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ALERT

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Internet Archive's Controlled Digital Book Lending Program Violates Copyright Law, Says Federal Appeals

By: Michael J. Schwab

A Federal appeals court has ruled that the nonprofit Internet Archive's "controlled digital lending program" – which creates and lends fully digitized copies of books – does not meet the copyright law's definition of a fair use. The September 4, 2024, decision in Hachette Books v. Internet Archive by the Second Circuit Court of Appeals upheld a lower court finding that the Internet Archive's lending practice runs afoul of the copyright law, even when it loans books on a one-to-one, owned-to-loaned basis.

The Internet Archive scans physical copies of books to create full digital versions, which consumers can check out on a one-to-one basis: i.e., one digital copy per physical book to one person at a time from one of the Archive's partner libraries. (The Internet Archive promotes its lending program to libraries as a free alternative to the print and eBooks sold by publishers.)

Back when the COVID pandemic was new, the Internet Archive set aside its one-to-one, owned-to-loaned policy for three months, which effectively permitted many people to borrow any scanned book simultaneously. The Archive's rationale was that rank-and-file readers couldn't get a hold of the books they used to borrow because the pandemic had shuttered their local libraries. But this wide-open lending program, known as the National Emergency Library, elicited strong objections from some authors, who saw it undermining their copyright protections.

Even though the Internet Archive responded to these complaints by restoring the original restrictive policy in June 2020, four publishers – Hachette, Penguin Random House, HarperCollins, and Riley – sued the Archive anyway, for allegedly violating the copyrights of 127 separate works with this lending practice.

Internet Archive claimed its lending practice constituted a permissible fair use of the works. Fair use refers to the legally permissible unauthorized use of a copyright protected work for certain purposes, such as commentary, criticism, news reporting, teaching, research and scholarship. Courts generally consider four factors in evaluating whether a particular use of a copyright protected work is a fair use. These are: (i) the purpose and character of the use, including whether the use is transformative; (ii) the nature of the

copyrighted work; (iii) the amount and substantiality of the portion of the work used; and (iv) the effect of the use on the potential market value of the copyrighted work.

In March 2023, the District Court for the Southern District of New York issued a summary judgment for the plaintiffs, and the Internet Archive subsequently appealed.

The higher court found that the Internet Archive failed to meet at least two of the four fair use factors – the "purpose and character of the use;" and "the effect on the potential market."

Regarding the first factor, the appeals court faulted the Internet Archive's digital copying and loan program for being insufficiently "transformative." A transformative use adds "new expression, meaning, or message" to the original work and is more likely to qualify as fair use than non-transformative copying.

The Second Circuit found that the Internet Archive merely changed the medium of the works (print to digital) and that such a change was derivative, not transformative. In other words, the digital copies (whether for use by one or many borrowers) served the exact same purpose as the original print books and, as such, were simply substitutes for the print books. The Internet Archive offered the same efficiencies as the publishers' own derivative works and greatly impinged upon the publishers' exclusive right to prepare those works.

As for the second factor, in disagreeing with the Internet Archive that its lending model was in the "public interest," the Court conceded that the program might have some short-term benefits for libraries and consumers. Nevertheless, it asserted that it also had long-term consequences and said it was "self-evident" that the Internet Archive's lending practices would cut into the publishers' market and had, and would, also hurt the books' authors.

The Second Circuit's decision is, of course, a major victory for the publishing industry. Importantly, the decision also has the potential to have a far-reaching impact on the viability of emerging technologies such as artificial intelligence (AI), whose basic building blocks rely on the use of prior works.

If you have any questions regarding the matter raised in this Alert, please feel free to contact **Michael J. Schwab** at mschwab@moritthock.com or (212) 239-5527.

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