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The Internet Archive and the National Emergency Library: Copyright Law and COVID-19

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Abstract: In the tradition of legal writing about landmark intellectual property cases, this paper provides an in-depth case study and analysis of an important copyright conflict during the COVID-19 crisis. The Internet Archive established the National Emergency Library to provide for access to knowledge for those who were unable to access their usual libraries, schools, and educational institutions. In response, four large publishers have brought a copyright lawsuit against the Internet Archive, alleging both direct copyright infringement, as well as secondary copyright infringement. The Authors Guild has supported this action. Fearful of litigation, the Internet Archive has decided to close the National Emergency Library earlier than it anticipated. The litigation raises a range of issues in respect of copyright infringement, the defence of fair use, library exceptions, digital lending, and intermediary liability. The conflict also raises questions about the operation of the first sale doctrine in the digital era. There are also divided views as to what, if any, remedies are appropriate in the case over the Internet Archive and the National Emergency Library. It is argued that there needs to better mechanisms under copyright law to enable access to knowledge in a public health crisis—such as the coronavirus outbreak. This case study makes a significant contribution to our understanding of the relationship between authors, publishers, and libraries in the digital age. It also provides an insight into copyright litigation—in particular, the role of amicus curiae submissions, and the nature and scope of copyright exceptions. This paper also raises larger considerations about the intersection of copyright law with larger concerns about access to knowledge, competition policy, and public health emergencies.

Keywords: copyright law; fair use; library exceptions; coronavirus; access to knowledge; Internet Archive; libraries; authorship; publishing

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1. Introduction

During the coronavirus (COVID-19) pandemic, many libraries, schools, and educational institutions have been shuttered during the lockdown. As a result, students, teachers, and communities have suffered from a lack of access to books and other reading material.

The Internet Archive is a non-profit digital library offering free universal access to books, movies and music, as well as archived web pages. The Internet Archive has had some previous experience with copyright law. During conflicts over copyright duration in the United States, the founder Brewster Kahle launched an unsuccessful challenge to the copyright term extension in the United States (*Kahle* v. *Gonzales* 487 F. 3d 697 (9th Cir. 2007)). The Internet Archive was particularly perturbed about the problem of orphan works—in which the copyright owner could not be identified or found. The Internet Archive celebrated the re-opening of the public domain—with the expiry of copyright works whose life had been extended by the *Sonny Bono Copyright Term Extension Act* 1998 (US). The Internet Archive has also been interested in the nature and scope of the defence of fair use—given its digitisation activities in respect of cultural works. The Internet Archive has also been increasingly concerned about the use of take down notices of archival material under the *Digital Millennium Copyright Act* 1998 (US).

In response to the disruption caused by the public health crisis of COVID-19, the Internet Archive established a National Emergency Library. This service was intended to provide 'a temporary collection of books that supports emergency remote teaching, research activities, independent scholarship, and intellectual stimulation while universities, schools, training centers, and libraries are closed.' Brewster Kahle, Digital Librarian of the Internet Archive, said: 'This was our dream for the original Internet coming to life: the Library at everyone's fingertips' (Freeland 2020). Professor Michael Geist (2020) has provided a useful podcast, outlining the objectives and ambitions of the National Emergency Library. The ambition of the National Emergency Library was to establish an intellectual commons—whilst libraries, schools, educational institutions, and universities were shutdown during the COVID-19 outbreak. Glyn Moody (2022, p. 34) has commented: 'The Internet Archive's National Emergency Library was not only fulfilling a pressing need for access to key works for students, it also revealed a major failure by the traditional publishing industry to meet this demand by embracing digital technology fully.'

A range of libraries, universities, and communities supported this initiative. Chris Bourg, Director of MIT Libraries, commented: 'In a global pandemic, robust digital lending options are key to a library's ability to care for staff and the community, by allowing all of us to work remotely and maintain the recommended social distancing' (Freeland 2020).

Historian Jill Lepore (2020) praised the National Emergency Library, observing: 'If the books you need aren't in any bookstore, and, especially, if you are one of the currently more than one billion students and teachers shut out of your classroom, please: sign up, log on, and borrow!'

The Internet Archive acknowledged that the National Emergency Library would not be a complete or total solution to educational needs during the pandemic: 'We understand that we're not going to be able to meet everyone's needs; our collection, at 1.4 million modern books, is a fraction of the size of a large metropolitan library system or a great academic library' (Freeland 2020). The Internet Archive noted that 'we offer digital access to books, many of which are otherwise unavailable to the public while our schools and libraries are closed.' Moreover, the Internet Archive supplied a range of public domain books: 'In addition to the National Emergency Library, the Internet Archive also offers free public access to 2.5 million fully downloadable public domain books, which do not require waitlists to view.'

The Internet Archive noted: 'We recognize that authors and publishers are going to be impacted by this global pandemic as well.' The Internet Archive encouraged its users to buy books: 'We encourage all readers who are in a position to buy books to do so, ideally while also supporting your local bookstore.' The Internet Archive was also wistfully hopeful that the National Emergency Library would be supported by authors and publishers: 'We hope that authors will support our effort to ensure temporary access to their work in this time of crisis.' The Internet Archive emphasized that it would remove books if need be upon request from authors: 'We are empowering authors to explicitly opt in and donate books to the National Emergency Library if we don't have a copy.'

The Internet Archive also commented that the National Emergency Library would be of limited duration: 'We chose that language deliberately because we are pegging the suspension of the waitlists to the duration of the US national emergency'. In the meantime, the Internet Archive hoped: 'Users all over the world have equal access to the books now available, regardless of their location.' In addition to the Internet Archive's National Emergency Library, the HathiTrust has been offering university libraries the on-line lending of scanned copyright books (Lee 2020b).

Publishers have launched a legal action against the Internet Archive for copyright infringement. The parties have filed motions for summary judgment in 2022. The publishers have sought summary judgment for copyright infringement against the Internet Archive (Hatchette Book Group, Inc., Summary Judgment Motion, 2022). The Internet Archive has sought summary judgment—particularly on the basis that its activities constitute fair use under copyright law (Internet Archive, Summary Judgment Motion, 2022). There have been

various amicus curiae—friend of the court—submissions put forward in support of the Internet Archive. The Authors Alliance argued that controlled digital lending was of benefit to authors—both to make their own works available and to access other literary works for their own research (Authors Alliance, Amicus Curiae Brief, 2022). Michelle Wu—a former Professor of Law and the former Law Library Director at the Georgetown University Law Center—put forward a brief, representing the perspective librarians, libraries, and readers who benefitted from controlled digital lending (Wu, Amicus Curiae Brief, 2022). Yuliya Zisinka and Kyle Courtney filed a brief on behalf of the Library Futures Institute, EveryLibrary Institute and ReadersFirst (Library Futures, Amicus Curiae Brief, 2022). They contended that controlled digital lending was a critical part of library practice in the United States. Lawyer Kenneth D. Crews and Kevin L. Smith—a librarian, library administrator, and publisher—wrote a brief in support of the Internet Archive (Crews and Smith, Amicus Brief, 2022). There were also a number of submissions by legal experts. New York University Professor Jason Schultz submitted an Amicus Brief on behalf 17 Copyright Scholars in support of Defendants' Motion for Summary Judgment (Schultz, Amicus Brief, 2022). The academy brief that controlled digital lending should be treated as fair use. Harvard University Professor Rebecca Tushnet led an amicus curiae brief of Intellectual Property Law Professors (Tushnet, Amicus Curiae Brief, 2022). This submission emphasized that there were larger constitutional concerns about free speech in this dispute over copyright law and fair use.

The publishers have opposed the requests of these library and scholarly parties to seek leave to appear as amicus curiae (Hatchett Book Group, Inc., Opposition to Amicus Curiae Briefs, 2022). The publishers have also been supported by a number of amicus curie briefs. The Copyright Alliance has defended a maximalist reading of the copyright regime (The Copyright Alliance, Amicus Brief, 2022). The Authors Guild and 22 additional writer/ artist organizations have made a submission, arguing that the activities of the Internet Archive threaten a wide range of creative communities (The Authors Guild, Amicus Brief, 2022). The International Publishers Association has also led an amici curiae submission arguing that the position of the Internet Archive would imperil publishers (International Publishers Association, Amicus Brief, 2022). There is an amicus curiae brief from 13 copyright scholars led by attorney Jacqueline Charlesworth arguing that controlled digital lending is not a fair use or an implementation of legitimate first sale rights (Charlesworth, Amicus Brief, 2022).

Drawing upon these legal briefs and filings, this paper seeks to provide a portrait of the polycentric copyright dispute over the Internet Archive and the National Emergency Library during the COVID-19 crisis. As part of its methodology, this paper will seek to represent the spectrum of views in the debate—drawing upon legal filings, and media contributions. This approach will use quotations from key figures and stakeholders in the copyright controversy. In terms of its methodology, this paper draws upon a long tradition of legal scholarship, which examines the legal arguments of parties and amicus curiae in intellectual property cases. The collection *Intellectual Property Stories* by Jane Ginsburg and Rochelle Dreyfuss (Ginsburg and Dreyfuss 2006) engages in a close reading of landmark United States intellectual property cases—looking at the process of litigation, as well as the outcome of the litigation. Similarly, in *Landmarks in Australian Intellectual Property* Law (2009), Andrew Kenyon, Megan Richardson, and Sam Ricketson curate a collection of intellectual property cases (Kenyon et al. 2009). The contributors tell the stories of each landmark litigation and situate each case in its social context, and provide factual details about the arguments made in each case, and the evidence provided. More recently, in his monograph, *The Genome Defense*, Jorge Contreras (2021) provides an account of personalities, stakeholders, and the legal arguments involved in the Supreme Court of the United States hearing on Myriad Genetics' gene patents. Following in this tradition, this paper provides a detailed map of the landmark polycentric dispute over the Internet Archive and the National Emergency Library, detailing the arguments and the rhetoric of key stakeholders and parties.

There is a well-established academic tradition of analysing copyright rhetoric—which is an important of copyright litigation. Patricia Loughlan (2007) has highlighted the need to interrogate the use of rhetoric in intellectual property discourse—particularly in the context of copyright law and the language of 'theft', 'stealing', 'robbery', and 'burglary.' The work of William Patry (2009, 2012) has highlighted the importance of rhetorical devices in copyright litigation and industry lobbying for copyright law reform. The research of Kathy Bowrey (2020) has stressed the need to analyse the mythologies of copyright industries about authorship, publishing, and culture.

This dispute over the Internet Archive and the National Emergency Library is the latest episode of a long-running 'copyright wars'. Drawing upon past work on digital copyright (Rimmer 2007, 2010, 2017), this article considers the legal challenge brought to the Internet Archive and the National Emergency Library by commercial publishers. Part 2 focuses upon how publishers have framed their complaints about the Internet Archive and the National Emergency Library. Part 3 also investigates the various complaints by professional associations of authors. Part 4 explores the history of the doctrine of fair use under United States copyright law, and its utility during the COVID-19 shutdown. Part 5 considers library lending in a digital age during the COVID-19 outbreak. Part 6 looks at the operation of the takedown and notice system of the *Digital Millennium Copyright Act* 1998 (US). The Internet Archive initially raised safe harbors as one of its defences—so it is important to address this topic. Part 7 also considers the arguments raised by the Internet Archive about the first sale doctrine. Part 8 also contemplates the debate over what, if any remedies, are appropriate. Part 9 also considers the Internet Archive's early closure of the National Emergency Library. It also examines the larger debate as to whether copyright exceptions and limitations need to be reformulated to deal with emergencies—such as the public health crisis of COVID-19.

Given the voluminous nature of the United States litigation, this paper will just focus on the United States copyright law in its analysis. A consideration of comparative and international dimensions of the litigation over the Internet Archive is beyond the scope of this paper—but it will be the subject of future research by the author.

2. The Publishers

The Association of American Publishers (AAP) (2020) made an initial negative response to the National Emergency Library. Maria Pallante—the President and CEO of AAP, and the former head of the United States Copyright Office—maintained: 'We are stunned by the Internet Archive's aggressive, unlawful, and opportunistic attack on the rights of authors and publishers in the midst of the novel coronavirus pandemic.' She insisted: 'Publishers are working tirelessly to support the public with numerous, innovative, and socially-aware programs that address every side of the crisis: providing free global access to research and medical journals that pertain to the virus; offering complementary digital education materials to schools and parents; and expanding powerful storytelling platforms for readers of all ages.' Pallante argued: 'It is the height of hypocrisy that the Internet Archive is choosing this moment—when lives, livelihoods and the economy are all in jeopardy—to make a cynical play to undermine copyright, and all the scientific, creative, and economic opportunity that it supports.' Her statements seem try to depict the Internet Archive as some sort of villain which is acting in bad faith.

The National Emergency Library earned the ire of commercial publishers, and professional author associations.

2.1. The Publishers' Lawsuit

Several large commercial publishing houses—Hachette Book Group Inc., HarperCollins Publishers, John Wiley & Sons, and Penguin Random House—have brought a copyright action against the Internet Archive in respect of its 'Open Archive' and the 'National Emergency Library'. The case is listed as *Hachette Book Group, Inc.* v. *Internet Archive* (1:20-cv-04160-JGK) (District Court of the Southern District, New York, 2020). The lawsuit alleges

that the Internet Archive is engaged in 'willful mass copyright infringement'—'Without any license or any payment to authors or publishers, IA scans print books, uploads these illegally scanned books to its servers, and distributes verbatim digital copies of the books in whole via public-facing websites.' The lawsuit invokes the language of 'piracy': 'Despite the 'Open Library' moniker, IA's actions grossly exceed legitimate library services, do violence to the Copyright Act, and constitute willful digital piracy on an industrial scale'. The complaint elaborates upon this rhetoric of 'theft': 'Consistent with the deplorable nature of piracy, IA's infringement is intentional and systematic: it produces mirror image copies of millions of unaltered in-copyright works for which it has no rights and distributes them in their entirety for reading purposes to the public for free, including voluminous numbers of books that are currently commercially available'. Glyn Moody (2022, p. 33) noted: 'The hyperbolic term "bootleg" was used no less than five times in the [original] document.'

It is worthwhile analysing the form and substance of this complaint. The legal action is part of a larger copyright policy agenda from the publishing industry.

The first cause of action is for direct copyright infringement. The second cause of action is for secondary copyright infringement—under the theories of contributory liability, inducement liability (*MGM Studios, Inc.* v. *Grokster, Ltd.*, 545 U.S. 913 (2005)), and vicarious liability. In terms of its prayer for relief, the publishers seek a declaration that the practices of the Internet Archive constitute willful copyright infringement. They have sought an injunction against the Internet Archive and its agents. The publishers have sought statutory damages from the Internet Archive. Alternatively, they have asked for an account of profits. The publishers have also asked for attorney's fees and interest.

The publishers noted in the lawsuit: 'The Works represent a cross-section of the exceptional books that are made possible by a functioning publishing ecosystem, from perennial classic novels to more recent highly acclaimed works of non-fiction and everything in between.' The book titles involved in the lawsuit include works of high literature such as William Golding's *The Lord of the Flies*, Toni Morrison's *Song of Solomon*, Cormac McCarthy's *The Road*, and J.D. Salinger's *The Catcher in the Rye*. There are also popular works, such as James Corey's *Caliban's War* from the science fiction series *The Expanse*, Terry Pratchett's comic fantasy *Night Watch*, C.S. Lewis' Narnia books, and some of the works of children's author Lemony Snicket. There are also non-fiction works such as Bill Bryson's *A Short History of Nearly Everything*, Malcolm Gladwell's works on behaviour and psychology, Steve Silberman's *Neurotribes*, and the 'For Dummies' series.

In terms of its chain of argument, the publishers contend that publishing underpins a democratic culture: 'Books are a cornerstone of our culture and system of democratic self-government and play a critical role in education.' They maintain that copyright law is essential to create functional markets for books and ebooks. The lawsuit suggests that there is an established market equilibrium between authors, publishers, and libraries. The publishers argued that the Internet Archive has unlawfully disrupted this book publishing ecosystem with the National Emergency Library. The lawsuit maintains that the Internet Archive's book digitization project is 'illegal'. The publishers argued that the 'Defendant opportunistically seized upon the COVID-19 pandemic as an excuse to accomplish its long-desired goals while ignoring the law and harming the publishing ecosystem so critical to the world of books.'

In its 2022 memorandum of law, the publishers expand upon such themes (Hatchette Book Group, Inc., Summary Judgment Motion, 2022). The publishers explain their motivation for the action: 'The Publishers bring this lawsuit on behalf of themselves and their authors to put an end to the Internet Archive's mass-scale copyright infringement of tens of thousands of their books' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 1). The publishers accuse the Internet Archive on mass copyright infringement on a commercial scale: 'Masquerading as a not-for-profit library, Internet Archive digitizes in-copyright print books on an industrial scale and distributes full-text digital bootlegs for free. Internet Archive has amassed a collection of more than three million unauthorized in-copyright ebooks—including more than 33,000 of the Publishers' commercially available

titles—without obtaining licenses to do so or paying the rightsholders a cent for exploiting their works' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 1). The publishers fear: 'Anybody in the world with an internet connection can instantaneously access these stolen works via IA's interrelated archive.org and openlibrary.org websites (collectively, the "Website")' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 1).

It is worth also highlighting the hyperbolic style of the complaint (Masnick 2020a). The purple prose is perhaps designed as much to garner a wider public attention, as to persuade the court of their convictions.

In its amicus brief, the International Publishers Association (2022) supports the position of the publishers in their action against the Internet Archive. The brief has also been joined by the Federation of European Publishers; the International Association of Scientific, Technical and Medical Publishers; the International Confederation of Societies of Authors and Composers; the International Federation of Film Producers Associations; the International Video Federation; and the International Federation of the Phonographic Industry. The brief noted that 'the amici have strong interests in the preservation of an effective level of copyright protection for copyright and related right holders in the U.S. and abroad' (International Publishers Association, 2022, p. 3). The International Publishers Association (2022, pp. 21–22) was concerned that a broad reading of copyright exceptions would 'not only injure authors and publishers—and potentially the broader rightholder community—but also place the country out of step with the rest of the world and, ultimately, harm of the public.' The International Publishers Association maintain that the Internet Archive is problematic under the *Berne Convention* 1887, the *TRIPS Agreement* 1994, the *WIPO Copyright Treaty* 1996, and the *WIPO Performances and Phonograms Treaty* 1996.

It is surprising and baffling that commercial publishers brought the action against the Internet Archive with its overheated rhetoric over piracy—given the public health crisis in the United States over COVID-19. There are certainly significant reputational risks for the publishers in bringing such a lawsuit, at a time at which the United States remains in a state of a public health emergency.

2.2. The Internet Archive's Response

In its answer and affirmative defenses, the Internet Archive forcefully denies the charges of piracy or thievery. The Internet Archive maintains that it is a merely digital version of a traditional library: 'Contrary to the publishers' accusations, the Internet Archive and the hundreds of libraries and archives that support it are not pirates or thieves'. The Internet Archives insists that they are 'librarians, striving to serve their patrons online just as they have done for centuries in the brick-and-mortar world.' The Internet Archive maintains: 'Copyright law does not stand in the way of libraries' right to lend, and patrons' right to borrow, the books that libraries own.'

In its summary judgment motion, the Internet Archive (2022, p. 2) emphasizes that Controlled Digital Lending does not harm publishers or authors: 'The publishing industry in the United States continues to thrive alongside widespread library lending.' The Internet Archive (2022, p. 2) observes: 'Never in the history of the United States have libraries needed to obtain special permission or to pay license fees to lend the books they already own.' The Internet Archive (2022, p. 2) warns that the publishers 'seek a new right foreign to American copyright law: the right to control how libraries lend books.' The Internet Archive (2022, p. 2) fear: 'Such an outcome would disrupt libraries' longstanding right to lend the books they own and their ability to preserve and share much of our cultural heritage in digital form.'

The Internet Archive (2022, p. 2) highlights that 'the publishers have not offered any evidence that Internet Archive's digital lending, or anyone else's, has cost them one penny in revenues.' Indeed, the Internet Archive (2022, p. 2) observes that the publisher's 'overall profits have grown substantially, and sales of the works at issue in this case appear to have

increased'. The Internet Archive (2022, p. 2) notes that the 'Plaintiffs specifically instructed their expert not to try to measure any economic harm.'

The Internet Archive (2022, p. 16) observes that 'the Plaintiffs are among the largest and most profitable book publishers in the United States, and they have enjoyed increasing profits in recent years.' The Internet Archive (2022, p. 16) draws attention to the record profits made by the publishing industry during the COVID-19 crisis: 'In 2020 and 2021, the publishing industry as a whole enjoyed record profits for electronic and physical formats of books.'

2.3. Copyright Law, Media Diversity and Competition

The dispute larger questions about media diversity and competition in the marketplace.

In its amicus curie brief, the Authors Alliance (2022, p. 2) expresses concerns about the lack of media diversity in publishing: 'The four publishers that are the plaintiffs in this case represent a massive concentration of publishing market power.' The Authors Alliance (2022, p. 2) expressed its dismay that the publishing 'ecosystem has long been out of balance, due not to the Internet Archive's activities, but to these publishers' leveraging of their power to insist on a marketplace in which they exercise almost absolute control over access, preservation, and research'.

Elsewhere, in *United States* v. *Bertelsmann* (2021), the United States Department of Justice has been considering competition issues in the proposal horizontal merger in the publishing industry. Peter Routhier (2022b), policy counsel for the Internet Archive, has highlighted that the antitrust trial against Penguin Random House has ramifications for the future of libraries. Routhier (2022b) noted that 'libraries remain deeply concerned that the future envisioned by these publishers is in nobody's interest but their own.'

There has growing concern about the consolidation of monopolies in the field of publishing, and the flow-on impacts of such control for booksellers, authors, and readers.

In groundbreaking work, Wendy Gordon (1982) emphasized the role of the defence of fair use in dealing with market failure. She concluded that 'an economic and structural analysis of the fair use doctrine and its place in the copyright scheme reveals that fair use is ordinarily granted when the market cannot be relied upon to allow socially desirable access to, and use of, copyrighted works' (Gordon 1982, p. 1657).

The scholarship of Peter Drahos and John Braithwaite (2002) has highlighted problems in respect of copyright law and competition policy in the publishing industry. Drahos and Braithwaite (2002, p. 54) observe: 'Copyright was also a means of ascension to the knowledge game'. Drahos and Braithwaite expressed concerns about the publishing industry engaging in cartel behaviour, and fixing the retail price of books to the detriment of consumers and readers.

Ariel Katz (2013) has highlighted tensions between copyright law and competition policy. He has made recommendations about how copyright law could be reformed to better advance competition policy goals. Katz (2013) highlights the role of the doctrine of fair use in supporting competition policy under copyright law. He observes that 'fair use promotes competition policy goals from within copyright because it permits some uses that mitigate the static inefficiency that copyright might create, but, at least as importantly, because it promotes dynamic efficiency by carefully allocating usage rights on the basis of how such allocation affects the various parties' incentives and capacity to innovate' (Katz 2013, p. 15). Katz has been concerned about ensuring that copyright law should not result in excessive static losses from unconstrained market power.

Jill McKeough (2003) has considered various law reform proposals to better align copyright law with competition policy. She has looked at both internal copyright doctrines (such as the defence of fair use) which could serve competition objectives; as well as external oversight by competition authorities. A 2021 festschrift on the work of Jill McKeough has highlighted the important legacy of her work on rethinking the interactions between copyright law and competition policy (Bowrey 2021; Ricketson 2021).

Likewise, there has also been a concern about the impact of copyright law upon media diversity. Historian of publishing Eva Hemmungs Wirten (2008) has identified many phases of conflict over copyright law and competition in the field of publishing. Siva Vaidhyanathan (2001, 2004) has explored how copyright industries have dominated cultural fields—including publishing. In a collection, Kembrew McLeod and Rudolf Kuenzli (McLeod and Kuenzli 2011) consider the clash of cultural values and aesthetic ideals in copyright disputes. In their book on *Chokepoint Capitalism*, Rebecca Giblin and Cory Doctorow (Giblin and Doctorow 2022) have examined how big content companies and technology companies have captured creative labor markets.

The dispute over the Internet Archive and the National Emergency Library provides a new context, in which to consider the interaction between copyright law and competition policy in the field of publishing.

3. Authors

The dispute over the Internet Archive and the National Emergency Library provides an opportunity to reconsider and evaluate the constructions of authorship in copyright law and policy. As Professor Kathy Bowrey (2020) has noted, 'In popular imagination the author is the beating heart of copyright, but not the primary beneficiary of it.' She has noted that Big Media conglomerates increasingly dominate copyright law and policy. There is a need to consider how copyright law may provide for better outcomes for authors and creative artists.

There have been competing views amongst authors about the copyright litigation over the Internet Archive and the National Emergency Library.

3.1. The Authors Guild

The Authors Guild (2020) has supported the publishers' lawsuit against the Internet Archive over the National Emergency Library.

Douglas Preston, author and President of the Authors Guild, argued: 'Internet Archive's wholesale scanning and posting of copyrighted books without the consent of authors, and without paying a dime, is piracy hidden behind a sanctimonious veil of progressivism' (The Authors Guild 2020). He also argues: 'The Internet Archive hopes to fool the public by calling its piracy website a 'library'; but there's a more accurate term for taking what you don't own: 'stealing.' (The Authors Guild 2020). It is worth deconstructing this statement. William Patry (2009, 2012) has warned that copyright owners have often utilized the rhetoric of piracy to push and lobby for copyright law reform. This statement by Douglas Preston also ignores the operation of the defence of fair use under copyright law—which allows for the use of works for certain purposes without the need for permission of payment.

In this statement, Preston confuses terms of property law and criminal law with intellectual property law—such as 'stealing' and 'theft'. This is also evident in his statement: 'What Internet Archive is doing is no different than heaving a brick through a grocery store window and handing out the food—and then congratulating itself for providing a public service.' The case at hand, though, is a civil matter relating to copyright infringement. The dispute is not a criminal proceeding. It seems a stretch to compare the Internet Archive to peer to peer networks such as Napster (*A&M Records, Inc.* v. *Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)) and BitTorrent sites like The Pirate Bay.

Moreover, Preston engages in a denial of the Internet Archive's status as a library. The Internet Archive has been properly constituted as a library under United States copyright law. Preston contends that there is no need for the Internet Archive because there are already libraries in the United States, which provide free access to e-books: 'Legitimate libraries pay for those e-books, and a portion of that flows back to authors as royalties, helping ensure they can continue to write' (the Internet Archive 2020). However, Preston ignores the context of the National Emergency Library—namely, it is a temporary measure

designed to deal with the situation in which many libraries and schools in the United States and around the world have been closed and shuttered due to the impact of COVID-19.

Deploying similar rhetoric, Preston (2020) has also written an opinion-editorial, 'The Pandemic Is Not An Excuse to Exploit Writers' in *The New York Times*.

Mary Rasenberger, the Authors Guild's Executive Director, tries to frame the dispute in terms of authors rights, maintaining: 'Internet Archive has demonstrated a blatant disregard for authors' copyrights and a lack of respect or acknowledgement that creators deserve to be compensated for their creative work'. She insists: 'It is a slap in the face for authors, whose writing incomes are already down for full-time authors nearly 42% in the past decade, according to the 2018 Authors Income Survey.' Rasenberger observes: 'For most authors, losing even a small royalty can make a big difference to their income, and yet Internet Archive has taken it upon itself to chip away even more at their ability to make a living.' It is not clear, though, that the service provided by the Internet Archive is undermining the sales of books or ebooks during the public health pandemic.

Much like her colleague, Rasenberger ignores the existence of the defence of fair use—which does not require permission or payment. She seems to insist that every use would need a specific license: 'We offered to work with Internet Archive in 2017 to create a licensing system that would make Open Library compliant with the copyright law, and that offer was rejected. Internet Archives' unwillingness to work with authors and publishers to make their program legal unfortunately made a lawsuit the only recourse.'

There has been debate about whether individual authors supported the position of the Authors Guild (Bustillos 2020). Denying media reports that he supported legal action versus the Internet Archive, Neil Gaiman (2020) has commented: 'I think a legal suit over something that was obviously a well-intentioned effort to make things easier on people in the earlier days of lockdown is wrong.'

3.2. Creative Communities

In 2022, the Authors Guild (2022) submitted an amicus brief in support of the publishers. In its amicus brief, the Authors Guild refined and expanded upon some of its earlier public statements. The Authors Guild (2022) reiterated that 'Defendant Internet Archive has engaged, and continues to engage, in willful infringement of Plaintiffs' copyrighted literary works on a massive scale'. The Authors Guild (2022) maintained that the Internet Archive 'differs from the most flagrantly illegal pirate websites chiefly by reason of its enormous scale'.

In its legal submission, the Authors Guild (2022) articulates its view that the 'Open Library is not fair use.' In its view, 'Open Library's digitization and distribution of Plaintiff's Works is not transformative.' The Authors Guild (2022) warned: 'If Open Library's practices are found legal, any website calling itself a library could digitize or copy any in-copyright creative works and "lend" out copies, including in a manner that actually downloads the copies on users' computers.'

The brief was joined by an array of creative communities and industries and peak bodies—including the Western Writers of America, Canadian Authors Association, American Photographic Artists, The Writers' Union of Canada, International Authors Forum, American Society of Media Photographers, Romance Writers of America, Society of Children's Book Writers and Illustrators, European Writers Council, National Writers Union, Graphic Artists Guild, American Society for Collective Rights Licensing, Society of Authors, Sisters in Crime, International Federation of Journalists, Dramatists Guild of America, National Press Photographers Association, Novelists Inc., Association of Authors Agents, The American Society of Journalists and Authors, The Union des Écrivaines et des Écrivains Québécois, and European Visual Artists. The brief noted that 'the Amici are all organizations that represent the professional interests of writers and other creators' (The Authors Guild 2022). The brief maintained that 'Authors, illustrators, photographers, and other creators of books make a vital contribution to education, to literacy, and to the shared culture on which our society rests' (The Authors Guild 2022, p. 21). The submission observed:

'Impoverishing authors threatens to impoverish that culture' (The Authors Guild 2022, p. 21). The brief concluded: 'Libraries are an essential means by which those contributions are made available to the public, but without the creators, libraries would have nothing to lend' (The Authors Guild 2022, p. 21).

3.3. The Authors Alliance

By contrast, the Authors Alliance (2020) has defended the Controlled Digital Lending: 'Controlled Digital Lending is particularly beneficial for authors whose works are out of print or otherwise commercially unavailable: In the absence of digitizing and lending these books, many would simply be inaccessible to readers.' In the view of the Authors Alliance, 'The Controlled Digital Library model is a boon to the authors of these and other books, allowing them to find new audiences online.'

The Authors Alliance (2020) says that it has 'not taken a position on the National Emergency Library, but we urge publishers and others to recognize that this is an extraordinary time of emergency and to be flexible about efforts to enable students, scholars, medical professionals, and the shelter-in-place public to read.' The Authors Alliance (2020) encourages an approach, which promotes access to knowledge during the pandemic: 'We applaud the publishers who have made scholarly content freely available to assist with access for the many students, faculty, and researchers now working remotely due to the global pandemic.'

In its amicus curie brief, the Authors Alliance (2022, p. 1) observed that it was an organization, which sought 'advance the interests of authors who want to serve the public good by sharing their creations broadly.' The submission noted that its 'members rely heavily on libraries such as the Internet Archive, both to make their own works available to readers and to access other literary works for their own research (Authors Alliance 2022, Amicus Brief, p. 1). The Authors Alliance (2022, p. 1) supported the Internet Archive: 'We think it reasonable and expected that libraries will implement systems—such as Controlled Digital Lending—to adapt how they lend books in light of current technology, and to ensure that authors reach readers.'

3.4. The Internet Archive and Authors

At a 2022 press conference held by the Internet Archive, author and editor Tom Scocca (2022) spoke out in defence of the Internet Archive. Scocca is the editor of The Brick House, the proprietor of Indignity, and the formal politics editor at Slate, and the author of Beijing Welcomes You. Scocca reflected upon the predicament of authors:

> To be a writer in the 21st century is to be caught between two conflicting concerns: the fear that one's work will be stolen, and the fear that one's work will be lost. These are the individual and personal expressions of the larger facts of our living amid an unprecedented availability of information, and of the unprecedented unavailability of that same information. (Scocca 2022)

Scocca (2022) expressed his understanding of the alarm of authors at 'the sense that our already precariously remunerated work might be distributed for no money at all, that the greedy and impersonal culture of torrenting and piracy might be coming for us, too.' Nonetheless, Scocca maintained that library lending was not a threat to authors: 'The distribution may be virtual and seemingly unreal, but it behaves like a solid item.' He warned of the dangers of copyright litigation against authors: 'That sort of dissolving culture isn't a renewable revenue source, it's a path to scarcity and amnesia.'

Lily Bailey—the lawyer for the Internet Archive—doubts that the copyright litigation will improve the lot of authors during the COVID-19 pandemic. She acknowledges: 'An issue I am deeply sympathetic with is that many authors don't have access to affordable healthcare during this pandemic' (Roberts 2020). She reflected: 'I just have serious doubts that aggressive copyright enforcement is the appropriate policy mechanism to solve [it]' (Roberts 2020). Bailey insisted: 'I want authors to have healthcare, but let's do that by fixing healthcare' (Roberts 2020).

The copyright litigation over the Internet Archive and the National Emergency Library also highlights the disjuncture between different visions of authorship in copyright law.

4. The Defence of Fair Use

The dispute over the Internet Archive, Controlled Digital Lending, and the National Emergency Library has raised questions about the nature and scope of copyright exceptions, defences, and limitations in the United States.

4.1. Case Law

There is a significant history of jurisprudence on the nature and scope of the defence of fair use in copyright law in the United States (Aufderheide and Jaszi 2018). There has been competing judicial philosophies—with emphasis on commercial appropriation, transformative use, and freedom of speech (Samuelson 2009, 2015).

The conflict between the publishers and the Internet Archive will raise larger questions about the operation of the defence of fair use under copyright law in the United States. There are a number of foundational fair use cases which have been invoked by the parties and the friends of the court in the submissions. It is worthwhile providing a brief outline of such canonical texts on copyright law and fair use in the United States.

In the case of *Campbell* v. *Acuff–Rose Music, Inc.*, 510 U.S. 569 (1994), the Supreme Court of the United States has emphasized that the defence of fair use supports transformative works. There has been a further application of this landmark precedent across multiple cultural fields, and technological modalities (Rimmer 2010).

In the lawsuit against the Internet Archive, the publishers maintained: 'No concept of fair use supports the systematic mass copying or distribution of entire books for the purpose of mass reading, or put another way, for the purpose of providing to readers the very thing that publishers and authors provide in the first place through lawful and established channels.' The publishers insisted that the 'Internet Archive does not add something new to the Plaintiffs' books, with a different purpose or character; thus, it cannot even begin to make the all-important showing that its use of the works is transformative.'

The precedent of the Google Books litigation will no doubt have an important bearing on the facts of the case involving the Open Archive and the National Emergency Archive.

The Association of American Publishers and the Authors Guild sued Google over the Google Books Project. After some long-winded litigation, the Association of American Publishers reached a settlement with Google Inc. In *Authors Guild* v. *Google Inc.* 804 F. 3d 202 (2015), the United States Court of Appeals for the Second Circuit found in favour of Google Inc. against the Authors Guild. Leval J noted: 'The ultimate goal of copyright is to expand public knowledge and understanding, which copyright seeks to achieve by giving potential creators exclusive control over copying of their works, thus giving them a financial incentive to create informative, intellectually enriching works for public consumption.' Leval J concluded 'that Google's making of a complete digital copy of Plaintiffs' works for the purpose of providing the public with its search and snippet view functions (at least as snippet view is presently designed) is a fair use and does not infringe Plaintiffs' copyrights in their books.'

Leval J insisted that 'Google's unauthorized digitizing of copyright-protected works, creation of a search functionality, and display of snippets from those works are non-infringing fair uses.' Leval J stressed: 'The purpose of the copying is highly transformative, the public display of text is limited, and the revelations do not provide a significant market substitute for the protected aspects of the originals'. The judge observed: 'Google's commercial nature and profit motivation do not justify denial of fair use.' Moreover, the judge commented: 'Google's provision of digitized copies to the libraries that supplied the books, on the understanding that the libraries will use the copies in a manner consistent with the copyright law, also does not constitute infringement.' The Supreme Court of the United States declined to hear an appeal by the Authors Guild in the matter of *Authors Guild*

v. *Google Inc.*, (2016) No. 15-849. This precedent will no doubt have wider applications in a range of other cultural contexts—across technological fields (Rimmer 2017; and Gray 2020).

In the case of *Authors Guild, Inc.* v. *HathiTrust*, 755 F.3d 87 (2d Cir. 2014), the Authors Guild suffered another loss in copyright litigation. In this matter, the Court of Appeals for the Second Circuit upheld HathiTrust's right to maintain a database to search for books, stating that 'the creation of a full-text searchable database is a quintessentially transformative use.' The Court also approved HathiTrust's service to make text available in formats accessible to print-disabled people. Finally, the Court remanded the case to the district court regarding the preservation of books.

In a more recent case of *Google LLC* v. *Oracle America, Inc.* 141 S. Ct 1183 (2021), the Supreme Court of the United States held by a majority of 6-2 that Google's use of Java APIs was within the bounds of fair use. Breyer J wrote the leading judgment. His Honour noted: 'The fact that computer programs are primarily functional makes it difficult to apply traditional copyright concepts in that technological world.' The judge observed: 'We do not overturn or modify our earlier cases involving fair use—cases, for example, that involve "knockoff" products, journalistic writings, and parodies.' Breyer J reflected: 'Rather, we here recognize that application of a copyright doctrine such as fair use has long proved a cooperative effort of Legislatures and courts, and that Congress, in our view, intended that it so continue.' His Honour explained his approach: 'As such, we have looked to the principles set forth in the fair use statute, §107, and set forth in our earlier cases, and applied them to this different kind of copyrighted work.' Breyer J concluded: 'We reach the conclusion that in this case, where Google reimplemented a user interface, taking only what was needed to allow users to put their accrued talents to work in a new and transformative program, Google's copying of the Sun Java API was a fair use of that material as a matter of law.' This precedent may well be useful in the defence of the Internet Archive and the National Emergency Library.

In the 2022 case of *Andy Warhol Foundation for the Visual Arts* v. *Goldsmith* (12 October 2022), the Supreme Court of the United States heard argument about the nature and scope of the defence of fair use in a dispute over appropriation art by Andy Warhol. In oral argument, there seemed to be significant divisions between members of the bench as to the nature and scope of the defence of fair use (Hurley 2022; Kruzel 2022; Wasserman 2022). The case has the potential to have a larger impact upon cultural production (Mann 2022). Previously, Justices Ginsburg and Breyer have been dominant judges in copyright disputes before the Supreme Court of the United States. Given the shifting composition of the bench of the Supreme Court of the United States, this forthcoming decision may provide an insight into the approach of the Roberts Court to the interpretation of the defence of fair use in United States copyright law.

4.2. The Internet Archive and Fair Use

Discussing the National Emergency Library, Brewster Kahle (2020a) has argued that we 'do not need an "emergency copyright act" because the fair use doctrine, codified in the Copyright Act, provides flexibility to libraries and others to adjust to changing circumstances.' He highlighted the previous losses of the Authors Guild against Google Inc. and HathiTrust on the question of the nature and scope of fair use: 'The Authors Guild, the leading critic of the National Emergency Library, has been incorrect in their assessment of the scope and flexibility of the fair use doctrine in the past and this is another instance where we respectfully disagree.'

Internet Archive's Answer and Affirmative Defenses (2020) raises fair use as its second affirmative defence, emphasizing that 'to the extent there was any use of Plaintiffs' copyrighted materials, such use is protected by the Fair Use Doctrine.' The document stresses that 'the Internet Archive's CDL program is sheltered by the fair use doctrine, buttressed by traditional library protections.' The Internet Archive elaborates: 'Specifically, the project serves the public interest in preservation, access and research—all classic fair use purposes.' The Internet Archive stressed that 'every book in the collection has already been published

and most are out of print.' The Internet Archive noted that 'patrons can borrow and read entire volumes, to be sure, but that is what it means to check a book out from a library.' The Internet Archive doubts that there will be an adverse impact upon the commercial marketplace: 'As for its effect on the market for the works in question, the books have already been bought and paid for by the libraries that own them.' The Internet Archive highlighted the transformative nature of the National Emergency Library: 'The public derives tremendous benefit from the program, and rights holders will gain nothing if the public is deprived of this resource.'

To bolster its position, the Internet Archive has also provided testimonials from users of the National Emergency Library. The Internet Archive has noted: 'Since this pandemic began, we have heard from hundreds of [teachers, librarians, and students], reaching out to figure out some way to keep teaching and learning going in their town, church, library or home school' (Hanamura 2020c). The Internet Archive also provided a portrait of the use of the service: 'Corroborating what we are hearing from professors, our patrons are seeking older books: more than 90% of the books borrowed were published more than 10 years ago and two-thirds were published during the 20th century' (Hanamura 2020c). The Internet Archive noted: 'Most patrons who borrow books from the National Emergency Library are reading them for less than 30 min, suggesting they are using the book for research as a reference check, or perhaps they are simply browsing as in a library or bookstore' (Hanamura 2020c).

In 2022, the plaintiffs and defendants published their memorandums of law in support of their respective motions for summary judgment. The Internet Archive (2022) elaborated upon its defence of fair use.

Considering the various factors underpinning the defence of fair use, the Internet Archive maintained that its implementation of Controlled Digital Lending was protected under the defence of fair use. The Internet Archive (2022, pp. 15–20) argued that the first factor strongly favoured fair use because Controlled Digital Lending was 'wholly non-commercial', a 'transformative use' and helped fulfil the goals of the copyright exhaustion doctrine. The Internet Archive (2022, pp. 21–22) suggested that the second factor was neutral—taking into account factual versus fictional works, published versus unpublished works. The Internet Archive (2022, p. 23) insisted that the third factor was neutral. The Internet Archive (2022, pp. 24–32) argued that the fourth factor favoured fair use—especially as, in its view, Controlled Digital Lending had no negative market effect. The Internet Archive argued that widespread Controlled Digital Lending would not cause market harm—pointing to Dr Reimers' analysis, and Dr Jorgensen's Analysis. The Internet Archive maintained that the plaintiffs only provided conjecture and innuendo—instead of offering empirical evidence of marker harm. In an alternative argument, the Internet Archive (2022, p. 32) contended that, even if Controlled Digital Lending displaced some book sales or licences, the fourth factor would still weigh in favour of fair use because any market harm to particular books would not affect incentives to publish.

The Internet Archive (2022, p. 34) also argued that the temporary National Emergency Library was also a lawful fair use. The Internet Archive (2022, p. 34) stressed that 'the pandemic created an emergency need for reliable information that was also easily accessible.' The Internet Archive (2022, p. 35) observed:

> Under those unique circumstances, lending books in that way was fair use. As with CDL, analysis of the data reflects that the publishers did not actually lose out on any revenues as a result of the NEL. But even if they had, the public benefits of reuniting students with the books locked up in their shuttered classrooms, and reuniting the public with the books locked up in their shuttered libraries, justified that temporary measure.

The Internet Archive (2022, p. 35) commented that 'the purpose and character of the use was to provide temporary access to books during a public health emergency, and in fact the number of concurrent loans during the [National Emergency Library] appears to have been well below the number of inaccessible physical copies even at its peak.'

The conflict over the Internet Archive and the National Emergency Library raises larger issues about the international standards, norms, and exceptions in respect of copyright law. At a 2022 press conference held by the Internet Archive, Benjamin Saracco, a medical school librarian in New Jersey, discussed how the copyright lawsuit impacted the medical community:

> The start of the COVID-19 pandemic was an extremely stressful time for me and my colleagues at the hospital library. In March 2020, the Governor of New Jersey signed an executive order that closed all libraries in the state. Even the physical books in my hospital's library were unavailable to circulate for a period of time during the pandemic. I remember being flooded with requests from medical students, nurses, and doctors during that time, particularly front line healthcare workers that were seeking information about COVID-19 and COVID-19 clinical care information to address the high rates of hospitalization in our state. (Saracco 2022)

Saracco (2022) stressed: 'From my educational and professional experiences as a librarian, especially during the start of the COVID-19 pandemic, I know the Internet Archive is an extremely valuable resource for the public.' Saracco (2022) commented: 'The library's practice of controlled digital lending was a lifeline at the start of the pandemic and has become an essential service and a public good since.'

It is worthwhile noting that there has been a code of best practices in fair use established for academic and research libraries (Association of Research Libraries 2012). Professor Patricia Aufderheide and Professor Peter Jaszi have been focused upon how to rebalance the copyright system—including through the use of the defence of fair use, and the adoption of professional guidelines (Aufderheide and Jaszi 2018).

In the United States, there has been a public statement of Library Copyright Specialists on fair use and emergency remote teaching and research. The Library Copyright Specialists (2020) reflected that universities and colleges in the United States were forced to move to remote teaching during the COVID-19crisis. They contended: 'While legal obligations do not automatically dissolve in the face of a public health crisis, U.S. copyright law is, thankfully, well equipped to provide the flexibility necessary for the vast majority of remote learning needed at this time.' The Library Copyright Specialists observed: 'The fair use doctrine accommodates the flexibility required by our shared public health crisis, enabling society to function and progress while protecting human life and safety.' They commented that there may need to be further copyright law reform if the COVID-19 crisis is a sustained one: 'While fair use is absolutely appropriate to support the heightened demands presented by this emergency, if time periods extend further, campuses will need to investigate and adopt solutions tailored for the long-term.' The emergence of the delta variant of the COVID-19 has certainly meant that the crisis will be extended further in a range of jurisdictions.

Corynne McSherry and Katharine Trendacosta (McSherry and Trendacosta 2020) of the Electronic Frontier Foundation have observed that, during COVID-19 lockdowns, access to the Internet has become critical for education, work, and entertainment: '[F]or many of us, the Internet is not only our town square, but also our school, art gallery, museum, and library.' McSherry and Trendacosta reflected: 'Many of these disputes over sharing culture are being played out in the court of public opinion for now, but users should know that there are strong legal protections as well.' In particular, they noted that the defence of fair use was flexible enough to take into account the current emergency situation: 'COVID-19 has created, almost by definition, a new and powerful public interest purpose that must be considered in any fair use analysis.'

Public Knowledge has contended: 'The National Emergency Library, which expands on Controlled Digital Lending, is justified under the circumstances of the pandemic, when so many print books paid for by the public are inaccessible' (Stella 2020a). John Bergmayer from Public Knowledge has argued that was a strong fair use argument' for both the Internet Archive's controlled digital lending program and its National Emergency Library (Lee 2020c). He highlighted that millions of books were currently locked up in libraries, and

inaccessible, because they had been closed due to the public health pandemic. Bergmayer maintained that such unique circumstances could justify the digital lending activities of the Internet Archive.

The Intellectual Property Professors brief contended that the approach of the Internet Archive was protected by the defence of fair use (Tushnet 2022). The submission observed: 'The Supreme Court has instructed courts not merely to balance the fair use factors, but to balance them in light of the purposes of copyright' (Tushnet 2022, p. 16). The brief noted that 'Non-commercial uses are favored in the law for a reason' (Tushnet 2022, p. 16). Professor Tushnet (2022, p. 16) and her colleagues highlighted how copyright law and the defence of fair use was designed to promote the Progress of Science and the Useful Arts, and freedom of speech, as recognized by the First Amendment: 'This Court should recognize their substantial benefits to society and to the foundations of free speech in weighing the fair use factors' (Tushnet 2022, p. 16).

Professor James Grimmelmann had a dour view about the prospects of the Internet Archive in respect of the case for fair use (Lee 2020c). Nonetheless, he questioned the argument of the publishers that the Internet Archive was a commercial venture. Grimmelmann maintained: 'Brewster Kahle is what the Russians might call a holy fool—someone who acts without real regard for himself or for worldly things in the service of a higher calling," Grimmelmann said' (Lee 2020c). He concluded that the Internet Archive 'is not a commercial venture' (Lee 2020c).

Michael Masnick (2020b) was pessimistic as to the outcome of the conflict between commercial publishers and the Internet Archive. He observed that 'this is copyright, and the rule of the land tends to be that when big legacy copyright holders file lawsuits, they tend to win.' He lamented that 'when big old industries scream copyright infringement, we've seen the courts buy it over and over again, even when the legal arguments are nonsensical.'

4.3. The Publishers' Views of Fair Use Arguments

The publishers contend that the Internet Archive cannot avail itself of the defence of fair use under copyright law (Hatchette Book Group, Inc., Summary Judgment Motion, 2022). The publishers contend:

> 'Internet Archive's sole justification for infringing millions of in-copyright books is that its actions are fair use. They are not. IA freerides on the authors' literary contributions and aggressively competes with the Publishers' authorized digital works by republishing its own unlicensed ebooks in full, including over 30,000 titles that the four Publishers already market to libraries and retail consumers. This is the very opposite of fair use'. (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 19)

The publishers insist that the 'Internet Archive cannot shoulder its burden of demonstrating that the four factors weigh in favor of fair use, whether viewed individually or in combination' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 20).

After considering the various factors involved in a fair use determination, the publishers argued: 'Internet Archive engages in commercial operations to scan millions of highly creative books in their entirety and posts the resulting copies on its Website for the quintessentially non-transformative purpose of providing users with free reading material, thus violating the Publishers' valuable right to create derivative works and causing market harm' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, pp. 39–40). The publishers commented that the 'Internet Archive's position that the Website's public benefit—namely its promotion of broad, free access to books—outweighs the rights of the Publishers and their authors is without merit' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 40). The publishers concluded: 'The ability of copyright law to incentivize the creation of new works will be profoundly undermined if Internet Archive devalues books further by continuing its mission to put bootleg copies of every book it can acquire on the Website' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 41).

The publishers insisted that they made books available during the COVID-19 crisis: 'During the COVID lockdown, the Publishers stepped in to help libraries and schools meet increased demand for ebooks' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 9). The publishers also argued that the National Emergency Library was not a fair use: 'While COVID-19 was a historic emergency, copyrights were not suspended and access to authorized library ebooks continued' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 42). The publishers maintained that 'the general population of authors struggled during this time and were heavily reliant on royalty income from their copyrights' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 42). However, this part of the argument of the publishers seems quite underdeveloped—in a profound way, it does not really deal with the impact of COVID-19 on education, research, and scholarship.

In its amicus brief, the Copyright Alliance (2022, p. 3) argued that the 'Defendant's practice of wholesale scanning of physical works does not fit within the bounds of fair use because the works created by this practice serve the exact same purpose as the works they infringe.' For its part, The Authors Guild (2022, p. 2) maintains that the '[Internet Archive]'s implausible assertion of fair use merely rehashes arguments that this Court, the Second Circuit and the U.S. Supreme Court have squarely and consistently rejected'. In its amicus curiae brief, the Copyright Professors and Scholars supporting the publishers sought to distinguish the facts of the Internet Archive conflict from the fair use precedents of *Google Books* and *HathiTrust*: 'In neither case did the defendant make complete works available to or distribute them to the general public as substitutions for the originals' (Charlesworth, 2022, p. 6). The Copyright Professors and Scholars insisted that the courts had repeatedly rejected unauthorized 'format-shifting' of copyrighted works as fair use (Charlesworth, 2022, p. 6).

In its amicus brief in the Internet Archive dispute, the International Publishers Association (2022, p. 21) highlighted 'the international implications of allowing [Internet Archive]'s activities'. The International Publishers Association (2022, p. 21) warned: 'If [Internet Archive]'s view of "fair use" in this case takes hold, the result would be an unbounded exception that runs afoul of numerous international obligations that the U.S. has solemnly taken on by not only entering into agreements and treaties but taking a leading role in their very existence.'

5. Controlled Digital Lending and Library Exceptions

In addition to questions about copyright law and fair use, the action will no doubt raise issues about library exceptions under copyright law and rules about lending.

5.1. The Internet Archive and Controlled Digital Lending

In its answer and articulation of its affirmative defences, the Internet Archive mounts a defence of Controlled Digital Lending. The Internet Archive seeks to normalize the practice of digital lending: 'To mirror traditional library lending online for everyone else, the Internet Archive allows patrons to borrow modern books via a process called Controlled Digital Lending ("CDL").' The Internet Archive elaborates upon the practices of Controlled Digital Lending:

> Under [Controlled Digital Library], the Internet Archive and other libraries make and lend out digital scans of physical books in their collections. Replicating longstanding brick-and-mortar practice, only one person can borrow one copy at a time.

The Internet Archive insists that 'this activity is fundamentally the same as traditional library lending and poses no new harm to authors or the publishing industry'. The organization maintains that Controlled Digital Lending achieves a higher set of objectives—'the Internet Archive fosters research and learning by making sure people all over the world can access books and by keeping books in circulation when their publishers have lost interest in providing access.'

Kahle (2020b) commented that the Internet Archive relied upon Controlled Digital Lending:

> Controlled digital lending is how many libraries have been providing access to digitized books for nine years. Controlled digital lending is a legal framework, developed by copyright experts, where one reader at a time can read a digitized copy of a legally owned library book. The digitized book is protected by the same digital protections that publishers use for the digital offerings on their own sites.

Kahle (2020b) maintained that 'many libraries, including the Internet Archive, have adopted this system since 2011 to leverage their investments in older print books in an increasingly digital world.' He maintained that controlled digital lending was defensible under copyright law.

In its summary judgment motion, the Internet Archive (2022, p. 1) highlights the important role played by libraries: Informed citizens need comprehensive libraries that meet people where they are'. The Internet Archive (2022, p. 1) discusses the importance of 'online spaces that welcome everyone to use their resources, invite them to create new and truthful works, and respect the interests of both authors and readers.' The Internet Archive (2022, p. 1) provides an account of Controlled Digital Lending:

> Through Controlled Digital Lending ("CDL"), the Internet Archive and other nonprofit libraries make and lend digital scans of print books in their collections at no cost to their patrons. Each book loaned via CDL has already been bought and paid for, so authors and publishers have already been fully compensated. Each book is then digitized at the library's own expense and, replicating longstanding brick-and-mortar practice, only one patron at a time can borrow it.

The Internet Archive (2022, p. 1) insists that the practice of Controlled Digital Lending is mainstream: 'Libraries have been practicing CDL in one form or another for more than a decade, and hundreds of libraries use it to lend books digitally today—including large public libraries such as the Boston Public Library and academic libraries such as Georgetown.'

At a press conference held by the Internet Archive in 2022, Brewster Kahle (2022) commented: 'We have been lending scanned digital copies of print books for more than 10 years, and it has helped millions of digital learners.' He warned: 'With this lawsuit, the publishers are saying that in digital form, we cannot buy books, we cannot preserve books, and we cannot lend books.' Kahle feared: 'This lawsuit is not just an attack on the Internet Archive—it is an attack on all libraries'. Kahle argued: 'The publishers want to criminalize libraries' owning, lending and preserving books in digital form.' (It should be noted, though, that this particular lawsuit is a civil suit—not a criminal action). Kahle insisted that there is a need to ensure that libraries could own and lend books, without interference from copyright owners: 'We need libraries to be independent and strong, now more than ever, in a time of misinformation and challenges to democracy.'

At a 2022 press conference held by the Internet Archive, Corynne McSherry (2022) of the EFF emphasized that 'the Archive's CDL program is not copyright infringement but a lawful fair use that preserves traditional library lending in the digital world.' She stressed that 'the concrete evidence shows that the Archive's digital lending does not and will not harm the market for books.' McSherry warned: 'The publishers are not seeking protection from harm to their existing rights'. In her view, 'They are seeking a new right foreign to American copyright law: the right to control how libraries may lend the books they own.' McSherry argued: 'The Internet Archive and the hundreds of libraries and archives that support it are not pirates or thieves.' She stressed that such organisations are composed of 'librarians, striving to serve their patrons online just as they have done for centuries in the brick-and-mortar world.' McSherry contended: 'Copyright law does not stand in the way of a library's right to lend its books to its patrons, one at a time.'

5.2. Friends of the Internet Archive

Kyle Courtney of Harvard University has considered the superpowers of libraries during exigent circumstances (Courtney 2020a, 2020b). He observed that 'libraries and archives have 'superpowers' under the copyright law that allows us to supply our communities with access to materials for research, scholarship, and study.' Courtney highlights the copyright exceptions granted to libraries and archives to enable to achieve their public objectives. He also suggests that libraries play a critical role in enhancing access to works through the use of new technologies: 'Adapting and utilizing technology for the benefit of our patrons is something that libraries and archives have been successful at for decades—from the first photocopiers in libraries, microfiche, computer labs, to 3D printers.'

Courtney (2020a) contends: 'So, in times like this COVID-19 crisis, let's continue to harness both law and technology to help'. He observed that both the defence of fair use and library exceptions could be helpful in respond to the challenges of the COVID-19 public health crisis.

The Association of Research Libraries (ARL) and the Scholarly Publishing and Academic Resources Coalition (SPARC) joined hundreds of individual libraries and supporters in signing a public policy statement in support of controlled digital lending (Hanamura 2020a). ARL observed: 'During the COVID-19 pandemic in particular, many academic and research libraries have relied on Controlled Digital Lending to ensure academic and research continuity at a time when many physical collections have been inaccessible' (Hanamura 2020a). SPARC argued: 'Controlled Digital Lending plays an important role in many libraries, and has been particularly critical to many academic and research libraries as they work to support students, faculty, and researchers through this pandemic' (Hanamura 2020a).

Professor Pamela Samuelson (2020) from the University of California, Berkeley Law School has defended controlled digital lending. She has lamented: 'It's really tragic that at this time of pandemic that the publishers would try to basically cut off even access to a digital public library like the Internet Archive is running.'

Reflecting upon the litigation, Professor Bryan Frye (2020) questions the action of the publishers. He observes: 'I think libraries are a good thing, in plague time and always.' Frye suggests: 'When you find yourself complaining about libraries, you might want to think twice about your priorities.'

Glyn Moody (2022, p. 36) has observed: 'As e-books became more central to the role of public libraries, it was increasingly evident that the terms under which they could be acquired, and which had evolved in an ad hoc way over the past decade, were unsatisfactory and unfair.'

Professor Rebecca Giblin and her colleagues have conducted empirical research in respect of library lending (Giblin et al. 2019). This study has highlighted the need for copyright law reform in this field. There are currently significant barriers to access to e-books under current legal regimes. Copyright law has not kept up-to-date with the digital revolution in respect of library lending. Giblin and her colleagues conclude: 'Ultimately we will make recommendations about whether e-lending ought to be left entirely to the market, as it is now, or whether there is a case for some regulatory intervention in order to help authors receive a fair share and to assist libraries to fulfil their public interest missions.'

Public Knowledge has urged legislators to provide greater clarity in respect of lending rights under copyright law (Stella 2020a, 2020b). Meredith Rose, Policy Counsel at Public Knowledge contended: 'We call on policymakers to support legislation clarifying the right of libraries to make print books available to patrons electronically, and to serve their constituencies during times of emergency' (Stella 2020b). She also called on copyright owners to improve access to knowledge during the public health pandemic: 'We also call on publishers and other stakeholders to make books more accessible—particularly focusing on books which are out of print, and are necessary for research, education, and scholarship' (Stella 2020b).

In their 2022 amicus brief, 17 copyright scholars led by Jason Schultz contended that copyright law entitles libraries to lend lawfully made copies without interference from copyright holders (Schultz, Amicus Brief, 2022).

Library Futures (2022, p. 17) maintained that 'libraries have a long-standing history of supporting the public's access to books.' Library Futures (2022, p. 17) contended: 'As technology evolves, libraries continually adapt their services to provide access in innovative ways to better serve their patrons, and [Controlled Digital Lending] is such an innovation.' Library Futures (2022, p. 17) maintained: 'Each time libraries embrace access-expanding innovations, the courts have acknowledged how these practices benefit the public.' In its view, [Controlled Digital Lending] is the next chapter of upholding access and should persist for a new generation of patrons' (Library Futures, 2022, p. 17).

Kenneth Crews and Kevin Smith urged 'the court to consider the controlled digital lending ("CDL") program at issue in this case not in a vacuum but against the backdrop of the long history of libraries and in the context of their evolving role as institutions that support and enhance democracy (Crews and Smith, Amicus Brief, 2022, p. 1). Crews and Smith provided a history of the development of libraries of the United States. They argued: 'Just as patron lending in the nineteenth century and Internet access in the late-twentieth century allowed libraries to meet the evolving needs of their communities, CDL offers libraries a means to meet the pressing demands of the current moment while considering the underlying commercial interest of publishers' (Crews and Smith, Amicus Brief, 2022, p. 3). Crews and Smith highlighted the important role of libraries in society: 'In an age when misinformation runs rife and extremism and inequality are on the rise, libraries are a chief recourse of truth-minded citizens.' Crews and Smith concluded that '[Controlled Digital Lending] provides a crucial mechanism through which libraries can continue their efforts' (Crews and Smith, Amicus Brief, 2022, p. 3). They maintained: 'This case presents an opportunity for the Court to make clear that libraries, acting within the law, have the imperative to deploy technologies and build innovative services in furtherance of access to information' (Crews and Smith, Amicus Brief, 2022, p. 17).

Librarian Michelle Wu (2022, p. 4) contends that 'Controlled Digital Lending was carefully crafted to balance respect for publishers and authors with the essential role of libraries in a digital age'. Wu (2022, p. 6) observes that 'Controlled Digital Lending advances the essential public function performed by libraries to acquire, preserve, and provide wide community access to content.'

The Authors Alliance (2022, p. 4) argues that the Controlled Digital Lending maintains copyright's balance of interests and does not reduce financial incentives for authors. The Authors Alliance (2022, p. 7) suggests that Controlled Digital Lending promotes broad public availability to books in a format relevant to readers. The Authors Alliance (2022, p. 11) also claims that Controlled Digital Lending ensures that books are preserved. The Authors Alliance (2022, p. 13) contends that Controlled Digital Lending facilitates author research.

5.3. The Publishers View of Controlled Digital Lending

In the lawsuit, the publishers deny that the Internet Archive can rely upon lending privileges: '[The Internet Archive] defends its willful mass infringement by asserting an invented theory called "Controlled Digital Lending" ("CDL")—the rules of which have been concocted from whole cloth and continue to get worse.' The publishers insisted that 'no provision under copyright law offers a colorable defense to the systematic copying and distribution of digital book files simply because the actor collects corresponding physical copies.' The lawsuit accuses the Internet Archive of exploiting the public health crisis: 'Then, in the face of the COVID-19 pandemic, Internet Archive opportunistically seized upon the global health crisis to further enlarge its cause, announcing with great fanfare that it would remove these already deficient limitations that were purportedly in place.'

In its 2022 memorandum of law, the publishers observed: 'Regardless of whether it actually complies with Controlled Digital Lending—and it does not—Internet Archive's practice of Controlled Digital Lending violates fundamental principles of copyright law,

and undermines market incentives necessary to spur the creation of new works' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 2). The publishers argued that, 'in sum, Controlled Digital Lending provides no legal cover for Internet Archive's massive infringement, and further, the undisputed evidence establishes that IA's compliance with even the most critical principles of CDL is a charade' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 16). The publishers commented: 'Whatever version of "controlled digital lending" it is currently using, the Internet Archive's "universal access" scheme violates fundamental principles of copyright law and should be halted' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 42).

The Copyright Alliance (2022, p. 3) contends that 'the limited reproduction rights granted to libraries and archives under §108 does not cover Defendant's wholesale copying and digital distributions'. The Authors Guild (2022, p. 3) argues that 'the free Open Library-generated ebooks will also create a direct market substitute for authorized lending by libraries outside the U.S., which lending—unlike Open Library—generates royalties for creators under the public lending right recognized by many other countries.' In other words, the Authors Guild argues that the Controlled Digital Lending system will undermine lending rights regimes around the world. The Copyright Professors and Scholars supporting the publishers maintain that 'the exceptions for libraries in Section 108 do not begin to approach the conduct at issue here' (Charlesworth, 2022, p. 9). The Copyright Professors and Scholars insist that 'the activities carried out through [Controlled Digital Lending] are far afield from the carefully drawn exceptions for libraries enacted by Congress' (Charlesworth, 2022, p. 10).

5.4. Law Reform

Panezi (2021b, p. 41) contends that there is a need for law reform in respect of the special exceptions for libraries and archives: 'Relating to exceptions and limitations benefiting libraries, and in conjunction with the recent case-law, the outdated provisions in Section 108 of the US Copyright Act can be seen as good reasons to rethink and perhaps reform the current copyright framework as applicable to libraries.' Panezi (2021b, p. 41) maintains that there is a need to recognize and protect the role of digital libraries: 'Fulfilling their traditional public service roles, and free from market constrains, digital libraries can further systematize knowledge in a relatively neutral manner'. Panezi (2021b, p. 41) also observes that digital libraries play a particularly important role in pandemics—such 'libraries and their books can further assist us in battling online misinformation and in our endless quest for trusted sources and for knowledge.' Panezi (2021a) has maintained that the legal system should protect the multiple roles of libraries during national emergencies—including the provision of access to credible information.

The Copyright Professors and Scholars supporting the publishers have argued that Congress has reviewed these issues surrounding the Internet Archive and chosen not to act (Charlesworth, 2022, p. 12). In its amicus brief, the Copyright Professors and Scholars maintain: 'This Court should not indulge [Internet Archive] and [Internet Archive] amici's effort to dispense with the legislative process and enact a self-declared exception from the requirements of the *Copyright Act*' (Charlesworth, 2022, p. 14). The Copyright Professors and Scholars maintain that it is up to Congress to decide copyright policy (Charlesworth, 2022, p. 15).

6. Intermediary Liability and Safe Harbors

The Internet Archive and the National Emergency Library also touched upon larger issues in respect of intermediary liability under the *Digital Millennium Copyright Act* 1998 (US).

6.1. Legal Debate

The Internet Archive's Answer and Affirmative Defenses (2020) includes Safe Harbor as its Fourth Affirmative Defense—emphasizing that 'to the extent they arise by reason of

the storage at the direction of a user of allegedly infringing material Plaintiffs' claims are barred in whole or in part by 17 U.S.C. S 512 (c).' The Internet Archive also notes: 'All of the works at issue in this case have been removed from the Internet Archive's websites.'

Republican Senator Thom Tillis (2020) from North Carolina—the Chair of the Judicial Subcommittee on Intellectual Property—wrote a letter to Brewster Kahle about the Internet Archive and the National Emergency Library. He said: 'I am not aware of any measure under copyright law that permits a user of copyrighted works to unilaterally create an emergency copyright act'. Tillis maintained: 'Indeed, I am deeply concerned that your "Library" is operating outside the boundaries of the copyright law that Congress has enacted and alone has jurisdiction to amend.' Tillis further cautioned that he was seeking to revise and reform the *Digital Millennium Copyright Act* 1998 (US).

In response, Brewster Kahle (2020a) of the Internet Archive emphasized: 'We were also clear that any author who did not want a book in the Library need only to send us an email and we have responded to them quickly.' He noted: 'This is contrary to the process claimed by the Authors Guild, which asserts that authors must send us a formal [*Digital Millennium Copyright Act* 1998 (US)] notice.' Kahle supported further discussion of copyright law reform: 'We welcome further discussion on these topics including what new legislation may be needed to preserve and extend the role of libraries in the digital age'. Taking a conciliatory tone, he also stressed that there was a need for wider consultation and engagement: 'We recognize that in our haste to respond to the urgent needs of teachers, students, and librarians, we did not do enough to engage with the broader information ecosystem, like authors, publishers and policymakers.'

The topic of the safe harbor, though, is not prominent in the arguments of the parties or the arguments of the amicus curiae in the 2022 submissions in the dispute over the Internet Archive and the National Emergency Library. As the legal debate has evolved, safe harbors have been a minor, rather than a major issue, in the case. It remains to be seen, of course, how the court will view the matter.

6.2. Policy Debate

The Internet Archive has long been a supporter of a broad safe harbor under the *Digital Millennium Copyright Act* 1998 (US). Brewster Kahle (2016) has emphasized: 'The DMCA Safe Harbors, while imperfect, have been essential to the growth of the Internet as an engine for innovation and free expression.' He observed: 'These provisions allow platforms like the Internet Archive to provide services such as hosting and making available user-generated content without the risk of getting embroiled in lawsuit after lawsuit' (Kahle 2016).

Legal counsel Lisa Bailey (2016) made a submission to the United States Copyright Office regarding the Section 512 Safe Harbors under the *Digital Millennium Copyright Act* 1998 (US). The submission noted: 'As we move increasingly towards a world where human knowledge is stored digitally, we are likely to see more libraries playing the role of host and curator of content posted by users' (Bailey 2016). Bailey (2016) argued that there was a need for law reform: 'The current system already imposes significant burdens on service providers, and we believe that altering these burdens to shift more responsibility to affirmatively monitor for infringement would force small nonprofits and libraries without huge budgets for legal staff to divert even more of their already strained resources into managing copyright claims, or else carry huge risk of liability.'

Bailey (2016) commented: 'Our community includes hundreds of volunteer archivists who actively seek to preserve at-risk websites, software, old audio recordings, home videos, and other older materials whose commercial life (if they ever had one) is long past.' She observed that the Internet Archive was respectful of the process: 'We have no problem whatsoever with taking down current commercially viable materials, and terminating the accounts of users who repeatedly or flagrantly post such materials' (Bailey 2016). Bailey (2016) was concerned, though, about the system unfairly punishing 'users who either made a genuine mistake in circumstances where rights issues were unclear or users who post

materials in a manner that may be a fair use but choose for whatever reason not to contest a takedown notice.'

The United States Copyright Office has undertaken an investigation of the operation of the intermediary liability scheme under the *Digital Millennium Copyright Act* 1998 (US). The United States Copyright Office has sought the views of a range of stakeholders about the operation of the safe harbors regime and the takedown and notice scheme in the *Digital Millennium Copyright Act* 1998 (US). The United States Copyright Office (2020) Report has been criticized, though, for its bias towards the interest of copyright industries—and its neglect of other stakeholders in the copyright ecosystem.

In 2020, the Internet Archive made a submission on a proposed reform bill on safe harbors (Bailey 2020). The submission stressed: 'The COVID-19 pandemic has proven how essential the Internet is for functioning in a modern society' (Bailey 2020). The Internet Archive observed: 'While Internet behemoths such as Google and Facebook dominate many discussions of Section 512, users who need access to information on the Internet also depend on much smaller non-profit organizations like the Internet Archive' (Bailey 2020). The Internet Archive warned: 'Abrupt and untested new changes to Section 512 would be especially burdensome on the Internet Archive and our patrons, as they could generate tremendous uncertainty surrounding how they would apply to different classes of stakeholders, and potentially create new vectors for abuse of the notice and takedown system' (Bailey 2020). The Internet Archive commented: 'The Internet Archive's goal of being a steward of knowledge is facilitated by the safe harbors, which shield us from liability for the occasional user who uploads infringing content, while allowing the vast majority of legal content to remain accessible' (Bailey 2020).

In 2022, the Internet Archive made a submission to the United States Copyright Office supporting a broad safe harbor under the *Digital Millennium Copyright Act* 1998 (US). (Routhier 2022a). Policy counsel Peter Routhier (2022a) observed: 'While the law is not perfect, the safe harbor provided by the DMCA has been important in allowing libraries, nonprofits, and other smaller participants to harness the power of the internet and play a meaningful role in the online information ecosystem.'

In the submission to the US Copyright Office, Routhier (2022c) comments that the Internet Archive is focused on curating the world wide web: 'Beyond the Wayback Machine, the Internet Archive preserves and provides access to a wide array of physical and digital materials.' Routhier (2022c) observes that the Internet Archive works closely with 'librarians, archivists, enthusiasts, and others.' Routhier (2022c) highlights the importance of such archival work: 'It is only through their work, motivated not by financial gain but by service to the public interest, that much of our digital heritage is archived and preserved today.' Routhier (2022c) comments that 'the work of a library today often involves the upload, hosting, and delivery of various kinds of materials, including from library partners as well as citizen archivists.' Routhier (2022c) maintains that 'Section 512 of the *Digital Millennium Copyright Act* is therefore of crucial importance to libraries and their patrons, including the Internet Archive, and to our shared mission of preserving and providing access to knowledge.'

Nicolas Suzor (2019) has highlighted the uneven regulation of internet intermediaries under copyright law. He has observed that there are different processes for dealing takedown notices under other forms of intellectual property. Moreover, Suzor (2019) stressed that other legal fields of regulation dealing with defamation law, online abuse, and hate speech have their unique systems for moderation and takedown. His work emphasizes that there is a lack of harmonization in terms of legal approaches to the regulation of internet intermediaries in United States law.

7. The Doctrine of First Sale

As its third affirmative defence, the Internet Archive argues that the 'Plaintiffs' claims are barred in whole or in part by the First Sale Doctrine, including under 17 U.S.C. § 109.'

7.1. Case Law

In the case of *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339 (1908), the Supreme Court of the United States rejected an effort by publishers to use copyright law to control downstream retail prices after initial authorized sales, stressing: '[T]he copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose . . . a limitation at which the book shall be sold at retail by future purchasers[.]'

In the case of *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519 (2013), the Supreme Court of the United States considered the operation of the first sale doctrine under copyright law. A majority 6-3 ruled that the 'first sale' doctrine applies to copies of a copyrighted work lawfully made abroad. In the leading judgment, Breyer J noted: 'Associations of libraries, used-book dealers, technology companies, consumer-goods retailers, and museums point to various ways in which a geographical interpretation would fail to further basic constitutional copyright objectives, in particular "promot[ing] the Progress of Science and useful Arts."' Breyer J was mindful of the experience of libraries:

> How, the American Library Association asks, are the libraries to obtain permission to distribute these millions of books? How can they find, say, the copyright owner of a foreign book, perhaps written decades ago? . . . And, even where addresses can be found, the costs of finding them, contacting owners, and negotiating may be high indeed. Are the libraries to stop circulating or distributing or displaying the millions of books in their collections that were printed abroad?

Breyer J observed that 'reliance upon the "first sale" doctrine is deeply embedded in the practices of those, such as book- sellers, libraries, museums, and retailers, who have long relied upon its protection.'

In her concurrence, Kagan J observed that 'the first-sale doctrine has played an integral part in American copyright law for over a century.'

7.2. The Internet Archive and the First Sale Doctrine

John Bergmayer (2020) of Public Knowledge has discussed the dispute over the Internet Archive and the National Emergency Library in terms of the first sale doctrine. He maintains: 'Under copyright's first sale doctrine, libraries do not need special permission (i.e., a license) to lend out books to the public'. Bergmayer observes: 'Anyone who owns a copy of a book is free to dispose of it however they want, including by lending it out.' He stressed: 'Copyright grants to authors the right to make and distribute new copies, but not the right to control how those copies are used once purchasers (including libraries) get a hold of them.' Bergmayer comments that the first sale doctrine has been complicated by the digital era: 'The first sale doctrine still applies—it remains lawful to lend or sell someone your phone or laptop, including all the copies of copyrighted works that are installed on it—but, as a practical matter, there's no way to "lend" someone a copy of a song or an ebook stored on your phone.'

In its 2022 summary judgment motion, the Internet Archive (2022, p. 19) cites the precedent of *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519 (2013)—with its specific comments about the importance of the first sale doctrine to libraries—in the defence of Controlled Digital Lending and the National Emergency Library against the claims of publishers. The Internet Archive (2022, p. 20) argues: 'Because Section 109 does not address the reproduction right implicated by digital lending, the fair use doctrine steps in to ensure that the substance of the common-law exhaustion rule survives technological changes in the way copyrighted works are loaned and read.' The Internet Archive (2022, p. 20) maintains: 'Indeed, this is one of the principal purposes of the fair use doctrine: to avoid applications of copyright law that would elevate form over substance, operating contrary to the ultimate purpose of copyright: "the intellectual enrichment of the public".' Moreover, the Internet Archive (2022, p. 21) suggests that 'the common-law doctrine of exhaustion can encompass reproduction of copyrighted material in some circumstances.' It points to the case of *Doan* v.

American Book Co., 105 F. 772 (7th Cir. 1901) which involved the reproduction of new copies of the cover of a children's schoolbook.

In their 2022 amicus brief, 17 copyright scholars led by Jason Schultz contend that controlled digital lending is protected by the doctrine of fair use (Schultz, Amicus Brief, 2022). Schulz and company contend: 'As libraries increasingly shift toward digital lending, plaintiffs see this as an opportunity to seize control of this longstanding practice and extract additional fees from libraries seeking to do what libraries have always done—lend the titles in their collections to their patrons in convenient and useful formats' (Schultz, Amicus Brief, 2022, p. 11). The 17 copyright scholars cautioned: 'Allowing copyright holders to gain control over digital lending by outlawing [Controlled Digital Lending] would pose an existential threat to the role libraries have historically exercised and to the common law and statutory doctrines and policies that have supported them for over a century' (Schultz, Amicus Brief, 2022, p. 11).

In their 2022 amicus brief, 17 copyright scholars led by Jason Schultz highlight the importance of the first sale doctrine (Schultz, Amicus Brief, 2022). The submission cites scholarly research on the first sale doctrine by Perzanowski and Schultz (2010), Shaffer Van Houweling (2007), Reese (2003). The submission stresses that 'the Supreme Court has cautioned against interpretations of copyright law that would disrupt library lending practices' (Schultz, Amicus Brief, 2022, p. 10). The submission comments: 'Following the codification of the First Sale doctrine in the 1976 Copyright Act, the Supreme Court again affirmed the freedoms of book owners to dispense of lawfully made copies without constraint' (Schultz, Amicus Brief, 2022, p. 10). The submission highlights: 'The Court defended the exhaustion doctrine and methods of library lending that it enables as critical to copyright's constitutional objectives, warning that forcing libraries to yield to publishers before lending books in their collections would "fail to further . . . the Progress of Science and useful Arts."' (Schultz, Amicus Brief, 2022, p. 10). The submission concludes that 'Preventing libraries from lending digital books would produce similarly intolerable consequences' because 'it would allow publishers to dictate not only which books libraries make available to their patrons, but also under what conditions libraries can lend them' (Schultz, Amicus Brief, 2022, p. 11). The submission maintains: 'Consistent with longstanding copyright principles, libraries should retain the ability to lend copies of lawfully acquired works in their collections as they see fit' (Schultz, Amicus Brief, 2022, p. 11).

7.3. The Publishers View of the First Sale Doctrine

The publishers question the Internet Archive's invocation of the first sale doctrine: 'Internet Archive nonetheless argues that broader principles in the "first sale doctrine" codified at 17 U.S.C. §109 should transform its mass digitization scheme into fair use' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 3). The publishers maintained that 'the Second Circuit rejected that theory in *Capital Records* v. *ReDigi, Inc.*, 910 F.3d 649 (2d Cir. 2018), holding that the first sale doctrine does not protect "unauthorized reproduction" of works' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 3). The publishers argued that 'any effort by Internet Archive to argue that it is sound public policy to employ the fair use analysis to advance the spirit of the first sale doctrine, despite violating its terms, cannot stand after *ReDigi*' (Hatchette Book Group, Inc., Summary Judgment Motion, 2022, p. 41).

The Copyright Alliance (2022, p. 3) contends that 'the first-sale doctrine under §109′ does not 'support Defendant's position, as the doctrine does not permit a physical work to be digitized and distributed.' The Copyright Alliance cites as authority for this proposition the case of *Capitol Records., LLC* v. *ReDigi, Inc.* 910 F. 3d 649 (2d Cir. 2018).

The Copyright Professors and Scholars supporting the publishers also argue that there is no 'Digital First Sale' right (Charlesworth 2022). The Copyright Professors and Scholars maintain that 'the first sale (or "exhaustion") doctrine codified in Section 109—addressed to the transfer of traditional physical copies—does not extend to digital distribution, which necessarily involves the making of new copies' (Charlesworth 2022, p. 3). Like the Copy-

right Alliance, the Copyright Scholars and Professors highlight the decision of *Capitol Records., LLC* v. *ReDigi, Inc.* 910 F. 3d 649 (2d Cir. 2018): 'It is remarkable that the proponents of CDL barely acknowledge this critical opinion of the Second Circuit in their submissions to this Court—and perhaps even more remarkable that they did not take it into consideration in continuing to promote CDL after the case was decided in 2018′ (Charlesworth, 2022, p. 9).

Professor James Grimmelmann, a legal scholar at Cornell University, observed that the legal status of this kind of digital lending was unclear—even if a library limits its lending to the number of books it has in stock (Lee 2020a). He commented that there was a lack of precedents in this filed. Nonetheless, there could be analogies drawn with the music industry's lawsuit against ReDigi, an online service that let users 're-sell' digital music tracks they had purchased online (*Capitol Records, LLC* v. *ReDigi Inc.*, 910 F. 3d 649 (2d Cir 2018)).

8. Remedies

In their complaint, the publishers have sought a declaration that 'the practices of Internet Archive in connection with "Open Library" constitute willful copyright infringement.' The publishers have also requested 'a preliminary and permanent injunction enjoining Internet Archive, and its agents' from infringing their copyright, as well as an order 'that all unlawful copies be destroyed.' The publishers have asked the court to enter 'judgment for Plaintiffs against Internet Archive for statutory damages in an amount based upon Internet Archive's willful acts of infringement of the Works.' The publishers have alternatively asked for an account of profits. The publishers have asked for costs and disbursements of this action, including reasonable attorney's fees, and pre-judgment and post-judgment interest.

The Internet Archive is concerned about the impact of the copyright litigation and any remedies upon its operations.

In its Fifth Affirmative Defense, the Internet Archive argues that 'Pursuant to 17 U.S.C. § 504(c)(2), Plaintiffs are not entitled to statutory damages, and statutory damages must be remitted, because the Internet Archive believed and had reasonable grounds for believing that the accused use of the copyrighted work was a fair use, including under Section 107, and the Internet Archive is an institution, library, or archives accused of having infringed by reproducing works in copies or phonorecords.' In its Sixth Affirmative Defense, the Internet Archive raises the Statute of Limitations: 'Plaintiffs' remedies are barred at least in part by the applicable statutes of limitations under 17 U.S.C. § 507(b).' In its Seventh Affirmative Defense, the Internet Archive argued: 'Plaintiffs' claims are barred, in whole or in part, by the doctrine of laches.'

In its prayer for relief, the Internet Archive asks the court to 'deny Plaintiffs' prayer for relief in it its entirety', 'dismiss the Complaint with prejudice and enter judgment in favor of [the Internet Archive]'; 'award the Internet Archive its attorneys' fees and costs incurred in this action, and any other amounts recoverable under law; and 'award the Internet Archive such other and further relief as the Court deems just and equitable.'

The court has called for consideration of such matters in the trial (Hanamura 2020b).

In its motion for summary judgment, the Internet Archive (2022, p. 35) maintained: 'If this Court determines the Internet Archive's lending of digitized books, through its [Controlled Digital Lending] program or its temporary [National Emergency Library], were not fair, the Court should remit any award of statutory damages because the Internet Archive had a good faith basis for believing each program was fair use.' The Internet Archive (2022, p. 36) insisted: 'The Internet Archive—through its Digital Librarian, Brewster Kahle—has always believed its implementation of [Controlled Digital Lending] and the [National Emergency Library] was fair use.' The Internet Archive (2022, p. 37) observed that it was its belief that the National Emergency Library was protected by the defence of fair use: 'The program was needed to alleviate significant access issues imposed by the pandemic, and the program was initiated after the Internet Archive received a flood of requests from students, teachers, and librarians.'

9. The Early Closure of the National Emergency Library

In response to the lawsuit, Brewster Kahle (2020c) of the Internet Archive responded: 'As a library, the Internet Archive acquires books and lends them, as libraries have always done.' He emphasized: 'Publishers suing libraries for lending books, in this case protected digitized versions, and while schools and libraries are closed, is not in anyone's interest.' Kahle hoped that the dispute could be resolved quickly.

In June 2020, the Internet Archive has further decided to end its National Emergency Library two weeks earlier than originally scheduled.

Brewster Kahle (2020b) of the Internet Archive noted that the National Emergency Library had served an important function: 'We have heard hundreds of stories from librarians, authors, parents, teachers, and students about how the NEL has filled an important gap during this crisis.' In particular, he noted that a New Jersey Librarian had used the National Emergency Library to find basic life support manuals needed by frontline medical workers in the academic medical center I work at.' Kahle commented: 'We are proud to aid frontline workers.'

Nonetheless, Kahle observed that the Internet Archive was closing early, because of the copyright action from the commercial publishers: 'The complaint attacks the concept of any library owning and lending digital books, challenging the very idea of what a library is in the digital world.' He commented: 'This lawsuit stands in contrast to some academic publishers who initially expressed concerns about the NEL, but ultimately decided to work with us to provide access to people cut off from their physical schools and libraries.' The online library has called the publishers to 'call off their costly assault.' Kahle concluded: 'We are now all Internet-bound and flooded with misinformation and disinformation—to fight these we all need access to books more than ever.' In his view, there needed to be much more harmonious 'collaboration between libraries, authors, booksellers, and publishers.'

The Internet Archive will return to controlled digital lending (Smarjstra 2020; Musil 2020).

There has been a concern that the Internet Archive will be made bankrupt by the copyright litigation, and its whole project will be in danger (Lee 2020c). The Internet Archive is a non-profit library, which plays an important in documenting and archiving the world wide web. A number of its services like the Wayback Machine are invaluable and indispensable in tracking the history and the present of the Internet.

In July 2020, Internet Archive founder Brewster Kahle urged the four major publishers suing over the organization's book scanning efforts to consider settling the dispute in the boardroom rather than the courtroom (Albanese 2020). He said: 'Librarians, publishers, authors, all of us should be working together during this pandemic to help teachers, parents, and especially students'. Kahle contended: 'I call on the executives of Hachette, HarperCollins, Wiley, and Penguin Random House to come together with us to help solve the challenging problems of access to knowledge during this pandemic, and to please drop this needless lawsuit.' Kahle maintained: 'We say that libraries have the right to buy books and preserve them and lend them even in the digital world.'

Cole and Koebler (2020) comment: 'The move puts one of the internet's largest repositories of knowledge in peril.' There has been much academic and scholarly discussion about efforts to create back-ups of the Internet Archive. Cole and Koebler (2020) reflected: 'There have also been exploratory attempts to do distributed backups of the Internet Archive, most notably by Archive Team, a group of archivists who backup notable or imperiled websites and databases'. However, they lamented that this project has been dormant since 2016.

An editorial for LexisNexis (2020) worried: 'The fear is that a victory for the publishers could financially harm the Internet Archive, and thus destroy the Wayback Machine'. The piece feared: 'No other organization provides a backup to this content, so if it's wiped out, it's permanently gone.'

10. Conclusions

In late 2021, the Internet Archive engaged in a creative protest over the copyright litigation. On the 25th anniversary of the Internet Archive, the institution considered the

future state of the Internet in 2046, considering whether knowledge will be free and open. The Internet Archive mocked up the dystopian state of websites in 2046—with key sites being locked down. Hopefully, the end result of the copyright litigation will not be the death knell of the Internet Archive.

The Internet Archive (2022, p. 37) has emphasized that 'the purpose of copyright law is to encourage creation and enrich the public commons.' In its view, 'By facilitating public access to books—without harming the market for them—Internet Archive's digital lending advances that goal.' Lila Bailey—the lawyer for the Internet Archive—has reflected upon the significance of the litigation over the National Emergency Library: 'This case will determine what libraries will be. We think the future of libraries hangs in the balance here' (Roberts 2020). She remains hopeful of the prospects of the settlement of the copyright litigation: 'We'd love to be in talks with the publishers. We prefer conversation to litigation' (Roberts 2020).

The dispute between the publishers and the Internet Archive has brought into focus a number of key issues in respect of copyright law, policy, and practice during the COVID-19 pandemic. In particular, the conflict has raised issues about copyright infringement; the scope and nature of the defence of fair use; library lending in a digital age; the takedown and notice scheme established under the *Digital Millennium Copyright Act* 1998 (US); and the doctrine of first sale. There has also been concern that the legal action by commercial publishers could threaten the future viability of the Internet Archive. The conflict has also raised comparative issues about whether other legal regimes are sufficiently flexible to deal with the array of issues raised by a public health emergency, such as COVID-19. It has been argued that there is a need to develop a better international regime under copyright law to deal with public health emergencies. The framework established in the context of patent law and access to medicines provides a useful guide as to what could be achieved in this space. There has been much debate over intellectual property flexibilities during the COVID-19 crisis under the *TRIPS Agreement* 1994, the *Doha Declaration on the TRIPS Agreement and Public Health* 2001, and the *Ministerial Decision on the TRIPS Agreement* 2022. Calls for a *TRIPS Waiver* have thus far been rejected at the World Trade Organization.

Rather than shutting down the National Emergency Library, we need to consider expanding and multiplying the model in the event of future emergencies. The global commons should be enlarged and bolstered during the various public health, economic, and social disruptions flowing from the COVID-19 outbreak (American University Program on Information Justice and Intellectual Property 2021).

Future research should consider the comparative and international dimensions of the copyright dispute over the Internet Archive and the National Emergency Library—given the global nature of the COVID-19 outbreak, and the shutdown of libraries, schools, and universities across the globe. The United Nations has emphasized that a COVID-19 recovery should follow the *United Nations Sustainable Development Goals* 2015—particularly in respect of facilitating education and access to knowledge.

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