

Libraries, Copyright Exceptions, and Social Justice

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I. Copyright Exceptions, Copyright's Purpose, and Social Justice	<i>page</i> 363
II. Circulation and the First Sale Doctrine	363
A. Throughout American History, Libraries Have Promoted Democratic Values By Lending Books to the Public	364
B. Americans Borrow Books and Other Materials From Libraries 4.4 Billion Times a Year	365
C. The First Sale Doctrine Enables Library Lending	366
D. Library Lending During the Pandemic	367
III. Internet Services and the DMCA Safe Harbors	367
A. Internet Access	368
B. Institutional Repositories	370
C. Information Location Tools	371
IV. Preservation of Cultural Heritage, Section 108, and Fair Use	371
V. Accessible Format Copies, Fair Use, and the Chafee Amendment	373
A. Fair use	374
B. Section 121 (the Chafee Amendment) and Equity for the Print-Disabled	376
C. The Triennial 1201 Exemption Rules	377
D. The Marrakesh Treaty and Implementing Law	378
Conclusion	379

Libraries in the United States promote social justice by preserving and providing the public with free, equitable access to information. Libraries can provide this free access only because of exceptions and limitations in the U.S. Copyright Act such as the first sale doctrine, the fair use right, and the safe harbors for providers of online services. As a result of these exceptions and limitations, Americans at every social-economic level of our society enjoy access to the knowledge contained in millions of copyrighted works, and they use that knowledge to improve their daily lives and to enhance their participation in and contributions to civil society. This chapter explores the importance of these exceptions and limitations, particularly in the modern remote information society, to the pursuit of the precepts of equitable access, inclusion, and empowerment in the fulfillment of libraries' social justice mission.

I. COPYRIGHT EXCEPTIONS, COPYRIGHT'S PURPOSE, AND SOCIAL JUSTICE

Copyright law in the U.S. exists to serve the public interest.¹ The Constitution empowers Congress to award copyrights to authors “for limited times” in order to “promote the progress of science.”² The copyright system assumes that, generally speaking, granting exclusive rights will provide an incentive to authors and publishers who might not otherwise create or publish new works. These incentives are a means to an end, however, and the law includes limitations and exceptions to exclusive rights to ensure they do not unduly burden the very public interest they were designed to serve,³ especially the First Amendment values of freedom of expression and access to knowledge.⁴ We should recognize, then, that the general fair use right and the specific provisions described below are as important to the vindication of copyright’s ultimate purpose as the copyright holder’s exclusive rights themselves.⁵ The limitations Congress enacted in Sections 107–122⁶ help to define the ambit of the copyright holder’s Section 106 rights, which themselves exist explicitly “Subject to” the rights and uses described in Sections 107–122.

II. CIRCULATION AND THE FIRST SALE DOCTRINE

Section 106(3) of the Copyright Act grants the copyright owner the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by . . . lending.”⁷ However, the first sale doctrine, codified at Section 109(a) of the Copyright Act, terminates the copyright owner’s distribution right in a particular copy “lawfully made under this title” after the first sale of that

¹ See, e.g., *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979, 1986 (2016) (“[C]opyright law ultimately serves the purpose of enriching the general public through access to creative works”) (quoting *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994); *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 349 (1991) (“The primary objective of copyright is not to reward the labor of authors, but [t]o promote the Progress of Science and useful Arts”); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975) (“[P]rivate motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts”); *Fox Film Corp. v. Doyal*, 286 U. S. 123, 127 (1932) (“The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors”).

² U.S. CONST. art. I, § 8, cl. 8.

³ Lateef Mtima & Steven D. Jamar, *Intellectual Property Social Justice Theory: History, Development, and Description*, Introduction in *THE CAMBRIDGE HANDBOOK ON INTELLECTUAL PROPERTY AND SOCIAL JUSTICE* (Steven D. Jamar & Lateef Mtima eds., 2023).

⁴ *Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003) (characterizing fair use as a “built-in First Amendment accommodation” in copyright law); *Golan v. Holder*, 565 U.S. 302 (2012). The First Amendment protects the right to receive information as well as the right to speak. See *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853, 867 (1982) (the right to receive information is “an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution” and “a necessary predicate to the recipient’s meaningful exercise of his own rights of speech, press, and political freedom”).

⁵ In addition to being among the beneficiaries of fair use, libraries and educational institutions in particular have been granted special dispensations to ensure that copyright’s purpose is served when exclusive rights get in the way. Section 108 of the Copyright Act empowers libraries to make and distribute copies in a variety of situations – replacement copies for themselves or for other libraries, chapters, and articles for personal study, entire works for personal study, entire works for any purpose during the last 20 years of a work’s copyright term, and to users at other libraries through interlibrary loan. Most recently, as part of the Music Modernization Act, Congress empowered libraries to copy and distribute sound recordings first published prior to 1972 when they are no longer commercially available. See 17 U.S.C. § 1401 (f)(1)(B). That provision makes § 108(h) applicable to these sound recordings, so the additional conditions in § 108(h) will apply here, too.

⁶ The Copyright Act is Title 17 of the U.S. Code (U.S.C.). For ease of reading, in the text of this chapter we will refer to sections of the Copyright Act only by section number, not including the full citation; but we will include the full citation in the footnotes.

⁷ 17 U.S.C. § 106(3).

copy.⁸ The House Judiciary Committee Report on the 1976 Copyright Act explains that under Section 109(a), “[a] library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.”⁹ The first sale doctrine thus is critical to the operation of libraries: “Without this exemption, libraries would be unable to lend books, CDs, videos, or other materials to patrons.”¹⁰ In short, the first sale doctrine is essential to one of the most basic library functions: lending books and other materials to the public.

A. *Throughout American History, Libraries Have Promoted Democratic Values By Lending Books to the Public*

For almost 400 years, libraries in America have been lending books and other materials. In 1638, John Harvard bequeathed his collection of books to a newly established college in Cambridge, Massachusetts for the use of its faculty and students.¹¹ Benjamin Franklin in 1731 helped establish the Library Company of Philadelphia, which allowed its stockholders to borrow its books.¹² William Rind created a commercial circulating library in Annapolis in 1763, which rented books for a small fee.¹³ By the end of the eighteenth century, many towns throughout the new nation had academic libraries, membership libraries, circulating libraries, or church libraries.¹⁴

In 1800, Congress established the Library of Congress. President Thomas Jefferson appointed the first Librarian of Congress, and sold his private collection to the Library of Congress in 1815, after its collection burned during the British occupation of Washington, D.C., in the War of 1812.¹⁵ Thomas Jefferson also articulated a vision of libraries across the country providing broad public access to books. In a letter to John Wyche, Jefferson stated that: “I have often thought that nothing would do more extensive good at small expense than the establishment of a small circulating library in every county, to consist of a few well-chosen books, to be lent to the people of the county under regulations as would secure their safe return in due time.”¹⁶

During the first half of the nineteenth century, access to books increased. Apprentice libraries were established for the use of young men migrating to the cities to help them “train for the new factory system which had been brought about by the industrial revolution.”¹⁷ Mercantile libraries developed for the use of merchants and law clerks. School districts began to invest in

⁸ 17 U.S.C. § 109(a).

⁹ H.R. Rep. No. 94-1476, § 109, at 79 (1976), as reprinted in 1976 U.S.C.C.A.N. 5659, 5693.

¹⁰ CARRIE RUSSELL, COMPLETE COPYRIGHT: AN EVERYDAY GUIDE FOR LIBRARIANS 43 (2004). John R. Whitman, *Intellectual Property Empowerment and Protection for Prisoners*, ch. 12 in THE CAMBRIDGE HANDBOOK ON INTELLECTUAL PROPERTY AND SOCIAL JUSTICE (Steven D. Jamar & Lateef Mtima eds., 2023).

¹¹ MICHAEL HARRIS, HISTORY OF LIBRARIES IN THE WESTERN WORLD 173 (1999).

¹² *Id.* at 183–84. Benjamin Franklin explained his rationale for organizing a library: “by thus clubbing our Books to a common Library, we should, while we lik’d to keep them together, have each of us the Advantage of using the Books of all the other Members which would be nearly as beneficial as if each owned the whole.” BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN 130 (Leonard W. Labaree ed., 1964).

¹³ “In many ways more democratic than the subscription social libraries, the circulating libraries often allowed women to have books, featured reading rooms with long hours, and provided access to a variety of reading matter, including newspapers, popular pamphlets, and novels.” Dee Garrison, *Libraries*, in ENCYCLOPEDIA OF THE UNITED STATES IN THE NINETEENTH CENTURY (Paul Finkelman ed., 2001).

¹⁴ HARRIS, *supra* note 11, at 202–203.

¹⁵ *Id.* at 196–97. The Library of Congress circulates materials to Supreme Court Justices, Members of Congress, thousands of Congressional employees, and other libraries (which can make the materials available to users within the library premises). The Library of Congress – Interlibrary Loan, <http://www.loc.gov/fr/loan/loanweb1.html> (last visited Nov. 17, 2022).

¹⁶ *Letter from Thomas Jefferson to John Wyche* (May 19, 1809), in THOMAS JEFFERSON: A CHRONOLOGY OF HIS THOUGHTS 223 (Jerry Holmes ed., 2002).

¹⁷ JEAN KEY GATES, INTRODUCTION TO LIBRARIANSHIP 70 (1968).

libraries for their students. By 1853, New York State had created school district libraries throughout the state with over 1,604,210 volumes.¹⁸ Horace Mann urged Massachusetts to follow New York's lead because he "saw the library as an essential contributor to the educational program of the school, as an invaluable aid in continuing education and in self-improvement, and an indispensable part of the cultural life of the people."¹⁹

In 1848, the Massachusetts legislature authorized the City of Boston "to establish and maintain a public library, for the use of the inhabitants."²⁰ In the following decades, other public libraries were established, but the public library movement accelerated dramatically after 1881 through the philanthropy of steel magnate Andrew Carnegie. Carnegie said that "[t]here is not such a cradle of democracy upon the earth as the Free Public Library, this republic of letters, where neither rank, office, nor wealth receives the slightest consideration."²¹ Carnegie ultimately funded the construction of 1,679 public library buildings in 1,412 communities across the United States.²²

In the twentieth century, the federal government expanded its support of libraries far beyond the Library of Congress. During the Great Depression, the Works Progress Administration built 350 new libraries and repaired many existing ones.²³ In 1941, President Franklin Roosevelt issued a proclamation identifying libraries as "essential to the functioning of a democratic society" and "the great tools of scholarship, the great repositories of culture, the great symbols of the freedom of the mind."²⁴ Congress enacted the Library Services Act of 1956 and the Library Services and Construction Act of 1964 to provide federal funding for library construction. Currently, the Institute of Museum and Library Services, an independent federal agency, administers the Museum and Library Services Act of 1996 and its 2003 reauthorization to channel millions of dollars of federal funding annually to libraries throughout the United States.²⁵

B. Americans Borrow Books and Other Materials From Libraries 4.4 Billion Times a Year

Notwithstanding the spread of digital technology, millions of Americans check out books and other materials from libraries. The collections of the over 9,000 public libraries in the country

¹⁸ *Id.* at 79.

¹⁹ *Id.* at 80. Indeed, the role that libraries can play in promoting self-actualization can extend to all members of society, as John Whitman explores elsewhere in this volume as means by which to uncover the expressive potential within the incarcerated population. See Whitman, *supra* note 10.

²⁰ Boston Public Library – Founding Legislation, <http://www.bpl.org/bpl-history/> (last visited Nov. 21, 2022).

²¹ Adam Arensen, *Libraries in Public Before the Age of Public Libraries: Interpreting the Furnishings and Design of Athenaeums and Other "Social Libraries," 1800–1860*, in *THE LIBRARY AS PLACE: HISTORY, COMMUNITY, AND CULTURE* 74 (John Buschman & Gloria J. Leck eds., 2007) ("When mention is made of the dependence of a democratic society on an informed citizenry, the American public library usually comes to mind as the instrument which has had as its fundamental purpose the serving of this crucial need"); Gates, *supra* note 17, at 91. See also United States Office of Education, *Public Libraries in the United States of America* iii (1876) ("[O]ur libraries will fulfill in every respect their high station as indispensable aids to public education, to the privilege and responsibility of instructing our American democracy").

²² HARRIS, *supra* note 11, at 246–47.

²³ Byron Anderson, *Public Libraries*, in *ST. JAMES ENCYCLOPEDIA OF POPULAR CULTURE* 133 (Tom Pendegast & Sara Pendegast eds., 2000).

²⁴ PATTI CLAYTON BECKER, *BOOKS AND LIBRARIES IN AMERICAN SOCIETY DURING WORLD WAR II: WEAPONS IN THE WAR OF IDEAS* 49 (2005).

²⁵ Institute of Museum and Library Services, <http://www.imls.gov/about/mission/legislation-budget> (last visited Nov. 21, 2022).

contain 1.44 billion materials, of which 27 percent are ebooks.²⁶ For these materials, there were a total of 2.23 billion circulation transactions in 2016.²⁷

The collections of 81,920 public school media centers contain 1.03 billion books and 38 million phonorecords and audiovisual materials.²⁸ These materials were checked out 2.05 billion times during the 2007–2008 school year.²⁹

The collections of 3,793 academic libraries include 1.09 billion copies of printed materials, as well as 122 million phonorecords and audiovisual materials and 252 million ebooks.³⁰ There were a total of 154 million circulation transactions for these materials in 2012.³¹ All this library lending is enabled by the first sale doctrine.

C. The First Sale Doctrine Enables Library Lending

Justice Breyer, writing for the U.S. Supreme Court in *Kirtsaeng v. John Wiley & Sons, Inc.*,³² stated that the first sale doctrine “is a common-law doctrine with an impeccable historic pedigree.” He quoted a 17th century articulation of “the common law’s refusal to permit restraints on the alienation of chattels,”³³ and observed that “a law that permits a copyright holder to control the resale or other disposition of a chattel once sold is similarly ‘against Trade and Traff[c], and bargaining and contracting.’”³⁴ Justice Breyer underscored “the importance of leaving buyers of goods free to compete with each other when reselling or otherwise disposing of these goods.”³⁵ Competition, “including the freedom to resell, can work to the advantage of the consumer.”³⁶

Based on these common law principles, the Supreme Court articulated the first sale doctrine in 1908 in *Bobbs-Merrill Co. v. Strauss*.³⁷ The Court held that a copyright owner’s exclusive distribution right is exhausted after the owner’s first sale of a particular copy.³⁸ Congress codified the first sale doctrine in the Copyright Act of 1909. Congress recodified it in the Copyright Act of 1976.

The first sale doctrine operates at every level of the U.S. economy. It allows wholesalers to sell products covered by copyright, including products distributed in copyrighted packaging, to retailers without first securing distribution licenses from the manufacturers. The first sale doctrine likewise permits retailers to sell products to consumers without obtaining distribution

²⁶ Institute of Museum and Library Services, *Public Libraries Survey Fiscal Year 2016* 13 (2019). In 2007, e-books represented just 1.44 percent of collection materials.

²⁷ *Id.* In 2016, there were a total of 1.35 billion visits to public libraries, an average of 4.36 visits per person. *Id.* at 18. There were 245.7 million reference transactions. *Id.* Public libraries offered 2.85 million programs for children and 500,000 programs for young adults. *Id.* at 22.

²⁸ National Center for Educational Statistics, U.S. Department of Education, *Characteristics of Public and Bureau of Indian Education Elementary and Secondary School Library Media Centers in the United States: Results From the 2011–12 Schools and Staffing Survey* 14 (2013).

²⁹ National Center for Educational Statistics, U.S. Department of Education, *Characteristics of Public and Bureau of Indian Education Elementary and Secondary School Library Media Centers in the United States: Results From the 2007–08 Schools and Staffing Survey* 9 (2009).

³⁰ National Center for Education Statistics, U.S. Department of Education, *Academic Libraries: 2012 First Look* 8 (2014).

³¹ *Id.* at 4.

³² 133 S. Ct. 1351, 1363 (2013).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 210 U.S. 339, 350–51 (1908).

³⁸ The Court noted that its decision applied solely to the rights of a copyright owner that distributed its work without a license agreement. *Cf. Venor v. Autodesk*, 621 F. 3d 1102 (9th Cir 2010) (holding that the first sale doctrine does not apply to copyrighted software distributed pursuant to license agreements as opposed to sales transactions).

licenses. Finally, the first sale doctrine permits consumers to rent or lend the products to other consumers, or to sell or give the products away when they no longer need them.

In *Kirtsaeng*, the Court in particular recognized the importance of the first sale doctrine to libraries. The case concerned the narrow issue of whether the first sale doctrine applied to copies of works manufactured outside of the United States. The Court specifically noted that U.S. library collections contain at least 200 million books published abroad. The Court observed that unless the first sale doctrine applied to these foreign made books, libraries could not lend these books without obtaining the copyright owners' permission – an impossible task. This holding underscored the importance of the first sale doctrine to all library lending: without it, a library would infringe the copyright owner's exclusive right of distribution every time it circulated any item in its collection not yet in the public domain.

D. Library Lending During the Pandemic

When the COVID-19 pandemic made circulation of physical books impossible, libraries could no longer rely on the first sale doctrine to make most of their collections available. The first sale doctrine applies to the circulation of physical copies of books and other materials. It does not apply to electronic lending, which involves the making of a copy in the user's computer. The first sale doctrine is an exception to the distribution right, not the reproduction right. Thus, when a public library lends an ebook, it typically does so under a license from the publisher.

However, fair use may permit lending of an ebook in certain circumstances. Many libraries believe that fair use allows controlled digital lending (CDL) where a library uses technical controls to circulate works digitally only to as many simultaneous readers as there are physical copies of a specific title in its collection (a limitation sometimes called the "owned-to-loaned ratio"). The physical copies are taken out of circulation while the digital versions are available, and technical controls prevent users from redistributing or copying the digital version.³⁹ During the pandemic, academic libraries have relied on various forms of CDL to provide access to works in their collections, even though the libraries have been physically closed. This enabled students and faculty to continue essential research and educational activities.

Additionally, the Internet Archive established the National Emergency Library (NEL), under which it suspended the "owned to loaned" ratio of its Open Library CDL program, permitting unlimited simultaneous readers to access electronic books in its collection (with some other limitations, including that works published in the last five years were excluded from the NEL). The Internet Archive reasoned that lifting this limitation was appropriate because almost all the libraries in the country were closed, preventing free public access to millions of physical books in library collections. A group of publishers sued the Internet Archive for operating the NEL as well as its more limited Open Library. In March 2023, the district court found the Internet Archive's Open Library, as well as the NEL, competed directly with the commercial eBook licensing market for libraries. Because of this direct competition, the Internet Archive's use was, according to the court, not "transformative" within the meaning of the first fair use factor, and harmed the market for the work, contrary to the fourth fair use factor.⁴⁰ The Internet Archive announced that it would appeal this decision. The programs referenced above that were initiated by academic libraries during the pandemic are distinguishable because they did not compete directly with the commercial eBook licensing market for libraries.

³⁹ See Position Statement on Controlled Digital Lending, controlleddigitallending.org/statement (last visited Nov. 21, 2022).

III. INTERNET SERVICES AND THE DMCA SAFE HARBORS

Libraries provide to their users a variety of Internet-related services that promote intellectual property social justice (IP-SJ). As a practical matter, libraries can provide these services only because the safe harbors of the Digital Millennium Copyright Act (DMCA) limit libraries' liability for their users' online activities. The "mere conduit" safe harbor in Section 512(a) has enabled libraries to provide Internet access to its users; the Section 512(c) "hosting" safe harbor has permitted research libraries to serve as institutional repositories for open access materials; and the Section 512(d) "linking" safe harbor has allowed libraries to provide information location services to users.⁴⁰

A. Internet Access

Not only large commercial entities such as Verizon and AT&T act as "service providers" within the meaning of Section 512(k)(1)(A). Libraries play this role as well. In the United States, there are virtually no Internet cafés that provide users with the hardware necessary for Internet access. While Starbucks has Wi-Fi, it does not supply laptops. And although increasingly more Americans at all income levels own smart phones, it is difficult (if not impossible) to fill out an online job application, or apply for healthcare, on a smart phone. Libraries are the only source for free Internet connectivity and Internet-ready computer terminals for most Americans.

The importance of the Internet to daily life, and lack of reliable access to the Internet from the homes of millions of predominantly lower income Americans, was starkly displayed during the COVID-19 pandemic. In particular, tens of millions of children could not participate in online classes because their homes did not have broadband or the household did not have a sufficient number of computers for all the children seeking access to online classes.

As many as 77 percent of Americans without Internet access in their homes rely on public libraries for Internet access.⁴¹ Public libraries provide the public with access to over 294,000 Internet-ready computer terminals.⁴² In 2016, there were 276 million user-sessions on these computers. There were 227 computer uses per 1,000 visits to public libraries.⁴³

A Pew Research Center survey revealed that 23 percent of Americans aged 16 and up went to libraries to use computers, the Internet, or a WiFi network.⁴⁴ Approximately 7 percent of Americans used libraries' WiFi signals outside when the libraries were closed.⁴⁵ (During the COVID-19 pandemic, even though many public libraries were closed, the libraries left their WiFi networks on, enabling users without home connectivity to access the Internet from outside the library structure. Indeed, some libraries boosted their WiFi networks to enhance this

⁴⁰ 17 U.S.C. § 512. In 1998, Congress adopted safe harbors from copyright liability for providers of Internet services. The objectives were to provide legal certainty for services providers; and to provide incentives for services providers to cooperate with rights holders to address infringement. The statute is very complex and has been the subject of extensive litigation. In brief, Internet access providers such as Comcast are not held liable for the infringing activities of their subscribers so long as they adopt and implement policies for terminating the accounts of repeat infringers. Providers of services where users could post content, such as YouTube, are not held liable for infringing content posted by users so long as they expeditiously remove content upon receiving a notice of claimed infringement from the rights holder. For a more detailed discussion, see U.S. Copyright Office, Section 512 of Title 17 (2020).

⁴¹ Pew Research Center, "Public Libraries and Technology: From 'Houses of Knowledge' to 'Houses of Access,'" (2014), <https://www.pewresearch.org/internet/2014/07/09/public-libraries-and-technology-from-houses-of-knowledge-to-houses-of-access/> (last visited Nov. 21, 2022).

⁴² Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2016* 29 (2019).

⁴³ *Id.*

⁴⁴ Pew Research Center, *Library Usage and Engagement* (2019), <https://www.pewresearch.org/internet/2016/09/09/library-usage-and-engagement/> (last visited Nov. 21, 2022).

⁴⁵ *Id.*

outside-the-premises access.) Library users who take advantage of libraries' computers and Internet connections are more likely to be young, Black, female, and lower income.⁴⁶ Around 42 percent of Black library users used libraries' computers and Internet connections, as did 35 percent of those whose annual household incomes were \$30,000 or less.⁴⁷

According to the Pew Research Center survey, 61 percent of library computer users who used the Internet at a library in the past 12 months did research for school or work; 53 percent checked email; 38 percent received health information; 26 percent took online classes or completed an online certification.⁴⁸

Libraries' broadband connections are particularly important in rural areas; 58 percent of rural adults believe that access to high speed Internet is a problem in their community.⁴⁹ Accordingly, public libraries in rural areas have the highest ratio of Internet accessible computers: 23 computers per 5,000 people.⁵⁰

Libraries in K-12 schools and institutions of higher learning provide Internet access for students and faculty. Additionally, at many institutions of higher education, the library operates the campus-wide network.⁵¹ Academic and school libraries also provide Internet access for students who do not have such access at home. During the COVID-19 pandemic, some community colleges that were otherwise closed still allowed students without broadband to use Internet-connected computer terminals in the college libraries.⁵²

A study performed by the Information School of the University of Washington for the Institute of Museum and Library Services demonstrated the importance of the Internet access provided by public libraries to people near or below the poverty line. The study found that, in 2009, over 77 million people accessed the Internet from public libraries in the United States.⁵³ Forty-four percent of people below the poverty line used library computers for Internet access and other services. Among young adults below the poverty line, the level of usage increased to 61 percent.⁵⁴

A 2012 study on the economic benefit of Texas public libraries found that Internet access via library computer terminals saved users over \$300 million in 2011.⁵⁵ The Wi-Fi provided by the Texas libraries saved users over another \$20 million. Approximately 62 percent of the Texas library directors said that the Internet access was "extremely beneficial" to users, while a further 20 percent indicated that it was "quite beneficial"; in addition, 56 percent of the directors said that Internet access was the single most important resource provided by their libraries. The users' online activities included: performing homework for classes from grade school to college; taking continuing education courses; training and testing for job certifications and licenses; looking,

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Pew Research Center, *Digital Gap Between Rural and Nonrural America Persists* (2019), <https://www.pewresearch.org/fact-tank/2019/05/31/digital-gap-between-rural-and-nonrural-america-persists/> (last visited Nov. 21, 2022).

⁵⁰ Institute of Museum and Library Services, *Public Libraries in the United States Survey, Fiscal Year 2016* 29 (2019).

⁵¹ At many colleges and universities, the libraries participate in the administration of campus-wide Internet access services. Under the Higher Education Opportunity Act, educational institutions have significantly more obligations to address copyright infringement by subscribers than do commercial Internet service providers. See <http://www.educause.edu/library/higher-education-opportunity-act-heoa> (last visited Nov. 21, 2022).

⁵² Lauren Lumpkin, *A Community for Students' Needs*, WASH. POST, Apr. 2, 2020, at B1.

⁵³ Samantha Becker, *Opportunity for All: How the American Public Benefits from Internet Access at U.S. Libraries* 2 (2010), <http://www.ils.gov/publications/opportunity-all-how-american-public-benefits-internet-access-us-libraries> (last visited Nov. 21, 2022).

⁵⁴ *Id.* at 5-8.

⁵⁵ Bureau of Business Research, IC2 Institute, University of Texas at Austin, *Texas Public Libraries: Economic Benefits and Return on Investment*, 2012, at 39-42.

and applying for, jobs; applying for unemployment benefits and social assistance; applying for disaster aid, as well as finding family during and after natural disasters; working short-term, paid online jobs; developing and operating businesses by placing and receiving orders; researching price comparisons; marketing new products; using online banking; and filing taxes. Numerous library directors indicated that some users were running small businesses entirely via the Internet at their library.

The Texas directors noted that even users with home Internet access use the library Internet access because of its greater bandwidth and faster service. Additionally, not all users have the option of Internet access at their residence. “Ranchers and others in rural area in particular have difficulty obtaining reliable and reasonably priced Internet at their residences.” Further, numerous directors reported that users with laptops accessed their libraries’ wireless service after normal hours; they cited examples of users parking near the library when the library was closed to access an Internet connection.

Lack of connectivity is more than a rural issue. A study of the public libraries in New York City found that 2.9 million residents don’t have broadband access at home.⁵⁶ Thus, between 2002 and 2011, the libraries have increased their total number of public access computers by 89 percent. Between 2007 and 2011, the number of computer sessions logged at public computers in the city’s libraries grew by 62 percent, from 5.8 million sessions in 2007 to over 9.3 million sessions in 2011.

The Section 512(a) safe harbor for “mere conduits” has enabled libraries to provide Internet access without the specter of liability for onerous copyright damages because of infringing user activity.⁵⁷

B. Institutional Repositories

With the growth of open access scholarly communications, libraries increasingly host online institutional repositories where academic authors can post papers, articles, and theses, and make these materials available online.⁵⁸ These repositories promote IP-SJ by making a wealth of information freely available to all, particularly those groups and communities which historically have had little access to elite scholarly and pedagogical resources. Most articles posted in repositories would otherwise be available only to those with affiliations to big universities who can afford expensive subscriptions to academic journals. The Section 512(c) safe harbor shelters libraries from liability for infringing material that may be contained in the materials posted by third parties. Elsevier, for example, has sent thousands of takedown notices to websites hosted by Harvard University, University of California Irvine and academia.edu, a social networking site for academics. The articles targeted by these Elsevier notices typically have been posted by their authors, who may have transferred their copyright to Elsevier in the publication agreements. The publication agreements often allow authors to post their final, peer-reviewed manuscript of the articles, but not the final published version, i.e., as formatted by the publisher. Elsevier asserts that it pursued only “final version of published journal articles” posted without their

⁵⁶ Center for the Urban Future, *Branches of Opportunity*, 2013, at 6.

⁵⁷ At many colleges and universities, the libraries participate in the administration of campus-wide Internet access services. Under the Higher Education Opportunity Act, educational institutions have significantly more obligations to address copyright infringement by subscribers than do commercial Internet service providers. See <http://www.educause.edu/library/higher-education-opportunity-act-heoa> (last visited Nov. 21, 2022).

⁵⁸ See Brianna Schofield & Jennifer Urban, *Takedown and Today’s Academic Digital Library*, I/S: A JOURNAL OF LAW AND POLICY FOR THE INFORMATION SOCIETY, Nov. 2015, <https://lawcat.berkeley.edu/record/1127554> (last visited Nov. 21, 2022).

authorization. The Section 512(c) safe harbor provided a mechanism for libraries to avoid getting caught in the middle of a dispute between the authors and their publisher.

C. Information Location Tools

Libraries also rely on the Section 512(d) safe harbor for information location tools. Librarians prepare directories that provide users with hyperlinks to websites the librarians conclude in their professional judgment to contain useful information. Section 512(d) shelters a library from liability if the website linked to, unbeknownst to the library, contains infringing material.

IV. PRESERVATION OF CULTURAL HERITAGE, SECTION 108, AND FAIR USE

Preservation of cultural heritage has long been a critical function of libraries. This function is especially important with respect to the preservation of the cultural production of communities outside the mainstream of society.

U.S. libraries and archives contain large collections of such materials. These collections – as all library and archival collections – are under constant threat from fire, flooding, deterioration, and obsolescence. In the pre-digital era, libraries relied on specific exceptions in the Copyright Act to make preservation copies.⁵⁹

Digital technology now provides unprecedented opportunities to preserve our cultural heritage. Digital technology enables the making of higher quality copies at lower cost than ever before. These copies can be stored in searchable databases that allow users to locate works far more effectively and efficiently. Searchable databases also enable users to detect patterns across a large number of works, opening new fields of research. These databases of preserved works consume far less space than the original copies. Additionally, backup repositories and databases can be created and stored in separate locations to ensure their survival.

For these reasons, libraries and archives throughout the United States have embarked on mass digitization projects to preserve their collections.⁶⁰ Fully 96 percent of large or medium-sized libraries are digitizing parts of their collections, and 78 percent are preserving some of their born-digital materials.⁶¹ Similarly, 87 percent of archives are digitizing their collections.⁶²

The specific preservation exceptions in 17 U.S.C. § 108 are of limited utility for digital preservation, however, because they allow only the making of three copies of a work, while digital preservation invariably involves far more intermediate and backup copies. As a result of the limitations of Section 108, libraries and archives must principally rely on the fair use right to engage in digital preservation of works still in copyright. The fair use jurisprudence over the past decade gives collecting institutions a high degree of confidence that digital preservation of their collections is a fair use.

The Second Circuit in *Authors Guild, Inc. v. HathiTrust*⁶³ ruled that fair use permitted a consortium of libraries to create and maintain a database of electronic copies of over 10 million

⁵⁹ 17 U.S.C. § 108(b) for unpublished works and 17 U.S.C. § 108(c) for published works.

⁶⁰ U.S. Inst. of Museum and Library Serv., *Protecting America's Collections: Results from the Heritage Health Information Survey* 38 (2019).

⁶¹ *Id.* at 51.

⁶² *Id.* at 49.

⁶³ 755 F.3d 87 (2d Cir. 2014).

books.⁶⁴ In finding that HathiTrust's provision of full-text search functionality was a fair use, the court relied heavily on the Court's decision in *Campbell v. Acuff-Rose Music, Inc.*,⁶⁵ particularly *Campbell*'s focus on the importance of transformative use under the first fair use factor, the purpose and character of the use. The *HathiTrust* court concluded that "creation of a full-text searchable database is a quintessentially transformative use," because it "does not 'supersede the objects or purposes of the original creation.'"⁶⁶ The *HathiTrust* court also relied on two Ninth Circuit decisions concerning Internet search engines – *Kelly v. Arriba Soft Corp.*,⁶⁷ and *Perfect 10, Inc., v. Amazon.com, Inc.*⁶⁸ – as well as a Fourth Circuit decision involving a plagiarism detection database – *A.V. ex rel. Vanderheye v. iParadigms, LLC*.⁶⁹ A year after *HathiTrust*, another Second Circuit panel reaffirmed *HathiTrust*'s holdings in *Authors Guild v. Google, Inc.*⁷⁰

The *HathiTrust* court did not explicitly rule that digital preservation per se was a fair use. However, it observed that: "[b]y storing digital copies of the books, the HDL preserves them for generations to come, and ensures that they will still exist when their copyright terms lapse."⁷¹ Moreover, any library or archives that engaged in a mass digitization project for preservation purposes would invariably provide search functionality, which *HathiTrust* (and *Google, Arriba Soft, Perfect 10*, and *iParadigms*) explicitly found legitimated the creation and maintenance of full-text and full image databases.

This cluster of circuit court decisions provides libraries and archives with a high degree of confidence that courts would find their digital preservation activities to be fair uses.⁷² Additionally, in the triennial Section 1201 Rulemaking, the Register of Copyrights found that

⁶⁴ For a discussion of *HathiTrust* in the context of identifying social justice bases for exceptions and limitations and for nontransformative first fair use factor assessment, see Lateef Mtima, "Three Steps" Towards Intellectual Property Social Justice, 53 Hous. L. Rev. 459 (2015).

⁶⁵ 510 U.S. 569 (1994).

⁶⁶ 755 F.3d at 97 quoting *Campbell*, 510 U.S. 569 (1994) at 579.

⁶⁷ 336 F.3d 811 (9th Cir. 2003).

⁶⁸ 508 F.3d 1146 (9th Cir. 2007).

⁶⁹ 562 F.3d 630 (4th Cir. 2009).

⁷⁰ 804 F.3d 202 (2d Cir. 2015).

⁷¹ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d (2d Cir. 2014) at 103.

⁷² Unfortunately, there is less clarity concerning the access collecting institutions may provide to the digitally preserved copies. To the extent the preserved materials were not originally intended for use in research or teaching, there may be a strong argument that providing access for such purposes is highly transformative and thus fair. See, e.g., *Swatch Grp. Mgmt. Servs. v. Bloomberg L.P.*, 756 F.3d 73 (2d Cir. 2014) (finding financial news publisher that reproduced and distributed full audio recording of earnings call was fair use because news reporting was transformative purpose relative to original purpose of earnings call); *White v. West Publ'g Corp.*, 29 F. Supp. 3d 396 (S.D.N.Y. 2014) (finding Lexis and West engaged in fair use in providing full text access to legal briefs in their research tools because research is a new purpose relative to the briefs' original purpose of persuading courts, and "processes of reviewing, selecting, converting, coding, linking, and identifying the documents 'add . . . something new, with a further purpose or different character' than the original briefs"); *Am. Inst. of Physics v. Schwengman Lundberg & Woessner, P.A.*, No. 12-528 (RHK/JJK), 2013 U.S. Dist. LEXIS 124578 (D. Minn. July 30, 2013) (finding law firm use of full text of scholarly articles in patent prosecution was transformative and thus fair use). Courts may also find the fourth fair use factor strongly favors libraries in cases where works are not commercially available, or are only available in second-hand markets or at very high prices. See, e.g., *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1277 (11th Cir. 2014) ("absent evidence to the contrary, if a copyright holder has not made a license available to use a particular work in a particular manner, the inference is that the author or publisher did not think that there would be enough such use to bother making a license available . . . [so] there is little damage to the publisher's market . . . and hence the fourth factor should generally weigh in favor of fair use"); *De Fontbrune v. Wofsy*, 409 F. Supp. 3d 823 (N.D. Cal. 2019) (holding that fourth factor favors fair use in light of "disparate markets and wildly different price points" for multi-volume book series containing photographs of paintings by Pablo Picasso). More generally, "orphan works" (whose owners are unknown or unlocatable) are susceptible to a variety of fair use arguments, especially in the hands of libraries and archives. See generally, Patricia Aufderheide et al., *Statement of Best Practices in Fair Use of Collections Containing Orphan Works*

the digital preservation activities of libraries, archives, and museums relating to software, video games, and motion pictures did not infringe copyright.⁷³ On this basis, the Register recommended that the Librarian of Congress grant exemptions to the prohibition of circumvention of technological protection measures for the purpose of preservation.⁷⁴ Agreeing with these recommendations, the Librarian granted the exemptions.⁷⁵

V. ACCESSIBLE FORMAT COPIES, FAIR USE, AND THE CHAFEE AMENDMENT

In many cases, the format in which information is stored creates differential barriers to access, creating information haves and have-nots. A book available only in a print format is inaccessible to readers with a print disability, for example. Readers with impaired motor function may not be able to turn physical pages in a printed book. Readers with limited eye mobility or difficulty focusing may not be able to visually scan a page, whether paper or electronic. Viewers with impaired hearing may not be able to perceive the dialog in an audiovisual work such as a feature film or an instructional video. These barriers can have dramatic effects on a person's quality of life, reducing their opportunities to participate in culture, to enjoy deep aesthetic experiences, to learn new skills, to obtain educational or professional credentials, and generally to live a full, well-rounded life and otherwise contribute to civil society. In a just society, a person's life prospects should not be shaped by arbitrary mental or physical differences.

Accordingly, a central aspect of libraries' social justice mission is ensuring equitable access to information for all members of society, regardless of their ability to pay, and regardless of their physical or mental characteristics. Because format can be a barrier to access, breaking down barriers often requires converting information to new formats. In many cases, this requires libraries to take steps that would normally be forbidden by copyright: to reproduce, adapt, distribute, display, and even perform protected works without the permission of the copyright holder. Without appropriate safety valves, copyright's monopoly would be a barrier to accessibility, and thus a barrier to social justice. It would give copyright holders a license to discriminate, however unintentionally, by giving them the exclusive right to decide the formats in which their works will be made available.

Fortunately, as we have already seen, copyright does have safety valves to ensure the limited monopoly it creates does not undermine its ultimate constitutional purpose, "to promote the Progress of Science" and culture. Copyright law includes two key statutory provisions, fair use and Section 121, that protect this activity domestically.⁷⁶ The Copyright Office's triennial anti-

for Libraries, Archives, and other Memory Institutions (2014), <https://cmsimpact.org/code/statement-best-practices-fair-use-collections-containing-orphan-works-libraries-archives-memory-institutions/> (last visited Nov. 21, 2022); Jennifer M. Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERKELEY TECH. L. J. 1379 (2012), <https://lawcat.berkeley.edu/record/1125074?ln=en>. In addition to fair use, 17 U.S.C. § 108(e) permits copying out-of-commerce works for patrons upon request. Furthermore, it should be noted that in the triennial Section 1201 Rulemaking, the Register of Copyrights found that providing off-premises access to preserved software likely was a fair use. U.S. Copyright Office, *Section 1201 Rulemaking: Eighth Triennial Proceeding Recommendation of the Register of Copyrights* 268–76 (2021).

⁷³ The Section 1201 Rulemaking is discussed in greater detail below in section V.C.

⁷⁴ U.S. Copyright Office, *Section 1201 Rulemaking: Seventh Triennial Proceeding Recommendation of the Acting Register of Copyrights* 240–45, 270–71 (2018); U.S. Copyright Office, *Section 1201 Rulemaking: Eighth Triennial Proceeding Recommendation of the Register of Copyrights* 88–94 (2021).

⁷⁵ 37 CFR § 201.40(b)(3), (17), and (18).

⁷⁶ The Copyright Act includes another limitation favoring libraries serving disabled persons: 17 U.S.C. § 110(8) permits "performance of a non-dramatic literary work, by or in the course of a transmission specifically designed for and primarily directed to" patrons who are unable to "read normal printed material" or "hear aural signals" as a result of

circumvention rulemaking has also consistently recognized and vindicated accessibility as an important value, and has declared repeatedly that fair use protects the creation and distribution of accessible texts.⁷⁷ The Marrakesh Treaty provides another clear pathway for cross-border sharing of accessible texts. By means of these provisions, copyright law ensures that proprietary interests yield to accessibility when the two come into apparent conflict.

A. Fair Use

The broadest protection for making and sharing accessible texts comes from fair use, codified at Section 107 of the Copyright Act. As libraries apply the flexible, equitable test for fair use, they can look to legislative history, best practices, and (most importantly) to the *Authors Guild v. HathiTrust* opinion, the first and only judicial application of fair use to a library's efforts to provide accessible formats to persons with disabilities.

The House Report on the 1976 Copyright Act describes several activities Congress believed were likely to be fair under the newly codified doctrine, and courts have relied on these examples for guidance in relevant circumstances. One such illustration is “the making of copies or phonorecords of works in the special forms needed for the use of blind persons.”⁷⁸ The House Report goes on to give as examples of these “special forms” both Braille and recordings of books being read aloud. It notes that works in these formats “are not usually made by the publishers for commercial distribution,” and endorses both the efforts of the Library of Congress and the work of “individual volunteers” in local libraries who make accessible copies in response to patron requests. This congressional intent was endorsed by the Supreme Court in the *Sony Betamax* case,⁷⁹ and later weighed as part of the first factor inquiry in *HathiTrust*. It also factored into the development of best practices for academic and research libraries.

Fair use best practices statements, developed through a rigorous process of interviews and small group discussions followed by independent legal review, have enabled a wide array of communities to better understand and exercise their fair use rights.⁸⁰ *The Code of Best Practices in Fair Use for Academic and Research Libraries*⁸¹ (ARL Code) expresses the consensus of academic and research librarians on the application of fair use to a set of situations they frequently encounter. Principle Five of the ARL Code states that providing accessible material is likely to be fair, particularly when tailored to the specific needs of the patron.⁸² The ARL Code also provides that the fair use case is strongest when efforts are coordinated with the university’s disability services office, when the library informs users of their rights and responsibilities, and when it adopts policies that are widely and consistently applied.

their disability. These transmissions must be “made without any purpose of direct or indirect commercial advantage” and made available through the facilities of a government body, a noncommercial educational broadcast station, or a narrowly defined set of broadcasters. This permits qualifying libraries to stream content directly to patrons with disabilities in these limited situations.

⁷⁷ See, e.g., U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Register’s Recommendation 134* (2015) (“making e-books accessible to persons who are blind, visually impaired or print disabled is a noninfringing use”).

⁷⁸ H.R. Rep. No. 1476, 94th Cong., 2nd Sess. 66, 73 (1976) (“House Report”).

⁷⁹ *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1985) (“Making a copy of a copyrighted work for the convenience of a blind person is expressly identified by the House Committee Report as an example of fair use”).

⁸⁰ PETER JASZI AND PATRICIA AUFDERHEIDE, *RECLAIMING FAIR USE* (2d ed. 2018).

⁸¹ Association of Research Libraries et al., *Code of Best Practices in Fair Use for Academic and Research Libraries*, Washington, D.C.: ARL, Jan. 2012, <https://www.arl.org/wp-content/uploads/2014/01/code-of-best-practices-fair-use.pdf>.

⁸² *Id.* at 22.

No cases involving copyright and accessibility were decided prior to or for almost four decades following the passage of the 1976 Copyright Act. The appellate courts' first encounter with the issue was in *Authors Guild v. HathiTrust*, part of the litigation in response to the Google Books project.⁸³ No court has ruled on the application of fair use to accessible texts since the Second Circuit's 2014 opinion in *HathiTrust*, which is destined to be highly influential.⁸⁴ The case dealt with digital preservation and non consumptive research as well as accessibility, and its other holdings are described elsewhere in this chapter. This section will focus on the court's treatment of accessibility.

The Authors Guild alleged that HathiTrust and the University of Michigan were infringing copyrights by providing accessible texts to qualified print-disabled patrons. The Second Circuit held to the contrary, applying the four-factor fair use test. The first factor, the nature and purpose of the use, easily favors libraries, for several reasons. As previously discussed, the legislative history shows an unequivocal intent that fair use permit libraries to make accessible copies for the print-disabled. The opinion also cites the Supreme Court's endorsement of this principle in *Sony*. The court also quotes with approval the House Report's allusion to the lack of a functioning market to provide accessible format copies to the print disabled, an issue that resurfaces in consideration of the fourth factor. Finally, the court rounds out its consideration of the first factor by highlighting the importance of accessibility as a social "purpose." It notes that since the passage of the 1976 Copyright Act, Congress has "reaffirmed its commitment to ameliorating the hardships faced by the blind and the print-disabled."⁸⁵ As evidence, the court cites the Americans with Disabilities Act and the Chafee Amendment. Taken together, these considerations tilt the first factor decisively in favor of HathiTrust.

The court gives the second factor (the nature of the work used) the swift, dismissive treatment that has become standard in fair use cases. Because HathiTrust includes all kinds of works (fiction and nonfiction, scholarly and popular, etc.), that factor technically disfavors fair use, but the court is quick to note that it is "rarely determinative."⁸⁶ Indeed, scholars have found the second factor is never determinative, and rarely influential at all.⁸⁷

The third factor (the "amount and substantiality" of the use) is assessed entirely in light of the first: the court asks whether the nature and quantity of copying is appropriate to the purpose of providing access to the print-disabled, which it has already found to be a valid one.

The only dispute appears to be over which files and how many copies of a given work HathiTrust can retain as part of its efforts to serve the print-disabled. In finding the HathiTrust Digital Library can retain page images as well as extracted text, the court reasons that doing so is reasonable because "gaining access to the HDL's image files – in addition to the text-only files – is necessary [for some print-disabled users] to perceive the books fully."⁸⁸ Keeping four copies in disparate locations is justified by the need to "balance server load" and to "guard against risk of

⁸³ See section IV above for more on the HathiTrust litigation.

⁸⁴ Even organizations that filed briefs against HathiTrust during the litigation seem to have made their peace with the opinion, subsequently praising the court's "carefully-limited reasoning and interest balancing." Jonathan Band, AAP Praised Wisdom of HathiTrust and Google Books Decisions, Project DisCo (May 18, 2017), <http://www.project-disco.org/intellectual-property/051817-aap-praises-wisdom-of-hathitrust-and-google-books-decisions/> (last visited Nov. 21, 2022).

⁸⁵ HathiTrust, 755 F.3d 87, 101–102 (2d Cir. 2014).

⁸⁶ *Id.*

⁸⁷ Robert Kasunic, *Is That All There Is: Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM J. L. ARTS 529–70 (2007).

⁸⁸ 755 F.3d 87, 103 (2d Cir. 2014).

data loss,”⁸⁹ reasonable technological steps in achieving HathiTrust’s valid overarching purposes.

Finally, the court turns to the fourth factor, the effect of the use on the market for the works used. Here the court notes that the commercial market in books for the print-disabled is extremely limited, “a mere few hundred thousand titles, a minute percentage of the world’s books,” especially when compared to the “more than 10 million volumes” in the HathiTrust Digital Library. The court also cites the common practice of authors forgoing royalties on accessible formats, then returns to the 1976 House Report, which invoked market failure in its own finding that fair use should protect the provision of accessible copies to the print-disabled.

The court’s conclusion is clear, broad, and unconditional: “we conclude that the doctrine of fair use allows [HathiTrust] to provide full digital access to copyrighted works to their print-disabled patrons.” The breadth of this conclusion, together with the clarity of the foregoing analysis, establishes fair use as a powerful source of authority for libraries to create and use digital collections to provide accessible materials not only to people with print disabilities, but people with other disabilities as well.

B. Section 121 (the Chafee Amendment) and Equity for the Print-Disabled

Section 121 of the Copyright Act, often referred to as the Chafee Amendment because it was first introduced by Rhode Island Senator John Chafee, merits coverage here because it further demonstrates congressional intent to limit copyright’s exclusive rights to facilitate broad access to information for the disabled. Specifically, it provides clear protection for making and sharing accessible texts for use by people with print disabilities. In the *HathiTrust* case, the district court found Section 121 as well as fair use applied to the defendants’ conduct.⁹⁰ Also, some of the DMCA exemptions described below still track Section 121 rather than Section 107. The provision was first adopted in 1996 and was updated as part of the U.S.’s implementation of the Marrakesh Treaty, resulting in additional clarity and a broader scope, in regard to both works covered and eligible persons.⁹¹

Section 121(a) provides that:

Notwithstanding the provisions of Section 106, it is not an infringement of copyright for an *authorized entity* to reproduce or to distribute in the United States copies or phonorecords of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation if such copies or phonorecords are reproduced or distributed in *accessible formats* exclusively for use by *eligible persons*.⁹²

The italicized terms have statutory definitions worth unpacking.

Most if not all libraries are “authorized entities” for purposes of the statute. The term’s statutory definition is: “a nonprofit organization or a governmental agency that has a primary mission to provide specialized services relating to training, education, or adaptive reading or information access needs of blind or other persons with disabilities.” Libraries meet this definition, as they do have provision of such services as “a primary mission.” As the district

⁸⁹ *Id.*

⁹⁰ Authors Guild, Inc. v. HathiTrust, 902 F. Supp. 2d 445, 465 (S.D.N.Y. 2012).

⁹¹ The Copyright Office has published a concise and useful guide to the Marrakesh Treaty Implementation Act, including references to relevant legislative history: U.S. Copyright Office, *Understanding the Marrakesh Treaty Implementation Act* (May 2019), https://www.copyright.gov/legislation/2018_marrakesh_faqs.pdf.

⁹² Emphasis added.

court's opinion in *HathiTrust* held: "The ADA requires that libraries of educational institutions have a primary mission to reproduce and distribute their collections to print-disabled individuals, making each library a potential 'authorized entity' under the Chafee Amendment."⁹³

The next defined term is "accessible formats." Added to Section 121 by the Marrakesh Treaty Implementation Act, "accessible formats" are defined as "an alternative manner that gives an eligible person access to the work . . . to permit him or her to have access as feasibly and comfortably as a person without such disability." The Senate Report language clarifies that the provision includes "related illustrations" such as graphs, maps, tables, or other forms of presentation. Furthermore, "It is understood that authorized entities may introduce such changes in a copyrighted work as are necessary to make the work accessible in the alternative format, taking into account the accessibility needs of the persons concerned. Such changes include, but are not limited to, differences in format or presentation."⁹⁴

The next term that needs definition is "eligible persons." The statute describes three categories of persons who meet this definition: those who are blind, those who have a "visual or perceptual or reading disability" that cannot be corrected and that renders them unable to read printed works, and anyone "otherwise unable, through physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading." Thus, eligible persons are not only folks with physical disabilities specifically affecting vision, but also folks with *any* disability (including learning disabilities and mobility impairments) that affect their ability to read text in a standard format.

There are additional limitations to Section 121's scope. It only allows modification of "previously published literary work[s] or . . . previously published musical work[s] that ha[ve] been fixed in the form of text or notation." The statute also requires certain notices be included on the copies provided under its auspices.⁹⁵ Fair use provides a flexible right to make accessible formats available to folks who need them, but for print disabilities, Section 121 provides libraries a clear, well-defined right to do so.

C. The Triennial 1201 Exemption Rules

The DMCA created a new cause of action, separate from copyright infringement, that a copyright holder could bring against anyone who circumvents a technological protection measure (TPM) that effectively controls access to an in-copyright work. In other words, it created a new bar against the hacking of digital locks. This bar is not expressly subject to any of the limitations and exceptions in the Copyright Act, including fair use. In recognition of the likely burden the provision could place on lawful uses, Congress also requires the Copyright Office to conduct a rulemaking process every three years during which it hears evidence of Section 1201's effect on lawful uses and recommends rules exempting certain uses from the law's bar on circumvention. The Librarian of Congress has the ultimate authority to issue exemptions based on the Register's recommendations. Advocates for exceptions bear the burden of

⁹³ 902 F. Supp. 2d 445, 465 (S.D.N.Y. 2012).

⁹⁴ S. Rep. No. 115-261 (2018), <https://www.Congress.gov/115/crpt/srpt261/CRPT-115srpt261.pdf> (last visited Nov. 21, 2022).

⁹⁵ 17 U.S.C. 121(b)(1)(B) and (C). The inclusion of the copyright notice (e.g., "© 2019 Oxford University Press") is a familiar practice for libraries, who must include this notice with copies it makes under Section 108. The language required by subsection (B) ("notice that any further reproduction or distribution in a format other than an accessible format is an infringement") is problematic, as it is not an accurate representation of the law! Libraries might be able to avoid misleading their patrons by adding language, e.g., "Unless permitted by the fair use doctrine or another provision of the Copyright Act, further reproduction or distribution."

convincing the Register and the Librarian that their uses are lawful and that they are unduly burdened by the anti-circumvention provision.

Since 2003, every set of exemptions has included a rule permitting circumvention of TPMs protecting ebooks that prevent use of accessibility functions by print-disabled readers.⁹⁶ The shape of these exemptions has evolved over time thanks to the efforts of disability rights organizations, education groups, and law clinics. Starting in 2012, the rules were expanded to cover circumvention by “authorized entities” as defined in Section 121.⁹⁷ The rules were renewed in each subsequent cycle, and the policy of the Americans with Disabilities Act has been cited in support of the lawfulness of these uses. In 2018, a new rule was adopted to permit captioning and audio description of video material for instructional uses, again with a predicate finding that “making motion pictures accessible to students with disabilities by adding captions and/or audio description is likely noninfringing.”⁹⁸ That finding is based on fair use, not Section 121, which does not apply to audiovisual works. It is also noteworthy that the 2018 rule specifically references the legal obligations that disability rights laws place on educational institutions, recognizing that copyright must yield to these obligations.⁹⁹ The 2021 rule expanded the exemption for accessibility for people with print disabilities to comply with Section 121 as it was updated by the Marrakesh Treaty Implementation Act, discussed in the next section.¹⁰⁰ It also made technical expansions of the other exemptions relating to people with disabilities.¹⁰¹

This long pattern of rulemaking activity provides more evidence of a general government policy favoring social justice in the form of accessibility, and it adds an expert agency’s repeated endorsement to the judicial recognition of fair use’s applicability in *HathiTrust*. More broadly, it shows the U.S. Copyright Office recognizes, in its own rulemakings, the scope and validity of exemptions to copyright rules favoring accessibility.

D. The Marrakesh Treaty and Implementing Law

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled was adopted by the World Intellectual Property Organization’s (WIPO) member states (including the United States) in 2013. The treaty is a response to what is often characterized as a “global book famine,” in which 285 million people in the world are blind or visually impaired but only 1–7 percent of books are published in accessible formats.¹⁰² According to WIPO, “The Treaty has a single objective: to increase access

⁹⁶ All the triennial rules and related materials are collected together at <https://copyright.gov/1201/> (last visited Nov. 21, 2022).

⁹⁷ U.S. Copyright Office, *Section 1201 Rulemaking: Fifth Triennial Proceeding Recommendation of the Register of Copyrights 25* (2012).

⁹⁸ U.S. Copyright Office, *Section 1201 Rulemaking: Seventh Triennial Proceeding Recommendation of the Acting Register of Copyrights 101* (2018).

⁹⁹ *Id.* at 107 (noting that the DMCA’s rule against circumvention was “adversely affecting the ability of educational institutions to offer accessible formats of motion pictures on an equal basis *in conformance with their legal responsibilities*”) (emphasis added).

¹⁰⁰ U.S. Copyright Office, *Section 1201 Rulemaking: Eighth Triennial Proceeding Recommendation of the Register of Copyrights 125* (2021).

¹⁰¹ *Id.* at 64.

¹⁰² World Intellectual Property Organization, *The Marrakesh Treaty: Helping to End the Global Book Famine*, https://www.wipo.int/edocs/pubdocs/en/wipo_pub_marrakesh_overview.pdf (2016) (accessed June 19, 2019); Krista L. Cox, *Applying Social Justice Principles in the Practice of Intellectual Property Law*, ch. 15 in *THE CAMBRIDGE HANDBOOK ON INTELLECTUAL PROPERTY AND SOCIAL JUSTICE* (Steven D. Jamar & Lateef Mtima eds., 2023) (providing an extensive discussion of the Marrakesh Treaty and its importance to promoting the social utility and social justice objectives of the copyright law).

to books, magazines, and other printed materials for people with print disabilities. It aims to achieve this by making it easier for accessible copies to be created and shared across international borders.¹⁰³ It requires all signatories to create exceptions to copyright that clearly permit the creation and cross-border sharing of accessible texts for the benefit of the print disabled.

To ensure compliance with the Marrakesh Treaty, Congress added a new Section 121A to Title 17 of the U.S. Code. Under that section, it is lawful for an authorized entity to export accessible texts to authorized entities or eligible persons in other Marrakesh Treaty signatory countries. It is also lawful for authorized entities to import copies (or phonorecords, in the case of sound recordings) of a previously published literary work or of a previously published musical work that has been fixed in the form of text or notation in accessible formats. This sharing is permitted subject to the requirement that authorized entities establish and follow practices to achieve a laundry list of objectives, including ensuring the person being served is eligible, limit distribution of copies only to eligible persons or authorized entities, and discouraging reproduction and distribution of unauthorized copies.

So, while Section 121A provides a clear right to share accessible texts across borders, it requires authorized entities to do some work developing policy. Moreover, it applies to the sharing of only certain kinds of works with specific countries. Fortunately, thanks to the savings clause at Section 121A(e), libraries can also rely on fair use for cross-border sharing of accessible texts in cases where Section 121A might not apply (principally, in dealing with countries who are not signatories to the Marrakesh Treaty). Section 602(a) bars exportation without permission where the copy at issue is infringing. Section 107, however, provides that fair use “is not an infringement of copyright.” Because the provision of accessible texts to qualified persons constitutes a fair use, exportation does not violate Section 602. Likewise, U.S. libraries can rely on fair use to justify the importation of accessible materials from foreign countries, without regard for the restrictions (to published literary and musical works only) incorporated in Section 121A.

CONCLUSION

The Supreme Court has observed on multiple occasions that copyright is meant to serve the public interest, and that the incentives that copyright law grants to rights holders are a means to the end of cultural flourishing. In many cases, markets work as this basic scheme envisions, providing incentives for creation and distribution of knowledge and culture. When the market fails, however, and the law’s exclusive rights become a mechanism for injustice, libraries are among copyright’s most important social justice safety valves. Libraries ensure that the life-changing power of access to information is not unduly limited by wealth, physical or mental impairment, or the other exigencies of life. Libraries thus make manifest the interdependent relationship between IP social utility and IP social justice by ensuring that everyone has access to knowledge through which they can take ownership of their inclusion in and empowerment through civil society. The vital limitations and exceptions described in this chapter that support libraries and their critical role in society exemplify the sort of balancing of interests that IP-SJ seeks to advance.

¹⁰³ *Id.*