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RED TAPE ON VIDEOTAPE

LEGAL ISSUES IN THE PRESERVATION
OF VHS COLLECTIONS

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1. INTRODUCTION

Libraries with significant VHS collections are facing a challenge: these materials are quickly deteriorating. Where VHS is the only format on which content is available, each loan and viewing further damages the fragile tape. These collections require digitization if they are to be preserved and patrons' access to them maintained. In light of the COVID-19 pandemic, the pressure for digital access has only increased, with libraries working to increase and expand remote access to non-physical materials.¹ However, the prospect of digitization and, in particular, digital access puts many libraries across the United States in fear of running afoul of copyright law. This memo provides an overview of the applicable law and the arguments that exist to support institutions in their work to preserve important content that may only be currently held in VHS format and is at risk of being lost to time.

The U.S. Copyright Act protects the exclusive right of authors to reproduce their work and to distribute such reproductions to the public,² as well as to create works “derivative” of the copyrighted work and perform or display it publicly. For our purposes, the most critical of these rights are the first two: the exclusive rights to reproduce a copyrighted work, under §106(1), and to distribute copies of that work, under §106(3).³

However, the purpose of copyright goes beyond the protection of authors' interests to account for readers and users as well.⁴ The Copyright Clause of the Constitution specifies that copyright should “promote the Progress of Science and the useful Arts.”⁵ In disseminating scientific and artistic materials to the public, libraries play a key role—one that Congress has recognized by providing special exceptions to copyright liability for libraries and archives, in the form of 17 U.S.C. §108 (“§108”).⁶ Beyond §108, the doctrine of fair use can also insulate libraries from copyright liability for some activities.

¹ See, e.g., *How to Borrow Materials and Use Our Services During COVID-19*, HARVARD LIBRARY, <https://library.harvard.edu/how-to/borrow-materials-and-use-our-services-during-covid-19> (last visited May 17, 2021).

² Whether “by sale or other transfer of ownership, or by rental, lease, or **lending**” 17 U.S.C. §106 (2012) (emphasis added).

³ See *id.* at §106(1),(3).

⁴ See, e.g., *Google LLC v. Oracle America, Inc.*, No. 18-956, 2021 WL 1240906 (April 5, 2021) (considering the public benefit of copying in finding fair use).

⁵ U.S. CONST. art. I, §8, cl. 8.

⁶ 17 U.S.C. §108.

This memo will address the legal justifications for actions that libraries may want to take with respect to their aging VHS collections, beginning with the lowest-risk options and moving toward strategies that may present a higher level of risk. Some of the perceived risk in this area of law is attributable to a dearth of copyright case law involving libraries. There are multiple plausible explanations for the absence of case law: one could attribute the lack of litigation to the fact that libraries are typically highly conscientious about how they go about copying and distributing works in their collection to patrons. On the other hand, it's possible that even where libraries engage in preservation and distribution activities that are not fully settled as non-infringing, they are unlikely to be sued because their public interest missions make them extremely sympathetic defendants. Potential plaintiffs would weigh the public relations costs of such a suit against any injury they sought to remedy. Accordingly, even the possible preservation and access strategies described in this memo as "higher risk" may, from a practical point of view, not result in significant legal exposure for an institution that carries them out conscientiously, with the appropriate checks and balances. However, the drawback of the case-by-case approach that courts have taken regarding fair use means that a library *could* incur significant costs even in proving a fair use case if it were unfortunate enough to get haled into court.⁷

That being said, the ongoing Internet Archive lawsuit provides a timely counterexample: while the Archive was able to operate for many years without attracting rightsholder ire, during the course of the coronavirus pandemic the Archive expanded its services via the National Emergency Library, suspending its limitations on the number of users that could borrow digital works simultaneously.⁸ The effort was intended to ensure access to materials during the pandemic, and attracted support from a range of libraries and colleges—undoubtedly a socially beneficial and sympathetic cause.⁹ Publishers, however, sued the Archive, alleging that its services constituted mass infringement.¹⁰ The Archive, in response,

⁷ In addition to the risk of potential litigation, libraries should also be aware of the small claims tribunal housed in the U.S. Copyright Office established recently by the Copyright Alternative in Small-Claims Enforcement (CASE) Act. Division Q, Title II, Subtitle A, § 212 "Copyright Small Claims," Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (Dec. 27, 2020). The tribunal will address copyright claims, with all damages capped at \$30,000. *Id.* The proceedings are voluntary and respondents have sixty days to opt out after being served, leaving the plaintiff with the option of pursuing litigation instead. *Id.*

⁸ Maria Bustillos, *Publishers Are Taking the Internet to Court*, THE NATION (Sept. 10, 2020), <https://www.thenation.com/article/society/publishers-are-taking-the-internet-to-court/>.

⁹ *Id.*

¹⁰ *Id.*

removed access to the National Emergency Library service while the suit proceeds, though it continues to operate the rest of its site.¹¹ While libraries tend not to attract unwanted legal attention for their preservation and distribution activities, publishers have shown their willingness to litigate when those practices become sufficiently widespread or well known. While the litigation is still pending, the Internet Archive lawsuit will inevitably provide valuable information on courts' receptiveness to library digital services.

The first Section of this memo sets out how librarians may utilize the special protections provided by §108 to digitize a limited number of copies of VHS materials without risk of copyright infringement liability. It also lays out the prerequisites for such protections, which will not apply in every case, particularly because §108 does not reflect the realities of our digital era or the needs of modern libraries and borrowers.¹² Fortunately, while it can't keep up with changing technology, the statute contains a fair use savings clause, which provides that "[n]othing in this section...in any way affects the rights of fair use."¹³ §108 may best be thought of as a minimum stop-gap, to ensure works can be digitized and held in other formats, though depending on the circumstances, possibly not loaned out to patrons.

The second Section of this memo explains the doctrine of fair use, codified in 17 U.S.C. §107,¹⁴ which protects uses of copyrighted material that benefit society to a degree that outweighs the harm caused to the copyright owner. While §108 may be in need of reform, the doctrine of fair use is so valuable to libraries and underlies so many of their key activities that the Library Copyright Alliance (LCA) has opposed proposed reforms of §108 by the Copyright Office out of fear that the product of any political wrangling would jeopardize the fair use saving clause.¹⁵ Fair use provides libraries a legal basis for not just digitizing but also lending physical digital copies of and offering via streaming services many works currently held in VHS format, especially where the original work is not presently commercially available and when the lending is done in a controlled manner. Streaming

¹¹ *Id.*

¹² *Revising Section 108: Copyright Exceptions for Libraries and Archives*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/docs/section108/> (last visited May 17, 2021).

¹³ See 17 U.S.C. §108(f)(4).

¹⁴ See 17 U.S.C. §107.

¹⁵ *LCA Statement on Copyright Office Discussion Document on Section 108 of Title 17*, LIB. COPYRIGHT ALL., <https://www.librarycopyrightalliance.org/documents/united-states-documents/section-108-of-the-copyright-act/lca-issues-statement-on-the-copyright-offices-notice-of-inquiry-concerning-section-108-of-the-copyright-act/> (last visited May 17, 2021).

access in particular reflects contemporary social norms, pursuant to which demand for physical copies of works has fallen. Picking up on this, the memo will explore the implications of Controlled Digital Lending (CDL), a policy suggestion by a group of respected copyright scholars with deep expertise in library and archival work—the legality of which is currently being challenged in the Internet Archive case.¹⁶ The fair use doctrine in the U.S. is strong and broad, but has the disadvantage of being case-specific in its application should such recourse to the courts be necessary.

As this memo is intended for background educational purposes and is not legal advice tailored to the situation of any particular library, libraries considering taking steps to digitize VHS collections should evaluate the programmatic value of their courses of action and the needs of their institutions and the communities they serve against the level of legal risk acceptable to them, consulting a lawyer if necessary.

2. §108 ALLOWS LIMITED NUMBERS OF PRESERVATION COPIES AND ON-SITE ACCESS

In enacting §108, Congress provided a mechanism for libraries to make copies of materials in their collections without worrying about incurring liability for violation of the authors' copyrights. §108 explicitly states that certain forms of reproduction and distribution of copyrighted works by librarians are not an infringement of the otherwise exclusive rights of a copyright owner, provided certain criteria are met.¹⁷ Unfortunately, the §108

¹⁶ This unresolved case may ultimately undermine the legality of CDL. See Compl. ¶ 8, *Hachette Book Group, Inc. v. Internet Archive*, No. 1:20-CV-04160 (S.D.N.Y. June 1, 2020). See *generally infra* Section 3.3.3 (explaining CDL). The plaintiffs argue that all CDL practices are not justified under the first sale doctrine, as scanned books are reproductions rather than distributions. Compl. ¶ 10, *Internet Archive*, No. 1:20-CV-04160 (2020). See *generally infra* note 90 (explaining the first sale doctrine). Further, they argue that the equivalency of physical and digital books underlying CDL is fundamentally flawed, as each product has an independent market and differs significantly from the other. Compl. ¶ 10, *Internet Archive*, No. 1:20-CV-04160 (2020). If the court finds for the plaintiff, the decision would be persuasive (but not binding) authority to undermine CDL's legal legitimacy generally and weaken this memorandum's fair use analysis by narrowing the relevant market under factor four to digitized audiovisual works directly harmed by libraries' mass digitization. See *generally infra* Section 3.1.4 (explaining market harm factor in fair use analysis); discussion *infra* Sections 3.2, 3.3 (applying fair use framework).

¹⁷ 17 U.S.C. §108(a).

copying protections afforded to audiovisual materials are slim—primarily limited to copies of unpublished or obsolete works.¹⁸

2.1. A Library May Make Three Copies of a Commercially Unavailable Work

Recognizing that the preservation of knowledge is a major aim for libraries, Congress, through §108(b) and (c), allowed for the creation of copies—a total of three—of works that threaten to be lost to time in one way or another.¹⁹ These sections apply to works that are unpublished, as well as works that are “damaged, deteriorating, lost or stolen, or if the existing format in which the work is stored has become obsolete.”²⁰

For any unpublished work in a library’s collection, three copies may be made “for purposes of preservation and security or for deposit for research use in another library or archives.”²¹ However, if the reproduction is in “digital format,”²² it may not be further distributed in that format or made available off-site.²³

For published works, there is more likely to be an active commercial market, and §108(c) imposes additional restrictions on the circumstances in which a library may make three copies. First, published works are only eligible for three copies if they’re replacing an original “that is damaged, deteriorating, lost or stolen, or if the existing format in which the work is stored has become obsolete” (the “condition check”), and second, the original must not be commercially available at a reasonable price (the “market check”).²⁴ To perform a market check, the copying library must determine, after a “reasonable effort,” that there is no “unused” replacement copy available at a fair price.²⁵ The statute does not define “fair price,” so a library interested in making preservation copies must rely on its reasonable

¹⁸ *Id.* §108(b); *id.* §108(c); *id.* §108(i). Note that much broader permissions exist for the copying of audiovisual newscast recordings. *Id.* §108(i). A single copy of these recordings may be made for any reason, *id.* §108(a), as well as interlibrary loan copies, *id.* §108(d), and copies for patron’s personal use, provided the library does not retain such a copy after it has been given to the patron, if a copy is not commercially available, *id.* §108(e).

¹⁹ *See id.* §108(b),(c).

²⁰ *Id.*

²¹ *Id.* §108(b).

²² *Id.* §108(b), (c). The prohibition on off-premise lending of “digital formats” was added in the 1998 revisions to the statute under the Digital Copyright Millennium Act.

²³ *Id.* §108(b)(2).

²⁴ *Id.* §108(c).

²⁵ *Id.* §108(c)(1).

judgment. The provision that covers published works also contains a restriction on copies in a “digital format”: like those of unpublished works, they may not be made available to the public in that format off-site.²⁶

As the VCR players necessary to play VHS tapes are no longer manufactured,²⁷ it could be argued that the VHS format has already become “obsolete” within the meaning of the statute. A current search shows no new players available, and a less than robust market for second-hand units.²⁸ Without the player, the cassettes are useless. However, many institutions are still in possession of working VCRs. At present, the lowest risk option would still be for a library seeking to make preservation copies under §108 to confirm that each tape to be copied is, in fact, deteriorating. However, if a library is prepared to take the position that the format itself is obsolete, an individual condition check is no longer necessary, as the obsolescence of the format would satisfy this requirement regardless of the tape’s condition.

2.2. §108 Does Not Protect Digital Copies Lent Off-site

When the Digital Millennium Copyright Act was passed in 1998, it included some amendments to §108. By that time, it was widely acknowledged that “digital preservation” was the most convenient and reliable method to make preservation copies, but digital technologies were also raising concern among content owners for their potential to facilitate large-scale distribution. The amendments added additional restrictions to the dissemination of digital copies of commercially unavailable works made under §108(b) and (c).²⁹ While the wording of the restriction in each section is slightly different, the fallout is that copies made pursuant to these sections in “digital format” may not be made available off-site, or more specifically, “outside the premises.”³⁰ This language may protect interlibrary loan agreements that involve the actual transfer of a digital copy in physical

²⁶ *Id.* §108(c)(2).

²⁷ Mark Walton, *Last known VCR maker stops production years after VHS format launch*, ARS TECHNICA (July 21, 2016), <https://arstechnica.com/gadgets/2016/07/vcr-vhs-production-ends/>.

²⁸ Search for “VCR,” GOOGLE SHOPPING, <https://shopping.google.com> (input “VCR” into the search field) (last visited May 17, 2021).

²⁹ Laura N. Gasaway, *Amending the Copyright Act for Libraries and Society: The Section 108 Study Group*, 70 ALB. L. REV. 1331 (2007).

³⁰ See 17 U.S.C. 108(b)(2), 108(c)(2).

format (i.e. DVD) from one library to another.³¹ However, sharing of purely digital (non-physical) files between libraries would likely not be covered by this exemption as the digital transfer may be viewed as a secondary copying of the underlying work.

The use of the phrase “digital format” in the statute means this restriction applies to both digital files and DVDs of published and unpublished works. It is not clear that this double meaning was intended, and the U.S. Copyright Office has attempted to correct this ambiguity by introducing, as part of a larger proposed reform to §108, new model statutory language. The new language would differentiate between copies stored in “physical formats,” which would include DVDs and could be made available for off-site use, and “non-physical” formats, which would have to be accessed on-site.³² This language has not been adopted and so may or may not be treated as persuasive by a court in the event of litigation.

2.3. §108 Also Allows for Fair Use

Due to the strict limits on the off-site lending of digital copies and small overall number of copies that can be made, §108 may be a somewhat poor fit for the aims of libraries in preserving their VHS collections and, more generally, with our increasingly digital contemporary culture. However, the statute’s specific protections for libraries only add to, and do not subtract from, libraries’ rights to make fair uses of copyrighted material.³³ In fact, as noted above in Section 0, this “savings clause” is critical, as libraries that want to make and lend additional digital copies of their VHS collections than §108 expressly allows may rely on fair use to do so.

³¹ The statute seems to take pains to protect such practices. For example, it explains that “systematic reproduction or distribution of a single or multiple copies,” as opposed to the “unrelated reproduction or distribution of a single copy,” is not protected. 17 U.S.C. 108(g), (g)(2). However, it also explains that “nothing in this clause prevents a library...from participating in interlibrary arrangements.” 17 U.S.C. 108(g)(2).

³² See Copyright Office, *Section 108 of Title 17: A Discussion Document of the Register of Copyrights*, 10–12 (September 2017), <https://www.copyright.gov/policy/section108/discussion-document.pdf>. By stressing “physical” vs. “non-physical” formats as opposed to “digital” ones, the Copyright Office argues that new language better matches how users view different types of work. *Id.* at 33. However, implicit in such a suggestion is that §108 in its current state does a poor job of mapping onto the modern, digital world.

³³ 17 U.S.C. §108(f)(4) (“Nothing in this section... in any way affects the right of fair use as provided by section 107.”).

3. FAIR USE

The law of fair use has a statutory basis, and has been extensively developed by the courts. Its application is highly fact-specific. Therefore, this section will begin by providing an overview of the law, then applying it first to the digitization (or copying) of VHS tapes for preservation purposes, and finally to the question of making the digital copies accessible to library patrons.

3.1. Fair Use Is Evaluated with a Four-factor Test

While the concept of fair use was originally created by courts, it is now codified in 17 U.S.C. §107, which states that “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . . scholarship or research, is not an infringement of copyright.”³⁴ These are not the only uses protected by the doctrine: the U.S. Supreme Court has made clear that this list is not exhaustive and has an “illustrative and not limitative” function.

To identify if a use is “fair,” the statute lays out four factors for consideration:

- “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.”³⁵

The Supreme Court has noted that none of these factors are alone determinative and they should not “be treated in isolation... All are to be explored, and the results weighted together.”³⁶ However, the first and fourth factors have over time become a focus for courts.³⁷

³⁴ 17 U.S.C. §107.

³⁵ 17 U.S.C. §107.

³⁶ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

³⁷ *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

3.1.1. The First Factor Looks to the Character and Purpose of the Copying and Dissemination of a Work

The first factor, by its text, distinguishes between copies made for commercial purposes and those made for educational purposes, as the latter is generally within the kind of copying the statute explicitly aims to protect.³⁸ Modern courts have increasingly downplayed this distinction after the Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* said this factor instead aimed to gauge how “transformative” a work is in “altering the original with new expression, meaning, or message.”³⁹ Courts treat transformativeness with special attention: it acts as a kind of sliding scale in which “the more transformative the new work, the less will be significance of other factors, like commercialism, that may weigh against a finding of fair use.”⁴⁰

What exactly constitutes a “transformative” use, however, is far from clear. Some courts have believed it refers *only* to new “expression, meaning, or message” added to an existing work.⁴¹ Such an interpretation would mean that verbatim copying *per se* cuts against fair use under this factor, or at least, creates a presumption against it favoring fair use.

This interpretation stands in sharp contrast to courts who have also considered whether a use is socially beneficial as *part* of the test for transformativeness,⁴² those that credit uses that serve a different function

³⁸ See *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) (finding that a library supplying researchers with copies of papers was a fair use); *Diversey v. Schmidly*, 738 F.3d 1196, 1203 (10th Cir. 2013) (arguing that the first factor weighed in favor of the distribution of a confiscated and unpublished dissertation by a library, though the court ultimately found the use unfair in light of the other factors); *Tresona Multimedia, LLC v. Burbank High Sch. Vocal Music Ass'n*, 953 F.3d 638, 648–50 (9th Cir. 2020) (finding the purpose and character factor weighed in favor of a high school chorus teacher’s use of a portion of a copyrighted song as part of a musical arrangement due to the educational use, but also the different message conveyed by the resulting arrangement).

³⁹ *Campbell*, 510 U.S. at 569 (finding fair use in a 2 Live Crew parody of the Roy Orbison classic “Pretty Woman”). See also *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010) (finding that “[a]lthough ‘transformative use is not absolutely necessary for a finding of fair use, the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works’”).

⁴⁰ *Id.*

⁴¹ *Id.* (quoting *Campbell*, 510 U.S. at 569, 579 (1994)).

⁴² See e.g., *Sony Computer Entertainment, Inc. v. Connectix Corp.*, 203 F.2d 596 (9th Cir. 2000) (finding defendant’s use was fair as their emulator software was “modestly

than the original even where exact copies are involved,⁴³ or both.⁴⁴ The Supreme Court’s most recent fair use decision, *Google LLC v. Oracle America, Inc.*,⁴⁵ suggests the legitimacy of taking these factors into account. In finding the challenged commercial use transformative despite verbatim copying, the *Oracle* Court pointed to the defendant’s purpose of encouraging the creation and usefulness of new products.⁴⁶ This case also leaves open the possibility that a *non-commercial* use, particularly one for “non-profit educational purposes,” as per the statutory language, could be especially favored under this factor.⁴⁷

3.1.2. The Second Factor Judges the Nature of the Underlying Work

The 2nd Circuit has stressed that this factor is “not dispositive”⁴⁸ and “rarely plays a significant role in...a fair use dispute.”⁴⁹ However, this same court has also said that this factor primarily looks to the underlying content of the copyrighted work in asking, among other things, whether the work is fact-based (as with non-fiction works) or creative (as with fictional works).⁵⁰ The 9th Circuit has also suggested that where a work is no longer available on the commercial market, that may cut in favor of fair use under this factor.⁵¹

transformative” in providing a “new platform” for users to play PlayStation games on their home computers).

⁴³ See e.g., *Perfect 10 v. Amazon*, 508 F.3d 1146, 1165 (9th Cir. 2007) (finding Google’s use of exact but reduced-sized copies of works fair as the thumbnail images were made to “improve access to information” in assisting peoples’ use of the search engine, citing *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003)).

⁴⁴ See e.g., *Google LLC v. Oracle America, Inc.*, No. 18-956, 2021 WL 1240906 (April 5, 2021) (holding that defendant’s purpose of fostering creation and expansion of an innovative smartphone product was transformative despite verbatim copying of competitor’s software); *White v. West Pub. Corp.*, 29 F. Supp. 3d 396, 399 (S.D.N.Y. 2014) (finding fair use for the reproduction of legal briefs because the defendant has created an “interactive legal research tool” which imbued the reproduced briefs with “further purpose and different character” than the originals which were merely prepared for litigation).

⁴⁵ No. 18-956, 2021 WL 1240906 (April 5, 2021)

⁴⁶ *Id.*

⁴⁷ See 17 U.S.C §107(1).

⁴⁸ *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 98 (2d. Cir. 2014).

⁴⁹ *Authors Guild v. Google, Inc.*, 804 F.3d 202, 220 (2d. Cir. 2015) (citing William F. Patry, *Patry on Fair Use §4.1* (2015)) (refusing to credit the fact that factual works happened to be involved in the case in arguing both fiction and factual works deserved protection, and instead judging Google Books overall use of “snippet” sections copied from books as fair because it “transformatively provides valuable information about the original”).

⁵⁰ *Id.* at 96 (quoting *Harper & Row*, 471 U.S. at 563).

⁵¹ *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022, 1028 (9th Cir. 2000).

Many courts have found that the second factor also turns, in part, on whether a work is published or unpublished.⁵² If a work is unpublished, that will often weigh against a finding of fair use as the “right of first publication is an important right held by the copyright owner.”⁵³ Only a few cases, such as the high-profile *Salinger v. Random House Inc.*⁵⁴ case, involved unpublished material as old as the VHS content in question here. There, the materials in question were letters that the author J.D. Salinger had written to various friends and acquaintances that were decades old at the time of the suit, and largely housed in libraries at a number of universities where they had been donated.⁵⁵ While the right of first publication was heavily stressed in finding against fair use, it should be noted that such letters still had a potential market only because of the unusual mystery surrounding Salinger as a literary figure.

3.1.3. The Third Factor Weighs the Amount and Substantiality of the Work Being Copied

As this factor’s language suggests, a court is directed to look at both the amount of a copyrighted work used and the “substantiality” of it in relation to the copyrighted work as a whole.⁵⁶ While copying a whole work may weigh against a finding of fair use,⁵⁷ such copying will be protected “where the material copied captures little of the material’s creative expression or is central to a copier’s valid purpose.”⁵⁸ In so ruling, courts have largely eschewed a bright-line quantity rule in favor of a rule that instead asks if the amount copied goes beyond its purported aim.⁵⁹

⁵² *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537 (S.D.N.Y. 2013). See also *Gaylord v. United States*, 595 F.3d 1364 (Fed. Cir. 2010) (citing *Blanch v. Koon*, 467 F.2d 244 (2d. Cir. 2006); *Sony*, 214 F.3d at 1022.

⁵³ *Meltwater*, 931 F. Supp. 2d at 552 (citing *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d. Cir. 1991)).

⁵⁴ 811 F.2d 90 (2d. Cir. 1987).

⁵⁵ *Id.* at 92.

⁵⁶ *Campbell*, 510 U.S. at 586.

⁵⁷ *A.V. ex rel. Vanderhye v. iParadigms, LLC.*, 562 F.3d 630 (4th Cir. 2009) (quoting *Sundeman v. The Seajay Soc’y, Inc.*, 142 F.2d 194, 205 (4th Cir. 1998)). See also *Soc’y Holy Transfiguration Monastery, Inc. v. Gregory*, 689 F.3d 29 (1st Cir. 2012).

⁵⁸ *Oracle*, No. 18-956, 2021 WL 1240906 (2021).

⁵⁹ See e.g., *Cambridge University Press v. Patton*, 769 F.3d 1232, 1275 (11th Cir. 2014) (arguing the District Court should have asked whether a University’s posting of portions of copyrighted books electronically for student “was excessive in light of the educational purpose of the use and the threat of market substitution”).

For example, 9th Circuit has explained that this factor is a “flexible one, rather than a simple determination of the percentage of the copyrighted work used”⁶⁰ and that under “certain circumstances” a court could find a fair use even where a work is copied “in its entirety.”^{61 62} In this vein, the 2nd Circuit explained that:

Neither our court nor any of our sister circuits has ever ruled that the copying of an entire work *favours* fair use. At the same time, however, courts have concluded that such copying does not necessarily weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use...⁶³

Seizing on this line of reasoning, scholars have argued that many courts have similarly relied more on the reasonableness of a particular use than on the amount used, and have thus found copying of entire works, when needed to fulfil a legitimate aim, to not weigh against fair use.⁶⁴ The Supreme Court’s recent *Oracle* decision reflects this very reasoning, as the Court took into account the necessity of attracting programmers to a “different computing environment” when assessing the verbatim copying of a popular software under this factor.⁶⁵

⁶⁰ *Monge v. Magazines, Inc.* 688 F.3d 1164 (9th Cir. 2012).

⁶¹ *A&M Records, Inc. v. Napster, Inc.* 239 F.3d 1004 (9th Cir. 2011) (quoting *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449–50 (1984)) (holding that Betamax’s ability to “time shift” original broadcasts by recording them for private viewing was a fair use). See, e.g., *Oracle*, No. 18-956, 2021 WL 1240906 (2021).

⁶² *Kelly v. Arriba Soft. Corp.* 336 F.3d 811 (9th Cir. 2003).

⁶³ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d. Cir. 2006) (deeming reduced sized reproductions of artistic Grateful Dead posters and images in a biography a fair use).

⁶⁴ David R. Hansen and Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books*, <https://controldigitallending.org/whitepaper> at 15 (citing *Bouchat v. Baltimore Ravens Ltd. Partn.*, 737 F.3d 932, 943 (4th Cir. 2013) (allowing the copying of an entire work to achieve an allowable aim); *Chicago Bd. of Educ. v. Substance, Inc.* 354 F.3d 624, 629 (7th Cir. 2003) (“there is no per se rule against copying in the name of fair use an entire copyrighted work if necessary”); *Sundeman*, 142 F.2d at 206 (arguing this factor weighs in favor of use when the copy granted to a researcher was a full copy as her work needed either the original or a reproduction of its full text); *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605, 613 (2d. Cir. 2006) (this factor does not “weigh against fair use because copying the entirety of a work is sometimes necessary to make a fair use of the image”)).

⁶⁵ *Oracle*, No. 18-956, 2021 WL 1240906 (2021).

3.1.4. The Fourth Factor Gauges the Potential Effect of Copying and Disseminating a Work on the Relevant Markets for that Work

It has been argued that while courts purport to place equal emphasis on the four factors, in practice, they place the most emphasis on the fourth statutory factor.⁶⁶ As part of this inquiry, courts must look at not just the extent of negative economic effects caused to a copyright owner by the alleged infringement but whether such conduct by others, similarly left unchecked, would have aggregate and negative impact on the market for the original⁶⁷ and derivative works.⁶⁸ The 2nd Circuit made it clear that the particularized concern is that the copyright owner will miss out on revenue because of the chance that potential purchasers would choose to acquire the copy over the original.⁶⁹ Treating this factor as a sort of microcosm of the overall fair use test itself, the Supreme Court has said it requires taking “into account the public benefits the copying will likely produce” relative to a rightsholder’s lost income.⁷⁰ Similarly harkening back to the overall aims of copyright law, the 11th Circuit has stressed the economic harm must be “substantial” so as to frustrate the artist’s incentive to publish the work in the first place.⁷¹

3.2. Fair Use Is Likely to Protect the Copying of VHS Tapes

With the condition of many VHS tapes rapidly deteriorating, the first question is whether fair use will permit them to be digitized for preservation purposes. Accordingly, this Section will assess, factor by factor, how fair use may insulate libraries from copyright infringement liability for creating digital copies of their VHS collections. The analysis assumes that the copies will be held in a dark archive,⁷² at least for the time being. While far from an optimal long-term solution, such preservation copies can be utilized as an interim measure to ensure that VHS collections can be held in

⁶⁶ 18 AM. JUR. 3D *Copyright and Literary Property* §95 (citing *Harper*, 471 U.S. at 539).

⁶⁷ *Id.* (citing *Campbell*, 510 U.S. at 569); *Swatch Group Management Services Ltd. V. Bloomberg L.P.*, 756 F.3d 72 (2d Cir. 2014); *Setlzer v. Green Day, Inc.*, 725 F.3d 1170 (9th Cir. 2013); *Cambridge University Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014); *Tresona*, 953 F.3d at 651–52.

⁶⁸ *Campbell*, 510 U.S. at 590 (quoting *Harper & Row*, 471 U.S. at 568).

⁶⁹ *Google*, 804 F.3d at 223 (arguing Google Books use of “snippets” of copyrighted works was unlikely to have a “significant” effect on the market) *Id.* at 224.

⁷⁰ *Oracle*, No. 18-956, 2021 WL 1240906 (2021); see also *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2nd Cir. 2006).

⁷¹ See *Cambridge Univ. Press v. Patton*, 769 F.3d 1232, 1276 (11th Cir. 2014).

⁷² A dark archive is “dark” in the sense that it is accessible only to library staff and not the general public.

digital format until such time as the institution is prepared to make them available.

Fair use provides a powerful justification for making copies of commercially unavailable tapes for any reason⁷³ and all tapes if copied only for purposes of preservation. In both instances, the first three factors are largely neutral and the fourth factor weighs heavily in favor of fair use.

3.2.1. The First Factor May Not Favor Fair Use as the Use May Not Be Transformative

In regards to the purpose and character of the use, libraries seeking to digitize VHS tapes would face a significant challenge, in that verbatim copying has generally not been a “transformative” use—with the notable exception of the challenged use in *Oracle*.⁷⁴ In response to this historical trend, the position statement on Controlled Digital Lending (hereafter the “CDL Position Statement”) argues that while librarians have a strong fair use argument for digitizing their collections, their argument “is not premised on [] being transformative.”⁷⁵ Instead, the CDL Position Statement’s co-authors emphasized the original statutory framing of this factor, namely the *purpose* of the use.⁷⁶

They argued that even though digitization is not transformative in the sense of adding or changing expressive elements, library uses virtually all favor fair use by “providing access to information in order to encourage literary, education, criticism, comment, news reporting, teaching, scholarship and research, creating the informed citizenry essential to a functioning democracy.”⁷⁷ Seizing on this distinguishing feature of library uses, two of the authors of the CDL Position Statement, Kyle Courtney of Harvard and David Hansen of Duke University, have pointed to three recent cases where the uses similarly involved a “format shifting” defense—that the defendant was merely moving content they had legally purchased from one medium to another.⁷⁸ While the court in all three cases ultimately disfavored fair use

⁷³ Unless, of course, the library’s copying had some purpose outside the scope of normal library or archival purposes (i.e. running a commercial venture).

⁷⁴ *Oracle*, No. 18-956, 2021 WL 1240906 (2021).

⁷⁵ Lila Bailey et al., *Position Statement on Controlled Digital Lending by Libraries* (Sept. 2018), <https://controlledigitalending.org/statement> at 2.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ HANSEN & COURTNEY, *supra* note 64, at 15 (citing Capitol Records, LLC v. ReDigi, Inc, 934 F. Supp. 2d 640, 645-46 (S.D.N.Y 2013) (affirmed by Capitol Records, LLC v. ReDigi, Inc., 934

on the first factor,⁷⁹ all three involved commercial uses both in regards to the commercial nature of the user, the fact that the product was inherently commercial, or both.⁸⁰ Moreover, courts have, at times, recognized even commercially motivated uses as transformative and, by extension fair, where they have resulted in increased access to information,⁸¹ and provided more accessible media for consumption.⁸² It is possible that a court could find, therefore, that this factor weighed in favor of a digitizing library.

At worst, the verbatim copying involved in archival digitization means that the lack of “transformative” modifications to the work would likely weigh evenly against the non-commercial, socially beneficial nature of the use, and thus this factor would cut neither for nor against fair use.

3.2.2. The Second Factor Depends on the Type of Work that Is Digitized, but Is Unlikely to be Probative

Libraries’ VHS collections likely consist of a wide variety of material, from fictional movies to nonfiction documentary footage; from widely published materials that are still commercially available, albeit in other formats, to unpublished, locally produced tapes of public lectures. This complicates the application of the second factor, which looks to the character of the underlying original work. However, whether this factor weighs for or against is unlikely to be influential in the overall question of whether VHS digitization is fair use, as the 2nd Circuit has acknowledged its relative lack of pertinence.⁸³ Therefore, a library could reasonably decide to digitize the full range of types of VHS materials.

A library seeking to mitigate risk under this factor could focus its digitization efforts on particular types of material. The second factor is most likely to favor fair use if the materials that are selected for digitization are

F. Supp. 2d 640 (S.D.N.Y. 2013)); *Wall Data Inc. v. Los Angeles County Sheriff’s Dept*, 447 F.3d, 778–79 (9th Cir. 2006) (finding the Sheriff’s use of 3663 licensed copies to install Wall Data’s software on 6,007 computers was, *inter alia*, not “transformative”); *Disney Enterprises, Inc. v. VidAngel, Inc.*, 869 F.2d 848, 861–62 (9th Cir. 2017)).

⁷⁹ *Id.* at 15–16.

⁸⁰ *Id.* at 16.

⁸¹ See *supra* note 44 (discussing *White*, 29 F. Supp. 3d at 396). *But see* *Sinclair v. Ziff Davis, LLC*, No. 18-CV-790 KMW, 2020 WL 3450136 (S.D.N.Y. Jun. 24, 2020) (granting motion for consideration based on insufficient evidence of social media platform granting defendant a sublicense to embed plaintiff’s photograph).

⁸² See *supra* note 43 (discussing *Perfect 10*, 508 F.3d at 1165).

⁸³ *Google*, 804 F.3d at 220 (finding that although the works involved were “factual,” both factual and fictional subjects matters had material worthy of copyright and that the court instead look to the Google Books system as a whole that copied both types of works).

factual and published works that are not commercially available. For example, if a university library holds tapes of public lectures that were not disseminated outside the university, it would have a strong argument that there is no potential market for such unpublished VHS materials, in contrast to the old letters of Salinger (see Section 3.1.2). Similarly, the CDL Position Statement argues that a library's copying of a "commercially inactive, out-of-print or a so-called 'orphan work' whose owner cannot be identified or located" makes for a presumptively strong argument for fair use under this factor.⁸⁴ Therefore, a library could check a work's publication status, its commercial availability, and whether it is primarily a work of fiction or non-fiction, before slating it for digitization. However, a library may not want to spend the time and cost associated with prioritizing non-fiction over fiction works when this factor is unlikely to be determinative to the fair use outcome.⁸⁵

3.2.3. The Third Factor Will Allow for Copying the Entirety of a Work when that Use is Necessary and Reasonable (e.g., for Preservation)

The fact that the entire work is copied would generally cut against fair use. However, it can be counterbalanced by a finding that the use in question is wholly reasonable for its purpose and that the purpose is one fair use would generally support.⁸⁶ Here, the libraries' first aim is to preserve existing knowledge from active deterioration, which requires copying the work in its entirety and supports a fair use defense to any §106(1) violation. Digitizing full copying is the only way for a library to fulfill its mission, and to continue to utilize its own collection towards these ends. As anything less than a full copy of a VHS work in this context makes little sense, this factor does not cut for or against fair use.

3.2.4. The Fourth Factor Will Only Weigh against a Library that Digitizes VHS Materials that Remain Commercially Available

In evaluating the fourth factor, the court would look to see if the commercial market for the underlying VHS work was harmed, in the form of lost sales, by the library's digitization efforts. Notably, if a library performs a market check, as required by §108 and described in Section 2.1, to ensure no copies are commercially available for a reasonable price, it will also be in a position to make a strong judgment about this factor. This will

⁸⁴ See BAILEY ET AL, *supra* note 75, at 2; Jennifer Urban, *How Fair Use Can Help Solve the Orphan Works Problem*, 27 BERK. T. L. J. 1379, 1379 (2012).

⁸⁵ See *Google*, 804 F. 3d at 220.

⁸⁶ See e.g., *Oracle*, No. 18-956, 2021 WL 1240906 (2021).

mean a search for both commercially available copies of that work in both original VHS (unlikely) and DVD formats. In some circumstances, commercial availability may be a close question that will require libraries to exercise discretion. For example, a VHS of a popular film from the 1980s may be the only source for the original version with the original prefatory material, whereas more contemporary formats may feature a remastered version.

If material is *only* available on a commercial streaming service,⁸⁷ a library has a strong argument that this work is not “commercially available” for purposes of the statute. After all, §108 requires libraries to make a “reasonable effort” to find an “unused *replacement*.”⁸⁸ Not only can this access to digital content not fully stand-in as an actual permanent replacement, as it is revocable, but such access does not serve libraries’ ultimate goal of preservation.

If no copies are available on the market for a fair price, then the market for the work is non-existent and cannot be harmed. While dissemination could still technically hurt a *potential* (future) market for the work or some derivative of that work, the fact that the underlying work was created in an outdated format and that the market has not provided it in a more modern format suggests that such harm is purely speculative. Similarly, it would spell a great loss to society if VHS works that are “orphaned”—those whose copyright owners cannot be found, and who may not even be aware that they are the rightsholders—were not able to be copied and disseminated even while the missing copyright holder is not exploiting the work.⁸⁹

If, however, a library chooses to digitize a VHS when that material is commercially available, they are running the risk of this factor cutting against the fairness of that copying. However, a library may weigh the cost and effort of performing a market check on each of its VHS works against the level of increased risk in not performing such a check. Depending on the overall character of its VHS collections, a library may be able to make educated guesses based on existing metadata that may act as a proxy for a lack of market availability (e.g. a publisher that is known to have gone out of business) which may diminish the additional level of risk involved in not performing individual market checks. Furthermore, if the copy is intended

⁸⁷ E.g. KANOPY <https://www.kanopy.com> (last visited May 17, 2021).

⁸⁸ §108(c)(1) (emphasis added).

⁸⁹ See Randal C. Picker, *Private Digital Libraries and Orphan Works*, 27 BERK. T. L. J. 1259 (2012); *Oracle*, No. 18-956, 2021 WL 1240906 (2021) (relying on public benefits of copying in finding factor four in favor of fair use.)

only for preservation in a dark archive, practically speaking, the level of additional risk may be negligible.

3.3. Fair Use Is Likely to Protect Loans of Materials that Are Commercially Unavailable

Once a library has digitized materials in its collection that it once held in VHS format, the question will arise of how these materials can be made accessible to patrons. Although access could take many forms, from physical media lending to digital streaming, the continuing constraints of the COVID pandemic will likely lead libraries to favor off-site streaming options to supplement physical access for at-risk communities. A legal analysis and the library's risk tolerance may narrow these options somewhat. As such uses of copies may not be protected by the first sale doctrine⁹⁰ or §108,⁹¹ the fair use doctrine is key in providing relief from copyright liability.

⁹⁰ The first sale doctrine originated in common law but was eventually codified by federal statute, 17 U.S.C.A. §109(a), and stands for the proposition that “once the owner of a copyright consents to the sale of particular copies of the copyrighted work, the copyright owner may not thereafter exercise the distribution right with respect to such copies.” *Construction and Application of ‘First Sale Doctrine’ in Copyright Law*, 75 A.L.R. Fed. 2d 387 (2013); *see also* 17 U.S.C.A. §109(a). In other words, as the Court has said, while §106(3) prohibits the distribution of copies of a copyrighted work, once a copy of a work is lawfully sold, the buyer is free to dispose of that particular copy as they see fit. “Section 109(a) now makes clear that a lessee of a copy will *not* receive ‘first sale’ protection but one who *owns* a copy will receive ‘first sale’ protection, *provided*, of course, that the copy was ‘*lawfully made*’ and not pirated.” The “first sale” made by the original copyright owner has “exhausted” their exclusive right of distribution. *Kirtsaeng v. John Wiley & Sons, Inc.* 568 U.S. 519, 524, 535 (2013).

However, the first sale doctrine may not protect the loan of a DVD that the library made itself by digitizing a VHS tape, because that copy of the work was not sold by the rightsholder, and thus the distribution right has not been exhausted. In *ReDigi*, 910 F.3d at 655, the defendant argued that because they had legally purchased an original music file of each work sold, as long as they exercised control over the number of digital copies made and circulated (i.e., no more than one for any original copy), the first sale doctrine should apply. Although some copyright scholars supported this argument, the court disagreed, finding that they were not the legal owner of that “*particular*” copy in having reproduced it digitally (quoting 17 U.S.C. §109(a)). *See Brief of Copyright Law Scholars as Amici Curiae*, Capitol Records, LLC. V. ReDigi, Inc., No. 16_2321-cv, 2017 WL 633664, at *4, *28 (2d. Cir. February 14, 2017) (arguing that copy owners are able to dispose of, re-sell or lend out their lawful purchases as they see fit and so, when combined with fair use, ReDigi’s first sale entitlement meant there was no recognizable harm to the market for the underlying work through their resale of digital music files).

⁹¹ For instance, all digital copies, whether purely digital or a DVD, are not allowed to be lent to or viewed by patrons except on library’s premises. *See* §108(b), (c) and discussion above in Section 2.2.

Accordingly, this section of the memo will walk through a fair use analysis of two ways in which digitized material may be made available: on physical media and via streaming service. How strongly the analysis tips in favor of fair use will depend in large part on whether the underlying work is commercially available. After all, the language of §108 and the court's application of fair use demonstrate a concern that digital copies can often be effortlessly reproduced and thus will drastically and negatively impact the copyright owner's commercial market for that work.⁹² However, if no market for that works exists, a finding of fair use is much more likely.

3.3.1. Fair Use Likely Protects the Loaning of Physical Digital Copies of Material that Is Commercially Unavailable, and Limits on Borrowing May Expand its Reach to Protect Commercially Available Works

The fair use analysis for loaning out physical copies of digitized VHS materials (e.g. on DVD), either directly to patrons or through inter-library loan, is very similar to the fair use analysis around the digitization itself. For factors one through three, it's essentially identical and shows these factors are largely neutral, if not tilting in favor of fair use. As discussed in Sections 3.2.1 through 3.2.3 above, under the first factor the use is likely non-transformative but done with an educational and non-profit purpose; the second factor is not particularly probative but can be made stronger through selection of favorable titles for digitization,⁹³ and the third factor would normally disfavor verbatim copying but in this context it is reasonable and necessary. Analysis under the fourth factor differs slightly for loans.

Although copying for a dark archive might be fair use regardless of a work's commercial availability, lending of that copy is likely fair use only where the work is not commercially available. In this case, there likely is not a significant effect on the market for such copies, as the public, like the library, cannot purchase the original works. Thus, the fourth factor, a point of emphasis for the courts, would strongly favor fair use as there is no existent market for such works and so no economic harm done to the copyright owner in disseminating them.

However, if a copy of a work that is commercially available were to be loaned to patrons, the analysis under the fourth fair use factor would

⁹² See *supra* Section 3.2.4.

⁹³ See *Google*, 804 F.3d at 220 (“The Supreme Court has passed over this factor without giving it much attention, stating that it is often ‘not much help.’”) (quoting *Campbell*, 510 U.S. at 586).

change substantially. Under these circumstances, the fourth factor likely would not support fair use, as the freely loaned copies have the potential to damage the market for the original work. The extent of this damage is debatable. On one hand, a library has only a few physical copies of each work, which are loaned to one end user at a time for a limited period. On the other hand, libraries can repeatedly lend their copies to a nearly unlimited number of users, none of whom need to purchase a copy. If the library lends only those copies of works that are not commercially available, the fourth factor most likely indicates fair use, and, on balance, the loaning of physical digital copies should be protected by fair use. If copies of works that are commercially available are loaned to patrons, the fair use defense is less likely to apply, though might still be asserted due to the substantial public benefits of such copying relative to potential losses.⁹⁴

3.3.2. Fair Use Likely Protects the Streaming of Material that Is Commercially Unavailable

If a library wished to offer patrons streaming access to digital files of works formerly held on VHS, again the four-factor analysis under fair use falls in more or less the same way as it did in Section 3.3.1, immediately above. The second and third factors would not cut strongly for or against fair use. A court could see the first factor analysis as equivalent to physical loans, or might be persuaded that streaming, which can reach borrowers who are not physically able to get to libraries, is an even more socially beneficial use.⁹⁵

The fourth factor would likely, as above, favor fair use for works that are not commercially available, and disfavor it for works that are. However, if a library decides to stream a commercially available work, as opposed to simply lend out a physical DVD, the analysis under the fourth factor is unfavorable to an even higher degree. First, each request to stream the content of a former VHS would likely be treated by courts as a new copy.⁹⁶ Moreover, granting patrons unlimited and instantaneous access to these works online could have a very significant impact on the commercial market for that work. It would function as a full substitute for a patron who might otherwise buy that work or pay for an online streaming service that

⁹⁴ See *Oracle*, No. 18-956, 2021 WL 1240906 (2021).

⁹⁵ BAILEY ET AL., *supra* note 75, at 2 (arguing that streaming provides “non-discriminatory access and information self sufficiency to residents in rural communities, the elderly or physically disabled, and other for whom a trip to their local library may be a barrier to access. During natural disasters and serve weather, as well as during health emergencies, CDL may be the only practical way for citizens to access what their libraries have purchased for their use”).

⁹⁶ See *ReDigi*, 910 F.3d at 649.

licenses the work for inclusion. Provided that the resolution of the stream was adequate, it might even prove to be *superior* to market offerings, accessible for free at any time, from anywhere. That being said, it is possible that the potential public benefits of such streaming may outweigh these concerns.⁹⁷

A potential workaround is to limit the number of users who are able to access the content. For example, a library might permit only a certain number of streams of a particular title per month, limit the length of time for which streams can be “borrowed,” or limit the number of repeat streams.

3.3.3. Controlled Digital Lending May Provide an Avenue for Streaming of Commercially Available Works

CDL is a system in which digital copies would stand in on a one-to-one basis for the library’s VHS versions of works, which would no longer be available for loan. Patrons would wait for online versions to become available in a virtual queue, with the content only becoming available once the previous patron’s “temporary lending period” (akin to how long a VHS or DVD would be physically lent out)⁹⁸ had expired.⁹⁹ The system is meant to mimic traditional physical lending as closely as possible, maintaining a strict “owned to loaned” ratio.¹⁰⁰ A library that owns three copies of a title might choose to loan one digital copy and two physical copies, two digital copies and one physical copy, or loan out three digital copies while restricting access to all of the physical copies.¹⁰¹

CDL in this way capitalizes on the fact that a library has lawfully acquired all of the works and could limit total consumption to only as much as could occur from that particular copy of the work. If streaming is restricted as the CDL model suggests, it drastically increases digital access to these works, supporting libraries’ educational aims, while minimizing the potential for economic loss to the copyright owner.

Unfortunately, two influential decisions may sharply call into question the viability of first sale doctrine as applied to CDL. First, the CDL Position Statement was released before the decision in *Capital Records, LLC v.*

⁹⁷ See BAILEY ET AL., *supra* note 75, at 2.

⁹⁸ The authors of the Position Statement broadly lay out the outline of such a system of digital lending regardless of the format of the copy. BAILEY ET AL., *supra* note 75, at 1.

⁹⁹ See BAILEY ET AL., *supra* note 75, at 2.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 1.

ReDigi Inc. from 2nd Circuit Court of Appeals.¹⁰² As Hansen and Courtney point out, the district court opinion had left open the critical question of whether “the transfer of a digital copy from one device to another” was “the transfer of a particular copy or the creation of a new copy[.]”¹⁰³ The 2nd Circuit ruled that a digital file transfer is a “new copy” for purposes of copyright law and therefore “does not qualify for first sale protection.”¹⁰⁴ In other words, the court found that the first sale doctrine does not apply to the transfer of digital files as the particular copy that a patron is ultimately utilizing is not deemed to be the same copy legally purchased by the library in the first instance—even when the so-called “copy and delete” method is used.¹⁰⁵ While this decision is not binding outside of the 2nd Circuit, it increases the risk profile associated with adopting CDL for libraries seeking to fully digitize and disseminate their VHS collections.¹⁰⁶

Likewise, the complaint in the Internet Archive lawsuit directly challenges this model. Rather than viewing the digital market for books as part of an overall market for published materials, publishers highlighted the intentional development of an eBook market by their industry, including the use of Digital Rights Management software and online marketing.¹⁰⁷ Publishers specifically rejected the CDL model, which they view as an “invented paradigm that is well outside copyright law,” arguing that it constitutes infringement.¹⁰⁸ Publishers further challenged the first sale model at the heart of CDL, reviewing it only as an exemption for distribution, rather than reproduction rights. CDL, then, would not save this activity, because the virtual loans would still constitute unlawful copying, rather than fair use.¹⁰⁹ It’s unclear how the court will resolve this issue, but the outcome will inform future digitization efforts.

Even with a diminished place for first sale doctrine in the digital realm, a library might nevertheless consider using technology that limits streaming or other forms of digital lending to achieve an “owned to loaned ratio” as

¹⁰² See *Capitol Records, LLC v. ReDigi, Inc.*, 934 F. Supp. 2d 640 (S.D.N.Y. 2013).

¹⁰³ HANSEN & COURTNEY, *supra* note 64, at 8.

¹⁰⁴ *ReDigi*, 910 F.3d at 649 (2d. Cir 2018).

¹⁰⁵ See *id.* at 660.

¹⁰⁶ As scholars have pointed out, this ruling potentially pulls the foundation out from under the legal argument for CDL. See *e.g.* Hot Topics in Intellectual Property (Am. Law Inst. Cont. Legal Educ. 2019) (“Under CDL, libraries take the position that they can lend digital copies of books as long as they don’t circulate any more copies than they legitimately own. The Authors Guild has recently attacked the CDL program, and this case would seem to bode ill for the legality of CDL going forward”).

¹⁰⁷ Complaint at 15–17, *Hachette Book Group, Inc. v. Internet Archive* (1:20-cv-04160).

¹⁰⁸ *Id.* at 40.

¹⁰⁹ *Id.* at 40–42.

suggested by CDL. Such a strategy would bolster the library's fair use defense to excuse the digital copying made to preserve the VHS which, following *ReDigi*, may be viewed by courts as a new and potentially infringing copy. As the underlying copying would be unauthorized, any further lending off-site would be infringing as well unless it was a fair use.

Overall, the built-in restrictions of CDL help further the argument that the library's effect is a net social good in increasing access to information in vital sectors and without incurring substantial harm to the copyright owners.¹¹⁰ The most important factors to courts, the first and fourth, work in tandem through this system to maximize "nonprofit educational purposes"¹¹¹ and minimize an "effect of the use upon the potential market for or value of the copyrighted work."¹¹²

4. CONCLUSION

The deterioration of libraries' VHS collections is a real and pressing problem. This memo has surveyed the variety of legal challenges libraries may face in pursuing a solution to this problem, and has highlighted strategies, at different levels of risk tolerance, for preserving VHS works in more usable and permanent formats. While §108 of the Copyright Act does not fully protect libraries from copyright liability for digitizing and lending such works in digital format, where it fails to account for modern realities, fair use is often able to fill in the gaps.

In particular, the lowest risk option entails a library strictly following the guidance of §108. Such protections allow up to three copies of an unpublished work provided the copy being reproduced currently resides in the library or archives and that any copies in a "digital format" are not made available outside its premises.¹¹³ Similarly a library can make up to three copies of a published work if the copies are made to replace a work that is "damaged, deteriorating, lost, or stolen" or whose existing format is "obsolete" and the library has determined through "reasonable effort" that an unused replacement copy of the work is not available at a fair price, while including an identical prohibition of off-site lending of digital copies.¹¹⁴ With regards to its collection of published VHS works, a library may in fact be able to forego the condition check, arguing that VHS is an

¹¹⁰ See BAILEY ET AL., *supra* note 75, at 2; *Oracle*, No. 18-956, 2021 WL 1240906 (2021).

¹¹¹ 17 U.S.C. §107(1).

¹¹² 17 U.S.C. §107(4).

¹¹³ 17 U.S.C. §108(b)(1),(2).

¹¹⁴ *Id.* §108(c)(1),(2).

obsolete format. If such an argument is accepted, a library would only need to perform a market check prior to making three copies of such a work.

At a minimum, libraries can feel confident that the comprehensive copying of their VHS works into a dark archive is protected under both §108 (for those works that meet its requirements) and fair use. An only somewhat riskier option would entail using a fair use argument to support the lending of DVDs off-site to patrons. This strategy is especially low-risk if the condition and market checks are performed. Streaming presents a more problematic application of fair use, as it is harder to ensure that such access will not impact the market for the original work. Therefore, libraries may wish to exercise additional controls around lending, such as around the character of the materials loaned (e.g. conducting market checks to ensure that the materials are commercially unavailable such as those that are unpublished or are orphaned and have long since left the market or focusing on categories of material that are particularly valuable and unique, justifying a higher level of investment), or else controls around the lending itself, such as maintaining the owned-to-loaned ratio through the use of digital cues as suggested by the CDL Position Statement¹¹⁵ or in capping the number of times a given work can be accessed per month.

It is not surprising that fair use protects a great deal of these activities, because libraries and archives are closely aligned to the core aims of copyright law that fair use exists to protect.¹¹⁶ In explicitly carving out fair use practices,¹¹⁷ §108 has provided libraries with a powerful and too-little-tapped legal right to keep pace with modern technology in best serving the needs of their patrons and society at large. The Patent and Copyright Clause of the Constitution provides that Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.”¹¹⁸ Congress has used that power to grant libraries special protections under §108, which provide libraries with a powerful and largely unused legal right¹¹⁹ to preserve their existing VHS materials, expand their digital lending programs, and keep pace with modern technology in best serving the needs of their patrons and society at large. As the 2nd Circuit has said, “[t]he ultimate test of fair use...is whether the copyright law’s goal of promoting the Progress of Science and useful Arts would be better served

¹¹⁵ *But see supra* Section 3.3.3 (detailing legal challenges to CDL).

¹¹⁶ *See URBAN, supra* note 84.

¹¹⁷ *See* 17 U.S.C. §108(f)(4).

¹¹⁸ U.S. CONST. art. I, §8, cl. 8.

¹¹⁹ Such uses are deemed to be not infringement without seeking permission from the copyright owner. *See* 17 U.S.C. §107.

by allowing the use then by preventing it.”¹²⁰ Undoubtedly the “Progress of Science and useful Arts” is better served by allowing libraries to save VHS works from obsolescence and to allow library patrons reasonable access to these important materials.

¹²⁰ *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2nd Cir. 2006) (quoting *Castle Rock Entm’t, Inc. v. Carol Publ’g Group*, 150 F.3d 132, 141 (2d Cir. 1998)).