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Feminist Use

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Feminist Use

Amanda Levendowski

In 2015, Judge Pierre Leval wrote that copyright isn't about authors, it's about the rest of us. "While authors are undoubtedly important intended beneficiaries of copyright," he explained, "the primary intended beneficiary is the public."¹ He would know—his scholarship has been transformative for how every jurist from the Supreme Court down approaches key copyright questions.² But copyright often falls short of this aspiration by benefiting only a sliver of the public.

Copyright law grants exclusive rights to authors of qualifying works, such as books, which protects those works from unauthorized copying.³ The first copyright legislation, the Statute of Anne of 1710, was drafted and enacted by a British Parliament comprised of privileged white men, largely for the benefit of other privileged white men, to encode men's vision for the intersection of creativity and capitalism.⁴ The Copyright Act of 1976, which continues to govern much of copyright law in the United States, was enacted by a Congress comprised of predominantly white men, and it eliminated formalities for copyright registration and extended copyright terms.⁵ Those changes make it more challenging for the public to access, read, and remix copyrighted works.⁶ Consistently, copyright laws have focused on the creativity of other men, evidenced by their exclusion of arts stereotyped as "women's work."⁷

Scholars like Rebecca Tushnet, Ann Bartow, and Dan Burk have long grappled with how gender shapes copyright,⁸ including how feminism frames fair use.⁹ The fair use doctrine empowers the public to copy, share, and remake copyrighted works without consent.¹⁰ It transforms would-be infringements into statutorily sanctioned activity under certain conditions, one of which is whether the use is for a preferred purpose that serves the public—such as news reporting, teaching,

scholarship or research—which means the use is “not an infringement of copyright.”¹¹ Courts also assess the use under a four-factor test, which analyzes:

1. The purpose and character of the use, including whether such use is of a commercial nature . . . ;
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.¹²

Sonia Katyal described how “fair use bears an intimate relationship to the way in which critical legal studies focused its gaze on the role of entitlements for minority groups. Like critical race theory, a critical approach to copyright law tends to ask the question of how entitlements are distributed and their effect on disenfranchised groups, and also to employ tools like fair use to restore some balance between property rights and social justice.”¹³ As Betsy Rosenblatt has documented, a growing body of critical scholarship seeks to explore the fairness of the fair use doctrine.¹⁴ However, there remains an FU lurking in fair use: fair use doesn’t need to be fair, and it often isn’t. Qualifying as “fair” legally says nothing about whether the use is “fair” equitably, and many fair uses are oppressive.¹⁵

When 2 Live Crew parodied Roy Orbison’s classic rock hit *Oh, Pretty Woman* with crude lyrics about “big hairy woman,” “need to shave that stuff,” “bald headed woman,” and “two timin’ woman,” the Supreme Court concluded in its inaugural fair use decision that the band’s parody qualified as fair use.¹⁶ The band’s misogynistic language was not a one-off. Kimberlé Crenshaw describes lyrics from the band’s album *Nasty As They Wanna Be*, the explicit version of the album that *Oh, Pretty Woman* appeared upon, was “virulently misogynist, sometimes violently so,” particularly toward Black women.¹⁷ Crenshaw coined the term “intersectionality” to account for “the particular manner in which Black women are subordinated,” which is embodied by the band’s lyrics.¹⁸ Orbison’s original offered one sexist approach to catcalling, but 2 Live Crew’s version reinforces another misogynistic stereotype by equating a woman’s worth with her appearance and behavior.¹⁹ That decision, *Campbell v. Acuff-Rose*, paved the way for other oppressive fair uses.

In the aughts, Google began displaying thumbnail images of nude models as part of its Google Image Search results without those models’ or their photographers’ permission.²⁰ In *Perfect 10 v. Amazon*, the Ninth Circuit concluded that such a use was fair.²¹ Even though the models’ consent was not relevant legally from a copyright perspective, the court did not address the ethics of broadly publicizing nude photos without consent.²² More than a decade later, Dr. Safiya Umoja Noble revealed that indiscriminately hoovering up other people’s copyrighted works to power an algorithmic Image Search can contribute to a different ethical

conundrum: sexist and racist results, like hits for pornography in response to searches for “Black girls.”²³

Gender and race play roles in other fair uses as well. Appropriation artist Richard Prince collaged and painted over portraits of Rastafarians by photographer Patrick Cariou, who spent six years building relationships with Rastafarians in Jamaica for his portraiture.²⁴ As part of the same series, Prince collaged and painted over photographs of nude women.²⁵ Both sets of subjects consented to the original photographs but not Prince’s alterations—and neither the subjects nor Cariou saw any part of Prince’s \$10 million in sales.²⁶ In *Cariou v. Prince*, however, the Second Circuit concluded that Prince’s art was mostly fair use.²⁷ And the secretive company Clearview AI curated a cache of billions of internet users’ photographs without their awareness to fuel face surveillance technology for law enforcement.²⁸ Often, the technology is demographically biased and disproportionately deployed against people of color, activists, immigrants, and other communities who are unjustly targeted.²⁹ And yet, while a court has not decided the issue, a judge could find some forms of face surveillance to constitute fair use.³⁰

“Fair use” can be a misnomer, but the public needs a vocabulary for equitable uses that utilize copyrighted works to challenge oppression or promote liberation. This chapter suggests one: feminist use.

To function effectively, feminist use cannot be limited to abstract theory. It must be a practice. Libraries are already modeling it through the growing library practice of controlled digital lending (CDL).³¹ CDL enables libraries to create 1:1 print-to-pixel conversion of their collections, empowering libraries to lend digital versions of print books in lieu of physical ones, which has significant impacts on dismantling oppression and promoting equity.³² CDL, unsurprisingly, also relies on fair use. Fair use can be flexible, fact dependent, and fraught. But as empirical and qualitative work by Pamela Samuelson, Matthew Sag, and Barton Beebe have shown, it can also be reasonably predictable.³³ That is why a growing number of libraries, librarians, and lawyers have endorsed the idea that CDL is fair use.³⁴ However, several publishers and some authors vehemently disagree, with the latter charging that CDL makes earning a living as a writer more difficult; the Internet Archive is appealing a recent decision determining that its digital lending program is not fair use.³⁵ This chapter does not settle that debate. Instead, it uses CDL to illustrate the characteristics of a feminist use.

Feminism is far from the only lens through which to reimagine secondary uses, but it offers one powerful way to discuss how such uses disrupt oppressive power dynamics. In a prior piece, *Defragging Feminist Cyberlaw*, I suggest conceptualizing cyberlaws and policies, including copyright, using three illustrative (but certainly not exhaustive) feminist values: consent, accessibility, and safety.³⁶ This chapter uses each value to assess CDL in three parts. Section I explains how copyright law is premised on consent—except when it isn’t, including rights to create copies that serve the public which predate fair use by a century. In section II, I examine

how CDL amplifies the accessibility of copyrighted works, both physically and logistically, to improve access to information. And finally, section III explores how CDL supports the safety of libraries and patrons by protecting resources necessary for a secure, informed public. Rather than reclassify less-than-feminist uses as unfair, this chapter concludes that we should adopt “feminist use” to describe uses that are morally defensible, socially desirable, and politically powerful, regardless of a legal regime that was not built to be feminist.

COMPLICATING CONSENT

Copyright is characterized by its relationship to consent. Without consent, creating copies and making other uses of copyrighted works represents infringement.³⁷ Members of the public may seek to license a work for appropriation, but a license may generally be denied for almost any reason, including objection to a critical reuse.³⁸ The alternative, simply using a copyrighted work without consent, carries significant penalties. If someone comes along and infringes a work registered with the Copyright Office,³⁹ such as by making and distributing copies or preparing derivative works,⁴⁰ that person may face up to \$150,000 in statutory damages per infringement.⁴¹ Usually.

Fair use is the obvious exception, and the consent-less use of copyrighted works has played a central role in libraries’ work for decades.⁴² It entitles patrons to copy information for purposes of teaching, scholarship, or research.⁴³ It empowers libraries to host e-reserves of notable volumes.⁴⁴ And it enables libraries to create digital books for patrons with print disabilities, promoting accessibility to information.⁴⁵ However, these feminist uses—all of which were also deemed legally fair—would be impossible if libraries were forced to seek consent from copyright owners like publishers, who resisted each of these innovations with litigation, lobbying, or both.⁴⁶

Eschewing copyright owners’ consent, however, cuts both ways. It enables fair uses that are sexist, racist, voyeuristic, and colonialist in ways that copyright owners would be unlikely to allow. The fix for oppressive fair uses may seem to be always requiring copyright owners’ consent for any secondary use. Some authors might like that to be the case. But it isn’t. Requiring consent can prevent oppressive uses, but it has the collateral effect of threatening the good faith fair use arguments underpinning many feminist ones, like CDL.⁴⁷ Such a radical policy shift would prevent uses that are both fair and feminist, like many examples of libraries’ past and present work.⁴⁸

However, the law has long recognized that consent is not always necessary to create copies. Nearly a century before Judge Joseph Story developed the framework for fair use, eighteenth-century booksellers were frustrated by the newly enacted Statute of Anne’s power to extinguish their publishing monopolies, particularly after Parliament declined to extend them.⁴⁹ In response, booksellers brought a series of

lawsuits arguing that copyright was a common law right of infinite duration.⁵⁰ In the landmark case of *Donaldson v. Beckett*, the House of Lords rejected that claim:

Copies of books have existed in all ages, and they have been multiplied; and yet an exclusive privilege, or the sole right of one man to multiply copies, was never dictated by natural justice in any age or country . . . The common law has ever regarded public utility, as the mother of justice and equity. Public utility requires, that the productions of the mind should be diffused as wide as possible; and therefore the common law could not, upon any principle consistent with itself, abridge the right of multiplying copies.⁵¹

Donaldson's bold proclamation recognizing that copyright owners' consent to create copies is not and should not always be required is peppered with caveats and exceptions, but the sentiment still animates parts of contemporary copyright policy. Former Register of Copyright Barbara Ringer, who was one of the lead architects of the Copyright Act of 1976, championed authors' rights and also identified one of the three goals comprising the public interest in copyright as "provid[ing] the widest possible access to information of all kinds."⁵² The Act encouraged that access by retaining term limitations (albeit extended ones) after which works could be used freely without consent and codified fair use, even while limiting accessibility in other ways.⁵³ To this day, the Supreme Court, as well as circuit courts, routinely address the "public benefit" of copying even though it is not a formal fair use factor.⁵⁴ Whether formulated as public utility, public interest, or public benefit, feminist uses like CDL create copies to serve it.

AMPLIFYING ACCESSIBILITY

As feminist philosopher and disability advocate Anita Silvers recounted, "women with disabilities experience subordination by the dominant culture for being members of the class of women, and again by feminist identity theory when it fails to adopt a disability perspective in recognizing women."⁵⁵ Disabled women, as well as other disabled people, often have less access to information.⁵⁶ As the American Association of People with Disabilities and its amici explained in *Authors Guild v. HathiTrust*, a prior case recognizing the legality of creating a digital library for disabled people, creating copies to serve disabled patrons "honor[s] the century-long efforts of people with disabilities to seek equal access to copyrighted works," which can be a challenge because there is "strong empirical evidence that people with disabilities are systemically unserved or underserved by copyright holders."⁵⁷ CDL continues these efforts by sharing library resources with disabled patrons, who may not be able to use print books or visit physical libraries but can use CDL to access high-quality digital knowledge on their own terms.⁵⁸ By making information more easily available than it would be through brick-and-mortar channels, CDL counters epistemic injustices effectively.⁵⁹

Online lending also functionally extends libraries' hours so that anyone who cannot visit a physical library during business hours—including disabled people, as well as working parents or people with eldercare responsibilities, people with limited access to public transit, and a world affected by a global pandemic—still benefit from libraries' resources. Digital materials can also improve literacy for young readers, debunk dangerous misinformation, and make it easier to access resources that promote a candid treatment of sexuality and gender, race and racism, and religion.⁶⁰ CDL also makes the histories of marginalized communities more broadly available.⁶¹

However, materials by and about marginalized people are under threat. In 2021, the American Librarian Association identified more than fifteen hundred books targeted for bans, the highest number since the organization began tracking bans two decades years ago.⁶² Not only are more books being banned, but they are being banned broadly. From June 2021 to June 2022, school library book bans occurred in 138 districts across thirty-two states.⁶³ Students see the problem. "Hiding away things that make us uncomfortable doesn't make them go away," explained Deeya, an Arkansas high school student, "Even if we don't talk about it, racism, sexual assault, genocide, and many other complex issues will still exist. We have to face the discomfort to keep it from happening again."⁶⁴ By borrowing books with CDL, all people can access books digitally that explore these and many other urgent issues, even when those books may not be available locally in physical libraries.

SUPPORTING SAFETY

Women flourish when they can safely access information. When books—whether written by women or about gender, sexuality, and reproductive rights—are destroyed or censored, the public suffers. Unfortunately, the safety of libraries, their collections, and their patrons is under siege, both physically and existentially. Physically, library collections are threatened by climate change. That threat inspired the creation of CDL. In 2001, Tropical Storm Allison devastated the University of Houston Law Library.⁶⁵ Parts of the library were flooded with at least eight feet of water, submerging many law books; mold destroyed much of the remaining collection.⁶⁶ Law librarian Michelle Wu pioneered a new approach to library resilience: CDL.⁶⁷ The initial idea driving CDL was, in Wu's words, to "preserve collections while respecting copyright law in a world where natural disasters are a growing threat."⁶⁸ Wu published an article outlining her early vision for CDL,⁶⁹ and many libraries responded by putting her theory into action.⁷⁰ Libraries began scanning physical books and loaning digital versions instead of physical ones, taking steps to mirror physical borrowing by ensuring that only one copy was in circulation at a time, limiting lending terms, and restricting patrons' ability to create copies.⁷¹

Existentially, libraries' ability to provide patrons with high-quality information is imperiled. Libraries have long been politicized, but that problem is

reaching new heights as attacks on library programs and patrons rise.⁷² Conservative politicians and school boards ban books about sexuality, race, and gender.⁷³ Right-wing lawmakers call for book burnings, and several have been held already.⁷⁴ And gun-carrying protestors and neo-Nazis threaten drag queen story hours at libraries.⁷⁵ But CDL enables libraries to freely, and fairly frictionlessly, lend books that combat oppression without exposing patrons to harassment. While libraries will always be powerful physical presences, CDL provides another way to educate and empower patrons.⁷⁶

REIMAGINING THE FU IN FAIR USE

CDL is promising, but it's not a panacea for knowledge inequality. Digitizing books is not free, posing a hurdle to libraries with increasingly scarce resources.⁷⁷ Libraries that *do* engage in CDL may have limited digitized collections or, more dangerously, curate ones that promote oppression and misinformation.⁷⁸ Patrons may not have reliable, or any, internet access, putting the benefits of CDL out of their reach.⁷⁹ And publishers and authors who oppose CDL raise a challenge: why do libraries have to create their own copies when publishers sell e-books?

Some publishers and authors see every CDL copy as a lost e-book sale; some even see each library lend as a missed potential sale.⁸⁰ However, CDL copies and e-books are not interchangeable.⁸¹ Libraries do not own e-books—they're licensed.⁸² E-books can cost more than physical books while being subject to contractual restrictions that limit lending, such as requiring libraries to rebuy e-book licenses after lending to a certain number of patrons.⁸³ Publishers and platforms can also unilaterally remove e-books from libraries' collections, as one publisher did when it pulled more than thirteen hundred titles from academic libraries or another corporation did when it deleted digital versions of *1984* from owners' libraries, both without notice.⁸⁴ And publishers do not produce e-books for every title, including for out-of-print books. CDL allows libraries to curate collections that more closely mirror their physical ones than publishers' digital ones. In that sense, CDL magnifies what libraries do best: combatting oppression with access to knowledge.

Regardless of whether an appellate court ultimately finds that CDL is fair use, that term remains a misnomer. Legally, a use need not be equitable to be fair. A use certainly does not need to be feminist, and fair uses often are not. But fair uses can still make way for a new FU: feminist use. Take the sexist, racist, voyeuristic, and colonialist fair uses introduced earlier. Despite their oppressive effects, each one can be invoked to defend the legality of CDL. Losing that legal battle means that the public, the supposed beneficiaries of copyright law, will be robbed of an invaluable tool for combatting oppression—and the feminist goals of consent, accessibility, and safety will be subverted along with it. By embracing the term “feminist use,” we gain a vocabulary for describing and distinguishing uses that are legally

tolerated from ones are radically transformative. Not in the copyright sense, but in the grand societal one.

NOTES

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1. *Authors Guild v. Google, Inc.*, 804 F.3d 202, 212 (2d Cir. 2015).
2. See Pierre K. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990) (arguing that “transformativeness” ought to be part of the first fair use factor inquiry).
3. 17 U.S.C. §§ 102, 106.
4. Copyright Act of 1710, 8 Ann. c. 21 (encouraging learning by securing limited monopolies to authors and purchasers of copies); see also Ann Bartow, *Fair Use and the Fairer Sex: Gender, Feminism, and Copyright Law*, 14 AM. J. GENDER, SOC. POL’Y & LAW 551, 557–58 (2006) (critiquing the patriarchal origins of copyright law). Parts of this paragraph are adapted from Amanda Levendowski, *Defragging Feminist Cyberlaw*, 37 BERKELEY TECH. L.J. 1 (forthcoming 2024) (on file with author).
5. *History of Women in the U.S. Congress*, CTR. FOR AM. WOMEN & POLS., <https://cawp.rutgers.edu/facts/levels-office/congress/history-women-us-congress> (accessed Apr. 7, 2023). However, it was largely drafted by a woman named Barbara Ringer. For a deeper dive into the remarkable Ringer, whose legislation limited access to copyrighted works but also codified fair use, see Amanda Levendowski, *The Lost and Found Legacy of Barbara Ringer*, THE ATLANTIC (July 11, 2014), <https://web.archive.org/web/20210921162304/https://www.theatlantic.com/technology/archive/2014/07/the-lost-and-found-legacy-of-a-copyright-hero/373948/>.
6. 17 U.S.C. § 102 (stating that copyright subsists in “original works of authorship fixed in any tangible medium of expression,” regardless of notice formalities or registration); 17 U.S.C. § 302 (generally extending term to life of the author plus seventy years).
7. Jessica Litman, DIGITAL COPYRIGHT 105–106 (2017); Bartow, *supra* note 4. *But see* Star Athletica, L.L.C. v. Varsity Brands, Inc., 137 S. Ct. 1002 (2017) (finding copyright protection in conceptually separable aspects of clothing designs).
8. See, e.g., Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism and Feminist Futures*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POSTMODERN WORLD (Lisa Buranen & Alice M. Roy eds., 1999); Malla Pollack, *Towards a Feminist Theory of the Public Domain, or Rejecting the Gendered Scope of United States Copyrightable and Patentable Subject Matter*, 12 WM. & MARY J. WOMEN & L. 603 (2006); Madhavi Sunder, *The Romance of the Public Domain*, 92 CALIF. L. REV. 1331 (2004); Bartow, *supra* note 4; Dan L. Burk, *Copyright and Feminism in Digital Media*, 14 AM. U. J. GENDER SOC. POL’Y & L. 519 (2006); Sonia K. Katyal, *Performance, Property, and the Slashing of Gender in Fan Fiction*, 14 AM. U. J. GENDER SOC. POL’Y & L. 463 (2006); Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL’Y & L. 183 (2007). Beyond the United States, Carys J. Craig has written about gender and copyright. See, e.g., Carys J. Craig, Joseph F. Turcotte & Rosemary J. Coombe, *What’s Feminist About Open Access?: A Relational Approach to Copyright in the Academy*, 1 Feminist@law 1 (2011).

9. See, e.g., Rebecca Tushnet, *My Fair Ladies: Sex, Gender, and Fair Use in Copyright*, 15 AM. U. J. GENDER SOC. POL'Y & L. 273 (2007); Bartow, *supra* note 4.
10. 17 U.S.C. § 107.
11. *Id.* Some characterize this as an affirmative defense.
12. *Id.* These factors were inspired by the test created by Justice Story in *Folsom v. Marsh*. 9 F. Cas. 342, 345 (C.C.D. Mass. 1841). Courts commonly ask whether the use is “transformative” under the first factor.
13. Peter Goodrich, Sonia K. Katyal, and Rebecca Tushnet, *Panel 1: Critical Legal Studies in Intellectual Property and Information Law Scholarship*, 31 CARDOZA ARTS & ENT. L.J. 601, 613 (2013) (referencing Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005). Thanks to Betsy Rosenblatt for citing this quote in her work.
14. Betsy Rosenblatt, *Considering the Role of Fairness in Fair Use* (work in progress) (manuscript on file with author) (canvassing relevant scholarship).
15. Examples of sexist, racist, and colonialist fair uses are discussed later in this chapter under Complicating Consent.
16. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578–94 (1994).
17. Kimberlé W. Crenshaw, *Beyond Racism and Misogyny*, BOSTON REV. (Dec. 1, 1991.), <https://www.bostonreview.net/articles/kimberle-w-crenshaw-beyond-racism-and-misogyny/>; Kimberlé Williams Crenshaw, *Beyond Racism and Misogyny: Feminism and 2 Live Crew*, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (Mari J. Matsuda, et al., eds., 2019).
18. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1 U. CHICAGO L. FORUM 139, 140 (1989).
19. Tushnet, *supra* note 19.
20. *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1155 (9th Cir. 2007).
21. *Amazon.com, Inc.*, 508 F.3d 1146. The models were not the copyright owners, but it remains striking that sharing their nude images broadly, publicly, freely available merited no attention.
22. Levendowski, *supra* note 4.
23. Safiya Umoja Noble, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); Michelle Ruiz, *Safiya Noble Knew the Algorithm Was Oppressive*, VOGUE (Oct. 21, 2021), <https://www.vogue.com/article/safiya-noble>.
24. *Cariou v. Prince*, 714 F. 3d 694, 698–99 (2d. Cir. 2013).
25. Richard Prince, *Djuana Barnes, Natalie Barney, Renee Vivian, and Roman Brooks Take Over the Guanahani* (2008), <https://www.ca2.uscourts.gov/docs/opn1197/Prince/A-802,%20Djuna%20Barnes,%20Natalie%20Barney,%20Richard%20Prince.jpg>.
26. *Id.* In another series, Prince appropriated women’s images. Jessie Heyman, *SuicideGirls Respond to Richard Prince in the Best Way Possible*, VOGUE (May 28, 2015), <https://www.vogue.com/article/suicidegirls-richard-prince>.
27. *Cariou*, 714 F. 3d at 712 (excepting five images and remanding for further proceedings).
28. Kashmir Hill, *The Secretive Company That Might End Privacy as We Know It*, NEW YORK TIMES (Jan. 18, 2020), <https://www.nytimes.com/2020/01/18/technology/clearview-privacy-facial-recognition.html>.
29. Ethical Use of Facial Recognition Act, S. 3284, 116th Cong. §§ 2(2)–2(3) (2020). Other potential targets include sex workers. Amanda Levendowski, *Resisting Face Surveillance with Copyright Law*, 104 N.C. LAW REV. 4 (2022). Clearview AI settled a lawsuit brought by the American Civil Liberties Union challenging the company’s technology under the Illinois Biometric Information Privacy Act, which included a five-year moratorium on selling its face surveillance technology to law enforcement in Illinois. Settlement Agreement & Release at 2, *ACLU v. Clearview AI, Inc.*, No. 2020-CH-04353

(Ill. Cir. Ct. May 4, 2022), <https://www.aclu.org/legal-document/exhibit-2-signed-settlement-agreement?redirect=exhibit-2-signed-settlement-agreement>.

30. Compare Amanda Levendowski, *How Copyright Law Can Fix Artificial Intelligence's Implicit Bias Problem*, 93 WASH. L. REV. 579 (2018) (detailing why using copyrighted works as machine learning training data is generally fair use) with Benjamin L. W. Sobel, *Artificial Intelligence's Fair Use Crisis*, 41 COLUM. J.L. & ARTS 45 (2017) (documenting how AI invocations of fair use may benefit the powerful rather than the public); Levendowski, *supra* note 4 (describing why using profile pictures to train facial recognition algorithms may be an exception).

31. 17 U.S.C. § 107. CDL is also reliant on the common law principle of exhaustion. *Position Statement*, CONTROLLED DIGITAL LENDING BY LIBRARIES (2022), <https://controldigitallending.org/statement> (last visited Apr. 8, 2023).

32. *Position Statement*, *supra* note 31.

33. See, e.g., Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009) (qualitative analysis of fair use cases); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012) (empirical analysis of fair use cases); Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978–2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1 (2020) (empirical review of fair use cases).

34. *Signatories to the Position Statement on Controlled Digital Lending by Libraries*, CONTROLLED DIGITAL LENDING BY LIBRARIES (2022), <https://controldigitallending.org/signatories> (last visited Apr. 8, 2023).

35. Complaint at 3, *Hachette Book Group, Inc. v. Internet Archive*, 1:20-cv-04160 (S.D.N.Y. June 1, 2020); *Hachette Book Group, Inc. v. Internet Archive*, 1:20-cv-04160, 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023) (“Each enumerated fair use factor favors the Publishers, and although these factors are not exclusive, IA has identified no additional relevant considerations. At bottom, IA’s fair use defense rests on the notion that lawfully acquiring a copyrighted print book entitles the recipient to make an unauthorized copy and distribute it in place of the print book, so long as it does not simultaneously lend the print book. But no case or legal principle supports that notion.”); *Controlled Digital Lending (CDL): An appeal to readers and librarians from the victims of CDL*, AUTHORS GUILD (2019), <https://authorsguild.org/app/uploads/2019/02/CDL-Appeal-13FEB2019-v1.pdf>. The iPIP Clinic advised the Internet Archive, including while I was on research leave. Client consent was sought and granted. All comments are based on public information and reflect my opinion.

36. Levendowski, *supra* note 4. To be clear, these are not the only feminist values—just a sampling of important ones.

37. 17 U.S.C. § 106.

38. Parodies are a prime example; compulsory licenses are a key exception.

39. *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881 (2019) (requiring registration with the Copyright Office to initiate infringement litigation).

40. 17 U.S.C. § 106 (outlining authors’ exclusive rights).

41. 17 U.S.C. § 504(C)(2) (requiring willful infringement).

42. An entire section of the Copyright Act is dedicated to libraries’ activities. 17 U.S.C. § 108.

43. *Williams & Wilkins Co. v. U.S.*, 487 F.2d 1345, 1359 (Ct. Cl. 1973). Libraries are also granted an exemption from liability for unsupervised use of reproducing equipment, such as photocopiers, provided the institution posts a notice about copyright laws. 17 U.S.C. § 108.

44. *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014).

45. *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 90–91 (2d Cir. 2014).

46. *Controlled Digital Lending: The Next Chapter in Libraries’ Expansion of Access to Knowledge*, LIBRARY FUTURES (on file with author). This policy work was adapted into Kyle Courtney & Juliya Ziskina, *The Publisher Playbook: A Brief History of the Publishing Industry’s Obstruction of the Library Mission* (forthcoming 2024), <https://dash.harvard.edu/handle/1/37374618>.

47. See, e.g., *Mattel, Inc. v. Walking Mountain Prod.*, 353 F.3d 792 (9th Cir. 2003) (observing that Mattel “would be less likely to grant a license to an artist that intends to create art that criticizes and reflects negatively on Barbie’s image,” which could be described as feminist art).

48. Kyle Courtney & Juliya Ziskina, *The Publisher Playbook: A Brief History of the Publishing Industry’s Obstruction of the Library Mission* (forthcoming). Work by the iPIP Clinic inspired this article.

49. *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841); *Donaldson v. Beckett* (1774) 1 Eng. Rep. 837; Paul Goldstein, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 34–35 (2003).

50. *Donaldson*, 1 Eng. Rep. 837; see, e.g., *Millar v. Taylor* (1769) 4 Burr. 2303 (holding that copyrights existed at common law that could not be extinguished by the Statute of Anne’s limited terms), *overruled by Donaldson*, 1 Eng. Rep. 837.

51. *Donaldson*, 1 Eng. Rep. 837. Thanks to Michelle Wu for this citation. For a deeper dive into equitable claims for the right to access information, see Michelle Wu, *Back to Basics: The Balance of Copyright as Natural Law and an Equitable Claim for the Right to Use Knowledge Legitimately Acquired* (on file with author).

52. Barbara Ringer, *Authors’ Rights in the Electronic Age: Beyond the Copyright Act of 1976*, 1 LOY. L.A. ENT. L. REV. 1 (1981). The other two goals were “to induce authors and artists to create and disseminate original works, and to reward them for their contributions to society” and preserve “a fundamental public interest related to . . . freedom of expression, freedom to write and publish whatever one wishes.” *Id.*, at 2–4. As discussed earlier, *supra* note 4, the Act codified fair use while limiting access to copyrighted works in other ways. For a deeper dive into Barbara Ringer’s legacy, see Levendowski, *supra* note 6.

53. 17 U.S.C. §§ 107, 302.

54. See, e.g., *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 1206 (2021) (“[W]e must take into account the public benefits the copying will likely produce . . .”); *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 848–49 (C.D. Cal. 2006) (“[S]earch engines such as Google Image Search provide great value to the public.”), *aff’d* *Amazon.com, Inc.*, 508 F.3d 1146 (discussing “the significantly transformative nature of Google’s search engine, particularly in light of its public benefit”); *Authors Guild*, 804 F.3d at 212 (“[W]hile authors are undoubtedly important intended beneficiaries of copyright, the primary intended beneficiary is the public.”). A user’s “public benefit” is usually addressed as part of the first factor.

55. Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY WOMENS L.J. 81, 82–83 (1998) (citing prominent feminist scholars, including Martha Minow, Susan Sherwin, Rosemarie Tong, and Iris Marion Young, among others, who “made important contributions by commenting on the confluence of disability discrimination with gender oppression”).

56. The choice to use identity-first language is a personal one guided by the guidelines of the National Center of Disability and Journalism and my personal preference as a disabled person. *Disability Language Style Guide*, NAT’L CTR. OF DISABILITY & JOURNALISM (Aug. 2021), <https://ncdj.org/style-guide/>.

57. Amicus Brief of the Am. Ass’n. of People with Disabilities, et al., *HathiTrust*, 755 F.3d 87.

58. Laura C. Wood, et al., *Libraries: Take AIM! Accessible Instructional Materials and Higher Education*, REPOSITORY SERV. ACCESSIBLE COURSE CONTENT (Mar. 2017), <https://dl.tufts.edu/pdfviewer/d504rx736/f11079946>; Joanne Kaeding, Diane L. Velasquez & Deborah Price, *Public Libraries and Access for Children with Disabilities and Their Families: A Proposed Inclusive Model*, 66 J. AUSTR. LIB. & INFO. ASS’N. 2 (2017), <https://www.tandfonline.com/doi/full/10.1080/24750158.2017.1298399>.

59. Many of these examples are courtesy of *Controlled Digital Lending: Unlocking the Library’s Full Potential*, LIBRARY FUTURES (2021), <https://www.libraryfutures.net/policy-document-2021>. For deeper dives into how marginalized people use and benefit from libraries, see Mary Case, et al., *Report of the ARL Joint Task Force on Services to Patrons with Disabilities*, ASS’N RSCH. LIBRS. (Nov. 2, 2012),

<https://www.arl.org/wp-content/uploads/2012/11/print-disabilities-tfreporto2nov12.pdf>; Joanne Kaeding, Diane L. Velasquez & Deborah Price, *Public Libraries and Access for Children with Disabilities and Their Families: A Proposed Inclusive Library Model*, 66:2 J. AUSTL. LIBR. & INFO. ASS'N. 96 (2017); Susan K. Burke, *The Use of Public Libraries by Native Americans*, 77 LIBR. Q. 4 (2007); Debby Warren, *Rural Libraries Take on Growing Role as Agents of Inclusion and Change*, NONPROFIT Q. (Dec. 16, 2019), <https://nonprofitquarterly.org/rural-libraries-take-on-growing-role-as-agents-of-inclusion-and-change/>; Margaret Barthel, *D.C. Public Library Wants to Build Bigger Neighborhood Branches in Communities Without Easy Access*, DCIST (Nov. 19, 2020), <https://dcist.com/story/20/11/19/dc-public-library-bigger-branches-in-communities-without-easy-access/>.

60. Irene Pictron, NAT'L LITERACY TRUST, *THE IMPACT OF EBOOKS ON THE READING MOTIVATION AND READING SKILLS OF CHILDREN AND YOUNG PEOPLE* (2014); Argyri Panezi, *A Public Service Role for Digital Libraries: A Case of Emergency Electronic Access to Library Material and The Unequal Battle Against Misinformation Through Copyright Law Reform*, 31 CORNELL J.L. & PUB. POL'Y 65 (2021); Meghan Gunn, *Recent Surge in Banned Books Targets Titles with Focus on Race, Sexuality*, NEWSWEEK (Apr. 12, 2022), <https://www.newsweek.com/2022/04/29/recent-surge-banned-books-targets-titles-focus-race-sexuality-1696575.html> (removal of books discussing “critical race theory,” as well as books about queerness and gender identities from libraries); Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AMERICA (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/>.

61. The Jamestown S'Klallam Tribal Library in Blyn, Washington, for example, was awarded the National Medal for Museum and Library Service for using CDL to share histories of Pacific Northwest tribal nations with patrons. Michael Dashiell, *Jamesdown S'Klallam Library Wins National Medal for Library Service*, DEREK KILMER (May 22, 2019), <https://kilmer.house.gov/news/in-the-news/jamestown-sklallam-library-wins-national-medal-for-museum-and-library-service> (describing Jamestown S'Klallam Tribal Library efforts to preserve history of Native nations in the Pacific Northwest through a digital collection).

62. Elizabeth A. Harris & Alexandra Alter, *With Rising Book Bans, Librarians Have Come Under Attack*, NEW YORK TIMES (July 18, 2022), <https://www.nytimes.com/2022/07/06/books/book-ban-librarians.html>.

63. Friedman & Johnson, *supra* note 60.

64. The Learning Network, *What Students Are Saying About Banning Books From School Libraries*, NEW YORK TIMES (Feb. 18, 2022), <https://www.nytimes.com/2022/02/18/learning/students-book-bans.html>.

65. Lila Bailey, *Protecting Books from Harm with Controlled Digital Lending*, INTERNET ARCHIVE BLOGS (Aug. 28, 2019), <https://blog.archive.org/2019/08/28/protecting-books-from-harm-with-controlled-digital-lending/>.

66. *Id.*

67. Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 LAW LIBR. J. 527 (2011). Wu's approach, coupled with feminist use, aligns with principles of eco-feminism; see, e.g., Val Plumwood, *FEMINISM AND THE MASTERY OF NATURE* (1993) (coining the term “critical ecofeminism” to illustrate how feminist critique can integrate theories of gender, race, and class oppression with the domination of nature).

68. Bailey, *supra* note 65.

69. Wu, *supra* note 67.

70. *Controlled Digital Lending: Unlocking the Library's Full Potential*, LIBRARY FUTURES (2021) <https://www.libraryfutures.net/policy-document-2021>.

71. Michelle M. Wu, *Revisiting Controlled Digital Lending Post-ReDigi*, 24 FIRST MONDAY 5 (2019).

72. Hannah Natanson, *Schools Nationwide Are Quietly Removing Books from Their Libraries*, WASHINGTON POST (Mar. 22, 2022, 9:54 AM), <https://www.washingtonpost.com/education/2022/03/22/school-librarian-book-bans-challenges/>.

73. *The Attack on Books in Schools*, NAT'L COAL. AGAINST CENSORSHIP (Dec. 2021), <https://ncac.org/news/attack-on-books>; *Media Factsheet on School Censorship*, GLAAD & NAT'L COALITION AGAINST CENSORSHIP (2021), <https://ncac.org/wp-content/uploads/2021/12/NCAC-GLAAD-Media-Factsheet-FOR-NCAC-WEB.pdf>.

74. Associated Press, *School Library Bill Advances, Sponsor Suggests Book Burning*, U.S. NEWS & WORLD REPORT (Apr. 27, 2022, 7:54 PM), <https://www.usnews.com/news/politics/articles/2022-04-27/school-library-bill-advances-sponsor-suggests-book-burning>; Helen Holmes, *Book Banning Is Increasing Across the United States, a Book Burning in Tennessee*, THE OBSERVER (Feb. 9, 2022, 4:05 PM), <https://observer.com/2022/02/book-banning-is-increasing-across-the-united-states-a-book-burning-in-tennessee/>; Bess Levin, *Conservatives Are Just Openly Endorsing Book Burning Now*, VANITY FAIR (Nov. 11, 2021), <https://www.vanityfair.com/news/2021/11/virginia-school-board-book-burning>.

75. Associated Press, *"Drag Queen Story Hour" at Oregon Pub Draws Gun-Carrying Protestors*, THE OREGONIAN (Oct. 25, 2022, 2:58 PM), <https://www.oregonlive.com/pacific-northwest-news/2022/10/drag-queen-story-hour-at-oregon-pub-draws-gun-carrying-protesters.html>; C. Mandler, *Ohio Drag Queen Storytime Canceled amid Armed Protests by Far-Right Groups*, CBS NEWS (Dec. 4, 2022, 9:17 PM), <https://www.cbsnews.com/news/ohio-drag-queen-storytime-event-canceled-amid-armed-protests-proud-boys-patriot-front/>; Abby Patkin, *Neo-Nazi Group Interrupts a Drag Queen Story Hour in Taunton*, BOSTON.COM (Jan. 18, 2023), <https://www.boston.com/news/local-news/2023/01/18/taunton-drag-queen-story-hour-neo-nazi-protest/>.

76. Mia Sato, *Ebook Service Hoopla Brings Anti-vax, Holocaust Denial, and Pro-LGBTQ Conversion Books to Libraries*, THE VERGE (Apr. 20, 2022), <https://www.theverge.com/2022/4/20/23034169/hoopla-ebooks-public-library-conspiracy-theory>.

77. However, libraries serving low income or rural communities can partner with other libraries who have CDL programs. As CDL founder and librarian Michelle Wu explained, "[i]t's a way of wealth sharing without much cost to communities." Caralee Adams, Lila Bailey & Chris Freeland, *Transforming Our Libraries: 12 Stories About Controlled Digital Lending*, CONTROLLED DIGITAL LENDING (2022), <https://archive.org/details/12CDLstories>.

78. The risk is not abstract, as a similar problem was posed by ebook lending services in libraries. Claire Woodcock, *Ebook Services Are Bringing Unhinged Conspiracy Books into Public Libraries*, VICE (Apr. 20, 2022), <https://www.vice.com/en/article/93b7je/ebook-services-are-bringing-unhinged-conspiracy-books-into-public-libraries>. While not CDL, the problem is only a skip away. As Michelle Wu has pointed out, however, CDL collections are not limited to works that a library has digitized itself. Michelle M. Wu, *Piece by Piece Review of Digitize-and-Lend Projects Through the Lens of Copyright Fair Use*, 36 LEGAL REFERENCE SERVS. Q. 51 (2017); Michelle M. Wu, *Shared Collection Development, Digitization, and Owned Digital Collections*, 44 COLLECTION MGMT. 131 (2019).

79. John Busby, Julia Tanberk & BroadbandNow Team, *FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access*, BROADBANDNOW (Feb. 3, 2020), <https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent>.

80. Dan Cohen, *Libraries Need More Freedom to Distribute Digital Books*, THE ATLANTIC (Mar. 30, 2023), <https://www.theatlantic.com/ideas/archive/2023/03/publishers-librarians-ebooks-hachette-v-internet-archive/673560/>.

81. See, e.g., 17 U.S.C. § 107.

82. For a deeper dive into the shift away from book and other media ownership and into licensing, see Aaron Perzanowski & Jason Schultz, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL AGE* (2018).

83. All Things Considered, *Librarians Worry E-book Pricing Might Affect People's Ability to Borrow Books*, NPR (Nov. 18, 2022), <https://www.npr.org/2022/11/18/1137817727/librarians-worry-e-book-pricing-might-affect-people-s-ability-to-borrow-books>.

84. See, e.g., Claire Woodcock, *Publishing Company Starts School Year by Removing Over 1,000 E-Textbooks*, VICE (Oct. 5, 2022), <https://www.vice.com/en/article/3ad5x8/publishing-company-starts-school-year-by-removing-over-1000-e-textbooks>; Brad Stone, *Amazon Erases Orwell Books from Kindle*, NEW YORK TIMES (July 17, 2009), <https://www.nytimes.com/2009/07/18/technology/companies/18amazon.html>. The publisher announced it would reverse course, at least temporarily. *Statement on Wiley eBooks Featured in ProQuest Academic Complete Library*, WILEY (Oct. 5, 2022), <https://newsroom.wiley.com/press-releases/press-release-details/2022/Statement-on-Wiley-eBooks-Featured-in-ProQuest-Academic-Complete-Library/default.aspx>.