

DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD
DASH.HARVARD.EDU

HARVARD LIBRARY


The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission

Citation

Courtney, Kyle K. and Juliya Ziskina. 2023. "The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission." Pre-print.

Link

https://nrs.harvard.edu/URN-3:HUL.INSTREPOS:37374618

Terms of use

This article was downloaded from Harvard University's DASH repository, and is made available under the terms and conditions applicable to Other Posted Material (LAA), as set forth at

https://harvardwiki.atlassian.net/wiki/external/NGY5NDE4ZjgzNTc5NDQzMGIzZWZhMGFlOWI2M2EwYTg

Accessibility

https://accessibility.huit.harvard.edu/digital-accessibility-policy

Share Your Story

The Harvard community has made this article openly available.
Please share how this access benefits you. Submit a story

The Publisher Playbook:
A Brief History of the Publishing Industry's Obstruction of the Library Mission [*]

By: Kyle K. Courtney[†] and Juliya M. Ziskina[‡]

I. Introduction **1**

II. Despite Publisher Contentions, Courts Uphold Public Policies for Lending and Congress Codifies Them (1890s–2010s) **2**

III. Libraries Adapt New Access Technology and Publishers Challenge the Longstanding and Legally Protected Practice of Interlibrary Loan (1930s–1970s) **3**

IV. Publisher Pushback Against Library Photocopying Results in Stronger Fair Use Protections for Libraries (1970s) **5**

V. Courts Find E-Reserves Are Fair Use Despite Publishers' Prolonged Litigation and Previous "Classroom Guidelines" (1970s–2020s) **7**

VI. Congress and Courts Enact and Affirm Increased Accessibility for Patrons with Print Disabilities (1980s–2010s) **12**

VII. Publishers Litigate Against State Legislation Promoting Fair and Equitable eBook Access (2020–Present) **15**

VIII. Publishers Sue the Open Library for Using Controlled Digital Lending to Increase Access to Books During the COVID-19 Crisis (Present) **20**

IX. Conclusion **21**

[*] The authors would like to thank the Georgetown Law Intellectual Property and Information Policy (iPIP) clinic students—Obinna O.C. Iloani, Julie Metkus and Jay Bober—for their work researching and drafting a memo that served as an early version of this paper as part of their semester clinical project.

[†] Kyle K. Courtney is Copyright Advisor at Harvard University, working out of the Harvard Library. He also is the co-founder and Board Chair of Library Futures, and has a fellowship at the NYU Law Engelberg Center on Innovation Law & Policy.

[‡] Juliya M. Ziskina is an attorney in New York City, working with Library Futures and other organizations in the digital rights space on law and policy involving equitable access to culture and information, public interest copyright, and the digital future of libraries.

I. Introduction

Libraries play an essential role in the democratization of knowledge to the public. To serve this role, libraries have continuously evolved their ability to provide access to collections in innovative ways. Many of these advancements in access, however, were not achieved without overcoming serious resistance and obstruction from the rightsholder and publishing industry. Libraries and their readers have routinely engaged in lengthy battles to defend the ability for libraries to fulfill their mission and serve the public good. However, Congress and the courts have historically upheld libraries' attempts to expand access for the public. As outlined below, the struggle to maintain the library's access-based mission and serve the public interest began as early as the late 1800s, and continues through today.

From the inception of large-scale loaning systems, the origins of the first sale doctrine in the late 1800s, to the practice of controlled digital lending (CDL) today, libraries have been met with resistance from rightsholders—in particular, publishers—through legislation, public campaigns, and both the threat of, and actual, litigation. Despite rightsholder challenges, courts and Congress have consistently recognized libraries' benefit for the public. For instance, the Supreme Court upheld the exhaustion of rights in a copyrighted work after a sale in *Bobbs-Merrill Co. v. Straus*, giving libraries the power to lend to patrons; Congress and the courts both supported libraries' rights to copy and share information to promote scholarly research in *Williams & Wilkins Co. v. United States*; the courts validated the use of the internet to make course materials more accessible to students in *Cambridge University Press v. Patton*; and Congress and the courts realized the importance of equality in access for those with print disabilities and took steps to make it a reality in *Authors Guild v. HathiTrust*. Despite publisher efforts to prevent all of these advancements, libraries and the public prevailed. Each of these instances are chapters in a broader story of the pursuit of increasing access to the public, the ensuing pushback, and eventual vindication.

Like the access-expanding innovations that preceded it, publishers are now challenging CDL through ongoing litigation in *Hachette, et. al. v. Internet Archive*, a case currently pending in the Southern District of New York. CDL enables libraries to digitize a print work and circulate the digitized copy in place of the physical one, limiting the library to lend at a one-to-one ratio between digital and print editions.[1] CDL serves as a powerful information equalizer by granting access where physical lending is impractical, improving access for print and physically disabled people, and revitalizing interest in books that have been unavailable in the digital marketplace.[2]

[1] *See* Kyle K. Courtney & David R. Hansen, *A White Paper on Controlled Digital Lending of Library Books* 2-3 (2018).
[2] *Controlled Digital Lending: Unlocking the Library's Full Potential*, LIBRARY FUTURES FOUNDATION (2021), https://www.libraryfutures.net/policy-document-2021.

The *Hachette* lawsuit challenging the legality of CDL is the most recent example of publisher attempts to obstruct libraries' efforts to expand access to knowledge.

Below is a brief review of the times and methods that publishers and rightsholder interests have attempted to hinder the library mission. This pattern of conduct, as reflected in ongoing CDL litigation, is not unexpected and belies a historical playbook on the part of publishers and rightsholders to maximize their own profits and control over the public's informational needs.

II. Despite Publisher Contentions, Courts Uphold Public Policies for Lending and Congress Codifies Them (1890s–2010s)

Libraries, as we understand them today, came about as publishing grew in eighteenth century America and private book clubs evolved into public lending libraries.[3] To promote access to a growing population of eager readers, these newly-developed libraries relied on the legal principle of "exhaustion," which stipulates that a rightsholder's control over their copyrighted work is ended after it is sold or given away.[4] Without the exhaustion principle, copyright owners could impose non-negotiable conditions on secondary sellers or lenders, forcing them to surrender control of their businesses.[5] Instead, this legal limitation on a rightsholders' control empowers practices like second-hand sales, online auctions, and library lending, which foster widespread dissemination of information. In the absence of such public policy, there is a risk that rightsholders might be able to monopolize how the American public accesses knowledge.

Publishers sought to challenge the exhaustion principle by way of lawsuits in the late 1800s.[6] In response to these suits, multiple courts held that distributors and booksellers were free to resell the books they purchased, and that binding and reselling loose or damaged pages was permissible.[7] These cases sparked a majority trend that recognized owning a copy entitled the owner to transfer the copy as they wished.[8] In 1908, this movement culminated in the Supreme Court decision *Bobbs-Merrill Co. v. Straus*.[9] The Bobbs-Merrill Company, a publisher, sought to

---

[3] George Unwin, *History of publishing*, ENCYCLOPEDIA BRITANNICA, (Oct. 1, 2020), https://www.britannica.com/topic/publishing (last visited Nov. 19, 2021); *A History of US Public Libraries*, DIGITAL PUBLIC LIBRARY OF AMERICA, https://dp.la/exhibitions/history-us-public-libraries/beginnings/ (last visited Nov. 19, 2021).

[4] AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 25 (2016).

[5] *See Common-Law Rights as Applied to Copyright: Hearing on H.R. 21592 Before the H. Subcomm. on Copyright of the H. Comm. on Patents*, 60th Cong. 35 (1909) (statement of Robert Parkinson).

[6] *Harrison v. Maynard, Merrill & Co*., 61 F. 689 (2d Cir. 1894) (permitting rebinding and resale of burnt book pages because the publisher conferred absolute title to the copy upon a purchaser); *Doan v. Am. Book Co.*, 105 F. 772 (7th Cir. 1901) (permitting cleaning, rebinding, and resale of soiled school books because a publisher loses its monopoly over the copy once it is sold).

[7] *Clemens v. Estes*, 22 F. 899, 900 (D. Mass. 1885); *Harrison*, 61 F. at 691; *Doan*, 105 F. at 778; *Kipling v. G. P. Putnam's Sons*, 120 F. 631, 634-35 (2d Cir. 1903).

[8] PERZANOWSKI & SCHULTZ, *supra* note 4, at 26.

[9] *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908).

control the subsequent sales of its books and sued a reseller for selling its book for less than the retail price at which they released the book.[10] The Court held that the resale was permissible because the ability "to control all future retail sales by a notice . . . would give a right not included in the terms of the [Copyright] statute, and, in our view, extend its operation, by construction, beyond its meaning."[11] As such, *Bobbs-Merrill Co*. firmly established the "first sale" doctrine by incorporating the exhaustion principle in U.S. copyright law.

Congress recognized the importance of the Supreme Court's decision establishing the first sale doctrine and expeditiously codified the first sale doctrine in the Copyright Act of 1909, permitting the lawful transfer of any copy of a copyrighted work.[12] Today, first sale is codified in § 109 of the Copyright Act of 1976, which states that the owner of a particular copy, like a book, is entitled to sell or dispose of that copy without the copyright owner's permission—including lending.[13] As the House Report accompanying the bill declared, "A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose."[14] Consequently, lending under the first sale doctrine allows libraries to reach readers who might be unable to pay market price for their own copy. To this day, libraries rely on the first sale doctrine to continue to lend books, films, and other materials to the public.

Despite courts' and Congress' consistent support for first sale, publishers have disputed the practice as recently as 2013 in *Kirtsaeng v. John Wiley & Sons, Inc.* In *Kirtsaeng*, a publisher of academic textbooks sued a graduate student for reselling international editions of textbooks in the United States.[15] The Supreme Court upheld the first sale doctrine as protecting the resale of legally obtained copies of a copyrighted work, regardless of their intended country of sale.[16] The Court justified its holding by stating that it "doubt[ed] that Congress would have intended to create the practical copyright-related harms with which a geographical interpretation would threaten ordinary scholarly, artistic, commercial, and consumer activities."[17] Despite publisher resistance, *Kirtsaeng* affirmed the first sale doctrine, further empowering the right of libraries to lend books that they have lawfully acquired.

III. Libraries Adapt New Access Technology and Publishers Challenge the Longstanding and Legally Protected Practice of Interlibrary Loan (1930s–1970s)

In the 1930s, microfilm, also known as "microform," gained popularity as a novel, affordable means of reproducing and publishing research materials. The method also improved

[10] *Id.* at 341.
[11] *Id.* at 351.
[12] Copyright Act of 1909, Pub. L. No. 60-349, § 41, 35 Stat. 1075.
[13] 17 U.S.C. § 109(a) (1976).
[14] H.R. REP. NO. 94-1476, at 79 (1976).
[15] *Kirtsaeng v. John Wiley & Sons, Inc*., 568 U.S. 519, 525-27 (2013).
[16] *Id.* at 525.
[17] *Id.* at 530.

libraries' abilities to share their collections amongst one another, which had already been common practice for over a century.[18] As a result, microform technology became popular among libraries as it was cheaper to store, distribute, and preserve than books, making it ideal for archiving.[19] However, publishers believed that microfilming and other similar technological innovations challenged their own reproduction and distribution rights.[20]

To resolve this conflict, the Joint Committee on Materials for Research, consisting of the American Council of Learned Societies (ACLS), the Social Science Research Council (SSRC), and the American book publishers' trade association negotiated the Gentlemen's Agreement of 1935.[21] The Agreement set guidelines for libraries, archives, and museums by limiting the acceptable amount of reproduction of copyrighted materials.[22] The Agreement permitted libraries to make singular copies of portions of copyrighted material from their collections and loan them out in place of the originals.[23] The Agreement marked the first of its kind between publishers, librarians, and research institutions concerning copyright law and advanced technological copying, representing what would become interlibrary loan and document delivery. While the Agreement was imperfect, its provisions have been cited in litigation[24] and appellate decisions,[25] and its spirit animated § 108 of the Copyright Act of 1976, which grants rights to libraries and archives to create copies.[26]

Section 108 also empowers libraries' ability to continue the centuries-old tradition of interlibrary loan (ILL), which enables libraries to access materials that are unavailable at their local library from another library instead.[27] ILL is one of the key methods by which materials are shared between libraries and provided to scholars, researchers, students, and other patrons. The U.S. Interlibrary Loan Code, first published in 1916 and adopted by the American Library Association (ALA) in 1917, notes that the purpose of ILL is twofold: "(a) to aid research calculated to advance the boundaries of knowl-edge by the loan of unusual books not readily accessible elsewhere; and (b) to augment the supply of the average book for the average reader."[28] In response to limited budgets, limited space, and frequent inability to buy books that are out of print, libraries often lend materials through ILL.

Despite ILL being a longstanding and legally protected practice, publishers challenged the technological advances in ILL, such as advanced photocopying techniques and the ability to make

---

[18] *See* INTERLIBRARY LOAN PRACTICES HANDBOOK 4 (Cherié L. Weible & Karen L. Janke eds., 3d ed. 2011).
[19] *The Pigeon Post into Paris 1870–1871*, UNIVERSITY OF CALIFORNIA, SOUTHERN REGIONAL LIBRARY FACILITY, https://www.srlf.ucla.edu/exhibit/text/hist_page4.htm (last visited Nov. 20, 2021).
[20] Peter B. Hirtle, *Research, Libraries, and Fair Use: The Gentlemen's Agreement of 1935*, at 1, 53 J. COPYRIGHT SOC'Y U.S.A. 4 (2006).
[21] *Id.* at 4.
[22] *Id.* at 1.
[23] *Id.* at 39.
[24] *Williams & Wilkins Co. v. United States,* 172 U.S.P.Q. 670, 672 (Ct. Cl. 1972), rev'd, 487 F.2d 1345 (Ct. Cl. 1973).
[25] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1355 (Ct. Cl. 1973).
[26] 17 U.S.C. § 108.
[27] *See* Margaret D. Uridge, *Interlibrary Lending and Similar Extension Services,* LIBR. TRENDS, July 1957, at 66, 67.
[28] A.L.A. Committee on Coordination. "Code of Practice for Interlibrary Loans,'' ALA Bulletin, 11:272, July 1917.

materials accessible via reproductions.[29] Concerned with how ILL might undercut their subscription market, publishers and other rightsholders lobbied Congress to include the prohibitive language that is now found in (1) and (2) of §108(g) of the Copyright Act, which prohibits "multiple" and "systematic" copying.[30] In response, library stakeholders proposed additional language that protected ILL from allegations of copyright infringement. Congress agreed and enacted additional language in 108(g) that attempted to balance libraries' and publishers' competing interests,[31] which stated, "nothing in this clause prevents a library or archives from participating in interlibrary arrangements."[32] This codified phrase ultimately defended libraries' right to lend materials to each other, successfully expanding access for patrons.

IV. Publisher Opposition to Library Photocopying Results in Stronger Fair Use Protections for Libraries (1970s)

Libraries continued to be early adopters of cutting-edge technologies to promote access for the public. For example, libraries were among the first entities to provide necessary photocopying services to patrons in the 1960s,[33] relying on the then-untested doctrine of fair use.[34] By definition, fair use grants a context-sensitive privilege to use an author's work without permission or payment.[35] But during the rise of access to photocopiers, Congress had not yet codified fair use.[36] Instead, courts had incrementally developed fair use into a common law doctrine through a century of cases.[37] When deciding fair use, courts consistently favored the public interest and recognized that they needed to "give the benefit of the doubt—until Congress acts more specifically—to science and the libraries, rather than to the publisher and the owner."[38] Regardless, without codification, the outcome of fair use cases remained fairly unpredictable.

In 1973, using a tactic that would be mirrored in later decades, publishers attempted to leverage the unsettled state of the law by disputing whether photocopying could be considered fair use, but courts instead supported libraries' photocopying as a permissible service.[39] In *Williams & Wilkins Co. v. United States*, the medical publisher Williams & Wilkins Company sued the Department of Health, Education, and Welfare because the National Institutes of Health (NIH) and

---

[29] *See* Hirtle, *supra* note 20 at 9.
[30] 17 U.S.C. § 108(g).
[31] *Copyright for Librarians, Interlibrary Loan*, UNIVERSITY OF TEXAS LIBRARIES (Aug. 5, 2020), https://guides.lib.utexas.edu/copyrightlibrarians/ill.
[32] 17 U.S.C. § 108(g)(2).
[33] *See* Louise Weinberg, *The Photocopying Revolution and the Copyright Crisis*, 38 THE PUB. INT. 99, 100 (1975).
[34] *See Folsom v. Marsh*, 9. F. Cas. 342, 348-49 (C.C.D. Mass. 1841) (detailing the criteria for a justifiable use of copyrighted materials).
[35] TIMOTHY LEE WHERRY, THE LIBRARIAN'S GUIDE TO INTELLECTUAL PROPERTY IN THE DIGITAL AGE: COPYRIGHTS, PATENTS, AND TRADEMARKS 18 (2002).
[36] *See id.* at 17.
[37] *Id.*
[38] *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1359 (Ct. Cl. 1973).
[39] *See id.*

the National Library of Medicine (NLM) had photocopied the publisher's medical journals without consent.[40] The Court of Claims, a predecessor of the Court of Federal Claims and the Federal Circuit,[41] held limited copying for nonprofit medical research purposes to be fair use and even noted that scientific research inevitably depends on such copying.[42] Unlike the commercial copying seen in previous cases,[43] the *Williams* court specifically noted that the library's copying practices involved a lack of commercial gain.[44] Notably, the court also asserted that both the library and its users were "trailblazers of scientific progress" who required easier access to copyrighted journals for research.[45] The court stated that "the law gives copying for scientific purposes a wide scope."[46] The Supreme Court affirmed the holding without a written opinion.[47]

However, the Court of Claims in *Williams* noted in its decision that Congress needed to enact new legislation to properly delineate the allowable extent of library photocopying.[48] As a result, Congress reformed the previous 1909 copyright law in the mid-1970s. The new law, the Copyright Act of 1976, treated libraries as a high priority.[49] In a Senate Report on the new Copyright Act, the Senate discussed the legislative need to clarify fair use because case law failed to explain how a library might provide photocopies of copyrighted material in its collection under the previous 1909 Act.[50] Indeed, the Senate criticized *Williams & Wilkins Co.* for poorly illustrating how to apply the fair use doctrine to library photocopying practices.[51] Ultimately, the fair use doctrine was officially codified in § 107 of the Copyright Act, emphasizing that reproduction for purposes such as teaching, scholarship, or research—all facilitated by libraries' copying—is not an infringement of copyright.[52]

At the same time, Congress also enacted § 108, which specifically protects library reproduction practices, like photocopying.[53] In addition to protecting ILL, Section 108 also protects libraries from liability for the unsupervised use of reproducing equipment, like photocopiers, as long as the equipment displays a notice regarding copyright laws.[54] Congress stated that it anticipated the expansion of library practices as a result of its resolution of

---

[40] *Id.* at 1346-47.
[41] *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982).
[42] *Williams & Wilkins Co.*, 487 F.2d at 1359.
[43] *See Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913 (2d Cir. 1995) (holding that systematic copying of entire journal articles for commercial setting was not fair use because the defendant's employees sought to avoid paying subscription fees to the publisher).
[44] *Williams & Wilkins Co.*, 487 F.2d at 1359.
[45] *Id.* at 1354.
[46] *Id.*
[47] *Williams & Wilkins Co. v. United States*, 420 U.S. 376 (1975) (affirming by an equally divided Court).
[48] *Williams & Wilkins Co.*, 487 F.2d at 1363.
[49] S. Rep. No. 94-473, at 67-71 (1975); *see* Amanda Levendowski, *The Lost and Found Legacy of Barbara Ringer*, THE ATLANTIC (July 11, 2014), https://www.theatlantic.com/technology/archive/2014/07/the-lost-and-found-legacy-of-a-copyright-hero/373948/ (last visited Nov. 19, 2021).
[50] S. REP. NO. 94-473, at 67-71.
[51] *Id.* at 71.
[52] 17 U.S.C. § 107.
[53] § 108.
[54] § 108(f)(1).

photocopying issues.[55] Similarly, the National Commission on New Technological Uses of Copyrighted Works (CONTU) supported § 108 because it determined that "[n]o persuasive evidence exists that journals . . . are going out of business because of photocopying."[56]

V. Courts Find E-Reserves Are Fair Use Despite Publishers' Prolonged Litigation and Previous "Classroom Guidelines" (1970s–2020s)

The "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," which came be known as the "Classroom Guidelines," were the result of independent meetings that took place prior to the passage of the Copyright Act of 1976 between "representatives of the Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, the Authors League of America, Inc., and the Association of American Publishers, Inc."[57] These meetings took place at the request of the House Judiciary Subcommittee, "in an effort to achieve a meeting of the minds as to permissible educational uses of copyrighted material."[58] The final document was completed in March 1976, and it was published in the House Report that accompanied the Copyright Act of 1976, making it part of the Act's legislative history.

The Classroom Guidelines began by stating that their "purpose ... is to state the minimum and not the maximum standards of educational fair use under Section 107."[59] Under the terms of the Classroom Guidelines, teachers were permitted to make individual copies of excerpts of certain works for use in teaching, research, and class preparation, and could make multiple copies of works for classroom use as long as the copying meets the conditions of "brevity," "spontaneity," and "cumulative effect."[60] These phrases were fairly limiting, particularly in the context of teaching and education. "Brevity" placed strict word count limits on allowable copying, such as "an excerpt from any prose work of not more than 1,000 words or 10 percent of the work."[61] "Spontaneity" provided that "[t]he inspiration and decision to use the work and the moment of its use for maximum teaching effectiveness are so close in time that it would be unreasonable to expect a timely reply to a request for permission."[62] "Cumulative effect" placed limits on the total amount of copying permissible.[63]

---

[55] S. REP. NO. 94-473, at 71.
[56] National Commission on New Technological Uses of Copyrighted Works (CONTU), *Final Report on the National Commission on New Technological Uses of Copyrighted Works* 49 (1978), http://digital-law-online.info/CONTU/PDF/Chapter4.pdf (last visited Nov. 19, 2021).
[57] *See* H.R.Rep. No. 94–1476 at 67 (1976)
[58] *Id.*
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 69.
[63] *Id*.

The Classroom Guidelines' conditions—including limited word counts and percentages all in the name of brevity, spontaneity, and cumulative effect—were criticized by the American Association of University Professors and the Association of American Law Schools as "too restrictive with respect to classroom situations at the university level."[64] The Classroom Guidelines also contained other restrictive provisions that directly impaired libraries from supporting their communities, including prohibitions on copying that substituted for the purchase of books and other publications, and prohibitions on copying and using the same material throughout multiple semesters for student access without licensing.[65]

Shortly after their inclusion in the legislative history of the Copyright Act, publishers weaponized these restrictive Classroom Guidelines against libraries and academic institutions. For instance, in 1983, nine major publishers sued New York University (NYU), asserting that NYU regularly used substantial portions of copyrighted materials for student use in classes.[66] The case resulted in a settlement using the Guidelines' formula for brevity, spontaneity, and cumulative effect as the core of the settlement agreement. The settlement required NYU to adopt the Guidelines as their institutional copyright policy and forced NYU and their respective libraries, archives, and research centers supporting the courses, to seek permission for any materials not eligible under the Guidelines in the future.[67] This case was the first copyright infringement case against a university and revealed a potentially expensive liability for the educational community. Although NYU settled, the nature of the settlement is significant. Despite not being law—but only part of the legislative history—publishers were utilizing the Classroom Guidelines to threaten litigation unless the Guidelines were adopted at universities as policy—as if they were law.

Years later, with the advent of the internet in the 1990s, several libraries began devising ways to use technology to increase access to class materials. The first wave was to digitize their library reserves, a practice where certain academic texts were kept by libraries for special "reserved" access for a class in an effort to further increase their accessibility.[68] Libraries scanned short portions of academic texts and uploaded them to an online platform where students could access the resulting text images of the works required for their classes.[69] This new electronic reserves (e-reserves) system increased physical and practical accessibility for students and patrons.[70] Libraries also expected that moving the reserves system online would prevent damage to books, reduce space required for the texts, increase efficiency of sharing texts, and lessen

---

[64] *Id*. at 72.
[65] *Id*. at 69-70.
[66] *See Addison-Wesley Pub. Co. v. New York Univ*., No. 82 CIV 8333 (ADS), 1983 WL 1134 (S.D.N.Y. May 31, 1983)
[67] *Addison-Wesley Pub. Co. v. New York Univ. Settlement Agreement with NYU* in CORPORATE COPYRIGHT & INFORMATION PRACTICES 167-78 (1983).
[68] *See* Austin Brice, *A Brief History of Electronic Reserves*, 12 J. OF INTERLIBRARY LOANS, DOCUMENT DELIVERY & INFO. SUPPLY 1, 4-6 (2001); Copyright Clearance Center, *Using Content: Library Reserves,* https://www.copyright.com/Services/copyrightoncampus/content/library.html#:~:text=Traditional%20Paper%20Reserves,reserve%20without%20obtaining%20copyright%20permission (last visited Oct. 5, 2021).
[69] *See* Brice, *supra* note 55 at 1-2.
[70] Karen J. Graves, *Electronic reserves: copyright and permissions*, 88 BULL. MED. LIBR. ASS'N 18, 18 (2000).

staffing needs.[71] By the end of the decade, more than 25 libraries had developed e-reserves programs,[72] although others were hesitant to adopt the practice due to copyright infringement concerns.[73]

Fair use, which was by then codified in Section 107 of the Copyright Act of 1976, specifically provided for the creation of copies for classroom purposes. But the law, and corresponding Guidelines[74] developed in the 1970s, were mostly directed toward physical copies.[75] The application of fair use to the creation of a single digital copy was still unclear.[76] Some libraries argued that e-reserves simply replicated library shelves, while other parties, including publishers, countered that e-reserves were comparable to photocopied compilations of course materials, called "coursepacks," and therefore were not fair use.[77]

The debate over e-reserves incited President Bill Clinton's Working Group on Intellectual Property Rights to address the issue at the Conference on Fair Use (CONFU) in 1994.[78] The CONFU working group, consisting of representatives from library associations, publishers, and educational organizations, met monthly for over a year, only to reach no consensus.[79] Publishers desired stringent copyright protections, whereas libraries advocated for flexibility through fair use—and the parties could not agree.[80] In late 1995, the parties concluded that it was impossible to draft fair use guidelines capable of garnering widespread support.[81] At least four major CONFU working groups—Digital Images, Interlibrary Loan, Distance Learning, and eReserves—failed to come to a consensus on fair use guidelines for their respective fields. The Educational Multimedia Group eventually submitted guidelines, but only over strong disapproval from many members within the group.[82] Some publishers supported the Educational Multimedia Group's proposed guidelines, but some library associations expressed concern that the proposed guidelines would

---

[71] *See* Brice, *supra* note 55 at 3; *Course Reserves: About Course Reserves*, WESTERN ILLINOIS UNIVERSITY, https://wiu.libguides.com/coursereserves (last visited Oct. 8, 2021).
[72] *See* Brice, *supra* note 55 at 6.
[73] *Id.*
[74] H.R. REP. NO. 1476, 94th Cong., 2d Sess. 68 (1976). (Again, the Classroom Guidelines are not law. 'The [Classroom] [G]uidelines were designed to give…direction as to the extent of permissible copying and to eliminate some of the doubt which had previously existed in this area of the copyright laws…. [T]hey are not controlling on the court.' *Marcus v. Rowley*, 695 F.2d 1171, 1178 (9th Cir. 1983)).
[75] 17 U.S.C. § 107.
[76] *See* Bryan M. Carson, *Electronic Reserves and the Failed CONFU Guidelines: A Place to Start Negotiations*, AGAINST THE GRAIN, Sept. 2007, at 32.
[77] *See* KYLE K. COURTNEY ET AL., WHAT'S FAIR ABOUT FAIR USE? THE BATTLE OVER E-RESERVES AT GSU 10 (2014); *see also* Carson, *supra* note 62.
[78] *See id.*; *see also* Brice, *supra* note 55 at 7.
[79] *See* COURTNEY ET AL., *supra* note 76; *see also* The Conference on Fair Use (CONFU), Final Report to the Commissioner 15-16, Nov. 1998.
[80] *See* COURTNEY ET AL., *supra* note 76 at 11; Carson, *supra* note 62.
[81] *See* Final Report to the Commissioner, *supra* note 65; *see also* Brice, *supra* note 55 at 7.
[82] *See* Final Report to the Commissioner, *supra* note 65; *see also* COURTNEY ET AL., *supra* note 76 at 11; *see also* Gregory K. Klingsporn, *The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines*, 23 COLUM.-VLA J.L. & ARTS 101 (1999).

make fair use a mechanical exercise, as opposed to a flexible one.[83] Even so, many institutions adopted these guidelines despite there being no formal agreement among stakeholders.[84]

The Association of American Publishers (AAP) addressed the issue of e-reserves directly with universities, occasionally threatening litigation.[85] In 2006, Cornell University, in an agreement with the AAP, adopted a policy requiring the university to seek permission to use copyrighted works in e-reserves if they would have to do so for coursepacks.[86] Publishers lauded this as a victory, though the University Librarian at Cornell made it clear that these guidelines were adopted to avoid litigation, since the AAP had threatened Cornell about potential copyright infringement.[87] Hofstra, Marquette, and Syracuse Universities reached similar agreements in 2008.[88] Although each university was able to avoid the costs and time associated with litigation, the resulting policies caused e-reserve use at each institution to drop significantly.[89]

In 2008, Cambridge University Press, Oxford University Press, and Sage Publications initiated "test case"[90] litigation against Georgia State University (GSU) for its fair use e-reserves policy,[91] seeking an injunction.[92] Notably, the Copyright Clearance Center, an organization that collects money for e-reserve permissions, agreed to fund 50 percent of the publishers' legal fees as an incentive for the publishers to proceed with the lawsuit.[93] GSU asserted that its system did not infringe on copyright because its e-reserves program was a fair use. The district court agreed, holding that the alleged infringements were a fair use.

As the GSU e-reserves case was unfolding, publishers utilized another furtive tactic in this e-reserves litigation: creating confusion over the library's critical role in providing access to works via reserves systems. There are distinct and important differences between "coursepacks"—normally sold to students and subject to permission and licensing—and "reserves," a traditional function of the library. Coursepacks are collections of print or electronic readings assembled by

---

[83] *See* Carson, *supra* note 62; *see also* Final Report to the Commissioner, *supra* note 65 at n.50 & 51.
[84] *See* Brice, *supra* note 55 at 7.
[85] *See* COURTNEY ET AL., *supra* note 76 at 12.
[86] *Id.*
[87] *See id.*
[88] *Id.*
[89] *See id.*
[90] "After the 2014 reversal, publishers had high hopes of prevailing in the case, which AAP president Tom Allen had called "a "test case" that would "inform application of fair use in the academic setting." Andrew Albanese, *GSU Prevails (Again) in Key Copyright Case,* PUBLISHERS WEEKLY, (April 1, 2016). https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/69830-gsu-prevails-again-in-key-copyright-case.html
[91] *See Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1237, 1241-42 (11th Cir. 2014); *see also Cambridge Univ. Press v. Patton*, 863 F. Supp. 2d 1190 (N.D. Ga. 2012); *GSU Library Copyright Lawsuit: Timeline*, GEORGIA STATE UNIVERSITY COLLEGE OF LAW, https://libguides.law.gsu.edu/gsucopyrightcase (last visited Nov. 10, 2021).
[92] *See Cambridge Univ. Press*, 769 F.3d at 1237, 1241-42.
[93] Andrew Albanese, *Libraries Urge CCC to Reconsider its Funding of E-Reserve Copyright Case*, PUBLISHERS WEEKLY, (Nov. 19, 2010). https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/45257-libraries-urge-ccc-to-reconsider-its-funding-of-e-reserve-copyright-case.html.

teachers to supplement college and university courses.[94] They are often housed for purchase at institutional bookstores, copy shops, or outsourced coursepack companies.[95] Reserves are fundamentally distinguishable; they are supplementary print or electronic course materials that faculty and staff put on hold, with limited circulation periods, for patrons to use.[96]

The publishers used the word "coursepacks" in their complaint, other litigation documents, and during trial to describe the electronic reserves systems run by GSU and their library staff.[97] This was an attempt to tie GSU's e-reserves program to a series of cases in the 1990s that determined that "coursepacks" were not a fair use.[98] In *Basic Books, Inc. v. Kinko's Graphics Corp.* and *Princeton Univ. Press v. Mich. Document Servs*., the courts held that the commercial, for-profit copy services could not claim fair use to copy articles and other materials for the classroom.[99] The courts held that permission, often in the form of licensing fees, was required.[100] Therefore, the use of the word "coursepack" was confusing to the interpretation of the law, and did not accurately reflect the purpose of the e-reserves system run by GSU library—a non-profit institution—that was making these materials available under a fair use policy that emphasized educational copying.

On appeal, the Eleventh Circuit acknowledged that Congress specifically allowed for educational copying, per the 1976 Copyright Act's Classroom Guidelines,[101] and highlighted that the university's copying was for a nonprofit educational purpose.[102] As noted above, these Classroom Guidelines were another tool utilized by rightsholders and publishers to create limiting, bright line rules for copying performed for educational purposes.[103] The Eleventh Circuit declined to take into account the Guidelines and stated, "although part of the legislative history of the Copyright Act, [they] do not carry force of law….. to treat the Classroom Guidelines as indicative of what is allowable would be to create the type of "hard evidentiary presumption" that the Supreme Court has cautioned against, because fair use must operate as a "'sensitive balancing of interests.'"[104]

---

[94] Carla Meyers, *Copyright and Course Reserves: Legal Issues and Best Practices for Academic Libraries*, LIBRARIES UNLIMITED xi, 2022
[95] *Id*.
[96] *Id.*
[97] *See Complaint* in *Cambridge University Press et al v. Patton et al.*, Docket No. 1:08-cv-01425 (N.D. Ga. Apr 15, 2008)
[98] *Basic Books, Inc. v. Kinko's Graphics Corp.*, 758 F. Supp. 1522 (S.D.N.Y. 1991) and *Princeton Univ. Press v. Mich. Document Servs.*, 99 F.3d 1381, 1384 (6th Cir. 1996)
[99] *Id*.
[100] *Id.*
[101] H.R. 94-1476 at 68 (1976).
[102] *See Cambridge Univ. Press,* 769 F.3d at 1261-67; *see also* 17 U.S.C. § 107.
[103] H.R. 94-1476 at 68 (1976).
[104] *See Cambridge Univ. Press,* 769 F.3d at 1273 (quoting *Campbell*, 510 U.S. at 584 (quoting *Sony*, 464 U.S. at 455, n. 40)).

Additionally, the court held that GSU's pedagogical purpose had to be taken into account when assessing the amount and substantiality of the portion of a work used.[105] These factors outweighed any indirect economic benefits the university experienced, thus favoring fair use.[106] The court reversed and remanded.

The case concluded in September 2020, when the district court declared GSU to be the prevailing party after finding the plaintiff publishers succeeded in establishing copyright infringement in just 10 of 99 claims brought to trial.[107] After more than a decade of litigation requiring immense financial investment, the court's favorable decision allowed libraries to continue essentially their same practice of e-reserves as had existed prior to the lawsuit.

VI. Congress and Courts Enact and Affirm Increased Accessibility for Patrons with Print Disabilities (1980s–2010s)

In the 2000s, increased book accessibility for people who are blind, visually impaired, or have print disabilities became a core part of policy discussions around the world.[108] According to the World Health Organization (WHO), 285 million people live with print disabilities that make it difficult or impossible to engage with standard text,[109] and these individuals only have access to five percent of published books.[110] In developing countries, the number of accessible texts drops to only half a percent.[111] This "book famine"[112] extends beyond the availability of books and broadly affects educational opportunities for people with disabilities as a whole.[113] Yet as of 2006, only 57 of 184 World Intellectual Property Organization (WIPO) members had national exceptions to copyright for accessible formats, meaning that every other country required rightsholder permission to convert text into formats that could be accessed by people with print disabilities.[114]

---

[105] *See Cambridge Univ. Press,* 769 F.3d at 1275.
[106] *Id.* at 1267.
[107] *Cambridge University Press v. Becker*, 446 F. Supp. 3d 1145, 1160-62, 1171-72 (N.D. Ga. 2020)
[108] We will be using the nomenclature of "print disabled," adopting the standard nomenclature used by advocacy groups such as the American Federation for the Blind. *See* American Federation for the Blind et al., *Comments Regarding a Proposed Exemption Under 17 U.S.C. § 1201* (2020), https://www.copyright.gov/1201/2021/comments/Class%2008_InitialComments_Accessibility%20Petitioners%20II.pdf.
[109] Print disability is defined as a disability that makes it difficult or impossible to access standard text. *See Print Disabilities*, IRIS CENTER, https://iris.peabody.vanderbilt.edu/module/bs/cresource/q1/p01/ (last visited Nov. 10, 2021).
[110] Shae Fitzpatrick, *Setting Its Sights on the Marrakesh Treaty: The U.S. Role in Alleviating the Book Famine for Persons with Print Disability*, 37 B.C. INT'L & COMP. L. REV. 139, 140 (2014).
[111] *Id.*
[112] *See Understanding the Marrakesh Treaty Implementation Act*, U.S. COPYRIGHT OFFICE, August 2020, https://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf.
[113] Fredric K. Schroeder, *Ending the Book Famine: Literacy for the Blind without Border*, 56 BRAILLE MONITOR (Aug./Sept. 2013).
[114] *See* Fitzpatrick, *supra* note 87 at 144.

The few countries that did have exceptions were nonetheless unable to share accessible works available across borders into other countries, leading to significant inefficiencies.[115]

Ultimately, WIPO took note of the lack of cohesion in accessibility among member countries and proposed an international treaty in 1985 as a way to harmonize international copyright law.[116] Due to prolonged discussions among WIPO members for more than two decades, a draft of the treaty was not developed until 2008.[117] Finally, in 2011, numerous proposals culminated into the Marrakesh Treaty.[118]

By this time, publishers had already attempted to undercut developments towards accessibility for people with print disabilities. In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA), which included a provision barring the circumvention of technological locks. This prohibition made it difficult to lawfully create accessible versions of copyrighted ebooks,[119] so advocates filed comments with the Copyright Office seeking temporary exemptions to the provision for people with print disabilities. In response, the AAP opposed the exemptions on the grounds that people with print disabilities could just read non-electronic books, despite themselves acknowledging that print disabled people have less access to literary works.[120]

More than a decade later in 2009 (just as the early iterations of the Marrakesh Treaty were proposed), publishers advocated against the new Kindle 2's read-aloud feature, which would have increased accessibility for readers with print disabilities.[121] Despite the feature's potential to equitize ebook access, the Authors Guild argued that the feature would negatively impact the audiobook market.[122] Publisher backlash prompted Amazon to discontinue the universally-available feature and instead required the company to obtain permission from the copyright holder before implementing the functionality.[123]

Shortly after Congress enacted the DMCA, publishers proceeded to challenge book accessibility through litigation. In the early 2000s, several universities permitted Google to electronically scan the books in their collections in order to create the HathiTrust Digital Library (HDL).[124] The HDL allowed patrons with verified print disabilities to access the full text of copyrighted works.[125] The Authors Guild and multiple other authors' associations sued HathiTrust for copyright infringement in 2011.[126] The trial court ruled against the Authors Guild, finding that

---

[115] *See* Schroeder, *supra* note 90.
[116] *See* Fitzpatrick, *supra* note 87 at 145.
[117] *Id.* at 146.
[118] *Id*.
[119] *See id*.
[120] Joint Reply Comments of AAP, et al. at 43-44 (2003), https://cdn.loc.gov/copyright/1201/2003/reply/023.pdf; *see also* Reid, *supra* note 96 at 30.
[121] *See* Roy Blount Jr.*, The Kindle Swindle,* N.Y. TIMES (Feb. 24, 2009).
[122] *Id*.
[123] Press Release, *Statement from Amazon.com Regarding Kindle 2's Experimental Text-to-Speech Feature*, AMAZON.COM (Feb. 27, 2009).
[124] *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 90-91 (2d Cir. 2014).
[125] *Id.* at 91.
[126] *Id.* at 92-93.

HathiTrust's use was permissible under fair use. The Authors Guild appealed the case to the Second Circuit.

The Second Circuit held in favor of HathiTrust, largely affirming the lower court's findings of fair use for accessibility and search.[127] In its decision, the court found that providing access to those with print disabilities furthered the aims of the Copyright Act.[128] The court further noted that the market for accessible books is incredibly limited, so much so that publishers routinely forgo royalties on specially formatted books, and that the HDL did little in terms of usurping the market or causing any lost profits.[129] The *HathiTrust* decision was a major victory for disability rights and effectively prevented further challenges to fair use in the context of accessibility.[130]

During this time, the Marrakesh Treaty remained the subject of debate. One of the most contentious issues was the potential inclusion of a fair use framework that would allow secondary uses of a copyrighted work without rightsholder permission.[131] Publishers and other corporate entities[132] argued against including the term because its ties to U.S. copyright law "could be misleading," and that the standard would be too challenging for legislators and courts to implement.[133] Due in part to media coverage of publishers' and corporations' efforts to thwart the treaty, the parties reached a compromise that would include fair use in the treaty.[134]

Eventually, the Marrakesh Treaty was adopted in 2013 and became the first user-rights-oriented intellectual property treaty.[135] As a result, the treaty required each signatory country to craft national laws implementing it.[136] To comply with the treaty, the United States modified § 121 of the Copyright Act, also known as the Chafee Amendment, an earlier law protecting the rights of readers with print disabilities.[137] The modifications removed the Chafee Amendment's limitation to non-dramatic works, expanded eligibility for exemption, and allowed for imports and exports of accessible works.[138] The Marrakesh Treaty Implementation Act officially went into

---

[127] *Id*. at 101-02.
[128] *Id.* at 101-02.
[129] *Id.* at 103.
[130] Brandon Butler et al., THE LAW AND ACCESSIBLE TEXTS: RECONCILING CIVIL RIGHTS AND COPYRIGHT, 15-16 (2019).
[131] *See* FOIA Request of Intellectual Property Owners Association Correspondence on Treaty Opposition, https://www.keionline.org/wp-content/uploads/FOIA-GE-Treaty-for-Blind.pdf; FOIA Request of Disney, Viacom & MPAA Regarding WIPO Treaty on Copyright Exceptions, https://www.keionline.org/sites/default/files/F-13-00172_OCR_Final_Response.pdf.
[132] See FOIA Request of Intellectual Property Owners Association Correspondence on Treaty Opposition, https://www.keionline.org/wp-content/uploads/FOIA-GE-Treaty-for-Blind.pdf.
[133] FOIA Request of Disney, Viacom & MPAA Regarding WIPO Treaty on Copyright Exceptions, https://www.keionline.org/sites/default/files/F-13-00172_OCR_Final_Response.pdf.
[134] *See* Kimberly Kindy, *Filmmakers' group tries to reshape treaty that would benefit the blind*, WASH. POST (June 22, 2013), https://www.washingtonpost.com/politics/filmmakers-group-tries-to-reshape-treaty-that-would-benefit-the-blind/2013/06/22/f98e6130-d761-11e2-9df4-895344c13c30_story.html.
[135] *See* Understanding the Marrakesh Treaty Implementation Act, *supra* note 89.
[136] *Id.*
[137] *Id.*; s*ee also* 17 U.S.C. § 121.
[138] *Id.*

effect in 2019, nearly 35 years after work on it began.[139] Ultimately, the persistent efforts of libraries, their allies, and other public-facing organizations to increase accessibility for patrons with print disabilities were met with success in the courts, in Congress, and on the international stage.

VII. Publishers Litigate Against State Legislation Promoting Fair and Equitable eBook Access (2020–Present)

As libraries have increased digital access to materials over the decades, ebooks have continued to be a contentious aspect of the modern library mission. Since publishers first made ebooks available to the public through restrictive license agreements, many ebook "purchasers," such as libraries and individual consumers, were effectively redefined into ebook renters due to the terms of the licenses.[140] Under these licensing agreements, publishers set non-negotiable terms of library contracts with complicated clauses, conditions, and definitions that impede the library's ability to provide traditional access in service of their communities.

As a result, the current ebook business model features significant fiscal, social, cultural, and legal implications that undermine a library's traditional lending and preservation functions. Libraries must continually replace items in their digital catalogs because of the restrictive nature of licensing agreements, instead of focusing library collection budgets on procuring new material and providing educational services to the public.[141] For example, despite spending as much as $84 to license books that can normally be purchased for $14.99, most agreements offered to libraries limit item licenses to two years, at which point the exact same materials must be re-purchased.[142] Some libraries pay a cost per circulation fee on top of initial fees, entering into *de facto* rental agreements at unrestrained prices.[143] Publishers often charge libraries three to 10 times as much as the consumer price for the same ebook.[144] Further, some electronic materials are simply not available to libraries to license from some publishers and distributors. Or, worse, publishers have

---

[139] *Id.*

[140] Kyle K. Courtney, *Rent NOT to Own: Copyright, Licensing, and the ebook Revolution* [Conference presentation]. Miami University Libraries Copyright Conference 2021, Online (2021, September 28).

[141] Andrew Albanese, *Hachette Book Group Changes Library E-book Terms*, PUBLISHERS WEEKLY (Jun. 17, 2019), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/80486-hachette-book-group-changes-library-e-book-terms.html.

[142] *ALA 'concerned' over Hachette Book Group ebook and audio book lending model changes*, AM. LIBR. ASS'N., (June 17, 2019), http://www.ala.org/news/press-releases/2019/06/ala-concerned-over-hachette-book-group-ebook-and-audio-book-lending-model.

[143] *A New Twist in Ebook Library Licensing Fees*, THE AUTHORS GUILD (Jun. 21, 2019), https://web.archive.org/web/20220303210514/https://www.authorsguild.org/industry-advocacy/a-new-twist-in-ebook-library-licensing-fees/.

[144] Jennie Rothschild, *Hold On, ebooks Cost HOW Much? The Inconvenient Truth About Library eCollections*, TRASHY BOOKS BLOG (Sept. 6, 2020); David Moore, *Publishing Giants Are Fighting Libraries on E-Books*, SLUDGE (Mar. 17, 2022), https://readsludge.com/2022/03/17/publishing-giants-are-fighting-libraries-on-e-books/.

even attempted an outright embargo sale of ebooks to libraries, sometimes called "windowing," falsely claiming that "library lending was cannibalizing sales."[145]

Libraries have no choice but to enter into these agreements if they are to even approximate continuing their core missions, let alone meet their responsibility of maintaining preservation copies for future generations. Further, licensing terms often restrict lawful activity that was hard-won on the part of libraries and advocates, such as ILL and the right to create accessible formats.[146] The exorbitant costs and burdensome restrictions of these ebook contracts are thus draining resources from many libraries and/or the consortia to which they belong, forcing them to make difficult choices to attempt to provide a consistent level of service.

Libraries began organizing to solve the problem through policy and legislative change. In 2020, Rhode Island was one of the first states to propose a bill that would help regulate the ebook licensing market. Rhode Island Senate Bill 2773 would "require[] a publisher who offers to license electronic books…to the public [to] offer [a] license…to libraries in the state on reasonable terms."[147] While this bill did not pass through the Rhode Island legislature to become law, it prompted other states to adopt its structure, language, and intent.

In 2021, Maryland's legislature, with the aid of the Maryland Library Association and the non-profit organization Readers First, proposed a similar ebook bill.[148] This bill was drafted to address one of the ebook issues plaguing libraries: for publisher licenses to provide equal access and pricing in ebook and digital content for libraries. The bill stated that if publishers offer an ebook license to the public, then they must also provide an ebook license to libraries under "reasonable terms."[149] The Maryland Library Association released a "Statement on Maryland's Digital Content Law" describing its view of what "reasonable terms" under the ebooks law would entail, which it derived from the testimony during the Maryland General Assembly's consideration of the bill.[150] For example, in the Maryland Library Association's view, "reasonable licensing terms" could include terms "without restriction on when libraries can access the book or how many copies can be obtained" or "print-equivalent license terms" that are based on "a centuries old

---

[145] Lynn Neary, *You May Have to Wait To Borrow a New E-Book From the Library*, NPR ALL THINGS CONSIDERED (Nov. 1, 2019), https://www.npr.org/2019/11/01/775150979/you-may-have-to-wait-to-borrow-a-new-e-book-from-the-library/

[146] Katherine Klosek, *US Copyright Office Allows Access to E-books for People with Disabilities, but Licenses May Still Restrict Access*, ASS'N. RESEARCH LIBRARIES (Jan. 18, 2022), https://www.arl.org/blog/us-copyright-office-allows-access-to-e-books-for-people-with-disabilities-but-licenses-may-still-restrict-access/.

[147] *The Electronic Book Licenses to Libraries Act*, S. 773, 2020 January Session (R.I. 2020) at http://webserver.rilegislature.gov/billtext20/senatetext20/s2773.pdf

[148] *See Evolution of EBook Bills*, EVERYLIBRARY INSTITUTE (last visited Aug. 17, 2022), https://www.everylibraryinstitute.org/evolution_ebook_bills

[149] *Public Libraries - Electronic Literary Product Licenses - Access*, MD GEN. ASSEMBLY (last updated June 11, 2021), https://mgaleg.maryland.gov/mgawebsite/Legislation/Details/SB0432?ys=2021RS

[150] *A Maryland Library Association Statement on Maryland's Digital Content Law*, MD LIBR. ASS'N. (July 14, 2021), https://www.mdlib.org/files/docs/press/statement.pdf.

model, updated to the digital realm," which would "be fair to publishers, authors, libraries, and users."[151]

The Maryland ebooks bill passed the Maryland General Assembly unanimously,[152] despite letters from the AAP to Maryland legislators claiming that the law was unconstitutional because it created a *de facto* compulsory license and therefore was preempted by federal copyright law.[153] The ebook law was set to take effect in January 2022. A mirror ebook bill in New York also passed both houses in the New York state legislature nearly unanimously.[154]

The AAP claimed that Maryland's ebook law was "radical"[155] and, in 2021, sued the state of Maryland on federal preemption grounds. The AAP complaint argued that by *requiring* publishers to sell a license to libraries, the state was legislating in the federal copyright realm, which is the role of Congress, not the states. The complaint focused solely on the copyright preemption issue.

During the oral arguments, federal judge Deborah L. Boardman interpreted the language of the ebook law as an "order to distribute" because it would *force* publishers to offer licenses, which would constitute a violation of their freedom to license their own copyrighted works.[156] The court found in favor of the publishers, stating that federal copyright law provides full legal support for copyright owners to choose to sell, license, or *withhold* their works from anyone.[157] According to Judge Boardman, the rights in Section 106 of the Copyright Act are exclusively granted to the copyright owner and therefore void any state laws requiring publishers to license or sell copyrighted work.[158] The court said plainly, "[t]he Act's mandate that publishers offer to license their electronic literary products to libraries interferes with copyright owners' exclusive right to distribute by dictating whether, when, and to whom they must distribute their copyrighted works. Accordingly, the Court finds that the Maryland Act likely stands as an obstacle to the accomplishment of the objectives of the Copyright Act and that it is likely preempted under the Supremacy Clause."[159] Nevertheless, Judge Boardman stated, "Libraries serve many critical

---

[151] *Id*. at 1.

[152] Matt Enis, *AAP Sues Maryland Over Law Requiring Publishers to License Ebooks to Libraries Under "Reasonable Terms"*, LIBR. J. (Dec. 9, 2021), https://www.libraryjournal.com/story/maryland-passes-law-requiring-publishers-to-license-ebooks-to-libraries-under-reasonable-terms

[153] Jim Milliot, *AAP Sues to Block Maryland, New York Library E-book Laws,* PUBLISHERS WEEKLY (Dec. 9, 2021), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/88092-aap-sues-to-block-maryland-new-york-library-e-book-laws.html

[154] Andrew Albanese, *New York Legislature Passes Library E-book Bill*, PUBLISHERS WEEKLY (June 11, 2021), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/86637-new-york-legislature-passes-library-e-book-bill.html.

[155] Complaint of American Association of Publishers in *Ass'n of Am. Publishers in v. Frosh*, 1:21-cv-03133-DLB, (D.MD. Feb. 16, 2022), ¶ 37. https://publishers.org/wp-content/uploads/2021/12/AAP-v.-Maryland.pdf

[156] Andrew Albanese, *After Hearing, Maryland's E-book Law Hangs in the Balance*, PUBLISHERS WEEKLY (Feb. 7, 2022), https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/88484-after-hearing-maryland-s-e-book-law-hangs-in-the-balance.html

[157] *Ass'n of Am. Publishers v. Frosh*, 586 F. Supp. 3d 379 (D. Md. 2022).

[158] *Id*. at 393.

[159] *Id*. at 388.

functions in our democracy… Libraries face unique challenges as they sit at the intersection of public service and the private marketplace in an evolving society that is increasingly reliant on digital media."[160]

As a result of the litigation over the Maryland ebook bill, New York State Governor Kathy Hochul vetoed the New York ebook bill. Governor Hochul stated: "While the goal of this bill is laudable, unfortunately, copyright protection provides the author of the work with the exclusive right to their works … As such the law would allow the author, and only the author, to determine to whom they wish to share their work and on what terms. Because the provisions of this bill are preempted by federal copyright law, I cannot support this bill."[161]

As of 2021, publishers have also been exploring new mechanisms that would adapt modern technology, such as blockchain and non-fungible tokens (NFTs), to further encroach on the secondary market, which includes libraries, college bookstores, and used bookstores.[162] For example, the textbook publishing giant Pearson announced plans in 2022 to use NFTs to track digital textbook sales to capture revenue lost on the secondary market and effectively "diminish the secondary market."[163] These new technologies use the same methodology as traditional ebook licensing—impeding downstream use and access via restrictive license agreements—but instead charge a fee for each change of possession or sale.

Another recent example of publisher leverage over content licensing is when, at the start of the Fall 2022 school semester, Wiley Publishing Company abruptly withdrew 1,379 multidisciplinary titles from ProQuest, a vendor for university ebook collections around the world.[164] As a result, librarians and faculty members in the United States and internationally scrambled to identify alternative textbook options for their students as the pandemic amplified the trouble with restrictive licensing and e-textbooks.[165] The decision was widely condemned by librarians, civil society organizations, and university libraries. The United Kingdom organization #ebookSOS organized several efforts in protest and compiled the full list of titles pulled from ProQuest to make authors aware that their books were being restricted.[166] Several weeks later,

---

[160] *Id.* at 398.

[161] Andrew Albanese, *Hochul Vetoes New York's Library E-book Bill*, PUBLISHERS WEEKLY (Dec. 30, 2021), https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html.

[162] Brittney Nguyen, *One of the biggest textbook publishers is tired of not making any money when you buy a used textbook — and wants to explore using NFTs to get a cut*, BUSINESS INSIDER (Aug. 6, 2022) ("The move to digital helps diminish the secondary market, and technology like blockchain and NFTs allows us to participate in every sale of that particular item as it goes through its life," CEO of Pearson Andy Bird added).

[163] *Id*.

[164] Claire Woodcock, *Publishing Company Starts School Year by Removing Over 1,000 E-Textbooks*, VICE (Oct. 5, 2022), https://www.vice.com/en/article/3ad5x8/publishing-company-starts-school-year-by-removing-over-1000-e-textbooks.

[165] *Pandemic Amplifies Trouble with Restrictive Licensing and E-Textbooks*, SPARC (Oct. 2, 2020), https://sparcopen.org/news/2020/pandemic-amplifies-trouble-with-restrictive-licensing-and-e-textbooks/

[166] *Excel Spreadsheet of Wiley Textbook Removals* (last visited Mar. 10, 2023), https://docs.google.com/spreadsheets/d/1zwACub3o5Qwx91qWZxIMUnjZ2Bo5dq9F/edit#gid=879364425

Wiley relented and announced it was temporarily restoring access (until June 2023) in the face of public pressure.[167]

The ebook state legislative battle reveals a familiar pattern: when public institutions that serve the public good attempt to reassert control over their mission, they are blocked by rightsholder organizations through both threats of, and actual, litigation. However, libraries and other public institutions have historically persevered against publisher obstruction in its variety of forms, and continue to do so. While the ebook bill was declared unconstitutional in Maryland and vetoed in New York, many states continued working with local and national library organizations to introduce similar bills and will continue to move legislation forward in the next legislative sessions.[168]

In addition to continued legislative action in the states, the proliferation of state ebook legislation caught the attention of federal legislators. In September 2021, Senate Finance Committee Chair Ron Wyden (D-Oregon) and U.S. Representative Anna Eshoo (D-California) sent a letter to the Big Five publishers with a wide-ranging set of questions regarding their practices in the library e-book market, including topics such as transparency in licensing agreements, a summary of current lending restrictions, current litigation against libraries, and their terms of engagement during the COVID pandemic.[169]

The representatives' letter affirms the library's right to purchase and lend digital materials much like they would print and decries the publishers' arrangements with libraries, writing, "Many libraries face financial and practical challenges in making e-books available to their patrons, which jeopardizes their ability to fulfill their mission…. Under these arrangements, libraries are forced to rent books through very restrictive agreements that look like leases."[170] They also emphasize that these leases could run afoul of copyright exceptions and limitations and significantly hinder equity in access and education. Further, Eshoo and Wyden write that "E-books play a critical role in ensuring that libraries can fulfill their mission of providing broad and equitable access to information for all Americans, and it is imperative that libraries can continue their traditional lending functions as technology advances."[171] Several months later, Eshoo and Wyden sent similar letters to nine of the top ebook aggregators.[172] Although as of 2023 the problems plaguing library

---

[167] *Statement on Wiley eBooks Featured in ProQuest Academic Complete Library*, WILEY (Oct. 5, 2022), https://newsroom.wiley.com/press-releases/press-release-details/2022/Statement-on-Wiley-eBooks-Featured-in-ProQuest-Academic-Complete-Library/default.aspx

[168] Kyle K. Courtney & Juliya Ziskina, *Mitigating the Library ebook Conundrum Through Legislative Action in the States*, LIBRARY FUTURES (June 2022), https://www.libraryfutures.net/library-futures-ebooks-policy-paper.

[169] *Wyden, Eshoo Press Big Five Publishers on Costly, Overly Restrictive E-Book Contracts with Libraries*, U.S. SENATE COMMITTEE ON FINANCE (Sept. 23, 2021), https://www.finance.senate.gov/chairmans-news/wyden-eshoo-press-big-five-publishers-on-costly-overly-restrictive-e-book-contracts-with-libraries

[170] *Id*.

[171] *Id*.

[172] *Wyden and Eshoo Press for Answers on Restrictive E-Book Agreements That Limit Libraries' Digital Lending*, SEN. RON WYDEN (Nov. 18, 2021), https://www.wyden.senate.gov/news/press-releases/wyden-and-eshoo-press-for-answers-on-restrictive-e-book-agreements-that-limit-libraries-digital-lending.

ebook contracts still persist, publishers' and aggregators' exploitative practices have prompted scrutiny from federal legislators.

VIII. Publishers Sue the Open Library for Using Controlled Digital Lending to Increase Access to Books During the COVID-19 Crisis (Present)

In 2018, "A White Paper on Controlled Digital Lending of Library Books" (CDL White Paper), authored by copyright scholars Kyle K. Courtney and David R. Hansen, proposed that under copyright law, any text could be lent as a digital copy, which could provide unprecedented access to knowledge.[173] Building on an earlier article espousing a novel method of digital preservation and increased access to digital collections by Georgetown Law Professor Michelle Wu,[174] the CDL White Paper suggested that libraries expand their role by digitizing the books, papers, magazines, and other print media in their collections and lending out those digital copies in place of their physical counterparts.[175] The lawfulness of CDL is predicated on the first sale and fair use doctrines, and that libraries maintain a one-to-one "owned to loaned" ratio; in other words, the number of digital copies out on loan should not exceed the number of corresponding physical books in a library's possession.[176]

A well-implemented CDL system can help facilitate the library mission of increasing educational access for the public.[177] As of 2023, more than 100 libraries across North America employ CDL systems to maximize economic efficiency, promote equitable and dependable education, improve libraries' civil rights functions, and democratize knowledge by expanding access.[178] With CDL, patrons with print and physical disabilities are uniquely served by being able to access digital material without undergoing a gauntlet of disability self-identification checks.[179] Moreover, when libraries closed in response to COVID-19, those employing CDL were able to seamlessly continue serving their patrons.[180]

In 2020, publishers sued the Internet Archive (IA) in the Southern District of New York for its CDL system, claiming that the Internet Archive's version of CDL, called the Open Library digital lending program, is copyright infringement.[181] In its complaint, Hachette Book Group,

---

[173] *See* Courtney & Hansen, *supra* note 1.
[174] Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 LAW LIBRARY J. 527, 535 (2011).
[175] *See* Courtney & Hansen, *supra* note 1.
[176] *Id*. at 535.
[177] *See* Courtney & Hansen, *supra* note 1 at 32.
[178] Brief for Library Futures Institute, EveryLibrary Institute, and Reader's First as Amici Curiae in Support of Internet Archive, *Hachette Book Group, Inc. v. Internet Archive*, 1:20-cv-04160, ECF No. 122, 7-9 (S.D.N.Y. July 28, 2020).
[179] *Authors Guild, Inc. v. Hathitrust*, 755 F.3d 87, 101 (2d Cir. 2014).
[180] *Controlled Digital Lending: Unlocking the Library's Full Potential*, *supra* note 2 at 3.
[181] Complaint at 3, *Hachette Book Group, Inc. v. Internet Archive*, 1:20-cv-04160, No. 33 (S.D.N.Y. July 28, 2020). Notably, the action was spurred by Internet Archive's establishment of the National Emergency Library, which removed all traditional CDL restrictions. Colin Dwyer, *Publishers Sue Internet Archive For 'Mass Copyright*

HarperCollins, Penguin Random House, and others alleged that the Open Library program was not actually "lending," and claimed that it is a clearly illicit "copying" scheme.[182] For its part, the Internet Archive observes that its program is "fundamentally the same" as traditional lending models and "poses no new harm to authors or the publishing industry."[183] IA's program utilizes the traditional CDL model and, depending on the outcome of this litigation, CDL may be recognized as an innovative means of serving all patrons, not just ones who can borrow in person.

IX. Conclusion

The historical conflict between libraries and publishers reveals a predictable pattern. Libraries are fast to adopt new ways of providing greater access to knowledge to their patrons. Publishers react by obstructing libraries' efforts. Courts, Congress, and sometimes both, consistently defend libraries and repeatedly acknowledge how their practices benefit the public despite publishers' objections. As a result, libraries' access-expanding innovations—from photocopying to digitizing—have become commonplace. From the public policy that animated lending in the 1800s, to the implementation of the Marrakesh Treaty in 2019, the pattern has persisted. CDL should be the next chapter of upholding access-expanding innovation. To use a phrase from an early exhaustion case: continued interference with the ability for libraries to provide access to their works has "been hateful to the law from Lord Coke's Day to ours, because it is obnoxious to the public interest."[184]

Infringement', NPR (June 3, 2020, 2:52 PM), https://www.npr.org/2020/06/03/868861704/publishers-sue-internet-archive-for-mass-copyright-infringement/.

[182] Complaint, *supra* note 124 at 15.

[183] Answer and Affirmative Defenses at 2, *Hachette Book Group, Inc. et al v. Internet Archive et al*, 1:20-cv-04160, No. 33 (S.D.N.Y. July 28, 2020).

[184] *Straus v. Victor Talking Mach. Co*., 243 U.S. 490, 501 (1917).