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INTEREST OF AMICUS CURIAE

Amici curiae are x individual librarians from libraries across the country and x library organizations [description of specialties and orgs]. *Amici* include librarians who have worked in every function in a library, from interlibrary loan to cataloguing to reference to systems administration. They have a deep understanding of carrying out these functions to fulfill libraries' public purpose to acquire, preserve, and provide community access to content while carefully balancing and respecting copyright. *Amici* also include librarians who value controlled digital lending (CDL) as a tool to accomplish libraries' public purpose. The *Amici* as well as libraries, library patrons, readers, and countless others who benefit from libraries may be significantly impacted by the Court's decision in this case.

The *Amici*'s shared mission to make authors' works accessible to the public depends on the fundamental copyright principles of fair use and the first sale doctrine. *Amici* believe the District Court did not conduct the necessary work-by-work analysis in its fair use determination against the Internet Archive (IA), and also emphasized economic considerations to the exclusion of copyright's public purpose. As a result, its decision may render both CDL and many common library practices potential copyright violations.

Individual signatories to this brief are participating in their individual capacity only and not on behalf of any institution with which they are affiliated. A list of *amici* is included in Appendix A. Individual signatories' institutions are listed for identification purposes only.

SUMMARY OF ARGUMENT

The Copyright Act and libraries have a shared purpose to spread knowledge to the public. Libraries rely on balanced, careful application of the fair use balancing test to achieve that purpose. The District Court's decision reduced copyright law's multi-part fair use balancing test to an economic theory and broadly applied it to Internet Archive's (IA) activities without distinguishing between the many different types of uses of digitized materials at issue in this case. The result is that not only libraries' various CDL programs but also their other longstanding, customarily permitted activities to distribute knowledge to the public could be considered commercial activities that violate copyright. A library offering standard services to connect the public to author's works, such as public read-aloud hours, while also conducting usual non-profit activities such as inviting donations through its website could suddenly be targeted for copyright infringement.

In support of the Internet Archive (IA), *Amici* respectfully submits that this Court should: (1) reverse and remand the decision for the District Court to separately analyze each of the actual uses of the works at issue under the fair use

balancing test and carefully restrict their analysis and holding to those actual uses; and (2) recalibrate the District Court opinion's reliance on economic theory to appropriately weigh access to knowledge and public interest in the fair use balancing test.

Amici address three points to help the Court's consideration of this case. *First*, the District Court did not conduct the required work-by-work analysis to determine fair use and failed to account for and appropriately distinguish multiple distinct uses of digitized materials which have differing methods, purposes, and impact. *Second*, the merging of these various uses is unjustified and results in broad harm by drastically expanding the definition of commerciality in the fair use balancing test. This expansion will chill many previously legitimate fair uses including by libraries as part of their mission to spread knowledge to the public. *Third*, this expansion of commerciality overrides the purpose of the initial Copyright Act to promote the spread of knowledge. It also counters Congress' intention in the 1976 Act to broadly define fair use so it could be determined based on each use's particular circumstances.

ARGUMENT

I. The District Court did not account for fundamentally different uses in its fair use analysis and thus failed to meet the doctrine's requirement of a case-by-case analysis.

A. The District Court merged multiple different uses.

The district court inappropriately merged over a dozen different uses of copyrighted material in this case into one fair use analysis, despite differing facts, purposes, and impact. This merger oversimplifies the analysis, resulting in a single conclusion that is not only overly broad, but also contrary to the bedrock principle that alleged violations of fair use must be analyzed on a case-by-case basis.

To illustrate how the district court merged multiple uses and thus failed to properly analyze each in turn, consider the following three actual uses in this case which appear superficially similar:

Use Case 1: Digital Copy Used in Place of Physical Copy, with Digital Rights Management ("DRM"). Where (1) a digital copy is made of a physical copy and (2) that digital copy is used in place of the physical copy. In this use case, DRM controls are used with respect to the digital copy and the number of copies in use at any given time remains equal to the original number of physical copies owned.

Use Case 2: Digital Copy and Physical Copy Both Available to Be Used, with DRM. Where (1) a digital copy is made of a physical copy, and (2) both the digital copy and the physical copy may circulate simultaneously. In this use case, DRM controls are used with respect to the digital copy and the maximum number of copies in use at any given time is two times the original number of copies owned.

Use Case 3: Multiple Digital Copies Available to Be Used Simultaneously, with DRM. Where (1) one or more new digital copies are made of a pre-existing digital copy, and (2) all new digital copies may circulate simultaneously even though there are no corresponding owned print copies. In this use case, DRM controls are applied with respect to all digital copies. This use case may add one or more new digital copies to the market, with no limitations on the simultaneous circulations of new digital copies exceeding the number of print copies owned.

Although Use Cases 1 through 3 appear similar in that a new digital copy or copies are being made, the analysis of each under fair use would, in fact, be quite different. For example, Use Case 1 (Digital Copy Used in Place of Physical Copy) adds no new copy to the market, it simply creates a replacement copy in a different format. Copyright law protects the work, however, not the format. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* §2.03 (2023). Use Case 2 (Digital Copy and Physical Copy Both Available to Be Used), on the other hand, does add a new copy to the market, but the resulting harm is limited both in theory and in fact: simply because a new copy can circulate simultaneously does not mean it does circulate simultaneously (i.e., for any given title, it is possible that no two users ever wanted to access the title simultaneously)..

B. Each use case requires a different fair use analysis to determine actual impact.

This case presented 127 works which copyrights had allegedly been infringed, yet the district court failed to parse out the facts and circumstances of each and instead treated all 127 identically for purposes of its fair use analysis. In doing so, the district court effectively converted the fair use's equitable doctrine to a bright line rule. This is not only unprecedented but also confusing for users as well as creators, and that confusion is multiplied in this era of exponential technological advancement and innovation.

As outlined in section I.A., there can be subtle but factually important differences in types of uses and thus it is possible that each of the 127 works named in the suit could have been impacted differently. For example, if a partner library owned a physical copy of a book that had not been checked out for years but saw increased circulation after creating a digital copy of that book and taking the physical book out of circulation (Use Case 1), it could be argued that the impact for that book was, in fact, net positive. The earlier lack of use would have eliminated any reason for the owning library to acquire another copy in any format and the new use exposes more people to the book and author. If heavy demand grows from such exposure, this could incentivize the library to acquire additional copies.

The impact on such a book would differ from other books that were in use in print but became simultaneously usable online (Use Cases 2 and 3). Even there, the

actual impact differs between those that were used simultaneously in numbers exceeding the number owned, and those where simultaneous use was possible but never exercised (i.e., where circulation records show that only one copy of the book, in either format, was ever checked out at a time). And those impacts further differ from books which may have been checked out in error or consulted briefly for a page citation and returned immediately. One cannot reliably measure impact or potential impact for these 127 books without looking at the actual uses and surrounding circumstances related to each title.

C. The District Court's Merger of Uses and Failure to Analyze Each Use Individually Harms Libraries

In order to fulfill their missions, many libraries engage only in Use Case 1 (Digital Copy Used in Place of Physical Copy), though each library has its own implementation of this style of lending and associated safety mechanisms. *See generally* David R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending of Library Books* (2018). Use Case 1 is fundamentally distinct from all other uses. Libraries, which our society has tasked with the collection, sharing, and preserving of information for the public, require clarity in the analysis of the factually distinct uses for the 127 works in the suit. If every use of an unlicensed digitized work is lumped together, despite distinct design differences and impacts, fair use itself loses meaning. A doctrine intended to apply case-by-

case analysis instead turns into a generic tool for any use that looks superficially like any other.

II. The District Court's merging of distinct uses of digitized works broadens the definition of commerciality and changes customary fair uses into unfair commercial uses.

By not distinguishing the various types of uses described in section I.A. and weighing their economic rewards and public benefits before concluding that "[t]he commercial-noncommercial distinction… favors the Publishers[]" the District Court appears to say an organization engages in commercial activity if it gains any donations, visibility, or positive press while also using a copyrighted work in a manner not explicitly permitted by the statute or past case. *Hachette Book Grp., Inc.,* 2023 WL 2623787, at *9. The Court's conclusion that IA's use of "its Website to attract new members, solicit donations, and bolster its standing in the library community" is commercial activity makes it difficult to identify any uses by any organization that are not commercial. Most nonprofits maintain a public presence, such as a website, and accept donations. For example, under this broadened definition, libraries could face copyright infringement claims for displaying a sign inviting Friends of Library memberships during a story hour event where a book is read aloud (public performance).

In contrast to the District Court's analysis, this Court has held that the commerciality factor is primarily concerned with the unfairness that arises when an

infringing user "capture[s] significant revenues as a direct consequence of copying the original work." *Blanch v. Koons*, 467 F.3d 244, 253 (2d Cir. 2006) (quoting *Am. Geophysical Union v. Texaco, Inc.*, 60 F.3d 913, 922 (2d Cir. 1994)); *see also Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986) (explaining that "[t]he commercial nature of a use is a matter of degree, not an absolute" in finding that "the educational elements...far outweigh the commercial aspects of the book" and holding that copying of interviews in a book was fair use). Other Circuits also carefully analyze the link between use of copyrighted material and financial reward [make the following a footnote: *See, e.g.*, *Sony Computer Entertainment America, Inc. v. Bleem, LLC*, 214 F.3d 1022, 1027 (9th Cir. 2000) (holding that a software developer's use of a screenshot of competitor's games in comparative advertising with respect to the balancing test's first factor likely was fair use even though the developer was using it to increase sales because comparative advertising "redounds greatly to the purchasing public's benefit with very little corresponding loss to the integrity of...copyrighted material" *id*.); *Nunez v. Caribbean Int'l News Corp.*, 235 F.3d 18, 22 (pointing out that "[f]or a commercial use to weigh heavily against a finding of fair use, it must involve more than simply publication in a profit-making venture" before agreeing with the lower court that photographs at issue were not used just as "an ordinary part of a profit-making venture, but with emphasis in an attempt to increase its revenue" *id*.).] and some have found it too attenuated. For

example, the Fourth Circuit found that use of a logo in a football team's lobby display about the city's football history was "simply not the type of commercial use frowned upon by § 107" because it was incidental rather than exploitative. *Bouchat v. Baltimore Ravens Ltd. Partnership*, 737 F.3d 932, 948 (2013). [will make following a footnote] The District Court's own prior holdings also require a direct link between the infringing use and financial benefit. *See, e.g.*, *Associated Press v. Meltwater U.S. Holdings, Inc.*, 931 F. Supp. 2d 537, 553 (S.D.N.Y. 2013) (requiring "careful exploration of the link between the defendant's precise use of the copyrightable elements of the plaintiff's work and the defendant's financial gain"); *O'Neil v. Ratajkowski*, 563 F. Supp. 3d 112 (S.D.N.Y. 2021) (noting defendant did not "directly and exclusively acquire[ ] conspicuous financial rewards from [her] use of the copyrighted material"). This District Court's expansion of commerciality threatens core, customary library practices that spread knowledge to the public such as reading books aloud, holding fanfiction contests, and creating promotional materials for read-alongs.

III. Copyright was established to further the public's access to information and narrowing it to an economic theory endangers common uses including library activities that achieve copyright's purpose of increasing public access to information.

A. Copyright was established to protect the author only insofar as the protection encouraged publication of works for public access.

Early state and federal government actors were concerned that without copyright the public would not have access to authors' writings. As one influential author, Joel Barlow, described in his 1783 letter to the President of the Continental Congress:

> If the passing of statutes similar to this [the 1710 British Statute of Anne] were recommended by Congress to the several States, the measure would be undoubtedly adopted, & the consequences would be extensively happy upon the spirit of the nation, by giving a laudable direction to that enterprising ardor of genius which is natural to our stage of society, & for which the Americans are remarkable. Indeed we are not to expect to see any works of considerable magnitude, (which must always be works of time & labor), offered to the Public till such security be given. There is now a Gentleman in Massachusetts who has written an Epic Poem, entitled "The Conquest of Canaan", a work of great merit, & will certainly be an honor to his country. It has lain by him, finished, these six years, without seeing the light; because the Author cannot risque the expences of the publication, sensible that some ungenerous Printer will immediately sieze upon his labors, by making a mean & cheap improvision, in order to undersell the Author & defraud him of his property.[1]

Barlow's most convincing argument was that securing copyright would result in greater public access to written works. Piracy by publishers was common at that

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[1] Letter from Joel Barlow to the Continental Congress (1783), *Primary Sources On Copyright (1450-1900)* (Lionel Bently & Martin Kretschmer eds.), https://www.copyrighthistory.org/cam/tools/request/showRecord.php?id=record_us_1783b (reproducing original source from The National Archives, Center for Legislative Archives: Papers of the Continental Congress, RG 360.4, 369-373 (No. 78)).

time and authors were reluctant to release their books to the public without protection against it.[2]

These concerns persuaded the Continental Congress to recommend that states "secure to authors or publishers of any new books not hitherto printed . . . the copy right of such books for a certain time . . .".[3] All states but Delaware followed the recommendation.[4] Most of these states included statutory preambles identifying the public purposes of copyright. 1 William F. Patry, *Copyright Law and Practice* 21 (1994). For example, New Hampshire's:

> As the improvement of knowledge, the progress of civilization, and the advancement of human happiness, greatly depend on the efforts of ingenious persons in the various arts and sciences; as the principal encouragement such persons can have to make great and beneficial exertions of this nature, must consist in the legal security of the fruits of their study and industry to themselves; and as such security is one of the natural rights of all men, there being no property more peculiarly a man's own than that which is produced by the labour of his mind: Therefore, to encourage the publication of literary productions, honorary and beneficial to the public. . . .

Id. (citing Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright, at 8, Copyright Office Bulletin No. 3 (rev.) (1963)).

The federal Constitution's Copyright Clause likewise reflects a societal purpose. U.S. Const. art. I, § 8, cl. 8. Several phrasings without the public purpose

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[2] Robert Spoo, *Without Copyrights: Piracy, Publishing, and the Public Domain* (2013) (detailing the scope of print piracy in early American history).
[3] Copyright Enactments: Laws Passed in the United States Since 1783 Relating to Copyright, at 1, Copyright Office Bulletin No. 3 (rev.) (1963).
[4] Phillip Wittenberg, *The Protection of Literary Property* 33 (Writer, Inc. rev. ed. 1978).

were proposed but not adopted.[5] The Clause's goal was spread of knowledge. It sanctioned monopoly merely as a means to achieve that end.[6]

The early state and federal governments intended copyright law to foster a fair environment for books to reach the public, not to protect private profit. The rights granted to authors were based in natural law notions of equity and were intended to give authors an effective weapon against unjust enrichment. This protection ensured the release of information to the public. The opportunity to make money was a by-product and not the primary justification for the state-authorized monopolies created by early copyright statutes.

The District Court's broad definition of commerciality and emphasis on market harm also ignores Congress' intention to retain the equitable aspect of fair use in Section 107. In its report to the House shortly before the 1976 legislation codifying fair use passed in that chamber and was sent to Conference Committee, the Judiciary Committee stated:

> The statement of the fair use doctrine in section 107 offers some guidance to users in determining when the principles of the doctrine apply. However, the endless variety of situations and combinations of

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[5] Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 Harv. J.L. & Tech. 87, 91 (1999); Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress As A Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1776-7 (2006); Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 Duke L.J. 1329, 1345-46 (2012).

[6] Alfred C. Yen, *Restoring the Natural Law: Copyright As Labor and Possession*, 51 Ohio St. L.J. 517, 528-9 (1990).

> circumstances that can rise in particular cases precludes the formulation of exact rules in the statute. The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

H.R. Rep. NO. 94–1476, at 65-66 (1976). The scope of the public's right to access copyrighted information cannot be reduced to market or profit criteria but rather rests on basic fairness principles examined in a balancing analysis.

B. The District Court's decision makes it risky to engage in common uses that are aligned with copyright's purpose but which may have a market impact.

Copyright in the real world illustrates that it cannot be solely or even primarily about economics. Works protected by copyright for non-commercial purposes, such as personal pictures, journal entries, fan art, term papers, emails, and blogs, overwhelmingly outnumber the ones created for commercial use. Statutory provisions also explicitly permit many uses that potentially impact sales, such as resale, donation, lending, and provisions to help the print disabled. 17 U.S.C. §§108-109, 121.

An economic theory cannot explain why daily, non-transformative uses are generally tolerated even when they potentially have a market impact, for example mixtapes, busking, and lending a DVD recording to a friend. Courts have

condoned forms of non-transformative "time shifting" of copyrighted work via a recording device. *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 443 (1984). In *Authors Guild, Inc. v. HathiTrust*, the court held that making copyrighted information in digital formats accessible to disabled people was not transformative. 755 F.3d 87, 101-102 (2d Cir. 2014). However, when all four factors were balanced the court found that the digitization of the resources was fair use. *Id.* at 103. Similarly, in *Cambridge University Press v. Patton*, the scanning of copyrighted educational materials for course reserves was found to be non-transformative. However, the educational purpose of the content was enough to tip the balancing test in favor of fair use. 769 F.3d 1232, 126 (11th Cir. 2014). Economic theory is not the primary consideration in the vast majority of copyright cases and is ignored altogether in many.

C. The District Court's application of economic theory would chill beneficial fair uses and innovations including libraries' efforts to spread knowledge in their communities.

Applying economic theory to fair use chills socially beneficial uses of works even though the author has arguably received fair compensation for their work. Technological advancements have made works more accessible to users in unique and novel ways, but the threat of litigation has stifled progress. For example, a cease-and-desist letter from the Author's Guild prompted Amazon to give authors

and publishers the ability to disable text-to-speech features on Kindle e-books.[7] An economic theory of copyright also would similarly incentivize copyright holders to attack auto translation as an illegitimate use where there is not yet any translation for purchase, as translation is also a paradigmatic derivative work.

Applying economic theory to copyright would force libraries to repurchase content they already have acquired rather than spend those funds on additional new content for their communities.[8] Neither the public nor authors, both of whom are the intended beneficiaries of copyright, benefit from libraries spending public or community funds on the same content repeatedly instead of acquiring new content. The logical consequence is that the public has access to fewer authors and works, fewer authors get wide exposure, and fewer works are preserved for future generations.

Viewing copyright practice through the capacious lens of the natural right to knowledge rather than the narrow lens of economic theory explains how it balances the right to receive fair payment for knowledge and the right to use

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[7] Jack Schofield, *Amazon Caves to Authors Guild over Kindle's Text-to-Speech Reading*, Guardian (Mar. 1, 2009), https://www.theguardian.com/technology/blog/2009/mar/01/authors-guild-blocks-kindle-voice.

[8] Daniel A. Gross, *The Surprisingly Big Business of Library E-Books,* New Yorker (Sept. 21, 2021), https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books.

knowledge. Society will not tolerate a commercial actor profiting from a work without compensating the creator, but it treats reasonable use (e.g., serenades, picnickers playing music in a public park, singing a song at a local talent show) as non-infringing. These activities are natural outgrowths of consumption and use.[9] Permitting everyday use supports the spread of knowledge[10] and does not implicate the unjust enrichment principles that underlie copyright. So long as a library simultaneously uses only the same number of copies it has legitimately acquired it has met the bargain intended by copyright. The author has received just payment for the number of copies of the work in use. The format of use is irrelevant.

CONCLUSION

The District Court's undifferentiated application of the fair use balancing test to many varied uses of digitized works and its resulting broad determination that IA's activities are commercial threatens to turn not just controlled digital lending but also everyday library activities into potential copyright violations. The decision potentially deprives the public, the ultimate intended beneficiaries of

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[9] Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. Pa. L. Rev. 549, 602 (2008).

[10] Douglas L. Rogers, *Increasing Access to Knowledge Through Fair Use-Analyzing the Google Litigation to Unleash Developing Countries,* 10 Tul. J. Tech. & Intell. Prop. 1, 20-31 (2007).

copyright, of the equitable right to reasonably use legitimately acquired content[11] and inhibits the normal use of content.[12]

A library buys a book to lend it. It is a reasonable use to lend the same number of copies of the book as purchased. Closing the door to reasonable use of information legitimately acquired increases information inequity, an outcome contrary to copyright's intended role in furthering societal access to information.

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[11] Press Release, Urban Libraries Council, North American Elected Officials Send Message to E-Book Publishers: Price Gouging Public Libraries Is Unacceptable (Nov. 6, 2019), https://www.urbanlibraries.org/newsroom/north-american-elected-officials-send-message-to-e-book-publishers-price-gouging-public-libraries-is-unacceptable.

[12] Sarah Lamdan, Jason M. Schultz, Michael Weinberg, & Claire Woodcock, New York Univ. Sch. of Law Engelberg Ctr. on Law and Pol'y, The Anti-Ownership Ebook Economy (July 2023), https://www.nyuengelberg.org/files/the-anti-ownership-ebook-economy.pdf.

APPENDIX – LIST OF AMICI CURIAE