Further, societally beneficial activities --- such as reading a book aloud during a library's story hour, using automated translation or text-to-speech technologies, or a teacher changing the words to a popular song to teach a particular topic --- exercise §106 rights as well.

That there are few lawsuits against these types of uses is due to the silent social contract underlying copyright, one that derives its authority from the same source that gives Congress power to act: Art. 1, Sec. 8, Clause 8 (Copyright Clause) of the Constitution, which defines the purpose of copyright as "… promot[ing] the Progress of Science and useful Arts…". The framing of copyright as government action undertaken to benefit the public implies that the grant is legitimate only if rightsholders are not permitted to exercise these rights against the overwhelming number of reasonable uses of copyrighted works that people engage in daily. Prohibiting such uses would slow societal progress. In the absence of this understanding, the broadness of §106 plus the availability of statutory damages in §504 make aggressive defense of rights attractive even against the average person, as rightsholders can gain a financial windfall without needing to prove harm or fault.

Unfortunately, a social contract is remarkably easy to break. There is no explicit agreement on its terms, no legal obligation to abide by it, and no power to enforce it. Further, reasonableness is subjective, so a rightsholder may sue or threaten to sue to stop a use seen as reasonable by the public and even other rightsholders. For that reason, any time a reasonable use comes before a court and is upheld as fair, it reinforces the social contract, reducing the incentives to sue. Ironically, the social contract itself makes such rulings unlikely because it keeps most reasonable uses out of the court. This makes the judiciary's upholding the social contract that much more important in the rare instances where it encounters reasonable uses.

The risk to the public of this unspoken aspect of copyright never disappears, as reasonableness is not an explicit part of the law. Judges have no obligation to ask if a copyright owner's stated cause of action is a reasonable application of §106 or whether the defendant's use is reasonable. It need only assess the activity against statutory text and case precedent. Any court engaged in such a mechanical analysis risks overlooking reasonableness, rewarding rightsholders for pursuing their rights even against noncommercial productive uses.

The next section will explain how human nature, novelty, and the legal system have artificially increased pressure over the years to break copyright's social contract.

The Interplay of Novelty, Copyright, and Blindspots

It is well established that the human mind routinely develops mental shortcuts for faster and more efficient processing, and that shortcuts based on inaccurate or incomplete information will create blindspots.[7] An example of a shortcut is a doctor diagnosing someone manifesting the traditional symptoms of a heart attack as having a heart attack. It is faster and more effective to act on that assumption than to run an exhaustive series of tests to check for another cause. Blindspots can be illustrated by older recommended drug dosages, developed through the study of men, and applied to everyone on the mistaken belief that they would be equally effective for women.[8]

Mental shortcuts are natural and necessary to living, but they are rarely (if ever) 100% accurate. Each mental shortcut creates a blindspot, a reduced ability to see what does not align with that shortcut. Such errors in private life are limited in reach, but where the actor is a public one, everyone pays the consequences. This paper will focus on three common shortcuts, their associated blindspots, and their impact on copyright in *Hachette*:

> Substituting an easier question, where people replace hard questions with related ones that are easier to answer.[9] An example is when someone is asked, "How sound is America's economic policy?" but mentally substitutes the following question in its place: "Am I and the people I know financially secure?" One can answer the latter question without knowing anything about the specifics of government policy. Through substitution, "[y]ou will not be stumped, you will not have to work very hard, and you may not even notice that you did not answer the question you were asked. Furthermore, you may not realize that the target question was difficult, because an intuitive answer to it came readily to mind."[10]
>
> The Halo Effect, where a first impression colors all subsequent information about and from an individual.[11] People meeting someone believed to have committed fraud, for example, are likely to be skeptical of any subsequent information or recommendations made by the assumed fraudster. The soundness of the actual information or recommendation provided is irrelevant to the filter's application.
>
> WYSIATI (what you see is all there is), where people act on the belief that what they know accurately represents the entirety of what can be known.[12] In responding to questions, people "…pick the best answer based on the very limited information available…" and are "…radically insensitive about the quality and quantity of information that gives rise to [their] impression and intuition."[13] This blindspot would be in play, for

[7] DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).
[8] See, for example, Irving Zucker & Brian J. Prendergast, *Sex differences in pharmacokinetics predict adverse drug reactions in women,* 11 BIOL. SEX DIFFER. 32 (2020), doi: 10.1186/s13293-020-00308-5.
[9] KAHNEMAN, *supra* note 6 at 97-104.
[10] *Id.* at 99.
[11] *Id.* at 82-85.
[12] *Id.* at 85-88, 114-118.
[13] *Id.* at 85.

> instance, if someone rejects the possibility that someone is of Asian descent simply because the person's physical features do not match their mental image(s) of that race.

A novel question in a familiar environment is particularly susceptible to blindspots because the patterns previously identified will not easily match the new situation but the desire to apply known shortcuts persist. *Hachette* was novel in two ways. First, the use was one where the defendant used the same number of copies that it had purchased, a circumstance that had no prior representation in case law. Second, the defendant was a library, an institution with unique societal obligations to collect, preserve, and provide access to copyrighted information for the public. Libraries are unlike any commercial or other nonprofit organizations that regularly come before the courts.

The Court's exposure to infringement and fair use made it ill-equipped to deal with either factor. Since the vast majority of infringement cases have been commercial in nature, either competitors suing each other or a copyright owner suing a commercial actor for commercial use,[14] the cases on which judges have built their mental shortcuts are disproportionately about commercial use. Though most uses of copyrighted works are reasonable and noncommercial, because of the social contract, they have not been disputed and therefore have minimal presence in case law. The majority of uses, therefore, are simply under- or un- represented in precedential shortcuts and are effectively invisible to the courts when they make their decisions. Because of its limited perspective, the Court was unable to see the *Hachette* facts that differentiated it from any previous case. This is WYSIATI in action, where the courts mistakenly act as if copyright case law represents the entirety of uses.

Once a claim of infringement is made, fair use (§107) serves to counter rightsholder overreach.

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. 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.

[14] WILLIAM F. PATRY, HOW TO FIX COPYRIGHT 38 (2011).

> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.[15]

Fair use is a defense to infringement and "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[16] It is not a strict test. While the four factors named in the statute must be applied by courts, judges are not restricted to considering only those factors.[17] But that is fair use in theory, not in practice. Even though Congress explicitly stated that codifying fair use did not narrow it,[18] lawmakers essentially gave every court an easier substitute question.

Under equity, "Is this use fair?" is a hard question. It requires analysis of the facts before it and does not permit a court to ignore facts that are uncomfortable or unfamiliar. In contrast, under the statute, courts have license to consider only the four factors and to ignore any facts they feel do not fit. These factors now drive every judicial opinion to the near exclusion of all others,[19] and they were indeed the only factors considered by the *Hachette* Court. The nation, in effect, has lost the more powerful protection provided by the purely equitable form of fair use, not because the statute reduced its power, but because courts are not inclined to use it when an easier analysis is legally acceptable.

The next section will examine *Hachette* and demonstrate how mental shortcuts produced errors that broke the social contract on which copyright is built.

Hachette v. Internet Archive

This section will first provide a brief overview of the case's history, followed by an analysis of the appeals court opinion and each blindspot detected in it.

Facts

Four leading book publishers in the United States sued IA in 2020 for their CDL operation. These were the facts as described by the district court:

These publishers routinely contract with authors for the exclusive rights to publish the authors' writings in analog and digital formats. In this case, they had published print copies of 127 books, making them available through book vendors, as well as digital copies, which they distributed

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[15] 17 U.S.C. §107.

[16] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 577, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994), *quoting* Stewart v. Abend, 495 U.S. 207, 236, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990).

[17] Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P., 756 F.3d 73 at 81 (2d Cir. 2014).

[18] "The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change." H.R. REP. NO. 94-1476 at 66.

[19] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019,* 10 NYU J. INTELL. PROP. & ENT. L. 1, 7 (2020).

through licenses handled by aggregators. Library licenses restricted access only to the subscribing libraries' members, and any digital object used prevented unauthorized copying through digital rights management (DRM). At the time of the lawsuit, all publishers offered a variety of library licenses (which differ from the licenses offered to individuals), including perpetual "one-copy, one-user" (all four publishers for academic libraries, Wiley also offered this option for public libraries); "one-copy-one-user" on one- or two-year terms (Hachette and Penguin); a "26-Circ Model" (HarperCollins, allowing an e-book to be circulated at most 26 times during the license term); and "pay per use" (HarperCollins and Penguin). Library licenses are a substantial source of income for these publishers.

IA acquired copies of the 127 books named in the lawsuit through purchase or donation. It digitized the titles, put the print copies in storage, and allowed its users to check-out the digital equivalents on archive.org and openlibrary.org (hereinafter, Open Library). Anyone may register to become a user, and every user can check out up to 10 titles simultaneously. When a book is checked out, it may be read online, downloaded, or read aloud by an automated text-to-speech reader. After a book is checked out, a link to buy the book at Better World Books (a for-profit used bookstore run by Brewster Kahle, who also runs IA) shows up on the title's page. If a user clicks on the link and buys the title, IA receives some form of payment for the referral.

IA's basis for circulating these titles is CDL: (1) they legitimately own a copy of the title, (2) they are circulating a digital equivalent of that title in the same number of copies that it owns, and (3) the digital copy is protected by DRM. In practice, IA's implementation included circulating not only the copies that they owned and had in storage but also additional copies owned by partner libraries. Where a partner library owned one or more copies of a title available digitally through IA, IA would add one additional copy for digital circulation through Open Library. It did not require nor check to see if the partner library moved one of their print copies into storage (or otherwise made it unavailable to the public) before making the additional digital copy available for circulation or before a patron checked out the digital copy.

On March 24, 2023, the district court (DC) held that IA's activities were commercial, non-transformative, and caused actual or potential market harm, all of which made their use infringing.[20] IA appealed, and on September 5, 2024, the appeals court (Court) affirmed the lower court's decision though rejected the conclusion that the use had been commercial in nature.

[It is important to note that while the facts in the case described multiple distinct uses, neither court differentiated between them. The analysis below applies only to the CDL uses described by the Court.]

[20] Hachette Book Grp., Inc. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023). A detailed analysis of the case can be found at Wu, M. M. (2023). *Hachette*, Controlled Digital Lending, and the Consequences of Divorcing Law from Context. *Legal Reference Services Quarterly*, *42*(2), 129–151. https://doi.org/10.1080/0270319X.2023.2222558

Analysis of Appeals Court Decision

There are two ways to identify judicial blindspots caused by mental shortcuts. One, apply the logic offered by a court to other commonplace instances to see if the logic holds. If it does not, then the court was blind to actual impact. In these cases, it is likely to appear that court reached a conclusion and tried to fit its analysis to that conclusion without considering the rationality of the test it articulated. Two, prove that a court's reasoning within the same opinion is inconsistent with itself.

The Court's analysis of the first factor illustrates the first test, and its analysis of the fourth factor shows the results of the second test.

Factor One (Purpose and Character of Use)

The Court considered only two elements in its factor one analysis: transformativeness and commerciality, with the bulk of the weight given to transformativeness.[21] Transformativeness is defined as a use that "…adds something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message,"[22] and typically weighs in favor of fair use. A commercial purpose frequently weighs against fair use.

The Court made good use of the first blindspot test in assessing the DC's definition of commerciality and finding IA's use to be noncommercial.[23] The DC had determined that each of the following activities made IA's uses commercial: (1) soliciting donations on their website, (2) getting a percentage of revenue from book sales made from links from IA site to Better World Books, and (3) getting good PR for Open Library. Its definition of commerciality required no revenue or benefit to be directly tied to the use of a CDL-title. The Court properly noted that, if allowed to stand, commerciality would no longer be an effective element for analysis, as any use of a copyrighted work by any organization with any revenue stream, no matter how far the benefit was removed from the copyrighted work, would be tagged as commercial.[24] By exposing the overreach of the DC's definition, the Court restored the standard definition of commerciality, once again requiring any benefit to be tied directly to the use of a copyrighted work. Even as the Court corrected the DC's error, it fell victim to the same type of mistake when it came to transformativeness.

Precedent held that a use that has a "purpose highly similar to the original is more likely to substitute or supplant the original work" is less likely to be considered transformative.[25] Since IA's Open Library made e-books available in a manner that the Court found identical to the commercial e-book, the Court found the use to be non-transformative. In reaching its

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[21] Hachette, *supra* note 2 at *6.
[22] Campbell, *supra* note 15 at 579.
[23] Hachette, *supra* note 2 at 10-12.
[24] I*d.*
[25] *Id.* at *6 citing *Warhol II*, 598 U.S. at 528 (2023).

conclusion, it rejected IA's argument that CDL was transformative because it improved efficiency and effectiveness of use.[26] IA's argument drew from a series of cases that had recognized improved efficiency as transformative, the first of which was *Sony,* a case addressing the legality of home recording of broadcast programs. The Supreme Court called this use time-shifting and found it to be a fair use.[27] While the term "transformative" had not yet been coined at that time, time-shifting in *Sony* is routinely cited by courts as being transformative.

The Court dismissed the applicability of *Sony* and its ilk for two reasons: in *Sony* (1) the improved efficiency provided by time-shifting was to one entitled to receive the copyrighted work, and (2) there was no commercial service similar to home recording available at the time.[28] It held that IA did not have a similar entitlement and that there were commercial alternatives available.[29] The validity of those distinctions is explored below.

Entitled to receive it

> In *Sony*, "timeshifting merely enable[d] a viewer to see such a work which [the viewer] had been invited to witness in its entirety free of charge" by the broadcasters, *Sony*, 464 U.S. at 449, 104 S.Ct. 774, and therefore did not "unreasonably encroach[ ] on the commercial entitlements of the rights holder," *TVEyes*, 883 F.3d at 177 (characterizing *Sony*). **The Publishers in this case never "invited" readers to read their books for free from an unlicensed digital library**. *Sony*, 464 U.S. at 449, 104 S.Ct. 774.[30] (emphasis added)

The Court says that the use in *Sony* did not unreasonably encroach on commercial rights because the broadcasters had given viewers free access to the programming. However, free access is not the same as authority to record, which was the activity in which users engaged. Therefore, if we apply the test that the Court articulated for IA's use (in bold above) to *Sony,* the test would be more properly phrased as "Did the broadcasters invite viewers to record their programs and view them after their air dates?" Since broadcasters had sued to end this activity, one can safely say that they did not feel that they had issued an invitation in *Sony* any more than the publishers issued an invitation to IA in the case at hand. In *Sony*, the broadcasters merely invited the users to view their programs synchronously with the broadcast; recording and delayed viewing were not part of the invitation. In *Hachette*, by publishing books, the publishers invited the public to buy that content; subsequent use was not part of the invitation.

In short, both viewers and IA were equally entitled to receive the content that they used. The viewers were entitled because the programming was freely broadcast, and IA was

[26] *Id*. at 8-10.
[27] Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 443-9 (1984).
[28] Hachette, *supra* note 2 at *9-10.
[29] *Id*.
[30] *Id.* at *9.

entitled because it had purchased (or otherwise legitimately acquired) a copy of each book they circulated.

Commercial alternative

The Court implied that home recording use would not have been transformative had today's technology been available at the time of *Sony* because users would have had a commercial alternative (e.g., streaming services).[31] Putting aside the fact that recording does not serve the same purpose as streaming, the Court's reasoning would lead to the conclusion that uniqueness is a required element of transformativeness when the purpose of use is efficiency. If that were the case, then transformative uses would be unstable; a transformative use today would no longer be transformative tomorrow if a commercial vendor suddenly launched a commercial service providing the same function. Put another way, based on the Court's assessment, should broadcasters sue against the use of DVRs today, a court should not find the use to be transformative.

What the Court misses is that time-shifting in *Sony* was not transformative because commercial activity was absent. It was transformative because it enabled the home viewer to meet the objective of the rightsholder (i.e., to have their programming viewed) in a manner more convenient for the user (i.e., delayed instead of instantaneous viewing). What viewers may reasonably do with copyrighted content they are entitled to have is a question separate from whether a commercial alternative is available. The former is about how to consume content to which one has legal access; the latter is about commercially-facilitated options to gain additional access or service. What makes home recording transformative not only at the time of *Sony* but today is that it retains the expectation of authorized access but frees the user from artificial restraints on use (i.e., watching programming only at a specific time).

CDL operates in a similar manner. The library must still legitimately acquire the number of copies of a work that it wishes to circulate. CDL does not relieve libraries of that responsibility but merely frees them to use the content purchased in a format most aligned with their mission.

Because the Court was able to deny the applicability of *Sony* to *Hachette*, it concluded that IA's CDL operation weighed against fair use in factor one, but as shown above, their distinction was based on shaky ground. If any court now applies the *Hachette* test to other long-standing fair or reasonable uses, it would also disfavor fair use in the first factor. (At first blush, this may not seem problematic, as it impacts only one factor out of four, but the next sections will demonstrate how this one factor controls factors two and three, and how the sheer number of people who engage in activities like home recording make the potential market harm of private use as great as public use.)

[31] *Id.*

The Court in its factor one analysis essentially created a shortcut for itself, asking "Is there a commercial alternative for the use in question?" when the actual question was "What is the purpose of CDL (or is CDL a reasonable use of a copy of a work purchased by a library)?" By conditioning a legitimate purpose on the absence of a commercial alternative,[32] the Court made noncommerciality, valid access, and reasonableness of use all irrelevant. As long as a commercial alternative exists, one entitled to copyrighted content no longer has greater protection in use than someone who has no entitlement.

In closing the discussion on factor one, let me be clear. I have no quarrel with a court determining that the uses in this case are not transformative. The term has always been a poor fit for the range of uses it has been used to justify, and opinions using the terms have such tortured reasoning that the concept becomes more incomprehensible with every application. What makes the Court's analysis invalid is that where a work is commercially available, (1) it eliminates any path for non-transformative uses of complete works to weigh in favor of fair use, (2) it injects consent into the transformativeness test, (3) it adds a uniqueness (no commercial alternative) requirement to transformativeness, and (4) it did not recognize that buyers have greater protections in use than non-buyers.

The Court's refusal to recognize non-transformative uses as favoring fair use not only runs contrary to customary practices and established fair uses but it also disrespects copyright's basic purpose, which is not to maximize commercial gain, but rather to spread information and to encourage the creation of new information.[33] Where the commercial alternative is in the form of continual repayment for sustained access to identical information (content and number of copies), it does not encourage the creation of new information; in fact, at the societal level, it does the exact opposite. After all, if a creator can gain continual and consistent levels of income without creating anything new, the monetary incentive to create anything new diminishes. Further, anyone paying repeatedly for the same information logically has less money available for new information and therefore, the funds that could have been used to support new creation has a narrower reach, concentrating support that would have been more evenly spread across the whole class of authors to support a much smaller class of authors.

These truths are particularly evident in relation to libraries and the unique societal purpose of cultural heritage organizations. First, libraries have an obligation to preserve information to be accessed by future users, so they need to provide communities with consistent or continual access. Unlike users who can stop and start subscriptions based on their own whims, and who may not care if the offerings on a platform remain the same from day to day, a library cannot meet its mission by providing unreliable access. Research, news reporting, and teaching, among other valued activities cannot produce quality output without reliable and consistent access to sources. Second, many books, such as non-fiction books from independent presses, sell only

[32] *Id.* at *9.

[33] "Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975).

hundreds of copies in their lifetimes,[34] and libraries are their primary audience. If libraries can afford fewer books because it must repay for popular books at artificially elevated prices[35] to retain access, it necessarily will invest fewer funds in a smaller group of authors.

By treating narrowing the definition of a purpose that favors fair use, the Court closed the door on reasonable uses; by injecting consent, as opposed to legitimate access, into the definition of transformativeness, it suggested that in some situations, rightsholders' objections to use may be sufficient to undermine a transformative use claim; by conditioning a transformative use claim of a complete work on requiring a lack of a commercial alternative, the Court focused on rightsholders' interests instead of the user's purpose; and by failing to recognize that a buyer of a work has paid for the use of that work, the Court has altered factor one from the purpose of use to the potential for loss of rightsholder revenue.

Impact of Factor 1 Blindspots on Factors 2 & 3

Factors Two and Three

Past copyright cases have shown factors two (nature of the work) and three (amount and substantiality taken) to be largely irrelevant outside of factors one and four.[36] But factor one can drive relevancy.

Regarding factor two, there is no question that the 127 books involved in this case are protected by copyright, but this factor only has value in the fair use test if the copyrightable parts of any work are used in an illegitimate manner or cause market harm. By depriving IA of a path to a legitimate non-transformative purpose, IA's purpose automatically becomes illegitimate. Therefore, factor two weighs against fair use not because of the nature of the works themselves but because the Court has held that the use of copyrighted content has no purpose supported by fair use.

Factor three matters only where the amount of the work taken exceeds the amount necessary to meet a legitimate purpose. Again, the refusal to recognize non-transformative, non-commercial uses as legitimate when a commercial alternative exists, this factor automatically weighs against fair use. If there is no legitimate purpose, then everything taken exceeds the amount necessary.

In short, by conducting a faulty factor one analysis, the Court forced factors two and three into artificial postures against fair use.

Factor Four – Market Harm

[34] See for example, https://scribemedia.com/book-sales/
[35] AMERICAN LIBRARY ASSOCIATION, COMPETITION IN DIGITAL MARKETS (October 15, 2019)
[36] *Google Books*, 804 F.3d at 220-1; *see also HathiTrust*, 755 F.3d at 98.

The second way to identify judicial blindspots is to prove that a court's reasoning within the same opinion is inconsistent, and the Court's second major blindspot is exposed in this manner.

In its analysis, the Court first defined the market, noting that there is but a single market for the written content in a book, as all uses and all formats described were using the same copyrighted work. While it is possible for derivative works to obtain separate copyright protection, they can only do so where there is independent copyrightable material (e.g., the sound recording of an audio book, which contains the narrator's performance). No allegations were made that any copyrighted content aside from that contained in the original printed book was used in this case, and therefore, there was a single market. Having established a singular market, encompassing all formats, the Court then inexplicably rested its market harm analysis on a particular format (e.g., e-book licensing). A hypothetical will demonstrate how a single market approach is inconsistent with the Court's conclusion of market harm.

> Publisher offers book in three different formats: print, CD, and e-book. The content in all three is identical. The print book costs $20, the CD $15, and the e-book $100. The print book and CD have no restrictions on use, and the e-book is licensed annually and contains restrictions such as prohibiting interlibrary loan. 200 libraries buy only the print, 300 libraries license only the e-book, and 500 libraries buy it in print and license the e-book. There are another 1000 libraries that have chosen not to acquire the content in any form.
>
> One year later: the 200 libraries which purchased the title only in print now use a digitized copy in line with CDL in place of the print copy purchased. The 300 libraries previously licensing only the e-book have each bought a print copy either on the new or the used book markets, and now lend the title through CDL. They choose not to renew their e-book subscriptions. Both before and after CDL, they lend only one simultaneous copy at a time. The 500 libraries that both purchased the book and licensed the e-book have also adopted CDL and choose not to renew their e-book licenses. Prior to non-renewal, these 500 libraries simultaneously circulated 2 copies of the book, one in print and one online. After cancelation, each simultaneously circulated only one copy, online.

Single market: The loss in license revenue is where the 800 libraries chose not to renew their e-book licenses, but this is not a market harm protected by copyright. Why? Because both before and after CDL was implemented, every library has paid for the number of copies it used. There is no basis on which to say that the copyright holder has been deprived of fair payment for their work when the content the library bought is the content being used in the number of copies purchased. The demand for the content by libraries has not diminished nor has their willingness to pay for content in the number of copies used.

Court's approach: The Court found credible the publishers' claim that that their e-book licensing revenue would be reduced under CDL. Applying that deference to the facts above to search for where such losses might be, there are three possibilities.

> The first is that is that for the 200 libraries that purchased the title only in print, every CDL copy represents a lost sale; in the absence of a CDL copy, these libraries would have needed two copies, one of which had to be a licensed e-copy. As these libraries were perfectly satisfied with one copy before and after they adopted CDL, though, there is no sign that (1) they ever needed two copies, or (2) had they wanted more copies, that they would have licensed the e-book instead of purchasing another print copy or buying the CD version.
>
> The second "loss" comes from the 800 libraries that canceled their e-book subscriptions and now use a CDL copy in place of the e-book copy. The e-book copy for 500 of these libraries was a second copy, so for this to be a market harm recognized by copyright (i.e., rightsholders not paid for work), these libraries must still be circulating two copies post-CDL. That they only circulate one copy after canceling the e-book license disproves this claim for the 500. For the 300 libraries for which the commercial e-book had been their only copy, the only way market harm could be found is if they failed to acquire the content legitimately and yet continued to circulate it. However, these libraries did acquire the content legitimately, just not in the format that the rightsholders prefer.
>
> The last "loss" comes in the form of potential lost sales to (1) consumers who borrow these library titles and who may never buy a copy or (2) the 1000 libraries which have chosen not to acquire the content in any form and which may never buy a copy. Regarding consumers, CDL might reduce sales, but no more so than traditional library lending. It is true that a patron who checks out a book from a library, whether in print or in e-book format, may never buy the book, but this is not market harm any more than borrowing a book from a friend is market harm. No one uses a copy that has not been paid for. There is no data that supports a supposition that every library loan is a lost sale; many people take advantage of library collections for discovery, exploring a wide range of books, genres, and authors that they otherwise would not have read, much less bought. As an example, very few (if any) academic authors would purchase every book that they use for their scholarship. With respect to the 1000 libraries that have not acquired the title in any form, to claim a potential loss is to assume that that any interlibrary loan (ILL) these libraries will make involving these titles is a lost sale. As with consumer purchasing, any future ILL use is speculative. Further, there is no data that supports the idea that in the absence of an ILL, libraries invariably purchase or license the content instead. After all, library acquisitions are based on perceived continuing community needs whereas ILLs are used to fill a temporary individual need.

Practically speaking, if the Court had recognized that the number of copies owned matched the number of copies used, it would have had to ask itself why the payment already made by IA (or

its donors) to acquire the print copy was not considered adequate payment to the rightsholders? Never before has market harm assumed that a purchaser of a copy may not use the number of copies they have purchased. There is no requirement that the use be tied to the container. As long as the benefit conferred (e.g., use of one copy) continues to match the payment (e.g., payment for one copy), it is impossible to say that the copyright owner has not received fair payment for their work.

How the Illusion of Harm Can Overtake Reality

In the absence of evidence of harm, the Court used the publishers' allegations of potential loss of licensing revenue to act as a proxy for market harm. This section will illustrate why that measure cannot withstand scrutiny.

Copyright has never protected against declining revenues standing alone.[37] It only protects against actual or potential financial injury where the loss is caused by an unauthorized copy of a work that results in more copies being used than have been paid for. This is a harm because the rightsholder would not have received fair compensation for the copy. The key to market harm, then, is not the harm itself, it is whether what causes the harm is attributable to (1) copyrighted content, and (2) use of copyrighted content in numbers exceeding the number paid for. Neither of those conditions are present in this case.

> Losses attributable to copyrighted content. The Court and the publishers have counted the potential loss of license fees, which are acknowledged to generally be higher than the print prices for libraries, as market harm. If copyright protects a work, though, then the focus on e-license costs becomes particularly problematic. Consider: in the hypothetical above, a copy of the same title was available in $20 (print/sale), $15 (CD/sale), and e-book ($100/license). The difference in price across formats cannot be about the copyrightable content, as it is identical across all three. The difference in cost can only be due to the container, because once the identical content is removed, the container is all that remains. Therefore, the heightened losses that the publishers claim has nothing to do with content, which is the only thing that copyright protects. It is about the format. Any reduction in income attributable to anything other than the use of a copyrighted work cannot count as market harm within a copyright analysis.
>
> Use of copyrighted content in numbers exceeding the number paid for. In *Hachette*, unauthorized copies are made but no additional copy is in use. IA has purchased (or otherwise legitimately acquired) the same number of copies it uses. The digital copy replaces the purchased copy, not an unsold copy on the market. The Court conveniently ignores the fact that the content has been purchased, and that IA uses only the number of copies legitimately acquired. That one fact differentiates CDL from every other fair use case that the Court cites.

[37] Campbell, *supra* note 15 at 591.

Note also that use of a book in CDL is exactly what the initial purchase was intended to do (e.g., lending to users), just in a different format. The reasonable benefits that a library receives from CDL is not a copyright benefit; converting the format of a work does not give a library the legal right to use the print and the e-book simultaneously. That right is a copyright benefit and cannot be obtained without just remuneration. In other words, engaging in CDL does not give a library copyright benefits over more copies than it has paid for; it does not hold legal right to use each without regard to the other's use. All it does is allow the library to use the legal right it has (use of one copy of the content) in the manner most convenient to it.

Last, there are two types of CDL uses mentioned by the Court that are not reflected in the hypothetical in the earlier section, both relating to how IA works with Partner Libraries: (1) if a Partner Library owns a print copy of a book, IA will provide them with a digital copy to be used in place of their print copy, and (2) the copy takes the form of a copy on Open Library, meaning that the copy is available to the general public instead of restricted to a library's customary patrons. Let's test these to see if there is any cognizable market harm under copyright.

> Use 1: IA's serving as the host for a Partner Library's copy. A library has always been free to use third parties to perform services for them that they themselves are authorized to undertake. Examples include hiring a contractor to make a copy of works that fall under §108 for preservation purposes or using a third-party learning management system to host and manage course reserves under fair use. In either case, the involvement of a third-party does not impact the analysis; that entity is using the library's delegated authority. So long as the third-party does not exceed the delegated authority, it will not have independent liability.[38] Since IA's hosting does not increase the number of copies on the market, every copy in use remains tied to a copy for which the rightsholder has been paid and which the Partner Library has the right to lend.
>
> Use 2: expanding the patron pool. The reach of the Library Partner's copy appears greater on IA's platform than on its own as users beyond the library's local community can gain access to the library's copy by checking it out directly from Open Library, but this use is also not a market harm protected by copyright. There is still no copy being used that has not been paid for. IA's platform merely facilitates efficient delivery. IA does nothing that the Partner Libraries could not do (and probably actually do) with their collections. Libraries routinely participate in ILL and join consortia, acts which extend the reach of their books beyond their pre-defined communities. Proving only that e-delivery is faster or reaches more people does not prove that the rightsholder has not been paid for the copy in use.

It is irrational to assert that a market is defined by a work, not a format, yet claim as market harm a library's refusal to acquire a work in a specific format. The lost revenue resulting from a library choosing to buy the print format instead of licensing an e-book is not about a lost sale.

[38] See, generally, case law noting that where an agent has acted within course and scope of authority delegated by principal, the principal bears responsibility for illegal acts. See Key Number 308 Principal and Agent.

Money is exchanged for the content regardless of which format is chosen. Counting the difference in cost between the print book and the licensed e-book as market harm, then, is about protecting profit independent of the type of market harm that copyright has traditionally protected.

How Trusting the Illusion of Harm Increases Power Imbalances

> Were we to approve IA's use of the Works, there would be little reason for consumers or libraries to pay Publishers for content they could access for free on IA's website. *See Warhol I*, 11 F.4th at 50. Though Publishers have not provided empirical data to support this observation, we routinely rely on such logical inferences where appropriate in assessing the fourth fair use factor. *See, e.g.*, *Google Books*, 804 F.3d at 223–25[39]

The Court accepted, without evidence, the publishers' allegations of harm or potential harm, claiming that harm is a "common sense" assumption.[40] They acknowledged that the assumption was rebuttable, but they found no such credible evidence in this case. The expert analyses provided by IA were incomplete and unreliable,[41] unsurprising since the relevant data resided only with the publishers and they refused to share it. Proving a negative is impossible; even attempting it when the parties controlling the relevant information have no obligation to disclose it is an exercise in futility.

In rejecting a rebuttal, the Court ignored the most relevant piece of evidence: IA had paid for the number of copies it was using or had otherwise legitimately acquired. The facts of this case were unlike any other where the "common sense" assumption was logical because in every other case, the number of copies used did not match the number of copies acquired legitimately. In contrast, it is not logical to assume that rightsholders are harmed when they were paid for the number of copies that a defendant is using.

Proof of payment for the number of copies used should have been sufficient to meet the defendant's burden of proof that there was no harm, shifting the burden of proof to the publishers. The publishers have actual data (e.g., sales) that could shed light on how IA's uses affected (if at all) sales. Again, sales alone are not normally the measure of market harm in the context of copyright, but if the Court insists on using that measure as a proxy for market harm, then excusing the publishers from proving harm means that any rightsholder can now gain the presumption of harm even if their data shows none.

Blindspots Under the Microscope

[39] Hachette, *supra* note 2 at *17.
[40] *Id.*
[41] *Id.* at *16-18.

The analysis above illustrates how the Court's blindspots were identified and what effect each had on the outcome. Below is a more granular look at the components that appear to have contributed to the making of the blindspots.

Denying the Antecedent

The first is a common logical error called "denying the antecedent" or the "fallacy of the inverse", which can be demonstrated by example.

> Example: if P, then Q. Not P. Therefore, not Q.

The logical error should be obvious. That something is not P does not automatically mean that it is not Q. In *Hachette*, there were two such errors, one regarding transformativeness and the other regarding the rights of libraries.

Requirement of transformativeness. In case law, there are few non-commercial cases, so the Court found no examples of non-commercial public use of complete works where factor one favored fair use. Broadening their search, the Court identified two types of public use that favored fair use, falling into one of two categories: (1) transformative and commercial (e.g., Campbell) or (2) transformative and non-commercial (e.g., HathiTrust). In both configurations, transformativeness was necessary, so regarding public use of complete works, the rule it applied was:

> If (transformative and commercial) or (transformative and non-commercial), it is possible for the use to be fair. Neither (transformative and commercial) nor (transformative and non-commercial). Therefore, not possible to be fair.
>
> Or in a shorter form: If transformative, possible for use to be fair. Not transformative. Therefore, not possible to be fair.

This conclusion does not logically follow. Due to the nature and cost of litigation, case law reflects only a small fraction of uses. Just because a court cannot find a non-transformative public use fair use example in a small dataset does not mean that such a use does not exist.

Library rights

> That Section 108 allows libraries to make a small number of copies for preservation and replacement purposes does not mean that IA can prepare and distribute derivative works *en masse* and assert that it is simply performing the traditional functions of a library.[42]

[42] *Id.* at *10.

Libraries are unusual in copyright in that they are explicitly named and have a statute outlining rights available exclusively to them (§108). The Court seemed to view this statute as the outer bounds of a library's authority to make a full reproduction and adopted the following reasoning with respect to such activity:

> If §108, then legitimate use. Not §108. Therefore, not legitimate use.

However, that §108 describes circumstances under which libraries may make complete reproductions does not mean the opposite: that libraries have no rights to make reproductions outside of §108. After all, both *Cambridge University Press* and *Williams* both found a library making complete reproductions to be fair use under §107.[43]

§107 and §108 are not mutually exclusive. Section 108 operates as a clearly defined safe harbor, identifying specific circumstances where a library is authorized to make full reproductions of works. Section 107, on the other hand, is intentionally broad to leave sufficient flexibility for uses not visible or unknown at the time of legislation to gain protection regardless.

Bias to Believe and Confirm

The second component contributing to the Court's blindness is what Kahneman calls the bias to believe and confirm, where people "seek data that are likely to be compatible with the beliefs they already hold" and discount or miss the elements that do not align with those beliefs.[44] This bias is apparent in multiple instances.

Defendant's characteristics. The language used by the Court signals that it did not find IA credible in claiming library status. The skepticism is expressed in the framing of the central question as being about use by a generic nonprofit organization, not by a library. It reappears when the Court states that IA does not "perform the traditional functions of a library."[45]

The Court's words reflect the belief it knows what the traditional functions of a library are, though it appears that they equate "traditional" with only one of many library functions, which is the lending of print books. Libraries are not one dimensional, though, and they do not all look the same. What defines them and separates them from other organizations is the mission to collect, disseminate, and preserve information for current and future generations.

By not looking like a "traditional" library in the Court's eyes, IA was given very little deference as a library. When one finds a defendant's claim of special status not credible, that status will factor very little into a decision (Halo Effect).

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[43] Cambridge Univ. Press v. Patton, 769 F.3d 1232 (11th Cir. 2014) (articles and chapters for course reserves); Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd, 420 U.S. 376, 95 S. Ct. 1344, 43 L. Ed. 2d 264 (1975) (articles for researchers).

[44] KAHNEMAN, *supra* note 6 at 81. See also Chapters 5 & 10.

[45] Hachette, supra note 2 at *10.

Public Dissemination. The Court draws a bright line between public and private dissemination, looking only at availability and not the nature of use.[46] However, there is a meaningful difference between disseminating unlimited simultaneous copies and disseminating only one simultaneous copy. In fixating only on public availability, it drew parallels to *Google* and *ReDigi* while ignoring the facts that made the cases clearly inapplicable.

> In *Google*, the Court latched onto this language: "[i]f Plaintiffs' claim were based on Google's converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong."[47] Since IA was using a digital form and making it available to the public, the Court claimed that its conduct was exactly what the *Google* court had said would be unfair. If one considers the context in which the statement was made, though, the words have a different meaning. Google had not purchased nor did it own copies of books it had scanned. It had not limited how many people could view their snippets at any given time. So, if the quote were to reflect the facts of the case, it would have more properly been read as: if Plaintiffs' claim were based on Google's converting books *that they did not own* into a digitized form and making that digitized version accessible to the *entire* public *simultaneously without limitation*, their claim would be strong (contextual words added in italics). That more accurate read makes the Court's extrapolation from it questionable, as there are meaningful differences between what the *Google* court had hypothesized and the actuality of CDL, where copies are owned, locked through DRM, and simultaneous lending is limited.
>
> The use of *ReDigi* makes even less sense. *ReDigi* concerned the "resale" of digital music, but the facts of the case indicated that (1) the seller only licensed the music, and (2) the license terms and the technological controls over the music made it such that the seller could redownload the music after "resale"[48]. In other words, reselling the music was a factual impossibility. It could not be conveyed in a manner where the seller lost access when the buyer gained it. The case in reality stands only for the principle that it is neither first sale nor fair use when a commercial actor knowingly helps a seller resell an item that the seller does not own. As IA and the Partner Libraries in *Hachette* owned the number of copies IA circulated, *ReDigi* has no applicability if the Court considers ownership more important than access when discussing copyright uses.

Advertising

> Here, not only is IA's Free Digital Library *likely* to serve as a substitute for the originals, the undisputed evidence suggests it is *intended* to achieve that exact result…IA itself advertises its digital books as a free alternative to Publishers' print and eBooks. *See, e.g.*, App'x 6099 ("[T]he Open Libraries Project ensures

[46] *Id.* at *13.
[47] *Id.* at 225.
[48] Redigi, *supra* note 4 at 658 and fn 6.

> [libraries] will not have to buy the same content over and over, simply because of a change in format." (internal quotation marks omitted)); *id.* at 6100 (marketing the Free Digital Library as a way for libraries to "get free ebooks"); *id.* at 6099 ("You Don't Have to Buy it Again!").[49]

The Court's inclusion of the description of IA's advertising in the opinion has no purpose but to convey its sense that IA is behaving inappropriately in attempting to undercut sales. This interpretation colors the entire opinion because of the Halo Effect. That mental shortcut is based on case law disproportionately representing commercial use and involving actors that did not pay for the number of copies used (e.g., Napster[50]).

In contrast, IA used the number of copies it had purchased (or which had been gifted to them), and DRM locked down the digital copies used so that they could not be replicated or redistributed. If no additional copies beyond the number purchased are in use, then the assumption that the service itself is illegal is questionable. If the service is not illegal, then advertising it, even if advertising undercuts sales, no longer appears inappropriate. By concluding first that IA's use had no legitimate purpose, the Court became predisposed to view all of IA's actions as illegitimate.

<u>The purpose of a book</u>

> …because IA's Free Digital Library primarily supplants the original Works without adding meaningfully new or different features that avoid unduly impinging on Publishers' rights to prepare derivative works, its use of the Works is not transformative.[51]

Much as the Court struggled with the idea that a library could look different from their mental image of a library, it also was only able to recognize one use of books: to be read. In seeing only the use most familiar to the public, it concluded that IA's copy had no meaningfully new or different features from the commercial copy. (As noted earlier, the copy that should have been used in comparison was the print copy that had been purchased, not an e-copy that IA had not licensed.) Regardless of which format the Court used, though, it should have been able to identify meaningful differences:

> Differences from print: prevention of loss and overdue returns, faster delivery, screen readable, available for check-out even after library hours, elimination of shipping costs associated with interlibrary loans, searchable text that can be incorporated into a searchable database and/or a library discovery layer for easier identification, natural-disaster resistant.

[49] Hachette, *supra* note 2 at *15.
[50] See, for example, A&M Recs., Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
[51] Hachette, *supra* note 2 at *10.

Differences from the commercial e-book: availability for interlibrary loan, consortial use, preservation; protection from third party tracking of readers.

Each of these differences is meaningful and tied directly to a library's mission in a way that no individual or non-cultural-heritage organization can claim. Saying that they have no immediately recognizable value to the average reader may be true but cannot be said when the purchaser is a cultural heritage organization with public responsibilities. Value is not determined by instinct; it is measured by objective proof, and each these differences can be objectively proven to make a meaningful difference in use of content legitimately obtained.

The 800 Pound Gorilla

The last point is less about a bias that was apparent from the opinion's text and more about my speculation on a silent influence: fear of what openly acknowledging that buyers of works may legally convert those works to different formats could have for individual users. The fear of piracy (e.g., someone breaking the DRM on a loaned e-book and sharing it) and the fear of widespread practice have been raised with every new technology since at least the 1800s, so it would be surprising if this thought had not crossed the Court's mind here. In case it has also crossed the reader's mind, I wanted to address these fears directly.

The first thing to remember is that even if a buyer converting copyright content it has purchased into a different format is found to be fair use, that is a very limited grant. It does not give them authority to post the new format on a pirate site, for example, since that would necessarily involve more rights under copyright than the purchaser has acquired. In buying a copy, the purchaser gets the right to use one copy. But once they create conditions such that they are using more than one copy – e.g., if they try to sell the old format while keeping the new one --- then the rightsholder has a cause of action based on the use of a copy in excess of what the user had purchased.

The second is that ignoring reality does not make it go away. If lawmakers, courts, and rightsholders do not recognize that people are already converting formats, they have chosen to wear blinders. Knowing that these activities have and continue to happen on a massive scale, would it not be better to create clear and understandable guidelines as to what users can do rather than to leave it to users to come to the rather commonsense conclusion that copyright law is neither logical nor fair, giving them every reason to disregard it?[52]

The last is that the fear of piracy is a substantively different issue, and in CDL, one no more threatening than that of commercial e-book use. A pirate will take what they know they have no legal right to take, regardless of format or source. The advantage in the electronic format over the print is that there is greater built-in protection than there is for other formats. This is

[52] See Justine Nadler, Flouting the Law, 83 Tex L. Rev. 1399 (2004-2005) (how the perceived legitimacy of a law impacts the willingness to abide by it)

because anti-circumvention statutes[53] make such piracy not only an infringement of copyright but also a violation of a second statute. Further, because dissemination is likely to happen online, it is easier to track than a sale of an unauthorized print or CD copy of a book.

The fears of the courts and of rightsholders are understandable. They have been expressed with every change of technology, whether photocopiers, home recorders, or the web. But fear will rarely result in sound decision-making. Copyright was intended to ensure that a copyright owner received fair payment for their work. Where a copyright owner has received payment for one copy and only one copy is used, they have received that fair payment.

[Also note that if the concern boils down to distinguishing between libraries and the average end user, there is a principled way to do this. A library not only has a unique status within copyright, having a societal duty that an individual does not, but libraries across the board have inventory systems through which they track their holdings and circulation. Unlike a user who might lose track of a loan or who might be careless with where their copies go, CDL's requirements include (1) tracking loans such that only the same number of copies purchased can be used simultaneously and (2) requiring that digital item be locked down through DRM. In other words, there are established controls in libraries that do not exist for private citizens, and libraries have missions that serve not only the reading public but authors. An individual may feel no responsibility towards the author of a book, but a library's entire operating model is based on legitimate acquisition. This is one of the ways in which libraries are unique.]

Overcoming Blindness

If blindspots caused by mental shortcuts are natural, common, and necessary to everyday life, is there any way for parties to make relevant issues sitting in blindspots more visible and important to courts? There are, though unfortunately, all of them are costly, whether in terms of time and/or money. Three such paths are below.

Non-copyright claims

Many of the blindspots mentioned above are caused simply by familiarity or the lack of diverse representation of uses in caselaw. Courts are not looking for novelty. They are seeking out similarities and signs that they can apply previous rulings to the current case. In copyright, that presents problems for any novel uses because, definitionally, there is no other case like theirs. If the court fails to differentiate at the start, the case is essentially over as the court forces a round peg into a square hole.

But one can short-circuit that routinized application if not only the facts, but the entire frame for the facts also changes. Copyright precedent does not apply in other areas of law, so by presenting non-copyright or non-statutory legal claims, libraries deprive air to the established

[53] Digital Millennium Copyright Act, 17 USC 1201 et seq

shortcuts in copyright and therefore avoid their built-in bias for commercial interests. Of course, the downside is that many other claims also have their own tests and a court could just as easily have blindspots in the applications of those tests, just different blindspots. This can still be an advantage if the plaintiffs, defendants, and interests in that other field of law are more diverse than those found in copyright caselaw.

I have already written about potential alternative claims extensively in two other articles, so I will only briefly recap them here.

Natural Right. Natural law represents fundamental activities that are objectively necessary to the thriving of humanity, and rights under natural law exist even after statutory enactment. Self-defense is an example. With or without legislation, a person has the right to defend themselves. Positive law may define some limits of self-defense but it cannot deny the right in its entirety. To make a natural law claim is to make a claim in equity, and to establish an equitable claim, one must have a basis that is not already covered by positive law. In this case, fair use is a defense, and §107 serves as a test, but nowhere in that defense or in that test is a guarantee of public rights. (In contrast, author rights are clearly defined in §106). The equitable claim that could be established here is the right to seek knowledge or the right to use knowledge. That may be too broad for a court to apply in the context of copyright, as doing so would also allow anyone to take a work and sell it without paying an author. So, a narrower formulation of that right in the context of copyright is the right to reasonably use information legitimately acquired. Or, alternatively, the right to use information legitimately acquired for the purpose the acquisition was intended to meet. In both cases, the claims are not defensive, but rather a broader contention that reasonable uses of copyrighted works were never intended to be controlled by copyright law.[54]

Restoring the Balance of Copyright: Antitrust, Misuse, and Other Possible Paths to Challenge Inequitable Licensing Practices[55] outlines several other possible paths, though none are about CDL itself. All would share common interests with CDL in that they empower preservation. All suggestions below would apply only to e-books, not other types of licenses which have more complicated formulations.

> State causes of action. Because commercial e-books are licensed, not purchased, there is a contractual component to every transaction. Insofar as contract language interferes with rights established by copyright law, an argument might be made that federal law preempts the restriction of fair use rights. The unconscionability inherent in undermining fair use rights is an alternative contract claim. [The current trend of state

[54] Defeating the Economic Theory of Copyright: How the Natural Right to Seek Knowledge is the Only Theory Able to Explain the Entirety of Copyright's Balance, 64 IDEA: The Law Review of the Franklin Pierce Center for Intellectual Property 135 (2024).

[55] 114 Law Library Journal 131 (2022)

legislation for e-book licenses[56] gets to the same issues as an unconscionability claim but is much more far reaching.]

Antitrust. The variety of antitrust claims that could be (and have been) leveled at licensing practices are too extensive to cover here, but perhaps the one most useful to CDL is tying, defined as "an arrangement whereby a seller sells a product to a buyer only if the buyer purchases another product from the seller."[57] The argument is that the publisher is using its copyright monopoly to illegally gain an advantage in another market or another product. Where publishers have tied e-books to a proprietary platform (i.e., one cannot obtain copyrighted content separate from the platform), they gain market share in multiple different markets: delivery platforms, personal data (if the platform collects personal data which is sold to others), and distribution (where it serves as the only distributor). This argument may be stronger after *Hachette* because the court has affirmed that copyrighted work, regardless of format, is in the same market. (This is an objectively true fact since content does not change from one format to another, but it has been remarkably difficult to get courts to acknowledge it). If the content is identical but the cost is 10x more in the licensed format and tied to a platform, it should be easy to prove that in licensing, the rightsholder is using a government monopoly to establish market dominance or gain profits in another arena (e-book technology, usage data, etc).

Misuse. Copyright misuse claims are very similar to antitrust claims --- refusal to deal, monopolistic conduct, etc – but the bar for success is lower.

Unfortunately, to take action on any of these fronts, one needs to either sue or be sued, which is costly both in terms of time and money. While I do not have data about costs in these areas of law, the costs in copyright litigation may provide some insight: the average cost of a suit is $295K for infringement claims of <$1M, $456K for infringement claims between $1M-$10M, and $1.4M for infringement claims between $10M-$25M, and $2.2M for claims greater than $25M,[58] amounts higher than most individuals and nonprofit organizations can bear.

Exposing Logical Errors

The second possibility does not so much avoid blindspots as it exposes them. Once there is a written decision, it is possible to prove the irrationality of its logic. This was done beautifully by this Court as applied to the district court's definition of commerciality. This "solution" is even more burdensome than the first, as it requires not only a lawsuit but at least one appeal. And since, as shown in this case, there is no guarantee that another court will see these errors, correct them, or will not introduce new illogical reasoning themselves, it is possible to have the

[56] For some information and links to such bills see https://www.libraryfutures.net/post/library-futures-ebook-bills-are-on-the-move
[57] *Tying*, BLACK'S LAW DICTIONARY (11th ed. 2019).
[58] AIPLA Report of the Economic Survey 2023 (2023) pp I200-I204

opportunity to expose every error (e.g, brief or scholarship) but to lack any meaningful recourse.

Laying Bare the Cost of Disappearing Ownership and Fair Use

The last solution is an attempt to lift the blinders on society at large, therefore influencing what judges know indirectly. In some ways, libraries may have done their jobs too well. They are excellent at remaining in the background, presenting users with what they want when they want without ever troubling them with the costs or difficulties in accomplishing this complex feat. In consequence, users, legislators, and judges all fail to understand the costs that the loss of fair use has on libraries and the public.

Publicly and routinely exposing these costs can socialize them, making them more "real" and credible to the public. Judges, instead of only seeing this type of data in a lawsuit, would have the opportunity to see the data regularly and to realize that the issues raised are continual and universal, with real consequences to society.

So, what if a substantial number of libraries, once a year, published on their websites the following information:

- How much they paid that year for e-books as compared to what a consumer would have paid for the same titles. (Where payments are made for a title that they had licensed before, the consumer cost would be $0 because once paid, they would not have to pay again. Some license agreements may prohibit sharing the terms of the agreement, which includes cost, but including the amount in an aggregate number with all other books should not violate such a provision).
- How many other books or databases could have been purchased for the difference between those amounts.
- What invisible costs come with the library's commercial licenses and how these directly impacted users over the course of the year, even if they were unaware of it (e.g., commercial vendors collecting their reading data).
- A chart of what can be done with an e-book as compared to a print book (lending, donating, reselling, etc).

The information might also be provided directly to their Boards and to their local, state, and federal representatives. The libraries would have on hand list of books, databases, or other resources that the library would have obtained but could not afford because of the extra amount libraries pay for licensed materials over a consumer. (Libraries often have wish lists of purchases in case extra funds come their way so this hopefully would not be too labor intensive to assemble. Having this information at hand can be useful to show critics that the losses are not hypothetical but have impacts grounded in fact. Libraries may want to post the list in full on the website where they think that users, authors, or publishers might be interested in seeing where money did not go).

What does this do? One, even for state and local legislators who support book bans and who may be happy that the library cannot afford some of the books that it would have acquired with additional funds, there should be outrage at the amount of money that is spent not on new content but rather to overcome an artificial barrier to access. The difference between what a consumer and a library pays for the same content is functionally a tax on libraries and only libraries. Because the content does not differ between the consumer and library version, the difference in price highlights not only the tax but raises the question of antitrust (e.g., illegally leveraging a copyright monopoly to gain an advantage and dollars in a non-copyright protected activity).

Libraries collectively may be able to design an even better list of data points to collect and present publicly. In the end, the goal is simply to systematically build allies beyond the public. While the public is important, chances are they will not be a significant factor in this fight. Why? Because the public, while they may be very supportive of libraries, is unlikely to prioritize a library over issues of immediate importance to them. Social security, immigration, health care, individual rights are the ones that gain traction, get media attention, and are the focus of single-issue voters. Libraries? Like most government services that are reliable and functioning smoothly, they have a low profile. Until something goes substantially wrong, they have no one's attention. (There are, admittedly, some exceptions, such as with book bans. But that is not about libraries failing to meet their functions; it is about a vocal part of the community claiming the right to undermine those functions).

Libraries, then, must recognize that voters are unlikely to mention to politicians how they feel about libraries or condition their vote on support for libraries. If libraries want to prevent society from ever reaching a crisis point from which it cannot recover, then they have to find a way to make government representatives themselves internalize the impact of these costs. Local and state lawmakers, the ones who fund public libraries, are obvious choices. They have more reason than federal lawmakers to bridle against the misuse of funds when they know the many other public purposes those funds could have advanced. (Of course, they might see this data as an opportunity to reclaim money from the library should licensing practices be brought to heel, but that still would result in a better copyright policy, if not better funding for the library.) In contrast, if the only time they ever see this type of data is during conflicts (e.g., lawsuits), the unfamiliarity of it takes away from its credibility. The idea of posting this information regularly and public is to make visible just a small fraction of what libraries know, to make it more familiar, and to show that, unlike plaintiffs who refuse to share relevant data, libraries have nothing to hide.

Conclusion

The grant of rights to copyright owners has always been overbroad, but for centuries, a social contract compelled rightsholders to exercise restraint before bringing suit for reasonable uses. *Hachette* brought a reasonable use into the courts, and instead of examining the complete facts

before it, the Court cherrypicked only the facts where the narrow perspective of past cases could be applied despite their overall factual dissimilarities.

In doing so, the Court decided *Hachette* not based on an objective analysis but rather its feelings on the facts that it recognized.[59] The feeling that IA's implementation of CDL was different from past fair uses and had too many similarities to commercial use cases that the Court could not let it pass. The feeling that there would be market harm to the rightsholders. The feeling that public use is fundamentally different from private use, even when the number of copies used matches the number of copies purchased. The problem is that copyright's purpose is not to give weight to feelings. It was intended to deliver a societal good, one that could be achieved neither by giving all power to the rightsholders nor all power to the public. It was a good achievable only through balance.

Fair use is the ultimate representative of that balance. The Court's choice to say that the only possible fair uses are the ones previously recognized by other courts blinded them to all the uses that exist in society but which they have not encountered in court. It automatically eliminated possibilities, narrowing reality to a sliver of what it actually is. The equitable nature of fair use was intended to be the safeguard against that kind of blindness, putting rightsholders, judges, and the public on notice that what any of us experiences is not the whole of the society's experiences. In refusing to defend reasonable uses, the Court chose to ignore fair use's purpose. A buyer of a copy of work no longer has the implied right to use it consistent with its purpose, at least not if that use can be met through a commercial source instead.

Though *Hachette* appears to be narrow in scope, applying only to public uses where commercial alternatives exist, allowing rightholders to claim a harm even when they have been paid for the number of copies used has serious implications for all reasonable uses. After all, in establishing a legal right to be paid multiple times by the same buyer to use the same quantity of the same copyrighted content they have already purchased, the Court has effectively reversed the Copyright Clause's explicit priorities, making private profit its primary purpose over societal advancement.

[59] For a more scientific explanation of how often and why people replace reasoned decision-making with their feelings, see KAHNEMAN, supra note 6 at chapters 29-30.