

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,  
HARPERCOLLINS PUBLISHERS LLC,  
JOHN WILEY & SONS INC., and  
PENGUIN RANDOM HOUSE LLC,

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through  
5, inclusive,

Defendants.

Case No. 1:20-CV-04160-JGK

**AMICUS BRIEF OF KENNETH D. CREWS AND KEVIN L. SMITH  
IN SUPPORT OF DEFENDANT INTERNET ARCHIVE'S MOTION  
FOR SUMMARY JUDGMENT AND IN OPPOSITION TO  
PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT**

Christopher T. Bavitz (CB0941)  
Cyberlaw Clinic  
Harvard Law School  
Reginald F. Lewis Law Center  
1557 Massachusetts Avenue, 4<sup>th</sup> Floor  
Cambridge, MA 02138  
Tel: 617-384-9125  
Fax: 617-812-3050  
Email: [cbavitz@law.harvard.edu](mailto:cbavitz@law.harvard.edu)

Counsel for Amici Curiae  
Kenneth D. Crews and Kevin L. Smith

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... **i**

**TABLE OF AUTHORITIES**..... **ii**

**STATEMENT OF INTEREST OF AMICI CURIAE** ..... **1**

**SUMMARY OF ARGUMENT** ..... **2**

**ARGUMENT** ..... **4**

I. The library has a long history of providing vital support for a more egalitarian, democratic, and civically engaged society; CDL represents the latest of a series of adaptations in service of these values. .... 4

    A. Libraries safeguard democracy and promote civic engagement. .... 4

    B. The evolution of the American library has consistently reflected an active pursuit of democratic ideals in a changing world. .... 6

        1. *Though founded with democratic ideals and principles in mind, libraries were initially exclusive institutions that had to expand throughout the nineteenth century to support public access.* ..... 6

        2. *Expanded public library access was crucial in the twentieth century fight against fascism.* ..... 8

        3. *By the second half of the twentieth century, libraries began to play a crucial role in advancing a more egalitarian and equal society.* ..... 9

II. CDL represents a logical and reasonable next step for libraries in their long-standing pursuit of their missions. .... 9

    A. The digital transformation has accelerated inequality in information access..... 10

    B. The most effective way to address attacks against libraries is to strengthen the function of libraries themselves. .... 11

        1. *CDL has many historical analogs and does not represent a radical departure from past practice.* ..... 12

        2. *Attempts by libraries to enhance access to information resources have often encountered opposition.* ..... 13

III. A decision that prevents libraries from pursuing CDL programs would significantly harm libraries and, therefore, the broader public..... 15

**CONCLUSION** ..... **16**

**TABLE OF AUTHORITIES**

**Cases**

Board of Education v. Pico, 457 U.S. 853, 868 (1982).....4

**Other Authorities**

A Modern Book Burning: LGBTQ-Themed Books Removed From North KC, Liberty Schools, THE KANSAS CITY STAR (Nov. 6, 2021) ..... 11

Adele Uphaus, Spotsylvania School Board Orders Libraries to Remove 'Sexually Explicit' Books, THE FREE LANCE STAR (Nov. 9, 2021) ..... 11

ALA, Core Values of Librarianship, THE AMERICAN LIBRARY ASSOCIATION (2019)..... 12

Alison Flood, US Libraries Report Spike in Organised Attempts to Ban Books in Schools, THE GUARDIAN (Nov 21., 2021) ..... 11

BENJAMIN FRANKLIN, THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN: 1706-1757, 105 (Applewood Books ed., 2008) ..... 5

BOSTON PUBLIC LIBRARY TRUSTEE REPORT (1852). ..... 8

Brooke Migdon, Movement to Ban — Or Even Burn — School Library Books Gains Momentum, THE HILL (Nov. 11, 2021) ..... 11

Candace Morgan et al., Challenges and Issues Today, in INTELLECTUAL FREEDOM MANUAL 207 (Am. Libr. Ass’n ed., 2010). ..... 4

COACHING COPYRIGHT (Kevin L. Smith & Erin L. Ellis eds., Am. Libr. Ass’n 2019)..... 1

David Hansen & Kyle Courtney, A White Paper on Controlled Digital Lending of Library Books, Controlled Digital Lending by Libraries and Democracy (2018) ..... 3, 13

E.B. White, The Meaning of Democracy, THE NEW YORKER (1943)..... 8

Ebook and Audiobook Usage Surges in Academic Libraries During Pandemic, OVERDRIVE (Apr. 13, 2021) ..... 10

Gerald S. Greenberg, Books as Disease Carriers, 23 LIBRARIES & CULTURE 3 (1988). ..... 7

Home Recording of Copyrighted Works: Hearings Before the Subcomm. on Cts., C. L., & the Admin. of Just. of the H. Comm. on the Judiciary, 97<sup>th</sup> Cong. (1982). ..... 15

How Americans Value Public Libraries in Their Communities, Pew RESEARCH CENTER (Dec. 11, 2013) ..... 12

James Madison, James Madison to W. T. Barry, August 4, 1822 (Aug. 4, 1822) (unpublished manuscript) (on file with the Libr. of Cong.).....5

JOHANNES TRITHEMIUS, DE LAUDE SCRIPTORUM MANUALIUM (Freunde Mainfränk ed., Kunst u. Geschichte 1973) (1492)..... 13

KATHLEEN MOLZ & PHYLLIS DAIN, CIVIC SPACE/CYBERSPACE: THE AMERICAN PUBLIC LIBRARY IN THE INFORMATION AGE (1999). .....6, 7

KENNETH D. CREWS, COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS: CREATIVE STRATEGIES AND PRACTICAL SOLUTIONS (Am. Libr. Ass'n 2020)..... 1

KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION (Univ. of Chicago 1993)..... 1

Kenneth D. Crews, GIPSON HOFFMAN & PANCIONE .....2

KEVIN L. SMITH, OWNING AND USING SCHOLARSHIP: AN INTELLECTUAL PROPERTY HANDBOOK FOR SCHOLARS (Ass’n of Coll. and Rsch. Libr. 2014)..... 1

Kevin L. Smith, THE UNIVERSITY OF KANSAS LIBRARIES.....2

Library Statistics, Fiscal Years 2016–2020, COLUM. UNIV., (DEC. 3, 2021)..... 16

Margaret Monroe, Reader Services to the Disadvantaged in Inner Cities, ADVANCES IN LIBRARIANSHIP (1971) .....9

Miriam Intrator, UNESCO, Reconstruction, and Pursuing Peace through a “Library-Minded” World, 1945-1950, in A HISTORY OF UNESCO 131 (Poul Duedahl ed., 2016)..... 8

Nancy Kranich, Libraries and Democracy Revisited, 90 LIBR. Q. 121 (2020).....passim

Public Libraries Act 1850, 13 & 14 Vit c.65 (UK) ..... 14

ROSEMAY RUHIG DU MONT ET AL., MULTICULTURALISM IN LIBRARIES (1994).....9

SIDNEY DITZION, ARSENALS OF A DEMOCRATIC CULTURE; A SOCIAL HISTORY OF THE AMERICAN PUBLIC LIBRARY MOVEMENT IN NEW ENGLAND AND THE MIDDLE STATES FROM 1850 TO 1900 (1947).....7

Spread of Education and Literacy, ENCYCLOPAEDIA BRITANNICA ..... 14

STUART MURRAY, THE LIBRARY: AN ILLUSTRATED HISTORY (Skyhorse Pub. 2009).....4

SUSAN ORLEAN, THE LIBRARY BOOK (Simon & Schuster 2018).....2, 7

Suzanne Perez, Goddard School District Orders 29 Books Removed From Circulation, KMUW (Nov. 9, 2021)..... 12

Thomas Jefferson, From Thomas Jefferson to James Madison, 31 July 1788 (Jul. 31, 1788)  
(unpublished manuscript) (on file with the Libr. of Cong.).....5

William R. Gordon, Advocacy for Democracy I, in LIBRARIES AND DEMOCRACY 203 (Nancy  
Kranich ed., 2001).....4

**STATEMENT OF INTEREST OF AMICI CURIAE**

Amici are library and information scholars and historians with deep expertise regarding libraries and archives, the laws that govern them, and the roles they play in society. Amici submit this brief in support of defendant Internet Archive on its motion for summary judgment and its opposition to plaintiffs’ cross-motion seeking a ruling that Internet Archive’s conduct constitutes copyright infringement. Amici urge the court to consider the controlled digital lending (“CDL”) program at issue in this case not in a vacuum but against the backdrop of the long history of libraries and in the context of their evolving role as institutions that support and enhance democracy.

Amici are uniquely positioned to understand the issues at hand from diverse perspectives. Both have been leaders for decades in addressing issues of copyright and related concerns for libraries, archives, universities, publishers, museums, and other institutions. They are authors of numerous published works, including articles and other writings that have been scanned and shared by libraries, as well as books available for purchase and that pay royalties to the authors.<sup>1</sup> One of the amici, Kevin L. Smith—in addition to being a librarian and library administrator—is the director of a long-established publisher that has an interest in both publishing scholarly

---

<sup>1</sup> See, e.g., KEVIN L. SMITH, OWNING AND USING SCHOLARSHIP: AN INTELLECTUAL PROPERTY HANDBOOK FOR SCHOLARS (Ass’n of Coll. and Rsch. Libr. 2014); COACHING COPYRIGHT (Kevin L. Smith & Erin L. Ellis eds., Am. Libr. Ass’n 2019); KENNETH D. CREWS, COPYRIGHT LAW FOR LIBRARIANS AND EDUCATORS: CREATIVE STRATEGIES AND PRACTICAL SOLUTIONS (Am. Libr. Ass’n 2020); KENNETH D. CREWS, COPYRIGHT, FAIR USE, AND THE CHALLENGE FOR UNIVERSITIES: PROMOTING THE PROGRESS OF HIGHER EDUCATION (Univ. of Chicago 1993).

literature and earning optimal revenues from sales of books and other works. Kevin L. Smith, THE UNIVERSITY OF KANSAS LIBRARIES, <https://lib.ku.edu/people/kevin-l-smith> (last visited Jul. 11, 2022). The other amicus, Kenneth D. Crews, is now in private law practice and has represented authors and publishers in their negotiation of agreements and in developing policies on proper adherence to principles of copyright law. Kenneth D. Crews, GIPSON HOFFMAN & PANCIONE, <https://www.ghplaw.com/our-people/kenneth-d-crews> (last visited Jul. 11, 2022).<sup>2</sup>

### SUMMARY OF ARGUMENT

The ambitious goals of the library—to serve as a democratizing force by providing public access to information—are belied by the prosaic and routine tasks often viewed as central to its inner workings: cataloguing, sorting, and shelving materials so patrons can find what they need; tending to books in need of care and purchasing replacements when they are beyond repair; and sharing materials via interlibrary loan across systems. It is through these simple activities, however, repeated en masse daily, that the library resists classification as a building full of books. It becomes “as much a portal as it is a place — a transit point, a passage.” SUSAN ORLEAN, THE LIBRARY BOOK 124 (Simon & Schuster 2018).

Centuries of cultural and technological change have enhanced the modern library’s ability to fulfill its core mission. Since their inception, American libraries have evolved from austere, racially-segregated institutions accessible only by the affluent few to vibrant cultural

---

<sup>2</sup> The views articulated in this brief are solely those of the amici and not necessarily the opinions or beliefs of the amici’s employers or clients. Amici have no direct financial interest in the outcome of this case but strongly believe that the law must continue to support, rather than impede, innovation in furtherance of independent and free access to information.

centers connecting communities to critical sources of information, entertainment, and services. From maps to mimeographs, paintings to puppets, film screenings to flu shots, library offerings have continuously expanded to meet the interests of diverse patrons in a rapidly changing world. CDL services like those at issue in this case<sup>3</sup> are far from unprecedented departures from traditional library functions. On the contrary, they represent the latest in a series of innovations developed by libraries to serve the public's interest in and need for information.

These innovations have often been the subjects of opposition. Nevertheless, just as patron lending in the nineteenth century and Internet access in the late-twentieth century allowed libraries to meet the evolving needs of their communities, CDL offers libraries a means to meet the pressing demands of the current moment while considering the underlying commercial interest of publishers. The need for these efforts has never been greater: in an age when misinformation runs rife and extremism and inequality are on the rise, libraries are a chief recourse of truth-minded citizens. In this context, CDL provides a crucial mechanism through which libraries can continue their efforts.

---

<sup>3</sup> “CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner...replicating with digital lending the legal and economically significant aspects of physical lending.” Using technical measures to manage user access, “a library may only loan simultaneously the number of copies that it has legitimately acquired” by maintaining a 1:1 ratio of owned to loaned copies. David Hansen & Kyle Courtney, A White Paper on Controlled Digital Lending of Library Books, CONTROLLED DIGITAL LENDING BY LIBRARIES AND DEMOCRACY (2018), <https://controleddigitalending.org/whitepaper>.



Many around the world will look to this Court’s decision and its analysis of legal issues related to libraries’ use of CDL to provide public information access in the modern world. The case therefore presents the Court with an opportunity to protect and reaffirm the library’s importance and value. In contrast, a ruling that undermines innovations by rejecting or limiting them could pose a fundamental threat to libraries’ contributions as stewards of the variety of inquiry and expression on which our democracy and culture depend. William R. Gordon, Advocacy for Democracy I, in LIBRARIES AND DEMOCRACY 203 (Nancy Kranich ed., 2001).

## ARGUMENT

**I. The library has a long history of providing vital support for a more egalitarian, democratic, and civically engaged society; CDL represents the latest of a series of adaptations in service of these values.**

**A. Libraries safeguard democracy and promote civic engagement.**

The library’s role as a beacon of enlightenment and bulwark against oppression has ancient roots. The Great Library of Alexandria made the city famous as the intellectual capital of the Western world more than a thousand years before the invention of the printing press. STUART MURRAY, THE LIBRARY: AN ILLUSTRATED HISTORY 15–17 (Skyhorse Pub. 2009). Resources maintained by libraries have long served as channels through which intellectual inheritance is handed down. They are also the principal mechanism for intellectual growth and testing of new ideas. Candace Morgan et al., Challenges and Issues Today, in INTELLECTUAL FREEDOM MANUAL 207 (Am. Libr. Ass’n ed., 2010). Without access to information stewarded by libraries, democracy itself quickly becomes “a hollow concept.” Nancy Kranich, Libraries and Democracy Revisited, 90 LIBR. Q. 121, 131 (2020). As the Supreme Court acknowledged in Board of Education v. Pico, 457 U.S. 853, 868 (1982), the ability of citizens to freely access information through libraries prepares them for active and effective civic participation and makes it possible for them to meaningfully exercise their rights of free speech and press. The founders

recognized the role of libraries as bastions of democracy even before the nation’s founding. Benjamin Franklin, who established the first subscription library in America, opined that “libraries have improved the general conversation of the Americans, made the common tradesmen and farmers as intelligent as most gentlemen from other countries, and perhaps have contributed in some degree to the stand so generally made throughout the colonies in defense of their privileges.” BENJAMIN FRANKLIN, *THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN: 1706-1757*, 105 (Applewood Books ed., 2008). James Madison echoed these sentiments, arguing that “a popular government without popular information or means of acquiring it is but a prologue to a farce or tragedy or perhaps both.” James Madison, James Madison to W. T. Barry, August 4, 1822 (Aug. 4, 1822) (unpublished manuscript) (on file with the Libr. of Cong.).<sup>4</sup>

In the modern era, libraries bear a unique responsibility to provide quality information to the public. No other institution offers so much information, so freely, to so many. Private companies (including publishers) play an important role in producing new informational resources. Understandably, however, they are driven by market forces and not by the well-being of society as a whole. Libraries safeguard the public’s ability to pursue diverse and varied inquiry and to learn freely in ways that may be impinged if control over the dissemination of digital materials is dictated exclusively by private interests. Against this backdrop, CDL is but

---

<sup>4</sup> Thomas Jefferson was also a firm believer in ensuring the flow of information. Notably, Jefferson went so far as to oppose copyright terms, even those as short as fourteen years, writing that “the benefit of even limited [copyright] monopolies is too doubtful to be opposed to that of their general suppression.” Thomas Jefferson, From Thomas Jefferson to James Madison, 31 July 1788 (Jul. 31, 1788) (unpublished manuscript) (on file with the Libr. of Cong.).

the latest effort by libraries to “promote the kind of discourse that makes democracy possible.” NANCY KRANICH, Libraries, the Internet, and Democracy, in LIBRARIES AND DEMOCRACY 92, 109 (Nancy Kranich ed., 2001).

**B. The evolution of the American library has consistently reflected an active pursuit of democratic ideals in a changing world.**

Libraries are not only enduring symbols of our commitment to democratic ideals; they are active participants in the affirmation of those ideals. Whereas the library of the founders’ day was an elitist and inaccessible bastion of knowledge, American public libraries gradually opened their doors to more patrons irrespective of race, gender, age, or class background. In the process, they offered increasingly efficient and egalitarian means of access to information. Thus, the evolution of the library has directly reflected the social progress of our nation over time.

**1. Though founded with democratic ideals and principles in mind, libraries were initially exclusive institutions that had to expand throughout the nineteenth century to support public access.**

CDL represents a stepping stone on the public library’s storied path toward greater accessibility for a broader pool of more diverse patrons. Framed as such, one might compare the advent of CDL to changes in attitudes and policies that first allowed women, the working class, and immigrants to enjoy the library’s advantages in the nineteenth century. A ruling against Internet Archive in this case would significantly impede this process of development and diversification.

Despite their idealistic origins, libraries at the time of America’s founding were private, elite institutions largely only accessible to white, land-owning men. The emergence of more truly “public” libraries was directly paralleled by growing emphasis on expanding public knowledge and its consequent impact on civic activity. KATHLEEN MOLZ & PHYLLIS DAIN, CIVIC SPACE/CYBERSPACE: THE AMERICAN PUBLIC LIBRARY IN THE INFORMATION AGE 3 (1999). In

the mid-nineteenth century, the private subscription libraries of earlier eras—which often limited access to a select few, included only books deemed morally suitable, and frowned upon the inclusion of potentially damaging novels—began to give way to public, tax-supported libraries with larger and more controversial catalogues. SUSAN ORLEAN, *THE LIBRARY BOOK* 124-128 (Simon & Schuster 2018).

Conceived as “civilizing agents and objects of civic pride in a raw new country,” these statute-authorized, tax-supported libraries were required by law to advance democratic ideals such as free and broad access to the widest variety of information and ideas. KATHLEEN MOLZ & PHYLLIS DAIN, *CIVIC SPACE/CYBERSPACE: THE AMERICAN PUBLIC LIBRARY IN THE INFORMATION AGE* 3 (1999). Of course, these changes did not go uncontested: just as CDL has prompted its share of hand-wringing, nineteenth century expansions in access often prompted unwarranted concerns about negative societal impacts and a senseless panic about the potential transmission of diseases through books. Gerald S. Greenberg, *Books as Disease Carriers*, 23 *LIBRARIES & CULTURE* 3, 281-294 (1988).

Despite these anxieties, state and national legislatures quickly encoded the importance of the public library. The Preamble to the 1851 Massachusetts Library Law, for instance, stated that the universal diffusion of knowledge—which was held to be “highly conducive to the preservation of [the people’s] freedom, a greater equalization of social advantages, their industrial success, and their physical, intellectual, and moral advancement and elevation”—was best accomplished by founding public libraries. SIDNEY DITZION, *ARSENALS OF A DEMOCRATIC CULTURE; A SOCIAL HISTORY OF THE AMERICAN PUBLIC LIBRARY MOVEMENT IN NEW ENGLAND AND THE MIDDLE STATES FROM 1850 TO 1900* 18 (1947). In a similar vein, the 1852 Boston Public Library Trustee Report argued that “it is [of] paramount importance that the means of

general information should be so diffused that the largest possible number of persons should be induced to read.” BOSTON PUBLIC LIBRARY TRUSTEE REPORT (1852).

**2. Expanded public library access was crucial in the twentieth century fight against fascism.**

As the American public library system continued to adapt and mature through the nineteenth and twentieth centuries, it became a vital source of free access to quality information in the face of fascism and totalitarianism. As the shadow of war stretched across Europe, American commentators lauded libraries for providing high-quality information that could check the growth of domestic extremism. Franklin D. Roosevelt, for instance, opined that:

Libraries are directly and immediately involved in the conflict which divides our world, and for two reasons; first, because they are essential to the functioning of a democratic society; second, because the contemporary conflict touches the integrity of scholarship, the freedom of the mind, and even the survival of culture, and libraries are the great tools of scholarship, the great repositories of culture, and the great symbols of the freedom of the mind.

Miriam Intrator, UNESCO, Reconstruction, and Pursuing Peace through a “Library-Minded” World, 1945-1950, in A HISTORY OF UNESCO 131, 131 (Poul Duedahl ed., 2016). E.B. White, author of Stuart Little and Charlotte’s Web, wrote a letter to the editor of the New Yorker calling democracy “the feeling of communion in the libraries, the feeling of vitality everywhere.” E.B. White, The Meaning of Democracy, THE NEW YORKER (1943), <https://www.newyorker.com/books/double-take/e-b-white-on-the-meaning-of-democracy>. Just as libraries of the 1930s and 1940s served as a check against extremism, today’s libraries stand ready to fight rising tides of misinformation. CDL is a vital part of the modern library’s arsenal in waging this battle.

**3. By the second half of the twentieth century, libraries began to play a crucial role in advancing a more egalitarian and equal society.**

The latter half of the twentieth century saw a series of concerted national efforts to provide equal access to information for a broader range of citizens. In 1964, Congress enacted the Library Services and Construction Act with the goal of providing federal funding for public library initiatives in underserved or disadvantaged communities, including but not limited to the institutionalized, the physically handicapped, low-income families, senior citizens, and ethnic minorities. Margaret Monroe, Reader Services to the Disadvantaged in Inner Cities, *ADVANCES IN LIBRARIANSHIP* (1971). Newly-available funds from the U.S. Office of Education under Title II-B of the Higher Education Act (“HEA”) facilitated national efforts to train minority librarians and provide education for multicultural librarianship. ROSEMAY RUHIG DU MONT ET AL., *MULTICULTURALISM IN LIBRARIES* 129 (1994). HEA Title II-B funding has supported various programs, including institutes on ethnicity and librarianship at Queens College, an institute at the University of Oklahoma for the improvement of Native American use of the library, the Institute on Public Library Service to the Disadvantaged at Emory University. *Id.* at 130. These initiatives aimed to reduce inequalities in access to information.

**II. CDL represents a logical and reasonable next step for libraries in their long-standing pursuit of their missions.**

While efforts to expand and democratize the library have been successful, inequality remains. The digital age presents new possibilities and new problems: some members of the public have limited access to digital resources; others have difficulty accessing physical spaces. The COVID-19 pandemic, during which digital access to traditionally physical aspects of life became crucial, crystallized the potential of and necessity for controlled digital lending. As libraries shuttered and people sought knowledge and connection while in quarantine, demand for e-books surged. Between March 2020 and April 2021, usage of e-books via the widely-adopted

Overdrive platform grew by forty-five percent; the use of digital materials by academic libraries grew by twenty-seven percent, and the number of academic users grew by forty-five percent.

Ebook and Audiobook Usage Surges in Academic Libraries During Pandemic, OVERDRIVE (Apr. 13, 2021), <https://company.overdrive.com/2021/04/13/ebook-and-audiobook-usage-surges-in-academic-libraries-during-pandemic/>.

CDL programs help address these gaps. They allow e-books to be read or listened to on adaptive reading devices, to be checked out by house-bound seniors, and to be read by children whose local school libraries have been shuttered by budget cuts. Just as no patron should be denied access to library services because their library cannot afford new books or does not carry books in adaptable formats, no patron should be denied access to books because their library cannot lease e-books.

**A. The digital transformation has accelerated inequality in information access.**

The digital transformation that characterized the dawn of the Internet era held extraordinary promise for lovers of books, libraries, and the free flow of information. It promised more access to more knowledge for more people. Keenly aware of how “access and integration of technological and information seeking skills [would] define the abilities of future individuals to attain a viable citizenship,” librarians knew how important it would be for their institutions to embrace digital materials to continue to fulfill their missions. Elizabeth L. Marcoux, Information Literacy for the Twenty-First-Century Citizen, in LIBRARIES AND DEMOCRACY 70 (Nancy Kranich ed., 2001). The promise of digital materials was nothing less than “equal access to the human record in as wide a variety of formats as possible.” Randy Pitman, Sex, Democracy, and Videotape, in LIBRARIES AND DEMOCRACY 118 (Nancy Kranich ed., 2001).

Despite the optimism at the onset of the new millennium, concerns grew that the promises of the information age would not be shared democratically with all. With the purchase

of licenses increasingly facilitating digital access, the wealthiest universities have equipped their students with thousands of licensed electronic tools, while students at less well-endowed schools have no access to the books or electronic databases necessary to advance their education. Nancy Kranich, Libraries, the Internet, and Democracy, in LIBRARIES AND DEMOCRACY 85 (Nancy Kranich ed., 2001). Many librarians lamented the fact that the vast majority of the materials in their collections were still available only in print despite strong patron demand for other formats. Pitman, supra, at 117.

**B. The most effective way to address attacks against libraries is to strengthen the function of libraries themselves.**

In an era rife with misinformation and extremism, libraries have the power to check the tide by facilitating access to a range of information and all views. Consequently, libraries are frequent targets of attacks, and the news today is filled with banned book lists, purged shelves, and even public officials advocating book burnings. See Alison Flood, US Libraries Report Spike in Organised Attempts to Ban Books in Schools, THE GUARDIAN (Nov 21., 2021), <https://www.theguardian.com/books/2021/nov/25/us-libraries-report-spike-in-organised-attempts-to-ban-books-in-schools>; Adele Uphaus, Spotsylvania School Board Orders Libraries to Remove 'Sexually Explicit' Books, THE FREE LANCE STAR (Nov. 9, 2021), [https://fredericksburg.com/news/local/education/spotsylvania-school-board-orders-libraries-to-remove-sexually-explicit-books/article\\_6c54507a-6383-534d-89b9-c2deb1f6ba17.html](https://fredericksburg.com/news/local/education/spotsylvania-school-board-orders-libraries-to-remove-sexually-explicit-books/article_6c54507a-6383-534d-89b9-c2deb1f6ba17.html); Brooke Migdon, Movement to Ban — Or Even Burn — School Library Books Gains Momentum, THE HILL (Nov. 11, 2021), <https://thehill.com/changing-america/enrichment/education/581134-movement-to-ban-or-even-burn-school-library-books-gains/>; A Modern Book Burning: LGBTQ-Themed Books Removed From North KC, Liberty Schools, THE KANSAS CITY STAR (Nov. 6, 2021), <https://www.kansascity.com/opinion/editorials/article255552966.htmlAAAGB8uQuGQ>;



Suzanne Perez, Goddard School District Orders 29 Books Removed From Circulation, KMUW (Nov. 9, 2021), <https://www.kmuw.org/education/2021-11-09/goddard-school-district-orders-29-books-removed-from-circulation>. Now, more than ever, the importance of informed citizens cannot be overstated.

The American Library Association’s decision to add democracy to its core tenets in 2019 further affirms this belief. According to the ALA, “democracy presupposes an informed citizenry. The First Amendment mandates the right of all persons to free expression, and the corollary right to receive the constitutionally protected expression of others. The publicly-supported library provides free and equal access to information for all people of the community the library serves.” ALA, Core Values of Librarianship, THE AMERICAN LIBRARY ASSOCIATION (2019) <http://www.ala.org/advocacy/intfreedom/corevalues>. Librarians are not alone in this opinion. Ninety-five percent of Americans ages sixteen and older agree that materials and resources available at public libraries play a vital role in giving everyone a chance to succeed. How Americans Value Public Libraries in Their Communities, PEW RESEARCH CENTER (Dec. 11, 2013), <https://www.pewresearch.org/internet/2013/12/11/libraries-in-communities/>.

**1. CDL has many historical analogs and does not represent a radical departure from past practice.**

In the modern technological landscape, CDL serves the same fundamental function as analog library lending. The benefits CDL can offer to the public—*i.e.*, promoting access to information, furthering democracy, and enhancing equality—resemble the benefits of analog lending, albeit with greater magnitude and further reach. Digital lending should not be viewed as a break with the past. Rather, CDL is the latest iteration of what libraries have always done: use available technology to provide access to those who need high-quality information. The number of copies that can be loaned at a given time is limited to the number of copies the library has

legitimately acquired — that is, it may only circulate the same number of copies that it owned before digitization. David Hansen & Kyle Courtney, A White Paper on Controlled Digital Lending of Library Books, CONTROLLED DIGITAL LENDING BY LIBRARIES AND DEMOCRACY (2018), <https://controldigitallending.org/whitepaper>. By maintaining an “owned to loaned” ratio, controlling circulation so that only one user can use any given copy at a time for a limited time, and employing appropriate technical measures to prevent users from retaining or distributing copies, CDL replicates the functions and controls of traditional libraries, just in a digital format. *Id.* The difference is merely one of format.

In shifting from analog lending to digital, controlled digital lending programs facilitate access for patrons. Those who cannot travel can access material via CDL. Those researching obscure topics can access books that would not otherwise be available in e-book format. Those with print disabilities can access material without having to disclose their disability and request special access. Controlled digital lending allows libraries to a more diverse set of readers, creating a more just information ecosystem.

**2. Attempts by libraries to enhance access to information resources have often encountered opposition.**

As early as the fifteenth century, Johannes Trithemius expressed dismay at the influence of the printing press, worrying that easy duplication of books would lead to laziness and dissipation in clerical communities. JOHANNES TRITHEMIUS, DE LAUDE SCRIPTORUM MANUALIUM (Freunde Mainfränk ed., Kunst u. Geschichte 1973) (1492). Similar pushback came in the eighteenth century with the development of the commercial lending library, and again in the nineteenth century with the advent of the free public library. When the British Parliament debated allowing taxes to be earmarked for public libraries in 1850, several members of Parliament expressed concern that the proliferation of public libraries would hurt private

industry. See Public Libraries Act 1850, 13 & 14 Vit c.65 (UK) (“He objected to the Bill, because it would tend to check the efforts of private enterprise”). Publishers and booksellers feared then (as some do now) that increased availability of books in library collections would discourage people from purchasing copies for their own use. Of course, circulating libraries ultimately promoted rather than diminished the sale of books; having always been lead purchasers of books, libraries regularly promote and generate interest in new publications. Spread of Education and Literacy, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/publishing/Spread-of-education-and-literacy> (last visited Jul. 12, 2022). Publishing companies might suggest that controlled digital lending is unprecedented—that digital is different—despite CDL’s fundamental connection both to the realities of analog lending and to long-standing library values. Arguments over controlled digital lending mirror the ones voiced during “the legal turmoil and societal upheaval created by the introduction of every major innovation and communication technology — writing, the printing press, the Telegraph, the telephone, radio, and television.” Susan B. Kretchmer, The Library Internet Access Controversy and Democracy, in LIBRARIES AND DEMOCRACY 97 (Nancy Kranich ed., 2001). Indeed, they might be compared to the doomsday prophesizing brought on by new technologies in other industries, as exemplified by the Motion Picture Association of America’s (“MPAA’s”) anxieties about the VCR in 1982.<sup>5</sup>

---

<sup>5</sup> In his testimony before a House Judiciary Committee, Jack Valenti (then-President of the MPAA) famously declared, “I say to you that the VCR is to the American film producer and the American public as the Boston strangler is to the woman home alone.” Home Recording of Copyrighted Works: Hearings Before the Subcomm. on Cts., C. L., & the Admin. of Just. of the

**III. A decision that prevents libraries from pursuing CDL programs would significantly harm libraries and, therefore, the broader public.**

Librarians at the dawn of the new millennium foresaw our current conflicts. They feared that technological protectionist measures “could effectively reduce libraries from repositories of valuable knowledge to mere marketing platforms for content distributors,” where “the free flow of ideas is limited to the obsolescent world of print.” Kranich, *supra*, at 89-91. To these librarians on the front lines of information literacy, what was at stake was not only the availability and affordability of information essential to the public interest, but also the “very basis upon which local libraries serve the public’s information needs.” Kranich, *supra*, at 93. Such measures did not merely threaten access to information for less privileged citizens, as even those with ample wealth and access would stand to lose if they were to be “relegated to simply buying whatever information they need.” Patricia Glass Schuman, *Advocating for America’s Right to Know*, in LIBRARIES AND DEMOCRACY 199 (Nancy Kranich ed., 2001). The librarians of yesteryear should be applauded for their prescience; digital books have become something that libraries do not own but rather borrow from the corporations that do. Daniel Gross, *The Surprisingly Big Business of Library E-books*, THE NEW YORKER (Sept. 2, 2021), <https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books>. But, this state of affairs is neither inevitable nor irreversible. As the latest example of libraries deploying digital technologies, CDL programs stand poised to ameliorate inequalities in digital access that concerned public servants decades ago.

---

H. Comm. on the Judiciary, 97<sup>th</sup> Cong. (1982). Needless to say, Valenti’s dire warnings never came to pass.

Costs imposed by e-book licensing are not merely theoretical. In 2020, Columbia University Library allocated over \$3M of an annual \$15M materials budget towards its digital and electronic collection, a 36.4% increase from 2016. Despite the fact that e-books remain a smaller fraction of most library collections, the capital required to maintain them can be prohibitively expensive, with license fees often clocking in at four or five times the consumer price tag. Take, for example, Madeleine Miller's best-selling novel Circe, for which a single library e-book license can be as much as five times the price charged to individual buyers. The buyer pays \$16.20 per e-book copy, while the library pays \$81.00, often from taxpayer funds. Library Statistics, Fiscal Years 2016–2020, COLUM. UNIV., (DEC. 3, 2021) [https://opir.columbia.edu/sites/default/files/content/Statistical%20Abstract/opir\\_libraries.pdf](https://opir.columbia.edu/sites/default/files/content/Statistical%20Abstract/opir_libraries.pdf).

Disparities in e-book pricing not only prevent libraries from providing resources to their patrons but also perpetuate existing inequities. Unsustainable costs reduce the capacity of libraries to provide digital content to their patrons, but more stringent policy regimes threaten to eliminate it completely. For the many patrons who rely on digital content, efforts to restrict access could effectively cut them off from access to these materials. Librarians believe in celebrating the creativity of authors, defending their autonomy, and rewarding their hard work. While so doing, however, they want to ensure that content is available as an information resource for the benefit of all their constituents.

## CONCLUSION

To remain relevant and to continue to democratize information access, libraries must meet patrons where they are; in the present day, that means the Internet. Libraries have nurtured our democracy from its inception and have changed alongside our society—evolving from private subscription models serving only the elite to free institutions that enrich citizens without

regard to race, creed, gender, or socioeconomic status. As a cornerstone of democracy, libraries will always be the site of cultural struggle and “a crucible for a society that is constantly moving toward a more perfect union.” Kretchmer, supra, at 97. Controlled digital lending is simply the latest iteration in a longstanding pattern of libraries meeting our technological moment.

The court is being asked to rule on copyright issues based on the specific facts as presented. The court should approach with caution any arguments that CDL is somehow unlawful under any circumstances. CDL is just one of numerous innovations in library services that have been developed and implemented through many decades and can be adapted to legal requirements. This case presents an opportunity for the Court to make clear that libraries, acting within the law, have the imperative to deploy technologies and build innovative services in furtherance of access to information.

Dated: July 14, 2022

Respectfully submitted,

/s/Christopher T. Bavitz

Christopher T. Bavitz (CB0941)  
Cyberlaw Clinic<sup>6</sup>  
Harvard Law School  
Reginald F. Lewis Law Center  
1557 Massachusetts Avenue, 4<sup>th</sup> Floor  
Cambridge, MA 02138  
Tel: 617-384-9125  
Fax: 617-812-3050  
Email: [cbavitz@law.harvard.edu](mailto:cbavitz@law.harvard.edu)

Counsel for Amici Curiae  
Kenneth D. Crews and Kevin L. Smith

---

<sup>6</sup> Amici thank current and former Harvard Law School Cyberlaw Clinic students and summer interns Tara Ahluwalia, Mariah Bellamoroso, Hiba Ismail, Mina Kim, Elena Guanuna Lehenbauer, Abigail Liles, Annie Tao, and Joon Yoon for their work on this brief.

**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that according to the word count feature of the word processor used in creating this brief, this amicus brief contains 4,867 words, (exclusive of the cover page, certificate of compliance, table of contents, and table of authorities), and is in compliance with Local Civil Rule 11.1 of the Southern District of New York, as well as with Individual Practice Rule 2.D of Judge John G. Koeltl (to whom this case has been assigned).

/s/Christopher T. Bavitz

Christopher T. Bavitz (CB0941)

Cyberlaw Clinic

Harvard Law School

Reginald F. Lewis Law Center

1557 Massachusetts Avenue, 4<sup>th</sup> Floor

Cambridge, MA 02138

Tel: 617-384-9125

Fax: 617-812-3050

Email: [cbavitz@law.harvard.edu](mailto:cbavitz@law.harvard.edu)

Counsel for Amici Curiae

Kenneth D. Crews and Kevin L. Smith