

No. 23-1260

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

HACHETTE BOOK GROUP, INC., HARPERCOLLINS PUBLISHERS LLC,
JOHN WILEY & SONS INC., and PENGUIN RANDOM HOUSE LLC,
Plaintiff-Appellee,

v.

INTERNET ARCHIVE and DOES 1 through 5, inclusive,
Defendant-Appellants.

*On Appeal from the United States District Court
for the Southern District of New York*

**BRIEF OF *AMICI CURIAE* KEVIN L. SMITH AND WILLIAM M. CROSS
IN SUPPORT OF APPELLANTS AND REVERSAL**

Dated: December 20, 2023

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TABLE OF AUTHORITIES

Cases

Abrams v. United States, 250 U.S. 616 (1919) 23

Board of Education v. Pico, 457 U.S. 853, 868 (1982) 6

Statutes

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Fed. R. App. P. 29(a)(2) 1

Fed. R. App. P. 29(a)(4)(E) 1

Other Authorities

A Modern Book Burning: LGBTQ-Themed Books Removed From North KC, Liberty Schools, The Kansas City Star (Nov. 6, 2021) 17

Adele Uphaus, *Spotsylvania School Board Orders Libraries to Remove ‘Sexually Explicit’ Books*, The Free Lance Star (Nov. 9, 2021) 17

Alison Flood, *US Libraries Report Spike in Organised Attempts to Ban Books in Schools*, The Guardian (Nov 21., 2021) 17

Andrew Cohen, *The Most Powerful Dissent in American History*, The Atlantic (Aug. 10, 2013) 19

Benjamin Franklin, The Autobiography of Benjamin Franklin: 1706-1757 105 (Applewood Books ed. 2008) 6

Boston Public Library, *Report of the Trustees of the Public Library of the City of Boston, July, 1852* (1852) 9

Brooke Migdon, *Movement to Ban—Or Even Burn—School Library Books Gains Momentum*, The Hill (Nov. 11, 2021) 17

Candace D. Morgan, *Challenges and Issues Today*, in *Intellectual Freedom Manual* 207 (8th ed. 2010)..... 5

Carrie Spector, *Stanford lecturer explores the rise of book bans, from Nazi book burnings to school board races*, Graduate School of Education (July 6, 2022).. 18

Clay Shirky, *Here Comes Everybody* (2008)..... 21

Coaching Copyright (Kevin L. Smith & Erin L. Ellis eds., 2019) 2

Core Values of Librarianship, the American Library Association (2019) 19

Dan Cohen, *Libraries Need More Freedom to Distribute Digital Books*, *The Atlantic* (March 30, 2023) 14, 22

Daniel Gross, *The Surprisingly Big Business of Library E-books*, *The New Yorker* (Sept. 2, 2021)..... 24

David Hansen & Kyle Courtney, *A White Paper on Controlled Digital Lending of Library Books*, *Controlled Digital Lending by Libraries* (2018)..... 3, 20

E.B. White, *The Meaning of Democracy*, *The New Yorker* (1943) 10

Ebook and Audiobook Usage Surges in Academic Libraries During Pandemic, *Overdrive* (Apr. 13, 2021) 12

Elizabeth L. Marcoux, *Information Literacy for the Twenty-First-Century Citizen*, in *Libraries and Democracy* 70 (Nancy Kranich ed. 2001)..... 15

From Thomas Jefferson to James Madison, 31 July 1788, *Founders Online*, National Archives 6

Gerald S. Greenberg, *Books as Disease Carriers*, *23 Libraries & Culture* 281 (1988)..... 9

Home Recording of Copyrighted Works: Hearings Before the Subcomm. on Cts., C. L., & the Admin. of Just. of the H. Comm. on the Judiciary, 97th Cong. (1982)..... 23

How Americans Value Public Libraries in Their Communities, *Pew Research Center* (Dec. 11, 2013)..... 19

Johannes Trithemius, *De Laude Scriptorium* (1492)..... 21

Kasey Meehan, *Banned in the USA: The Mounting Pressure to Censor*, Pen America: The Freedom to Write..... 17

Kathleen Molz & Phyllis Dain, *Civic Space/Cyberspace: The American Public Library in the Information Age* (1999). 8

Kevin L. Smith, *Owning and Using Scholarship: An Intellectual Property Handbook for Scholars* (2014) 2

Kevin Smith, Colby College..... 2

Library Statistics, Fiscal Years 2016–2020, COLUM. UNIV. (DEC. 3, 2021)..... 24

Margaret Monroe, *Reader Services to the Disadvantaged in Inner Cities*, in *Advances in Librarianship* Vol. 2 253 (Melvin J. Voigt ed. 1971)..... 11

Maria Bonn, Josh Bolick, and William Cross, *Scholarly Communication Librarianship and Open Knowledge* (2023) 2

Miriam Intrator, *UNESCO, Reconstruction, and Pursuing Peace through a “Library-Minded” World, 1945-1950*, in *A History of UNESCO* 131 (Poul Duedahl ed., 2016)..... 10

Nancy Kranich, *Libraries and Democracy Revisited*, 90 *Libr. Q.* 121 (2020)..... 5

Nancy Kranich, *Libraries, the Internet, and Democracy*, in *Libraries and Democracy* 83 (Nancy Kranich ed. 2001) 16

Nancy Kranich, *Libraries, the New Media, and the Political Process*, in *Libraries and Democracy* 108 (Nancy Kranich ed. 2001)..... 7

Nikki Davidson, *Behind E-Books, Libraries Find Restrictions and High Costs*, Govtech.com (June 15, 2023) 13

Patricia Schuman, *Advocating for America’s Right to Know*, in *Libraries and Democracy* 197 (Nancy Kranich ed., 2001) 23

Public Libraries Act 1850, 13 & 14 Vit c.65 (UK)..... 21

Randy Pitman, *Sex, Democracy, and Videotape*, in *Libraries and Democracy* 118 (Nancy Kranich ed. 2001)..... 16

Rosemay Ruhig Du Mont et al., *Multiculturalism in Libraries* (1994)..... 11

Sidney Ditzion, *Arsenals of a Democratic Culture; a Social History of the American Public Library Movement in New England and the Middle States from 1850 to 1900* (1947)..... 9

Spread of Education and Literacy, Encyclopaedia Britannica 22

Stuart Murray, *The Library: An Illustrated History* (2009)..... 5

Susan B. Kretchmer, *The Library Internet Access Controversy and Democracy*, in *Libraries and Democracy* 96 (Nancy Kranich ed., 2001) 22, 26

Susan Orlean, *The Library Book* (2018) 8

Suzanne Perez, *Goddard School District Orders 29 Books Removed From Circulation*, KMUW (Nov. 9, 2021) 18

The Libraries’ Will Cross receives a Fulbright to study open knowledge and copyright across the EU, NC State University Libraries (May 10, 2022)..... 2

United States Copyright Office, *Section 108 of Title 17: A Discussion Document of the Register of Copyrights* (2017)..... 15

Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 2 Colum. L. Rev.1600 (1982)..... 13

Will Cross, NC State University Libraries..... 2

William R. Gordon, *Advocacy for Democracy I*, in *Libraries and Democracy* 203 (Nancy Kranich ed., 2001)..... 4

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are library and information scholars and historians with deep expertise regarding libraries and archives, the laws that govern them, and the roles they play in society. *Amici* submit this brief in support of defendant Internet Archive’s appeal of the United States District Court’s decision that Internet Archive’s implementation of a controlled digital lending (“CDL”) program constituted copyright infringement. *Amici* urge the court to consider the CDL program at issue against the backdrop of the long history of libraries and in the context of their evolving role as institutions that support and enhance democracy.¹²

Amici are uniquely positioned to understand the issues at hand from diverse perspectives.³ Both have been leaders in addressing copyright concerns for libraries, archives, universities, publishers, museums, and other institutions. They

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), *amici curiae* certify that no party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than the *amici curiae*, their members, or their counsel—contributed money that was intended to fund preparing or submitting this brief.

² Pursuant to Fed. R. App. P. 29(a)(2), *amici curiae* certify that counsel for defendant-appellant Internet Archive and counsel for plaintiffs-appellees have consented to the filing of this brief.

³ The views articulated in this brief are solely those of the *amici* and not necessarily the opinions or beliefs of the *amici*’s employers or clients. *Amici* have no direct financial interest in the outcome of this case but strongly believe that the law must continue to support, rather than impede, innovation in furtherance of independent and free access to information.

are authors of numerous published works, including articles and other writings that have been scanned and shared by libraries, as well as books available for purchase and that pay royalties to the authors.⁴ One of the *amici*, Kevin L. Smith, is the director of libraries at Colby College. *Kevin Smith*, Colby College, <https://www.colby.edu/people/people-directory/kevin-smith/> (last visited Oct. 4, 2023). Previously, he served as the director of a university press and worked to restore the financial health of the press. *Id.* William M. Cross is the Director of the Open Knowledge Center and the head of Information Policy at North Carolina State University. *Will Cross*, NC State University Libraries, <https://www.lib.ncsu.edu/staff/wmccross> (last visited Nov. 30, 2023). As a Fulbright-Schuman Innovation fellow, he studied copyright and open knowledge practices in the EU, and he develops numerous educational materials on copyright and open education. *See Id.*; *The Libraries' Will Cross receives a Fulbright to study open knowledge and copyright across the EU*, NC State University Libraries (May 10, 2022), <https://www.lib.ncsu.edu/news/main-news/libraries-will-cross-receives-fulbright-study-open-knowledge-and-copyright-across-eu> (last visited Dec. 18, 2023).

⁴ *See, e.g.*, Kevin L. Smith, *Owning and Using Scholarship: An Intellectual Property Handbook for Scholars* (2014); *Coaching Copyright* (Kevin L. Smith & Erin L. Ellis eds., 2019); Maria Bonn, Josh Bolick, and William Cross, *Scholarly Communication Librarianship and Open Knowledge* (2023).

SUMMARY OF ARGUMENT

This case asks whether libraries may advance to serve the evolving needs of our increasingly digital world. Throughout history, libraries safeguarded democracy by preserving knowledge and providing public access to information necessary for meaningful participation in a democratic society. To fulfill this longstanding purpose, libraries dynamically evolved with their readers. What was once a discriminatory, guarded institution reserved for affluent scholars now provides information, entertainment, and health services as a center for community gathering. Since the 1950s, libraries have actively adapted to the development of digital technology, servicing patrons with search engines, digital catalogs, and electronic copies. During the COVID-19 pandemic, people’s need to access information online increased more than ever, and libraries turned to digital solutions, such as CDL.

CDL technology⁵ is a natural, necessary next step in libraries’ evolution. It is far from an unprecedented departure from traditional library functions. Just as

⁵ “CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner...replicating with digital lending the legal and economically significant aspects of physical lending.” Using technical measures to manage user access, “a library may only loan simultaneously the number of copies that it has legitimately acquired” by maintaining a 1:1 ratio of owned to loaned copies. David Hansen & Kyle Courtney, *A White Paper on Controlled Digital Lending of Library Books*, Controlled Digital Lending by Libraries (2018), <https://controldigitalending.org/whitepaper> (last visited Dec. 18, 2023).

patron lending in the nineteenth century and Internet access in the late-twentieth century allowed libraries to meet the evolving needs of their readers, CDL offers libraries a means to meet today's pressing demands while considering the underlying commercial interest of publishers. The need for these efforts has never been greater: in an age when misinformation runs rife and extremism and inequality are on the rise, libraries are a chief recourse of truth-minded citizens. In this context, CDL provides a crucial mechanism through which libraries can continue their efforts.

This Court's decision and its analysis of legal issues related to CDL will impact the public's access to information in the modern world. This case, therefore, presents the Court with an opportunity to protect and reaffirm libraries' importance and value. A ruling that rejects or limits CDL could pose a fundamental threat to libraries' contributions as stewards of the variety of inquiry and expression on which our democracy and culture depend. William R. Gordon, *Advocacy for Democracy I*, in *Libraries and Democracy* 203 (Nancy Kranich ed., 2001).

ARGUMENT

I. The library has a long history of providing vital support for a more egalitarian, democratic, and civically engaged society; CDL represents the latest of a series of adaptations in service of these values.

A. Libraries safeguard democracy and promote civic engagement.

The library's role as a beacon of enlightenment and bulwark against oppression has ancient roots. The Great Library of Alexandria made the city famous as the intellectual capital of the Western world more than a thousand years before the invention of the printing press. Stuart Murray, *The Library: An Illustrated History* 15-17 (2009). Resources maintained by libraries have long served as channels through which intellectual inheritance is handed down. They are also the principal mechanism for intellectual growth and testing of new ideas. Candace D. Morgan, *Challenges and Issues Today, in Intellectual Freedom Manual* 37 (8th ed. 2010). Without access to information stewarded by libraries, democracy itself quickly becomes "a hollow concept." Nancy Kranich, *Libraries and Democracy Revisited*, 90 *Libr. Q.* 121, 131 (2020). As the Supreme Court acknowledged in *Board of Education v. Pico*, 457 U.S. 853, 868 (1982), the ability of citizens to freely access information through libraries prepares them for active and effective civic participation and makes it possible for them to meaningfully exercise their rights of free speech and press.

The founders recognized the role of libraries as bastions of democracy even before the nation's founding. Benjamin Franklin, who established the first subscription library in America, opined that "libraries have improved the general conversation of the Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges." Benjamin Franklin, *The Autobiography of Benjamin Franklin: 1706-1757* 105 (Applewood Books ed. 2008). James Madison echoed these sentiments, arguing that "a popular government without popular information or means of acquiring it is but a prologue to a farce or tragedy or perhaps both." From James Madison to William T. Barry, 4 August 1822, Founders Online, National Archives, <https://founders.archives.gov/documents/Madison/04-02-02-0480> (last visited Dec. 20, 2023).⁶

In the modern era, libraries bear a unique responsibility to provide quality information to the public. No other institution offers so much information, so freely, to so many. While private companies (including publishers) play an

⁶ Thomas Jefferson was also a firm believer in ensuring the flow of information. Notably, Jefferson went so far as to oppose copyright terms, even those as short as fourteen years, writing that "the benefit of even limited [copyright] monopolies is too doubtful to be opposed to that of their general suppression." From Thomas Jefferson to James Madison, 31 July 1788, Founders Online, National Archives, <https://founders.archives.gov/documents/Jefferson/01-13-02-0335> (last visited Dec. 20, 2023).

important role in facilitating the distribution of information, they are primarily driven by commercial interests rather than the public good. It is libraries that safeguard the public's interests: at libraries, readers can pursue their inquiries at zero cost, free from private control.

For libraries to fulfill this unique role in the digital space, CDL is necessary. Without CDL, private companies would have the power to control exclusively the dissemination of digital materials. CDL is the latest effort by libraries to “promote the kind of discourse that makes democracy possible.” Nancy Kranich, *Libraries, the New Media, and the Political Process*, in *Libraries and Democracy* 108, 109 (Nancy Kranich ed. 2001).

B. The evolution of the American library has consistently reflected an active pursuit of democratic ideals in a changing world.

CDL represents a stepping stone on the public library's storied path toward greater accessibility. Framed as such, current opposition against CDL is comparable to attitudes that opposed the libraries' evolution throughout history. Libraries were first met with opposition when they transformed from elitist, inaccessible institutions to current American public libraries that welcome patrons irrespective of race, gender, age, or class background. In that process, libraries had to adopt new printing and copying technology to meet their patrons' increasing needs. Publishers pushed back. Yet, libraries continued to progress with us because society recognized their value and affirmed their efforts to change to meet the

needs of the time. Libraries have evolved alongside broader social and technological progress throughout history and should continue to innovate with society as a whole.

1. Though founded with democratic ideals, libraries were initially exclusive institutions that had to expand throughout the nineteenth century to support public access.

Despite their idealistic origins, libraries at the time of America’s founding were private, elite institutions largely only accessible to white, land-owning men. The emergence of more truly “public” libraries was directly paralleled by growing emphasis on expanding public knowledge and its consequent impact on civic activity. Kathleen Molz & Phyllis Dain, *Civic Space/Cyberspace: The American Public Library in the Information Age* 3-4 (1999). In the mid-nineteenth century, the private subscription libraries of earlier eras—which often limited access to a select few, included only books deemed morally suitable, and frowned upon the inclusion of potentially damaging novels—began to give way to public, tax-supported libraries with larger and more controversial catalogs. Susan Orlean, *The Library Book* 124-128 (2018).

Conceived as “civilizing agents and objects of civic pride in a raw new country,” these statute-authorized, tax-supported libraries were required by law to advance democratic ideals such as free and broad access to the widest variety of information and ideas. Molz & Dain, *supra*. Of course, these changes did not go

uncontested: just as CDL has prompted its share of hand-wringing, nineteenth century expansions in access often prompted unwarranted concerns about negative societal impacts and a senseless panic about the potential transmission of diseases through books. Gerald Greenberg, *Books as Disease Carriers*, 23 *Libraries & Culture* 281 (1988).

Despite these anxieties, state and national legislatures quickly encoded the importance of the public library. Historian Sidney Ditzion cites an unused draft preamble to the 1851 Massachusetts Library Law as reflecting the “full understanding of the mind of the Massachusetts legislature” in its recognition that diffusion of knowledge—conducive to “preservation of freedom” as well as “moral advancement and elevation”—was best accomplished by founding public libraries. Sidney Ditzion, *Arsenals of a Democratic Culture; a Social History of the American Public Library Movement in New England and the Middle States from 1850 to 1900* 18 (1947). In a similar vein, the 1852 Boston Public Library Trustee Report argued that “it is [of] paramount importance that the means of general information should be so diffused that the largest possible number of persons should be induced to read.” Boston Public Library, *Report of the Trustees of the Public Library of the City of Boston, July, 1852* (1852).

2. Expanded public library access was crucial in the twentieth century fight against fascism.

As the American public library system continued to adapt and mature through the nineteenth and twentieth centuries, it became a vital source of free access to quality information in the face of fascism and totalitarianism. As the shadow of war stretched across Europe, American commentators lauded libraries for providing high-quality information that could check the growth of domestic extremism. Franklin D. Roosevelt opined that libraries “are directly and immediately involved in the conflict which divides our world” due to their role in a democratic society and status as “great tools of scholarship, the great repositories of culture, and the great symbols of the freedom of the mind.” See Miriam Intrator, *UNESCO, Reconstruction, and Pursuing Peace through a “Library-Minded” World, 1945-1950*, in *A History of UNESCO* 131, 131 (Poul Duedahl ed., 2016). E.B. White, author of *Stuart Little* and *Charlotte’s Web*, wrote a letter to the editor of the *New Yorker* calling democracy “the feeling of communion in the libraries, the feeling of vitality everywhere.” E.B. White, *The Meaning of Democracy*, *The New Yorker* (1943), <https://www.newyorker.com/books/double-take/e-b-white-on-the-meaning-of-democracy> (last visited Dec. 18, 2023). Just as libraries of the 1930s and 1940s served as a check against extremism, today’s libraries stand ready to fight rising tides of misinformation. CDL is a vital part of the modern library’s arsenal in waging this battle.

3. By the second half of the twentieth century, libraries began to play a crucial role in advancing a more egalitarian and equal society.

The latter half of the twentieth century saw a series of concerted national efforts to provide equal access to information for a broader range of citizens. In 1964, Congress enacted the Library Services and Construction Act with the goal of providing federal funding for public library initiatives in underserved or disadvantaged communities, including but not limited to the institutionalized, the physically handicapped, low-income families, senior citizens, and ethnic minorities. Margaret Monroe, *Reader Services to the Disadvantaged in Inner Cities*, in *Advances in Librarianship* Vol. 2 253 (Melvin J. Voigt ed. 1971). Newly-available funds from the U.S. Office of Education under Title II-B of the Higher Education Act (“HEA”) facilitated national efforts to train minority librarians and provide education for multicultural librarianship. Rosemary Ruhig Du Mont et al., *Multiculturalism in Libraries* 129 (1994). HEA Title II-B funding has supported various programs, including institutes on ethnicity and librarianship at Queens College, an institute at the University of Oklahoma for the improvement of Native American use of the library, and the Institute on Public Library Service to the Disadvantaged at Emory University. *Id.* at 130. These initiatives aimed to reduce inequalities in access to information.

II. CDL represents a logical and reasonable next step for libraries in their long-standing pursuit of their missions.

While efforts to expand and democratize the library have been successful, inequality remains. The digital age presents new possibilities and new problems: some members of the public have limited access to digital resources; others have difficulty accessing physical spaces. The COVID-19 pandemic, during which digital access to traditionally physical aspects of life became crucial, crystallized the potential of and necessity for CDL. As libraries shuttered and people sought knowledge and connection while in quarantine, demand for e-books surged. Between March 2020 and April 2021, usage of e-books via the widely-adopted Overdrive platform grew by forty-five percent, the use of digital materials by academic libraries grew by twenty-seven percent, and the number of academic users grew by forty-five percent. *Ebook and Audiobook Usage Surges in Academic Libraries During Pandemic*, Overdrive (Apr. 13, 2021), <https://company.overdrive.com/2021/04/13/ebook-and-audiobook-usage-surges-in-academic-libraries-during-pandemic/> (last visited Dec. 18, 2023). CDL programs allow e-books to be read or listened to on adaptive reading devices, to be checked out by house-bound seniors, and to be accessed by children whose local school libraries have been shuttered by budget cuts. Just as no patron should be denied access to library services because their library cannot afford new books or does not

carry books in adaptable formats, no patron should be denied access to books because their library cannot lease e-books.

Libraries are burdened by high costs in their attempt to meet patron demand for e-books. According to the American Library Association, publishers will often charge libraries \$55 for one copy of a popular e-book for two years, while they sell the same e-book to consumers for about \$15 for perpetual use. Nikki Davidson, *Behind E-Books, Libraries Find Restrictions and High Costs*, Govtech.com (June 15, 2023), <https://www.govtech.com/biz/data/behind-e-books-libraries-find-restrictions-and-high-costs> (last visited Dec. 18, 2023) . Publishers price e-books higher for libraries, because they worry making e-books more accessible will harm their market. As a result, libraries cannot afford to match the increasing demand for digital books, thereby failing to meet consumers where they are today: online. *Id.*

Wendy Gordon creates a compelling framework for determining fair use, arguing that fair use should be awarded to the defendant in a copyright infringement action when (1) market failure is present; (2) transfer of the use to defendant is socially desirable; and (3) an award of fair use would not cause substantial injury to the incentives of the plaintiff copyright owner. Wendy Gordon, *Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 2 Colum. L. Rev. 1600, 1614 (1982).

Gordon's first prong is most relevant here, as social desirability of use and injury to copyright owners will be addressed later in the brief. Under Gordon's first prong, market failure in the e-book context is certainly present. All of the market power is held by the publishers. Absent a digital first sale right, libraries cannot simply buy e-books on the consumer market (as they would in the physical realm by walking into bookstores and buying hard copyiesfor library use). As Dan Cohen describes, "[m]ost libraries do not even own ebooks in the true sense of ownership. The best they can do is to license ebooks for a limited time, or for a limited number of circulations, before they have to pay again." Dan Cohen, *Libraries Need More Freedom to Distribute Digital Books*, The Atlantic (March 30, 2023), <https://www.theatlantic.com/ideas/archive/2023/03/publishers-librarians-ebooks-hachette-v-internet-archive/673560/> (last visited Dec. 18, 2023). This means that publishers can hold libraries to extremely restrictive terms, providing access to a title essentially on a "take it or leave it" basis.

Forcing repeated sales of the same content is a far cry from the privileged position libraries were intended to occupy by the authors of the U.S. Copyright Act.⁷ Here, market failure is evident: one side (the publishers) has such a dominant

⁷ Perhaps recognizing the importance of libraries, Congress carved out an exception for libraries in the Copyright Act of 1976. *See* 17 U.S.C. § 108. Even before 1976, libraries were authorized to make non-commercial copies for decades. With the development of technology that enabled high-speed reproduction in the

position that they control all the terms of any sale, without any countervailing forces to balance the market. Fair use was designed to address precisely this type of market failure. Thus, CDL should be upheld under fair use. Otherwise, a decision against CDL would harm the public mission of libraries and perpetuate the existing market failure.

A. The digital transformation has accelerated inequality in information access.

The digital transformation that characterized the dawn of the Internet era held extraordinary promise for lovers of books, libraries, and the free flow of information. It promised more access to more knowledge for more people. Keenly aware of how “access and integration of technological and information seeking skills [would] define the abilities of future individuals to attain a viable citizenship,” librarians knew how important it would be for their institutions to embrace digital materials to continue to fulfill their missions. Elizabeth L.

Marcoux, *Information Literacy for the Twenty-First-Century Citizen, in Libraries and Democracy* 70 (Nancy Kranich ed. 2001). The promise of digital materials was

1960s, however, publishers challenged libraries’ traditional practice of making non-commercial copies. Congress responded with Section 108, allowing libraries to make such copies with certain limitations. Scholars and the Copyright Office have long criticized the limitations under this provision, stressing how Section 108’s limitations are no longer practical in the digital space *See generally* United States Copyright Office, *Section 108 of Title 17: A Discussion Document of the Register of Copyrights* (2017).

nothing less than “equal access to the human record in as wide a variety of formats as possible.” Randy Pitman, *Sex, Democracy, and Videotape, in Libraries and Democracy* 118 (Nancy Kranich ed. 2001)

Despite the optimism at the onset of the new millennium, concerns grew that the promises of the information age would not be shared democratically with all. With the purchase of licenses increasingly facilitating digital access, the wealthiest universities have equipped their students with thousands of licensed electronic tools, while students at less well-endowed schools have no access to the books or electronic databases necessary to advance their education. Nancy Kranich, *Libraries, the Internet, and Democracy, in Libraries and Democracy* 83 (Nancy Kranich ed. 2001) Many librarians lamented the fact that the vast majority of the materials in their collections were still available only in print despite strong patron demand for other formats. Pitman, *supra*, at 117.

B. The most effective way to address attacks against libraries is to strengthen the function of libraries themselves.

In an era rife with misinformation and extremism, libraries have the power to check the tide by facilitating access to a range of information and all views. Consequently, libraries are frequent targets of attacks, and the news today is filled with banned book lists, purged shelves, and even public officials advocating book burnings. Libraries are being forced through political pressure and stochastic terrorism to remove materials that they believe belong in their collections and to

which their patrons need access. In the 2022-2023 academic year, there were 3,363 instances of book bans at K-12 public schools—a 33% increase from the prior school year. Kasey Meehan, *Banned in the USA: The Mounting Pressure to Censor*, Pen America: The Freedom to Write, <https://pen.org/report/book-bans-pressure-to-censor/> (last visited Dec. 18, 2023). See Alison Flood, *US Libraries Report Spike in Organised Attempts to Ban Books in Schools*, The Guardian (Nov 21, 2021), <https://www.theguardian.com/books/2021/nov/25/us-libraries-report-spike-in-organised-attempts-to-ban-books-in-schools> (last visited Dec. 18, 2023); Adele Uphaus, *Spotsylvania School Board Orders Libraries to Remove ‘Sexually Explicit’ Books*, The Free Lance-Star (Nov. 9, 2021), https://fredericksburg.com/news/local/education/potsylvania-school-board-orders-libraries-to-remove-sexually-explicit-books/article_6c54507a-6383-534d-89b9-c2deb1f6ba17.html (last visited Dec. 18, 2023); Brooke Migdon, *Movement to Ban—Or Even Burn—School Library Books Gains Momentum*, The Hill (Nov. 11, 2021), <https://thehill.com/changing-america/enrichment/education/581134-movement-to-ban-or-even-burn-school-library-books-gains/> (last visited Dec. 18, 2023); *A Modern Book Burning: LGBTQ-Themed Books Removed From North KC, Liberty Schools*, The Kansas City Star (Nov. 6, 2021), <https://www.kansascity.com/opinion/editorials/article255552966.html> (last visited Dec. 18, 2023); Suzanne Perez, *Goddard School District Orders 29 Books*

Removed From Circulation, KMUW (Nov. 9, 2021),

<https://www.kmuw.org/education/2021-11-09/goddard-school-district-orders-29-books-removed-from-circulation> (last visited Dec. 18, 2023). As we once again

face a fundamental clash of ideologies,⁸ the importance of informed citizens cannot be overstated. CDL has the power to help ensure patrons still have access to works that might be deemed inappropriate by those in positions of authority, at any time or place.

The American Library Association's decision to add democracy to its core tenets in 2019 further affirms this belief. According to the ALA, "democracy presupposes an informed citizenry. The First Amendment mandates the right of all persons to free expression, and the corollary right to receive the constitutionally protected expression of others. The publicly-supported library provides free and equal access to information for all people of the community the library serves."

Core Values of Librarianship, The American Library Association (2019),

⁸ Contemporary efforts to ban books bear some resemblance to historical antecedents. In Nazi Germany, many books were burned that promoted political ideologies opposed to Nazism or embraced novel ideas of race and sexuality. In fact, according to Jennifer Wolf, a senior lecturer of education at Stanford University, one of the first Nazi book burnings occurred at a clinic that researched and performed gender affirmation surgery and housed a library of books on the subject. Carrie Spector, *Stanford lecturer explores the rise of book bans, from Nazi book burnings to school board races*, Graduate School of Education (July 6, 2022), <https://ed.stanford.edu/news/stanford-lecturer-explores-rise-book-bans-nazi-book-burnings-school-board-races> (last visited Dec. 18, 2023).

<http://www.ala.org/advocacy/intfreedom/corevalues>. Librarians are not alone in this opinion. Ninety-five percent of Americans ages sixteen and older agree that materials and resources available at public libraries play a vital role in giving everyone a chance to succeed. *How Americans Value Public Libraries in Their Communities*, Pew Research Center (Dec. 11, 2013), <https://www.pewresearch.org/internet/2013/12/11/libraries-in-communities/> (last visited Dec. 17, 2023). Furthermore, the importance of an informed citizenry is affirmed in many First Amendment cases. Justice Oliver Wendell Holmes’ dissent in *Abrams v. United States*, 250 U.S. 616 (1919)—one of the most frequently cited passages in First Amendment jurisprudence, despite its being a dissent—emphasizes that the “ultimate good desired,” or *summum bonum*, for society, can only be achieved through the free trade of ideas. See Andrew Cohen, *The Most Powerful Dissent in American History*, *The Atlantic* (Aug. 10, 2013), <https://www.theatlantic.com/national/archive/2013/08/the-most-powerful-dissent-in-american-history/278503/> (last visited Dec. 17, 2023). By removing barriers to entry into the marketplace of ideas, we enable people to decide what ideologies are best for them—ultimately benefiting us all. Libraries fuel an informed citizenry that can actively engage in the marketplace of ideas and propel our democracy forward. Limiting the public’s access to library resources is the ultimate barrier to information-sharing and therefore to a true democracy.

1. CDL has many historical analogs and does not represent a radical departure from past practice.

In the modern technological landscape, CDL serves the same fundamental function as analog library lending. The benefits CDL can offer to the public—i.e., promoting access to information, furthering democracy, and enhancing equality—resemble the benefits of analog lending, albeit with greater magnitude and further reach. Digital lending should not be viewed as a break with the past. Rather, CDL is the latest iteration of what libraries have always done: use available technology to provide access to those who need high-quality information. The number of copies that can be loaned at a given time is limited to the number of copies the library has legitimately acquired—that is, it may only circulate the same number of copies that it owned before digitization. David Hansen & Kyle Courtney, *A White Paper on Controlled Digital Lending of Library Books*, Controlled Digital Lending by Libraries (2018), <https://controldigitalending.org/whitepaper> (last visited Dec. 18, 2023). By maintaining an “owned to loaned” ratio, controlling circulation so that only one user can use any given copy at a time for a limited time, and employing appropriate technical measures to prevent users from retaining or distributing copies, CDL replicates the functions and controls of traditional libraries, just in a digital format. *Id.* The difference is merely one of format.

In shifting from analog lending to digital, CDL programs facilitate access for patrons. Those who cannot travel can access material via CDL. Those researching

obscure topics can access books that would not otherwise be available in e-book format. Those with print disabilities can access material without having to disclose their disability and request special access. CDL allows libraries to serve a more diverse set of readers, creating a more just information ecosystem.

2. Attempts by libraries to enhance access to information resources have often encountered opposition.

As early as the fifteenth century, Johannes Trithemius expressed a reverence for the work of scribes in the face of a move toward the printing press. *See* Clay Shirky, *Here Comes Everybody* 68 (2008) (citing Johannes Trithemius, *De Laude Scriptorium* (1492)). Similar pushback came in the eighteenth century with the development of the commercial lending library, and again in the nineteenth century with the advent of the free public library. When the British Parliament debated allowing taxes to be earmarked for public libraries in 1850, several members of Parliament expressed concern that the proliferation of public libraries would hurt private industry. *See* Public Libraries Act 1850, 13 & 14 Vit c.65 (UK) (“He objected to the Bill, because it would tend to check the efforts of private enterprise”). Publishers and booksellers feared then (as some do now) that increased availability of books in library collections would discourage people from purchasing copies for their own use. Of course, circulating libraries ultimately promoted rather than diminished the sale of books; having always been lead purchasers of books, libraries regularly promote and generate interest in new

publications. *Spread of Education and Literacy*, Encyclopaedia Britannica, <https://www.britannica.com/topic/publishing/Spread-of-education-and-literacy> (last visited Jul. 12, 2022). Today, studies show that print-book sales are actually up 33 percent in the past 10 years.⁹ The last decade has demonstrated that publishers need not fear technological change threatening their market performance.

Publishing companies might suggest that CDL is unprecedented, despite CDL's fundamental connection both to the realities of analog lending and to long-standing library values. Such arguments over CDL mirror the ones voiced during "the legal turmoil and societal upheaval created by the introduction of every major innovation and communication technology—writing, the printing press, the Telegraph, the telephone, radio, and television." Susan B. Kretchmer, *The Library Internet Access Controversy and Democracy*, in *Libraries and Democracy* 96, 96-97 (2001) Indeed, they might be compared to the doomsday prophesizing brought on by new technologies in other industries, as exemplified by the Motion Picture Association of America's ("MPAA's") anxieties about the VCR in 1982.¹⁰

⁹ See Dan Cohen, *supra*.

¹⁰ In his testimony before a House Judiciary Committee, Jack Valenti (then-President of the MPAA) famously declared, "I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone." Home Recording of Copyrighted Works: Hearings Before the Subcomm. on Cts., C. L., & the Admin. of Just. of the H. Comm. on the

III. A decision that prevents libraries from pursuing CDL programs would significantly harm libraries and, therefore, the broader public.

Librarians at the dawn of the new millennium foresaw our current conflicts. They feared that technological protectionist measures “could effectively reduce libraries from repositories of valuable knowledge to mere marketing platforms for content distributors,” where “the free flow of ideas is limited to the obsolescent world of print.” Nancy Kranich, *Libraries, the Internet, and Democracy*, in *Libraries and Democracy* 83, 89-91 (Nancy Kranich ed. 2001) To these librarians on the front lines of information literacy, what was at stake was not only the availability and affordability of information essential to the public interest, but also the “very basis upon which local libraries serve the public’s information needs.” *Id.* at 93. Such measures did not merely threaten access to information for less privileged citizens, as even those with ample wealth and access would stand to lose if they were to be “relegated to simply buying whatever information they need.” Patricia Schuman, *Advocating for America’s Right to Know*, in *Libraries and Democracy* 197 (Nancy Kranich ed., 2001). The librarians of yesteryear should be applauded for their prescience; digital books have become something that libraries do not own but rather borrow from the corporations that do. Daniel Gross, *The Surprisingly Big Business of Library E-books*, *The New Yorker* (Sept. 2, 2021),

Judiciary, 97th Cong. (1982). Needless to say, Valenti’s dire warnings never came to pass.

<https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books> (last visited Dec. 18, 2023).

But, this state of affairs is neither inevitable nor irreversible. As the latest example of libraries deploying digital technologies, CDL programs stand poised to ameliorate inequalities in digital access that concerned public servants decades ago.

Costs imposed by e-book licensing are not merely theoretical. In 2020, Columbia University Library allocated over \$3M of an annual \$15M materials budget towards its digital and electronic collection, a 36.4% increase from 2016. Despite the fact that e-books remain a smaller fraction of most library collections, the capital required to maintain them can be prohibitively expensive, with license fees often clocking in at four or five times the consumer price tag. Take, for example, Madeleine Miller's best-selling novel *Circe*, for which a single library e-book license can be as much as five times the price charged to individual buyers. The buyer pays \$16.20 per e-book copy, while the library pays \$81.00, often from taxpayer funds. *Library Statistics, Fiscal Years 2016–2020*, Colum. Univ. (Dec. 3, 2021), https://opir.columbia.edu/sites/default/files/content/Statistical%20Abstract/opir_libraries.pdf (last visited Dec. 18, 2023).

Disparities in e-book pricing not only prevent libraries from providing resources to their patrons, but also perpetuate existing inequities. Unsustainable costs reduce the capacity of libraries to provide digital content to their patrons, but more stringent policy regimes threaten to eliminate it completely. For the many patrons who rely on digital content, efforts to restrict access could effectively cut them off from access to these materials. Librarians believe in celebrating the creativity of authors, defending their autonomy, and rewarding their hard work. While so doing, however, they want to ensure that content is available as an information resource for the benefit of all their constituents.

CONCLUSION

To remain relevant and to continue to democratize information access, libraries must meet patrons where they are; in the present day, that means the Internet. Libraries have nurtured our democracy from its inception and have changed alongside our society—evolving from private subscription models serving only the elite to free institutions that enrich citizens without regard to race, creed, gender, or socioeconomic status. As a cornerstone of democracy, libraries will always be the site of cultural struggle and “a crucible for a society that is constantly moving toward a more perfect union.” Susan B. Kretchmer, *The Library Internet Access Controversy and Democracy*, in *Libraries and Democracy* 96, 97

(2001) CDL is simply the latest iteration in a longstanding pattern of libraries meeting our technological moment.

The court is being asked to rule on copyright issues based on the specific facts as presented. The court should approach with caution any arguments that CDL is somehow unlawful under any circumstances. CDL is just one of numerous innovations in library services that have been developed and implemented through many decades and can be adapted to legal requirements. 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 broad access to information.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that:

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(b) and Second Circuit Local Rule 29.1(c) because it contains 5,710 words as calculated by the word count feature of Microsoft Office 365, exclusive of sections exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Amicus Curiae Brief of Kevin L. Smith and William M. Cross in Support of Appellants and Reversal with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on December 20, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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