March 31, 2023

Reflections from the Association of American Publishers on Hachette Book Group v. Internet Archive: An Affirmation of Publishing

Maria A. Pallante
President and Chief Executive Officer

Following three years of litigation in the critical copyright case *Hachette Book Group, et al, v. Internet Archive,* we now have a strong and favorable result. In granting summary judgement for the publisher plaintiffs, Judge Koeltl resolved all four fair use factors in the Copyright Act against the Internet Archive (IA). The opinion, issued a week ago on March 24, 2023, can be found here.

Everyone who values our global, creative economy should read the Court's opinion in *Hachette.* The holdings are a forceful validation of well-established law and an unequivocal rejection of the defendant's upside-down assertions that its activities support "research, scholarship, and cultural participation by making books more widely available on the Internet." That description is meant to sound lofty, but it ignores the economic incentives and protections that make creative professions possible in the first place. As the Court observed, "Any copyright infringer may claim to benefit the public by increasing public access to the copyrighted work" (P. 44, quoting *Harper & Row Publishers v. Nation Enterprises*).

The AAP helped to guide this suit because we know that copyright is both the lifeblood of authors and the foundation of a sustainable publishing industry. Four companies—Hachette Book Group, HarperCollins Publishers, John Wiley & Sons, and Penguin Random House—stood as plaintiffs to defend the principles at stake, but our membership includes a broad mix of commercial and nonprofit publishers of nearly every size and specialty, who in turn account to hundreds of thousands of authors.

The suit was prompted by IA's mass digitization and distribution of millions of books, without the permission of authors or publishers, in violation of fundamental principles of copyright law. Internet Archive sought to justify its "Open Library" under a legal theory called "controlled digital lending" (CDL), but the Court firmly rejected that assertion, holding instead that it offers up a competing market substitute for authorized versions of the works in violation of authors' and publishers' rights.

Judge Koeltl also addressed the ongoing nature of the threat, noting that IA could expand its Open Library project far beyond the current scope, and that new organizations might emerge to perform similar functions, which in the Court's view would plainly risk future displacement of the publishers' potential revenues. Making the point further, the Court said, "If anyone could freely access the works, electronically or otherwise, the [plaintiff] would have no market in

which to try and publish, disseminate, or sell its works" (P.40, quoting *Soc'y of the Holy Transfiguration Monastery, Inc. v. Gregory*).

Internet Archive's central claim is that if it possesses a print book, then it can also make and distribute digital copies of that print book to members of the global public under a library lending model, provided it does not also lend the print copy simultaneously. In practice, this "lending" operation involves systematically digitizing millions of print books without permission and sending the digital copies to anyone who signs up with an email address. In rejecting both the theory and operation of IA's CDL defense, the Court recognized that digital books are inherently different from physical books, including in the ease of distributing them worldwide in an instant.

It's important to note that Internet Archive plays no role in the hard work of researching, writing or publishing books, or for that matter, in creating or sustaining the overall publishing ecosystem, as bookstores and libraries do. IA's advocates often create the impression that libraries regularly engage in CDL to avoid copyright transactions, but the truth is that libraries regularly license ebooks from publishers for fees that permit their patrons to access them for free while ensuring that authors get paid.

In fact, despite IA's inducements, the vast majority of libraries do not participate in its CDL project. According to an interrogatory in the case, as of December 24, 2021, only 62 libraries contributed to IA's Open Library, and only 13 of those were public libraries out of 9,000 public library systems in the United States (P. 10 of this brief). The admission is consistent with testimony from IA's former Director of Finance, who said that by 2016 "our library partners ran out of books that were out of copyright, so pre-1923, and they're reluctant to give us books that were in copyright" (PP. 49-50 of this brief).

Internet Archive's posture and stated objectives continue to alarm authors and publishers around the world, not only because of the land grab that is at issue in this case, but also because of IA's very public attempts to bludgeon and belittle basic copyright principles. Prior to being sued, IA refused to halt or engage in discussions, and after being sued, it chose to accelerate its activities. In the spring of 2020, Internet Archive was offering copies of 1.4 million in-copyright titles to the public without permission. Today the number is 4.45 million.

The IA's expedience is inapposite to the way that lawful businesses operate. Bringing creative works to market takes time, talent, vision, relationships, collaborations, and resources. The very mission of publishing—to inspire, entertain, educate, transform, and promote scientific progress—requires a long view, which thankfully copyright affords.

As so clearly set forth in the Constitution, authors are the key to achieving the public purpose of copyright. In the world of publishing, authors are our heroes. So too are the individuals and businesses that help make books successful: readers, booksellers, educators, librarians, technology platforms, and everyone who protects and respects the rule of law.

One of the most basic rules in the Copyright Act is that copyrights are divisible. The divisibility empowers authors to license a plethora of rights, formats, markets, and derivative uses that derive from their creative expression, and to strive to do so over the course of many years. The CDL theory frontally devalues the potential of the copyright bundle by presuming that physical and digital formats are systematically interchangeable. Indeed, that one neat trick would make several inconvenient legal precedents go away, including the carefully drawn appellate decisions in *Authors Guild v. Hathi Trust* (2014), *Authors Guild v. Google Books* (2015), and *Capitol Records v. Redigi* (2018).

This precedent also explains how separate copyright interests inform the marketplace. As Judge Koeltl explicitly recognized, the publishers "did not price print books with the expectation that they will be distributed in both print and digital formats" and they "are entitled to revenue from all formats" (P.44). This fundamental principle provides an incentive to publishing houses and other media companies to invest in the development of new formats, from ebooks to streaming platforms, all for the benefit and enjoyment of the public.

As became clear in this case, CDL has no containable limiting principle. Under the theory, it would also be okay to publicly stream and distribute copies of music and films if the CDs and DVDs in possession (priced in the original markets as physical works) are held in a shipping container. A court decision in the other direction would most certainly have led us to such extrapolations because that is how legal precedent works. But unsurprisingly, Judge Koeltl could find "no legal principle or case" to support so wild a theory and so serious a slippery slope. Rather, he wrote, "Every authority points in the other direction" (P.45).

The key legal issue in the case was whether Internet Archive engages in a "transformative use" under the first factor of the fair use analysis. Internet Archive has insisted that its activities are "transformative" because it increases the "utility" of the works by making the delivery of ebooks more efficient and convenient. (Of course, publishers already engage in this very efficient form of distribution, including by licensing ebooks to libraries.) Citing to numerous fair use decisions, Judge Koeltl bluntly rejected IA's analysis as a distortion of the fair use doctrine.

As the opinion explains, Internet Archive does nothing to meet the transformative standard: It does not provide information about the works, create a searchable database in a manner that does not allow users to read the texts, use its scans to detect plagiarism, or display tiny low-resolution thumbnails that link to websites containing the originals. Rather, as the Court explained, it usurps a market "that properly belongs to the copyright-holder" (P. 39, quoting *Fox News v. TVEyes*).

The Court also rejected Internet Archive's argument that the underlying values beneath the first sale doctrine should be imported into the fair use analysis, since that doctrine (codified by Congress) only permits a lawful owner of a print book to lend, sell, or otherwise redistribute it, not to reproduce it, including in a different medium. Observing that language from the U.S. Appeals Court in *Redigi* (involving music files) "applies equally to IA," Judge Koeltl concluded that the Court is not free to disregard the terms of the Copyright Act "merely because the entity

performing an unauthorized reproduction makes efforts to nullify its consequences by the counterbalancing removal from circulation of the preexisting copies" (P. 33, quoting Redigi).

It is worth noting that extensive discovery in the litigation showed that Internet Archive had not enforced its most central CDL principles. Regardless, the Court warned that "Even full enforcement of a one-to-one owned-to-loaned ratio, however, would not excuse IA's reproduction of the Works in Suit" (P. 32). As this holding reaffirms, injecting unauthorized digital copies of an author's book into public circulation is not allowed. The public policy reasons for this conclusion are not new. Publishers are entitled to create the contractual and technical controls that they deem necessary to protect their intellectual property and to have oversight of digital distributions.

As a point of clarity, we sued Internet Archive on June 1, 2020, for its entire practice of "controlled digital lending," not only the extra-extreme version that it rolled out in March 2020 with its hyperbolic "National Emergency Library" (NEL) and shut down on June 16, 2020, shortly after the U.S. Copyright Office suggested it was likely outside the bounds of fair use. We previewed a suit in February 2019 with this public statement, which regrettably was ignored. When the pandemic hit, the underlying suit was already being prepared. But that doesn't make the NEL any less astonishing—it was a sweeping unilateral assertion that seemed to suggest that private actors can adopt their own self-serving laws during a time of crisis.

Internet Archive continues to explain its NEL infringement as a solution to brick-and-mortar libraries being shuttered in the early days of the pandemic. This rationale is nonresponsive to the fact that libraries were already offering licensed digital services, which were not shuttered but thriving. In fact, the first year of the pandemic achieved record levels of digital book circulation from authorized libraries engaged in authorized lending.

Unsurprisingly, the NEL rattled authors and Senators, as well as the Copyright Office which concluded that, "[I]t would have been beneficial for Internet Archive to engage with writers and publishers prior to launching the National Emergency Library to discuss the contemplated parameters for the project and determine their willingness to participate." In any event, Judge Koeltl disposed of the emergency version of CDL in a few simple lines of a 47-page opinion (P.46), while comprehensively rejecting the original version.

While the recent decision finds that Internet Archive's activities far exceed fair use, the fair use doctrine is alive and well under the law, and anyone is free to apply it in accordance with the precedent set forth in this and other cases. Indeed, libraries, authors, and businesses all rely on the doctrine. Separate from fair use, the AAP supports efforts to update Section 108 of the Copyright Act (the library exceptions) to permit qualifying libraries, museums, and archives to make digital copies of works in circumstances that warrant such duplication. The issues and recommendations are laid out comprehensively in the Copyright Office's 2017 report. See https://www.copyright.gov/policy/section108.

In the context of the lawsuit, Internet Archive worked hard to describe its mission in the language of multiple institutions (libraries, museums, and archives), but it seems obvious that IA is first and foremost a private archive, as its primary mission is to collect and preserve material, including at-risk works that might otherwise disappear. This is what an archive should do. What archives do not routinely do is loan or transmit their collections indiscriminately to members of the public in contravention of the digital rights of the copyright holders.

Lending to the public has more traditionally been the domain of public libraries, which are community institutions devoted to their respective locales, and which make numerous and unique contributions to society. It therefore seems potentially hurtful to public lending libraries to be lumped into the same category as an international Internet platform that is acting as a global collector, hub, and distribution platform for literary works, and one potentially siphoning off their patrons. No doubt, there are perspectives on these points that are properly the purview of library, archive, and museum professionals to debate, but if the lines should blur in a manner that would affect the exclusive rights and limitations of the Copyright Act, the issues become public policy questions that are more broadly important, including to the affected rightsholders.

Meanwhile, just as Congress intended, the Copyright Act supports billions of seamless transactions on the Internet, a feat that is a testament to the significant work of policymakers to adopt modern copyright treaties, enact statutory updates, and combat the organized piracy that is responsible for devastating losses to the creative economy. The lawful chain of commerce includes business models for noncommercial partners, which permit authors to convey—and publishers to deliver—a robust selection of ebooks to public libraries for their patrons. In fact, during 2021 libraries achieved all-time records for circulation, while lowering the average cost-per-title borrowed, with over 120 libraries reaching one million digital checkouts. In 2022 the trend continued, with more public libraries than ever exceeding 1 million digital book checkouts. Also during 2022, 129 public library systems in seven countries achieved more than 1 million digital book checkouts.

It is a fact that library patrons have never had access to more ebooks than they do today, but that doesn't mean that authors publishers, libraries, platforms and aggregators will cease to explore new options. The lawful marketplace is constantly evolving, and it depends entirely on innovations, negotiations, and thought leadership. Of course, ebooks are but one format that publishers invest in and make available in addition to audiobooks, print books, learning platforms, and interactive software. In general, readers of fiction and nonfiction trade titles remain overwhelmingly attached to hardcover and softcover formats which continue to comprise over 75 percent of the consumer market. Print books are also essential to instilling literacy and a love of reading in young people, as this article from the National Literacy Trust explains, as well as this one from the journal *Research in Social Stratification and Mobility about* growing up in a home with 500 books.

What was this litigation about? It was about honoring the importance of copyright law to the public interest and not taking for granted the rights, remedies, and exceptions that Congress

has legislated in its careful judgement over two and half centuries of attention to intellectual property.

The AAP is proud of the plaintiff publishing houses for vigorously pursuing justice for themselves, their authors, the industry, and the future industry, especially during the difficulties of the global pandemic. We are extremely grateful to the Authors Guild (which represents novelists, biographers, children's book writers, and scores of other professional authors who devote years of dedication, skill, and talent to their crafts), as it played a leading and early role in uncovering the infringement, demanding answers, and alerting policy makers and the public to the existential nature of the threat.

The Authors Guild also led an important *amicus curiae* brief in the case that was signed by 23 organizations representing hundreds of thousands of professional writers, creators, and their agents. The brief states that "IA's implausible assertion of fair use merely rehashes arguments that this Court, the Second Circuit and the U.S. Supreme Court have squarely and consistently rejected." It also observes that "The public-spirited veneer of "library lending" behind which IA seeks to disguise its massive infringement is a Trojan horse. It undermines the careful balancing of interests that Congress codified in the Copyright Act and poses a grave threat to the livelihoods of countless individual copyright owners."

The Copyright Alliance also filed a brief in support of the publishers. It represents two million individual creators and over 15,000 organizations across the entire spectrum of creative industries that depend on the exclusive rights guaranteed by copyright law, including members of the film, music and software industries. The Alliance told the court that the Internet Archive's practice "may start here with books, but by judicial extension, could quickly threaten motion pictures, music, software, video games, and other works that enrich our society…It is feasible that it and other actors could "lend" for free thousands of copies of the bestsellers from every artistic industry—books, music, film, and more—all to compete with lawfully made licensable digital works and streaming services."

Also filing was a coalition of seven international organizations, led by the International Publishers Association, on behalf of publishers, authors, and producers from the book, music, and film industries worldwide. Their brief reminded the Court of the various copyright treaties and normative practices to which the United States is a party. Controlled digital lending is "contrived," it wrote, and the facts "do not meet the minimum standard for protection as defined by international treaties." The international *amic*i also cautioned that if the United States is "perceived to allow businesses like IA to function without restraint [the] spillover problem will be global, massive, and potentially irreversible."

We are also grateful for the brief filed by Professors and Scholars of Copyright Law—a significant filing that reminded the Court of the shaky basis of the Internet Archive's position. "Although CDL is presented by IA and IA *amici* as an established library practice," the scholars wrote, it is in fact a concept that IA invented as a shield for itself and its library collaborators." As they further explained, "Since it is clear that neither fair use nor first sale provides a basis for

CDL, its proponents fall back on an argument that when fair use and first sale are combined, the rules of copyright are somehow reversed to permit the activities in question."

The AAP and plaintiff publishers are represented in this case by Elizabeth McNamara and Linda Steinman and their team at Davis, Wright, Tremaine, New York, and Scott Zebrak and Matt Oppenheim and their team at Oppenheim + Zebrak, Washington, DC. We are so appreciative of their counsel, skills, and partnership.

(Minor edits April 4, 2023).