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HIGHER EDUCATION AS A LUXURY GOOD

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The 2019 college admissions bribery scandal revealed uncomfortable truths about elite higher education and its conspicuous consumption. In this article, I explore the legal implications of treating higher education as a luxury good reflecting wealth and status. Like luxury goods companies, elite universities are regarded as owners of luxury brands. Just as companies such as Louis Vuitton, Ferrari, and Hermès own brands that enjoy a high level of exclusivity and serve conspicuous consumption, so too do elite universities. In the minds of many, Harvard, Stanford, and Yale are analogous to Louis Vuitton, Ferrari, and Hermès.

This “luxurification” of higher education, however, perpetuates class division and violates the right to education by favoring students from families who can pay the tuition. In response, I put forward an intellectual property-based proposal as a new means of protecting the right to education. While their trademarks can be regarded luxury brands, I suggest that elite universities should responsibly exercise their other intellectual properties including copyrights and patents, thereby making knowledge accessible to the general public through open access and fair use modes. Through fulfilling such responsibility, elite universities would enable students from all walks of life to benefit from the democratization of knowledge.

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*Education is the most powerful weapon which you can use to change the world.*¹

– Nelson Mandela

*Chances to acquire cultural knowledge and skills should not depend upon one's class position, and so the school system, whether public or private, should be designed to even out class barriers.*²

– John Rawls

INTRODUCTION

In characterizing a recent college admissions fraud case brought by the U.S. Attorney for the District of Massachusetts, Judge Douglas Woodlock bluntly labelled the fraud “a sneaky crime of conspicuous consumption.”³ In this highly publicized case, Jeffrey Bizzack was sentenced to two months in prison for paying \$250,000 to secure his son’s admission to the University of Southern California through bribery and deceit.⁴ At least fifty other parents were prosecuted for bribing elite university officers to secure admission for their children.⁵ Although

1. Nelson Mandela, Speech at Madison Park High School, Boston (June 23, 1990), in *OXFORD ESSENTIAL QUOTATIONS* (Susan Ratcliffe ed., 5th ed. 2017), <https://www.oxfordreference.com/view/10.1093/acref/9780191843730.001.0001/q-oro-ed5-00007046>.

2. JOHN RAWLS, *A THEORY OF JUSTICE* 63 (rev. ed. 1999) (emphasis added).

3. Transcript of Sentencing at 62, *United States v. Bizzack*, No. 19-cr-10222 (D. Mass. Oct. 30, 2019). Judge Douglas Woodlock refers to “conspicuous consumption” as “the kind of thing that rich people can do that poor people can’t because they’ve got the money to do it, to obtain a good – let’s call it a good – that impresses their friends and satisfies the sense of personal self-worth . . .”). Coined in the late 19th Century by economist and sociologist Thorstein Veblen, the term “conspicuous consumption” denoted the purchase of luxury goods or services for the sheer purpose of flaunting wealth and social status. THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 29 (Martha Banta ed., Oxford Univ. Press 2007) (1899).

4. Transcript of Sentencing at 110, *United States v. Bizzack*, No. 19-cr-10222 (D. Mass. Oct. 30, 2019). See also Nick Anderson, *California Businessman Gets Two Months of Prison in College Admissions Scandal*, *WASH. POST* (Oct. 31, 2019, 7:15 PM), <https://www.washingtonpost.com/education/2019/10/30/california-businessman-gets-two-months-prison-college-admissions-scandal>.

5. See *Investigations of College Admissions and Testing Bribery Scheme*, DOJ, <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme> (last visited Sept. 15, 2020).

some parents publicly professed to have acted out of love,⁶ their approach to higher education as an object of conspicuous consumption, a luxury brand available for purchase, was clear. At what point did universities, noble institutions empowering knowledge, growth, and the pursuit of truth,⁷ become brand-name service providers for such conspicuous consumption?

Media coverage and public opinion have reflected little on this judicial observation, instead directing their focus to the following questions⁸: How did these parents bribe officers at Stanford, Yale, the University of Southern California, and other elite universities?⁹ What legal penalties have been imposed upon the parents involved in the largest college admissions scandal ever prosecuted in U.S. history?¹⁰ How have elite

6. For example, Douglas Hodge, a former chief executive of Pimco, admitted that he “acted out of love for [his] children, but [he] know[s] that this explanation for [his] actions is not an excuse.” See Kate Taylor, *More Parents Plead Guilty in College Admissions Scandal*, N.Y. TIMES (Oct. 21, 2019), <https://www.nytimes.com/2019/10/21/us/college-admissions-scandal.html>; Kirk Carapezza, *At Least 50 People Charged in College Admissions Scandal*, NPR (Mar. 12, 2019, 5:59 PM), <https://www.npr.org/2019/03/12/702735127/at-least-50-people-charged-in-college-admissions-scandal>.

7. ANTHONY T. KRONMAN, *THE ASSAULT ON AMERICAN EXCELLENCE* 16 (2019) (arguing that an elite university is a community devoted to collaborative pursuit of the truth).

8. Zack Friedman, *30 Fast Facts About the College Admissions Scandal*, FORBES (Mar. 18, 2019), <https://www.forbes.com/sites/zackfriedman/2019/03/18/30-facts-college-admissions-scandal/#100097b512a0>.

9. See, e.g., Erin Durkin, *US College Admissions Scandal: How Did the Scheme Work and Who Was Charged?*, THE GUARDIAN (Mar. 13, 2019, 11:16 AM), <https://www.theguardian.com/us-news/2019/mar/12/college-admissions-fraud-scandal-felicity-huffman-lori-loughlin>.

10. See, e.g., Evan Gerstmann, *What the Charges in the College Admissions Scandal Really Mean*, FORBES (Apr. 10, 2019), <https://www.forbes.com/sites/evangerstmann/2019/04/10/what-the-charges-in-the-college-admissions-scandal-really-mean/#231098371f4b>; Janelle Lawrence & Patricia Hurtado, *Ex-Pimco CEO's 'Guilty' Starts Frenzied Day in College Scam*, BLOOMBERG (Oct. 21, 2019), <https://www.bloomberg.com/news/articles/2019-10-21/the-upside-of-pleading-guilty-in-the-college-admissions-scandal>.

universities reacted to their involvement in¹¹ one of the “great scandals of the 21st Century”?¹²

Leading law professors have responded with wise advice, yet none have engaged with the charge of conspicuous consumption. Anthony Kronman, the former Dean of Yale Law School, asked elite universities to reconsider their diversity programs in order to neutralize the politicization of their campuses.¹³ Daniel Markovits, Guido Calabresi Professor of Law at Yale, has stated that by favoring wealthy families, elite universities’ admissions policies have caused enormous inequality.¹⁴

In this article, I argue that a core problem underlying the college admissions bribery scandal is the conspicuous consumption of elite higher education, a phenomenon that the economist Thorstein Veblen rejected as “a conspicuous waste of time and labor” in the late 19th century.¹⁵ Like luxury goods companies, elite universities¹⁶ are regarded as owners of luxury brands. Just as companies such as Louis Vuitton, Fer-

11. Madison Park & Faith Karimi, *Here’s What Universities Are Saying About the College Admissions Scandal*, CNN (Apr. 25, 2019, 3:01 PM), <https://www.cnn.com/2019/03/14/us/college-admission-cheating-universities-re-act/index.html>.

12. Victor Garcia, *Elite College Cheating Scandal Arrests ‘The Tip of the Iceberg’*, Harvard Law Professor Alan Dershowitz, FOX NEWS (Mar. 12, 2019), <https://www.foxnews.com/us/dershowitz-college-admissions-scandal-the-tip-of-the-iceberg> (“Famed Harvard law professor Alan Dershowitz said a nationwide college admission cheating scandal will go down as one of the “great scandals of the 21st Century . . .”).

13. Anthony Kronman, *The Downside of Diversity*, WSJ (Aug. 2, 2019), <https://www.wsj.com/articles/the-downside-of-diversity-11564758009> (“The demand for diversity has steadily weakened the norms of objectivity and truth and substituted for them a culture of grievance and group loyalty.”). Cf. *Students for Fair Admissions v. Harvard*, 397 F.Supp.3d 126 (D.Mass. 2019) (ruling that diversity program is legally valid).

14. Daniel Markovits, *American Universities Must Choose: Do They Want to Be Equal or Elite?*, TIME (Sept. 12, 2019, 5:00 PM), <https://time.com/5676174/universities-equality-eliteness> (“Elite schooling has become the dynastic technology of choice for the one percent . . . Education must become less hierarchical and less meritocratic; and the top schools must become less elite . . . Meritocratic admissions processes must be able to justify all the immense inequality that they produce.”).

15. VEBLÉN, *supra* note 3, at 257 (“The conventional insistence on a modicum of conspicuous waste as an incident of all reputable scholarship has affected our canons of taste . . .”).

16. There are a number of different ways “elite” universities can be defined. Part II discusses common features of “elite” universities.

rari, and Hermès own brands that enjoy a high level of exclusivity and serve the conspicuous consumption of luxury goods,¹⁷ so too do elite universities. Through operating competitive admission practices, charging exorbitant tuition,¹⁸ and fostering an elite culture, these universities have shaped themselves into luxury brands.¹⁹ Some simple figures capture the luxurification phenomenon: each year, top universities admit only four and a half to seven percent of their total applicants,²⁰ and have estimated annual costs of attendance of over \$100,000.²¹ They have also been accused of tolerating an unfriendly atmosphere for enrolled low-income students.²² I propose that Harvard, Stanford, and Yale can be viewed as analogous to Louis Vuitton, Ferrari, and Hermès.

The more surprising reality is that elite universities have actually become *hyper* luxury brands. In this article, I largely draw this conclusion based on trademark law. Due to their extremely low admission rates, elite university brands are more exclusive than most luxury brands. Hence, it is no surprise that a Chinese family was willing to pay \$6.5 million to a college consultant in order to get their daughter into Stanford.²³ Unlike traditional luxury brands whose survival depends on trade-

17. See *infra* Sections I. A–B.

18. While elite universities do charge exorbitant tuition, not all who attend these universities have to pay this tuition. For example, a number of Ivy League universities do not charge tuition to low income families. See, e.g., *Affordability*, HARV. COLL., <https://college.harvard.edu/admissions/why-harvard/affordability> (last visited Sept. 15, 2020).

19. See *infra* Sections II.A–B. These factors work together to shape elite universities into luxury brands.

20. John Fabian Witt, *Elite Colleges Don't Understand Which Business They're in*, ATLANTIC, Mar. 15, 2019, at 2, 5 (“Top institutions reject nearly 95 percent of their applicants.”).

21. Alia Wong, *Six-Figure Price Tags Are Coming to Colleges*, ATLANTIC, Nov. 8, 2019, at 1–3 (“The annual cost of attending several selective universities is slated to reach \$100,000 within a few years.”).

22. Clint Smith, *Elite Colleges Constantly Tell Low-Income Students That They Do Not Belong*, ATLANTIC, Mar. 18, 2019, at 2; Sean Illing, *How Elite Colleges Fail Half of the Poor Students They Admit*, VOX, June 17, 2009, at 6–7.

23. Joel Rubin & Matthew Ormseth, *Family in China Paid \$6.5 Million to College Admissions Fixer for a Spot at Stanford, Sources Say*, L.A. TIMES, May 1, 2019, at 1–2; Faith Karimi & Brynn Gingras, *Chinese Woman Who Paid \$6.5M After Her Daughter Got into Stanford Says She Did It to Help Others*, CNN, May 3, 2019, at 1.

mark protection,²⁴ elite university brands prosper with little need for trademark protection.²⁵

It is time for us to reflect upon the nature of the conspicuous consumption of elite higher education as a new luxury good. This is key to preventing repeated admissions scandals and to the further reconsideration of the role of elite universities. It is also of paramount importance in protecting the right to education in the United States,²⁶ where the higher education sector is already in deep crisis.²⁷

In fact, the luxurification of higher education runs counter to the ethos of education in general and *the right to education* in particular.²⁸ While the ethos of education is still a debatable topic,²⁹ increasingly it is agreed that through fostering knowledge and pursuing truth, education nurtures social mobility and creativity.³⁰ The luxurification of higher educa-

24. See *infra* Section II.C; See also Barton Beebe, Intellectual Property and the Sumptuary Code, 123 HARV. L. REV. 810, 851–59 (2010) (discussing how trademark law preserves the prestige of luxury brands); Haochen Sun, *Reforming Anti-Dilution Protection in the Globalization of Luxury Brands*, 45 GEO. J. INT'L L. 783, 786 (2014) (arguing that “anti-dilution protection plays an important role in preserving and enhancing the exclusivity and quality reputation of luxury brands.”); Haochen Sun, *The Distinctiveness of a Fashion Monopoly*, 3 NYU J. INTELL. PROP. & ENT. L. 142, 148 (2013) (discussing the “status-conferring function” of trademark law).

25. See *infra* Section II.C.

26. See, e.g., Heidi R. Gilchrist, *Higher Education as a Human Right*, 17 WASH. U. GLOBAL STUD. L. REV. 645, 664 (2018) (arguing that the high tuition charged by elite universities have led to unequal access to higher education, making the U.S. “in violation of the human right to higher education”).

27. See, e.g., MARTHA C. NUSSBAUM, NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES 1–2 (2010) (arguing that the U.S. is suffering from an educational crisis because liberal arts education has been significantly devalued).

28. See *infra* Section II.D.

29. See MARTHA MINOW, IN BROWN’S WAKE: LEGACIES OF AMERICA’S EDUCATIONAL LANDMARK 5 (2010); Kimberly Jenkins Robinson, *Fisher’s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185 (2016) (“Debates over . . . higher education admissions remain central to discussions about the meaning of equality and the role of education in advancing equal opportunity.”).

30. See JOHN DEWEY, DEMOCRACY AND EDUCATION 20–22 (1916) (arguing that education has a social leveling effect); MINOW, *supra* note 29, at 171–72 (2010) (arguing that inclusive education promotes social mobility); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 397 (2006) (“The relationship between education and social equality now turns

tion, however, perpetuates class division³¹ by allowing those who can afford it to purchase knowledge and gain more cultural capital for their next generation.³² The right to education includes equal access to higher education.³³ The luxurification of higher education, however, violates the ethical premises of this right through favoring students from wealthy families, creating a class divide in higher education.³⁴

In response, I put forward an intellectual property (IP)-based proposal that can help counter the luxurification of higher education. I suggest that while their trademarks can be regarded as luxury brands, elite universities should responsibly exercise their other intellectual properties. The proposal presents two responsibilities for elite universities. First, they should take advantage of their copyrights over staff publications to participate actively in open access knowledge sharing and dissemination.³⁵ Second, they should prudently exercise the fair use doctrine, a user right under copyright law, to make available tens of millions of books housed in their libraries through an e-lending program.³⁶

As I will discuss in the article, this proposal effectively deals with the luxurification of higher education in three ways.

on education's vital role in facilitating not only civic virtue but also economic well-being. Going forward, both economic participation and civic virtue properly inform the notion of educational adequacy for equal citizenship.").

31. Gilchrist, *supra* note 26, at 663 ("In the United States, we have become accustomed to the idea of higher education coming at a phenomenal cost – something you either save a lifetime for as the middle class or consider certain expensive institutions out of reach, 'for the elite.'").

32. Markovits, *supra* note 14, ("The elite invests unprecedented time and money in educating its children. Rich parents pay for art, music, and sports lessons, hire tutors and, critically, send their children to schools that spend many times more on educating their students than middle-class schoolsCollege and professional school, being dominated by rich children, of course themselves extend and increase the training gap between the rich and the rest.").

33. *See infra* Section II.D.1.

34. *See infra* Section II.D; MITCHELL L. STEVENS, CREATING A CLASS: COLLEGE ADMISSIONS AND THE EDUCATION OF ELITES 14 (2007) (concluding that "one profound result of higher education's expansion has been the entrenchment of a complicated, publicly palatable, and elaborately costly machinery through which wealthy parents hand privilege down to their children").

35. *See infra* Section III.A.

36. *See infra* Section III.B.

First, it requires elite universities to take more responsibility for the promotion of social justice. Elite universities have grown financially, politically, and culturally much more powerful than ordinary people can imagine. Twelve elite universities each have endowments valued at \$10 billion or more.³⁷ Seven elite universities own seven of the 10 largest libraries in the U.S.³⁸ They also serve as a training ground for leadership.³⁹ With great power, it is often said, comes great responsibility.⁴⁰ Given that elite universities have become exceptionally strong in the control of IP rights, as later discussed, it is time they take responsibility equivalent to their increased acquisition of IP rights.

Second, the use of IP maximizes the mission of universities as knowledge powerhouses. With leading scholars and a wealth of teaching and research resources, elite universities boast unparalleled software and hardware to produce and disseminate knowledge.⁴¹ Copyrighted works and registered patents embody knowledge for human flourishing and societal development.⁴² Therefore, the synergies between elite universities and IP sparked through the responsibilities proposed

37. *Which Colleges Have the Largest Endowments?*, CHRON. HIGHER EDUC. (Jan. 31, 2019), <https://www.chronicle.com/article/Which-Colleges-Have-the/245587>.

38. Benjamin Elisha Sawe, *Largest Libraries in the United States*, World Atlas, (Apr. 25, 2017), <https://www.worldatlas.com/articles/largest-libraries-in-the-united-states.html>.

39. Tara Isabella Burton, *Why Are American Colleges Obsessed With 'Leadership'?*, Atlantic (Jan. 22, 2014), <https://www.theatlantic.com/education/archive/2014/01/why-are-american-colleges-obsessed-with-leadership/283253/>.

40. See *Kimble v. Marvel Entm't, L.L.C.*, 576 U.S. 446, 464 (2015) (citing STAN LEE & STEVE DITKO, AMAZING FANTASY NO. 15: "SPIDER-MAN" 13 (1962) ("[I]n this world, with great power there must also come—great responsibility.")). Section II.D discusses why elite universities should bear this responsibility.

41. See *infra* Section II.A.1.

42. See MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 4 (2012) ("Intellectual property bear[s] considerably on central features of human flourishing, from the developing world's access to food, textbooks, and essential medicines; to the ability of citizens everywhere to participate democratically in political and cultural discourse; to the capacity to earn a livelihood from one's intellectual contributions to our global culture.").

here seek to incentivize production and public dissemination of knowledge to the fullest extent.

Third, the proposal taps into the great potential of IP to provide equal enjoyment of the right to higher education. The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴³ declares that to protect the right to education, states should ensure that “[h]igher education shall be made equally accessible to all, on the basis of capacity. . .”⁴⁴ My proposal encourages elite universities to make knowledge accessible to the general public through open access and fair use modes. For example, Harvard University would be required to publicly share their faculty publications through open access platforms.⁴⁵ Therefore, it is by nature a proposal for the democratization of knowledge throughout the world.

The article proceeds as follows. Part I considers how luxury brands prosper through exclusivity and conspicuous consumption, which require strong trademark protection. Part II explores the extent to which the names of elite universities can be compared to luxury brands. Part III examines the problems with such luxurification of higher education and offers an IP-based proposal that requires elite universities to assume enhanced responsibility to disseminate knowledge to the general public—an effort designed to achieve democratization of knowledge.

43. G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights, (Dec. 16, 1966) [hereinafter G.A. Res. 2200A].

44. G.A. Res. 2200A, *supra* note 43, art. 13.; KLAUS DIETER BEITER, THE PROTECTION OF THE RIGHT TO EDUCATION BY INTERNATIONAL LAW 95 (2006) (arguing that the term “capacity” is intended to include those who come from disadvantaged backgrounds).

45. *See infra* Section III.B.

I.

THE MAKING OF A LUXURY BRAND

A. *Exclusivity*

Ranging in price from \$40,000 to \$500,000⁴⁶ and with a waiting list of up to six years,⁴⁷ the Hermès Birkin is the most coveted handbag.⁴⁸ Why are luxury items such as the Hermès Birkin so appealing?

As designer Giorgio Armani observed, luxury is defined by exclusivity.⁴⁹ Consumers are drawn to luxury goods due to their exclusivity.⁵⁰ This aura of exclusivity entails superior quality, enhanced creativity, and the steep price of goods or services marketed by these luxury brands.

1. *Quality*

Luxury brands are synonymous with exceptional materials, craftsmanship, and service. High-quality leather, fabrics, and rare stones are sourced by luxury companies from care-

46. Jack Houston & Irene Anne Kim, *A Handbag Expert Explains Why Hermès Birkin Bags Are So Expensive*, BUSINESS INSIDER (June 13, 2019, 12:00 PM), <https://www.businessinsider.com/hermes-birkin-bag-real-handbag-expert-so-expensive-2019-6> (“Hermès Birkin bags are the most expensive bags in the world, ranging from \$40,000 to \$500,000 for a single bag.”).

47. Colleen Kane, *Why a \$223,000 Hermes Birkin Bag Might Actually Be a Good Investment*, FORTUNE (June 23, 2015 1:00 PM), <https://fortune.com/2015/06/23/hermes-birkin-investment> (“Some consumers are dying to get their hands on one—Birkins can have a wait list of up to six years, depending on the materials used.”); *See also* Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195, 216 (2007) (“For example, in 1990 the Hermes Kelly Bags started at \$2,850, with a nearly one-year waiting list for orders. By 2004, the waiting list had been closed for three years so Hermes could catch up on backorders.”) (citations omitted).

48. Houston & Kim, *supra* note 46 (“Birkins are one of the most exclusive and sought-after bags today . . .”).

49. JOHN POTVIN, *GIORGIO ARMANI: EMPIRE OF THE SENSES* 112 (2017) (quoting Giorgio Armani, “Luxury must be top quality, and very exclusive.”).

50. *See* JEAN-NOËL KAPPERER & VINCENT BASTIEN, *THE LUXURY STRATEGY: BREAK THE RULES OF MARKETING TO BUILD LUXURY BRANDS* 104–05 (2d ed. 2012) (“The [luxury] brand must do everything possible to appear exclusive . . . The need for exclusivity . . . explains why luxury today increasingly nests within the service sector.”); Angshuman Ghosh & Sanjeev Varshney, *Luxury Goods Consumption: A Conceptual Framework Based on Literature Review*, 20 S. ASIAN J. MGMT. 146, 150 (2013) (“[L]uxury is considered something exclusive by most studies.”).

fully selected supply chains⁵¹ and rigorous screening processes are used to maintain premium product craftsmanship.⁵² Luxury companies are also recognized for offering high-quality in-store and post-sale services dedicated to customers' needs.⁵³

2. Creativity

Luxury brands also signify the high level of creativity that is embedded in their goods and services. Luxury fashion companies vigorously support innovation in product design, constantly redefining fashion trends and luxury lifestyles.⁵⁴ Legendary designers, such as Giorgio Armani, Coco Chanel, Valentino Garavani, Gianni Versace, and Yves Saint-Laurent, created and branded their own luxury business empires with highly creative designs.⁵⁵ Luxury conglomerates, such as Compagnie Financière Richemont SA ("Richemont"), Kering S.A., and LVMH Moët Hennessy Louis Vuitton ("LVMH"), rely on gifted designers and artists.⁵⁶ Karl Lagerfeld, an exceedingly talented, influential, and prolific designer served as creative director of Chanel, Chloé (owned by Richemont) and Fendi (owned by LVMH). Lagerfeld revived Chanel's business⁵⁷ and revitalized the brand image of Chloé and Fendi.⁵⁸

51. KAPFERER & BASTIEN, *supra* note 50, at 100–01.

52. "According to current CEO Axel Dumas, the main strength of the Hermès brand is the love for craftsmanship." Martin Roll, *Hermès – The Strategy Insights Behind the Iconic Luxury Brand*, MARTIN ROLL (Sept. 2018), <https://martinroll.com/resources/articles/strategy/hermes-the-strategy-behind-the-global-luxury-success>. "[E]ach and every product coming out under the brand's name should reflect the hard work put into it by the artisan." *Id.*

53. See Sun, *supra* note 24, at 794.

54. KAPFERER & BASTIEN, *supra* note 50, at 207–08.

55. See, e.g., UCHE OKONKWO, LUXURY FASHION BRANDING: TRENDS, TACTICS, TECHNIQUES 30-31 (2007).

56. Other leading fashion designers have played defining roles in the major fashion brands managed by the luxury conglomerates: Alber Elbaz for Lanvin, Tom Ford for Gucci, John Galiano for Dior, Tomas Maier for Bottega Veneta, and Riccardo Tisci for Givenchy.

57. Nicole Phelps, *Legendary Designer Karl Lagerfeld Has Died*, VOGUE (Feb. 16, 2019), <https://www.vogue.com/article/karl-lagerfeld-obituary> ("Upon assuming the reins in 1983, Lagerfeld swiftly revived Chanel, reinterpreting the house founder's iconic tweed skirtsuits, little black dresses, and quilted handbags.").

58. Vanessa Friedman, *Karl Lagerfeld, Designer Who Defined Luxury Fashion, Is Dead*, N.Y. TIMES (Feb. 19, 2019), <https://www.nytimes.com/2019/02/19/obituaries/karl-lagerfeld-dead.html> (praising Lagerfeld for "developing [for

Certain sectors of the luxury economy strengthen exclusivity by developing and utilizing new technologies. The company's development of technology is what makes Rolls Royce a luxury car brand synonymous with ultra comfort and speed,⁵⁹ and makes Aston Martin a brand representing beauty and speed.⁶⁰ Luxury watch companies such as TAG Heuer⁶¹ and Rolex⁶² develop cutting-edge technologies as a means of enhancing their market status in the digital age. Similarly, the popularity of Bang & Olufsen as a luxury brand for audio equipment has surged in part due to its use of advanced sound-processing technology.⁶³

3. Price

Luxury companies also maintain the exclusivity of their brands through pricing strategies,⁶⁴ with high prices normally

Chloé] his trademark irreverence for style's sacred cows" and "transform[ing] [Fendi] from boring bourgeois furrier into hip fashion name"). Marc Jacobs, another star designer and fashion genius, transformed Louis Vuitton (owned by LVMH) from a staid luggage-maker into the world's most influential luxury fashion brand. See Astrid Wendlandt & Pascale Denis, *Designer Marc Jacobs Leaves Vuitton to Float Own Brand*, REUTERS (Oct. 2, 2013), <https://www.reuters.com/article/entertainment-us-lvmh-louisvuitton-jacob/designer-marc-jacobs-leaves-louis-vuitton-source-idUSBRE9910HY20131002>.

59. KAPFERER & BASTIEN, *supra* note 50, at 57 ("[O]nly technology beneath [a Rolls Royce car] could take this 2.6 tonne vehicle to a speed of 149 miles per hour without any vibration.").

60. Markus Kramer, *Technology Meets Luxury*, MARKUS KRAMER (Mar. 8, 2019, 5:23 PM), <https://www.markuskramer.net/technology-and-luxury> ("Aston Martin's Lagonda brand is being revived on the very notion that luxury and technology are not opposites, but in fact co-exist in order to 'create technologically radical, visually spectacular, thoroughly modern and ultra-luxurious vehicles.'").

61. Christophe Roulet, *TAG Heuer Brings Cutting-Edge Technology to Fine Watches*, FHH JOURNAL (July 18, 2012), <https://journal.hautehorlogerie.org/en/tag-heuer-brings-cutting-edge-technology-to-fine-watches>.

62. Brielle Jaekel, *Is Watch Design the Next Frontier for Augmented Reality?*, LUXURY SOC'Y (July 31, 2019), <https://www.luxurysociety.com/en/articles/2019/07/watch-design-next-frontier-augmented-reality> ("Rolex launched an AR try-on app that offers a high-end viewing experience for customers to gain a clear picture of what it would be like to wear the product on his or her wrist.").

63. *Bang & Olufsen High-tech & Luxury*, <https://luxuryxclusives.com/luxury-trend/bang-olufsen-high-tech-luxury/> (last visited Nov. 8, 2020).

64. Liselot Hudders et al., *Consumer Meaning Making: The Meaning of Luxury Brands in a Democratized Luxury World*, 55 INT'L J. MKT. RSCH. 391, 393

commensurate with the quality and creativity invested in their products or services.⁶⁵ Harry Winston and Van Cleef & Arpels sell their jewelry at a much higher price than other brands because of the high quality of their diamonds and creative designs, craftsmanship and services.⁶⁶ The same applies to other luxury brands. Normally, the better the materials, craftsmanship, and services a luxury company provides and the more it invests in creativity, the more it charges for its products.⁶⁷

As price is an important indicator of the level of exclusivity, luxury brands apply marketing strategies like offering limited editions and controlling sales channels.⁶⁸ To safeguard these exclusivity-oriented marketing strategies, luxury companies have taken legal action against retailers who sell their products too cheaply⁶⁹ or without a license.⁷⁰ Some luxury companies even destroy unsold inventory to prevent its sale

(2013) (citation omitted) (“The concept of luxury is inherently connected with exclusivity, which implies a premium price and rarity.”).

65. Franck Vigneron & Lester W. Johnson, *A Review and a Conceptual Framework of Prestige-Seeking Consumer Behavior*, *ACAD. MKTG. SCI. REV.*, 1999, at 1.

66. See, e.g., FRED CUELLAR, *HOW TO BUY A DIAMOND: INSIDER SECRETS FOR GETTING YOUR MONEY’S WORTH* 55–56 (8th ed. 2018) (discussing how Cartier, Graff, Van Cleef & Arpels, and Harry Winston market the vivid white diamonds, that are much better in quality than those sold by Walmart, Costco, or Sam’s Club).

67. Price also determines the level of exclusivity that a luxury brand represents. According to Erwan Rambourg, everyday luxury is capped below \$200, affordable luxury below \$500, accessible luxury below \$2,000, premium core luxury below \$5,000, superpremium luxury below \$50,000, and ultra high-end luxury is limitless. See ERWAN RAMBOURG, *THE BLING DYNASTY: WHY THE REIGN OF CHINESE LUXURY SHOPPERS HAS ONLY JUST BEGUN* xix (2014).

68. See Sun, *supra* note 24, at 791 (“[L]uxury companies have adopted distribution policies to either sell products only in their own company stores or to authorize selected dealers to sell on their behalf with strict licensing terms.”).

69. Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 *V.A. L. REV.* 1381, 1407 (2005) (“Some luxury-goods producers have even taken legal action against retailers for selling their goods too cheaply, on the ground that discounted pricing may increase sales in the short term but will injure the brand’s exclusive image (and therefore reduce total sales revenue) over the long term.”).

70. Case C-59/08, *Copad SA v. Christian Dior couture SA*, 2009 E.C.R. I-3421, ¶¶ 7–8 (reporting that Dior refused its licensee to sell its products in discount stores).

downmarket.⁷¹ For instance, Burberry burned \$37.8 million worth of unsold products in 2017 alone.⁷² Chanel and Louis Vuitton also destroy inventory for the same purpose.⁷³

B. *Conspicuous Consumption*

Apart from quality and creativity, what else does the high price of a Birkin bag signal? And why are consumers willing to buy this extremely expensive item? The high price is a public statement of the Birkin bag as a status symbol,⁷⁴ and many consumers purchase these bags for this reason. The exclusivity of luxury brands like the Hermès Birkin is inextricably linked with their signifying function vis-à-vis the conspicuous consumption of luxury goods or services.⁷⁵

1. *Conspicuous Consumption of Luxury Goods*

Conspicuous consumption refers to people's willingness to pay a much higher price for a functionally similar good for the purpose of the public display of that good as a status symbol. A person's acquisition of wealth does not necessarily level up his or her social status. Instead, this wealth must be used to publicly display certain indicators. According to Veblen, "[i]n order to gain and to hold the esteem of men . . . wealth . . . must be put in evidence, for esteem is awarded only on evidence."⁷⁶ One's consumption of the bare necessities of life

71. Matthew Dalton, *Why Luxury Brands Burn Their Own Goods*, WALL ST. J. (Sept. 6, 2018, 1:37 PM), <https://www.wsj.com/articles/burning-luxury-goods-goes-out-of-style-at-burberry-1536238351> ("Destroying unsold inventory is a widely used but rarely discussed technique that luxury companies perform to maintain the scarcity of their goods and the exclusivity of their brands.")

72. Brendan Cole, *Luxury Brands Prefer to Burn Millions of Dollars' Worth of Clothes to Letting 'Wrong' Shoppers Buy Them at Discount*, NEWSWEEK (July 19, 2018, 7:35 AM), <https://www.newsweek.com/luxury-brands-prefer-burn-millions-dollars-worth-clothes-over-letting-wrong-1032088>.

73. *Id.*

74. Katya Foreman, *The Birkin Bag: Fashion's Ultimate Status Symbol*, BBC (Jan. 16, 2015), <http://www.bbc.com/culture/story/20150116-the-ultimate-status-symbol>.

75. Youngseon Kim, *Power Moderates the Impact of Desire for Exclusivity on Luxury Experiential Consumption*, 35 PSYCH. & MKTG. 283, 286 (2018) ("[L]uxury experiences are intangible offerings analogous to scarce goods due to limited supply, and more importantly, with status appeals.")

76. See Veblen, *supra* note 3; see also Roger S. Mason, *Conspicuous Consumption: A Study of Exceptional Consumer Behavior* 7 (1981) ("It is not

does not produce such evidence, but lavish spending on luxury goods and services does. Luxury goods in Veblen's times, such as precious metals and gems,⁷⁷ expensive "food, drink, narcotics,"⁷⁸ hand-made silver spoons,⁷⁹ and fashionable dress,⁸⁰ were costly and sold to a relatively small number of people because they were naturally scarce and crafted in a sophisticated manner. "Since the consumption of these more excellent goods is evidence of wealth," Veblen observes, "it becomes honorific; and conversely, the failure to consume in due quantity and quality becomes a mark of inferiority and demerit."⁸¹

Conspicuous consumption leads to the so-called Veblen effect, through which the demand for luxury goods increases as their price increases.⁸² Subject to this effect, a luxury good or service has a two-segment pricing scheme: the real price and conspicuous price. The former stands for the normal market price that ordinary consumers pay for the good.⁸³ It covers the costs for design, production, and circulation. The conspicuous price refers to the extra costs the seller charges for the status-signifying function of its luxury goods. People who con-

sufficient merely to possess wealth or power—they must be put in evidence, for esteem is awarded only on evidence."); Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 795 (2012).

77. VEBLÉN, *supra* note 3, at 86–87.

78. *Id.*, at 52.

79. *Id.*, at 85–86.

80. *Id.*, at 111–24.

81. *Id.*, at 53.

82. *See, e.g.*, H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183, 189 (1950) ("By the Veblen effect we refer to the phenomenon of conspicuous consumption; to the extent to which the demand for a consumers' good is increased because it bears a higher rather than a lower price. We should perhaps emphasize the distinction made between the snob and the Veblen effect – the former is a function of the consumption of others, the latter is a function of price.").

83. *Id.* at 203 ("The essential economic characteristic with which we are concerned is the fact that the utility derived from a unit of a commodity employed for purposes of conspicuous consumption depends not only on the inherent qualities of that unit, but also on the price paid for it. It may, therefore, be helpful to divide the price of a commodity into two categories; the real price and the conspicuous price. By the real price we refer to the price the consumer paid for the commodity in terms of money. The conspicuous price is the price other people think the consumer paid for the commodity and which therefore determines its conspicuous consumption utility." (footnote omitted)).

sume conspicuously are willing to buy luxury goods at higher conspicuous prices. This is because they care much more about the status-signifying function of conspicuous prices than other consumers, who are only willing to pay real prices.⁸⁴ The higher the conspicuous prices of luxury goods, the more willing elite consumers are to buy these goods as signifiers of status.⁸⁵

2. *Conspicuous Consumption of Luxury Brands*

For a long time, the conspicuous consumption phenomenon applied to luxury goods without brand names attached. However, since the 1980s, the luxury goods sector has radically transformed its elite-oriented business model through branding. First, as more people are able to afford luxury goods, sales volume increases. Marketing luxury goods through brand names is cost-effective and impactful.⁸⁶ This trend has intensified since the formation of luxury brand conglomerates, making each luxury company more profit-driven.⁸⁷

Second, extensive advertising of luxury goods through television and social media increasingly relies upon brand names. Many luxury good advertisements contain a trademark or a combination of trademarks that represent the brand names of the good. These trademarks indicate the identity of product manufacturers and service providers and signify the quality, creativity, and price of their products or services. Lux-

84. According to Veblen, a person who consumes conspicuously “makes his estimate of value of the article chiefly on the ground of the apparent expensiveness of the finish of the those decorative parts and features which have no immediate relation to the intrinsic usefulness of the article; the presumption being that some sort of ill-defined proportion subsists between the substantial value of the article and the expense of adornment added in order to sell it.” VEBLEN, *supra* note 3, at 256–57.

85. Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349 (1996) (examining situations where Veblen effects arise from the desire to gain social status by conspicuous consumption to signal wealth).

86. See MARK TUNGATE, *LUXURY WORLD: THE PAST, PRESENT AND FUTURE OF LUXURY BRANDS 2* (2009) (“Certainly since the turn of the last century, when couturiers who made wildly expensive dresses for a narrow market of wealthy women began to diversify in order to boost their incomes.”).

87. *Id.* (“At the beginning of the 21st century, when established luxury brands fell into the hands of giant corporations with profit-hungry shareholders, this courtship of the mass market accelerated and intensified.”).

ury companies also routinely incorporate celebrities into their advertisements to show that their products or services are so distinctive and elegant that they ought to be enjoyed only by people with elite lifestyles.⁸⁸

As Jean Baudrillard famously observed, “[in order] to become an object of consumption, the object must become a sign.”⁸⁹ Mikimoto sells jewelry made of cultured pearls, each of which is worth a mere 10% of a natural pearl.⁹⁰ The value resides in the Mikimoto trademark: the sign, represented by its conspicuous price. With increased prevalence of trademarks, consumers increasingly associate these symbols not only with luxury goods and services, but also with prestige and social status.⁹¹

Trademark law has also come to recognize trademarks as symbols of prestige and social status. Courts have held that the Christian Dior mark stands for “allure and [a] prestigious image [with] an aura of luxury,”⁹² the Ferrari mark “for rarity and quality,”⁹³ Hermès for “scarcity” and “status,”⁹⁴ the Lexus mark for “exclusive luxury experience,”⁹⁵ Gucci for “‘luxury’ status,”⁹⁶ and the Rolex and Vacheron & Constantin-Le Coul-

88. See Haochen Sun, *Living Together in One Civilized World: How Luxury Companies and Consumers Can Fulfill Their Ethical Responsibilities to the Poor*, 47 U.C. DAVIS L. REV. 547, 553–54 (2013); KLAUS HEINE, *THE CONCEPT OF LUXURY BRANDS* 79–88 (2d ed. 2012).

89. JEAN BAUDRILLARD, *THE SYSTEM OF OBJECTS* 200 (James Benedict trans., Verso 1996) (1968).

90. Hannah Elliott, *You’re Buying Fancy Jewelry Wrong*, BLOOMBERG (Dec. 13, 2017, 4:00 AM), <https://www.bloomberg.com/news/articles/2017-12-13/how-to-buy-jewelry-an-expert-shares-what-you-are-doing-wrong>.

91. Sidney J. Levy, *Symbols for Sale*, 37 HARV. BUS. REV. 117, 121–22 (1959) (“Symbols of social participation are among the most dramatic factors in marketing. Like it or not, there are social class groupings formed by the ways people live, the attitudes they have, and the acceptance and exclusiveness of their associations. Most goods say something about the social world of the people who consume them. The things they buy are chosen partly to attest to their social positions.”).

92. Case C-59/08, *Copad SA*, 2009 E.C.R. I-3421, ¶ 37.

93. *Ferrari S.p.A. Esercizio Fabbriche Automobili e Corse v. McBurnie*, No. 86-1812-B(IEG), 1989 WL 298658, at *7 (S.D. Cal. June 1, 1989).

94. *Hermès Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108–09 (2d Cir. 2000).

95. *Toyota Motor Sales, U.S.A., Inc. v. Tabari*, 610 F.3d 1171, 1175 (9th Cir. 2010).

96. *Gucci America, Inc. v. Guess?, Inc.*, 868 F. Supp. 2d 207, 218 (S.D.N.Y. 2012).

tre marks for “prestige.”⁹⁷ Given that luxury brands signify their users’ social positions, courts have further recognized their function in relation to conspicuous consumption. For instance, based upon the judicial recognition of Louis Vuitton’s “luxury status” and “image of exclusivity and refinery,”⁹⁸ a Louis Vuitton product is “something wealthy women may handle with reverent care and display to communicate a certain status.”⁹⁹

In a similar vein, attorneys who have argued cases for luxury brands have emphasized in their court filings that these brands function as high-status signifiers. For example, attorneys asserted that Lexus “is a very prestigious luxury brand and it is an indication of an exclusive luxury experience,”¹⁰⁰ and is also well-known for its “power, attraction, reputation and prestige.”¹⁰¹

II.

ELITE UNIVERSITIES AS LUXURY BRANDS

In F. Scott Fitzgerald’s masterpiece *The Great Gatsby*, protagonist Jay Gatsby pretends to be an Oxford University graduate in order to increase his reputation and his chances of winning over the woman he loves.¹⁰² How can a university’s name carry so much allure and prestige? What is the relevance of this amid the recent college admissions scandal?

In this part, I argue that elite university names also represent exclusivity and serve conspicuous consumption, and thus, such names should be regarded as luxury brands. Moreover, mainly from the trademark protection perspective, I further contend that elite universities should be regarded as owners of *hyper* luxury brands.

97. *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc.*, 221 F.2d 464, 466 (2d Cir. 1955).

98. *Louis Vuitton Malletier S.A. v. My Other Bag, Inc.*, 156 F. Supp. 3d 425, 435 (S.D.N.Y. 2016).

99. *Id.*

100. *Toyota Motor Sales*, 610 F.3d at 1175.

101. *Toyota Jidosha Kabushiki Kaisha v. Munchy Food Indus.*, [2014] Opposition to Trademark Application No. 30117999, ¶ 32.

102. Michael Dirda, *A New Look at Gatsby — as an Oxford Man*, WASH. POST (May 8, 2019), https://www.washingtonpost.com/entertainment/books/a-new-look-at-gatsby—as-an-oxford-man/2019/05/08/51c1ff50-7023-11e9-8be0-ca575670e91c_story.html.

A. *Exclusivity of University Brands*

Elite universities achieve exclusivity through bolstering their quality of education, creativity of research, competitiveness of the admissions process, and rates of tuition.

1. *Quality*

With large endowment funds plus high tuition fees,¹⁰³ elite universities are financially capable of offering excellent software for teaching and learning. These universities top the relevant educational rankings and have the largest endowments. Thirteen have individual endowments valued at \$10 billion or more.¹⁰⁴ Elite universities endeavor to recruit talented scholars through rigorous hiring processes and further provide training programs to improve the quality of teaching. They also dedicate resources to innovating curricula that will equip students with cutting-edge knowledge for postgraduate and professional pursuits. Moreover, elite universities generously capitalize on their endowments, creating an excellent peer learning atmosphere by enrolling high caliber students.

Meanwhile, elite universities are well known for their excellent hardware, such as libraries, classrooms, and dormitories. For example, Harvard University has the largest university library in the United States and the largest private library in the world.¹⁰⁵

2. *Creativity*

With vibrant academic traditions, culture, and capabilities, elite universities excel in research performance, producing impactful findings. The top positions in ranking lists are mostly occupied by elite universities.¹⁰⁶ These universities have

103. Not all universities that could be characterized as “elite” charge high tuition across the board. For example, UC Berkeley charges lower tuition fees for in-state undergraduate students, but still charges high tuition fees for out-of-state undergraduate students. *See Cost*, U.C. BERKELEY, <https://admissions.berkeley.edu/cost> (last visited Sept. 15, 2020).

104. CHRON. HIGHER EDUC., *supra* note 37.

105. Benjamin Elisha Sawe, *Largest Libraries in the United States*, WORLDATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/largest-libraries-in-the-united-states.html>.

106. Five Ivy League schools together with other elite universities with acceptance rates being less than 10%, such as the Massachusetts Institute of Technology, Stanford University and the University of Chicago, are ranked

a vital role to play in fostering innovation and inventing new technologies.¹⁰⁷ Stanford, the Massachusetts Institute of Technology (MIT), and Harvard have been ranked as the top three most innovative universities for five straight years since 2015,¹⁰⁸ and all ten universities with the highest number of Nobel Prize winners between 2000 and 2017 are elite universities.¹⁰⁹

3. *Competitiveness*

The highly competitive admissions process is another factor contributing to the exclusivity of elite universities. Every year, the number of applications to elite universities far exceeds the number of students they can admit. It is estimated that only 6.4% of 368,806 applicants were admitted by the top ten U.S. universities as ranked by the *U.S. News & World Report* for the fall 2019 entering class.¹¹⁰ There has been a tendency for elite universities to raise admissions standards, making enrolment even more competitive.¹¹¹

The acceptance rates of Ivy League universities and other top colleges have dropped to record lows in recent years. Harvard's acceptance rate fell from 4.6% in 2018 to 4.5% in 2019, resulting in only 1,950 students accepted out of 43,330 applicants.¹¹² Duke University cut its acceptance rate from 8.6% in 2018 to 7.4% in 2019, the biggest drop among the top ten U.S. universities.¹¹³ Other elite colleges also operate with

the top 10 best US universities. *2021 Best National University Rankings*, U.S. NEWS & WORLD REP., <https://www.usnews.com/best-colleges/rankings/national-universities> (last visited Sept. 21, 2020).

107. Farnam Jahanian, *4 Ways Universities Are Driving Innovation*, WORLD ECON. F. (Jan. 17, 2018), <https://www.weforum.org/agenda/2018/01/4-ways-universities-are-driving-innovation>.

108. David M. Ewalt, *Reuters Top 100: The World's Most Innovative Universities 2019*, REUTERS (Oct. 23, 2019), <https://www.reuters.com/innovative-universities-2019>.

109. Ellie Bothwell, *Top 10 Universities for Producing Nobel Prizewinners 2017*, TIMES HIGHER EDUC. (Oct. 13, 2017), <https://www.timeshighereducation.com/news/top-10-universities-producing-nobel-prizewinners-2017>. This list excludes the winners of literature and peace prizes.

110. See Kevin J. Delaney, *New Data Show How Hard It Was to Get into an Elite US College This Year*, QUARTZ (Mar. 31, 2019), <https://qz.com/1584304/acceptances-rates-at-top-us-colleges-dropped-further-for-the-class-of-2023>.

111. See STEVENS, *supra* note 34.

112. See Delaney, *supra* note 110.

113. See *id.*

extremely low acceptance rates, including Columbia (5.1%), Yale (5.9%), the University of Chicago (5.9%), MIT (6.6%), and the University of Pennsylvania (7.4%).¹¹⁴

4. Price

Exceptionally high tuition is another force driving the exclusivity of elite university education. Price reinforces the luxury aura of such educational services as it creates a financial barrier to entry, separating those who can afford education as a luxury good from those who cannot.¹¹⁵ In fact, if elite universities charged lower tuition, their quality and status could be questioned.¹¹⁶

Current tuition and fees for full-time undergraduate students at all of the top ten U.S. universities exceed \$50,000 per year,¹¹⁷ while the average cost for in-state students at public universities is \$10,440.¹¹⁸ Columbia University charges the highest tuition among the top ten at \$64,380.¹¹⁹ Over the last forty years, the tuition and fees of U.S. elite universities have risen faster than U.S. inflation rates and household income, deterring middle- and low-income students from applying.¹²⁰

114. *See id.*

115. Even though many elite universities as well as the Federal Government provide scholarships or extensive financial aid for low-income families, there are often still various barriers preventing them from benefiting from these aid programs. *See infra* text accompanying notes 219–220.

116. *See* Alia Wong, *Six-Figure Price Tags Are Coming to Colleges*, ATLANTIC (Nov. 8, 2019), <https://www.theatlantic.com/education/archive/2019/11/some-colleges-could-soon-cost-100000-year/601648> (“Being expensive is seen as being good—if one [elite] college is 20 percent cheaper than another [elite] college, students are going to wonder what’s wrong with it.”).

117. *2021 Best National University Rankings*, *supra* note 106.

118. COLL. BD., TRENDS IN COLLEGE PRICING 2019 9 (2019), <https://research.collegeboard.org/pdf/trends-college-pricing-2019-full-report.pdf> (last visited Sept. 26, 2020). Nonetheless, University of Oxford, University of Cambridge and Imperial College, which are on the top 10 list of universities in *The Times Higher Education World University Rankings 2020*, only charges UK and EU students approximately \$12,020 for annual tuition fees, which is just 19 percent to 23 percent of the prices charged by top 10 U.S. universities. Laura Tucker, *Tuition Fees at the World’s Top Universities*, QS TOP U. (June 10, 2020, 8:00 AM), <https://www.topuniversities.com/student-info/student-finance/tuition-fees-worlds-top-universities>.

119. *2021 Best National University Rankings*, *supra* note 106.

120. Jon Marcus, *New Data Show Some Colleges Are Definitively Unaffordable for Many*, HECHINGER REP. (Oct. 18, 2018), <https://hechingerreport.org/new-data-show-some-colleges-are-definitively-unaffordable-for-many>.

The high costs of elite university education are justified not only by the quality of education, creative output, and competitive admissions process, but also by access to highly compensated jobs upon graduation. Most Wall Street bankers are recruited from the Ivy League and other elite universities such as MIT and Stanford.¹²¹ Four-fifths of U.S. law firm partners earning \$5 million in profits per partner are graduates of the top five law schools.¹²² A recent survey of Harvard, Princeton, and Yale alumni shows that three-quarters of them live in zip codes ranking in the top 20% on an index of income and education, half in zip codes in the top 5%, and a quarter live in zip codes in the top 1%.¹²³

B. *Conspicuous Consumption of Educational Brands*

1. *Conspicuous Consumption of Elite Education*

Duke is an elite university located in Durham, North Carolina, charging undergraduate students approximately \$60,000 in tuition and fees.¹²⁴ Located only about ten miles away, the University of North Carolina at Chapel Hill (UNC) is a public university, charging in-state undergraduate students approximately \$9,000 in tuition and fees.¹²⁵ Given these two school choices, many parents would choose to send their children to study at Duke. This is because they attach more importance to Duke's exclusivity accrued from its quality of education, creativity, and admissions process. The acquisition of prestige and social status through conspicuous consumption of education is another reason why families might make such a decision.¹²⁶ Elite universities facilitate conspicuous consumption of education in the following two ways.

121. KAREN HO, *LIQUIDATED: AN ETHNOGRAPHY OF WALL STREET 11* (2009).

122. DANIEL MARKOVITS, *THE MERITOCRACY TRAP: HOW AMERICA'S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, and Devours the Elite 11* (2019).

123. *Id.* at 48–49.

124. *Compare Duke University vs. University of North Carolina—Chapel Hill*, U.S. NEWS & World Rep., https://www.usnews.com/best-colleges/compare/2920-2974/duke-university-vs-unc?xwalk_id=198419&xwalk_id=199120 (last visited Sep. 26, 2020).

125. *Id.*

126. See Richard H. McAdams, *Relative Preferences*, 102 *YALE L. J.* 1, 90 n.330 (1992) (“Education has been noted as being a positional good because people often seek simply to be *more* educated or at least more credentialed, than

First, elite universities' efforts to boost their exclusivity produce an inevitable corollary to the Veblen effect. As discussed in Part I, the Veblen effect reverses the classic relationship between price and demand by increasing demand for luxury goods despite (or as a result of) their rise in price. This effect is observable in elite higher education.¹²⁷ Each year, more students apply to increasingly expensive elite colleges. Research shows that after adjusting for inflation, tuition and fees charged by private colleges rose by 140% between 1985 and 2016.¹²⁸ The Ivy League and other top colleges like Duke, MIT, and Stanford increased tuition and fees roughly 3–4% every year from 2013 to 2018.¹²⁹ Nonetheless, every year these elite universities have received more applications, driving acceptance rates lower.¹³⁰ In fact, rising tuition and fees in elite universities boost applications.¹³¹ For instance, it was found

others.”) (citing FRED HIRSCH, *SOCIAL LIMITS TO GROWTH* 48–51 (1976)); *see also* Siva Vaidhyathan, *A Study in Total Depravity*, *BAFFLER* (July 2015), <https://thebaffler.com/salvos/study-total-depravity> (arguing that parents choose to send their children to expensive and elite private universities with the intention of gaining prestige).

127. *See* GEOFFREY SCHNEIDER, *MICROECONOMIC PRINCIPLES AND PROBLEMS: A PLURALIST INTRODUCTION* 225 (2019) (“Elite universities have found that raising the price of tuition signals a degree of exclusivity and actually *increases* the number of applications, which is a sign of the demand for a college education at that university. On the other hand, lowering the price of tuition can signal to applicants that a university is of lower quality.”); *see also* Nicholas A. Bowman & Michael N. Bastedo, *Getting on the Front Page: Organizational Reputation, Status Signals, and the Impact of U.S. News and World Report on Student Decisions*, 50 *RES. HIGHER EDUC.* 415, 430 (2009) (“[T]uition costs and instructional expenditures can serve as alternative markers of prestige . . .”).

128. ROBERT KELCHEN, *HIGHER EDUCATION ACCOUNTABILITY* 3 (2018).

129. *See* JinAh Kim, *Ivy League Tuition Has Been Rising Almost the Same Amount Every Year: Is This Just Coincidence?*, *DAILY PENNSYLVANIAN* (Apr. 19, 2017, 12:46 AM), <https://www.thedp.com/article/2017/04/tuition-increase-across-ivies>.

130. *See, e.g.*, Vaidhyathan, *supra* note 126 (“Elite higher education in America has long been a Veblen good—a commodity that obeys few, if any, conventional laws of economic activity. In some cases . . . , the higher the sticker price of a particular college or university, the more attractive it is.”).

131. Terence Kealey, *Free the Market: Take the Cap off Tuition Fees*, *TIMES* (Mar. 29, 2011, 1:01 AM BST), <https://www.thetimes.co.uk/article/free-the-market-take-the-cap-off-tuition-fees-bz0wz3z3kpk> (“Universities embody aspiration, and few people aspire to a degree from a cheap university. . . . In America, the more that universities have raised their fees, the greater the demand to go there.”).

that for elite colleges, an additional \$1,000 increase in tuition and fees contributed to a 3.6-point increase in SAT scores, a 1.2% reduction in acceptance rates, and a 0.5% increase in the percentage of admitted students who enrolled.¹³²

Elite universities treat low acceptance rates as a means of enhancing prestige.¹³³ They have an incentive to reject more applicants because lowering acceptance rates could improve their university ranking performance, which in turn encourages more students to apply.¹³⁴ Students and their parents become more anxious when they realize that gaining admission to an elite college is becoming more difficult, and this pushes them to apply to more schools to maximize their chances of acceptance.¹³⁵ The globalization of higher education is another factor driving down acceptance rates. The past two decades have witnessed a rapidly increasing number of international applicants who can easily afford the high tuition and fees at elite universities.¹³⁶

Second, the Veblen effect shows that the impetus for conspicuous consumption of elite education is the prestige and social status conferred by these elite universities. Given their exclusivity, elite universities confer prestige on their students and graduates through their admissions and educational programs.¹³⁷ Limited numbers, restrictive entrance requirements,

132. Bowman & Bastedo, *supra* note 127.

133. See STEVENS, *supra* note 34, at 16 (“The measure of an institution’s prestige has come to be defined, in part, by the proportion of each year’s applicants it turns away.”). See generally Andrew Schrage, *College Admissions Scandal Revisited: Is an Ivy League Education Worth the Price?*, MONEY CRASHERS, <https://www.moneycrashers.com/ivy-league-college-education-worth-cost> (last visited Dec. 20, 2019).

134. See Michelle Lou & Brandon Griggs, *Acceptance Rates at Top Colleges Are Dropping, Raising Pressure on High School Students*, CNN (Apr. 4, 2019), <https://edition.cnn.com/2019/04/03/us/ivy-league-college-admissions-trnd/index.html>.

135. Anemona Hartocollis, *Greater Competition for College Places Means Higher Anxiety, Too*, N.Y. TIMES (Apr. 20, 2016), <https://www.nytimes.com/2016/04/21/us/greater-competition-for-college-places-means-higher-anxiety-too.html>.

136. See FRANK BRUNI, WHERE YOU GO IS NOT WHO YOU’LL BE: AN ANTI-DOTE TO THE COLLEGE ADMISSIONS MANIA 35 (2015).

137. See Mitchell L. Stevens & Josipa Roksa, *The Diversity Imperative in Elite Admissions*, in DIVERSITY IN AMERICAN HIGHER EDUCATION: TOWARD A MORE COMPREHENSIVE APPROACH 64 (Lisa M. Stulberg & Sharon Lawner Weinberg eds., 2011).

and lack of financial resources mean that only a very small portion of students can be admitted and complete their studies at these universities. The amount of status elite universities can confer on students and graduates depends on the status they themselves enjoy, measured to a certain extent by rankings. The higher a university ranks, the more prestige its students and graduates enjoy. The status of an alumnus also has an impact on the status of his or her alma mater. Elite universities tout their networks of distinguished alumni, such as leading government officials and accomplished entrepreneurs, to raise their national and international profiles.

The Veblen effect explains why some parents are keen to foot the bill for their children's expensive, elite education. While they care about the academic benefits of elite universities,¹³⁸ they also value the prestige and social status that they impart. Parents may treat the payment of high tuition and fees as an opportunity to show off their wealth and enjoy the prestige and social status that is associated with these elite universities.¹³⁹ From this perspective, the high tuition and fees become the conspicuous price of the status-signifying function of elite higher education.¹⁴⁰ Moreover, many parents see their

138. Some believe that parents actually know very little about the quality of education offered by elite universities. See Michael Martin, *Veblen Saw It Coming*, INSIDE HIGHER EDUC. (July 3, 2019), <https://www.insidehighered.com/views/2019/07/03/thorstein-veblens-writings-about-rich-are-relevant-ongoing-admission-scandal> (arguing that “few, if any, of the parents caught up in the recent scandal could offer a reasonable explanation of the actual educational quality differences between an ‘elite’ institution and a ‘not-quite-so-elite’ institution.”).

139. See *id.* (“[V]ery high tuition is a marketing advantage rather than a barrier for ‘conspicuously consuming’ parents with the means to easily cover it. And bidding for the opportunity to pay that high tuition fully demonstrates the special status of these parents.”).

140. See Paul F. Campos, *The Extraordinary Rise and Sudden Decline of Law School Tuition: A Case Study of Veblen Effects in Higher Education*, 48 SETON HALL L. REV. 167, 179 (2017) (“What could account for an enormous increase in tuition correlating with a large increase in applications, in both absolute and relative terms? One explanation for the apparent existence of Veblen goods is that they are a form of conspicuous consumption: that people sometimes pay more for something precisely because it costs more, not despite that fact.”).

children's achievements as a reflection and extension of their own.¹⁴¹

2. *Conspicuous Consumption of Elite University Brands*

As revealed in Part I, conspicuous consumption of luxury goods has evolved into a focus on brands that signify exclusivity and prestige. So has conspicuous consumption of elite education. Elite universities have increasingly relied upon their institutional names and logos as brands, and parents and students increasingly care about these brands.

Elite universities adopt luxury branding strategies to strengthen the exclusivity and prestige of their educational services. Given their long history, incumbent universities such as those in the Ivy League have already gained the status of luxury education brands.¹⁴² Their management teams endeavor to maintain and improve their top rankings by strengthening their exclusivity and soliciting donations for further institutional development.¹⁴³

On the other hand, some universities adopt luxury branding strategies in order to rebrand themselves as elite. For example, several universities have implemented the so-called Absolut Rolex Plan to boost the quality and reputation of their educational services.¹⁴⁴ Quoting from George Washington University's former president, Stephen Trachtenberg, who initiated the plan: "College is like vodka. . . . Vodka is by definition a flavorless beverage. It all tastes the same. But people will spend \$30 for a bottle of Absolut vodka because of the brand. A Timex watch costs \$20, a Rolex \$10,000. They both tell the

141. Emilie Beecher, *The College Admissions Scandal was All About Bragging Rights*, MEDIUM (Mar. 25, 2019), <https://medium.com/age-of-awareness/the-college-admissions-scandal-was-all-about-bragging-rights-4229f689e221>; see also Martin, *supra* note 138 (reporting that many parents may say that "[I]ook, my child is special because they attend an expensive university, and thus I am a very special person/parent, as well").

142. TUNGATE, *supra* note 86, at 203 (statement of Stanley Katz) ("There isn't any doubt that brand matters and Harvard is the prestige brand It's the Gucci of higher education, the most selective place").

143. See *id.* (pointing out Malcolm Gladwell's conclusion that Ivy League schools are in "the luxury brand management business").

144. See KEVIN CAREY, *THE END OF COLLEGE: CREATING THE FUTURE OF LEARNING AND THE UNIVERSITY OF EVERYWHERE* 63 (2015).

same time.”¹⁴⁵ This Absolut Rolex Plan has paid off.¹⁴⁶ George Washington has significantly increased the exclusivity and reputation of its educational services, as have other universities that implemented this luxury branding strategy.¹⁴⁷

Wealthy parents are often consumers of luxury educational brands.¹⁴⁸ For example, affluent families in China are increasingly sending their children to U.S. universities.¹⁴⁹ Soon after they become wealthy, they regard university degrees, especially those conferred by elite universities, as status symbols for themselves and their children.¹⁵⁰ In 2014–2015 alone, more than 300,000 Chinese students attended universities in the United States.¹⁵¹ These families sometimes spend heavily on admissions counselling, private tutoring, and extra-curricular activities for their children, and even make donations to universities in order to increase the chances of their children’s admission.¹⁵²

The tremendous popularity of university rankings evinces the effectiveness of elite universities’ luxury branding strategies. Oftentimes, university rankings simply highlight elite uni-

145. *Id.*

146. *Id.*; Kevin Carey, *How to Raise a University’s Profile: Pricing and Packaging*, N.Y. TIMES (Feb. 6, 2015), <https://www.nytimes.com/2015/02/08/education/edlife/how-to-raise-a-universitys-profile-pricing-and-packaging.html> (“The Absolut Rolex plan worked. The number of applicants surged from some 6,000 to 20,000, the average SAT score of students rose by nearly 200 points, and the endowment jumped from \$200 million to almost \$1 billion.”).

147. CAREY, *supra* note 144, at 64.

148. See Vaidhyanathan, *supra* note 126 (“Parents might boast of a child attending [an elite university] (and their own ability to foot the bill) with stickers on their Audis . . .”).

149. See Lia Zhu, *Rich Chinese Parents Also Caught Up in College Admissions Scandal*, CHINA DAILY (May 9, 2019, 2:16 PM), <https://www.chinadailyhk.com/articles/8/118/57/1557382867918.html>.

150. See WILLIAM J. BENNETT & DAVID WILEZOL, *IS COLLEGE WORTH IT?: A FORMER UNITED STATES SECRETARY OF EDUCATION AND A LIBERAL ARTS GRADUATE EXPOSE THE BROKEN PROMISE OF HIGHER EDUCATION XI* (2013); Joyce Lau, *Can Job Training Trump a Degree?*, N.Y. TIMES BLOGS (June 5, 2013, 3:46 AM), <https://rendezvous.blogs.nytimes.com/2013/06/05/can-job-training-trump-a-degree/>.

151. See CARL MINZNER, *END OF AN ERA: HOW CHINA’S AUTHORITARIAN REVIVAL IS UNDERMINING ITS RISE* 48–49 (2018).

152. See Alexis Lai, *Hong Kong in Hot Pursuit of Ivy League Education*, CNN (Dec. 2, 2012), <https://edition.cnn.com/2012/12/02/world/asia/hong-kong-ivy-league-admission/index.html>.

versities' institutional names and/or logos encapsulating many university achievements. Therefore, these names and logos are perceived as brands symbolizing exclusivity, prestige, and social status. The higher a university is ranked, the more exclusive and prestigious its name and logo are in the minds of students and parents.¹⁵³

Guided by the symbolic ramifications of ranked names and logos, students and parents rely increasingly upon university rankings to make their selections.¹⁵⁴ For instance, Monks and Ehrenberg's research found that a university's drop in moving to a lower rankings led to a greater acceptance rate, a smaller percentage of admitted students who enroll, and an entering class of lower academic quality.¹⁵⁵ Among prospective international students, 32% have been found to consider ranking an important factor when choosing their university.¹⁵⁶ Chinese students cited the *U.S. News & World Report* rankings as the most influential factor.¹⁵⁷

C. *Elite Universities as Hyper Luxury Brands*

In the two preceding Sections, I have demonstrated that, like a luxury good, the exclusivity of elite higher education makes it a target for conspicuous consumption. It follows, then, that elite university names and logos can be regarded as luxury brands in the educational services marketplace.

153. See ELLEN HAZELKORN, *RANKINGS AND THE RESHAPING OF HIGHER EDUCATION: THE BATTLE FOR WORLD-CLASS EXCELLENCE* 92 (2d ed. 2015) ("Rankings can provide branding and advertising value.").

154. See Mahsood Shah et al., *Do High Ranked Universities Have Better Graduate Employment Outcomes?*, in *WORLD UNIVERSITY RANKINGS AND THE FUTURE OF HIGHER EDUCATION* 217 (Kevin Downing & Fraide A. Ganotice, Jr. eds., 2017); Eva Cairns, *University Rankings: How Important Are They?*, *FORBES* (Oct. 17, 2013), <https://www.forbes.com/sites/evacairns/2013/10/17/university-rankings-how-important-are-they-an-interview-with-nello-angerilli-avp-university-of-waterloo-canada/#1b47dd747d3c>.

155. See James Monks & Ronald G. Ehrenberg, *The Impact of U.S. News & World Report College Rankings on Admission Outcomes and Pricing Decisions at Selective Private Institutions* 9 (Nat'l Bureau of Econ. Research Working Paper No. 7227, 1999), <https://www.nber.org/papers/w7227.pdf>.

156. QS, *INTERNATIONAL STUDENT SURVEY 2019* 10 (2019), http://info.qs.com/rs/335-VIN-535/images/QS_ISS19_Global.pdf.

157. See Madeline A. Rafi, *Influential Factors in the College Decision-Making Process for Chinese Students Studying in the U.S.*, 8 *J. INT'L STUDENTS* 1681, 1685 (2018).

While elite universities and luxury companies both apply luxury branding strategies, the names and logos of universities are more exclusive and prestigious. In this section, I consider from a trademark protection perspective why elite university names and logos should be regarded as *hyper* luxury brands.

1. *Luxury Brands and Trademark Protection*

Luxury companies rely heavily on trademark law to protect the exclusivity and prestige of their brands, which in turn drive conspicuous consumption. Trademark law confers upon business owners, such as luxury companies, an exclusive right to a trademark that is capable of indicating the source of a product or service in the marketplace.¹⁵⁸ If trademark protection were to be suspended or eliminated in a country or across the globe, the pervasiveness of counterfeit goods or services would cause a crisis of survival for the entire luxury industry.

On the one hand, the absence of trademark protection would embolden counterfeiters to flood the market with fake goods without any legal liability, which would significantly impair the exclusiveness and prestige of luxury brands.¹⁵⁹ On the other hand, other forms of IP such as copyright and design patents have proven to be ineffective in protecting luxury companies in warding off free-riding activities.¹⁶⁰ Therefore, courts

158. See generally Sun, *supra* note 24, at 150 (“Trademarks are signs that are capable of indicating the sources of goods or services. They inform consumers as to who manufactured or provided a particular product or service. Therefore, trademark law only protects source-indicating signs.”); Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020 (2005); Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999).

159. See *Hermès Int’l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 109 (2d Cir. 2000) (“A loss [to the public] occurs when a sophisticated buyer purchases a knockoff and passes it off to the public as the genuine article, thereby confusing the viewing public and achieving the status of owning the genuine article at a knockoff price.”). Cf. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, *THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION* 5 (2012) (arguing that “fashion thrives due to copying”); Jonathan M. Barnett, *Shopping for Gucci on Canal Street: Reflections on Status Consumption, Intellectual Property, and the Incentive Thesis*, 91 VA. L. REV. 1381, 1410 (2005) (“Without counterfeiters, none or far fewer of these demonstrative sales would be made, fewer non-elite consumers would be apprised of the latest movement in the fashion cycle, and the resulting aspirational effect would be weaker.”).

160. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1176 (2009); Susan Scafidi, *Intellectual Prop-*

have attached great importance to trademark law's function in weeding out counterfeits by holding that it is legal to sell knock-offs only if they do not bear a counterfeit trademark.¹⁶¹

Trademark law protects luxury brands as status symbols in four primary ways. First, it guards against the use of marks that are confusingly similar, which helps luxury companies preserve the exclusivity of their trademarks. Normally, courts apply a multi-factor test¹⁶² to decide whether the party sued by the luxury company has used its mark in such a way as to mislead consumers into believing that the goods in question were manufactured by the luxury company. By prohibiting the use of confusingly similar marks, the test's "competitive proximity" and "bridging the gap" factors also entitle luxury companies to control not only their existing market channels,¹⁶³ but also the potential market sectors they legitimately intend to expand into.¹⁶⁴ The more famous and distinctive a luxury mark is, the stronger the legal protection the anti-confusion test would afford.¹⁶⁵

erty and Fashion Design, in 1 INTELLECTUAL PROPERTY AND INFORMATION WEALTH 115 (Peter K. Yu ed., 2006).

161. See *People v. Rosenthal*, No. 2002NY075570, 2003 WL 23962174, at *1 (N.Y. Crim. Ct. Mar. 4, 2003) (noting that "while it is perfectly legal to sell merchandise that copies the design and style of a product often referred to as 'knock-offs' it is against the law to sell goods that bear a counterfeit trademark").

162. See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961) (setting forth eight factors to be considered in determining the likelihood of confusion: (1) the strength of the mark; (2) the similarity of the parties' marks; (3) the proximity of the parties' products in the marketplace; (4) the likelihood that the plaintiff will "bridge the gap" between the products; (5) evidence of actual consumer confusion; (6) whether the defendant acted with bad faith in adopting the mark; (7) the defendant's product quality; and (8) consumer sophistication, although a court is not "limited to consideration of only these factors."). No single *Polaroid* factor is dispositive though. *Nabisco, Inc. v. Warner-Lambert Co.*, 220 F.3d 43, 46 (2d Cir. 2000).

163. *Polaroid Corp.*, 287 F.2d at 495; see generally *Nabisco, Inc.*, 220 F.3d 43.

164. See *Louis Vuitton Malletier, S.A. v. Hyundai Motor Am.*, No. 10 Civ. 1611(PKC), 2012 WL 1022247, at *22 (S.D.N.Y. Mar. 22, 2012) (quoting *Hormel Foods Corp. v. Jim Henson Prods., Inc.*, 73 F.3d 497, 504 (2d Cir. 1996)) ("Bridging the gap refers to the senior user's interest in preserving avenues of expansion and entering into related fields.").

165. See *Kenner Parker Toys, Inc. v. Rose Art Indus.*, 963 F.2d 350, 353 (Fed. Cir. 1992). But see *Barton Beebe & C. Scott Hemphill, The Scope of Strong Marks: Should Trademark Law Protect the Strong More Than the Weak?*, 92

Second, the post-sale confusion doctrine prevents knock-offs from causing harm to luxury brands' quality reputation and prestige.¹⁶⁶ In *Rolex Watch U.S.A., Inc. v. Canner*¹⁶⁷ and *Ferrari S.P.A. v. Roberts*,¹⁶⁸ the courts ruled that the public circulation of knockoff watches that bore the "Rolex" trademark and cars that looked very similar to Ferrari's had led consumers to question the quality, reputation, and prestige of Rolex and Ferrari.

Third, the anti-dilution doctrine guards against blurring the distinctiveness of a famous trademark and tarnishing its reputation. The anti-blurring doctrine¹⁶⁹ "functions to prevent the prestigious images of luxury brands from being diluted into brands accessible to the mass public, an effect that would gradually whittle away the prestige of luxury brands."¹⁷⁰ Tarnishment may occur when a trademark is linked to "products of shoddy quality, or is portrayed in an unwholesome or unsavory context."¹⁷¹ In this context, the harm caused by dilutive use is "that the public will associate the lack of quality or lack of prestige in the defendant's goods with the plaintiff's unrelated goods."¹⁷²

N.Y.U. L. REV. 1339, 1342 (2017) (calling for reconsideration of the *Kenner* doctrine).

166. See Jeremy N. Sheff, *Veblen Brands*, 96 MINN. L. REV. 769, 791 (2012).

167. *Rolex Watch U.S.A., Inc. v. Canner*, 645 F. Supp. 484, 495 (S.D. Fla. 1986) ("Individuals examining the counterfeits, believing them to be genuine Rolex watches, might find themselves unimpressed with the quality of the item and consequently be inhibited from purchasing the real time piece. Others who see the watches bearing the Rolex trademarks on so many wrists might find themselves discouraged from acquiring a genuine because the items have become too common place and no longer possess the prestige once associated with them.").

168. *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse v. Roberts*, 944 F.2d 1235, 1244 (6th Cir. 1991) (affirming that "[t]he *Rolex Watch* court noted . . . [it] was necessary to protect against the cheapening and dilution of the genuine product, and to protect the manufacturer's reputation.").

169. 15 U.S.C. § 1125(c)(2)(B) (2018) (prohibiting "association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark").

170. Sun, *supra* note 24, at 79.

171. *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir.1996) (quoting *Deere & Co. v. MTD Prods.*, 41 F.3d 39, 43 (2d Cir. 1994)).

172. *Id.* See also Case C-408/01, *Adidas-Salomon AG v. Fitnessworld Trading Ltd*, 2003 E.C.R. I-12537, ¶ 38 ("[T]arnishment of the mark, describes the situation where . . . the goods for which the infringing sign is used ap-

Fourth, trademark law has widened the scope of the registrability of marks, enabling non-traditional luxury marks to receive legal protection against confusing and dilutive uses. These trademarks differ from those that are traditionally registered as word or logo marks. Famous examples are single-color marks such as the Tiffany blue¹⁷³ and Christian Louboutin red-sole marks,¹⁷⁴ smell marks such as the Chanel perfume mark,¹⁷⁵ and motion marks such as the vertical opening mechanism of a Lamborghini door.¹⁷⁶

2. *Hyper Luxury Brands*

There is a key difference between brands owned by elite universities and those of luxury companies. Elite universities can be elevated to the status of *hyper* luxury brands¹⁷⁷ on the basis of their extremely low admission rates, enrolling just five

peal to the public's senses in such a way that the trade mark's power of attraction is affected."). In a later U.S. case, *Fendi Adele S.R.L. v. Filene's Basement, Inc.*, 696 F. Supp. 2d 368, 391 (S.D.N.Y. 2010), Filene's sold counterfeit merchandise bearing one or more of the Fendi marks. The case record reflected that the marks on the counterfeit items were virtually identical to, or exact replicas of, one or more of the Fendi marks. The U.S. court held that "Filene's use of the Fendi Marks dilutes the quality of the Marks by diminishing their capacity to identify and distinguish the Fendi Products." *Id.* In the Dior case discussed previously, the European Court of Justice asserted that "an impairment to the aura of luxury is likely to affect the actual quality of those goods." Case C-59/08, *Copad SA v. Christian Dior couture SA*, 2009 E.C.R. I-03421, ¶ 26.

173. See *Color Branding & Trademark Rights*, COLOR MATTERS, <https://www.colormatters.com/color-and-marketing/color-branding-legal-rights> ("Tiffany only owns 'robin's egg blue' for its boxes and bags.").

174. See *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 212 (2d Cir. 2012).

175. See *Lessons from Chanel and Coty's "Smell-Alike" Victory*, FASHION L. (JAN. 6, 2017), <https://www.thefashionlaw.com/home/lessons-from-chanel-and-cotys-smell-alike-victory>.

176. See *Image Trademark with Serial Number 75883661*, JUSTIA TRADEMARKS, <https://trademarks.justia.com/758/83/n-75883661.html>.

177. See José Amorim, *Friday Chronicle #16: Luxury is Dead, Hyper-Luxury is the New Black*, LUXURY ACTIVIST (Sept. 9, 2015), <https://luxuryactivist.com/blog/friday-chronicle-16-luxury-is-dead-hyper-luxury-is-the-new-black/> ("Consumers looking for premium products and services get more demanding and a real segmentation has happened. Some of them are looking for hyper exclusive products and services. . . . Hyper luxury represents products that are rare, exclusive, extremely high quality, often handmade and unapologetically expensive.").

percent of applicants every year.¹⁷⁸ Luxury companies generally open their stores and services to the general public, selling goods or services to anyone who can afford them. Elite education goes beyond the purchase of luxury goods because money is not generally enough to gain admission to an elite university.

Another major factor determining the hyper luxury brand status of elite universities is their very limited recourse to trademark protection. For a number of reasons, elite universities do not need to rely on strong trademark protection in the same way that luxury companies do.

First, elite university brands rely very little on anti-confusion protection. For instance, Hotel Stanford is a three-star hotel located near Pennsylvania Station in New York City.¹⁷⁹ It is highly unlikely that anyone would believe Stanford University has any affiliation with it because, according to the test set out in *Polaroid Corp. v. Polarad Electronics Corp.*¹⁸⁰ for assessing the likelihood of confusion, there is no “competitive proximity” between a hotel and a university, nor would Stanford extend its business activities to hotel services. However, if a secondary school were to name itself Stanford High School, its position in the educational domain suggests an affiliation with the university that might cause confusion among target consumers.¹⁸¹ However, any journalist or curious parent could quickly and easily defeat the validity of this suggestion by fact-checking with Stanford University. Therefore, few schools would attempt such a false affiliation.

178. See John Fabian Witt, *Elite Colleges Don't Understand Which Business They're In*, ATLANTIC (Mar. 15, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/admissions-scandal-shows-real-goal-elite-colleges/584968>.

179. A short walk from Pennsylvania Station, Hotel Stanford has a convenient setting, making it an ideal place to stay when in New York City. It is close to the Empire State Building, eateries and shops. See *Hotel Stanford*, HOTELS COMBINED, https://www.hotelscombined.com/Hotel/Search?file Name=hotel_Stanford&date=SundayFortnight&gclid=EAIaIQobChMI952UvZfT5wIVWaSWCh2_YAVmEAAYAAAEgKs6PD_BwE.

180. See *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492, 495 (2d Cir. 1961).

181. See Mark Bartholomew, *Trademark Morality*, 55 WM. & MARY L. REV. 85, 119 (2013) (“[W]hen a court perceives that the merchandiser intended to profit from the university’s brand goodwill, the university will typically succeed in its infringement claim.”).

Second, elite university brands are impervious to post-sale confusion. Trademark law prevents circulation of counterfeit goods that damage the reputation and prestige of luxury brands.¹⁸² However, wearing, for example, a poor-quality counterfeit Harvard-branded hat does not necessarily harm Harvard's brand reputation or prestige because they are related to the quality of educational services, not hats.

Third, elite university brands can defeat dilutive uses largely because there is moral backlash against such uses. Suppose a company registered the "Princeton" mark for its toilet plungers. This mark, however, would blur the distinctiveness of the Princeton mark, because it would now be associated with products other than educational services.¹⁸³ Moreover, the reputation of the mark might be tarnished as it is "portrayed in an unwholesome or unsavory context."¹⁸⁴ However, universities are highly regarded by the public. Therefore, the public would treat such dilutive uses of educational marks as an offense to the moral mission of a university and it would unlikely be attracted to any toilet plungers bearing the Princeton mark.¹⁸⁵ For these reasons, it is unlikely that a manufacturer would make such dilutive use of an educational mark.

Fourth, due to the importance they attach to history and tradition, elite university brands tend to use only conventional words and logos as trademarks. Unlike luxury goods companies, they have not yet used or sought to protect non-traditional marks such as color, smell, and motion marks.

D. *Social Justice and the Right to Higher Education*

The luxurification and conspicuous consumption of elite education are phenomena that do not only involve elite universities and wealthy families. In this section, I examine their

182. See *Hermès Int'l v. Lederer de Paris Fifth Ave., Inc.*, 219 F.3d 104, 108 (2d Cir. 2000).

183. 15 U.S.C. § 1125(c)(2)(B) (2018).

184. See *Hormel Foods Corp. v. Jim Henson Prods. Inc.*, 73 F.3d 497, 507 (2d Cir. 1996) (quoting *Deere & Co. v. MTD Prods., Inc.*, 41 F.3d 39, 43 (2d Cir. 1994)).

185. See *Tommy Hilfiger Licensing, Inc. v. Nature Labs, LLC*, 221 F. Supp. 2d 410, 422 (S.D.N.Y. 2002) (ruling that tarnishment harms a famous mark because it "ceases to serve as a 'wholesome identifier of the owner's products'" (emphasis added) (quoting *Deere & Co. v. MTD Prods., Inc.* 41 F.3d at 43)).

implications for the protection of everyone's right to higher education as a means of promoting social justice.

1. *The Right to Higher Education*

Since its inception, the right to higher education has paved the way for the enjoyment of higher-education equality. The 1948 Universal Declaration of Human Rights (UDHR)¹⁸⁶ states that “[e]veryone has the right to education” and “higher education shall be equally accessible to all on the basis of merit.”¹⁸⁷ And the ICESCR¹⁸⁸ states that to protect the right to education, states should ensure “higher education shall be made equally accessible to all, on the basis of capacity.”¹⁸⁹ The shift from “merit” to “capacity” broadens the coverage of the right to education to benefit students from disadvantaged backgrounds¹⁹⁰ who may not have benefited from a strong primary and secondary education but nonetheless have the capacity for further study. The scope of the right to education is not clearly defined in the ICESCR because the cost of education is very high; states are only required to have higher education that is “equally accessible.”¹⁹¹

Although the right to education is not a fundamental right provided for under the U.S Constitution,¹⁹² U.S. courts

186. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 26 (Dec. 10, 1948).

187. *Id.*

188. G.A. Res. 2200A, *supra* note 43.

189. *Id.* art. 13(2)(c).

190. See BEITER, *supra* note 44, at 97.

191. G.A. Res. 2200A (XXI), *supra* note 43, art. 13(2)(c). See also, The UNESCO Convention against Discrimination in Education, art. 4, Dec. 14, 1960, 429 U.N.T.S. 93.

192. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18, 30-39 (1973) (ruling that education is not a constitutionally protected fundamental right that would trigger strict scrutiny of its infringement); Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 STAN. L. REV. 735, 739 (2018) (concluding that “the [Supreme] Court rejected education as a fundamental right in *San Antonio Independent School District v. Rodriguez*”); Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 435 (2012) (“The [Supreme] Court held that the Constitution did not explicitly or implicitly create a right to education and that education’s significance and connection to other rights were inadequate to render education a fundamental right.”). Cf. *Gary B. v. Whitmer*, 957 F.3d 616, 655 (6th Cir. 2020) (“When combined with the historical analysis discussed above, this

have attached importance to its protection as a civil right. In *Brown v. Board of Education*,¹⁹³ the Supreme Court relied upon “the importance of education to our democratic society” and the right to education to resoundingly invalidate racial segregation in the public school system:

[E]ducation is perhaps the most important function of state and local governments. . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . [T]he opportunity of an education . . . , where the state has undertaken to provide it, is *a right* which must be made available to all on equal terms.¹⁹⁴

In *Grutter v. Bollinger*,¹⁹⁵ the Supreme Court recognized the value of equality in higher education, ruling that the Equal Protection Clause of the U.S. Constitution did not prohibit the University of Michigan Law School’s narrowly tailored use of race in its admissions decision to “further a compelling interest in obtaining the educational benefits that flow from a diverse student body.”¹⁹⁶ This ruling was made because access to legal education “must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.”¹⁹⁷ Moreover, the Court stressed the importance of equal access in public school to all segments of American society, and that “[n]owhere is the importance of such openness more acute than in the context of higher education.”¹⁹⁸ Although *Grutter* deals with the Fourteenth Amendment as it applies to a public school—a state actor, Congress has established the importance of equality in private educa-

means that access to such a basic minimum education is a fundamental right protected by the Due Process Clause of the Fourteenth Amendment.”).

193. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

194. *Id.* at 493 (emphasis added).

195. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

196. *Id.* at 343.

197. *Id.* at 332–33.

198. *Id.* at 331–32.

tional institutions receiving Federal financial assistance in Title VI of the Civil Rights Act of 1964.¹⁹⁹

2. *Social Justice*

What does the luxurification of higher education mean for access to it? In modern societies, higher status is as important as seeking more political and economic power because people care about how they are perceived by others.²⁰⁰ Against this backdrop, the luxurification of higher education reinforces how the receipt of education confers social status.²⁰¹

People attain higher status with increasing, highly differentiated levels of educational attainment. A functionalist theory of education argues that the bestowal of different statuses by reason of educational attainment is beneficial to society, as people need to occupy a variety of social positions in order for society to function well. Education can help sort people into appropriate social positions by equipping them with the job skills needed for specialized occupations. The educational system reinforces social stratification and preserves social class inequalities from one generation to the next by sorting students according to social class and transmitting class-oriented norms, values, beliefs, and behaviors.

The luxurification of higher education drives social class division and inequality in education. This is because universities are stratified, just like people in society, and differentiated by students' social class background and academic accomplishments. Highly ranked universities tend to draw students with higher socioeconomic status, and students from more privileged backgrounds are more likely to attend high-quality, prestigious universities.²⁰² Receiving education at an elite university is a means of accruing, maintaining and signaling economic power and prestige.

Such luxurification is completely at odds with equal access as the ethical basis for the right to higher education recog-

199. See 42 U.S.C. § 2000d (2018) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

200. See STEVENS, *supra* note 34, at 32.

201. See *Id.* at 33.

202. See RACHEL BROOKS, *EDUCATION AND SOCIETY: PLACES, POLICIES, PROCESSES* 70 (2019).

nized by international human rights treaties, Congress and the Supreme Court. U.S. elite universities date back to colonial times when religious groups sponsored the college education of their clergy.²⁰³ Later, upper class men established colleges to nurture children of their own class.²⁰⁴ Until the 1950s, elite universities and colleges reserved admission for students “fortunate enough to have been born into the right family or to have attended a particular . . . high school.”²⁰⁵

According to the 1947 Truman Commission on Higher Education, “the social role of education in a democratic society is at once to insure equal liberty and equal opportunity to differing individuals and groups, and to enable the citizens to understand, appraise, and redirect forces, men, and events as these tend to strengthen or weaken their liberties.”²⁰⁶ From an individual standpoint, higher education is linked to an important array of benefits ranging from better personal and spousal outcomes, children’s educational gains, greater longevity, and even to life-long happiness.²⁰⁷ From a societal standpoint, higher education is the key to social mobility and creativity and a catalyst for free speech and democracy.²⁰⁸

Elite universities have been utilizing diversity programs to admit students from different races through affirmative action and from low-income families through financial aid awards. In

203. See Jeanne H. Ballantine et al., *The Sociology of Education: A Systematic Analysis* 415 (8th ed., 2017).

204. See *Id.*

205. Jacques Steinberg, *The Gatekeepers: Inside the Admissions Process of a Premier College* xiii (2002).

206. 1 George F. Zook et al., *Higher Education for American Democracy: A Report of the President’s Commission on Higher Education* 5 (Harper & Bros.) (1947).

207. See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (“The American people have always regarded education and acquisition of knowledge as matters of supreme importance”); Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status and Higher Education Attainment*, 46 ARIZ. ST. L.J. 231, 260 (2014).

208. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (ruling that education is “the very foundation of good citizenship”); *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972) (accepting Wisconsin’s proposition “that some degree of education is necessary . . . if we are to preserve freedom and independence”); Martha Minow, *Education and Democracy* (Oct. 17, 2017), <https://blog.harvardlawreview.org/education-and-democracy/> (“Civics education . . . leads to greater political engagement, voting, and higher degrees of acceptance toward people of different backgrounds.”).

Fisher v. University of Texas,²⁰⁹ the Supreme Court upheld the legality of race-based diversity programs provided that they can pass the strict scrutiny test.²¹⁰ Similarly, in *Students for Fair Admissions v. Harvard*,²¹¹ the District Court for the District of Massachusetts upheld the legality of race-based diversity programs on the same grounds.²¹²

While elite universities promote equal access to higher education through affirmative action and financial aid, these schemes have had little effect on the luxurification of higher education. It is estimated that only 9% of freshmen attending elite universities are from the bottom half of the socioeconomic spectrum,²¹³ and just 5% of American students at prestigious law schools come from families in the bottom half of the socioeconomic distribution.²¹⁴ Financial aid schemes also have limited impact. A study has shown that most elite universities, including five in the Ivy League, have more students from the top 1% of the income scale than from the entire bottom 60%.²¹⁵ Scholars have pointed out that Americans have become accustomed to the reality that higher education comes at a phenomenal cost, requiring most middle-class families to save a lifetime for their children's education at elite universities.²¹⁶

A recent proposal to shift the responsibility solely to the public educational sector has proven too politically controversial and is thus very unlikely to be accepted nationally. In his failed bid for the 2020 presidency, Senator Bernie Sanders ar-

209. 133 S. Ct. 2411 (2013).

210. *Id.* at 2421 (ruling that the university must prove that its admissions program is "narrowly tailored to obtain the educational benefits of diversity").

211. 397 F. Supp. 3d 126 (D. Mass. 2019).

212. *Id.* at 191 ("Strict scrutiny requires that classifications used by Harvard in its admissions program be narrowly tailored to further a compelling interest.").

213. MCKINSEY & CO., *THE ECONOMIC IMPACT OF THE ACHIEVEMENT GAP IN AMERICA'S SCHOOLS* 9 (2009).

214. Richard H. Sander, *Class in American Legal Education*, 88 *DENV. U. L. REV.* 631, 632-33 (2011).

215. See Gregor Aisch et al., *Some Colleges Have More Students from the Top 1 Percent than the Bottom 60. Find Yours.*, *N.Y. TIMES* (Jan. 18, 2017), <https://www.nytimes.com/interactive/2017/01/18/upshot/some-colleges-have-more-students-from-the-top-1-percent-than-the-bottom-60.html>.

216. See, e.g., Gilchrist, *supra* note 26, at 663.

gued that “[i]t is time to build on the progressive movement of the past and make public colleges and universities tuition-free in the United States—a development that will be the driver of a new era of American prosperity.”²¹⁷ Although perhaps not as far-reaching as Senator Sanders’ proposal, the Federal government does provide a variety of grants, scholarships, loans, and other aid for certain eligible students pursuing higher education.²¹⁸ However, this level of federal assistance is inadequate to protect the right to higher education. Federal student aid has not done enough to make higher education more affordable. For instance, it is found that between 1987–2010, the increase in federal financial aid for students may have caused a 102% increase in college tuition.²¹⁹ Moreover, the overly complicated and confusing application procedures have been identified as another primary cause that has prevented about half of the eligible high school graduates from applying for general financial aid.²²⁰

Given the deep-seated problems caused by the luxurification of higher education and the ineffectiveness of Federal Government intervention, I propose that elite U.S. universities should devote more of their resources to promoting equal access to higher education. One means of doing so is promoting equal access to knowledge. Intellectual properties include original expression of ideas in the form of textbooks, research papers, and literary books, and inventions with novel solutions to existing technological problems. Therefore, intellectual

217. Bernie Sanders, Opinion, *Make College Free for All*, WASH. POST (Oct. 22, 2015), https://www.washingtonpost.com/opinions/bernie-sanders-america-needs-free-college-now/2015/10/22/a3d05512-7685-11e5-bc80-9091021aeb69_story.html.

218. See Fed. Student Aid, *Types of Financial Aid*, U.S. DEP’T OF EDUC., <https://studentaid.gov/understand-aid/types> (last visited Sept. 26, 2020).

219. See Veronique de Rugy & Jack Salmon, *Reevaluating the Effects of Federal Financing in Higher Education*, Mercatus Ctr. (Aug. 13, 2019), <https://www.mercatus.org/publications/education-policy/reevaluating-effects-federal-financing-higher-education>.

220. See Abigail Hess, Bill Gates: The American College Financial Aid System is Failing Students, CNBC, (May 4, 2018, 2:40 PM) <https://www.cnbc.com/2018/05/04/bill-gates-the-american-financial-aid-system-is-failing-students.html> (“As a result, about half of American high schoolers eligible for government financial and two-thirds of low-income high school seniors who are Pell Grant-eligible don’t even submit an application—potentially missing out on substantial funds for college.”).

properties embody a rich repertoire of knowledge.²²¹ Moreover, the enjoyment of intellectual properties is non-rivalrous, meaning that a person's use of a work or an invention does not hamper others' simultaneous use of the expression or technical features embodied in the work or invention.²²² Therefore, responsible exercise of rights over intellectual properties by IP owners has an enormous impact on the public's access to knowledge.²²³

As demonstrated below, elite universities either own a wealth of intellectual properties or are in an advantageous position to exercise fair use to disseminate knowledge embodied in books housed in their libraries. Therefore, the ability elite universities possess to use their intellectual property in a socially responsible manner is of great importance in protecting the right to higher education through equal access to knowledge.

III.

ELITE UNIVERSITIES' INTELLECTUAL PROPERTY-BASED RESPONSIBILITIES

In this part, I consider how elite universities should take responsibility to protect the right to higher education from an IP-based perspective. While their trademarks can be regarded as luxury brands, I propose two responsibilities of elite universities related to their other intellectual properties such as copyrights and patents. First, they should take advantage of their copyrights over staff publications to participate actively in open access knowledge sharing and dissemination. Second, they should prudently exercise the fair use doctrine, a user right under copyright law, to create e-lending programs and

221. See SUNDER, *supra* note 42.

222. See generally, JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 3 (2008) (explaining how technologies of reproduction can make it very hard to exclude people from enjoying literary works); WILLIAM W. FISHER III, *PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT* 199 (2004) (characterizing public goods as "nonrivalrous" because "enjoyment of them by one person does not prevent enjoyment of them by other persons").

223. See Amy Kapczynski, *The Access to Knowledge Mobilization and the New Politics of Intellectual Property*, 117 *YALE L. J.* 804 (2008) (analyzing successes in applying a bottom-up approach to mobilizing the public to challenge the contours of intellectual property law and defend access to knowledge).

make available to the public the tens of millions of books housed in their libraries.

A. *Promoting Open Access*

1. *Open Access*

The open access movement was initiated to remove information access barriers posed by the traditional academic publishing model. There are generally two forms of open access. Gold open access refers to circumstances where an author publishes his or her article in an online journal.²²⁴ The article is made freely available to the public at the point of publication.²²⁵ In contrast, green open access refers to when an author publishes his or her article in any journal and then self-archives a copy in a freely accessible institutional or specialist online archive known as a repository.²²⁶ The copy may be either the pre-print or the post-print of the article.²²⁷

Due to cost restraints, scholars may not have access to the literature that would keep them in touch with the latest developments in their fields and aid them in research. No single library in the world is able to afford subscriptions to all scholarly journals in English and other languages, as that represents over three million articles that are published every year.²²⁸ By removing price barriers such as subscription fees and copyright and licensing restrictions, open access expands literature base and facilitates intellectual exchange for the research community. Open access can promote scholars' visibility and readership,²²⁹ thereby improving the potential impact of their works. In sum, open access can achieve higher accessibility and wider dissemination of knowledge promotes education and research, which in turn produces more knowledge for society.

224. See, e.g., Peter Suber, *Open Access Overview*, EARLHAM COLL. (Dec. 5, 2015), <https://legacy.earlham.edu/~peters/fos/overview.htm>.

225. See *id.*

226. Eric Priest, *Copyright and the Harvard Open Access Mandate*, 10 NW. J. TECH. & INTELL. PROP. 377, 391 (2012).

227. Suber, *supra* note 224.

228. See ROB JOHNSON ET AL., *THE STM REPORT: AN OVERVIEW OF SCIENTIFIC AND SCHOLARLY PUBLISHING* 5 (5th ed. 2018), https://www.stm-asoc.org/2018_10_04_STM_Report_2018.pdf.

229. Philip M. Davis, *Open Access, Readership, Citations: A Randomized Controlled Trial of Scientific Journal Publishing*, 25 FASEB J. 2129, 2131 (2011).

2. *Copyright Hurdles*

Scholarly authors are normally the first copyright owners of their publications. Historically, they distribute their research outputs to the academic community through publishers. Most assign or grant exclusive licenses to use copyright of their publications to publishers.²³⁰ Authors adopting the green OA model without the consent of publishers may infringe copyrights such as the right to reproduce copyrighted works,²³¹ the right to distribute copies of the works,²³² and the right to display the works to the public.²³³ On the other hand, scholars' careers depend to a large extent on their publication achievements. They are discouraged from archiving these articles on open, free repositories because this may negatively affect their publication opportunities or even risk provoking publishers to bring copyright infringement lawsuits against them.

Commercial publishers worry that open access will cause significant revenue loss, potentially causing their business fatal harm. Some have very profitable businesses under the traditional publishing and subscription model. Elsevier, a giant academic publisher owning many of the world's most prestigious journals, posted monstrous profit margins of 37% in 2017 and 2018.²³⁴ For non-commercial publishers, particularly specialized science societies, journal subscription fees are a major source of income funding their research, scholarships, and activities. Enabling free access would drive out niche journals, threaten the existence of their societies, and adversely affect scientific progress as a result.²³⁵

In 2015, Elsevier sued Sci-Hub for unlawfully reproduced and distributed copies of articles published on the Elsevier

230. Elizabeth Gadd et al., *RoMEO Studies 4: An Analysis of Journal Publishers' Copyright Agreements*, 16 *LEARNED PUBL'G* 293, 295 (2003).

231. 17 U.S.C. § 106(1) (2018).

232. 17 U.S.C. § 106(3) (2018).

233. 17 U.S.C. § 106(5) (2018).

234. Benedicte Page, *Elsevier Records 2% Lifts in Revenue and Profits*, *THE BOOKSELLER* (Feb. 21, 2019), <https://www.thebookseller.com/news/elsevier-records-2-lifts-revenue-and-profits-960016>.

235. Marilyn Werber Serafini, *Who Owns NIH Research?*, *NAT'L J.*, Dec. 4, 2004, at 3614, 3615.

website.²³⁶ Sci-Hub is a website hosted in Russia from which users can freely download scientific articles that are paywalled at their journal's websites.²³⁷ It claims to support the open access movement, removing informational and economic inequality by making scientific knowledge available everywhere in the world.²³⁸ The District Court for the Southern District of New York awarded Elsevier \$15 million in damages, and, in a default judgment, granted a permanent injunction to restrain Sci-Hub's operator from distributing Elsevier's copyrighted works.²³⁹

In 2017, the International Association of Scientific, Technical, and Medical Publishers, representing more than 140 publishers, requested ResearchGate amend its article-sharing practices, including its automated system for scanning uploaded articles. ResearchGate is a for-profit social networking site for the academic community that facilitates access to academic research by sharing publications and connecting researchers for collaboration.²⁴⁰ It has more than 15 million members worldwide.²⁴¹ After ResearchGate rejected its request, Elsevier sued ResearchGate for copyright infringement in Germany in 2017,²⁴² and in the United States in 2018.²⁴³ In

236. Complaint at 1, 7, *Elsevier Inc. v. Sci-Hub*, No. 15 CV 4282, 2015 WL 3505890 (S.D.N.Y. June 3, 2015).

237. Lindsay McKenzie, *Linking Liability*, INSIDE HIGHER ED (Aug. 16, 2019), <https://www.insidehighered.com/news/2019/08/16/legal-questions-raised-over-links-sci-hub>.

238. Sci-HUB, <https://sci-hub.scihubtw.tw/> (last visited Feb. 8, 2020).

239. *Elsevier Inc. v. Sci-Hub*, No. 15-CV-4282 (RWS), 2017 WL 3868800, at *1–3 (S.D.N.Y. June 21, 2017).

240. *About*, RESEARCHGATE, <https://www.researchgate.net/about> (last visited Feb. 7, 2020).

241. *Id.*

242. Dalmeet Singh Chawla, *Publishers Take ResearchGate to Court, Alleging Massive Copyright Infringement*, SCIENCE (Oct. 6, 2017, 5:47 PM), <https://www.sciencemag.org/news/2017/10/publishers-take-researchgate-court-alleging-massive-copyright-infringement>.

243. Complaint for Declaratory & Injunctive Relief & Damages, *Am. Chem. Soc'y v. ResearchGate GmbH*, No. 8:18-cv-03019-GJH (D. Md. Oct. 2, 2018); Holly Else, *Major Publishers Sue ResearchGate over Copyright Infringement*, NATURE (Oct. 5, 2018), <https://www.nature.com/articles/d41586-018-06945-6>.

response, ResearchGate terminated public access to 1.7 million articles on its site.²⁴⁴

When the copyright is vested in a publisher, the publisher has broad powers to control how it is shared—just as Elsevier has been trying to do. In this event, universities can hardly be granted rights or hold a copy for open access, just as the authors cannot publish their work on a free access online platform. This is indeed detrimental to the open access movement and international knowledge commons as a whole. Most researchers do not need copyright as an incentive to publish. The publisher is thus the only party in the research ecosystem with a major countervailing interest against open access and for locking up research behind paywalls.²⁴⁵

3. *A Better Open Access Mode*

Given their enormous academic and financial resources, elite universities should act in concert to resist publishers' cracking down on the open access mode of sharing research publications. I suggest that there are three strategies elite universities may take.

First, elite universities should forge a coalition for open access based upon the Harvard Open Access Project (HOAP). Launched in 2011, the HOAP makes knowledge accessible to the public.²⁴⁶ Aimed at creating a global knowledge commons, the HOAP builds open access support into standard university practice. In general, it provides automatic, default rights retention in scholarly articles and a commitment to providing copies for open distribution.²⁴⁷ It also offers guidance on how universities can flexibly adopt different open access policies without the need for strict sets of rules.²⁴⁸

244. David Matthews, *Publishers Push ResearchGate Harder in Copyright Battle*, TIMES HIGHER EDUCATION (Nov. 9, 2017), <https://www.timeshighereducation.com/news/publishers-push-researchgate-harder-copyright-battle>.

245. Suber, *supra* note 224, at 5.

246. Priest, *supra* note 226, at 381.

247. *Id.*

248. There are roughly six types of open access policies that universities can adopt according to their needs. Most stringent is where the institution is granted certain nonexclusive rights to future research articles published by faculty. Alternatively, the policy may simply require deposit of articles in the repository. Least demanding are policies that simply encourage open access with an opt-in measure. Different types of open access offer this access through different mechanisms. *See* Berkman Klein Ctr. for Internet & Soc'y,

Elite universities may take advantage of the HOAP as a forum for discussion of open access policies. Universities such as Duke, MIT, and Princeton have been a part of the HOAP since its inception.²⁴⁹ If more elite universities joined, the HOAP coalition would become more impactful, in turn prompting other academic institutions to join. This would help the HOAP develop a common open access policy template for all academic institutions.

Second, elite universities should consider requiring that research staff only publish government-funded scholarly works in open access journals. In 2018, Plan S, a major push for open access, was initiated by a group of national research funding organizations from twelve European countries, with the support of the European Commission and the European Research Council.²⁵⁰ Plan S requires scientists and researchers who have received funding from these research organizations and institutions to publish their works in open repositories, on open access platforms, or in journals that are available to the public without embargo by 2020.²⁵¹ This policy recommendation is based on the principle that since government funding is derived from taxes collected from the public, publications that rely upon such funding should directly benefit the public by providing free access.²⁵² Elite universities should closely study Plan S and the practical effects and implications of its policy recommendations, and then adopt appropriate open access

Univ. of Harvard, *Drafting a Policy*, HARV. OPEN ACCESS PROJECT, https://cyber.harvard.edu/hoap/Drafting_a_policy (last visited Jan 18, 2020).

249. See Berkman Klein Ctr. for Internet & Soc'y at Harvard Univ., *Policies of the Kind Recommended in the Guide*, https://cyber.harvard.edu/hoap/Additional_resources#Policies_of_the_kind_recommended_in_the_guide. See also Elisheva Patterson, *Academic Author Copyright Loss—Impacts and Remedies*, 61 ARIZ. L. REV. 699, 721-23 (2019) (describing Princeton's open access policy).

250. *What is cOALition S?*, PLAN S, <https://www.coalition-s.org/about/> (last visited Oct. 10, 2020).

251. The S-Plan Diet, *European Countries Demand That Publicly Funded Research Should Be Free to All*, THE ECONOMIST (Sept. 15, 2018), <https://www.economist.com/science-and-technology/2018/09/15/european-countries-demand-that-publicly-funded-research-be-free>.

252. *Principles and Implementation*, PLAN S, <https://www.coalition-s.org/addendum-to-the-coalition-s-guidance-on-the-implementation-of-plan-s/principles-and-implementation> (last visited Feb. 9, 2020).

publication policies for staff research that is government funded.

Third, elite universities should proactively fund and support the creation of open access journals and textbooks by their staff. Law reviews provide an excellent model for the creation of open access journals. Edited by law school students, publications are made available on the law review website or through open access sharing platforms such as Law Review Commons.²⁵³ Capitalizing on the elite university brand names and modelled on law reviews, new open access journals in different disciplines may be created with the enhanced engagement of relevant faculty members. For example, each Harvard Engineering School department could publish a new open access journal on computer science, bioengineering, electrical engineering, materials science and mechanical engineering, and so on, according to department specialty. If other elite universities make similar efforts in concert, these new open access journals will compete effectively with paywalled commercial journals operated by publishers like Elsevier. Such competition may lead these publishers to pursue alternative profit-making avenues through open access journals.

Textbooks have become increasingly expensive, and this places a big financial burden on students. Against this backdrop, Professor Tim Wu's recent opinion piece calls for the urgent reconsideration of the practice of professors assigning their students the textbooks they have written or published, and whether this is actually taking unfair advantage of students.²⁵⁴ An open textbook program could be created throughout elite universities, funding faculty members who are willing to publish open access textbooks and also providing research and editorial assistance. This program would allow faculty members to retain copyright over their textbooks, but keep them open and freely available for students and professors.

253. LAW REVIEWS COMMONS, <https://lawreviewcommons.com/> (last visited Oct. 10, 2020).

254. Tim Wu, Opinion, *How Professors Help Rip Off Students*, N.Y. TIMES (Dec. 11, 2019) <https://www.nytimes.com/2019/12/11/opinion/textbook-prices-college.html>.

B. *Enhancing Access to Libraries*

1. *Digital Libraries and E-Lending*

Elite universities boast some of the finest libraries in the United States. Seven elite universities own seven of the 10 largest U.S. libraries. Housing nearly 17 million volumes, Harvard has the third largest library in the United States and the largest private library in the world.²⁵⁵ Yale and Columbia house a similar number and diversity of volumes.²⁵⁶

However, elite university libraries are largely accessible only to university affiliates, not the general public. Is it possible to enable these excellent library systems to directly benefit the larger public? Advances in digital technologies are making it possible. The emergence of scanning and data-processing technologies, together with the invention of the Internet, have paved the way for digital libraries that offer unprecedented access to a vast body of knowledge.²⁵⁷ They allow users to read, borrow, search, copy, paste, highlight, and comment in ways that traditional libraries cannot. In the age of big data and artificial intelligence, digital libraries appear more desirable than ever,²⁵⁸ promoting speedy information searches and knowledge-sharing for a diverse array of human activities and ambitions. Current technologies are sufficiently advanced to permit the creation of digital public libraries and could even allow realization of a truly universal library.²⁵⁹

255. Benjamin Elisha Sawe, *Largest Libraries in the United States*, WorldAtlas, (Apr. 25, 2017), <https://www.worldatlas.com/articles/largest-libraries-in-the-united-states.html>.

256. *See id.*

257. MAURIZIO BORGHI & STAVROULA KARAPAPA, COPYRIGHT AND MASS DIGITIZATION 10 (2013) (“This unprecedented empowering of the reading experience with the accumulation of all the world’s knowledge in electronic format, and with all possible associations that can be made by exploring the computational potential of this knowledge, is what mass digitization promises to achieve.”).

258. *See* Catherine Nicole Coleman, *Artificial Intelligence and the Library of the Future, Revisited*, STAN. U.: DIGIT. LIBR. BLOG (Nov. 3, 2017), <https://library.stanford.edu/blogs/digital-library-blog/2017/11/artificial-intelligence-and-library-future-revisited>.

259. James Somers, *Torching the Modern-Day Library of Alexandria*, THE ATLANTIC (Apr. 20, 2017), <https://www.theatlantic.com/technology/archive/2017/04/the-tragedy-of-google-books/523320> (reporting that according to Richard Ovenden, the head of Oxford’s Bodleian Libraries, “[t]he universal library has been talked about for millennia”).

What stand in the way, however, are copyright holders. U.S. court decisions to uphold legality of the Google Books library, for instance—celebrated by the media²⁶⁰ and legal academy²⁶¹ as a triumph of education and knowledge sharing—only allow users to make full-text searches of the copyrighted books that Google has scanned and to subsequently enjoy snippet views of those books.²⁶² With these limitations, Google Books is far from a full-blown digital library.²⁶³ The U.S. judiciary’s “fair use” doctrine has, at best, legalized the operation of digital libraries only to the extent that Google has achieved. By no means has it eliminated the legal impediments keeping universities and governments from creating digital public libraries.²⁶⁴

Another option is the dissemination of books through e-lending from physical libraries housed at elite universities or other similar institutions. With the rise of the Internet and the rapid development of e-patrons such as Amazon Kindle, accessing and reading digital books has become easier and more popular.²⁶⁵ The advantages of digital books over physical books are, among other things, that digital books take up no physical space and can be kept forever, while physical books

260. See Andrea Peterson, *Google Books Just Won a Decade-Long Copyright Fight*, WASH. POST (Apr. 18, 2016, 12:47 PM), <https://www.washingtonpost.com/news/the-switch/wp/2016/04/18/google-books-just-won-a-decade-long-copyright-fight> (reporting that the conclusion of the copyright dispute would give “people a new way to find and buy books while at the same time advancing the interests of authors”).

261. See Pamela Samuelson, *Google’s Court Victory Is Good for Scholarly Authors. Here’s Why*, CHRONICLE OF HIGHER EDUC. (Oct. 27, 2015), <https://www.chronicle.com/article/Google-s-Court-Victory-Is/233940> (arguing that the final ruling by the U.S. court “is actually a substantial boon for authors, especially scholarly ones”); Haochen Sun, *Copyright Law as an Engine of Public Interest Protection*, 16 NW. J. TECH. & INTELL. PROP. 123, 186 (2019).

262. *Authors Guild, Inc. v. Google, Inc.*, 954 F. Supp. 2d 282, 291–92 (S.D.N.Y. 2013); *Authors Guild, Inc. v. Google, Inc.*, 770 F. Supp. 2d 666, 671 (S.D.N.Y. 2011).

263. See, e.g., Pamela Samuelson, *Google Books Is Not a Library*, HUFFINGTON POST (May 25, 2011), https://www.huffingtonpost.com/pamela-samuelson/google-books-is-not-a-lib_b_317518.html.

264. See Sun, *supra* note 261, at 186 (“Although the U.S. courts shielded Google Library through the application of the fair use doctrine, they did not remove all legal impediments to the potential creation of digital public libraries.”).

265. See Matthew Chiarizio, Note, *An American Tragedy: E-Books, Licenses, and the End of Public Lending Libraries?*, 66 VAND. L. REV. 615, 622–25 (2013).

wear over time. These two advantages are particularly important to libraries as they can reduce their operation costs.

Libraries acquire ownership of physical books when the books are purchased from publishers or their distributors. The situation is different than “purchasing” digital books. With licensing agreements regulating the relationship between publishers or their distributors on the one hand and libraries on the other hand, the two parties are no longer vendors and purchasers, but licensors and licensees. Subject to the terms of licensing agreements, libraries are merely licensees of digital books with a right to allow their patrons to access the books by way of online viewing and/or downloading.²⁶⁶ They have no right to lend digital books under the first sale doctrine as licensees do not meet the “ownership” requirement of Section 109(a).²⁶⁷

Linda Frederiksen et al. conducted a survey that examines the relationship between holding digital book collections and interlibrary loan use by looking at the daily lending practices of libraries for digital book chapters.²⁶⁸ It was revealed that 2.4% of respondent libraries with digital book collections had some or all interlibrary loan rights with respect to their digital books.²⁶⁹ 58% of the libraries had some or no licenses at all for interlibrary loan of digital books.²⁷⁰ The remaining 40% of the libraries did not know whether they had these licenses.²⁷¹ The results suggest that more than half of libraries are barred from lending digital books to other libraries’ patrons due to licensing restrictions imposed by publishers. Some libraries do not allow interlibrary loans of digital book chapters due to practical barriers such as the absence of workflow to verify interlibrary loan rights and the technical difficulty in handling digital book chapters.²⁷²

266. Kristen M. Cichocki, *Unlocking the Future of Public Libraries: Digital Licensing that Preserves Access*, 16 U. BALT. INTELL. PROP. L.J. 29, 38 (2009).

267. Marysia Wlazlo, Note, *The Take of the E-Book: Library Lending’s Newest Edition*, 63 SYRACUSE L.R. 273, 290 (2013).

268. Linda Frederiksen et al., *Ebooks and Interlibrary Loan: Licensed to Fill?*, 21(3) J. INTERLIBRARY LOAN, DOCUMENT DELIVERY & ELEC. RESERVES 117 (2011).

269. *Id.* at 128.

270. *See id.* at 125.

271. *See id.*

272. *See id.* at 129.

Meanwhile, major publishers have set different licensing restrictions on e-lending. Libraries are not permitted to lend digital books freely to their patrons as if they were physical books. Various lending and purchase models of e-lending are available in the marketplace,²⁷³ but none allow libraries to purchase multiple copies of digital books outright for lending. Basically, libraries need to pay a fee per circulation and/or re-purchase e-book copies when licensing periods run out.

Publishers have alleged that library lending of digital books is eroding their revenues.²⁷⁴ In November 2019, Macmillan Publishers applied a new, more restrictive lending and purchasing model to its new digital books, restricting the number of digital book copies for perpetual access to one per library for the first eight weeks after publication. After an eight-week waiting period, libraries can purchase additional unlimited copies for two years of access or fifty-two lends, whichever comes first.²⁷⁵ Under the old model, libraries could purchase as many digital copies as they chose.²⁷⁶ According to Macmillan, the new move protects the economic value of books and the publishing ecosystem. Nonetheless, many libraries are boycotting the policy, declining to purchase any new Macmillan books in digital format.²⁷⁷

Even if libraries are able to build digital collections by acquiring outright ownership of digital books, the first sale doctrine under copyright law will still not apply to their e-lending

273. Michael Kozlowski, *Big 5 Publishers Digital Lending and Purchase Models for Public Libraries*, GOOD E-READER (Nov. 19, 2019), <https://goodereader.com/blog/e-book-news/big-5-publishers-digital-lending-and-purchase-models-for-public-libraries>.

274. See, e.g., Matt Enis, *Macmillan Announces Two-Month Embargo on Library Ebooks*, LIBR. J. (July 25, 2019), <https://www.libraryjournal.com/?detailStory=Macmillan-announces-two-month-embargo-on-library-ebooks> (“Sargent said that the embargo had been tested with the Tor imprint ‘in response to our growing fears that library lending was cannibalizing sales.’”).

275. Gennie Gebhart, *Publishers Should be Making E-Book Licensing Better, Not Worse*, ELECTRONIC FRONTIER FOUND. (Nov. 7, 2019), <https://www.eff.org/deeplinks/2019/11/publishers-should-be-making-e-book-licensing-better-not-worse>.

276. Lynn Neary, *You May Have to Wait to Borrow a New E-Book from the Library*, NPR (Nov. 1, 2019), <https://www.npr.org/2019/11/01/775150979/you-may-have-to-wait-to-borrow-a-new-e-book-from-the-library>.

277. Matt Enis, *Libraries Respond to Macmillan Ebook Embargo with Boycotts, Advocacy*, LIBR. J. (Nov. 13, 2019), <https://www.libraryjournal.com/?detailStory=Libraries-respond-macmillan-ebook-embargo-boycotts-advocacy>.

programs. From technical and legal perspectives, lending digital books differs from lending physical books. It goes beyond distributing copyrighted works and also involves reproduction. Typically, digital files constituting digital books are transferred to and reproduced in readers' digital devices for access. Upon completion of the transfer, the library and the reader both keep a copy of the same digital book on their respective devices.²⁷⁸

In *Capitol Records, L.L.C. v. ReDigi Inc.*,²⁷⁹ the Court of Appeals for the Second Circuit dealt with whether the first sale doctrine codified in Section 109(a) of the Copyright Act allows resale to digital music purchases. The Second Circuit found that sellers uploading digital music files onto a remote server, and purchasers downloading them, caused digital music files to be fixed on new material objects "for a period of more than transitory duration." This was unauthorized reproduction, regardless of whether sellers' preexisting duplicates were destroyed.²⁸⁰ Such unauthorized reproduction violated Capitol Record's exclusive reproduction rights under Section 106(1) and "[was] not protected, and even addressed, by Section 109(a)."²⁸¹ The legal implication of the ruling is that the first sale doctrine does not extend to e-lending if digital files are transferred from libraries to patrons. In other words, reselling or lending digital copyrighted materials via data migration constitutes copyright infringement.

278. Chiarizio, *supra* note 265, at 626.

279. 934 F. Supp. 2d 640 (S.D.N.Y. 2013), *aff'd*, 910 F.3d 649 (2d Cir. 2018). ReDigi developed an online platform for the resale of lawfully purchased digital music files. When deleting digital music from their own computer, registered users could simultaneously upload this music onto a remote server, the "Cloud Locker", via ReDigi's media manager software program. Users could then resell these uploaded files. The seller's access to a music file was terminated and transferred to the purchaser at the time of purchase. The purchaser could then choose to download the file or retain the file on the Cloud Locker and stream it for access. Capitol Records, a recording label owning copyrights in a number of songs sold through ReDigi, sued ReDigi for multiple violations of the Copyright Act.

280. *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 657–58 (2d Cir. 2018).

281. *Id.* at 657.

2. *E-Lending as Fair Use*

Elite universities may consider relying on the fair use doctrine to provide e-lending services to students and research staff at partnered universities located in poor regions in the United States, as well as in “Least Developed Countries” as defined by the U.N.²⁸² This e-lending program would first encourage each elite university to collaborate with one partner university located in a poor United States region and another in a least-developed country. Elite universities can respond to an e-lending request of a student or research staff member at a partnered school by digitizing relevant materials. This digital technology has been applied by university libraries such as the Yale Library, enabling its patrons to borrow books in digital format.²⁸³ To comply with copyright law, Yale Library has put in place restrictions that only allow users to print up to 30% of the text, and to copy up to 15%.²⁸⁴ The e-lending program I propose may use these digital technologies with stricter limitations, such as limiting each user at a partner school to borrowing and viewing one e-book at a time and to printing and copying only up to 10% of the text.

The e-lending program as such is in line with the fair use doctrine.²⁸⁵ In determining whether a use of a work is fair or not, the court considers four non-exclusive statutory factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²⁸⁶ The first and fourth factors are the most important

282. Least Developed Countries (LDCs), <https://www.un.org/development/desa/dpad/least-developed-country-category.html> (last visited Sept. 26, 2020). For this solution to work, the intended audience would need internet access. While this may be a significant issue in expanding access, digital inequality is beyond the scope of this paper.

283. *Yale University Library eBooks: Ebook Central*, YALE U. LIBR., <https://guides.library.yale.edu/ebooks/EbookCentral> (last updated Sept. 16, 2020).

284. *See id.*

285. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1163 (9th Cir. 2007).

286. 17 U.S.C. § 107 (2018).

for fair use analysis.²⁸⁷ The first factor favors educational and transformative use of copyrighted works.²⁸⁸ The proposed e-lending program has an educational purpose and transforms the function of books in question into knowledge tools to *alleviate* poverty as those partnered universities lack funding to purchase adequate books for teaching and research. The fourth factor also favors the program, because it would not cause substantial harm to the market value of copyright holders' books given the limited number of users at those partner universities and the adoption of restrictive measures such as print and copy limits.

Recently, the Internet Archive together with other library organizations launched the Control Digital Lending (CDL) initiative. Libraries digitize materials in their collections to lend in place of print versions without prior permission from authors or publishers. CDL requires that the number of digital copies should not exceed the number of print copies libraries originally legitimately own, and one digital copy can only be loaned to one person at a time, for a limited time. Therefore, the "owned to loaned" ratio remains unchanged under CDL. The initiative holds promise for enhancing the efficiency of lending and broadening open access to information and knowledge. However, the legal basis of CDL is dubious, sparking controversy between industry associations and CDL-implementing libraries. The Internet Archive's Open Library has rejected a number of copyright takedown notices sent by Author Guild members requesting the removal of unauthorized digi-

287. See *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 (1994) ("[T]he fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance.").

288. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 606 (2008) (pointing out that "a finding of transformiveness may be dispositive of the outcome of the fair use test"); Neil Weinstock Netanel, *Making Sense of Fair Use*, 15 LEWIS & CLARK L. REV. 715, 768 (2011) ("Since 2005, the transformative use paradigm has come to dominate fair use case law . . ."); Rebecca Tushnet, *Copy This Essay: How Fair Use Doctrine Harms Free Speech and How Copying Serves It*, 114 YALE L.J. 535, 555 (2004) (arguing that "fair use law has been realigned around transformative use.").

tal copies of their books held by the library.²⁸⁹ In February 2019, a coalition of thirty-seven national and international organizations and federations representing writers, photographers, visual artists, translators, publishers, and reproduction rights and public lending organizations issued an open appeal letter to petition against the practice of CDL.²⁹⁰

The e-lending program I have proposed herein differs from the CDL. The program only applies to a small number of selected partner universities, not the public, and also places various limits on how its users may check out and read books electronically. Therefore, it falls within the requirements of the fair use doctrine and thereby does not infringe copyrights.

CONCLUSION

As both international human rights treaties and the Supreme Court have emphasized, the right to education entitles everyone to equal access to higher education. Nevertheless, as I have shown in this article, the luxurification of higher education stands in the way of this equality. The college admissions bribery scandal has proven that this problem is endemic in the U.S. higher education sector.

Unequal access to higher education can be effectively ameliorated by requiring elite universities to take more responsibility for protecting the right to higher education. An important way to achieve this goal, as discussed, is to encourage elite universities to responsibly exercise their intellectual property rights so as to make knowledge accessible to the general public through open access and fair use modes.

Through fulfilling such responsibilities, elite universities will help bring protection of the right to higher education into a new era of social justice, so that students from all walks of life can benefit from the democratization of knowledge. The beauty of this democratization is that while some students physically receive education at their elite university campuses,

289. *Controlled Digital Lending Is Neither Controlled nor Legal*, THE AUTHORS GUILD (Jan. 8, 2019), <https://www.authorsguild.org/industry-advocacy/controlled-digital-lending-is-neither-controlled-nor-legal>.

290. *Controlled Digital Lending: An Appeal to Librarians and Readers*, THE AUTHORS GUILD (Feb. 13, 2019), <https://www.authorsguild.org/industry-advocacy/cdl-appeal-to-readers-and-librarians>.

fellow students could intellectually join them in benefiting from the knowledge disseminated from these campuses.