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## *Hchette*, Controlled Digital Lending, and the Consequences of Divorcing Law From Context

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## *Hachette*, Controlled Digital Lending, and the Consequences of Divorcing Law From Context

Michelle M. Wu\*

In an argument, it is not uncommon for opposing sides to use the same language to support their points. This is possible because quotations, when removed from their context, lose their full meaning. Therefore, it is unsurprising to see this behavior in litigants, as each party presents information in the light that best supports their position. It is less common in court decisions,<sup>1</sup> as missing context can cause confusion both for litigants and for other parties similarly situated. It also risks undermining the opinion's legitimacy by not acknowledging and addressing the limitations of the sources upon which it relies.

This article will look at the recent *Hachette* decision against the Internet Archive,<sup>2</sup> analyzing how the court's reliance on past authorities with insufficient judicial or general copyright context distorted their meanings. It will focus on the controlled digital lending (CDL)<sup>3</sup> aspect, not discussing the other claims in the suit or exploring the specific implementation of CDL by the Internet Archive (IA). Since CDL programs can vary widely, IA is better situated than others to identify missing context related to the analysis of the unique components of their efforts, and other libraries engaging in CDL are better positioned to describe how their programs differ from the judge's description of IA's.

Further, it could be said that the decision turned into one that was not about CDL at all, because the judge's analysis determined that that IA's Open Library made print books and their digitized replacements available simultaneously,<sup>4</sup> something contrary to CDL principles. Since

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<sup>1</sup> Some scholars have already shown the possibility of bias in the precedents that judges cite. See, for example, Anthony Niblett & Albert H. Yoon, *Friendly Precedent*, 57 WM. & MARY L. REV. 1789 (2016) (noting that Republican-appointed panels more frequently cite conservative precedents, while Democratic-appointed panels lean towards liberal ones). But using authority outside of context is an issue separate from cherry-picking cases; bias may give greater weight to some cases than to others, but it does not consciously distort a specific case's holdings.

<sup>2</sup> *Hachette Book Group, Inc. v. Internet Archive*, 2023 WL 2623787 (S.D.N.Y.) (2023).

<sup>3</sup> For a description of CDL, see Lila Bailey, et al., *Position Statement on Controlled Digital Lending by Libraries*, <https://controldigitallending.org/statement/>.

<sup>4</sup> *Hachette*, *supra* note 2 at \*11. The judge's reasoning was arguably faulty in that at least in some instances, IA did comply with CDL own-to-loan principles (e.g., the first copy of book that it loaned, where only one digital copy was available and the print equivalent was in storage). However, the court made no such distinction between the copies or the uses, lumping them all together. Therefore, the instances where the definition of CDL was met could be raised on appeal as deserving independent analysis. The court's finding that IA did not adhere to own-to-loan was highly consequential. On one hand, it essentially deprived IA of the analysis detailed in CDL literature and gave the court leverage to treat every copy that IA used as an unauthorized extra copy added to the market. When the failure to comply with own-to-loan is treated by the court as fact, the fact becomes inseparable from its entire analysis. On the other hand, it turned all of the court's language directly applicable to CDL into dicta, as the facts it cited made CDL irrelevant to the case before it. For example, while the *Hachette* court did briefly hypothesize on how compliance

IA's operation failed to meet the very definition of CDL, the decision logically was not about CDL but about an operation that called itself CDL, shared some aspects with it, but (according to the court) substantially departed from its requirements. For all of these reasons, the analysis below only delves into the court's general language where it might be used to chill all CDL programs or innovation more generally.

### **Hachette v. Internet Archive**

In *Hachette Book Group, Inc., v. Internet Archive* (hereinafter *Hachette*), the court granted summary judgement to four book publishers (Hachette Book Group, Inc, HarperCollins Publishers LLC, John Wiley & Sons., Inc., and Penguin Random House LLC) on their claims that IA's Open Library infringed on the copyrights of 127 of their titles. Below is a summary of the facts as described by the court:<sup>5</sup>

The plaintiffs are four of the largest trade book publishers in the United States, and their businesses regularly enter into contracts with authors for the exclusive rights to publish the authors' writings in analog and digital formats. In this case, they had published print copies of 127 books, making them available through book vendors, as well as digital copies, which they distributed through licenses handled by aggregators. Library licenses restricted access only to the subscribing libraries' members, and any digital object used prevented unauthorized copying through digital rights management (DRM). At the time of the lawsuit, all publishers offered a variety of library licenses (which differ from the licenses offered to individuals), including perpetual "one-copy, one-user" (all four publishers for academic libraries, Wiley also offered this option for public libraries); "one-copy, one-user" on one- or two-year terms (Hachette and Penguin); a "26-Circ Model" (HarperCollins, allowing an e-book to be circulated at most 26 times during the license term); and "pay per use" (HarperCollins and Penguin). Library licenses are a substantial source of income for these publishers.

IA acquired copies of the 127 books named in the lawsuit through purchase or donation. It digitized the titles, put the print copies in storage, and allowed its users to check-out the digital equivalents on archive.org and openlibrary.org (hereinafter, Open Library). Anyone may register to become a user, and every user can check out up to 10 titles simultaneously. When a book is checked out, it may be read online, downloaded, or read aloud by an automated text-to-speech reader. After a book is checked out, a link to buy the book at Better World Books (a for-profit

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with own-to-loan might affect the first factor, based on its own findings, such compliance was absent in the case it was deciding.

<sup>5</sup> *Hachette*, *supra* note 2. The following recitation of facts from pages \*1-\*4 of the opinion with regard to IA is limited only to those related to the operation described as CDL.

affiliated with IA) shows up on the title's page. If a user clicks on the link and buys the title, IA receives some form of payment for the referral.

IA's basis for circulating these titles is CDL: (1) they legitimately own a copy of the title, (2) they are circulating a digital equivalent of that title in the same number of copies that it owns, and (3) the digital copy is protected by DRM. In practice, IA's implementation included circulating not only the copies that they owned and had in storage but also additional copies owned by partner libraries. Where a partner library owned one or more copies of a title available digitally through IA, IA would add one additional copy for digital circulation through Open Library. It did not require nor check to see if the partner library moved one of their print copies into storage (or otherwise made it unavailable to the public) before making the additional digital copy available for circulation or before a patron checked out the digital copy.

The court concluded that the following was undisputed: that IA ...

violated the Publishers' reproduction rights, by creating copies of the Works in Suit, 17 U.S.C. § 106(1); the Publishers' rights to prepare derivative works, by "recasting" the Publishers' print books into ebooks, id. § 106(2); the Publishers' distribution rights, by distributing ebook copies of the Works in Suit to IA's users, id. § 106(3); the Publishers' public performance rights, through the "read aloud" function on IA's Website, id. § 106(4); and the Publishers' display rights, by showing the Works in Suit to users through IA's in-browser viewer, id. § 106(5).<sup>6</sup>

And then it stated that IA had failed to establish a fair use defense.<sup>7</sup>

Though the *Hachette* court treated all uses in the case as identical (i.e., the creation of an unauthorized, additional copy that was then added to the market), there are arguably several distinctly different types of uses at play. Among these uses are: one was where a copy was made and used to replace a copy that was bought (i.e., CDL); another was where a copy was made and used to supplement a copy that was bought (e.g., controlled lending of a digital copy where the print copy remained available but the number of simultaneous users of the digital copy was tied to the number of print copies owned); and a third was where there were no limits on how many digital copies could circulate simultaneously (e.g., National Emergency Library). This article discusses only the first of these uses, where all three elements of CDL are met.

## Fair Use

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<sup>6</sup> *Id.* at \*5.

<sup>7</sup> *Id.* at \*15.

As embodied in the United States' Constitution, copyright seeks to balance the interests between authors and the public.<sup>8</sup> The debates and documents surrounding every piece of copyright legislation demonstrate how difficult this balance is as well as Congress' commitment to maintaining it.

The nation's copyright laws explicitly recognize both interests. Section 106 reserves to the copyright owner broad control over the exclusive rights of reproduction, distribution, the making of derivative works, public display, and public performance.<sup>9</sup> To guard public interest, though, statutory exceptions exist to permit acts under certain circumstances that would otherwise qualify as infringement. Those exceptions include resale,<sup>10</sup> interlibrary loan,<sup>11</sup> and providing materials to the print disabled, among others.<sup>12</sup> The broadest exception by far is fair use:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.<sup>13</sup>

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<sup>8</sup> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. Art I, Sec 8, Cl 8.

<sup>9</sup> 17 U.S.C. §106.

<sup>10</sup> 17 U.S.C. §109.

<sup>11</sup> 17 U.S.C. §108.

<sup>12</sup> 17 U.S.C. §121.

<sup>13</sup> 17 U.S.C. §107.

Fair use “permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster.”<sup>14</sup> It is not a strict test. While the four factors named in the statute must be applied by the courts, judges are not restricted to considering only those factors.<sup>15</sup> Outcomes, therefore, are not predictable and are only discoverable through the analysis of a given case’s facts<sup>16</sup> and a court’s individualized perspective on the appropriate inputs.

### **Controlled Digital Lending**

On principle, CDL stands for the general proposition that a library may still use the content it purchases even as technology changes. In practice, CDL is where a library owns a copy of a book, digitizes it, and circulates the e-copy in place of the original. CDL can take on many forms, but to qualify under the definition, it must meet three criteria: (1) The library must legitimately own a copy of the book (e.g., through purchase or gift); (2) The library must comply with an own-to-loan ratio, which means that if it chooses to circulate an e-copy in place of the print, it may circulate simultaneously no more copies than it owns; and (3) any e-copy used must be controlled through digital rights management so as to prevent wholesale copying and redistribution.<sup>17</sup>

### **Hachette: Case Law Precedents**

In its use of case authorities, the district court’s decision appeared to deliberately exclude facts that would have undercut their use. Four examples are below.

#### **Authors Guild v. Google**

In *Authors Guild v. Google*, Google had digitized millions of books owned by academic and public libraries, made them into a searchable database, allowed users to view snippets of the books, and provided full-text digital copies of the books to the libraries that had provided the print equivalents for scanning.<sup>18</sup> These uses were each determined to be fair under §107, despite the fact that Google had made reproductions (e.g., digitizing the books and making copies available to the providing libraries), derivative works (e.g., creating a searchable database), and

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<sup>14</sup> *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994), *quoting* *Stewart v. Abend*, 495 U.S. 207, 236, 110 S. Ct. 1750, 109 L. Ed. 2d 184 (1990).  
4 NIMMER ON COPYRIGHT § 13.05 (2018)

<sup>15</sup> *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73 at 81 (2d Cir. 2014).

<sup>16</sup> *Campbell*, *supra* note 14 at 577-78.

<sup>17</sup> *Id.*

<sup>18</sup> *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015).

public displays (e.g. displaying pages of works in the form of snippets), producing products described under §106 as within the exclusive authority of the copyright holder.

*Google's* description of the issues and the resolution follows:

This copyright dispute tests the boundaries of fair use. Plaintiffs who are authors of published books under copyright...appeal from the grant of summary judgment in Google's favor. Through its Library Project and its Google Books project, acting without permission of rights holders, Google has made digital copies of tens of millions of books, including Plaintiffs', that were submitted to it for that purpose by major libraries. Google has scanned the digital copies and established a publicly available search function. An Internet user can use this function to search without charge to determine whether the book contains a specified word or term and also see "snippets" of text containing the searched-for terms. In addition, Google has allowed the participating libraries to download and retain digital copies of the books they submit, under agreements which commit the libraries not to use their digital copies in violation of the copyright laws. These activities of Google are alleged to constitute infringement of Plaintiffs' copyrights. Plaintiffs sought injunctive and declaratory relief as well as damages.

Google defended on the ground that its actions constitute "fair use," which, under 17 U.S.C. § 107, is "not an infringement." The district court agreed...Plaintiffs brought this appeal.

Plaintiffs contend the district court's ruling was flawed in several respects. They argue: (1) Google's digital copying of entire books, allowing users through the snippet function to read portions, is not a "transformative use" within the meaning of *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578-585, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994), and provides a substitute for Plaintiffs' works; (2) notwithstanding that Google provides public access to the search and snippet functions without charge and without advertising, its ultimate commercial profit motivation and its derivation of revenue from its dominance of the world-wide Internet search market to which the books project contributes, preclude a finding of fair use; (3) even if Google's copying and revelations of text do not infringe plaintiffs' books, they infringe Plaintiffs' derivative rights in search functions, depriving Plaintiffs of revenues or other benefits they would gain from licensed search markets; (4) Google's storage of digital copies exposes Plaintiffs to the risk that hackers will make their books freely (or cheaply) available on the Internet, destroying the value of their copyrights; and (5) Google's distribution of digital

copies to participant libraries is not a transformative use, and it subjects Plaintiffs to the risk of loss of copyright revenues through access allowed by libraries. We reject these arguments and conclude that the district court correctly sustained Google's fair use defense.

Google's making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information about Plaintiffs' books without providing the public with a substantial substitute for matter protected by the Plaintiffs' copyright interests in the original works or derivatives of them. The same is true, at least under present conditions, of Google's provision of the snippet function. Plaintiffs' contention that Google has usurped their opportunity to access paid and unpaid licensing markets for substantially the same functions that Google provides fails, in part because the licensing markets in fact involve very different functions than those that Google provides, and in part because an author's derivative rights do not include an exclusive right to supply information (of the sort provided by Google) about her works. Google's profit motivation does not in these circumstances justify denial of fair use. Google's program does not, at this time and on the record before us, expose Plaintiffs to an unreasonable risk of loss of copyright value through incursions of hackers. Finally, Google's provision of digital copies to participating libraries, authorizing them to make non-infringing uses, is non-infringing, and the mere speculative possibility that the libraries might allow use of their copies in an infringing manner does not make Google a contributory infringer.<sup>19</sup>

In *Hachette*, Judge Koeltl found IA's digital lending unfair, relying on *Google's* statement (in dicta) that "[i]f Plaintiffs' claim were based on Google's converting their books into a digitized form and making that digitized version accessible to the public, their claim would be strong."<sup>20</sup> Since IA was using a digital form and making it available to the public, the Court claimed that its conduct was exactly what the *Google* court had said would be unfair. However, if one considers the context in which the statement was made, the words have a different meaning. Google had not purchased nor did it own copies of books it had scanned. It had not limited how many people could view their snippets at any given time. So, if the quote were to reflect the facts of the case, it would have more properly been read as: if Plaintiffs' claim were based on Google's converting books *that they did not own* into a digitized form and making that digitized version accessible to the *entire public simultaneously without limitation*, their claim would be strong (contextual words added in italics). That more accurate read makes the *Hachette* court's reliance on it questionable, as there are meaningful differences between what the *Google*

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<sup>19</sup> *Id.* at 206-208.

<sup>20</sup> *Id.* at 225.



court had hypothesized and the actuality of CDL, where copies are owned and simultaneous lending is limited.

### Authors Guild v. HathiTrust

The second example is *Authors Guild v. HathiTrust*, where a library repository made available digitized books (1) in the form of a publicly searchable database showing only hits (and not full-text) in its results, and (2) in full-text to print-disabled patrons.<sup>21</sup> Both uses were determined to be fair under §107, though on different grounds, despite the fact that HathiTrust was making reproductions (e.g., digitization, load-balancing copies), distributions (e.g., full-text copies to print-disabled patrons), and derivative works (e.g., the creation of a database from the works), all activities normally falling under an author's §106 rights.

The *Hachette* court relied most heavily on *HathiTrust*'s language on providing full-text copies to print-disabled users. The language from that section of the case is below (with the language quoted by *Hachette* highlighted in bold):

The HDL also provides print-disabled patrons with versions of all of the works contained in its digital archive in formats accessible to them. In order to obtain access to the works, a patron must submit documentation from a qualified expert verifying that the disability prevents him or her from reading printed materials, and the patron must be affiliated with an HDL member that has opted-into the program. Currently, the University of Michigan is the only HDL member institution that has opted-in. We conclude that this use is also protected by the doctrine of fair use...

In applying the Factor One analysis, the district court concluded that “[t]he use of digital copies to facilitate access for print-disabled persons is [a] transformative” use. *HathiTrust*, 902 F.Supp.2d at 461. This is a misapprehension; providing expanded access to the print disabled is not “transformative.”...By making copyrighted works available in formats accessible to the disabled, the HDL enables a larger audience to read those works, but the underlying purpose of the HDL's use is the same as the author's original purpose.

Indeed, when the HDL **recasts copyrighted works into new formats** to be read by the disabled, **it appears, at first glance, to be creating derivative works over which the author ordinarily maintains control**. See 17 U.S.C. § 106(2). As previously noted, paradigmatic examples of derivative works include translations

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<sup>21</sup> *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014).

of the original into a different language, or adaptations of the original into different forms or media. See *id.* § 101 (defining “derivative work”). The Authors contend that by converting their works into a different, accessible format, the HDL is simply creating a derivative work...

This observation does not end the analysis. “While a transformative use generally is more likely to qualify as fair use, ‘transformative use is not absolutely necessary for a finding of fair use.’... We conclude that providing access to the print-disabled is still a valid purpose under Factor One even though it is not transformative.”<sup>22</sup>

The *Hachette* court cited *HathiTrust* as having described the type of full-text sharing in CDL as likely infringement: “HathiTrust reiterated that outside this context [of providing full-text to the print-disabled], when a defendant ‘recasts copyrighted works into new formats,’ it appears to ‘creat[e] derivative works over which the author ordinarily maintains control.’”<sup>23</sup> What Judge Koeltl failed to disclose was that his words, “outside of this context,” is not a qualification found anywhere in *HathiTrust*’s analysis. Instead, the actual quote by the *HathiTrust* court was followed by a comment that even if an exclusive right had been infringed, there could be valid purposes that justified the breach.<sup>24</sup> It then described how providing a full-text copy to the print-disabled was such a valid purpose. The *Hachette* summary makes it appear that the *HathiTrust* court had already weighed in on the validity of providing full-text digital copies to people other than the print disabled, which is not supported by the plain text of the opinion. Read in its entirety, the section in which the *HathiTrust* quote is found only contains one generalizable principle: that there can be valid purposes to justify the infringement of the author’s rights to reproduce and make a derivative work.

### Sony v. Universal City Studios

The third case missing context was *Sony Corp. v. Universal City Studios, Inc.* In *Sony*, the Betamax (an early home recording device) was used by private homeowners to record programs for their personal viewing, and the use of the Betamax for such taping was held to be fair use.<sup>25</sup> Judge Koeltl disqualified *Sony*’s application to CDL’s defense as the reproductions at question there were by home viewers for their own use, and IA’s lending involved non-private use and access by the public (even if only to one person at a time).<sup>26</sup>

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<sup>22</sup> *Id.* at 101-2.

<sup>23</sup> *Hachette*, *supra* note 2 at 7 (citing *HathiTrust*, *supra* note 21 at 101-2).

<sup>24</sup> *HathiTrust*, *supra* note 21 at 101-2.

<sup>25</sup> *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 776, 78 L. Ed. 2d 574 (1984).

<sup>26</sup> *Hachette*, *supra* note 2 at \*8.

This reasoning ignores a fundamental fact on which *Sony* was based. The right of the viewer to record the work did not rest solely in the fact that it was private action, and fair use did not rely on the lack of distribution; the crux of reasoning was that the people using the Betamax had legitimate access to the programs they were recording. “When one considers the nature of a televised copyrighted audiovisual work, see 17 U.S.C. § 107(2), and that timeshifting merely enables a viewer to see such a work which he had been invited to witness in its entirety free of charge, the fact that the entire work is reproduced, see *id.*, at § 107(3), does not have its ordinary effect of militating against a finding of fair use.”<sup>27</sup>

One can test this conclusion themselves by asking these questions: (1) if a company subscribes to a cable service, would it be fair use for it to attach a DVR to one of its TVs, for one of its executives to tape a program on that TV and watch it later? and (2) If the home user recorded a program and then lent the resulting Betamax recording to a neighbor to watch, would that still be fair use? The first action is arguably not private, and the second involves distribution, but both should still be fair under *Sony*. *Sony*, therefore, has a significantly broader application than applied by the district court in *Hachette*.

#### Capitol Records v. ReDigi

The last case to be analyzed is *ReDigi*, the application of which is the most puzzling of all four cases here. The facts were so unusual that any relevance beyond those specific circumstances is hard to find. ReDigi, a commercial entity, held itself out as a reseller of digital music, and a music publisher challenged its resales as an infringement of their copyrights. The transfer of a copy from the original buyer to ReDigi and then from ReDigi to the subsequent buyer involved making copies and conveying the copies to each other, which the publisher claimed violated their exclusive rights to reproduce and distribute under §106. The problem in using this case for any meaningful copyright analysis lies in its facts:

- (1) No one involved in the resale (not the original buyer, Redigi, or the new buyer) ever owned any music. All of it was licensed, and even though the court did not mention this fact, it necessarily impacted the rest of the case, because...
- (2) The way the licenses worked ensured that there could never be an effective transfer. The Court and the parties all acknowledged that both the original owner and the later purchaser could simultaneously access the music after “resale”:

Defendants do not dispute that, under Apple iCloud's present arrangements, a user could sell her digital music files on ReDigi,

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<sup>27</sup> *Sony*, *supra* note 25 at 449.

delete Music Manager, and then redownload the same files to her computer for free from the Apple iCloud. Apple's iCloud service allows one who has purchased a file from iTunes to re-download it without making a new purchase.<sup>28</sup>

(An analogy would be a court that rules on whether a tenant's sale of rented property constituted a valid sale. Even without knowing any other facts about the case, one knows from the outset that a valid sale is impossible. The core question is whether the tenant owned what they tried to sell. Any analysis without addressing that question is worthless, as it would ignore the validity of the foundation on which the claim is built.)

Ignoring for the moment the arguable irrelevance of *ReDigi* to any other case, let us look at how the Court applied it in *Hachette*. It cited *ReDigi* as eliminating a first sale argument for own-to-loan use, as ReDigi had been denied such a defense even though they went further than IA, claiming the existence of only one copy after reproduction and transfer.<sup>29</sup> IA's use in, in contrast, retains the original copy as well as a digital copy, though in CDL only one is used at any given time.

The context missing in this case was how narrow the *ReDigi* decision was. Even though ReDigi purported to make a successful digital transfer, with only one copy existing at any time and only one person able to access the music both before and after resale, ReDigi acknowledged that their software could not actually stop both the original and subsequent buyers from simultaneously accessing the music sold. Therefore, the facts of the case make the decision about software that claims to move music from the hands of one person to another but in fact does not transfer it at all, instead making and distributing a copy in a way where both users can hold it at the same time.

The Court carefully contained its ruling to a single version of ReDigi's software: "We conclude that the operation of ReDigi version 1.0 in effectuating a resale results in the making of at least one unauthorized reproduction,"<sup>30</sup> thereby indicating that the decision was not about a digital first sale doctrine as much as it was about ReDigi's technology (already obsolete by the time of judgement) being inadequate to meet the requirements of first sale.

In case readers misunderstand the limits of the decision, other language in the case make it inescapable: "Because neither we, nor the district court, have decided whether version 2.0 would infringe, this opinion does not decide on the lawfulness of the use...of systems

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<sup>28</sup> Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649, fn 6 (2d Cir. 2018).

<sup>29</sup> Hachette, *supra* note 2 at 10.

<sup>30</sup> ReDigi, *supra* note 28 at 659.

functioning like version 2.0, at least to the extent that their systems differ from the aspects of version 1.0 that are adjudicated in this opinion.”<sup>31</sup> *ReDigi* is often cited for the principle that there can be no valid digital first sale, but its text never reaches that conclusion. It only denied the existence of digital first sale in *ReDigi* 1.0’s operation, leaving the door open for all other technologies.

(Important side note: IA’s actual argument in *Hachette* was not that first sale applied, it was that the broader concept of exhaustion applied, which is a common law principle wider than the specific manifestation in §109. IA’s argument was that it had legitimate access to the number of copies it was simultaneously lending; the author had exhausted their right to control how those copies were used once they received their original payment. This is an equitable argument, which is distinctly different from an argument based on positive law as embodied in §109.)

*Hachette* also cites *ReDigi* in support of the oft-repeated assertion that “the purpose of copyright” is “to incentivize new creative works by enabling their creators to profit from them.”<sup>32</sup> This takes us to the next section where we see that ignoring the context of copyright’s origin is what created this damaging and perpetuated illusion.

### **Hachette: Application of Copyright and Fair Use**

Sometimes missing context is so deeply embedded in the perspective of a court case that there is no single instance to be analyzed. One such example in *Hachette* is the court’s heavy reliance on cases where the defendant had never paid to use any copies of a copyrighted work and where there had been no limitations on simultaneous use. In contrast, IA owned copies of the books they lent, and limited simultaneous access. These two elements together differentiated CDL from every other fair use case heard by courts, so the *Hachette* court’s insistence on shoehorning its facts into existing case law was particularly troubling. When applying a test that is by definition “an equitable rule of reason...” where “...no generally applicable definition is possible,”<sup>33</sup> the lack of a precedent is not intended to weigh for nor against fair use, yet the court does use the lack against IA (and against aspects of CDL) repeatedly<sup>34</sup>. It is instructive to note that every major case that today stands for fair use (e.g., *Sony*, *Perfect 10*, *HaitiTrust*) had no precedent when decided.

The second example comes in the form of the economic theory of copyright, which was invoked multiple times in the decision. This utilitarian theory is well established and has been

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<sup>31</sup> *Id.* at fn 7.

<sup>32</sup> *Hachette*, *supra* note 2 at 13 (citing *ReDigi*, *supra* note 28 at 662).

<sup>33</sup> H.R. REP. NO. 94-1476, at 65 (1976).

<sup>34</sup> *Hachette*, *supra* note 2 at 10, 15.

routinely advanced by jurists and scholars,<sup>35</sup> and one of its basic tenets is that copyright represents an author's right to profit from their work, or the right to have the opportunity to profit from their work.<sup>36</sup>

The economic theory is the dominant theory in copyright but was built on imperfect inputs, something that is not commonly discussed nor immediately visible. Due to the structure of copyright laws, which give only copyright owners (and not the public) an affirmative right to sue, and the opportunity for statutory damages, virtually every case that appears in courts has an economic motivation, and the economic theory grew from these very cases. However, the theory fails in context, as the historical record clearly exposes non-profit justifications for the language in the Copyright Clause.

What persuaded early state and federal government actors to establish copyright was the concern that without it, the public would never gain access to some authors' writings. At that time, piracy by publishers was common, and authors were reluctant to release their books publicly without the ability to stop it. One influential author, Joel Barlow, described it this way:

Indeed we are not to expect to see any works of considerable magnitude, (which must always be works of time & labor), offered to the Public till such security be given. There is now a Gentleman in Massachusetts who has written an Epic Poem, entitled "The Conquest of Canaan", a work of great merit, & will certainly be an honor to his country. It has lain by him, finished, these six years, without seeing the light; because the Author cannot risque the expences of the publication, sensible that some ungenerous Printer will immediately sieze upon his labors, by making a mean & cheap improvison, in order to undersell the Author & defraud him of his property.<sup>37</sup>

This argument convinced the Continental Congress that the inability to stop piracy was a barrier to getting books to the public and therefore, it made a recommendation to states to "secure to Authors or Publishers of New Books the Copyright of such Books for a certain

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<sup>35</sup> See, for example, Pierre N. Leval, Toward A Fair Use Standard, 103 HARV. L. REV. 1105 (1990); Wendy J. Gordon, Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors, 82 COLUM. L. REV. 1600 (1982); Brian L. Frye, Against Creativity, 11 NYU J.L. & LIBERTY 426, 429 (2017).

<sup>36</sup> See, for example, HaithiTrust, *supra* note 21 at 95.

<sup>37</sup> Letter from Joel Barlow to the Continental Congress (1783), PRIMARY SOURCES ON COPYRIGHT (1450-1900), eds L. Bently & M. Kretschmer, [www.copyrighthistory.org](http://www.copyrighthistory.org). Original source: The National Archives, Center for Legislative Archives: Papers of the Continental Congress, RG 360, 4: 369-373 (No. 78).

time.”<sup>38</sup> All states but Delaware followed the recommendation,<sup>39</sup> though most reserved the right only to authors.<sup>40</sup> The vast majority named public benefit as the reason for copyright.

This same societal purpose is later reflected in the framing of the Copyright Clause, which makes the spread of knowledge its goal, with copyright merely being a means to achieve that end.<sup>41</sup> Copyright, then, was about fostering a fair environment for the public release of works, making it likely that books would reach readers while allowing authors to prevent piracy. It (i.e., the government’s recognition of copyright) was not about profit.<sup>42</sup> The rights granted to the author to control their work were based in equity, to give them an effective weapon against unjust enrichment; the opportunity to make money was a side effect but not the justification for the control.<sup>43</sup>

Beyond history, copyright in the real world illustrates better than anything else that it cannot be solely about economics, or even primarily about economics. Today, works protected by copyright without commercial intent (e.g., personal pictures, journal entries, fan art, term papers, emails) overwhelmingly outnumber the ones created for commercial use,<sup>44</sup> and non-commercial uses (e.g., DVR recordings, local talent show performances, fan fiction, remixes on Youtube<sup>45</sup>) outstrip commercial uses<sup>46</sup>. In short, any theory of copyright that cannot explain 99%+ of the instances where copyright attaches is, by definition, a nonviable theory.

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<sup>38</sup> U.S. Copyright Office, *Copyright Laws Of The United States Of America, 1783–862*, at 1 (1962).

<sup>39</sup> Phillip Wittenberg, *The Protection Of Literary Property* 33 (The Writer Inc. rev. ed. 1978).

<sup>40</sup> The only exceptions were Pennsylvania and Virginia, who also extended the right to those who bought the rights to books from authors. PRIMARY SOURCES, *supra* note 37, Pennsylvania Copyright Statute, Pennsylvania (1784) & Virginia Copyright Statute, Virginia (1785).

<sup>41</sup> Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 OHIO ST. L.J. 517, 528-9 (1990).

<sup>42</sup> That copyright can be used for profit --- and that the Founders knew this – does not mean that the purpose was profit. As an analogy, consider that public office can be used for personal gain and that the Federalist Papers make clear that the Founders knew that anyone occupying public office would likely be self-interested. See, for example, FEDERALIST PAPER 6. They established public offices anyway. Though these offices can be used for personal advantage, the creation of them was not intended to further personal gain. The establishment of public offices was simply what they had determined to be a necessary part of creating a republic, and they felt that a republic held benefits over divided states or other forms of government.

<sup>43</sup> Michelle M. Wu, *Defeating the Economic Theory of Copyright: How the Natural Right to Seek Knowledge is the Only Theory Able to Explain the Entirety of Copyright’s Balance*, <https://scholarship.law.georgetown.edu/facpub/2495/> (prepublication draft).

<sup>44</sup> In 2022, it was estimated that every minute, 66K photos are shared on Instagram, 500 hours of video are uploaded to YouTube, 527,760 photos are shared on Snapchat, and 231.4M email messages are sent. DOMO, *Data Never Sleeps 10.0*, <https://www.domo.com/data-never-sleeps#> (last visited March 29, 2023).

<sup>45</sup> Some Youtubers do make money from their postings, but most do not. An unofficial estimate notes that approximately .25% of YouTube channels make money. <https://alanspicer.com/what-percentage-of-youtubers-make-money/>

<sup>46</sup> Many of the uses described in note 25 (e.g., YouTube videos) not only create new copyright works but qualify as copyright use (e.g., video that incorporates pre-existing music or program footage). Note that the point is not that these activities cannot be monetized, after all, the platforms hosting some of these creations do make money from the content. However, the users and creators of copyrighted works themselves have no commercial intent. That copyright can be monetized is a separate question from whether monetization is the purpose of copyright.

## The Consequences of Separating Law from Context

When one applies law without seating it within its broader context, irrelevant information can appear relevant. For example, if a decision-maker only ever sees cats in the context of large cats like tigers and lions, and only in cases where they have done great damage to people or property, he may determine that cats are dangerous, they do tremendous harm, and an appropriate response to the threat of harm is to injure or kill the animal. The pronouncement on the appropriate response, on its face, would apply to all cats. Absent context, someone observing a house cat or even a peaceful wild cat could use the decision-maker's conclusion to justify injuring or killing it out of fear of potential harm. With context, it becomes immediately apparent that the decision was not intended to authorize violence against every cat. The decision-maker's ruling on appropriate action is largely irrelevant when applied to domestic cats or peaceful large cats, something easily ignored when his conclusion is used without consideration of both the facts on which it was based and a recognition that there is an enormous universe of cats outside of those contemplated by the decision-maker.

In *Hachette*, to fully understand how missing context about the entirety of copyright impacted the outcome, it is necessary to introduce common instances of fair use not considered by the court. This expanded view is critical because the language of our laws and the costs of litigation<sup>47</sup> mean that most cases coming before courts are those that are driven by profit, and this unnatural concentration of cases hides the fact that the overwhelming majority of fair uses are never litigated.

Instead, if we look at daily activities that technically infringe on §106 rights, the blinders created by court opinions are stripped away. Recording a song off the radio, publicly posting fan fiction, converting an LP to an mp3, creating a mixed tape for a friend, reading a children's book aloud during a library's story hour, posting a picture of an art display on Instagram, or downloading an image from the web for a desktop background or use in a workplace presentation. All of these infringe on one or more of an author's exclusive rights, all are widespread, and all potentially result in some lost sales. People recording songs from "free" sources do not pay for that use; people reading fan fiction may never buy the original book; people converting their music to mp3 do not buy digital versions of that music; listeners at book readings may never buy the book; those seeing art on Instagram may never buy the artist's offerings (e.g., the art itself or postcards featuring the art); and those downloading an image from

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<sup>47</sup> The average costs of copyright litigation today (not including appeal) are \$161K for cases worth up to \$1M; \$882K for cases worth \$1M - \$10M; \$1.125M for cases worth \$10M - \$25M; and \$2.501M for cases worth more than \$25M. Costs inclusive of discovery, motions, and claim construction. AM. INTELLECTUAL PROP. LAW ASSOC., 2021 REPORT OF THE ECONOMIC SURVEY, I-208 - I-214 (2021).



the web more often than not do not pay for the image's use. Yet each of these uses is considered by society as normal consumption and use of copyrighted work and as fair. That they engage in the activities listed in §106 as belonging to the author, and potentially or actually reduce commercial activity, does not make them unfair.

With this added context, we return to the Hachette case and how missing context (i.e., the daily reality of copyright) allowed five arguably irrelevant pieces of information to hijack the fair use analysis.

**Transformativeness.** The Court stated that “In this Circuit, consideration of the first factor focuses chiefly on the degree to which the secondary use is “transformative,”<sup>48</sup> and it included citations to cases declaring that “use of copyrighted material that merely repackages or republishes the original is unlikely to be deemed a fair use.”<sup>49</sup> But this emphasis on transformative uses is shown to be misplaced once all fair uses are considered. None of the examples at the start of this section are transformative uses, and these types of uses greatly outnumber the types of transformative uses considered by the courts. Simply because transformative works are more likely to have a commercial angle and therefore be the subject of litigation does not mean that they make up the majority of fair uses. The lack of a transformative use has never stood in the way of a use being considered fair. This truth can be demonstrated not only through daily examples but is also supported by case law, such as where a digital copy was given to print-disabled users in HathiTrust, where a computer cached old websites, or where Google gave copies of digitized books to their owning libraries.<sup>50</sup>

**Format.** Copyright protects a work,<sup>51</sup> not a format. Even though copyright-adjacent laws, such as the Digital Millennium Copyright Act,<sup>52</sup> make additional protections available to some formats, those laws do not define what is copyrightable. Copyright applies only to “original works of authorship fixed in any tangible medium of expression.”<sup>53</sup> Format is nowhere in its definition, other than noting that “medium” includes mediums yet to be imagined. It is well known that merely changing a format neither extends a copyright's term nor changes what

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<sup>48</sup> Hachette, *supra* note 2 at \*6.

<sup>49</sup> Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 108 (2d Cir. 1998) (quoting Leval, *supra* note 35 at 1111).

<sup>50</sup> HathiTrust, *supra* note 21 (full-text to print-disabled); Field v. Google Inc., 412 F.Supp.2d 1106 (D. Nev., 2006) (caching); Google, *supra* note 18 at 228 (digital copies to libraries).

<sup>51</sup> In explaining that copyright protects only a work, Nimmer says “...a movie is copyrightable to the extent there is information on a film (or videotape), which presents sights and sounds when played on a projector (or television). A software program may contain copyrightable audiovisual information, which will be visible and audible when booted up into a computer. However, the projector, the television, and the computer are not themselves copyrightable; each is a machine, usable by all (unless subject to an applicable patent) for individual copyrightable works.”1 NIMMER ON COPYRIGHT § 2.09 (2023).

<sup>52</sup> Pub. L. 105-304, 112 Stat. 2860 (1998).

<sup>53</sup> 17 USC §102.

copyright protects (i.e., the work's content).<sup>54</sup> Therefore, the Court's focus on the digital format skewed the factor one analysis ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purpose"). In CDL, where one copy is purchased and one used, the purpose of the use is not to change the format; it is to lend a book it owns, or alternatively, to lend a digital copy of a book it owns in place of the original. The proper question then is, "Is a library's digitizing of a book that it has purchased (or otherwise legitimately acquired), and lending the digitized version in place of its original copy, a legitimate purpose?"

While the court could appropriately question the manner of use under the "character of use," it never undertook a serious analysis of the purpose separate from the character. To show why the approach is questionable, let's again look at the earlier common law fair use examples. The user who had converted their LPs to mp3s had created derivatives in digital format, a valid purpose. The format is completely irrelevant to the question of purpose (e.g., private listening), even if it might be relevant to the character of use.

Public access. The third distraction is public access. The *Hachette* court held that making the work publicly available made the use unfair, but again, looking at uses commonly seen as fair --- such as a local piano recital, reading a book aloud during a library's story hour, or spontaneous ballgame or concert tailgate sing-alongs --- availability to the public itself does not weigh against fair use.

Substitution. Moving to factor four ("the effect of the use upon the potential market for or value of the copyrighted work"), the first issue to which the court gave undue weight is the fact that in CDL, the digital copy substitutes for the original. Its analysis here is understandable, considering how many courts have said that substitution in the market is unfair,<sup>55</sup> but a practical test shows that substitution is often found in fair use. In the case of a user converting an LP3 to mp3, the mp3 also substitutes for the original, yet the use would still be considered fair. Why?

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<sup>54</sup> "Similarly, a given motion picture constitutes a work of authorship whereas its copies may take different forms, such as celluloid, videotape, Blu Ray discs, and the like. There is but a single work of authorship, no matter how numerous and diverse the copies." 1 NIMMER ON COPYRIGHT §2.03 (The Scope of Protectable Works under Statutory Copyright) (2023). See also 1 NIMMER ON COPYRIGHT §3.04 (Derivative or Collective Work) (2023). Note: many changes in format also incorporate changes or additions to content, such as an audiobook, which adds a narrator's voice. Any additional content can qualify for copyright protection by itself, could be protected as a derivative work, or could qualify for protection as a compilation. For example, an audiobook would qualify for protection as a derivative work and a sound recording, where the tone, timbre, cadence, etc. of the voice is protected separately from the words of the book. The protection of the book's original words remains unchanged; it is exactly the same with or without the existence of the audiobook version. An example of compilation protection can be found in an article that is selected for publication in a journal. The article has its own copyright, but the journal issue in which it is published is a compilation. The copyright for the article protects the article's words; the copyright for the compilation protects the selection and order of the articles included in the issue and not the words itself. See, generally, 1 NIMMER ON COPYRIGHT §3.04 and Chapter 2 (Subject Matter of Copyright) (2023).

<sup>55</sup> See, for example, Campbell, *supra* note 14.

One can imagine several justifications, but a rationale supported by *Sony* would be that it qualifies because the mp3 substitutes for the copy that the user had already purchased (i.e., that they had legitimate access to). Insofar as it reduces sales, it has no greater power to do so than the copy that the user had already purchased. No sales are lost because the user has already made their purchase, and the conversion is to facilitate reasonable use by the purchaser. In the case of CDL, the same argument can be made for the library. The purchase has already been made, and the digital copy only replaces the print copy. The conversion to digital form is made to facilitate reasonable use of the number of copies of the work purchased by the library.

Lost sales. The last data point that was given disproportionate weight was publisher's sales figures on library licenses, and its use to prove lost sales. Where a use is fair, market harm carries little to no weight. The examples at the start of this section illustrate the point, as do the cases where courts explicitly note that fair use can exist despite market harm (e.g., parodies).<sup>56</sup> A court cannot first determine that lost sales equal market harm, skipping over serious inquiry into whether the sales numbers are even relevant to the fourth factor. In CDL, where the books loaned by the library are owned by the library, the market harm is not caused by an additional copy. The library had already purchased the book, which makes the digital copy a replacement for the original; it adds no additional copy to the market. For the copy that it added (digital), it removed a copy (print); the total number of copies on the market are unchanged, even if the formats differ. The lost sales plaintiffs claim is the loss of resale of the same content to libraries that have already legitimately acquired the content. But the inability to resell content, or to maximize profit, is not a cognizable harm, as “[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors.”<sup>57</sup> Since copyright only protects a work, the “fair return” assured is for that writing, not for the format. Where the content is identical in multiple formats, the writer arguably receives their “fair return” from any given purchaser when their book is sold, irrespective of format, so long as only the same number of copies is used as was bought.

Just as the economic theory of copyright fails to explain 99% of the instances in which copyright attaches, the foundation on which each of the above *Hachette* conclusions rested is faulty, based on an analysis of fewer than 1% of all fair uses.

### **How the Court's Decision Threatens the Public and All Innovation**

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<sup>56</sup> See, for example, Campbell, *id.* at 591–92 (citing BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT 69 (1967): “We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because “parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically.”).

<sup>57</sup> Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 546, 105 S. Ct. 2218, 2223, 85 L. Ed. 2d 588 (1985).

So why does a case that appears to be narrow – focusing on activities that only libraries would engage in --- have potentially wide impact? Because it flips the purpose of the Copyright Clause on its head. Instead of recognizing the public purpose of copyright as being the justification for authors’ rights, it subjugates the public’s rights to the author’s by infringing on the public’s long-standing right to reasonably consume and use information that it legitimately acquires.<sup>58</sup>

To illustrate the danger of this reversal of copyright’s purpose, note that the *Hachette* court not only found the controlled lending of digital texts as infringing but also IA’s “read aloud” function, which allowed a user to automatically convert text to audio.<sup>59</sup> This is not the first effort to limit users’ access to technology that would help them to consume materials they have purchased. Amazon was threatened with litigation twice, one for automated text-to-speech and the other for speech-to-text.<sup>60</sup> *Sony* is another obvious example, where home viewers had every right to access the materials they were recording, but the studios tried to hinder their consumption of programming.

Where a copyright owner (or a publisher, which is even more alarming, as they are not one of the two parties that the Copyright Clause aims to protect) is allowed to interfere with reasonable use, the ability to innovate to help the end user is compromised. Technology becomes a tool that can only be used by the actors on one side of copyright’s balance, while the other is prohibited from doing the same. Worse, the side that is prohibited from acting is the one whose rights are the very basis of copyright.

Copyright was intended to facilitate access, consumption, and use of information, not to obstruct it. Yet, the *Hachette* case adds to the growing list of cases where publishers, out of fear that some uses of technology might harm current or future sales, try to prevent all uses by depriving everyone of access to specific technologies. In doing so, they are claiming the right to control end use, not just of copyrighted works but of any work, and the risk to the public lies in any court decision that validates these incursions into spaces previously immune to copyright owner interference.

### **How Missing Context Might be Raised in an Appeal**

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<sup>58</sup> A longer discussion of the public’s natural rights to use information can be found in Wu, *supra* note 42.

<sup>59</sup> *Hachette*, *supra* note 1 at \*5.

<sup>60</sup> Mike Masnick, *Amazon Gives In to Ridiculous Authors Guild Claim: Allows Authors to Block Text-To-Speech*, TECHDIRT (Feb. 27, 2009) <https://www.techdirt.com/2009/02/27/amazon-gives-in-to-ridiculous-authors-guild-claim-allows-authors-to-block-text-to-speech/> (text to speech); Nick Statt, *Major book publishers sue Amazon’s Audible over new speech-to-text feature* (Aug. 23, 2019), <https://www.theverge.com/2019/8/23/20830057/amazon-audible-speech-to-text-feature-lawsuit-major-book-publishers> (speech to text).

There are at least three ways that missing context could play a role in an appeal, whether in party or amicus briefs or in an appellate court decision:

By taking quotations of precedent out of context, the district court created a ruling broad enough to deny fair use defenses to many actions today viewed as fair use, such as fan creations, so long as the use directly or indirectly generates any amount of income. While most authors creating fan art, fiction, or video make no money, some do generate income by permitting ads to show on the same pages as their works.<sup>61</sup> Others may post their work freely on their own websites, but provide a “donate” button, allowing supporters to signal their appreciation for the artist through monetary contributions. In such cases, even if they make no income from their fan art itself (e.g., there are no donations or views of that art), the potential to make money exists, which the district court implied is sufficient to make a use commercial. After all, the opinion never said whether IA was paid for any views tied to the 127 works in question but still concluded that IA’s use of those works was commercial<sup>62</sup>. An appeals court could correct the use of prior cases, noting that the district court’s interpretation of precedent was faulty, and then through reestablishing context, instruct future courts on the intended meaning of each precedent.

By minimizing the context of the case in front of it, the district court was able to merge multiple distinct uses into a single use. For example, the automated reading of a book aloud is distinct from CDL, and both of these uses are distinct from the various ways to digitize and lend a book outside of CDL’s requirements. Those are just a few of the uses in this case, yet the analysis does not consider them separately, instead lumping them all under lending a book outside of CDL definitions. The body of fair use case law has already established that not every reproduction falls within the author’s §106 rights and that even when there is a recognized reproduction under §106, it may not be added to the market in a way that §107 counts (see *The Consequences of Separating Law from Context* section above). Each use in this case could yield substantially different conclusions on those key points. An appeals court may be asked to recognize the unique characteristics of each use and to remand the case to the district court to address every use independently.

In not seating the economic of theory of copyright within the full practice of copyright, the district court was able to focus almost exclusively on the monetary benefits and costs associated with the use of copyrighted works. An appeals court may recognize instead that copyright’s purpose was not to give authors the right to profit but rather to “promote the progress of science and useful arts”. When societal advancement is given greater weight than profit, any analysis prioritizing money over other principles necessarily changes.

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<sup>61</sup> See, for example, the YouTube Partner Program (<https://support.google.com/youtube/answer/94522?sjid=13686113306724872621-NA>)

<sup>62</sup> Hachette, *supra* note 2 at \*9.

## Conclusion

The *Hachette* case poses the same type of danger to copyright as *ReDigi* does. Both say that they are about one topic when they are factually about another. They are cited (or likely will be cited) in subsequent cases for that first topic, even though their own findings make clear that the facts before them failed to justify ruling on those matters. *ReDigi* claimed to be about first sale, but the seller owned no music (or any copy of it), so the foundation on which a first sale would be based was absent. *Hachette* is ostensibly about CDL, but the court found that the use in question did not meet the definition of CDL. When courts opine on issues that are not in the case in front of them, those words have no binding authority. But because the words themselves remain on the books, both cases leave a trail of damaging language in broad terms that can, when used out of context, stand in the way of fair uses and innovation.

Context matters, as the same words can convey very different meanings as the facts around them change. The context missing in the *Hachette* opinion obscures the central questions in CDL. All discussion looked only at how to fit a unique set of facts into existing case law, selecting quotations that in proper context would not have supported the Court's reasoning. Such an attempt to repurpose past cases to apply to a design that is one of first impression undercuts the equitable purpose of fair use, which requires a case-by-case analysis.

A library is an essential part of the copyright ecosystem, both paying authors for books used and extending access to its communities, including where members of the community cannot afford to pay independently for access. The library, as a purchaser of books, should be entitled to reasonably use the content it legitimately acquires.

If copyright is to maintain its original purpose of facilitating the consumption and use of information, courts will need to recognize the full context of copyright and not the limited insight that is gained through the very small percentage of cases that reach them.