COPYRIGHT'S INVISIBLE HAND: SUBSIDIZING AMERICA'S CULTURAL INSTITUTIONS

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The doctrine of copyright exhaustion conceals a substantial and underappreciated subsidy at the heart of American copyright law. For more than a century, it has operated as a deliberate congressional scheme transferring billions of dollars in value to cultural institutions, such as libraries, museums, and galleries.

This Essay reconceptualizes copyright law as a system of choices about when rightsholders may and may not separate purchasers based on their use. Viewed through this lens, exhaustion emerges as Congress's decision to forbid unbundling that would burden cultural institutions. It allows those institutions to acquire millions of copyrighted items at consumer prices rather than institutional premiums that unconstrained markets would demand. Legislative history, statutory design, and comparative law confirm that this subsidy was no accident, but an intentional policy to support institutions that expand access to knowledge and foster our shared culture and heritage.

That framework is now under siege. As physical books give way to ebooks, publishers circumvent exhaustion by charging libraries three to five times the retail price for temporary digital licenses. Recent judicial decisions intensify the threat by treating inflated institutional prices as the copyright owners' natural entitlement, unraveling Congress's carefully crafted scheme to secure the vitality of cultural institutions.

The way the legal system responds to this erosion will determine whether cultural institutions endure as engines of democratic access or devolve into pay-to-play licensees in an information aristocracy where only the wealthy can fully participate in our cultural life.

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INTRODUCTION

The doctrine of copyright exhaustion stands as an important, yet seemingly simple, component in the grand architecture of American copyright law. Known colloquially as the "first sale doctrine," it appears to state a rather trivial proposition: once a copyright owner sells a copy of their work, their control over that particular copy ends.[1] The purchaser may then resell it, lend it, donate it, or display it as they wish.[2] This principle, codified in Section 109 of the Copyright Act, reads like a straightforward limitation on copyright's reach—a boundary marker delineating where exclusive rights yield to personal property rights. Yet beneath this doctrinal simplicity lies a profound structural choice about the distribution of knowledge and culture in a democratic society.

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1 *See* Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 524 (2013); *see also infra* note 28 and the accompanying text (discussing the doctrine and some of the scholarship exploring it).

2 17 U.S.C. §§ 109(a), (c) (2023).

This Essay argues that copyright exhaustion operates as something far more consequential than a mere limitation on copyright holders' control. It functions as a deliberate congressional subsidy to America's cultural institutions—including libraries, museums, galleries, and archives[3]—that enables them to fulfill their essential missions. Specifically, by preventing copyright owners from engaging in certain forms of price discrimination, Congress has systematically channeled billions of dollars in economic value to the institutions that facilitate, preserve, disseminate, and democratize access to human knowledge and cultural expression.

This subsidy emerges from what this Essay identifies as copyright law's hidden architecture: a complex system of bundling and unbundling choices that determine when copyright owners may charge different prices to different users based on their intended use.[4] Understood that way, copyright law actively structures markets by determining which users can be separated and charged differently, and which must be treated as an undifferentiated mass. When Congress prohibits unbundling—for example, by forcing copyright owners to charge public libraries the same price as individual readers despite libraries' vastly more extensive use—it creates a subsidy as real as any direct appropriation, yet elegantly embedded within copyright's market mechanism itself.[5]

Consider the economic reality that copyright exhaustion conceals: a public library might circulate a single book hundreds of times over its lifetime, reaching readers who could never afford to purchase it themselves. From a pure market perspective, this heavy use creates far more value than a single reader's private consumption. Publishers, if legally permitted, would rationally charge libraries premium prices reflecting the scale of their use. Indeed, in markets where exhaustion has been circumvented, we see exactly this pricing pattern emerge.[6] Yet copyright exhaustion forbids this seemingly natural market segmentation, compelling publishers to offer their works to the New York Public Library for the same price

3 For simplicity, this Essay uses the term "cultural institutions" to refer to organizations that promote, preserve, and provide public access to society's knowledge, culture, history, art, and intellectual heritage. These include galleries, libraries, archives, and museums (sometimes called "GLAM institutions"), as well as cultural centers, historical societies, and, in some contexts, universities and similar organizations that serve comparable functions.

4 *See infra* Part I.

5 *See infra* Part II.

6 *See infra* Section IV.A.

they charge a casual reader in Brooklyn.

This forced bundling represents a massive—and socially desirable—transfer of value. Every year, American libraries circulate billions of copyrighted items[7]—books, films, music, and more—all acquired at consumer prices rather than the institutional premiums that unconstrained markets would demand.[8] Museums and galleries similarly benefit from copyright exhaustion's guarantee that they may publicly display their collections without negotiating separate public display licenses.[9]

The digital revolution, however, threatens the very foundations of this subsidy. For example, as physical books give way to ebooks, a trend accelerated in the post-pandemic world, publishers have discovered they can circumvent exhaustion.[10] The result has been devastating for cultural institutions. Libraries, for instance, now pay three to five times the retail prices for temporary digital licenses, which drain their budgets and severely restrict their ability to fulfill their mission and serve their communities.[11] Indeed, the careful balance Congress struck between incentivizing creation and ensuring public access has been fundamentally disrupted.

Recent court decisions, most notably the Second Circuit's 2024 ruling in *Hachette Book Group v. Internet Archive*,[12] reveal a troubling judicial blindness to both the special role that cultural institutions play in our democratic society and the deliberate subsidy that Congress embedded within copyright law. In *Hachette*, the court held that it was not fair use for an online library to scan physical books, withdraw the originals from circulation, and provide restricted access to the digital versions.[13] The Second Circuit reasoned, among other things,

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7 *See, e.g.*, INST. OF MUSEUM & LIBR. SERVS., CHARACTERISTICS OF PUBLIC LIBRARIES IN THE UNITED STATES: RESULTS FROM THE FY 2019 PUBLIC LIBRARIES SURVEY 4 (2021), https://www.imls.gov/sites/default/files/2021-08/fy19-pls-results.pdf [https://perma.cc/A8N3-F2AX]; Ariel Katz, *Copyright, Exhaustion, and the Role of Libraries in the Ecosystem of Knowledge*, 13 I/S: J.L. & POL'Y FOR INFO. SOC'Y 81, 82 (2016).

8 Libraries acquire goods from two main sources: self-purchase and donations. Both sources are fostered by copyright exhaustion. Consequently, regardless of origin, exhaustion ensures that rightsholders receive only the consumer price for items that end up on public library shelves.

9 17 U.S.C. § 109(c).

10 *See infra* Part IV.

11 *See* Guy A. Rub, *Reimagining Digital Libraries*, 113 GEO. L.J. 191, 196 (2024); *infra* text accompanying notes 92–94.

12 115 F.4th 163 (2d Cir. 2024).

13 *Id.* at 196.

that the library's actions deprived publishers of the premium prices they might otherwise have charged libraries for licensed digital distribution.[14] Yet treating publishers' ability to extract such premiums as a natural market entitlement—rather than as *precisely* the kind of price discrimination Congress intended to curtail—unravels a framework that has stood for more than a century, designed to support cultural institutions.[15] This jurisprudential drift reflects a deeper failure to apprehend the structural choices underlying copyright law. It represents an inability to see beyond isolated doctrines and to acknowledge the deliberate market architecture Congress has crafted.

This Essay proceeds in four parts. Part I develops a theoretical framework to reconceptualize copyright law as a system of bundling and unbundling choices, revealing how Congress uses these choices to subsidize socially valuable activities. Part II applies this framework to copyright exhaustion, demonstrating how the doctrine's specific provisions create a targeted subsidy for cultural institutions. Part III marshals extensive evidence—using legislative history, the statutory structure, Congressional responses to reform proposals, as well as comparative law examples—proving that this subsidy reflects deliberate policy rather than historical accident. Part IV applies this subsidy framework to contemporary challenges, showing how digital distribution and restrictive licenses threaten to unravel Congress's careful design.

The stakes of this analysis extend far beyond technical copyright doctrine. At a moment when democratic institutions face unprecedented challenges, when economic inequality threatens equal access to knowledge and culture, and when digital technologies promise both liberation and new forms of exclusion, understanding how copyright law supports our cultural infrastructure has never been more urgent. The policies underlying the doctrine of copyright exhaustion, properly understood, emerge not as an antiquated relic of the physical media age, but as a sophisticated mechanism for ensuring that knowledge and culture are accessible to all members of society, not merely those who can afford market prices. Its preservation—or reformation for the digital age—will determine whether future generations inherit a society where libraries and museums serve all, or institutions that can only

14 *Id.* at 192.

15 *See infra* text accompanying notes 102–104.

offer what publishers permit at prices communities cannot afford. It is a choice between a democratic culture and an information aristocracy where only the wealthy can fully participate in our cultural life.

I
RECONCEPTUALIZING COPYRIGHT LAW AS A DELIBERATE BUNDLING POLICY

To understand copyright exhaustion's subsidy function, we must first reconceptualize copyright law itself. This Essay suggests that one way to understand copyright law is to perceive it as a legal system that actively makes choices about when copyright owners can and cannot engage in price discrimination by unbundling different categories of users.[16] This perspective reveals copyright exhaustion as one tool, among many, that Congress uses to encourage or discourage particular activities.

Price discrimination occurs when a seller charges different prices to different buyers for the same (or very similar) good or service, typically based on the buyers' willingness to pay and, relatedly, their intended use.[17] The law can encourage, permit, discourage, or prohibit such practices.[18] In the copyright context, this means that the law can allow or prevent copyright owners from charging different prices based on how purchasers intend to use copyrighted works.

Consider the very core of copyright law (and the source of its name): the ability of copyright owners to control the reproduction of their work.[19] By generally prohibiting unauthorized reproduction, the legal system allows authors to

16 The effect of copyright law on price discrimination has, of course, been discussed in the literature. *See, e.g.*, Guy A. Rub, *Contracting Around Copyright: The Uneasy Case for Unbundling of Rights in Creative Works*, 78 U. CHI. L. REV. 257, 269–71 (2011); Michael J. Meurer, *Copyright Law and Price Discrimination*, 23 CARDOZO L. REV. 55, 80–85 (2001). Wendy Gordon, in particular, wonderfully examined some of the implications of viewing certain copyright doctrines through the lens of price discrimination. Wendy J. Gordon, *Intellectual Property as Price Discrimination: Implications for Contract*, 73 CHI.-KENT L. REV. 1367 (1998).

17 *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 133–34 (1988) (discussing the economics of price discrimination); Rub, *supra* note 16, at 261–64 (explaining the concept in the context of copyright licenses); Meurer, *supra* note 16, at 67–75 (same).

18 Antitrust law, in particular, has generated an extensive scholarship and multiple judicial opinions on price discrimination and its impact on the market, particularly in the context of the Robinson-Patman Act. *See, e.g.*, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006). This perspective, however, is well beyond the scope of this work.

19 17 U.S.C. § 106(1).

separate individual readers from commercial publishers. An individual who wants to buy a book for personal reading pays one price, while a publisher who wants to buy the right to print and distribute thousands of copies pays a much higher price reflecting its more extensive use. This permitted separation, or unbundling, is facilitated by the law and promotes sound policy, as it allows copyright owners to capture a significant share of the value created by their work from commercial users. Indeed, it is hard to imagine any copyright system that would not give copyright owners the legal tools to separate buyers along these lines.

Similarly, the exclusive right of public performance allows copyright owners to charge different prices to different categories of users.[20] Someone who buys a screenplay to read privately at home pays one price, while a theater company that wants to perform the work publicly pays a higher price reflecting the broader and commercial nature of the use. This unbundling recognizes that different uses create different values for their purchasers and allows copyright owners to capture that value accordingly.

Next on the bundling spectrum there are those cases—relatively uncommon under U.S. law—where copyright law allows unbundling but regulates the terms on which it occurs. Compulsory licenses represent the clearest example of this approach.[21] For example, under Section 115 of the Copyright Act—known as the mechanical license provision—once a song has been released, copyright owners must allow others to create cover versions of their musical works, but they are entitled to a statutory royalty rate set by an administrative body rather than through private negotiation.[22] This system recognizes an interesting unbundling between buyers: those who buy the rights to the composition of a song to be the first to record and release it pay a higher negotiated price, while those who just want to enjoy playing the song at home pay a much lower price. The law permits complete separation between those two. In between, there are those who buy access to the composition to create a commercial cover. The law allows

20 17 U.S.C § 106(4).

21 See Jacob Victor, *Reconceptualizing Compulsory Copyright Licenses*, 72 STAN. L. REV. 915, 918 (2020) (discussing compulsory licenses under U.S. copyright law); Kristelia A. Garcia, *Penalty Default Licenses: A Case for Uncertainty*, 89 N.Y.U. L. REV. 1117, 1125–28 (2014) (discussing the role of compulsory licenses in some copyright industries).

22 Victor, *supra* note 21, at 938.

the copyright owner to charge them a different price from mere home consumers, but it prevents them from using their market power to demand excessive fees or to block covers entirely.

On the end of the spectrum, there are cases where copyright law explicitly prohibits certain forms of unbundling in order to encourage socially beneficial activities, even if those activities entail high-volume use of copyrighted works. The fair use doctrine provides a host of such examples.[23] Copyright law, for the most part, does not allow copyright owners to charge different prices to buyers based on whether they intend to criticize the work, create a parody thereof, or quote it for educational purposes. As those usages are considered fair use,[24] any buyer can engage in them, meaning that they are bundled with ordinary consumption. As a result, buyers who want to engage in any of those activities are granted access and the rights they need at a relatively low price, equal to that of any ordinary buyer. Thus, through this forced bundling, the law encourages activities that serve important social goals, such as promoting First Amendment values and accessible education.

Similarly, the idea-expression distinction prevents copyright owners from charging different prices based on whether buyers intend to use the ideas expressed in the work for their own creative projects.[25] A composer cannot charge one price to a listener who simply wants entertainment and a higher price to a musician who plans to incorporate the composition's general themes into their own work. This bundling choice, embodied in the Copyright Act, encourages cumulative creativity and ensures that the building blocks of culture remain freely available.[26]

These are all examples, a few out of many, of deliberate choices that Congress can and does make about which forms of unbundling to permit, which to regulate, and which to prohibit entirely. These choices reflect judgments about which activities serve important social purposes and deserve encouragement and protection. The next Part focuses on these

23 17 U.S.C. § 107.

24 See Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith, 143 S. Ct. 1258, 1273 (2023) (noting that commentary typically qualifies as fair use); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994) (same for parodies); 17 U.S.C. § 107 (listing "criticism, comment, . . . teaching . . . scholarship, or research" as typical fair uses).

25 17 U.S.C. § 102(b).

26 *See* Molly Shaffer Van Houweling, *The Freedom to Extract in Copyright Law*, 103 N.C. L. REV. 445, 446–47 (2025).

decisions in the context of the copyright exhaustion doctrine.

II
COPYRIGHT EXHAUSTION AS AN INSTITUTIONAL SUBSIDY

Copyright exhaustion fits naturally within this framework of active bundling and unbundling choices developed in Part I. Through this lens, exhaustion reveals itself as a doctrine that makes several crucial bundling decisions. These decisions promote a host of socially desirable activities and, crucially for this Essay, provide a subsidy for cultural institutions.

A. The Unbundling Choices of Copyright Exhaustion

The doctrine of copyright exhaustion suggests that once a copyright owner sells a particular copy of their work, they cannot control the downstream transfer, or the public display, of that copy.[27] The purchaser owns that copy as personal property and may resell it at a garage sale, lend it to friends, donate it to a charity, or display it in their place of business without seeking permission from or paying additional fees to the copyright holder.[28]

The first bundling choice embedded within copyright exhaustion, codified in Section 109(a), is to prohibit unbundling in connection with post-sale transfer of the copies sold. Specifically, the copyright owner is denied the ability to charge different prices based on whether buyers intend to keep their copies, donate them, resell them, or lend them to a spouse, a large group of friends, or anyone in the city. Indeed, just as copyright owners cannot separate a parodist from a reader, or an inspired new musician from a mere listener, they cannot unbundle and divide their buyers based on the volume

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27 17 U.S.C. §§ 109(a), (c).

28 *See* Jessica D. Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1879 (2007). Copyright exhaustion doctrine has been explored at length in the copyright literature, although it is often said to be "frustratingly under-theorized." Molly Shaffer Van Houweling, *Touching and Concerning Copyright: Real Property Reasoning in* MDY Industries, Inc. v. Blizzard Entertainment, Inc., 51 SANTA CLARA L. REV. 1063, 1064 (2011). Attempts to provide such a theory include, among many others, John F. Duffy & Richard Hynes, *Statutory Domain and the Commercial Law of Intellectual Property*, 102 VA. L. REV. 1 (2016) (arguing that the doctrine is designed to prevent copyright law from displacing other areas of the law); Guy A. Rub, *Rebalancing Copyright Exhaustion*, 64 EMORY L.J. 741 (2015) (suggesting that the doctrine is primarily justification is saving information costs); Aaron Perzanowski & Jason Schultz, *Copyright Exhaustion and the Personal Use Dilemma*, 96 MINN. L. REV. 2067 (2012) (stressing how the doctrine promotes dominion over personal property).

of their post-sale transfer activities.[29] All of these post-sale usages are bundled together with ordinary consumption.

The second bundling choice of copyright exhaustion, codified in Section 109(c) of the Act, is to prohibit unbundling based on in-person display of the work. Thus, copyright owners cannot charge different prices based on whether buyers intend to display their works publicly or keep them private. A collector who wants to hang a painting in a gallery that is open to the public pays the same price as one who plans to hang it in a private bedroom.

Copyright exhaustion doctrine might be the best example of how copyright's bundling and unbundling possibilities represent deliberate policy decisions rather than natural or inevitable features of copyright law. Indeed, Congress could have easily made different choices, and from time to time considered making them.[30]

Major international copyright treaties do not set forth the scope of, or even require, copyright exhaustion,[31] leaving countries free to structure their regimes as they see fit. As a result, countries around the world have adopted dramatically different approaches to the bundling question.

Consider, for example, the heart of copyright exhaustion: control over post-sale lending. Some countries require licenses for lending, allowing copyright owners to unbundle lenders from non-lenders.[32] Others, including most members of the European Union, allow lending but require payment of statutory royalties to copyright owners, representing a regulated unbundling approach similar to compulsory licenses.[33] Still others, like the United States, adopt a broad view of exhaustion and prohibit unbundling based on lending

29 As an example of this powerful legal unbundling mechanism, consider the dispute between Redbox and several movie studios. The studios sought to prevent Redbox from distributing DVDs of some of their newer films by refusing to sell those DVDs directly to the company. In response, Redbox began purchasing the DVDs at Walmart instead. *See* Redbox Automated Retail LLC v. Universal City Studios LLLP, No. 08-766, 2009 WL 2588748, at *2 (D. Del. Aug. 17, 2009).

30 *See infra* Section III.0 (discussing proposals to narrow copyright exhaustion that were rejected).

31 *See, e.g.*, Agreement on Trade-Related Aspects of Intellectual Property Rights art. 6, Apr. 15, 1994, 1869 U.N.T.S. 299 ("[N]othing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights."); *see also* Margaret Chon, *Protecting Progress: Copyright's Common Law and Libraries*, 72 J. COPYRIGHT SOC'Y 761, 774–77 (2025) (exploring the treatment of exhaustion from international and comparative law perspectives).

32 *See* Rub, *supra* note 11, at 204–05.

33 *Id.* at 205–06.

activities altogether.[34]

Comparable differences exist in countries' approaches to the exhaustion of the right of public display. While some countries, like Canada and France, hold that such rights are not exhausted, thus allowing an unbundling regime which requires museums or galleries to obtain specific licenses to display works they own publicly,[35] other countries, like the United States, hold a liberal view of exhaustion, adopting a bundling regime between public display and regular consumption, which does not require a license for in-person public display of sold works.[36]

These variations reflect different judgments about which activities—and to what extent—deserve encouragement, and which users deserve protection and support. The United States' choice to adopt an expansive copyright exhaustion regime represents a deliberate decision to subsidize certain categories of users and activities, even at the cost of reducing copyright owners' potential revenue streams. That choice and its institutional beneficiaries are the focus of the next Section.

B. Cultural Institutions as the Primary Beneficiaries of Exhaustion

While copyright exhaustion support most users of copyrighted works, its most significant beneficiaries are cultural institutions. Public libraries are the most obvious example. Because public libraries are probably the heaviest lenders of copyrighted goods, at least in the physical, non-digital space,[37] they are also the most prominent beneficiaries from being bundled together with every home user, as copyright exhaustion dictates. A typical public library lends tens of thousands of books annually,[38] representing exactly the kind of high-volume use that copyright owners

34 *Id.* at 207–08; 17 U.S.C. § 109(a).

35 YANIV BENHAMOU, WIPO, SCCR/38/5, REVISED REPORT ON COPYRIGHT PRACTICES AND CHALLENGES OF MUSEUMS 18 n.36 (2019), https://www.wipo.int/edocs/mdocs/copyright/en/sccr_38/sccr_38_5.pdf [https://perma.cc/3ESJ-LRUB].

36 17 U.S.C. § 109(c); *see also* Shubha Ghosh, *The Implementation of Exhaustion Policies: Lessons from National Experiences* 30–70 (U. Wis. L. Sch. Legal Stud. Rsch. Paper Series, Paper No. 1248, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2390232 [https://perma.cc/HSR2-WGAJ] (comparing various aspects of copyright exhaustion under U.S., European Union, Canadian, Indian, Japanese, Brazilian, and Chinese laws).

37 *See infra* Section IV.0 (discussing the more challenging digital context).

38 *See supra* note 7.

would want to charge premium prices for if legally permitted. But copyright exhaustion's forced bundling allows libraries to purchase copyrighted material for the same price offered to private users, regardless of the volume of their post-sale use.[39] This is a form of a public subsidy where, as part of copyright's overall scheme, libraries are guaranteed lower prices, saving them, collectively, billions of dollars each year.

Museums and galleries are similarly the most obvious beneficiaries of the public display component of copyright exhaustion, codified in Section 109(c). These institutions regularly display copyrighted works as part of their cultural and educational missions. From a public display perspective, they are among the heaviest users conceivable, and precisely the kind of users whom rightsholders would prefer to charge a premium commensurate with that level of use. Exhaustion, however, relieves them of seeking separate public display licenses, as the right to on-site display is incorporated with lawful acquisition, thus bundling together museums and galleries with low-volume purchasers.[40] The effect is to keep prices low for high-volume cultural institutions,[41] which is a form of legal subsidy.

The core mechanism for copyright law to promote human knowledge—to "promote the Progress of Science" as the Constitution puts it—is, of course, to provide authors with sufficient income to incentivize creation.[42] But the subsidy that exhaustion creates signals that cultural institutions should not be the principal source of those incentives. The copyright ecosystem as a whole should compensate authors, and in many cases, high-volume users, like publishers and movie studios, do in fact pay more, except where the law deliberately shields such users to encourage socially valuable activities. Cultural institutions are the prime example: large-scale, high-social-value users who benefit substantially from the forced bundling that exhaustion compels.

III

39 In addition, by bundling buyers who read and discard copyrighted works with those who donate them to libraries, exhaustion provides another mechanism for libraries to acquire materials cheaply.

40 Archives' reliance on copyright exhaustion is more indirect, though they benefit from donations, which exhaustion fosters, and from exhaustion of the display right when materials are shown for educational purposes.

41 *See* Rub, *supra* note 16, at 269–71 (exploring how bundling together high-volume and low-volume users typically forces prices down to the former).

42 *See, e.g.*, Google LLC v. Oracle Am., Inc., 141 S. Ct. 1183, 1195 (2021).

SUBSIDIZING AND SUPPORTING CULTURAL INSTITUTIONS AS A DELIBERATE POLICY CHOICE

As noted in the previous parts, Congress's bundling choices were intentional, particularly with respect to copyright exhaustion. Across legal systems, the scope of exhaustion is shaped quite differently—and often more narrowly—confirming that the U.S. approach reflects deliberate policy rather than inevitability.[43]

Congress's rationale for supporting cultural institutions is rooted in the extensive services they provide to society at large. Libraries, for example, among others, expand access to knowledge for those who cannot afford to purchase books, support research and education, preserve works that might otherwise be lost, and promote literacy and lifelong learning.[44] As such, they are a cornerstone of a robust democratic society.

Museums and galleries also play an important role in our society. Their exhibitions serve vital cultural and educational functions, as they make art and cultural artifacts accessible to the public, provide interpretive context, preserve works for future generations, and foster cultural dialogue and understanding.[45] Like libraries, these institutions generate substantial positive externalities that justify public support.

Congress's intent to subsidize cultural institutions by bundling their routine activities with ordinary consumption is understandable, desirable, and evident on the face of the Copyright Act. This Part, however, provides additional, substantial historical evidence that subsidizing and supporting cultural institutions not only makes sense and aligns with a straightforward reading of exhaustion, but it also reflects an intentional policy choice adopted by Congress.

The legislative history of copyright reforms, the precise contours of the codification of exhaustion, complementary mechanisms within the Act that promote cultural institutions, and Congress's approach to subsequent amendments all point

43 *See supra* text accompanying notes 31–36.

44 *See, e.g.*, *Libraries: An American Value*, AM. LIBR. ASS'N (June 30, 2006), https://www.ala.org/advocacy/intfreedom/americanvalue [https://perma.cc/86TP-DJBR] (describing the social values of libraries); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 372–73 (2005) (the roles of public libraries in our society); Rub, *supra* note 11, at 194–95 (exploring the benefits of public libraries to society); Chon, *supra* note 31, at 765–67 (discussing "the unique role of libraries in the copyright ecosystem").

45 *See* AM. ALL. OF MUSEUMS, MUSEUMS AS ECONOMIC ENGINES 5–6 (2017), https://www.aam-us.org/wp-content/uploads/2018/04/American-Alliance-of-Museums-web.pdf [https://perma.cc/6ZJW-38E8].

in the same direction. Taken together, they demonstrate a consistent, more than a century-long commitment to prioritizing support for cultural institutions.

A. The Role of Cultural Institutions in the Process Leading to the Enactment of Copyright Legislation

While Congress's appreciation of the special role that cultural institutions in general, and public libraries in particular, play in our society, and of the need to support them, can be inferred from the text of the Copyright Act, the legislative history provides further evidence.

Since at least the early twentieth century, libraries have played a central role in every major copyright reform effort. Their participation was no accident. It reflected a recognition that these institutions have important interests that warrant protection within the copyright system.

Representatives of the American Library Association (ALA)[46] and the National Education Association (NEA), together with representatives of the copyright industries (including publishers), were invited to—and did—participate in the hearings that led to the enactment of the Copyright Act of 1909,[47] which for the first time codified copyright exhaustion.[48] Congressional records from the period note that the 1909 Act incorporated agreements between the ALA and publishers,[49] and include extensive discussion of libraries' "privileges," particularly with respect to importing books.[50] To ensure that the Act did not harm libraries and their operations, Congress even heard from library representatives who opposed the ALA-publishers agreement.[51] As the House Report concluded, "Libraries were heard."[52]

Library organizations, along with other stakeholders,

46 The American Library Association was founded in Philadelphia in 1876, six years after passage of the Copyright Act of 1870, and has participated in every major copyright reform since. *See History*, AM. LIBR. ASS'N (June 9, 2008), https://www.ala.org/aboutala/history [https://perma.cc/98VJ-QDDH].

47 *See, e.g.*, *Arguments Before the Comms. on Patents of the S. and H.R., Conjointly, on the Bills S. 6330 & H.R. 19853*, 59th Cong. 5 (1906) [hereinafter *Arguments Before the Comms. On Patents*] (statement of Herbert Putnam, Librarian of Cong.) (listing the various groups that were invited by the Copyright Office).

48 Copyright Act of 1909, ch. 320, § 41, 35 Stat. 1075, 1084.

49 *See, e.g.*, *Arguments Before the Comms. On Patents*, supra note 47, at 19.

50 For example, public libraries and their interests were mentioned hundreds of times in the records of the 1906 joint subcommittee hearings. *Id.*

51 *Id.* at 62–66 (statement of William P. Cutter).

52 *Id.* at 37.

including the publishers, participated in the deliberations leading to the passage Copyright Act of 1976, the one in effect today.[53] The American Library Association and other representatives of libraries and their organizations submitted extensive comments on proposed drafts of the act, testified at hearings, and negotiated over the wording of key provisions.[54] That level of participation would make little sense if Congress did not recognize libraries as having distinct interests worthy of protection.

The process that culminated in the 1976 Act began with thirty-four studies on copyright law published by the Copyright Office between 1955 and 1961.[55] Two of those studies focused exclusively on libraries: Study Number 15 examined the need to permit library reproduction of copyrighted materials because "libraries provide an indispensable service to research by furnishing the individual researcher with the materials needed by him for reference and study,"[56] and Study Number 9 explored library use of copyright notices, noting that libraries "serve the general public and have no commercial objective in providing this service."[57] Other studies, especially the one on

53 *See* JESSICA LITMAN, DIGITAL COPYRIGHT 39–45 (2001). This Section focuses on the legislative history of the major copyright legislation since the Copyright Act of 1909, particularly as it relates to copyright exhaustion. In that period, the Copyright Office and Congress considered many other limited amendments to the Copyright Act, and a few of them were ultimately enacted. Public libraries were heavily involved in those discussions as well. A full exploration of each of those initiatives is beyond the scope of this Essay, though some are discussed in *id.* at 81–82, 122–27. Proposals to amend copyright exhaustion specifically are discussed *infra* in Section III.0.

54 For example, on May 14, 1975, the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice considered whether libraries should be granted a right to reproduce copyrighted materials. It heard hours of testimony and accepted statements from dozens of librarians, representing the interests of multiple types of libraries. *See, e.g.*, *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Cts., C.L., & the Admin. of Just. of the Comm. on the Judiciary*, 94th Cong. 183–204 (1975) (statement of Edmon Low, representing six library associations); *id.* at 228–29 (statement of the Am. Libr. Ass'n); *id.* at 254–60 (statement of Julius M. Marke, representing the Am. Ass'n of L. Librs.); *see also* Jessica D. Litman, *Copyright Legislation and Technological Change*, 68 OR. L. REV. 275, 325–26 (1989) (describing the dispute over this issue, the involvement of libraries in the legislative process, and the eventual compromise that led to the enactment of § 108, which addresses reproduction by libraries and archives).

55 *See, e.g.*, Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977) (discussing those studies).

56 BORGE VARMER, PHOTODUPLICATION OF COPYRIGHTED MATERIAL BY LIBRARIES, STUDY NO. 15, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS, AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 49 (Comm. Print 1960).

57 JOSEPH W. ROGERS, USE OF THE COPYRIGHT NOTICE BY LIBRARIES, STUDY NO. 9, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND

fair-use, also discussed libraries at length, including their special privileges in other countries.[58]

The congressional record accompanying the 1976 Act repeatedly emphasizes the special role of libraries in securing public access to knowledge. Indeed, the legislative history contains dozens of statements underscoring the need to support libraries and to empower them to fulfill their mission and provide public access to knowledge.[59] These statements make clear that Congress understood the tradeoffs inherent in copyright policy and consciously chose to protect cultural institutions in multiple contexts.

The role of cultural institutions is especially salient in the legislative history of copyright exhaustion. For example, the House Report accompanying the 1976 Act explained the rationale for Section 109(a), governing exhaustion of the distribution right, with this illustration:

> Thus, for example, the outright sale of an authorized copy of a book frees it from any copyright control over its resale price or other conditions of its future disposition. A library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose.[60]

Similarly, when explaining the rationale for Section 109(b) (now 109(c)), dealing with the exhaustion of public display rights, the Report again used cultural institutions as the prime example: "The exclusive right of public display . . . would not apply where the owner of a copy wishes to show it directly to the public, as in a gallery or display case."[61]

Thus, the role of cultural institutions—and the ways in which the 1976 Act in general, and the doctrine of copyright exhaustion in particular, were designed to support them—was one of the focal points of the legislative process. But the evidence of this deliberate design extends beyond the records of Congress and the Copyright Office, as the next sections explain.

COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 95 (Comm. Print 1960).

58 *See, e.g.*, ALAN LATMAN, FAIR USE OF COPYRIGHTED WORKS, STUDY NO. 14, COPYRIGHT LAW REVISION, STUDIES PREPARED FOR THE SUBCOMM. ON PATENTS, TRADEMARKS AND COPYRIGHTS, S. COMM. ON THE JUDICIARY, 86TH CONG. 12, 22 (Comm. Print 1960).

59 *See, e.g.*, H.R. REP. No. 94-1476, at 65 (1976) (suggesting that it is fair use for a library to reproduce a portion of a damaged work); *id.* at 73 (discussing how libraries distribute works for the blind); *id.* at 77 (explaining the need to allow libraries to make copies to support scholarship and research).

60 *Id.* at 79.

61 *Id.*

B. Statutory Carve-Outs Shield Cultural Institutions

Section 109, which codifies copyright exhaustion, does not place every distribution or public display beyond the copyright owner's post-sale control. Rightsholders may, in limited circumstances, unbundle certain distributions or displays and charge higher prices commensurate with that use. Crucially, however, these carve-outs are drafted so as not to implicate cultural institutions. Indeed, even when narrowing exhaustion, Congress preserved the very features essential to the functioning of cultural institutions.

Consider, for example, Section 109(b)—the principal limitation on Section 109(a)'s distribution-right exhaustion. Added in 1984 and expanded in 1990, Section 109(b) provides that, notwithstanding exhaustion, the rental, lease, or lending of computer programs and sound recordings requires a license. Those actions were carved out of the exhaustion regime because Congress was concerned that those types of works are especially susceptible to easy copying and thus unrestricted lending is likely to facilitate piracy.[62]

At the same time, Congress took pains to clarify that this restriction does not reach public library lending. Section 109(b) applies only if the lending is "for purposes of direct or indirect commercial advantage."[63] To remove any doubts, the provision states that it shall not "apply to the rental, lease, or lending of a phonorecord for nonprofit purposes by a nonprofit library or nonprofit educational institution."[64] It then directed the Copyright Office to revisit the issue within three years in a way that allows public libraries "the capability to fulfill their function."[65]

Although library lending can also facilitate piracy, Congress deliberately chose to preserve it through Section 109(b)'s nonprofit exemption. The House Committee Report accompanying the 1990 bill acknowledged the piracy risk but emphasized that it "does not wish, however, to prohibit nonprofit lending by nonprofit libraries and nonprofit

62 *See* H.R. REP. NO. 101-735, at 8 (1990); MARYBETH PETERS, U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT 99 (2001) (discussing the rationale for section 109(b); *See also* LITMAN, *supra* note 53, at 81–82 (discussing the circumstances leading to the expansion of Section 109(b) in 1990).

63 17 U.S.C. § 109(b)(1)(A).

64 *Id.*

65 *Id.* § 109(b)(2)(B). The Copyright Office issued that report in 1994 and in it the Office indeed took care to guarantee the libraries' abilities to continue their operation. That report is discussed in Section III.D below. *See infra* text accompanying notes 77–79.

educational institutions. Such institutions serve a valuable public purpose."[66] Members in both chambers pressed for assurances that representatives of public libraries would agree to the amendment and that library operations would not be impaired.[67] Indeed, that exception—and the need to implement Section 109(b) without disrupting the day-to-day operations of libraries and educational institutions—was discussed at length when Section 109(b) was first introduced in 1984 and when it was expanded in 1990.[68]

A similar pattern appears with respect to Section 109(c), governing the exhaustion of the public-display right. The statute exhausts control over in-person public display of a lawfully owned copy "at the place where the copy is located,"[69] but it does not extend exhaustion to displays by transmission (e.g., posting an image to a public website), which remain subject to a license. But that limitation is largely inapplicable to museums and galleries, whose core activities center on on-site display. The House Report made clear that the provision was drafted with cultural institutions in mind, explaining that the copyright owner's public-display right "would not apply" where an owner wishes to show a work directly to the public "as in a gallery or display case."[70]

C. Safeguarding Cultural Institutions Beyond Exhaustion

The subsidy to cultural institutions within copyright exhaustion doctrine should be understood as part of a larger

66 H.R. REP. NO. 101-735, at 8 (1990).

67 U.S. COPYRIGHT OFF., THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1990: THE NONPROFIT LIBRARY LENDING EXEMPTION TO THE "RENTAL RIGHT" 12–13 (1994) (exploring the legislative process leading to the enactment of Section 109(b)).

68 *See, e.g.*, H.R. REP. NO. 101-735, at 4 (1990) (noting—in the main section discussing the "summary and purpose" of the bill expanding Section 109(b)—that "[p]rovisions have been included to permit lending by nonprofit libraries and education institutions."); 136 CONG. REC. S5533 (daily ed. May 1, 1990) (remarks of Sen. Orrin Hatch) (explaining that the legislation "make[s] it clear that the bill would not prohibit the lending of authorized copies of software by nonprofit libraries and nonprofit educational institutions"); H.R. REP. NO. 98-987, at 5 (1984) (discussing the 1984 amendment that first introduced Section 109(b) and explaining that "the committee [] intends that the legislation not interfere with the usual lending activities of nonprofit libraries or the educational programs of nonprofit educational institutions").

69 17 U.S.C. § 109(c).

70 H.R. REP. No. 94-1476, at 79 (1976); *see also* U.S. COPYRIGHT OFF., DMCA SECTION 104 REPORT 25 (2001) (briefly discussing section 109(c) and mentioning that it "permits, among other things, the display of a painting in a museum or public art gallery by the purchaser of the painting").

statutory scheme that cuts across the entire Copyright Act. Multiple provisions specifically target cultural institutions by granting them distinctive rights or privileges that support their missions.[71]

For example, Section 108 provides specific exemptions allowing libraries and archives to reproduce works for preservation and research purposes. It exempts these institutions from needing a license and, in effect, bundles these socially desirable high-volume activities with ordinary consumption. Additional examples include, among others, Sections 110(1) and (2), which provide exemptions for certain educational uses from the copyright owner's control of public performance and display, and Section 504(c)(2), which limits statutory damages for infringements by libraries and educational institutions.

Similarly, when, in 1990, Congress enacted the Visual Artists Rights Act (VARA), thereby adding moral rights to U.S. copyright law, it made sure that those rights would not interfere with the routine operations of museums and galleries, such as conserving deteriorating works or making choices about lights, frames, and placements.[72]

This broader pattern of statutory subsidies and support demonstrates that Congress consciously intended to assist cultural institutions through the copyright system. Copyright exhaustion is the most significant of these subsidies, but it operates alongside other provisions that serve similar purposes.

D. Rejecting Attempts to Undermine Libraries' Subsidy

From time to time, Congress was asked to consider revisions to the Copyright Act that could have affected cultural institutions. For example, the copyright industries and other stakeholders have often lobbied to narrow libraries' special treatment under the copyright exhaustion doctrine. The common thread in the response to such attempts is Congress,

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71 *See* Karyn Temple Claggett & Chris Weston, *Preserving the Viability of Specific Exceptions for Libraries and Archives in the Digital Age*, 13 I/S: J.L. & POL'Y FOR INFO. SOC'Y 67, 68–69 (2016) (exploring the multiple provisions of the Copyright Act that provide special treatment for libraries and archives).

72 *See* 17 U.S.C. § 106A(c)(2) ("The modification of a work of visual art which is the result of conservation, or of the public presentation, including lighting and placement, of the work is not a destruction, distortion, mutilation, or other modification [in violation of VARA]".); H.R. REP. NO. 101-514, at 16 (1990) ("[G]alleries and museums continue to have normal discretion to light, frame, and place works of art.").

and the U.S. Copyright Office, which is statutorily required to advise it,[73] continued commitment to secure the libraries' special role and treatment under the Copyright Act.[74]

For example, in the 1970s and 1980s, at the encouragement of the Authors Guild, proposals were made to require libraries to pay for their lending activities.[75] Bills to that effect were even introduced in Congress but never enacted.[76]

Other unsuccessful efforts to narrow libraries' special treatment occurred in the 1990s. From 1993 to 1994, the Copyright Office conducted a study of the special treatment of nonprofit libraries under Section 109(b).[77] The software industry urged the Office to support an amendment to the Act that would prohibit public libraries from lending software to patrons.[78] But the Copyright Office declined to support the proposal,[79] and such an amendment was never enacted.

Shortly thereafter, another unsuccessful effort was made to narrow copyright exhaustion in ways that would have harmed libraries. In July 1994, the Information Infrastructure Task Force (IITF), appointed by President Clinton, issued its

73 *See* 17 U.S.C. § 701(b)(1) (noting that the Copyright Office shall "[a]dvise Congress on national and international issues relating to copyright").

74 The focus of this Section, and of this Essay as a whole, is on the role of cultural institutions within the framework of federal legislation. Accordingly, the discussion in the Section centers on the actions, statements, and policies of the federal legislative branch. Yet the recognition of libraries' distinctive societal role, the corresponding need to legally support their operations, and the contribution of copyright's exhaustion doctrine to that effort have not been confined to Congress. For example, the Supreme Court, in its most recent engagement with the issue, underscored the importance of interpreting copyright exhaustion in a manner that safeguards the continued functioning of libraries. Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519, 541 (2013). State legislatures, for their part, have likewise explored—and in some instances enacted—statutory measures aimed at facilitating public libraries' lending activities in the digital sphere, although many of those initiatives might be preempted by federal law. *See, e.g.*, Rub, *supra* note 11, at 247–50; Mary LaFrance, *Copyright, Ebooks, and the Future of Digital Lending*, 27 YALE J.L. & TECH. 58, 114–41 (2025); Elizabeth Townsend Gard, *Nine Copyright Things Every Library and Archive Should Know in 2023*, 41 CARDOZO ARTS & ENT. L.J. 485, 511–14 (2023).

75 *See* Richard LeComte, *Writers Blocked: The Debate over Public Lending Right in the United States During the 1980s*, 44 LIBRS. & CULTURAL REC. 395, 397–405, 408–11 (2009).

76 For example, in 1973 Representative Ogden Reid introduced H.R. 4850 to create a commission to study ways to compensate authors for the use of their books by libraries. Similar proposals were made in 1985, and bills were introduced in both chambers. See *id.* at 404–05.

77 U.S. COPYRIGHT OFF., THE COMPUTER SOFTWARE RENTAL AMENDMENTS ACT OF 1990: THE NONPROFIT LIBRARY LENDING EXEMPTION TO THE "RENTAL RIGHT," at v (1994).

78 *Id.* at x.

79 *Id.* at xx.

preliminary draft report—known as "The Green Paper."[80] Among its recommendations was an amendment to Section 109 stating that copyright exhaustion would not apply to *any* transmission, digital or otherwise, of copyrighted works.[81] The proposal drew sharp criticism, led most prominently by the American Library Association.[82] During the four-month comment period, the Task Force held four days of public hearings and received more than 1,500 pages of written comments from over 150 individuals and organizations.[83] By the time the Task Force released its September 1995 "White Paper," the proposal to amend Section 109 had been abandoned.[84]

Finally, in 2001, the Copyright Office issued its much-anticipated report on digital distribution, prepared pursuant to the Digital Millennium Copyright Act of 1998.[85] The report undertook a careful examination of emerging digital-distribution practices and ultimately recommended against amending the first-sale doctrine to encompass digital transmissions, chiefly because of concerns about uncontrolled copying and piracy.[86] At the same time, the Office took pains to detail the significant worries raised by public libraries[87] and to outline potential mechanisms that might mitigate those harms.[88] It concluded by emphasizing that libraries' unique institutional role may warrant additional legislative attention should these concerns remain unresolved, observing:

> We hope and expect that the marketplace will respond to the various concerns of customers in the library community. However, these issues may require further consideration at some point in the future. Libraries serve a

80 INFO. INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: A PRELIMINARY DRAFT OF THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS (1994).

81 *Id.* at 39.

82 LITMAN, *supra* note 53, at 92–96 (describing opposition by libraries, other stakeholders, and professors to the Green Paper).

83 INFO. INFRASTRUCTURE TASK FORCE, WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 3–4 (1995) (describing the comment period).

84 *Id.*

85 Digital Millenium Copyright Act of 1998 (DMCA), Pub. L. No. 105-304, § 104, 112 Stat. 2860, 2876–77.

86 PETERS, *supra* note 62, at 97–101.

87 This topic is further addressed in Part IV below.

88 PETERS, *supra* note 62, at 102–05.

> vital function in society, and we will continue to work with the library and publishing communities on ways to ensure the continuation of library functions that are critical to our national interest.[89]

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Indeed, the reconceptualization of copyright law as a set of bundling and unbundling choices, especially in the context of exhaustion, reveals Congress's deliberate effort to subsidize certain cultural institutions, particularly public libraries. Substantial evidence—within and beyond the exhaustion provisions, both inside the Act and in its legislative history—shows that for more than a century this subsidy has been intentional rather than accidental, carefully targeted to support activities that serve important social functions. The uses protected by exhaustion, such as free lending and on-site public display, are precisely those that expand access to knowledge, preserve cultural heritage, and sustain the democratic discourse these institutions lead.

IV
IMPLICATIONS: CONTEMPORARY LEGAL CHALLENGES TO CULTURAL INSTITUTIONS

Understanding copyright exhaustion as a mechanism deliberately designed to support and subsidize cultural institutions sheds light on several legal challenges those institutions face in the digital age. This Part discusses two of them, focusing on the digital lending crisis. It points to the erosion of the special mechanisms Congress designed to support cultural institutions, as the judiciary has too often failed to preserve them against efforts to undermine their efficacy.

A. The Digital Lending Crisis

The gradual shift from physical to digital distribution, which was greatly accelerated during and after the COVID-19 pandemic, has created a crisis for libraries and other cultural institutions that depend on copyright exhaustion.[90] Because digital distribution entails reproduction, rightsholders have argued that Section 109(a), which codifies the exhaustion of the distribution right, does not apply in the digital context.[91]

89 *Id.* at 105.

90 *See* Rub, *supra* note 11, at 196–97 (discussing the crisis).

91 *See, e.g.*, Brief of *Amici Curiae* Ass'n of Am. Publishers, Inc. in Support of Plaintiffs-Appellees at 2, Capitol Recs., LLC v. ReDigi Inc., 910 F.3d 649 (2d Cir.

This position enables them to charge premium prices for digital lending that would be impossible in the physical world.

The magnitude of this pricing differential—directly at odds with Congress's bundling choice in establishing exhaustion—is striking. While libraries typically pay slightly less than retail price for physical books, they routinely pay three to five times (!) retail price for a mere two-year license to a digital book.[92] In that way, publishers separate socially desirable, high-volume cultural institutional users from low-volume individual users and charge the former premium prices based on intended use. This is *precisely* the kind of user unbundling that Congress sought to prevent.

The economic impact on libraries has been severe. Many report devoting increasing portions of their budgets to digital licenses while being forced to reduce collections and services.[93] Some have had to choose between providing access to popular digital titles and maintaining traditional services, undermining their ability to serve their communities effectively.[94]

The Second Circuit's 2024 decision in *Hachette Book Group v. Internet Archive*[95] represents a particularly troubling development in this context and reflects a lack of appreciation for the role of cultural institutions or the unique subsidy and support Congress intended to provide them.

The case involves the Internet Archive (IA), which describes itself as an open-to-all digital library.[96] IA engaged in a practice

2018) (No. 16-2321-cv) ("§ 109(a) by its terms only provides a defense to violations of the copyright owner's exclusive right of distribution . . . it offers no defense for infringements of [the] exclusive right of reproduction."); *Capitol Recs.*, 910 F.3d at 656–59 (accepting that argument).

92 *See Publisher Price Watch*, READERS FIRST, https://www.readersfirst.org/publisher-price-watch [https://perma.cc/K852-4XWS] (last visited Aug. 17, 2025) (documenting the discrepancy in prices); Rub, *supra* note 11, at 213–14 (discussing the phenomenon).

93 *See, e.g.*, Daniel A. Gross, *The Surprisingly Big Business of Library E-books*, NEW YORKER (Sep. 2, 2021), https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books [https://perma.cc/5PZE-ATCU].

94 *See, e.g.*, Dan Cohen, *Libraries Need More Freedom to Distribute Digital Books*, ATLANTIC (Mar. 30, 2023), https://www.theatlantic.com/ideas/archive/2023/03/publishers-librarians-ebooks-hachette-v-internet-archive/673560 [https://perma.cc/GY4C-PT3L].

95 115 F.4th 163 (2d Cir. 2024).

96 *About the Internet Archive*, INTERNET ARCHIVE, https://archive.org/about/ [https://perma.cc/S67V-9UV9] (last visited Feb. 10, 2026). The Internet Archive, an organization owned and controlled by Brewster Kahle, a multi-millionaire, is certainly an unusual type of "library," and one might argue that it is not the kind Congress intended to support and subsidize. Although that is a complex question beyond the scope of this Essay, the Second Circuit did not rely on this distinction

known as controlled digital lending (CDL), also used by many public libraries.[97] Under CDL, a library scans a physical book, removes it from circulation, and lends a corresponding digital copy to one user at a time, aiming to replicate traditional lending by ensuring that a library never lends more digital copies than the number of physical copies it owns.[98]

From a legal standpoint, the viability of CDL hinges on the application of the fair use defense.[99] That doctrine exists, in part, to ensure that copyright law continues to serve its constitutional purpose of promoting the progress of knowledge, even as the technologies for creating, distributing, and consuming information goods evolve. Congress, courts, and legal scholars alike broadly acknowledge this essential function of fair use.[100]

The subsidy-based perspective developed in this Essay sheds light on the application of fair use to CDL. At its core, a properly implemented CDL system[101] attempts to preserve in the digital environment the same bundling choices that Congress made for the physical world. Libraries are not seeking to expand their rights beyond what Congress intended, but rather to maintain the same level of subsidy in a new technological context.

To be sure, CDL provides libraries with significantly more affordable access to digital books than what publishers currently charge in the absence of legal constraints—prices that reflect the publishers' ability to fully exploit market power through price discrimination. Yet, as Part III explains, facilitating cheap access advances rather than undermines congressional intent by supporting the cultural institutions

in its decision in *Hachette*, including in its analysis of the fourth fair use factor. Unfortunately, that problematic analysis, as discussed below, appears applicable to all libraries.

97 Brief of *Amici Curiae* Nine Library Orgs. & 218 Librarians in Support of Defendant-Appellant at 8–9, Hachette Book Grp. v. Internet Archive, 664 F. Supp. 3d 370 (S.D.N.Y. 2023) (No. 20-cv-04160) (noting that "[o]ver 100 libraries across the United States rely on a CDL program to distribute their collections").

98 DAVID R. HANSEN & KYLE K. COURTNEY, A WHITE PAPER ON CONTROLLED DIGITAL LENDING OF LIBRARY BOOKS 2 (2018), http://nrs.harvard.edu/urn-3:HUL.InstRepos:42664235 [https://perma.cc/QM96-V2VC].

99 *Id.* at 9.

100 *See* Rub, *supra* note 11, at 233–35 (showing how this role is reflected in the Act's legislative history, Supreme Court caselaw, and copyright literature).

101 CDL is not a detailed scheme but a general framework that libraries can implement in multiple ways. Accordingly, a particular implementation may or may not properly replicate the economics of traditional library lending. In that respect, this Essay does not take a position on whether or not IA's specific implementation was indeed fair use.

Congress sought to subsidize.

In *Hachette*, the Second Circuit miserably failed to account for this broader context. Nowhere is this more evident than in its treatment of the fourth—and presumably most important—fair-use factor, which directs courts to assess "the effect of the [defendant's] use upon the potential market for or value of the [plaintiff's] copyrighted work."[102] The court suggested that publishers suffered market harm because they were denied the ability to charge libraries premium prices tied to their high-volume lending.[103] But that is *exactly* the form of unbundling among buyers—based on their lending habits—that Congress sought to foreclose. The Second Circuit's analysis of the fourth factor appeared to assume, with little discussion, a natural entitlement to such premium licensing revenue from cultural institutions and treated it as part of the copyright owners' market. But it is not, and never was.

Indeed, the Second Circuit misunderstood the statutory scheme. As shown above,[104] to support libraries and their lending practices, Congress deliberately chose to prevent publishers from unbundling users based on their lending habits. The market for premium-priced institutional lending licenses is not a natural baseline, but precisely the sort of price discrimination Congress intended to prevent. The error is clear through the subsidy lens: by treating potential institutional-license revenue as a protected market interest, the court effectively erased the subsidy Congress intended to confer on libraries and similar institutions. That approach transfers millions from libraries to copyright owners and circumvents the purpose of the exhaustion doctrine.

Going forward, courts applying the fourth fair use factor should not presume that a copyright owner is entitled to the potential revenues from separating cultural institutions from other users.[105] Instead, they should recognize that Congress

102 17 U.S.C. § 117(4); *see* Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 566 (1985) (describing the fourth factor as "undoubtedly the single most important element of fair use").

103 *E.g.*, Hachette Book Grp. v. Internet Archive, 115 F.4th 163, 192 (2d Cir. 2024) (framing the publishers' market harm as the "lost eBook licensing fees" and noting that those markets are "reasonable and developed").

104 *Supra* Part II.

105 The focus of this section is on the application of the fair-use doctrine to address the digital-lending crisis and to preserve Congress's longstanding intent to support cultural institutions. To be sure, Congress could itself intervene and unequivocally reaffirm that commitment in the digital environment. In prior work, I have outlined several frameworks that Congress could adopt in doing so. Rub, *supra* note 11, at 240–47; *see also* LaFrance, *supra* note 74, at 142–49

made a deliberate choice to bundle institutional and individual uses together, thereby preventing price discrimination between these categories of users.

More broadly, the subsidy framework suggests that copyright policy should be evaluated not only by its effects on rightsholders and individual users, but also by its impact on cultural institutions that serve crucial public functions. Developments that undermine these institutions' ability to serve their communities may impose broader social costs that often outweigh any benefits to copyright owners.

B. The Sale-Versus-License Distinction

A second threat to cultural institutions arises from the increasing use of licensing models that attempt to circumvent copyright exhaustion altogether. Software companies, book publishers, and other content providers increasingly characterize their transactions as licenses rather than sales, arguing that exhaustion never applies because no sale has taken place.[106] Under this reasoning, once a transaction is classified as a license, copyright exhaustion is rendered inapplicable, and any subsequent distribution of the copyrighted good—whether by resale, lending, or even noncommercial transfer—requires a separate license.[107] Parties who fail to obtain such a license are exposed to liability as copyright infringers and the severe remedies that it entails, including statutory damages and even criminal sanctions.[108]

This development is particularly troubling because it permits rightsholders to reintroduce the very forms of user unbundling that Congress explicitly sought to eliminate through exhaustion. By defining transactions as licenses,

(identifying additional approaches for amending the Copyright Act). Nevertheless, for reasons that lie beyond the scope of this Essay, Congress is unlikely to enter this fray. *See* Rub, *supra* note 11, at 197 (noting that "Congress does not currently show an inclination to step in"). *See generally* Jeanne C. Fromer & Jessica Silbey, *Retelling Copyright: The Contributions of the Restatement of Copyright Law*, 44 COLUM. J.L. & ARTS 341, 363 (2021) (suggesting that Congress "has left the core of the [Copyright] Act . . . virtually intact for the past four decades"); Peter Menell & David Nimmer, *Symposium: Aereo, Disruptive Technology, and Statutory Interpretation*, SCOTUSBLOG (June 26, 2014), https://www.scotusblog.com/2014/06/symposium-aereo-disruptive-technology-and-statutory-interpretation/ [https://perma.cc/E8JG-HXB7] ("[W]e have witnessed time and time again, Congress faces tremendous structural constraints in updating copyright law.").

106 Guy A. Rub, *Against Copyright Customization*, 107 IOWA L. REV. 677, 683–85 (2022) (discussing the practice and its legal implications).

107 *Id.*

108 17 U.S.C. §§ 502–506.

publishers can segment users and charge different prices for different categories of activity. For example, a publisher might impose one price for personal reading and a far higher price for lending, public display, or other forms of high-volume, institution-based use. The result is that cultural institutions might be forced to bear disproportionately high costs for fulfilling their public missions. In this sense, licensing models not only undermine exhaustion's role in preserving public access but also erode the subsidy Congress deliberately created to sustain cultural institutions.

There is currently a circuit split concerning the classification of such transactions as licenses. The Ninth Circuit has endorsed this practice. In *Vernor v. Autodesk*, for example, it held that by merely including certain trivial terms in a standard-form agreement attached to a product at the time of first distribution, the transaction will be classified as a license rather than a sale, thereby eliminating copyright exhaustion.[109] By contrast, the Second Circuit has explicitly rejected this formalistic approach. For example, in *Universal Instruments v. Micro Systems Engineering*, it declines to follow *Vernor* and instead held that when a transaction in economic substance functions as a sale, such as when it involves the permanent transfer of possession in exchange for a fixed price, it will be treated as a sale for exhaustion purposes, regardless of the standard-form agreement's labels.[110]

The subsidy-based framework developed in this Essay strongly supports the Second Circuit's approach over that of the Ninth Circuit.[111] As shown above, Congress sought to advance specific social goals by prohibiting unbundling based on certain actions, such as post-sale transfers. Allowing exhaustion to be nullified by the mere inclusion of "magic words" in nonnegotiable, standard-form contracts would effectively hand copyright owners the power to easily rewrite congressional policy at will. Nothing in the legislative record suggests that Congress intended exhaustion to be so easily circumvented. Indeed, such a result would directly undermine the subsidy function Congress deliberately built into the copyright system. Properly understood, exhaustion must therefore be applied based on the economic reality of the

109 621 F.3d 1102, 1111 (9th Cir. 2010).

110 924 F.3d 32, 44–46 (2d Cir. 2019).

111 There are additional doctrinal reasons, which are beyond the scope of this Essay, to be *highly* skeptical of the Ninth Circuit's approach. *See* Rub, *supra* note 106, at 708–12.

transaction rather than its contractual label, ensuring that cultural institutions continue to receive the protections Congress designed for them.

CONCLUSION

This Essay reexamines the copyright exhaustion doctrine through a theoretical lens, revealing its function as a deliberate congressional subsidy for cultural institutions. By analyzing copyright law as a system of bundling and unbundling choices that enable or prevent price discrimination, the Essay shows that exhaustion's prohibition on post-sale restrictions represents a conscious policy decision to support institutions that serve vital democratic, cultural, and educational functions.

The evidence for this subsidy function is compelling and multifaceted. For over a century, Congress has consistently structured copyright exhaustion to protect these institutional users. The statutory structure, with exemptions safeguarding cultural institutions even as exhaustion was narrowed elsewhere, along with the records of Congress and the Copyright Office, all point to intentional design. When copyright owners sought to eliminate these protections, Congress repeatedly refused, confirming its commitment to supporting cultural institutions through forced bundling.

Understanding exhaustion as a subsidy mechanism has immediate practical implications for contemporary copyright disputes. As physical media gradually give way to digital distribution, publishers and technology companies are circumventing exhaustion's protections. Libraries now face discriminatory pricing for digital content—paying three to five times retail for temporary licenses—that accomplishes exactly the user unbundling Congress aimed to prevent. Courts, unappreciative of exhaustion's subsidy function, have largely failed to protect the congressional scheme.

Cultural institutions, and the communities they serve, deserve and need support. Congress understood this when it crafted the Copyright Act. To abandon them now to the unchecked power of rightsholders' price discrimination would gut that design, strip away the subsidy that has sustained them for generations, and imperil their ability to remain what Congress intended: vital, enduring engines of education, culture, and democracy.