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My Library: Copyright and the Role of Institutions in a Peer-to-Peer World

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MY LIBRARY: COPYRIGHT AND THE ROLE OF INSTITUTIONS IN A PEER-TO-PEER WORLD

Rebecca Tushnet*

Today's technology turns every computer—every hard drive—into a type of library. But the institutions traditionally known as libraries have been given special consideration under copyright law, even as commercial endeavors and filesharing programs have begun to emulate some of their functions. This Article explores how recent technological and legal trends are affecting public and school-affiliated libraries, which have special concerns that are not necessarily captured by an end-consumer-oriented analysis. Despite the promise that technology will empower individuals, we must recognize the crucial structural role of intermediaries that select and distribute copyrighted works. By exploring how traditional libraries are being affected by developments such as filesharing services, the iTunes Music Store, and Google's massive digitization project, this Article examines the implications of legal and technological changes that are mainly not directed at libraries, but are nonetheless vital to their continued existence.

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INTRODUCTION

Today's technology turns every computer—every hard drive—into a library. Every household can maintain and organize a stunningly large collection of media, from music to movies to texts. But if each hard drive is a kind of library, should we give the institutions traditionally known as libraries any special consideration in copyright as we historically have done? Can we distinguish the activities of institutional libraries (whether open to the public or attached to schools or universities) from those of individuals or of bookstores?¹ These questions are important not just in theory but in practice, as the Copyright Office prepares to make recommendations to Congress about potential revisions to the library-specific exemptions in the Copyright Act² in response to new concerns about the digital age.³ It has always been difficult for libraries to define themselves and their goals;⁴ the problem now is that easily available copying technologies and the legal changes that they have generated have made it difficult for the generally good image of libraries to justify actual library practices of lending, copying, and sometimes facilitating others' copying. This Article considers some legal and practical implications of the current shift in the resources, aims, and meanings of libraries.

Universities and libraries, as institutions concerned with the collection and dissemination of knowledge, have special concerns that are not necessarily captured by the individual-oriented analysis with which much copyright scholarship is concerned. For example, Lawrence Lessig divides an individual's potential actions with respect to an expressive work into publishing (or

1. There are similarities between the issues faced by institutions in the intellectual property field and the issues that institutions face in the free speech realm that have arisen with the disaggregation and the fragmentation of news reporting. Are the *New York Times* and an individual internet poster deserving of the same doctrinal treatment in defamation, trade secret, or other speech-related cases? If so, will everyone be entitled to the First Amendment protections given to traditional media, or will the law equalize downward by depriving everyone, including major news organizations, of privileges related to newsgathering? See, e.g., David McGowan, *Approximately Speech*, 89 MINN. L. REV. 1416, 1434 (2005).

2. 17 U.S.C. §§ 101–1332 (2000).

3. See Press Release, The Library of Congress, Section 108 Study Group Convenes to Discuss Exceptions to Copyright Law for Libraries and Archives (May 13, 2005), http://www.loc.gov/section108/release_051305.html.

4. See generally PATRICK WILLIAMS, *THE AMERICAN PUBLIC LIBRARY AND THE PROBLEM OF PURPOSE* (1988).

copying) and transforming.⁵ I have made a similar division in previous work.⁶ Technology allows individuals to publish and transform on a previously unknown scale, creating new legal challenges that deserve the sustained attention that other analyses have offered. This Article, however, is mainly concerned with a third type of activity: distribution to individuals that enables them to access a work, which includes what we might once have called reading or watching.⁷ Though technology can also enable direct individual access, nonmarket institutions such as libraries have a large and even growing role in providing individuals with access to copyrighted works.

The gap between institutional and individual interests begins with the fact that technologies—including books—are designed for some purposes and not for others; their very configurations determine who can use them and who cannot.⁸ This point is less obvious with respect to books than to DVDs, but it is still true of books. Consider, for example, the power relationships that are literally encoded in the presentation of the Bible in Latin versus its translations into the vernacular. Without translation, people literate only in the vernacular could look at the Bible but could not read it; reading and interpretation depended on the smaller group of Latin readers. Likewise, the wider access to Bibles enabled by the printing press and by wider literacy had enormous effects on religious experience and practice.⁹ If knowledge is power,

5. See Lawrence Lessig, *Free(ing) Culture for Remix*, 2004 UTAH L. REV. 961, 962–63.

6. See Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535 (2004).

7. As a member of the Library of Congress's Section 108 Study Group pointed out, pure archiving by libraries, which preserves works against some future catastrophe but does not try to give users access in the present, is much less troubling to copyright owners than providing access to users. See Teddy Davis, *Panel Seeks Balance on Copyright*, ROLL CALL, June 15, 2005, at 29, 30. Thus, though archiving and access are both often library goals, this Article will mainly consider access.

8. See, e.g., DANIEL J. COHEN & ROY ROSENZWEIG, *DIGITAL HISTORY: A GUIDE TO GATHERING, PRESERVING, AND PRESENTING THE PAST ON THE WEB* 113–14 (2006) (“[W]e take the book for granted, but it embodies literally centuries of thought about design and use. . . . Modern books have limited parameters, certain structures and conventions. . . .” (citation omitted)); Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 FORDHAM L. REV. 537, 540 (2005) (“[P]roducts are typically designed with certain uses in mind, and so imbued with characteristics that allow some uses and disallow others. In some cases, behavior is inadvertently channeled. . . . But frequently size, shape, material, or placement of artifacts is calculated to produce a particular result.”); Michael J. Madison, *Things and Law*, 56 CASE W. RES. L. REV. (forthcoming 2005), available at <http://ssrn.com/abstract=709121> (discussing uses of works enabled or disabled by technology).

9. See, e.g., LEONARD W. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 21–22 (1960) (quoting Governor Berkeley’s 1671 statement that “I thank God, there are no free schools nor *printing* . . . for *learning* has brought disobedience, and heresy, and sects into the world, and *printing* has divulged them. . . . God keep us from both!” (citation omitted)); Frederick Mark Gedicks & Roger Hendrix, *Religious Experience in the Age of Digital Reproduction*, 79 ST. JOHN’S L. REV. 127, 146 (2005) (arguing that printers

books are a technology of power. Similarly, when reproduction was difficult, visual art works were simply unavailable and unseen to people who could not afford to be in the same place as an original work. But this feature of visual art seemed so natural that it was not salient to policy-makers. Only when reproduction became technically possible did accessibility become a potential concern of law. New technologies also have made issues of access particularly salient to us, as institutions reconfigure in response to the promises and threats of ubiquitous digitization.¹⁰

Specifically, copyright law and practice have changed markedly in response to recent technological innovations in ways that force us to reexamine the role of public and nonprofit institutions in the copyright regime. Jessica Litman has set forth a compelling analysis of how copyright laws have historically been made in the United States by negotiations between existing industries that are aware of copyright's relevance to them; the resulting bargains have generally been adopted by Congress with little or no outside influence.¹¹ Litman points out that the only nonowner groups at the bargaining table usually have been universities and libraries, now joined by manufacturers of consumer electronics.¹² As a result, individuals' interests have been ignored, lost, or sacrificed, and much recent scholarship therefore emphasizes the need to take the individual consumer—the reader, the moviegoer, and the radio listener—into account in creating a workable copyright law.¹³

decisively undermined clerical control over the interpretation of scripture by making it directly accessible, without an authorized interpreter, to lay readers) (citing 1 ELIZABETH L. EISENSTEIN, *THE PRINTING PRESS AS AN AGENT OF CHANGE* 304–05 (1979)).

10. Cf. Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004) (discussing technology's effects on the salience of various characteristics of speech); Dan L. Burk, *Expression, Selection, Abstraction: Copyright's Golden Braid*, 55 SYRACUSE L. REV. 593, 594, 612 (2005) (discussing other copyright problems, always inherent in legal doctrine, made salient by technological change).

11. JESSICA LITMAN, *DIGITAL COPYRIGHT* 35–63 (2001).

12. *Id.* at 124. While universities and libraries often see themselves as representing the public interest, not every individual uses libraries, and these institutions are better at defending their own practices (noble as they may be) than at preserving users' rights generally. See, e.g., 17 U.S.C. § 108 (2000) (setting out exemptions for specified library services, but not immunizing individual patrons from liability for using those services).

13. See, e.g., Ann Bartow, *Electrifying Copyright Norms and Making Cyberspace More Like a Book*, 48 VILLANOVA L. REV. 13 (2003); Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996); Rochelle Cooper Dreyfuss, *TRIPS-Round II: Should Users Strike Back?*, 71 U. CHI. L. REV. 21 (2004); Raymond Shih Ray Ku, *Consumers and Creative Destruction: Fair Use Beyond Market Failure*, 18 BERKELEY TECH. L.J. 539 (2003); Lawrence Lessig, *The Creative Commons*, 65 MONT. L. REV. 1 (2004); Jessica Litman, *Consumers and the Global Copyright Bargain*, 2 INTELL. PROP. Q. 139 (1998); Joseph P. Liu, *Copyright Law's Theory of the Consumer*, 44 B.C. L. REV. 397 (2003); Molly Shaffer Van Houweling, *Distributive Values in Copyright*, 83 TEX. L. REV. 1535 (2005).

In bringing consumers' interests into the analysis, we should not forget that intermediate institutions like schools and libraries are major markets for copyright owners and, therefore, major sources of copyrighted works for many consumers. Unlike peer-to-peer systems such as Grokster¹⁴ and search engines, which aspire to provide access to whatever other people make available,¹⁵ libraries and schools generally have opinions about what a good source is and what patrons should be reading, even when they also enable access. At the same time, these intermediaries often serve to mitigate the strict wealth discrimination imposed by the direct market for copyrighted works, allowing people to read and to watch far more copyrighted works than they could pay for themselves.

Intermediate institutions have much to teach us about how to make copyright law effective and just.¹⁶ Laws and policies designed only for owners and consumers disserve intermediate institutions¹⁷—as the following sections will show—and ultimately harm consumers as well, given that individuals generally lack the organization and resources to fend for

14. See *MGM Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764, 2770–71 (2005) (describing Grokster's filesharing operations).

15. Search engines generally rank results by relevance (or occasionally by payment for placement), but this is done without the exercise of human judgment for any given search, and the results will generally not exclude matching pages.

16. Cf. JoAnne Yates, *How Firms Use Technology*, Presidential Address Before the 2005 Business History Conference, at 2 (May 19–21, 2005) (transcript on file with author) (emphasizing that historians of technology should consider institutions, not just individuals, as users of technology). Yochai Benkler has begun to explore the intermediary institutions that organize, monitor, and distribute collaborative creative endeavors such as "open source software," whose creators do not make conventional exclusive ownership claims. See Yochai Benkler, *Coase's Penguin, or, Linux and the Nature of the Firm*, 112 YALE L.J. 369 (2002). My aim here is to examine the current situation of intermediary institutions that deal mainly in works that are not freely offered to them.

17. Matthew Sag, for example, suggests "consumer autonomy" as a guiding principle (along with the more standard concepts of transformativeness, idea/expression, and medium neutrality) for limiting copyright rights. See Matthew Sag, *God in the Machine: A New Structural Analysis of Copyright's Fair Use Doctrine*, 11 MICH. TELECOMM. & TECH. L. REV. 381, 428–32 (2005). But libraries and universities apparently cannot qualify as consumers even when they purchase their copies. Sag distinguishes "consumers acting as consumers" by making personal uses (which would be protected) from "consumers acting as potential rivals of the copyright owner" by distributing works (which would not be protected), necessarily excluding intermediate institutions from the class protected by his principle. *Id.* at 431 (emphasis omitted). Similarly, William Fisher offers, as a way to moderate copyright law and to protect ordinary consumers, an approach that would ban price discrimination for identical products. However, he does not address the issues that a library copy may see much heavier use than an individual copy and that a library copy is usually sold to the library at a higher price. See WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 192 (2004). Fisher's favored proposal, to replace exclusive rights with taxes, might involve taxing storage devices and internet access, but he does not state whether libraries (whose internet access is currently heavily subsidized) would pay such taxes, and his only mention of schools accompanies his suggestion that universities might participate in voluntary entertainment cooperatives. See *id.* at 252–53.

themselves against well-organized content owners. Just as standard democratic theory suggests that voluntary associations like social clubs, political parties, and bowling teams are important sources of private ordering to cushion individuals from the overwhelming power of the state, the university and the library are buffers against total control of the flow of information by large-scale content owners.

In the past, the potential contradiction between the idea that libraries provide quality information and the idea that they are repositories of the sum of human knowledge was avoided by technical constraints in both collection and dissemination that are now less pressing, given the lower costs of digital storage and distribution. Relatedly, the expanding capacity of a single authorized copy to satisfy multiple users, mostly in nonlibrary contexts, has increased pressure on traditional library activities—from basic lending to interlibrary loan—that copyright owners see as quite similar to filesharing. Libraries have long claimed protection for some activities under the rubric of fair use. Thus, Part I explores the differences between traditional libraries, which are venerated in standard political and academic rhetoric, and filesharing services, which are far more often condemned. Surprisingly, despite the moral valence of the library, current fair use doctrine has very few tools for distinguishing the good public library from the evil Grokster, and libraries' digital initiatives are only making the distinctions harder to make.

In response to the current legal environment, publishers have claimed rights to be paid for standard library services like interlibrary loan and course reserves. They have also implemented digital rights management (DRM) technologies, which impose technical barriers to copying or sharing digital works, in ways that conflict with archival, educational, and other institutional missions. Part II therefore turns to DRM, using the example of libraries that subscribe to the iTunes Music Store¹⁸ to explore the consequences—intended and accidental—of using technology to control access and copying. As courts struggle to distinguish between access and copying as a way to preserve some consumer rights, the technology makes such distinctions nearly impossible, especially when institutions are the relevant consumers.

Moving away from doctrine to more basic questions about what we should value in libraries, two features of the information economy are particularly important: first, the rapidly increasing storage capacity of

18. The iTunes Music Store sells downloadable music (as well as audiobooks, music videos, and television shows) protected by technology that limits how many times each file can be copied.

ordinary consumer devices, and second, new ways of quickly and cheaply cataloging, finding, and sorting information. These developments pose fundamental challenges to the idea that there is something special about libraries and librarianship. For example, Google's algorithms call into question the definition of a good research strategy. Google's programming has standards for quality sources—the number and credibility of inbound links, in particular—that differ from human judgments. Google's standards are not necessarily worse or better, but they are different, and library patrons accustomed to Google may expect similar apparent comprehensiveness from their librarians. But is a real library something more than an automated trawl of webpages, something that should receive specific legal protection from expansive copyright claims? Part III therefore explores Google's plans to digitize the contents of several major libraries, and how the law complicates the dream of a universal library.

This Article's aim is to encourage thought about how the law can enable universities and libraries to continue their roles as repositories of nonmarket-based access to information and creative works. Commitment to the library as an intermediary between individuals and copyright owners is needed to defend our libraries as something more than the aggregate of my library and yours. There are no perfect solutions, and this Article does not offer a manifesto for specific changes; compromise with copyright owners and some freedom for experimentation are probably the best we can hope for.

I. PUBLIC LIBRARY

Libraries, as institutions dedicated to providing patrons with edifying and entertaining material, are often thought of as beneficiaries (and staunch supporters) of copyright's fair use doctrine. Fair use, in certain situations, allows unauthorized copying that would otherwise infringe. This can be seen as serving numerous goals: Efficiency, distributional justice, and freedom of speech are popular ones. The doctrine is potentially expansive and lacking any categorical exclusion. Commercial copying, copying an entire work, copying of highly expressive works, and anything else can in appropriate circumstances be fair use. But that very expansiveness makes it unreliable. Sometimes, maybe most of the time, commercial copying, copying an entire work, and copying of highly expressive works will *not* be fair use.¹⁹

19. The four-factor test for fair use set out in § 107 of the Copyright Act requires an assessment of (1) the purpose of the use, including whether it is commercial or noncommercial

Overall, as this part will explain, statutory fair use is becoming less useful to libraries and universities. At the same time, the existing statutory exceptions for libraries and universities (which define certain activities that do not infringe copyright regardless of fair use) have not taken up the slack. Current practices are in flux as various institutions experiment with technology and, often, run up against legal barriers that complicate their attempts to serve their patrons. This part looks at the mainly unintended effects of recent copyright doctrine—developed largely in response to filesharing services—on the formal legal position of library and university activities.

A. New Options Undermine Established Practices

Changes in copyright law, technology, and culture have combined to alter the ways in which libraries and their patrons acquire and use information. This means disruption and uncertainty, both for new practices as well as for well-established patterns.²⁰

An analogy from the history of Fourth Amendment law may prove instructive. When technological changes enabled new methods of communication, they also enabled new methods of government surveillance: Inventors quickly followed the telephone with the wiretap. Law struggled to respond, trying to apply the Fourth Amendment's prohibition on unreasonable searches and seizures²¹ to a context that its drafters never anticipated. From one perspective, a wiretap did not infringe on any individual rights, because the ability to have a conversation with someone who was not physically in the same location (that is, via telephone) was not previously part of a citizen's rights. From another, ultimately more persuasive perspective, however, a wiretap allowed the government to listen in on an ordinary conversation between people who considered themselves to be talking in private, given that the telephone changed how private conversations were conducted.²² Whereas physical presence and private conversation were always

and whether it transforms the original with new meaning or content, as a critical review or parody does; (2) the nature of the copied work (published/unpublished, factual/fictional, with greater protection against copying given to the latter in each pair); (3) the amount copied; and (4) the effect of the use on the market for the copyright owner's works. 17 U.S.C. § 107 (2000). As these vague and incommensurable considerations suggest, fair use under the statute is notoriously uncertain. See, e.g., Joseph P. Liu, *Regulatory Copyright*, 83 N.C. L. REV. 87, 133 (2004).

20. This section looks at how legal doctrine has made fair use less hospitable to libraries. A separate issue, taken up in Part II, is how licensing has replaced copyright law, including fair use, in determining what libraries can and cannot do.

21. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. CONST. amend. IV.

22. See *Katz v. United States*, 389 U.S. 347 (1967).

coterminous before, they could now be separated. Courts had to decide which element was crucial in determining whether a warrant would be required for a wiretap.²³

Analogously, changes in technology and social practices that enable previously unimaginable levels of private copying require us to rethink old principles. Private copying used to be just that—private, unobjectionable, and nobody else’s business. But the scale of computer and network-assisted private copying is so much greater, far greater than the threat of photocopying, that it may make a difference in kind, as far as the health of the copyright industries is concerned.

One major risk in periods of change is that our justifications for drawing the line between prohibited and permitted new activities may then be applied to older, previously uncontested situations, throwing their legality into doubt.²⁴ In the Fourth Amendment context, abandoning a focus on the physical integrity of the home in order to protect reasonable expectations of privacy ultimately led courts to discount the value of physical integrity, and thus to deny Fourth Amendment protection, in cases in which they found that there was no reasonable expectation of privacy.²⁵

23. See, e.g., Sherry F. Colb, *A World Without Privacy: Why Property Does Not Define the Limits of the Right Against Unreasonable Searches and Seizures*, 102 MICH. L. REV. 889, 894 (2004) (“[N]ew technology unmoors privacy from property. Now threats to privacy can arise without in any way implicating rights to private property.”); Sonia K. Katyal, *The New Surveillance*, 54 CASE W. RES. L. REV. 297, 305–06 (2003).

24. See Frederick Schauer, *Commercial Speech and the Architecture of the First Amendment*, 56 U. CIN. L. REV. 1181, 1194 (1988). Schauer explains:

Whenever some preexisting rule is to have a new application added to its coverage, the question arises, or ought to arise, about the effect of the new application on the old rule. More particularly, any new application potentially affects the strength of the preexisting rule, even and perhaps especially with respect to that rule’s earlier applications. . . . Suppose, for example, that there is a rule allowing any person convicted for the first time of a misdemeanor to be paroled, as a matter of right, after six months imprisonment. And then suppose the rule is extended to cover felonies as well as misdemeanors. Faced now with the possibility that first time murderers, arsonists, rapists, and kidnappers will be paroled after six months, the rule is much more likely to be repealed, with a loss of the presumably desirable policy adopted by the original unamended rule.

Id. (footnote omitted).

25. The observation that the “reasonable expectation of privacy” standard has often proved more useful to the government than to individuals, despite its origins as an expansion of Fourth Amendment protections, is commonplace in the literature. The specific point that I wish to make here is that the older, property/trespass-based standard would have barred some searches that the privacy standard allows, even though that older standard had significant limitations of its own. See, e.g., Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 314–16, 318–20, 331–33 (1998); Peter P. Swire, *Katz Is Dead. Long Live Katz*, 102 MICH. L. REV. 904, 907 (2004) (arguing that Justice Brennan’s intent in shifting from property to privacy as the foundation of Fourth Amendment protection was to create “a doctrine that would apply both in settings where

Just as technological change altered search and seizure law in ways that affected longstanding practices, technology-driven copyright reforms destabilize historically accepted uses of works. With millions of people trading music and movies in the privacy of their homes with no expectation of profit, neither the individualized, private nature of particular instances of copying nor the lack of money changing hands may suffice to insulate a copier from liability. The No Electronic Theft Act²⁶ was enacted precisely to remove the prior requirement of profit-seeking from the definition of criminal copyright infringement. In the digital age, the distinction between capitalist pirates and anticapitalist pirates no longer seemed adequate to sort the most harmful infringers from the general herd. Libraries' activities, while traditionally free to patrons and small-scale as to individual patrons and works, have long been large in the aggregate.²⁷ As profit has become less important to finding infringement, the aggregate scale of library activities has become more salient, and libraries—never copyright owners' favorite entities—are getting harder to distinguish from pirates when using conventional legal categories such as nonprofit uses.

It is an article of faith among most copyright scholars that libraries are not *Grokster*, but why that is true is not self-evident—especially when libraries collect and distribute popular materials.²⁸ The same normative conception of libraries may account for publishers' historical reluctance to sue such venerated institutions. Publishers are, however, perfectly willing to tell libraries that the law requires permission for any digital uses as a negotiating stance. Moreover, they are increasingly willing to sue universities, perhaps because universities have deeper pockets than public libraries.

Exploring the behavior of the beneficent library compared with the piratical peer-to-peer service can explain why libraries' formal legal protections are diminishing even as their moral stature largely remains undiminished. The first potential distinction is that libraries pay for their

government powers would expand . . . and would recede"); see also Katyal, *supra* note 23, at 346–50 (discussing a case in which a court found no reasonable expectation of privacy in files on a home computer when the computer had been connected to a filesharing program, despite the constitutional history of protecting conduct in the home).

26. See No Electronic Theft (NET) Act, Pub. L. No. 105-147, 11 Stat. 2678 (1997) (codified as amended in scattered sections of 17, 18, and 28 U.S.C.).

27. See, e.g., *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (upholding copying of entire articles by library for research purposes as fair use despite large-scale copying in the aggregate), *aff'd by an equally divided court*, 420 U.S. 376 (1975).

28. Most library partisans—librarians and scholars—seem to operate on some idea of “good guys” and “bad guys,” similar to that of the Supreme Court in *MGM Studios, Inc. v. Grokster Ltd.*, 125 S. Ct. 2764 (2005). This is a powerful heuristic, but it is vulnerable to detailed examination of what actual libraries do in practice. See *infra* text accompanying notes 29–49.

copies (at least the first time)—yet the same thing is true for almost every file on Grokster, because people paid for copies of CDs and DVDs that they then shared. We also imagine that libraries impose restraints on copying (and on membership, either geographically or based on enrollment in an academic institution), and that this makes libraries better citizens than filesharing services. But this is not entirely true. Interlibrary loan often produces permanent copies of articles; lending out CDs (or even books, now that scanners are common), can be expected to allow borrower copying; libraries can deliver digitized works across the country, especially if they participate in library consortia;²⁹ and the lending of digital works creates temporary copies that may implicate the reproduction right.³⁰ Moreover, making a permanent copy is not the only way to infringe copyright: Public performance or display can also infringe.

There are two clear distinctions between the prototypical library and the music lover who opens her library of mp3 files to the world. First, the standard library loan imposes a time limit on a patron's possession of an item. Second, the library loses physical control over its copy while it is lent out, while the filesharer gives copies away permanently and without losing her own file. But, as just noted, many traditional library activities, such as helping patrons find books and articles that they may then copy for research or other personal use, lead to the creation of new permanent copies, just like filesharing.³¹ To see

29. See, e.g., Katie Hafner, *In Challenge to Google, Yahoo Will Scan Books*, N.Y. TIMES, Oct. 3, 2005, at C1 (discussing libraries' and archives' collaborations and the potential for aggregating individual digital library holdings into comprehensive collections); John Ober, *The California Digital Library*, D-LIB MAG., Mar. 1999, <http://www.dlib.org/dlib/march99/03ober.html> (discussing an initiative that pools the resources of many of California's libraries).

30. See *MAI Sys. Corp. v. Peak Computer*, 911 F.2d 511 (9th Cir. 1993) (holding that copies necessarily made by loading a computer program into temporary memory violated the reproduction right).

31. See Fara Tabatabai, Note, *A Tale of Two Countries: Canada's Response to the Peer-to-Peer Crisis and What It Means for the United States*, 73 FORDHAM L. REV. 2321, 2376 (2004). Tabatabai notes:

Both library photocopiers and [peer-to-peer] networks are available for unregulated public use. Both traffic in creative works, some in the public domain and some still under copyright. Moreover, both lawfully obtain the original copies of the works that they make available to the public: the library purchases books or has them donated, just as it is generally the first user on a [peer-to-peer] network to have purchased a song who then uploads that song for the benefit of other users.

When an individual user uploads files onto a [peer-to-peer] network, that user is effectively uploading her own private library of works. Simply making this library available to others, alongside copying technology, is not significantly different from making public library works available alongside public use photocopiers.

Id. (footnote omitted). Tabatabai's argument is that peer-to-peer services should be considered noninfringing, but the equation of the two types of libraries is more likely to harm the traditional library than to help make peer-to-peer safe from legal attack in the United States. *But see* *BMG Canada, Inc. v. Doe*, [2004] 239 D.L.R. (4th) 726, 739 (Can.) (analogizing peer-to-peer to library practices in order to hold peer-to-peer noninfringing in Canada).

how standard library practice results in permanent user-owned copies, consider the Canadian Supreme Court's recent description of library photocopy services, which sounds very much like a description of requesting and receiving a particular file through a peer-to-peer filesharing service:

The Great Library provides a request-based photocopy service for Law Society members, the judiciary and other authorized researchers. Under this "custom photocopy service", legal materials are reproduced by Great Library staff and delivered in person, by mail or by facsimile transmission to requesters.³²

Interlibrary loan, likewise, is often no more loaning than filesharing is sharing. When one participant on a library-oriented mailing list noted that many audiobooks were available on Napster, another person responded, "It's called 'Inter-Library Loan.'"³³ The point was that, given current practices, the patron routinely ends up with her own copy of an article, just like someone downloading from a peer-to-peer service.³⁴ Unsurprisingly, copyright owners are increasingly insisting that they have a right to control traditional interlibrary loan as well as any digital versions.³⁵

Sufficiently prolific lending can also substitute for permanent copying of all kinds, as many professors with books checked out from the library for months or even years can attest. One librarian proposed putting the nation's library collections into a single database, with enhanced content (pictures of book jackets, reviews, recommendations, etc.) just like Amazon.com's; instead of a price, patrons would see how long they would have to wait to receive any particular item. If wait times were short, this superlibrary would be a near-perfect substitute for Amazon itself in many situations.³⁶ Even a short-term loan can substitute for a permanent copy if

32. *CCH Canadian Ltd. v. Law Soc'y of Upper Can.*, 2004 S.C.C. 13, 29320, [2004] S.C.J. No. 12, at 2 (Mar. 4, 2004) (Can.). The court held that the library's practices in this respect constituted fair dealing, not copyright infringement, under Canadian standards. *Id.* at 2-6. Interestingly, a later case relied on other portions of the court's reasoning to hold that uploading files through peer-to-peer services was also noninfringing. See *BMG Canada*, [2004] 239 D.L.R. (4th) at 738-39.

33. Posting of Eric Hellman to Web4lib, <http://lists.webjunction.org/wjlists/web4lib/2000-June/032018.html> (June 23, 2000, 09:22 EDT).

34. See Laura N. Gasaway, *Values Conflict in the Digital Environment: Librarians Versus Copyright Holders*, 24 COLUM.-VLA J.L. & ARTS 115, 146 (2000).

35. See, e.g., Copyright Clearance Center, *Overview of Academic Services*, <http://www.copyright.com/cc/do/viewPage?pageCode=ac2-n> (last visited June 21, 2005) ("[t]o share and use printed content, including the use of library reserves, interlibrary loan and document delivery services," institutions should use the Copyright Clearance Center's (CCC) Transactional Reporting Service). The CCC here is attempting to license regular print interlibrary loan and reserves. It offers separate licenses for electronic copies. *Id.*

36. See Steve Coffman, *Building Earth's Largest Library: Driving Towards the Future*, D-LIB MAG., May 1999, <http://www.dlib.org/dlib/may99/05clips.html#COFFMAN>.

the patron only wants to read (or watch) a work once. For works that people do not place a high value on owning, library lending, made more efficient by new technologies like electronic cataloging, poses a greater threat to copyright owners' revenues. Relatedly, the traditional time-consuming and inefficient process of acquiring a copy at the library—visit the building, find the book on the shelf, go to the photocopier—limited the attractiveness of the library as a substitute for a purchased copy. Electronic delivery and other efficiency improvements have ameliorated those annoyances.

Digital copies offer even more possibilities for absorbing demand. If a patron's electronic copy had a time limit on access, but the patron could easily renew or download a new copy every time that the old one expired, then the copy would be permanent for all relevant purposes. After all, most people do not listen to all of their music or read all of their books every day (or even more than once); the physical presence of the book or CD is just a reminder that the work is available. Copies made using filesharing services are often impermanent, as people download songs to listen to once or movies to substitute for a one-time rental.³⁷ An easily-renewable copy or a short-term copy can be a perfect economic substitute for a permanent copy, and can therefore harm the copyright owner's market just as much as a standard physical copy.

We may not recognize the clear similarities between the library and a peer-to-peer file sharing service because we may be implicitly operating with an image of the library as the place of last resort, a low-demand repository of works with limited marketplace value in the first place. The library thus solves a collective action problem by aggregating otherwise insufficient demand. Many people will use an encyclopedia occasionally or read a biography once, placing some value on such works even though they are not willing to pay the publisher's price. The library will be willing to pay because the total value received by all readers is equal to or greater than the publisher's price.

This image is more consistent with the university library than the community library, the latter of which generally has the latest *Harry Potter* along with CDs and DVDs. Popular works at libraries have been controlled by rationing—people get them from the library only if they are willing to wait for one of a few library copies. If the time lag drops because libraries become more efficient, as the iPod Shuffle discussed in Part II might allow, libraries will look even more like filesharing services (which impose their own time and quality rationing). Even looking only at university libraries, for

37. See, e.g., Ann Bartow, *Arresting Technology: An Essay*, 1 BUFFALO INTELL. PROP. L.J. 95, 117 (2001).

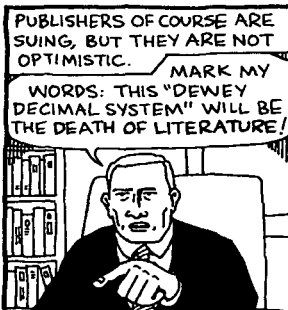
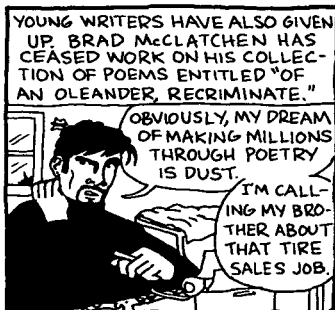
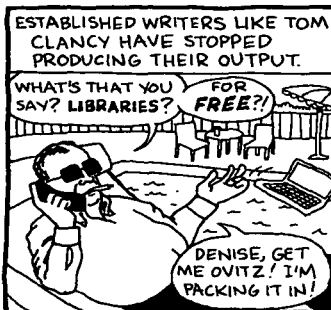
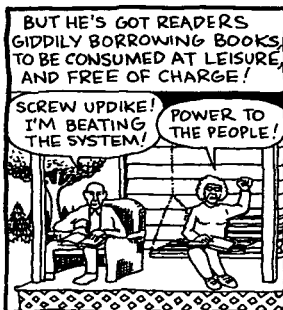
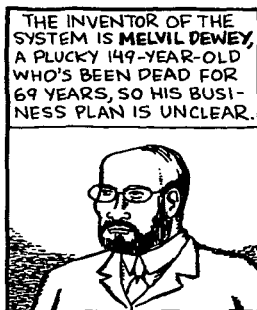
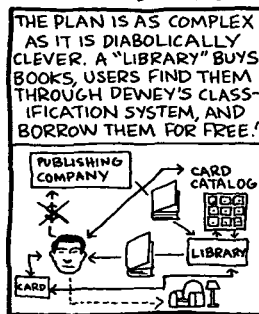
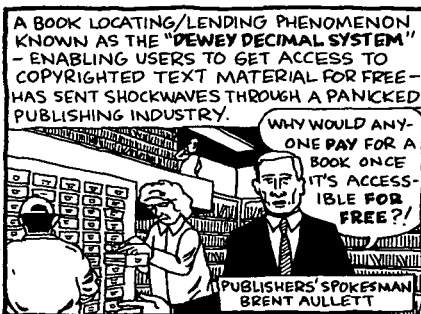
academic publishers, low demand is the market, and a library that lends out a textbook—or worse, puts it on electronic reserve—threatens that core market if one copy can satisfy numerous students.³⁸

Consider the following excerpt from a *Tom the Dancing Bug* cartoon, which does not need to use the name “Napster” to make its point:³⁹

TOM the DANCING BUG
PRESENTS:



Library System Terrorizes Publishing Industry



TOM THE DANCING BUG © 2000 Ruben Bolling. Reprinted with permission of UNIVERSAL PRESS SYNDICATE. All rights reserved.

38. See Dale Buss, *Sometimes, It's Not the Tuition. It's the Textbooks*, N.Y. TIMES, Sept. 4, 2005, § 3, at 8.

39. Ruben Bolling, *Tom the Dancing Bug*, SALON, Aug. 24, 2000, <http://archive.salon.com/comics/boll/2000/08/24/boll/>.

That libraries and filesharing services are not so far apart in practice is further illustrated by the details of recent litigation: The question of whether simply making a copy of a work available to members of the public violates a right of the copyright owner, regardless of whether any person actually borrows or copies the work, has been litigated against libraries and filesharing services alike.⁴⁰

The kind of analysis required to find Napster liable for contributory copyright infringement may also make libraries more vulnerable—if not to actual lawsuits, then to plausible claims by copyright owners that induce libraries to pay for all copies or to refrain from offering new services to patrons. Specifically, the district court in *A & M Records, Inc. v. Napster, Inc.*,⁴¹ building on other recent cases, held that Napster downloaders were making “commercial” use of freely traded music files because they got for free something which they would ordinarily have had to pay for⁴²—much like a library patron who checks out a book or prints out a copy of a year-old article from the *New York Times* on microfiche. The *Napster* court also ruled that the uploader of a file was not engaged in a “personal” use even if the downloader was, a conclusion that the court of appeals found not clearly erroneous.⁴⁴ Similarly, a library that is sued for allowing patrons to make personal copies might not be able to claim the benefit of patrons’ noncommercial and small-scale status as part of a fair use defense.⁴⁵

40. See *In re Napster, Inc. Copyright Litig.*, 377 F. Supp. 2d 796, 802–04 (N.D. Cal. 2005) (discussing *Hotaling v. Church of Jesus Christ of Latter-Day Saints*, 118 F.3d 199 (4th Cir. 1997) (holding that church libraries had infringed the distribution right by adding unauthorized copies of a work to their collections, listing them in their catalogs, and making them available to the public even absent any evidence that any patron ever actually used any copy)).

41. 114 F. Supp. 2d 896 (N.D. Cal. 2000), *aff’d in relevant part*, 239 F.3d 1004, 1015 (9th Cir. 2001).

42. *Id.* at 912. The *Napster* court also used its finding of commercial use to presume harm to the copyright owner’s legitimate market. See *Napster*, 239 F.3d at 1015. Although the Supreme Court rejected such a presumption in its most recent fair use case, *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584–85 (1994), the Ninth Circuit applied it nonetheless, as did the Sixth Circuit in *Princeton University Press v. Michigan Document Services*, 99 F.3d 1381 (6th Cir. 1996). Both courts implicitly relied on *Campbell*’s statement that a presumption of market harm was inappropriate in a case of transformative use, see *infra* Part I.B., which involved “something beyond mere duplication for commercial purposes,” *Campbell*, 510 U.S. at 591. Many library-based activities, however, will involve “mere duplication,” so libraries may reasonably fear that their activities will be presumed to cause market harm in the same way as Napster users’ activities.

44. See *A & M Records*, 114 F. Supp. 2d at 912, *aff’d in relevant part*, 239 F.3d at 1015.

45. 17 U.S.C. § 108(f)(1) (2000) states that “[n]othing in this section shall be construed to impose liability . . . for the unsupervised use of reproducing equipment located on [library] premises” if the equipment displays proper notice that works may be subject to copyright. The scope of the provision is unclear—by its terms, it merely says that the library exemptions in § 108 do not themselves make libraries liable for other kinds of copying. Interestingly, though libraries

Such a result would be consistent with the cases of copy shops that were successfully sued for making course packets for college students.⁴⁶

Copyright owners, meanwhile, have redefined their expected markets so that the “effect on the market” factor of the fair use test favors them in almost every situation. Simple reproduction, even as part of assisting research, is less likely to be seen as fair use these days because copyright owners can assert that they have licensing mechanisms in place for such reproduction. With easy licensing, copiers look more like freeloaders, and the dispute seems to be between two private parties about how resources will be allocated between the two of them, rather than about freedom.

Consumer Reports, for example, has easily searchable online archives,⁴⁷ and will deliver a copy of any article to anyone willing to pay. Thus, a library that does not pay when it makes a copy for a user is costing the copyright owner money. Section 108 of the Copyright Act provides some shelter for nonsystematic library copying for patrons,⁴⁸ but that exception is tightly limited;⁴⁹ when § 108 is not available, fair use is unlikely to provide a backstop. Moreover, the same arguments that have persuaded courts to condemn ordinary copying under a fair use analysis make § 108 vulnerable politically when copyright owners complain that the heavy hand of government is preventing them from exploiting a legitimate market.

To be clear, my claim is not that library fair use is dead. Many libraries, particularly at major research institutions, remain committed to the concept of fair use. At a bare minimum, they can use fair use as a bargaining chip with publishers who are seeking ever-increasing controls. Campus libraries are, for example, using fair use to justify maintaining electronic reserves (e-reserves) even without publishers’ consent, and to insist on contracts that allow electronic materials to be put on e-reserve.⁵⁰ More generally, the unpromising language of recent judicial opinions does not mean that libraries should or will abandon the mission of preserving and disseminating our textual heritage. Very few copyright owners are

routinely display an appropriate notice by photocopiers, very few post a similar notice by computers, which might lead to problems even under § 108.

46. See, e.g., *Princeton Univ. Press*, 99 F.3d 1381.

47. <http://www.consumerreports.org>.

48. See 17 U.S.C. § 108(d)–(e) (dealing with copies made at the request of patrons).

49. See Laura N. Gasaway, *America’s Cultural Record: A Thing of the Past?*, 40 HOUST. L. REV. 643 (2003) (discussing the complexities and uncertainties of § 108 that limit its usefulness).

50. See ASS’N OF COLL. RESEARCH LIBRARIES, AM. LIBRARY ASS’N, STATEMENT ON FAIR USE AND ELECTRONIC RESERVES (2003), <http://www.ala.org/ala/acrl/acrlpubs/whitepapers/statementfair.htm> (setting forth principles to govern library use of electronic reserves, which are digital copies of works that students may read by logging on to a library website).

willing to sue such venerated institutions, and courts might well reason differently if confronted with a nonprofit library claiming fair use.

Still, library positions on fair use are often more hortatory than specific, perhaps as a way of minimizing copyright owners' protests,⁵¹ as well as in recognition of the case-by-case nature of fair use determinations. This means that it can be difficult to determine what actual fair use practices are, which limits the development of norms that can be generally relied upon. Some libraries are bold; others are not (or are barred by university counsel from being bold).⁵² Even significant assertions of fair use may be self-limited, such as an e-reserves policy that allows professors to post supplemental, but not required material, under a claim of fair use.⁵³ Unlike copyright owners, libraries are unlikely to stretch the limits of the rights that copyright law grants them. Bargaining in the shadow of the law, libraries will often end up with a foreshortened version of fair use.

B. The Role of Transformative Fair Use in Constraining Libraries

If private, free-to-the-user copying is not necessarily fair, then what is fair use today? As courts have become more concerned with technologies that allow rapid, nearly costless distribution of exact copies, they have also become more concerned with attempts by copyright owners to suppress new works that alter, criticize, or comment on existing copyrighted works. While it has become harder to establish a fair use merely because it is personal, private, or small-scale—because nothing in the digital age reliably stays personal, private, or small-scale—it has become easier to defend a

51. When the Association of American Publishers (AAP) actually obtained a list of materials on electronic reserve at the University of California at San Diego, for example, it threatened legal action. Therefore, universities understandably might decide not to shout about their aggressive e-reserve policies from the rooftops. See Marty Graham, *Sides Clash Over Online Library*, NAT'L L.J., Apr. 25, 2005, at 4, available at <http://www.law.com/jsp/article.jsp?id=1114679112558> (last visited Jan. 23, 2006).

52. See, e.g., MARTHA L. BROGAN, A KALEIDOSCOPE OF DIGITAL AMERICAN LITERATURE 27 (2005) ("Special collections librarians report that many libraries refuse to make a single copy for authors without proof—in writing—that the owner, agent, or estate executor of the literary property has granted permission."); DENISE TROLL COVEY, ACQUIRING COPYRIGHT PERMISSION TO DIGITIZE AND PROVIDE OPEN ACCESS TO BOOKS 58 (2005) (stating that Carnegie Mellon's legal counsel refused to allow the library to digitize out-of-print works without permission, even if a diligent search for the copyright owner failed).

53. See, e.g., Duke University Medical Center Library, Conference on Fair Use: Guidelines for Electronic Reserve Systems, <http://www.mclibrary.duke.edu/find/ereserves/copyright/confu.html> (last visited Jan. 23, 2006) (adopting the Conference on Fair Use Guidelines, which substantially limit the scope, centrality to courses, and duration of materials that can be put on electronic reserve under a claim of fair use, even though the Guidelines were never approved by the Conference).

use that is “transformative”—one that takes portions of a copyrighted work and changes it in some way, through parody or commentary.⁵⁴

Protecting transformative uses that the copyright owner is likely to oppose on ideological grounds is a good idea. The trouble is that, in protecting transformation and emphasizing the reasons that transformation should be outside of copyright owners’ control, courts and commentators are tempted to divide copiers into two kinds—the good critic and the bad pirate. The first makes copies that are transformative and critical, adding new material and usually not reproducing all of the original. The second merely reproduces, and therefore is unlikely to qualify for the fair use defense.⁵⁵

This bias against reproduction is occurring despite the historic status of pure copying at the core of fair use, which is reflected in the portion of the preamble of § 107 of the Copyright Act that mentions “multiple copies for classroom use.”⁵⁶ (Tellingly, an important recent decision omitted those words when quoting the preamble in its discussion of how fair use is valuable because it furthers free speech interests.)⁵⁷ It is also in some tension with the *Betamax* case, which held that private home time-shifting of broadcast programs was a fair use⁵⁸—but that case is under sustained attack from many fronts today.

Current copyright doctrine invites the conclusion that, though the copyright owner cannot control many transformative uses, it will usually be allowed total control over mere reproduction. Reproduction lacks the relevant features of transformative use. Copyright owners are likely to license pure reproduction, so they are not suppressing critical commentary or otherwise acting as censors when they demand payment. Moreover, pure reproduction does not directly add new works to the world, so control does not hamper creativity.

54. See Tushnet, *supra* note 6, at 550–52.

55. See, e.g., *Am. Geophysical Union v. Texaco*, 60 F.3d 913, 923 (2d Cir. 1995) (stating that transformative use is “central” to a fair use defense); Tushnet, *supra* note 6, at 555–60; Diane Leenheer Zimmerman, *The More Things Change, the Less They Seem “Transformed”: Some Reflections on Fair Use*, 46 J. COPYRIGHT SOC’Y U.S.A. 251, 257 (1998) (“[T]he presence or absence of transformation has become the linchpin on which post-*Campbell* fair use cases tend to turn.”).

56. 17 U.S.C. § 107 (2000); see also *Williams & Wilkins Co. v. United States*, 487 F.2d 1345, 1351, 1353–57 (Ct. Cl. 1973) (upholding copying of entire articles by library as fair use), *aff’d by an equally divided court*, 420 U.S. 376 (1975); MARSHALL A. LEAFFER, UNDERSTANDING COPYRIGHT LAW 431 (3d ed. 1999).

57. See *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1264 (11th Cir. 2001) (“[P]urposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research . . . are at the heart of fair use’s protection of the First Amendment . . .” (quoting 17 U.S.C. § 107) (first omission in original)).

58. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (holding that recording free broadcast television for later personal viewing in the home was a fair use).

Lost in this neat division is the importance of widespread access to copyrighted works in the first place. The distinction between transformation and simple copying breaks down in practice: A research paper that quotes earlier works is transformative, but the copies that the researcher made at the library in order to have those earlier works at hand while she wrote are not transformative. What seem like victories for critics of copyright owners, then, contribute to the worsening situation for people making copies at the library, who do not look much like critics at the time of copying. Libraries, as institutions offering resources to all kinds of patrons, are even more distant from the partisan critic who is currently favored in fair use law.⁵⁹ While a researcher might have a valid fair use defense for her noncommercial copying,⁶⁰ once the focus is on the library, its aggregate contribution to patrons' copying looks more like an interference with copyright owners' legitimate markets, as discussed in the previous section.

At the same time, (transformative) fair use is being reconceptualized as a First Amendment limit on copyright.⁶¹ Libraries' roles in collecting and distributing information on a wide scale are extremely difficult to recognize as First Amendment (fair use) values without eviscerating copyright entirely. C. Edwin Baker, for example, proposes a number of First Amendment limits on copyright, but finds himself hard-pressed to defend library-like behavior in a digital environment, because that involves wide distribution of multiple copies of multiple works.⁶² Libraries will have even more trouble if fair use doctrine is assimilated into First Amendment doctrine because, as Fred Schauer has pointed out, the latter systematically refuses to give special protections to institutions, including libraries.⁶³ Treating individuals and institutions alike means granting a lower level of protection for institutions than would otherwise be available. The values of helping people find the best of existing works and of preserving public

59. Some definitions of transformation include recontextualization of a work, for example by taking a model's glamour shot and using it to illustrate a news story about her. Changing a work's context can often give it new meaning, and libraries certainly do that. For example, when a librarian may offer a fan of the *Harry Potter* novels examples of other British children's literature that deepen a reader's understanding of the books, or respond to a patron's interest in George Orwell's *1984* with nonfiction books about the Soviet Union and Nazi propaganda. But that kind of recontextualization is not generally recognized as transformative by courts even though it can transform understanding. See Tushnet, *supra* note 6, at 556 n.97, 573.

60. See *Duffy v. Penguin Books USA, Inc.*, 4 F. Supp. 2d 268, 274–75 (S.D.N.Y. 1998) (finding that a researcher's photocopying of part of an out-of-print book was fair use).

61. See Tushnet, *supra* note 6, at 549–62.

62. See C. Edwin Baker, *First Amendment Limits on Copyright*, 55 VAND. L. REV. 891, 911–19 (2002).

63. See Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

access to a wide variety of materials—the values of libraries—do not fit the individualistic, dissenter-oriented model of transformative fair use.

Although a few recent fair use defenses have succeeded in the absence of transformation, they have involved circumstances unlikely to occur in the library context: copies of works relevant to litigation or police investigations;⁶⁴ a search engine's digital index that offered small, low-resolution versions of copyrighted photographs but sent users to the copyright owners' websites for the full-size versions;⁶⁵ or a reproduction of a specific photograph that was causing public controversy as part of a news story.⁶⁶ Courts are not likely to see these exceptional cases as similar to a library's systematic efforts to deliver works to its patrons.

In sum, current fair use doctrine lacks rhetoric and rationales to explain why it is important—why it is fair—for libraries to provide works to patrons without permission and without compensating copyright owners. Because our legal and political rhetoric lacks a defense of equal access to the texts that form the building blocks of culture, the doctrinal categories developed in response to new distribution methods offer few chances to recognize the moral difference between libraries and filesharers. When libraries copy, facilitate copying, or engage in other acts that implicate copyright's exclusive rights, they are extending their traditional public purpose of enabling citizens to share equally in the nation's expressive wealth; they are doing things very similar to traditional lending. Reasserting the role of copying in serving the public good is especially important because traditional kinds of lending no longer serve patrons' needs as well as they once did, and new activities take up a greater portion of a library's services.⁶⁷

More generally, neither the filesharer nor the library engages in transformation in the sense of creating new works when they distribute existing works. Their practices are also designed to be aggregated: The point of the traditional library is to collect numerous works so that individual patrons may make particular selections, while the point of Kazaa is to collect numerous individual collections for similar purposes—even the name “My Library” for a single user's music collection expresses the concept

64. See *Bond v. Blum*, 317 F.3d 385 (4th Cir. 2003) (child custody litigation); *Shell v. City of Radford*, 351 F. Supp. 2d 510 (W.D. Va. 2005) (murder investigation); *Lucent Info. Mgmt., Inc. v. Lucent Techs. Inc.*, 5 F. Supp. 2d 238 (D. De. 1998) (trademark litigation).

65. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 815 (9th Cir. 2003).

66. *Núñez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 21 (1st Cir. 2000).

67. See *infra* text accompanying notes 76–77. Many library materials, from databases to DVDs, are now born digital; they cannot be loaned without some sort of copying. Even where analog version are available, as a practical matter, library patrons may only be willing to use digital delivery methods.

of aggregating for greater ease of selection.⁶⁸ Moreover, lending out CDs and DVDs closes the gap even further between the public library and the peer-to-peer filesharing service,⁶⁹ for they must know that at least some patrons will go home and make copies of those digital files.⁷⁰ If a patron routinely checked out large numbers of CDs and returned them the next day, how much money would the library have to spend to defend against a contributory infringement claim?

Many people feel strongly that libraries are different from Google, Kazaa, and other entities, and I do not disagree; however, it is difficult to explain that difference.⁷¹ The answer may well be that the combination of free access and librarians' guidance in finding good materials needs support, but that conclusion is not evident from recent legal developments. The fact that libraries lend more often than they copy, and pay for many of their copies, seems important but is a question of degree, not kind, when compared to many filesharers' collections, which also often include purchased music.

Another possibility is that libraries may be different because they aspire to be limited—most of them do not want to collect everything in existence or serve every person in the world.⁷² But in practice it can be hard to distinguish between resource constraints and lack of interest in a larger

68. See, e.g., My Library, http://home.real.com/product/help/rplov2_gold/en/My_Library.htm (last visited Nov. 20, 2005) (discussing the "My Library" feature of the RealPlayer media player). My Library also suggests the personalization of a standard format. Indeed, several university libraries have adopted My Library personalization schemes, allowing patrons to customize the interface that they use to access library websites, so that they will only see the resources that are likely to be most useful to them. See, e.g., Suzanne Cohen et al., *MyLibrary: Personalized Electronic Services in the Cornell University Library*, D-LIB MAG., Apr. 2000, <http://www.dlib.org/dlib/april00/mistlebauer/04mistlebauer.html>; Susan Gibbons, *Building Upon the MyLibrary Concept to Better Meet the Information Needs of College Students*, D-LIB MAG., Mar. 2003, <http://www.dlib.org/dlib/march03/gibbons/03gibbons.html>.

69. Also, books are available on peer-to-peer networks, though they are a tiny fraction of what is available. See Sandeep Junnarkar, *In the Virtual Stacks, Pirated Books Find Eager Thumbs*, N.Y. TIMES, June 3, 2004, at G5.

70. In the case of DVDs, this would generally require use of a circumvention technology, but it is still predictable.

71. See, e.g., Derivative Work, *Essence of Library*, <http://lquilter.net/blog/archives/2005/08/17/essence-of-library> (Aug. 17, 2005, 20:33 EST) (considering definitions and core functions of libraries, given that "library exceptionalism is only going to work so long as libraries are conceptually distinct").

72. See Eli Edwards, *Ephemeral to Enduring: The Internet Archive and Its Role in Preserving Digital Media*, INFO. TECH. & LIBR., Mar. 2004, at 3, 5 (distinguishing the internet Archive from a true library because the internet Archive has only a rudimentary notion of collection development: "Its goal is to archive as much of the Internet as its technology will allow. There is no judgment on the veracity, quality or appropriateness of the content being archived."); Posting of Mike Madison to Madisonian.net, *More on Libraries*, <http://madisonian.net/?p=303> (Aug. 16, 2005, 12:42 EST) (arguing that the fundamental attributes of a library are its limits in space, time, or subject matter).

collection. Nor does everyone agree that libraries should be limited—many dream of a universal library of all human knowledge.⁷³ Likewise, libraries may be different because librarians try to help patrons find the best results for their needs, instead of leaving them adrift in the universe of material—but then again, many patrons never consult librarians, turning to the catalogue instead. Additionally, some filesharing services have user ratings designed to help searchers find the best results, and Google built its empire on providing useful and trusted search results, as discussed in Part III.⁷⁴

Libraries thus have reason to be concerned that the legal and factual landscape has shifted enough that copyright owners can credibly threaten a successful (or at least prohibitively expensive) lawsuit unless the libraries obtain licenses for many of their core activities. As Laura Quilter writes,

[L]ibrary exceptionalism has *not* served the library community well: Despite numerous statutory exemptions for libraries, librarians have still retreated into deep conservatism and fear of copyright liability. Librarians realize that the laws governing information transmission are porous, and the laws that apply to for-profit corporations will also affect not-for-profit libraries.⁷⁵

As long as there is no lending right in U.S. law, libraries can still lend out books, tapes, and other physical media, but even that may become less important as users demand new technologies and new distribution methods, and publishers offer works only in digital form. As discussed in Part II,

73. See, e.g., Hannibal B. Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform* (Expresso Preprint Series, Working Paper No. 775, 2005). Two historians involved in digital history initiatives see both perils and opportunities in this project:

The low cost of storage (getting radically less expensive every year, unlike paper) means that it very well may be possible or even desirable to save everything ever written in our digital age. The selection criteria that form the core of almost all traditional archiving theories may fall away in the face of being able to save it all. This possibility is deeply troubling to many archivists and librarians because it destroys one of the pillars of archiving—that some things are worth saving due to a perceived importance, whereas other things can be lost to time with few repercussions.

COHEN & ROSENZWEIG, *supra* note 8, at 227–28 (citations omitted).

74. See, e.g., Posting of Siva Vaidhyanathan to Sivacracy.net, A Librarian From Wisconsin Weighs in on Google and Libraries, <http://www.nyu.edu/classes/siva/archives/001882.html> (Aug. 17, 2005, 18:11 CST). Vaidhyanathan likes libraries a lot better than Google, because “Google’s search algorithms are not innocent. Nor are they open to interrogation or revision. Librarians work transparently, or at least under an ideology that demands openness and accountability.” *Id.* As I discuss *infra* Part IV, Vaidhyanathan’s concept of library transparency is somewhat romanticized. In reality, it may be difficult to make legal distinctions between librarians’ choices of what results to offer patrons and those of search algorithms, especially since such actions are not directly connected to the copying that can trigger legal claims.

75. Derivative Work, Google and Not-for-Profit Libraries, <http://lquilter.net/blog/archives/2005/08/13/google-not-for-profit-libraries> (Aug. 13, 2005, 11:39 EST).

public libraries are increasingly offering patrons the ability to check out materials electronically, including downloads that do not require a trip to the physical library. University of Arizona libraries no longer use paper reserves for articles and book chapters.⁷⁶ Dartmouth College is revamping its entire campus to deliver audio, video, and other materials to students wherever they may be.⁷⁷ If students get their discussion materials in their rooms instead of on reserve at the library, various rights come into play that were not implicated by the functionally identical (but clunkier) practices of an earlier time.

The Association of American Publishers (AAP), which has opposed the use of e-reserves unless licensed by publishers,⁷⁸ recently sent letters to the University of San Diego objecting to its e-reserves, which are accessible to students with passwords.⁷⁹ The Copyright Clearance Center (CCC), which administers licenses on behalf of a large number of publishers, takes the position that e-reserves require the same permissions and licensing fees as coursepacks.⁸⁰ While the CCC also claims that traditional physical reserves require licensing, it sees e-reserves as more like coursepacks in their utility—and thus economic value—to students. Under current copyright law, the CCC's demands for payment are not plainly overreaching.

76. See Anick Jesdanun, *E-Reserves Spark Copyright Debate: Publishers Worry About Lost Revenue From College Assignments*, CHARLESTON GAZETTE, May 19, 2005, available at 2005 WLNR 7980187.

77. See Katie Zezima, *At Dartmouth, Advanced Wi-Fi*, N.Y. TIMES, May 4, 2005, at G6.

78. See Laura N. Gasaway, *Copyright Considerations for Electronic Reserves*, in MANAGING ELECTRONIC RESERVES 109, 126 n.70, 127 n.72 (Jeff Rosedale ed., 2002).

79. See Scott Carlson, *Legal Battle Brews Over Texts on Online Reserve at U. of California Library*, CHRON. HIGHER EDUC., Apr. 22, 2005, at A36. The AAP objects to the very "notion" of electronic reserves because students have easy access to the reserves, unlike traditionally inconvenient print reserves, and can even print their own copies. *Id.*

80. See COPYRIGHT CLEARANCE CTR., USING ELECTRONIC RESERVES: GUIDELINES AND BEST PRACTICES FOR COPYRIGHT COMPLIANCE 2 (2005); see also Steven J. Melamut, *Pursuing Fair Use, Law Libraries, and Electronic Reserves*, 92 LAW LIBR. J. 157 (2000) (reviewing copyright issues surrounding electronic reserves). The CCC is increasing its reach further by integrating its permissions process with the popular course-management software Blackboard, so that professors will automatically seek permission for any use of copyrighted works in online teaching—even though some uses are fair or are explicitly exempt from copyright owners' control under the Technology, Education and Copyright Harmonization (TEACH) Act, Pub. L. No. 107-273, § 13301, 116 Stat. 1910 (2002) (codified at 17 U.S.C. §§ 110(2), 112(f) (2000 & Supp. 2002)). See, e.g., Copyright.com, *Now You Can Get Copyright Permission Within Blackboard*, <http://www.copyright.com/ccc/do/viewPage?pageCode=i14> (last visited Nov. 20, 2005).

C. Regularizing Nonprofit Institutions as Market Participants

Precisely because libraries offer easy, free access to a variety of copyrighted materials, content owners often distrust libraries and want them to be assimilated as pure market participants so that they will pay for every patron's use just as if the patrons were shopping in a bookstore.⁸¹ In one important context, the library and the university have already been absorbed into the general market: When they provide internet access to their patrons and students, they are service providers subject to the general demands of the Digital Millennium Copyright Act (DMCA), just like America Online, Verizon, or any other for-profit entity.⁸² The DMCA's § 512 provides safe harbors against contributory liability for service providers who respond properly to copyright owners' claims of infringement by an individual user, and as a result many universities have already adopted stringent policies governing student use of the internet.⁸³

Perhaps because they do not provide a great way to download copies of music and movies (at least not until they provide wireless access), libraries have had a less prominent role in the recent downloading wars. They are nonetheless major service providers, especially for economically and educationally disadvantaged populations,⁸⁴ and their relative invisibility in

81. See, e.g., Ann Bartow, *Libraries in a Digital and Aggressively Copyrighted World: Retaining Patron Access Through Changing Technologies*, 62 OHIO ST. L.J. 821, 824–25 (2001) (discussing libraries as “high profile sharers”); Gasaway, *supra* note 78, at 118, 120 (stating that content owners now call library copying practices piracy and seek to end the practice of interlibrary loan).

82. There is a separate provision for nonprofit higher educational institutions limiting the circumstances under which the behavior and knowledge of a faculty member or graduate student-employee will be treated as the institution's so as to deprive it of a Digital Millennium Copyright Act (DMCA) defense. See 17 U.S.C. § 512(e) (2000). But in the ordinary situation involving a student, the university is in the same position as a for-profit service provider, entitled to a safe harbor against contributory liability for users' activities as long as it follows certain rules. Libraries are not mentioned in § 512.

83. See Sonia K. Katyal, *Privacy vs. Piracy*, 7 YALE J.L. & TECH. 222, 225, 291, 296–97 & accompanying notes (2004–2005). Professor Katyal's home institution, Fordham, even prevents receipt of an entire mp3 file format using its email system, a fairly extreme prophylactic measure. See *id.* at 270 n.192. Such policies are not irrational. College students are disproportionately likely to use peer-to-peer filesharing systems, as they are young, tech-savvy, short on money, and long on time. See STEVE JONES, PEW INTERNET & AM. LIFE PROJECT, *THE INTERNET GOES TO COLLEGE: HOW STUDENTS ARE LIVING IN THE FUTURE WITH TODAY'S TECHNOLOGY* 7 (2002).

84. See BILL & MELINDA GATES FOUNDATION ET AL., *TOWARD EQUALITY OF ACCESS: THE ROLE OF PUBLIC LIBRARIES IN ADDRESSING THE DIGITAL DIVIDE* 4, 19–20 (2004); PAUL HARWOOD, PEW INTERNET & AM. LIFE PROJECT, *PEOPLE WHO USE THE INTERNET AWAY FROM HOME & WORK* 1, 2 (2004) (finding that 26 percent of adult internet users have logged on at a library; only 3 percent depend on libraries and other “third places” as their only points of access, but they are disproportionately poor, rural, and inexperienced internet users).

filesharing might change as libraries increasingly offer wireless access.⁸⁵ Already, library policies are beginning to address filesharing services, and some public libraries have encountered the same filesharing bandwidth troubles as universities.⁸⁶ Arguably, libraries could be vicariously liable for patron infringement if they benefit financially by needing to buy fewer copies of a CD or less extensive licenses to works, or even if the availability of infringing material “acts as a draw” for patrons and thus leads to increased funding.⁸⁷ Some libraries have filed with the Copyright Office to receive safe harbor treatment under the DMCA, and legal experts advise more to do so.⁸⁸ The logic of treating libraries and universities like any other service provider is hard to deny when they all connect to the same network.

As service providers, libraries and universities have incentives—not all of them provided by pressure from outside content owners—to resist open end-to-end internet architecture. End-to-end design means that the network is as dumb as possible, accepting whatever users’ applications can put through the pipes; by contrast, a centralized design can only do what it was supposed to do and does not necessarily allow anyone to join the network. It is the difference between the electricity grid, which allows any device to plug in that has the right type of plug, and a building security system that only allows certain people inside, and then only on authorized business.⁸⁹ End-to-end design has allowed much experimentation, innovation, creativity, spamming, and copyright infringement from the edges of the network. From a service provider’s perspective, some of these activities

85. See Bruce Newell, *Make Your Library a Wi-Fi Hotspot*, WEB JUNCTION, Nov. 30, 2004, <http://webjunction.org/do/DisplayContent?id=8211>.

86. Some wireless-enabled libraries try to block peer-to-peer filesharing. See, e.g., Northport-East Northport Public Library, *Wireless Internet Access: Frequently Asked Questions*, <http://www.nenpl.org/services/computer/wireless.htm> (last visited June 8, 2005). Others merely ask patrons not to use peer-to-peer services. See, e.g., Daly City Public Library, *Wireless Network: Frequently Asked Questions*, <http://www.dalycitylibrary.org/wireless.htm?lib=DALY> (last visited June 8, 2005). Some library patrons will inevitably try to use peer-to-peer services. See Posting of Chris Jowaisas to TechnoBiblio, http://www.technobiblio.com/archives/2004/02/kazaap2p_in_libraries.php (Feb. 8, 2004, 23:10 PST); Posting of Paul Deane to Web4lib, <http://lists.webjunction.org/wjlists/web4lib/2002-January/016643.html> (Jan. 30, 2002, 21:43 EST).

87. Maty Minow, *Library Copyright Liability and Pirating Patrons*, CALIFORNIA LIBRARIES, May 2001 (quoting *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1023 (9th Cir. 2001)), available at http://www.cla-net.org/resources/articles/minow_pirating.php (suggesting that copyright owners could make this argument).

88. See LibraryLaw Blog, *I Know This Is Boring But It Could Save You a Lawsuit*, http://blog.librarylaw.com/librarylaw/2004/08/ellison_v_rober.html (Aug. 5, 2004).

89. See generally LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* 34–41 (2001); FISHER, *supra* note 17, at 171.

should be controlled.⁹⁰ Thus, universities may attempt to bar filesharing services by blocking the ports that those services use.⁹¹ In addition, they may offer encrypted, streaming audiovisual content only available to students who authenticate themselves as members of a particular class.⁹² Libraries also experiment with “so-called ‘dumb’” public computer terminals that, because they lack anything beyond rudimentary capabilities, are easier to maintain and monitor.⁹³

Libraries and universities as intermediaries have reasons not to allow total user control, just as they have reasons not to collect every book printed or offer every possible course. Many of those reasons are resource-based, but many are not. Some rationales, like those supporting internet filtering, are based on judgments about what patrons should be reading or learning. Often, resources and value judgments combine: Even those who oppose filtering might think, for example, that a child doing a school report should have priority on the library’s computer over an adult who wants to look at pornographic pictures. One question, then, is whether—or when—nonprofit intermediaries should commit to open access and to end-to-end architecture, especially given that resource constraints for nonprofit institutions are not going away any time soon. The principle that universities and libraries are committed to open inquiry will inevitably conflict with the principle that they exist to shape and guide value judgments, as well as with their roles as market participants who do, after all, have to worry about bandwidth, hackers, and contributory infringement liability.

II. iTUNES LIBRARY

The current popularity of the iPod digital music player and the iTunes Music Store does not mean that we can confidently predict the shape of digital entertainment in five years, but it does offer some insights into the interaction between technology, law, and practice. One of the biggest

90. See David D. Clark & Marjory S. Blumenthal, *Rethinking the Design of the Internet: The End to End Arguments vs. the Brave New World* 3–4, 20 (Aug. 10, 2000) (paper presented at the Policy Implications of End-to-End Workshop, Stanford Law School, Dec. 1, 2000), available at <http://cyberlaw.stanford.edu/e2e/papers/TPRC-Clark-Blumenthal.pdf>.

91. See, e.g., David McPhie, *Almost Private: Pen Registers, Packet Sniffers, and Privacy at the Margin*, 2005 STAN. TECH. L. REV. ¶ 41, at 1.

92. See Steven Potash, *Technological Systems to Protect Digitized Content Enabling Educators to Utilize the TEACH Act* 7, 24 (Feb. 4, 2003), <http://www.openebook.org/events/presentations/TEACH%20DRM%20Feb%204%202003.pdf>.

93. See, e.g., Joseph Anderson, *The ‘Skinny’ on Thin Clients*, WEB JUNCTION, Mar. 3, 2004, <http://www.webjunction.org/do/DisplayContent?id=1230>.

advantages that iTunes offers versus earlier competitors is its focus on not weighing consumers down with annoying technical restrictions on music downloaded from the iTunes Music Store, though some restrictions do exist. In particular, to play a protected file, transfer it to an iPod, or burn an audio CD, the user's computer must be authorized through the iTunes Music Store, which authorization comes when a user signs up and pays. A single iTunes account can unlock music on up to five computers and an unlimited number of iPods. In other words, iTunes DRM is carefully designed so that it will almost never make a consumer mad, never trigger her sense of outrage that some stupid program is interfering with music that she feels she owns, but will still control copying.⁹⁴ What ordinary consumer wants to play a song on more than five computers? What consumer will mind not being able to share a music file with a friend when she can just burn a CD with the same song? What the restrictions are directed at—with reasonable precision—is unlimited dissemination to strangers.

Because it was not designed for institutional users, however, this targeted but flexible DRM offers libraries new opportunities and new dangers. Libraries attempting to take advantage of the new technology may run afoul of contract and copyright law. At the same time, the practical ability of libraries to use (and to publicize their use of) the iTunes Music Store highlights the fundamental limitations of DRM in a diverse marketplace. Both intermediate institutions and copyright owners may be surprised by the effects of DRM designed with only individual users in mind. This part explores some of the issues raised by DRM in libraries, concluding with criticism of the way in which the DMCA has interacted with general copyright doctrines to limit the rights of intermediate institutions and the people they serve.

A. Libraries Experimenting at the Margins of Technology and Law

Like personal, private use in the home, library lending used to be limited by the library's ability to acquire physical copies. But digitized materials can be shared with hundreds of patrons at once if the library is not bound by law or contract to restrict access beyond what the technology allows. Experiments with lending the iPod Shuffle (a small digital music player) to library patrons as a way to lend out audiobooks suggest the possibilities for distributing digital files to patrons so they can get more

94. For a detailed discussion of iTunes and its digital rights management (DRM), see generally James Grimmelman, *Regulation by Software*, 114 YALE L.J. 1719 (2005).

value from libraries. At the same time, use of the iPod Shuffle illustrates the limitations of the current system, which uses both contract and DRM to restrict dissemination of copyrighted digital materials.⁹⁵

Libraries' use of the iPod Shuffle might be offered as evidence that DRM, combined with attractive pricing, can offer benefits both to libraries and to copyright owners. The South Huntington Public Library in New York, which lends out iPod Shuffles, has explained that the combined cost of purchasing iPods and downloading digital audiobooks to fill them is less than that of acquiring the same audiobooks on CD; the benefit to a cash-starved library is obvious.⁹⁶ But the benefit accrues to copyright holders, too. Not only does the copyright owner profit directly from the sale of the audiobook file, but, compared to lending out CDs—which patrons can rip to obtain an unprotected copy for themselves and then return—library lending of iPod Shuffles also looks substantially better for avoiding widespread filesharing of unprotected copies.⁹⁷

95. See Cyrus Farivar, *Library Shuffles Its Collection*, WIRED NEWS, Mar. 3, 2005, <http://wired-vig.wired.com/news/mac/0,2125,66756,00.html>. Although Farivar's story reports that the library is using mp3 files, other reporting suggests that the audiobooks are downloaded from Audible.com via Apple's iTunes store, see Michael Stephens, *The iPod Experiments*, LIBR. J., Apr. 15, 2005, <http://www.libraryjournal.com/article/CA515808>, and therefore are wrapped in a proprietary DRM scheme, whereas mp3 files are unprotected and can be copied at will.

One might wonder how much protection the iTunes DRM offers: An iTunes user who has a valid iTunes account can work around the DRM by burning a protected file onto a CD in an unprotected format that will play on any CD player; this CD could then be ripped and turned into an unprotected mp3. But this is probably not a huge problem for copyright owners, and the fact that so many copyright holders licensed their music and audiobooks to Apple and Audible is some evidence of that. The protected file-to-CD-to-mp3 workaround results in diminished sound quality and is generally not worth the bother. Moreover, a library's use of protected files on a Shuffle is unlikely to cause files to leak to mp3 format: CD-burning is only available to users who are authorized to play the protected file on their home computers. Authorization requires signing in with a valid iTunes account that has paid for the content. Thus, though a patron might be able to transfer the protected audiobook file from an iPod Shuffle to her personal computer, playing the file or burning it to CD would be impossible without further illegal hacking in order to defeat the DRM. (All of the iTunes hacks of which I am aware require an authorized computer before the DRM can be removed, so our intrepid library hacker would have to do a lot of work.)

96. See Farivar, *supra* note 95; see also Stephens, *supra* note 95 (discussing a high school with plans to use iPod Shuffles with Audible.com downloads because it will be cheaper than CDs and audiotapes). Other libraries are also experimenting with iPods, such as the Baylor University library, which is using music ripped from CDs to create playlists for music courses, organized by class assignment. See Posting of Michael Stephens to Tame the Web: Libraries and Technology, <http://www.tametheweb.com/ttwblog/archives/000977.html> (Feb. 23, 2005, 17:57 EST).

97. Audiobooks in mp3 format are available on filesharing services. See, e.g., Posting of Jerry Kuntz to Web4lib, <http://lists.webjunction.org/wjlists/web4lib/2000-June/032017.html> (June 23, 2000, 08:50 EDT). One iPod-using library also buys albums from the iTunes Music Store, burns them to CD, and prints the cover art—a practice that runs greater risks of leakage than its iPod Shuffle policies, though the CDs will have lower sound quality than commercial CDs. See Posting of Michael Stephens to Tame the Web, *supra* note 96.

It should be noted, however, that the price differences between audiobooks on CD and audiobooks from the iTunes Music Store likely stem from the fact that the iTunes Music Store does not presently have a mechanism for price discrimination. The iTunes Music Store cannot tell whether a purchaser is a private person or a library and thus does not charge higher prices to the library, even though a copy of *The Da Vinci Code* is worth more to the library—whose patrons will collectively listen to it many times—than to an individual who only expects to listen to the book once.

The technology, indeed, enhances the benefit that a library receives from an iTunes download compared to the benefit that a private consumer receives. While media generally are more valuable to a library than to any individual patron, the downloaded audiobook is potentially much more valuable to the library than the same book on CD or in print. This is because the iTunes model, as noted above, is designed so that the average individual consumer will not notice the service's technological limits on use:⁹⁸ An iTunes account currently allows a protected file to be played on up to five computers and on an unlimited number of personal devices such as the Shuffle.⁹⁹

As a practical matter, a private individual is not likely to have an unlimited number of personal devices. A library can purchase a large number of iPods and then copy a single audiobook file onto every one. There is no indication that the South Huntington Public Library, which has received substantial media coverage for lending iPods, is doing this. To the contrary, its website seems to indicate that it will only lend out one copy of an audiobook at a time. But this is a matter of library policy rather than technological constraint. The ability to put one audiobook on any number of devices, along with the ability to change the contents regularly to meet patron demand, is why libraries might embrace the Shuffle, but it is also why copyright owners are likely to resist libraries' attempts to use consumer services like the iTunes Music Store.

Nontechnical, contractual solutions may be available to copyright owners. The iTunes Music Store's terms of sale arguably forbid library use of the Store, since they authorize only "personal, non-commercial use" and state

98. See, e.g., Bill Palmer, *With iTunes Set for World Domination, Steve Jobs Is the New Crusader for Our Digital Rights*, IPOD GARAGE, Apr. 29, 2004, <http://www.billpalmer.net/ipodgarage/ipod000089.html> ("[T]he rights [granted by iTunes] were broad enough and consistent enough that most users would never even notice there were any restrictions in place at all, as long as they were doing things on the up and up.").

99. See iTunes Tutorial: Understanding Your Digital Music Rights, <http://www.apple.com/support/itunes/tutorial/segment102095b.html> (last visited Nov. 7, 2005). Burning to CDs is also allowed.

that the Store “sells products to end user customers only.”¹⁰⁰ Nevertheless, the high praise that iTunes has received from proconsumer organizations has not included any recognition that libraries and other institutions are currently not supposed to use this wonderful, consumer-friendly system.¹⁰¹

Likewise, the Audible.com website, which supplies audiobook content to iTunes, limits its offers to individuals making “personal non-commercial use.”¹⁰² The Books on Tape website,¹⁰³ which offers separate sections for libraries and individual consumers, heavily promotes Audible.com on the consumer part of its site, but makes no mention of the service on the library section. Audible has made separate marketing efforts to libraries as clients, including groups of libraries in Illinois and Ohio that agree to pay a yearly licensing fee per audio device and to purchase a minimum number of devices.¹⁰⁴

Audible’s behavior is not unique. Books on Tape offers CDs and tapes to consumers for a discount from the prices that it charges libraries.¹⁰⁵ When other publishers explicitly make audio downloads available to libraries and other institutions, they will almost certainly use a different pricing scheme—as Audible.com does with ListenIllinois¹⁰⁶—and will likely restrict the ability to transfer a single file onto more than one portable device,

100. iTunes Terms of Sale, <http://www.apple.com/support/itunes/legal/policies.html> (last visited Nov. 7, 2005); see also iTunes Music Store Terms of Service, <http://www.apple.com/support/itunes/legal/terms.html> (last visited Nov. 7, 2005) (containing “personal, noncommercial use” limitation).

101. See, e.g., CTR. FOR DEMOCRACY & TECH., PROTECTING COPYRIGHT AND INTERNET VALUES: A BALANCED PATH FORWARD VERSION 1.0, at 2, 7 (2005), <http://www.cdt.org/copyright/20050607framing.pdf> (praising iTunes Music Store as a solution to problems of digital distribution of music).

102. Audible.com, Legal Notices, <http://www.audible.com> (follow “Legal Notices” hyperlink) (last visited Nov. 7, 2005).

103. <http://www.booksontape.com>. The library-specific portion of the website is <http://library.booksontape.com>.

104. See Posting of Lori Bell to Web4lib, <http://lists.webjunction.org/wjlists/web4lib/2002-December/010259.html> (Dec. 17, 2002, 17:56:02 EST) (stating that Audible.com is working with 150 libraries around the country). ListenIllinois and ListenOhio offer content from Audible.com to eligible library patrons on library-supplied players under a negotiated group license agreement. See ListenIllinois, <http://www.listenillinois.org/> (last visited June 6, 2005); ListenOhio, <http://www.listenohio.org/> (last visited June 6, 2005); The Shifted Librarian, ListenIllinois Goes Live!, <http://www.theshiftedlibrarian.com/2004/01/05.html#a4976> (Jan. 5, 2004, 13:30 CST). There is a content licensing fee associated with each mp3 player, as well as a fee for each player. See Memorandum from Pamela P. Brown, Info. Tech. Servs. Dir., to Sys. Adm’rs, Pub. Adm’rs, Sch. Library Adm’rs, & Academic Library Adm’rs 1 (Mar. 9, 2004), <http://www.lcls.org/content/extra/ListenIllinois-systems3.04.pdf>.

105. Libraries can get close to consumer prices if they agree to buy a certain number of audiobooks each year, but consumers still have a slight advantage in price and a large advantage in flexibility. See Books on Tape, <http://www.booksontape.com>.

106. See Memorandum from Pamela P. Brown, *supra* note 104 (setting forth pricing scheme for Illinois libraries participating in Audible.com’s audiobook program).

potentially negating the price savings that current pioneer libraries are realizing. The King County Library System in Washington State allows patrons to download copies of audiobooks from home—but despite the potentially infinite availability of digital copies, the library only allows a limited number of downloads at a time because it only has licenses for a few copies at a time. After one month, the audiobook expires (unless it has been transferred to a CD or Windows Media-compatible audio device) and then another patron can borrow the file.¹⁰⁷ A notable feature of this scheme is that downloaded audiobooks *cannot* be returned to the library's available catalog early, unlike ordinary books,¹⁰⁸ presumably to minimize patrons' incentives to behave altruistically by quickly copying the book to CD and then returning it for another patron's use.

The contractual issues surrounding digital products thus offer another set of potential traps for a library striving to serve its patrons better using new technologies. Even if we ignore the contractual issues, however, it is useful to ask whether libraries that copy audiobooks onto iPod Shuffles are risking copyright liability. For example, what about the library that takes its audiobook CDs and rips them to files that fit on an iPod?¹⁰⁹ None of the current exceptions for library copying would seem to authorize such behavior.¹¹⁰

What about fair use? Arrayed against the library from the start are the amount copied (the entire work) and, in most cases, the nature of the work (fictional or, even if nonfictional, probably a creative assemblage of facts, like a popular biography). The purpose of the use might be seen as commercial if it circumvents the need to pay for each copy, and it would not be transformative, since the copied work would not be altered in any way. For those reasons, a court would also be tempted to find harm to a copyright owner's market, especially because a library-specific market for CD

107. See Susan Gilmore, *King County Library Lets You Copy Its e-Books*, SEATTLE TIMES, Jan. 31, 2005, available at http://seattletimes.nwsource.com/html/localnews/2002165499_ebooks31m.html. The system is the same for the New York Public Library's newly announced downloadable audiobooks program. See Press Release, N.Y. Pub. Library, Kafka or Clancy for Your Headphones: The N.Y. Public Library Offers Digital Audio Books for MP3 Players and Computers (June 13, 2005), available at <http://www.nypl.org/press/audiobooks.cfm>.

108. See Gilmore, *supra* note 107.

109. I am assuming that no shrinkwrap license on the CDs explicitly bars such acts. For definition and discussion of shrinkwrap licenses, see generally Nathan Smith, *The Shrinkwrap Snafu: Untangling the "Extra Element" in Breach of Contract Claims Based on Shrinkwrap License*, 2003 BYU L. REV. 1373.

110. Section 108 of the Copyright Act, which deals with exceptions to copyright's exclusive rights specifically targeted to libraries and archives, does not authorize systematic, deliberate reproduction of multiple copies. See 17 U.S.C. § 108(g) (2000).

audiobooks already exists. All the relevant factors except the library's non-profit status, then, weigh against the library's copying in this instance.

In other words, despite the positive press coverage for library iPods and the exciting possibilities that they offer, a library using iPods to deliver copyrighted content to patrons without the explicit consent of the copyright owner is running substantial risks. Though the libraries using iPods are doing so in a way that does not encourage widespread copying, that may not help them if copyright owners begin to protest such new uses.

B. A Note on the Institutional User and the Inevitable Insufficiency of Digital Rights Management

The iTunes Music Store contract brings out one feature of DRM that has not been explored in the scholarly literature: If the relevant users/consumers are diverse in the uses they make of copyrighted works, even technically advanced DRM will be insufficient to police use according to the copyright owner's preferences. Rather than withering away as they are replaced by DRM, contract and copyright law remain vital backstops.¹¹¹

Along with the library with an iTunes account, consider the law student with a free Westlaw account—contractually obligated to use it only for law school—who in fact uses it for research at the law firm at which he is a summer associate.¹¹² The technology is capable of distinguishing types of users based on their password information, but it is not capable of discerning what kind of research they are doing.¹¹³ Westlaw's real protection against the

111. This is a different point than others have made about the insufficiency of DRM. Generally, they observe that DRM can be circumvented in practice. See, e.g., Michael J. Meurer, *Too Many Markets or Too Few? Copyright Policy Toward Shared Works*, 77 S. CAL. L. REV. 903, 960–61 (2004). My argument is that, because DRM has been implemented to be acceptable to ordinary consumers, unusual users can frustrate copyright owners' intentions without circumventing the DRM in any way, as in the example of the library that purchases one audiobook and puts it on hundreds of devices.

112. Legal database vendors have threatened to cancel the contracts of schools whose students misuse their academic access. See Laura N. Gasaway, *Copyright Ownership & the Impact on Academic Libraries*, 13 DEPAUL-LCA J. ART & ENT. L. 277, 300 n.42 (2003). Contracts governing who can use a database, as opposed to what they can do with it, are much easier to enforce. A recent report says that "[t]he level of legal threat over unauthorized or unpaid for use of databases in fact appears rather low," which may not be surprising, as "most colleges take seriously the task of overseeing access as long as the rules are relatively clear and easy to implement." PRIMARY RESEARCH GROUP, LICENSING AND COPYRIGHT MANAGEMENT: BEST PRACTICES OF ACADEMIC, SPECIAL AND RESEARCH LIBRARIES 9 (2004); see also *id.* at 23–24 (discussing contracts which limit authorized users to those classified as students or educators, not other people affiliated with the university).

113. Even in a copyright panopticon, it would be extremely difficult for technology to determine whether John Librarian was accessing a particular work in his role as librarian or his role as private citizen, precisely the kind of distinction that a good price-discriminating copyright owner would want to make.

misbehaving student's activities comes from its contract, not its password protection. The open source software movement, too, relies almost entirely on contract to enforce its use restrictions, which require programs using open source code¹¹⁴ to be made available to others on equal terms. Publishers have even tried to use shrinkwrap contracts on printed reference books, which cannot be protected by DRM.¹¹⁵ Contract can (purport to) regulate what DRM cannot.

In the library context specifically, materials that are supplied electronically to university or research libraries may be accompanied by contractual restrictions that prevent a librarian from using her password to give access to a member of the general public.¹¹⁶ At the same time, libraries as consumers make demands of the technologies that, like the general consumer demand for the ability to use one purchased song on multiple devices, make DRM incapable of controlling leakage on its own. Practices that academic libraries often insist on engaging in—interlibrary loan, e-reserves, preparation of coursepacks, remote access, and distance education, for example—are incompatible with total copyright owner control over each copy. Most electronic licensing agreements signed by members of the Association of Research Libraries, for example, allow interlibrary loan, though usually they provide for printing from an electronic copy and delivering that copy through the mail, fax, or electronic fax service. Once that practice is allowed by the technology, DRM has lost its total control over further copies because the text has migrated to an unprotected format: a standard printout.¹¹⁷

Many scholars have pointed out that encoding a rule into technology so that it is self-enforcing strips away the ability to make exceptions.¹¹⁸ But what has seemed less important is that this rigidity may work against the

114. See Greg R. Vetter, "Infectious" Open Source Software: *Spreading Incentives or Promoting Resistance?*, 36 RUTGERS L.J. 53 (2004) (discussing various open source schemes, which make software code freely shareable and changeable).

115. See Posting of Paule Deane to LISNews, <http://www.lisnews.com/article.pl?sid=05/06/07/0536245> (June 7, 2005, 05:56 EST); Smith, *supra* note 109 (discussing shrinkwrap licenses, which are adhesion contracts entered into by opening the shrinkwrap on a package or by taking some other action to use the shrinkwrapped product).

116. See LAWRENCE LESSIG, *FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY* 281 (2004). Contractual restrictions would be necessary to deter the sympathetic librarian even if DRM were also in place.

117. See Mary M. Case, *A Snapshot in Time: ARL Libraries and Electronic Journal Resources*, ARL BIMONTHLY REP. (Ass'n of Research Libraries, Wash., D.C.), Aug. 2004, <http://www.arl.org/newsltr/235/snapshot.html>; see also PRIMARY RESEARCH GROUP, *supra* note 112, at 30 (reporting that the University of Idaho has to negotiate to get rights to "share out" print copies from electronic resources with interlibrary loan partners).

118. See, e.g., Meurer, *supra* note 111, at 962–63.

implementing body as well as in its favor. One example that has been used as an analogy for DRM—"speed bumps" to keep most consumers behaving honestly¹¹⁹—offers more complex lessons than the simple analogy suggests. Traffic calming, as it is more generally called, involves manipulating the physical environment to prevent drivers from speeding. Speed bumps or speed tables are popular traffic calming measures in residential areas. But speed bumps do not know what kind of vehicle is driving over them; they do not retract when, say, an ambulance, fire truck, or police car legitimately needs to go faster than the posted speed limit. Just as the iTunes Music Store DRM treats every consumer identically, notwithstanding the major differences between a public library and a private citizen, speed bumps treat every vehicle identically, notwithstanding the special needs of official vehicles. One-size-fits-all benefits copyright owners and local governments with increased control over ordinary, everyday uses, but can harm them in more unusual situations.¹²⁰

Once this consequence of rigidity is noticed, of course, there are things that can be done to mitigate the problem. On wide enough streets, it is possible to stagger speed bumps so that an emergency vehicle can swerve around them but an ordinary driver will probably just slow down.¹²¹ But this depends on voluntary self-sorting by emergency and nonemergency drivers—and possible tickets for abusive behavior—just as the iTunes Music Store depends on voluntary compliance—and possible legal action—to enforce contractual restrictions. Copyright owners may someday offer "iTunes for Libraries," with DRM tailored to library-type uses, and rely on libraries to subscribe to that rather than to the consumer version. What looks like a technological solution is actually supported by a substrate of norms and law,

119. See, e.g., Amy Harmon, *Studios Using Digital Armor to Fight Piracy*, N.Y. TIMES, Jan. 5, 2003, § 1, at 1 (quoting Jack Valenti, the head of the Motion Picture Association of America, who argues that "[w]e need to put in speed bumps to keep people honest"); A "Speed Bump" vs. Music Copying, BUS. WK., Jan. 9, 2002, available at http://www.businessweek.com/bwdaily/dnflash/jan2002/nf2002019_7170.htm, quoted in PAUL GOLDSTEIN, COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX 184 (rev. ed. 2003); DIGITAL CONNECTIONS COUNCIL OF THE COMM. FOR ECON. DEV., PROMOTING INNOVATION AND ECONOMIC GROWTH: THE SPECIAL PROBLEM OF DIGITAL INTELLECTUAL PROPERTY 45 (2004), available at http://www.ced.org/docs/report/report_dcc.pdf ("[E]ven though DRM systems may be cracked, they will serve as speed bumps.").

120. See, e.g., Nika Rolczewski, *Speed Bumps May Cost Lives in Emergencies; Ambulances, Fire Crews Are Losing Valuable Time on City's 'Calm' Streets*, TORONTO STAR, Nov. 27, 2004, available at 2004 WLNR 12261644. See generally Americans Against Traffic Calming, <http://www.io.com/~bumper/ada.htm> (last visited June 2, 2005) (offering numerous arguments about the unintended consequences of traffic calming devices).

121. See Speed Reduction: Speed Bumps, <http://www.portlandonline.com/transportation/index.cfm?&a=83338&c=38748&y=7&x=8> (last visited June 2, 2005).

contractual and otherwise. As long as users and their uses are diverse, we cannot expect contracts to wither away—though their terms may certainly become more oppressive.

C. Locking Down the Library

1. The Digital Millennium Copyright Act and Institutions

As has often been noted, one substantial problem with using DRM instead of law to control copying is that DRM technology cannot go through § 107's four-factor balancing test for fair use. It also controls acts that were not previously within the copyright owner's control, such as private performance in the home and library lending.¹²²

While libraries and schools were not the specific target of the DMCA, the law nonetheless presents substantial risks that these institutions will be unable to use protected works in the ways that they want to, ways which usually track traditional library lending.¹²³ As discussed above, the DRM technology incorporated into downloads from the iTunes Music Store does not currently limit the number of audio devices on which a file can be played. If iTunes develops an institutional licensing model, however, a library with fifty iPods would certainly pay a greater licensing fee than a library with five. In a fully developed market, the option to buy a physical copy might disappear: Instead of selling audiobooks on CD, publishers could sell audiobook rights, so that libraries will pay per use rather than pay once for the physical medium.

122. DRM can, for example, be programmed to restrict the number of times that a file can be played. Somewhat like iTunes, DRM could be programmed to require each computer playing a CD to check in with a central server; the CD would not play if too many computers are already authorized to play it. For discussions of this type of "tethering" technology and similar measures, see R. Anthony Reese, *The First Sale Doctrine in the Era of Digital Networks*, 44 B.C. L. REV. 577, 613–14 (2003); U.S. COPYRIGHT OFFICE, DMCA SECTION 104 REPORT 75 (2001), available at http://www.copyright.gov/reports/studies/dmca/dmca_study.html.

123. See generally Laura N. Gasaway, *The New Access Right and Its Impact on Libraries and Library Users*, 10 J. INTELL. PROP. L. 269 (2003); Jennifer Femminella, *Online Terms and Conditions Agreements: Bound by the Web*, 17 ST. JOHN'S J. LEGAL COMMENT. 87, 115–18 (2003) (discussing terms in library contracts that limit interlibrary loan, prevent archiving, and in other ways threaten long-term access to works).

Electronic licensing is spreading fast,¹²⁴ and although the process is most advanced in research and academic libraries, general public libraries are being brought into the fold. For example, the King County Library with its website downloads already adheres to this electronic licensing model, with only a limited number of copies of e-books available at a time.¹²⁶ The dark side of moving to proprietary systems is already apparent in King County: The library is only able to lend a few copies of Jane Austen's *Pride and Prejudice* at a time, because its licenses and associated DRM prevent it from distributing this public domain work freely.¹²⁷ Likewise, the New York Public Library's press release announcing its new downloadable audiobook program highlighted four texts, three of which are in the public domain and all of which are subject to DRM and contract-backed limitations on the library's lending of copies.¹²⁸ (It should not go unnoticed that the New York Public Library is one of Google's sources for the Google Book Search Library Project, discussed in the next section. The library is contractually barred from allowing Google to make copies of its digital books, public domain or not. Constraints on libraries and other archives thus become constraints on everyone else.)

124. See PRIMARY RESEARCH GROUP, *supra* note 112, at 32 (noting that since 1999, use of paper journals at the University of Idaho is down 40 percent, while use of electronic articles tripled; the dean of library services reports that "[w]e are going to go exclusively electronic as fast as we can go"); Case, *supra* note 117 (reporting that spending for university research libraries grew 400 percent between 1994–95 and 2001–02, while overall materials spending grew only 61 percent).

126. See *supra* note 107 and accompanying text.

127. See Gilmore, *supra* note 107; King County Library System: Digital Books, *Pride and Prejudice*, <http://ebooks.kcls.org> (search for "Pride and Prejudice" under "Browse Digital Books" field) (last visited June 7, 2005) (showing three available copies of one edition and six available copies of the World Digital Library Edition); see also Gasaway, *supra* note 123, at 299 (discussing restrictions on an e-book version of *Alice in Wonderland*).

128. See Press Release, N.Y. Pub. Library, *supra* note 107 ("Available titles range from recent bestsellers such as *The 9/11 Commission Report* and *The Jane Austen Book Club* to classics such as Emily Brontë's *Wuthering Heights* and Herman Melville's *Moby Dick*."). With respect to audiobooks, the sound recording of someone reading *Wuthering Heights* would be protected by copyright even though the underlying text is in the public domain. Like King County's licenses, however, the New York Public Library's licenses control both text and audio versions, which is unsurprising since they use some of the same vendors. See, e.g., New York Public Library, *Madame de Treymes*, <http://ebooks.nypl.org/> (search for "Madame de Treymes" in the basic search, then follow the "Madame de Treymes" hyperlink) (last visited June 13, 2005) (showing one available copy of e-book whose text is in the public domain); New York Public Library, *The Scarlet Letter*, <http://ebooks.nypl.org/> (search for "Scarlet Letter" under basic search, then follow the final "Scarlet Letter" hyperlink to the Brilliance Audio edition) (last visited June 13, 2005) (showing four copies of audiobook whose text is in the public domain). With respect to e-books, publishers may claim copyright in the text as a result of formatting and editorial choices, though I believe that this claim is insupportable in law because such minor choices are not enough to create a copyrightable derivative work.

In the first major test of the DMCA's anticircumvention provisions, the Second Circuit Court of Appeals dismissed the concern that the use of DRM would prohibit free dissemination of public domain works on DVDs. A film professor who wishes to use a portion of a movie can get it on videotape. Even if videotape is unavailable, the professor could point a video camera at the screen of a television playing the DVD, and this would not be considered circumvention, according to the Second Circuit (though why not is not entirely clear).¹²⁹ More generally, works are usually available in unprotected formats of one kind or another. But the developing market for electronic books demonstrates that important works in the public domain are being swept up into the new packages being sold to libraries. And if exclusive blanket contracts prevent libraries from picking and choosing which works to pay for¹³⁰—or, worse, prevent them from offering public domain e-books in nonprotected formats that might compete with proprietary schemes—the situation may worsen.¹³¹ Format compatibility is also a concern: Apple's proprietary format will not play on music players other than iPods, and iPods cannot play Windows Media files, so libraries may not be able to make audiobooks available to patrons with the wrong hardware. In the future, libraries may be stuck with obsolete formats that are practically inaccessible, even if it would be theoretically possible to convert them.¹³²

This is not to say that libraries that enter into such contracts are evil or even misguided, given their patrons' preferences and their limited resources.

129. See *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 459 (2d Cir. 2001).

130. Bundling of desirable and undesirable works is already occurring in packages offered to libraries. See Gasaway, *supra* note 123, at 302.

131. So far, exclusive contracts do not appear to be a big concern. The real problem in King County is that the library offers a bewildering array of electronic formats, two audio and two text, each with different technical requirements and limitations. See King County Library System, eBooks: Audio Listening Options, <http://www.kcls.org/ebooksaudio/audiofilesoptions.cfm> (last visited June 7, 2005) (comparing restrictions on the two available digital audio formats); King County Library System, Digital Books: Digital Book Quick Start Guide, <http://ebooks.kcls.org/D5DD45C6-3B93-4038-A6F7-90E5DA42A04B/10/56/en/Help-QuickStartGuide.htm> (last visited June 7, 2005) (discussing three of the four digital options, but not mentioning the fourth, available elsewhere on the site). The complexity of multiple licensing regimes may also interfere with normal library practices, as libraries use the lowest common denominator to decide what to do—barring all interlibrary loan of digital materials, for example, rather than investigating whether any particular contract actually bars such loans, because it is too difficult to keep track of every variation. See Femminella, *supra* note 123, at 117 n.153. Academic libraries have announced principles that attempt to limit the variability of digital contracts, see Gasaway, *supra* note 112, at 300, but whether they will succeed or spread to other libraries remains to be seen.

132. The DMCA allows circumvention in some cases of obsolete formats, see 68 Fed. Reg. 62,011, 62,014 (Oct. 31, 2003), but the requirements are stringent and there is no guarantee that libraries will be able to find programmers to do the work.

Rather, the marketplace as a whole may evolve in ways that ultimately hurt the overall goal of open access, even for fair uses and works in the public domain.

Because of the “analog hole” that requires even digital works to be made visible or audible to users,¹³³ some users will be able to make copies of many works even when technological protections prevent digital copying.¹³⁴ Perhaps the smart librarian will keep a digital camera on hand to take pictures of a computer screen, or will encourage patrons to bring theirs in, when the library lacks printing rights. The inconvenience means that copying will happen less often;¹³⁵ but then again, Congress intended to make copying more difficult in order to prevent uncontrolled digital dissemination of copyrighted works.

Libraries and other intermediate institutions, therefore, face two interlocking trends. The first, which produced the DMCA’s anticircumvention provisions, gives copyright owners the right to control most ordinary uses of a work through technical and contractual means. The second, which is the change in § 107 fair use doctrine discussed above, favors transformation and disfavors plain copying. The combination of these two trends leads decisionmakers to discount the importance of free access to works as long as, once a person has access to a work, she is relatively free to criticize, rework, and transform it using her own words or images. The result is that the value of making works widely available, for edification and enlightenment without overt transformation, is lost.

133. See, e.g., Daniel S. Hurwitz, *A Proposal in Hindsight: Restoring Copyright’s Delicate Balance by Reworking 17 U.S.C. § 1201*, 2005 UCLA J.L. & TECH. 1, ¶ 46, http://www.lawtechjournal.com/articles/2005/01_050528_hurwitz.php.

134. Interactive media such as games (and databases) will not be so easily captured, but the assumption underlying the Second Circuit’s reasoning seems to be that wholesale copying is not fair use anyway, especially for entertainment media. Therefore, awkward copying for transformative purposes will do just fine.

135. Not everyone who is motivated to transform a work will have the resources to engage in the necessary workarounds. Tony Reese ably explains:

In the case of many works, copyright owners may well be moving toward issuing works only in protected formats, ending the availability of new works in unprotected analog copies. And while the possibility of copying the visual or audio output of a protected work may offer some room for noninfringing use, it seems likely as a practical matter to substantially diminish the quality and availability of such use. In addition, some copyright owners have expressed a desire to use technology, perhaps backed by legal requirements, to “plug the analog hole” and prevent such copying of copyrighted works.

R. Anthony Reese, *Will Merging Access Controls and Rights Controls Undermine the Structure of Anticircumvention Law?*, 18 BERKELEY TECH. L.J. 619, 653 (2003), available at http://btlj.boalt.org/data/articles/18-2_spring-2003_symp_reese.pdf.

2. Garage Door Openers in the Library: Access Versus Fair Use?

The DMCA outlaws unauthorized access in almost all circumstances, and copyright owners assert that they have total control over the terms of access, even if that involves getting rid of copyright law's limits on exclusive rights. Such limits include not just statutory fair use and statutory exceptions but even rights that copyright law does not give to owners, such as the right to control lending or private performance. Yet the DMCA's anticircumvention provisions threaten far more than control over access. Just as accepting transformation and criticism as the basic justifications for fair use limits our ability to defend traditional nontransformative fair uses, thinking of access as the basic value that needs protection in the DMCA context threatens to sacrifice other valuable freedoms—including the freedoms to make copies in certain cases and to make transformative fair uses.

One instance of this dilemma may be seen in the recent DMCA case involving garage door openers, *Chamberlain Group, Inc. v. Skylink Technologies, Inc.*¹³⁶ Skylink, without Chamberlain's consent, sold replacement garage door openers that were compatible with the plaintiff's system. The replacement openers worked by sending a signal to the computer program embedded in the receiving unit—a signal that allowed the program to work by “accessing” it—something that the DMCA appears to regulate. In holding that the defendant's conduct was lawful, the Court of Appeals for the Federal Circuit stated that “the copyright laws authorize consumers to use the copy of Chamberlain's software embedded in the [garage door openers] that they purchased. . . . [T]he copyright laws authorize members of the public to access a work, but not to copy it.”¹³⁷

Neither part of the last sentence is true. There is no explicit right of access in the Copyright Act, only a first sale right to transfer or otherwise dispose of a lawfully acquired copy of a work. Moreover, the Copyright Act authorizes copying against the copyright owner's will in certain circumstances. But in order to prevent the DMCA from being applied in a ridiculous manner, the Federal Circuit apparently felt compelled to make broad claims about basic access rights which, concomitantly, led it to assert that the law allows copyright owners total control over copying.

136. 381 F.3d 1178 (Fed. Cir. 2004).

137. *Id.* at 1193; *see also id.* at 1203 (“The DMCA cannot allow Chamberlain to retract the most fundamental right that the Copyright Act grants consumers: the right to use the copy of Chamberlain's embedded software that they purchased.”); *id.* at 1204 (“The Copyright Act authorized Chamberlain's customers to use the copy of Chamberlain's copyrighted software embedded in the [garage door openers] that they purchased.”).

The *Chamberlain* court also suggested that the DMCA legitimately allows copyright owners to control fair uses as well as foul. Therefore, copyright owners can use technological measures to prohibit copying that is not infringing. Yet this conflicts with the court's holding that "[w]hat the law authorizes, Chamberlain cannot revoke"¹³⁸—unless we see access authorized by law as something fundamentally distinct from other uses of copyrighted works authorized by law, such as transformative fair use, multiple copies for classroom use, and library copies under § 108. Thus, the decision creates a hierarchy in users' rights, privileging passive access while leaving other acts, such as those that would involve copying part of a work in order to comment on it, vulnerable to technological controls.

Similar hints of a distinction between basic access and other acts that do not violate copyright owners' rights can be found in other parts of the DMCA. As Tony Reese has discussed, the DMCA's legislative history suggests that access, on its own, generally would not implicate copyright owners' rights and would not be subject to the DMCA's rights control provisions.¹³⁹ The legislative history explicitly contrasted access to reproduction (copying). The wrinkle here is that access is not a traditional copyright right under U.S. law, but it interacts with rights that are sometimes part of the copyright owner's exclusive rights: Access to a digital work necessarily includes some type of performance or display, depending on the type of work at issue, because digital works must be performed or displayed in order to be intelligible to humans.¹⁴⁰ But copyright owners generally have the exclusive rights of public display and performance.¹⁴¹

138. *Id.* at 1202 ("Copyright law itself authorizes the public to make certain uses of copyrighted materials. Consumers who purchase a product containing a copy of embedded software have the inherent legal right to use that copy of the software. What the law authorizes, Chamberlain cannot revoke.")

139. See Reese, *supra* note 135, at 635–36 (discussing 17 U.S.C. § 1201(h) (2000), an exception for circumvention of access controls in order to protect minors from inappropriate internet content).

140. While the *Chamberlain* court asserted that "all defendants who traffic in devices that circumvent rights controls necessarily facilitate infringement," *Chamberlain*, 381 F.3d at 1195 (emphasis added), this is only a plausible statement with respect to the reproduction right. Most displays and performances of digital works are private, and thus not within the scope of a copyright owner's rights in the first place. Even as to the reproduction right, and even counting § 107 fair uses as instances of infringement allowed by an affirmative defense, the court's statement ignores the explicit exceptions in the copyright law, consistent with the judicial trend to allocate control over all reproductions to copyright owners. Julie Cohen has, however, pointed out to me that, under the RAM copy doctrine, which holds that even temporary copies in a computer's memory implicate the reproduction right, the court's claim makes some sense: Many private digital displays and performances will also involve a RAM copy and thus a reproduction.

141. The public performance rights of sound recording copyright owners are more limited than the rights of owners of other kinds of works, but the differences are not relevant to this discussion.

Moreover, access to a digital work often creates a temporary copy in a computer's memory, which may be enough to trigger the reproduction right.¹⁴²

One difficulty with the access/reproduction distinction for libraries, therefore, is that their activities may not involve private displays and performances.¹⁴³ For example, viewing a digitized work in a library may involve a public display, thus triggering the copyright owner's display right. As a result, distinguishing access from reproduction is not enough to establish a baseline of acts that will generally be permitted by institutional actors, even though the distinction might offer some solace for individual consumers.

Instead, libraries and schools could push for an understanding of the access/reproduction line that puts library-type displays and performances on the access side of the line. A court could extend the *Chamberlain* analysis to reason that, when the law authorized access, it perforce authorized the temporary copying, display, or performance required for access. Uncontrolled reproduction, after all, is what Congress saw as the reason to pass the DMCA,¹⁴⁴ and uncontrolled reproduction is the problem of filesharing programs. Uncontrolled private performance and display without uncontrolled reproduction is the present situation with regard to nondigital works. And such performances and displays—at least if they are made using legitimate copies—are not dangerous to copyright owners' financial survival (although denying copyright owners the right to control private uses may prevent them from engaging in precise pay-per-use models). Getting the right to perform and display works when performance and display are the natural consequence of using the work in its digital form might be far more valuable to libraries, schools, and other educational institutions than another narrow § 108 exemption for copying.¹⁴⁵

142. See *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993) (holding that unauthorized loading of software into a computer's memory constituted infringement).

143. The DMCA is silent on the public/private distinction, and it is highly unlikely that a technological measure currently could operate as a "rights control" by controlling only public performances or displays. Rather, technological measures control whether a work can be performed or displayed at all. Sufficiently advanced "tethering" technology could perhaps verify whether a device was in a private home or a lecture hall and allow only private performances or displays, but it is hard to see who would have an interest in developing that kind of technology.

144. See *Chamberlain*, 381 F.3d at 1197 (discussing "copying and distribution" as Congress's central concern in enacting the DMCA).

145. Note, however, that the iPod uses discussed above all involve one reproduction per iPod, so an access/reproduction line would still leave this new distribution model up for negotiation with copyright owners.

III. GOOGLE LIBRARY

Google wants to be the first and last name in information retrieval. To that end, it has expanded its internet search capabilities in various ways, from indexing non-html documents (for example, Microsoft Word documents or PDFs) to indexing the contents of individual computers (Google Desktop) to providing searches that include abstracts and full texts of scholarly works (Google Scholar). Recently, Google announced another initiative, in cooperation with the University of Michigan, Harvard University, Stanford University, the New York Public Library, and Oxford University:¹⁴⁶ the Google Book Search Library Project, intended to digitize and make searchable the contents of millions of books in the libraries' collections, some of which are in the public domain and some of which are still under copyright. As to books possibly under copyright,¹⁴⁷ Google Library (as I will call it)¹⁴⁸ would digitize the full text unless publishers object to the digitization of specific works, but searches would only retrieve limited samples, so that the searcher would still need to find a way to get a copy of the full book on her own. Helpfully, Google plans to provide links to sites offering books for purchase alongside the search results. Contributing libraries would receive full digital copies of every book scanned from their collections and would be able to use them online, as long as they do not sell the copies to Google's competitors.¹⁴⁹

A. Legal Issues of the Universal Library

Google's plans are not yet completely defined. Publishers have already begun to protest,¹⁵⁰ however, and the Authors Guild and the AAP have

146. See Google Print Help Center, <http://print.google.com/support/publisher/bin/answer.py?answer=20769&topic=1047> (last visited June 6, 2005).

147. Google is using very conservative assumptions. For example, books published in the United States after 1923 will all be treated as if they were still under copyright, even though many such books were not renewed. (Renewal became automatic for books published after 1962, and there is no renewal term for books published after 1978, so Google's rule affects books published from 1923 to 1962 that are actually in the public domain. Such public domain texts will not be made available to Google searchers, whereas pre-1923 public domain works will be readable in their entirety.)

148. Google has changed the name of the overall project from Google Print to Google Book Search, presumably because it sounds better from a legal perspective.

149. See Jeffrey B. Young, *From Gutenberg to Google*, CHRON. HIGHER EDUC., June 3, 2005, at A24, A25.

150. See Antone Gonsalves, *Google Suspends Copying Protected Books; Publishers Unimpressed*, TECHWEB, Aug. 12, 2005, <http://www.techweb.com/wire/showArticle.jhtml?articleID=168601309>; Antone Gonsalves, *Opposition to Google Library Project Intensifies*, TECHWEB, Aug. 29, 2005,

filed suit to enjoin Google from proceeding.¹⁵¹ Publishers will be able to opt out by submitting lists of books that should not be digitized, but many publishers are still dissatisfied, insisting that the burden should not be on them to opt out.¹⁵²

Elisabeth Hanratty, a law student, concludes that Google's activities with respect to books still under copyright are unlikely to count as fair use.¹⁵³ A notable point in that analysis is that Google cannot rely on the library-specific exceptions in the Copyright Act even though it is acting in part on libraries' behalf. Like the DMCA exceptions that allow libraries to circumvent technical protection measures if they can somehow come up with the technology themselves, the library copying exceptions do not allow libraries to buy (or even to receive) unauthorized copies from someone else.

This seems like a silly distinction—even more so in the DMCA context, in which a library is unlikely to have a circumvention-savvy programmer on staff—but one reason that it seems silly is that libraries are not really isolated from the market or special in many of their needs. For example, they need heat, light, and power as well as software programs, copying technology, and other information-specific products. When we recognize that, however, we have to refine the case for treating libraries as if they were not ordinary market participants in copyright. Unlike Hanratty, I believe that Google Library's fair use case is tolerably strong, given that Google's wholesale copying is only intermediate¹⁵⁴ and that the result is a

<http://www.techweb.com/wire/ebiz/170101412> (stating that the Association of Learned and Professional Society Publishers is willing to go to court to stop Google); Burt Helm, *A Google Project Pains Publishers*, BUSINESSWEEK ONLINE (May 23, 2005), http://www.businessweek.com/technology/content/may2005/tc20050523_9472_tc024.htm; *The University Press Assn.'s Objections*, BUSINESSWEEK ONLINE, May 23, 2005, http://www.businessweek.com/bwdaily/dnflash/may2005/nf20050523_9039.htm; Young, *supra* note 149, at A27 (interview with Peter Givler, executive director of the Association of American University Presses); Sally Morris, Chief Executive, Ass'n of Learned & Prof'l Soc'y Publishers, Google Print for Libraries-ALPSP Position Statement, July 2005, <http://www.alpss.org/2005pdfs/Googlestatement.pdf>.

151. See Daniel B. Wood, *Copyright Lawsuit Challenges Google's Vision of Digital 'Library'*, CHRISTIAN SCI. MONITOR, Sept. 26, 2005, at 3; Press Release, Association of American Publishers, Publishers Sue Google Over Plans to Digitize Books (Oct. 19, 2005), <http://www.publishers.org/press/releases.cfm?PressReleaseArticleID=292>.

152. See Christine Mumford, *Google Library Project Temporarily Halted to Allow Copyright Owner Response*, BNA ELECTRONIC COM. & L. REP., Aug. 24, 2005, at 826, <http://pubs.bna.com/ip/BNA/eip.nsf/is/a0b1h9w8q3>.

153. See Elisabeth Hanratty, Issue Brief, *Google Library: Beyond Fair Use?*, 2005 DUKE L. & TECH. REV. 0010, <http://www.law.duke.edu/journals/dltr/articles/2005dltr0010.html>.

154. With the exception of the digital copies that will be provided to libraries, Google will not make full copies available to anyone. Instead, Google will display only a few sentences related to a searcher's query. The full copies for libraries may also be justifiable on fair use grounds, but the analysis differs from that applicable to Google's own plans to use its copies.

database with social value separate from, and possibly greater than, the value of the individual components.¹⁵⁵ Nevertheless, it is clear that Google is running some substantial risks.

Independent of Google's risks, the libraries that plan to provide Google with the physical copies that it needs in order to scan the works into its system are also running risks. Some are legal: If Google Library infringes, the libraries may well be contributory infringers, knowingly providing Google with the means to infringe.¹⁵⁶ This may explain why, of the libraries partnered with Google, only the University of Michigan at Ann Arbor, which has sovereign immunity against monetary damages for copyright claims, has publicly confirmed its plans to allow Google to digitize all 7.8 million books in its collection.¹⁵⁷

The Association of American University Presses has expressed specific concerns about libraries' participation in Google Library. First, publishers desire to sell libraries digital copies, but Google Library would provide a digital copy or copies to the library that allowed it to digitize its physical copy.¹⁵⁸ Though receiving an infringing copy does not itself violate a copyright owner's rights, the idea that a library receives valuable consideration for participating in Google Library would certainly weaken its legal position and might even provide the basis for a claim of vicarious liability.¹⁵⁹

155. See *Kelly v. Arriba Soft Corp.*, 336 F.3d 811 (9th Cir. 2003) (finding that copying images from websites and displaying low-resolution "thumbnails" of the images as part of an image search engine was a transformative fair use); Jonathan Band, *The Authors Guild v. The Google Print Library Project*, LLRX.COM, Oct. 15, 2005, <http://www.llrx.com/features/googleprint.htm> (arguing that *Kelly* is precedent favorable to Google). The main difference between *Kelly* and Google's plan is that complete digitized versions of books are generally not freely available from authorized sources on the internet, whereas the copyright owner in *Kelly* voluntarily made images available on a public website. That difference may not be dispositive, if the effect of having a comprehensive index of texts creates enough new value for searchers and does not impair sales of entire books.

156. Contributory infringement liability requires, first, that the contributory infringer knows or has reason to know of the direct infringement, and, second, that it causes or materially aids the direct infringement. See *A & M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1019–20 (9th Cir. 2001). By delivering the books to Google for scanning, the library would know of the infringement and at least materially contribute to it.

157. See Young, *supra* note 149, at A25 (sidebar).

158. See *The University Press Assn.'s Objections*, *supra* note 150.

159. Vicarious infringement occurs when a defendant has the right and ability to supervise the infringer, and the defendant benefits financially from the infringement. See *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th Cir. 1996). By controlling which books are released to Google, the library would have the right and ability to supervise, and the free digital copy that the library would otherwise have to purchase from the copyright owner could be a direct financial benefit. This is similar to the way that the *Napster* court deemed individual copying to be commercial because the copiers avoided paying the customary price for music. Even if the library could make its own copy pursuant to statutory exceptions or fair use, the resources that it would save by allowing Google to do the work might be enough of a direct financial benefit to trigger vicarious liability.

Depending on the technological means used to give the library a digital copy, there might also be a claim of direct infringement based on the reproduction of the work on the library's computers.¹⁶⁰

Moreover, libraries and publishers have long been at odds, and the conflict over pricing has only intensified in recent years as cash-strapped libraries fight what they see as excessive prices.¹⁶¹ Publishers are already "very concerned about many libraries' extremely permissive use of digitized materials in their e-reserves systems,"¹⁶² and libraries' use of the digital copies might involve further reproductions to make them available to students, which could also trigger direct infringement claims. In an unavailing attempt to assuage copyright owners, the University of Michigan will voluntarily restrict access to full digital copies of copyrighted books, but publishers remain nervous.¹⁶³

B. Is Google's Universal Library a Library at All?

Other risks from Google's plan are more philosophical: What is the point of a library in a world where (almost) everything is available online?¹⁶⁴ The digital revolution is increasing demand for library services, as libraries offer internet access and electronic resources to patrons,¹⁶⁵ but libraries should not be reduced to Starbucks (with or without the coffee).¹⁶⁶ Nor should universities become mere conduits for anything that is available on the internet, even as students increasingly perceive online resources as an integral part of their educational experiences.¹⁶⁷

160. See University of Michigan-Google Cooperative Agreement, § 2.5, <http://www.lib.umich.edu/mdp/um-google-cooperative-agreement.pdf> ("Google shall provide the [University of Michigan] Digital Copy via a network connection, or in any other manner mutually agreed upon by the Parties.").

161. See, e.g., Bernard Wysocki Jr., *Scholarly Journals' Premier Status Diluted by Web*, PITTSBURGH POST-GAZETTE, May 23, 2005, available at <http://www.post-gazette.com/pg/05143/509681.stm>.

162. See *The University Press Assn.'s Objections*, *supra* note 150.

163. See Susan Kuchinkas, *Google Library: Peril for Publishers?*, INTERNET NEWS, June 17, 2005, <http://www.internetnews.com/bus-news/article.php/3513586>.

164. If Google digitized every book in the five participating libraries, which it is not going to do, it would still only have a third of the books listed in the largest existing digital catalog. See Brian Lavoie et al., *Anatomy of Aggregate Collections: The Example of Google Print for Libraries*, D-LIB MAG., Sept. 2005, <http://www.dlib.org/dlib/september05/lavoie/09lavoie.html>.

165. See Wade Roush, *The Infinite Library*, TECH. REV., May 2005, at 54, available at http://www.technologyreview.com/articles/05/05/issue/feature_library.asp.

166. See Daniel Akst, *Do Libraries Still Matter?*, CARNEGIE REP., Spring 2005, available at <http://www.carnegie.org/reporter/10/books/index.html>.

167. See STEVE JONES, PEW INTERNET & AM. LIFE PROJECT, *supra* note 83, at 12-13.

Even in a world of pervasively digitized information, functions remain for the library: A library can be a community place, a third space away from home and work that enables play and anonymity.¹⁶⁸ Yet the integration of print and internet is especially troubling for those who emphasize the evaluation and sorting functions of libraries and schools, which do not necessarily want to make everything available to patrons, at least not without commentary on the value of a particular text. A library's selection function—its ability to present knowledge in context—may distinguish it both from the profit-seeking market and from a computer-generated response based on aggregating popular links. This position requires a claim of special expertise, either in a substantive area or in the practice of searching for good information; either way, libraries must assert their expert status if that is the explicit reason to prefer librarians to databases.

Another problem with equating a search engine to a universal archive is that books and scholarly articles—edited, selected, and designed to persist over time—may be lost or chopped to pieces among search results that have much less of a pedigree; searchers may end up with unreliable information that has a veneer of respectability.¹⁶⁹ On the other hand, the answer to that problem may lie in adding scholarly materials to Google's informational riches. It may be futile to hope that students and citizens will eventually learn to distrust fast answers, given that they have shown a consistent preference for speed and ease over the more accurate but hard to use scholarly databases so far.

168. See, e.g., Bartow, *supra* note 13; Marylaine Block, *In Need of a Better Business Model*, EX LIBRIS, Mar. 12, 2004, <http://marylaine.com/exlibris/xlib207.html> (discussing libraries as sites of community, self-improvement, cultural events, and education, and as offering space for adult readers and children).

169. See, e.g., Marcus A. Banks, Commentary, *The Excitement of Google Scholar, the Worry of Google Print*, 2 BIOMEDICAL DIGITAL LIBR., Mar. 22, 2005, at 3, <http://www.biomediglib.com/content/pdf/1742-5581-2-2.pdf> (expressing concerns about commercialization and the flattening of "distinctions between materials that are used for different purposes," such as Linnaeus versus Martha Stewart on the subject of gardening); Rory Litwin, *On Google's Monetization of Libraries*, LIBR. JUICE, Dec. 17, 2004, available at http://www.libr.org/juice/issues/vol7/LJ_7.26.html (expressing concerns about the special status of information from libraries as part of a sustained search for truth rather than as a source of superficial fragments to be skimmed and used in a commercial context); Roy Tennant, *Google Out of Print*, LIBR. J., Feb. 15, 2005, available at <http://www.libraryjournal.com/article/CA502014.html?display=Digital+LibrariesNews&industry=Digital+Libraries&industryid=3760&verticalid=151> (suggesting that Google Print's copyright limitations will lead to inaccurate and out-of-date results); Young, *supra* note 149, at A25 (Michael Gorman, president-elect of the American Library Association, objects to "atomizing" books so that quotes appear in search results that "taken out of context, have virtually no meaning." He worries that Google Library will feed "the common delusion of undergraduates everywhere" that Google provides enough relevant results to write papers and do research.).

Even if the solution is to bring the university library to Google, there are nontrivial concerns over shifting control over digital works to a for-profit organization like Google, no matter how benign the company has been to date.¹⁷⁰ Google's commitment that end users will never have to pay for search results¹⁷¹ does not preclude commercial exploitation and perhaps manipulation of results. And Google has limited potential competition from its partners—the University of Michigan has agreed in its contract with Google to use technological measures to restrict automated access to its digital copies and to make efforts to stop redistribution of those copies. Thus, the contract provides that the university will attempt to preclude any large-scale copying, including but not limited to commercial uses, regardless of whether the digitized material is in the public domain.¹⁷² Google Library, like the iTunes Library, is not a public library as we currently understand that term.¹⁷³

What, then, should we aspire to in our libraries? The general ideological orientation of universities and libraries is, in economic terms, to have a discount rate of zero—to value the education of a student twenty years from now as much as that of a student today and to value a book equally for every year that it is in the stacks. Profit-seeking corporations have a different view. Proponents of electronic books, for example, want to offer libraries the option to buy access to popular books, access that will expire after a

170. See Roush, *supra* note 165, at 56. Roush notes that:

Letting a for-profit organization like Google mediate access to library books . . . could either open up long-hidden reserves of human wisdom or constitute the first step toward the privatization of the world's literary heritage. . . . "[S]ome librarians are very concerned about the terms of access and are very concerned that a commercial entity will have control over materials that libraries have collected."

Id. (quoting program director for a library-oriented nonprofit).

171. See University of Michigan-Google Cooperative Agreement, *supra* note 160, § 4.3.

172. See *id.* § 4.4.1 (recording that the university pledges to develop "methods and systems for ensuring that . . . substantial portions of the [University of Michigan] Digital Copy are not downloaded from the services offered on [the university's] website or otherwise disseminated to the public at large"). The university is allowed to partner with other research libraries to share content, see *id.* § 4.4.2, but not general public libraries. Google's deal with the New York Public Library is not publicly available, but the library's press release says that full texts will be available to the public on the library's website, see Press Release, N.Y. Pub. Library, NYPL Partners with Google to Make Books Available Online (Dec. 14, 2004), <http://www.nypl.org/press/google.cfm>; nonetheless, there may be similar measures in place to prevent large-scale copying by potential rivals.

173. See Litwin, *supra* note 169. Litwin writes:

The weighty, loveable, historic notion of 'The Library' will doubtless be prominent in Google's marketing of its great reservoir of text, but we would be fooled to think it means that the values indicated by that word (equity of access, collective ownership, privacy, organization, bibliography, and librarianship as a profession) were somehow in play in Google's collection.

Id.

certain number of readers get the book. Thus, libraries could ensure that every patron could get immediate access to the latest blockbuster novel or Oprah's Book Club pick, and would not be saddled with excess inventory once the latest fad ended. Librarians, bizarrely from a business viewpoint, may prefer to buy permanent copies—even of e-books—and then ration access according to waiting lists.¹⁷⁴

There is a sense of bewilderment in a presentation by J. Stephen Pendergrast, cofounder and chief technology officer of a major e-book company, when he notes that the market does not seem to be developing toward expiring e-books, even though they could be cheaper than permanent copies and even though expiration, he thinks, simply mimics the deterioration that eventually makes physical books unusable.¹⁷⁵ Never mind that e-books are programmed to expire faster than most physical books deteriorate; everything is faster in the brave new world. The real problem is that Pendergrast's argument is like telling a doctor that disease and death are part of the human condition and therefore to be replicated, not reduced, by any new treatments. Permanence is the point and deterioration is the enemy.

This library orientation toward permanence is not necessarily just a matter of valuing future Dan Brown readers as much as today's. Librarians also have an interest in offering current patrons other books to check out while these users are on the wait list. Current bestsellers may bring people into the library (or onto the library's website), but the library's mission may be better served by lending out other, less popular books while patrons wait for a copy of *The Da Vinci Code* to become available. This is especially true if, as is likely, patrons' second-choice books vary substantially. Though they all want to read Dan Brown, some will choose a mystery, others a romance, others a biography while they wait, and the library will be able to lend out a wider array of books, perhaps even books recommended by the staff.¹⁷⁶ One way to see the limited Dan Brown collection, then, is as a

174. Perpetual access rights are especially important to academic and research libraries, see PRIMARY RESEARCH GROUP, *supra* note 112, at 14, but other libraries may have the same commitments.

175. See J. Stephen Pendergrast, Co-Founder & Chief Tech. Officer, Fictionwise, Inc., *The Libwise Library System: Pricing Models in the eBook Library Market*, Presentation at the eBooks in the Public Library Conference (Mar. 16, 2004), <http://www.openebook.com/events/presentations/ebookpreso%20-%20pdf/spendergrast.pdf>.

176. See Chris Anderson, *The Long Tail*, WIRED, Oct. 2004, <http://www.wired.com/wired/archive/12.10/tail.html> ("But most of us want more than just hits. Everyone's taste departs from the mainstream somewhere, and the more we explore alternatives, the more we're drawn to them."); *id.* (arguing that the availability of hits brings consumers in, but offering more differentiated content along with hits produces the most value); Marylaine Block, *Libraries: The Original "Long Tail"*, EX LIBRIS, Feb. 11, 2005, <http://marylaine.com/exlibris/xlib239.html>; cf. DAVID

lure—a way to get people to read books that they would not otherwise have known about or have been motivated to check out of the library.

With infinite resources, of course, the library's first choice might be to have huge numbers of *The Da Vinci Code* available along with all of the second choices, so that everyone walks away as happy as possible *and* with improved preferences. With extensive but not infinite resources, the library might even be happy to have most of its copies of the hits expire as long as a few permanent copies remained—one or two copies of *The Bridges of Madison County* are probably all that is required in 2006 to satisfy demand. As long as resources are small and often shrinking, however, it may make sense for libraries to purchase a range of digital content even if publishers want to sell hits to them as if they were just bookstores.¹⁷⁷

Another feature of the digitized library is that browsing may become fundamentally different as patrons no longer peruse a shelf of books on related topics. Scholars and librarians who fondly remember discoveries in the library stacks fear the disappearance of that serendipity. Yet a page of Google search results allows a different kind of browsing. Clay Shirky points out that library categorizations—which shaped what we historically knew as browsing—have a fair amount of arbitrariness encoded into them.¹⁷⁸ The person doing the categorizing decides whether French history and French literature should be shelved separately or together, and that decision controls the experiences of all future browsers. We should not romanticize past categorization systems, which often relied on assumptions that we would now find unjustified, such as the Dewey Decimal System's allocation of 90 percent of the religion category numbers to Christianity.¹⁷⁹ If a researcher knows exactly what she wants, Google Library may take her directly there, just as a card catalog would—but the list of search results is likely to operate like the

FOSTER WALLACE, *E Unibus Pluram: Television and US Fiction*, in *A SUPPOSEDLY FUN THING I'LL NEVER DO AGAIN* 21, 37 (1997) (“[T]elevision is [not] vulgar and dumb because the people who compose the audience are vulga: and dumb. Television is the way it is simply because people tend to be extremely similar in their vulgar and prurient and dumb interests and wildly different in their refined and aesthetic and noble interests.”).

177. See Marylaine Block, *Browsing, Yes. Finding, No*, *EX LIBRIS*, Jan. 9, 2004, <http://marylaine.com/exlibris/xlib201.html> (discussing library practices of maintaining broad and deep collections, in contrast to physical bookstores' hit-driven selections).

178. See Clay Shirky, *Ontology Is Overrated: Categories, Links, and Tags*, *CLAY SHIRKEY'S INTERNET WRITINGS*, http://www.shirky.com/writings/ontology_outrated.html (last visited June 6, 2005). See generally GEOFFREY C. BOWKER & SUSAN LEIGH STAR, *SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES* (1999) (discussing the ideological choices embedded in any categorization scheme).

179. See Shirky, *supra* note 178.

library shelf, offering related works, albeit different ones than the Dewey Decimal System or Library of Congress classification would have produced.

The very fact that some librarians and educators are nervous about the universal library is an important reminder of the persistent tension between openness and guidance that shapes educational and library practice. We want students to have open minds, but not so open that their brains fall out. We want library patrons to have easy access to information, but it would be good if they could tell the difference between reliable financial advice and a Ponzi scheme, and they might well need some help doing that. They might even prefer the librarian to direct them toward the reliable advice in the first place.¹⁸⁰ Controlling students' access to information—telling them what to think about—has always been one way to teach them how to think. Google Library, from one perspective, threatens the role of the educated intermediary.¹⁸¹

These claims for the virtues of expertise should not be overstated, as some librarians may not be ideal sources. Imagine a librarian in a small community's only library who discourages inquiries about homosexuality or

180. As two historians observe, archives and libraries have been moving toward more direct educational functions, rather than merely presenting collections, as they move onto the web. See COHEN & ROSENZWEIG, *supra* note 8, at 44. Whether this represents a shift in philosophy or a strategy to get funding (which may be more readily available for projects that have obvious educational utility) is unclear. See also Daniel Callison, *The Learning Laboratory*, THRESHOLD, Winter 2004, at 16 ("The school library of the future is based on the instructional strategies and best practices that place teachers and students in the role of being a critical selector and user of information."). Joseph Janes makes a passionate statement in favor of the librarian as guide:

[W]hat we are, and what we do, are superior to search engines: We help people know what they really want, we know lots of ways of searching for it, we know how to evaluate stuff, we care about quality, we know about and have access to lots of other kinds of resources beyond the free Web, we know when to stop searching, and so on.

Joseph Janes, *Internet Libraries: Librarians Are Not Search Engines*, AM. LIBR., May 2004, at 58; see also Christine L. Borgman, *Designing Digital Libraries for Usability*, in DIGITAL LIBRARY USE: SOCIAL PRACTICE IN DESIGN AND EVALUATION 85, 87 (Ann Peterson Bishop et al. eds., 2003) (contrasting information science definitions of digital libraries, which focus on networked systems and content, with librarians' definitions, which emphasize the role of services, including staff, who choose, interpret, and preserve digital materials).

181. See Litwin, *supra* note 169. Litwin explains:

Information seekers often choose the convenience of the internet over consultation with an information professional, or even the consultation of a bibliography or an index. The stable exception, up to this point, has been in the area of serious research of the kind that requires the use of highly specialized writings, often including those very old works. To access those materials, and to find them in their proper context, a researcher needs to use a library and some of the many research aids that are produced by librarians and scholars. Google's plan will put those works in a giant bucket (so democratizingly) and enable you to pull them out with keywords, kind of like catching fish with a net. So much of this material requires expert knowledge even to comprehend, let alone situate in its proper context, that disintermediated access can in some cases be worse than no access at all.

Id.

evolution. Even without an ideological overlay, it is difficult to gauge librarians' overall effectiveness. One study found that only 55 percent of librarians' answers to questions were judged correct by other information experts,¹⁸² while another study found that librarians offered correct sources or strategies 90 percent of the time.¹⁸³ People, including librarians, vary; there are both benefits and costs to a system in which asking one librarian produces a different set of answers than asking another, as compared to a system in which each one of Google's servers returns the same search results.

Even if experts still exist, ordinary users may think that they no longer need to consult those experts, and they may stop supporting the institutions that teach people how to sort information in the first place. Google Library threatens not to make the library obsolete but to make it nothing special, and that is a serious threat.

IV. OUR LIBRARIES, OURSELVES

What should institutions with educational and archival missions do about the changing information landscape? In a perfect world, fair use broadly understood would include government subsidies to libraries so that the libraries can pay copyright owners for access to their works. The problem with that is the familiar one: Funding obviously costs money, whereas legal protections for libraries—like tax breaks—are off the books and thus politically more palatable in a budget-starved time. Exceptions to copyright law are more likely to be generous, and stable over time, than budget allocations.

An important strategic question is how libraries should respond to the anticopying, potentially pro-access trend in the judicial interpretation of fair use. One option is to seek more institution-specific protection from Congress for activities that libraries want to engage in, using the Copyright Office proceedings currently underway.¹⁸⁴ Section 108 could be amended to allow digital preservation copies in more circumstances, including when a third party such as Google provides them, and could even foreclose restrictive contracts by providing that such materials should be openly accessible, at

182. See Peter Hemon & Charles R. McClure, *Unobtrusive Reference Testing: The 55 Percent Rule*, LIBR. J., Apr. 15, 1986, at 37.

183. See John V. Richardson, Jr., *Reference Is Better Than We Thought*, LIBR. J., Apr. 15, 2002, at 41, 42.

184. See Press Release, The Library of Congress, *supra* note 3. Cf. 17 U.S.C. § 110(2) (2000 & Supp. 2002) (the TEACH Act, which categorically allows certain defined types of reproduction, display, and performance in the context of computer-assisted education).

least when their copyrights expire.¹⁸⁵ Library exemptions could turn on the number of simultaneous users (perhaps as a percentage of patrons, students, or total population in the area served) rather than the number of copies created by digital uses, since the number of copies no longer corresponds in any predictable or useful way to the number of users.

Such steps would help to provide certainty and to ensure that libraries could continue to serve some of their core functions. But there is a cost: Specific exemptions may detract from institutions' commitment to defending general fair use rights. It is important for libraries to preserve their § 107 rights, however, to preserve some breathing space for new or unusual situations—or at least to get a good deal before giving up those rights.

One possibility is to build on current activism on “orphan works,” which are defined as works whose copyright status or ownership is unknown. Many institutions, including major library and university organizations, are heavily involved in efforts to amend the Copyright Act to enable easier use of works whose ownership cannot be determined after a reasonable search.¹⁸⁶ The Copyright Office's recent report proposes to allow institutions and individuals to copy such orphan works, subject to limited remedies if a copyright owner surfaced.¹⁸⁷ Orphan works activists have collected numerous stories of socially beneficial projects and creative endeavors stymied by failure to find copyright owners.¹⁸⁸ Likewise, libraries and other institutions could collect information on beneficial library practices that are nonetheless legally risky, and then lobby for an exemption tailored to those practices. Such practices may include password-protected e-reserves for students, or conversion of CDs and audiobooks to other formats for compatibility with patrons' devices.

This strategy might require this acceptance of the general tone of copyright owners that whatever is not permitted is forbidden, but it could help in specific cases. Moreover, if courts and legislatures got used to the idea that user groups would work toward best practices, the climate of tolerance for

185. Alternatively, appropriate legislation could allow the Copyright Office to engage in rulemaking that would allow specified library practices. Joseph Liu has persuasively suggested that the general turn in copyright law toward industry-specific, highly detailed regulation, of which library exemptions are a small example, could often be better implemented through administrative rulemaking than legislative codification. See Liu, *supra* note 19, at 87.

186. See, e.g., Library Copyright Alliance, Comments on Orphan Works Notice of Inquiry (Mar. 25, 2005), <http://www.arl.org/info/frn/copy/orphanedworks/LCAcomment0305.pdf>.

187. See, e.g., Register of Copyrights, Report on Orphan Works 127 (2006), <http://www.copyright.gov/orphan/orphan-report-full.pdf>.

188. See, e.g., Letter from Jeffrey P. Cunard, Counsel for the Coll. Art Ass'n, Debevoise & Plimpton LLP, to Jule L. Sigall, Assoc. Register for Policy & Int'l Affairs, U.S. Copyright Office (Mar. 25, 2005), http://www.collegeart.org/pdf/caa_orphan_letter.pdf.

good-faith attempts to serve users might improve.¹⁸⁹ It would not be a matter simply of winning a new provision for orphan works, or for library uses of digital technology, but of establishing a pattern that emerging uses should readily achieve statutory safe harbors if they are in fact fair and limited.

These incremental measures would not be a panacea, but they could help libraries and other nonmarket institutions maintain their core functions. A basic problem confronting intermediate institutions trying to fit into the new copyright regime is that their interests are complex. In one sense, they represent aggregations of individuals, and thus look like just another consumer group. In another sense they represent a set of nonmarket-based aspirations. Only by defending the latter concept can libraries preserve and perhaps even reclaim some of the new technological possibilities for serving their patrons. Open access, preservation, and guidance to users in sorting and evaluating information are values that are worth defending, not just because they are good for individuals but because they are good for society as a whole.

189. See Michael J. Madison, *A Pattern-oriented Approach to Fair Use*, 45 WM. & MARY L. REV. 1525, 1623–30, 1666–67 (2004) (arguing that fair use defenses should be evaluated based on whether they fit into accepted social practices); ASS'N OF INDEP. VIDEO & FILMMAKERS ET AL., DOCUMENTARY FILMMAKERS' STATEMENT OF BEST PRACTICES IN FAIR USE (2005), <http://www.centerforsocialmedia.org/rock/backgrounddocs/bestpractices.pdf> (offering best practices for documentary films).
