

The Future of Controlled Digital Lending

Dave Hansen
Authors Alliance



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Position Statement On Controlled Digital Lending By Libraries

Introduction

This Position Statement on Controlled Digital Lending by Libraries (“Statement”) offers a good faith interpretation of U.S. copyright law for American libraries considering how to perform traditional lending functions using digital technology while preserving an appropriate balance between the public benefit of such lending and the protected interests of private rights holders. This Statement only applies to in-copyright works, as public domain works may be distributed without restriction. This Statement is not intended to describe the upper limits of the fair use or other rights of libraries, bind the signatories to any legal position, or constitute legal advice. **Because the following analysis is general, any library considering implementing controlled digital lending should consult a competent attorney to develop an appropriate program responsive to the specific needs of the institution and community.**

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Controlled Digital Lending (“CDL”)

A White Paper on Controlled Digital Lending of Library Books

David R. Hansen & Kyle K. Courtney¹

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This paper is about how libraries can legally lend digital copies of books. It explains the legal and policy rationales for the process – “controlled digital lending” – as well as a variety of risk factors and practical considerations that can guide libraries seeking to implement such lending. We write this paper in support of the *Position Statement on Controlled Digital Lending*,² a document endorsed by many libraries, librarians, and legal experts. Our goal is to help libraries and their lawyers become more comfortable with the concept by more

¹ *These institutional affiliations are for identification purposes only.* David R. Hansen is Associate University Librarian for Research, Collections & Scholarly Communications at Duke University Libraries. Kyle K. Courtney is Copyright Advisor and Program Manager at Harvard Library’s Office for Scholarly Communication.

We’re grateful for comments and suggestions from a number of people including Lila Bailey, Anne Gilliland, Mary Minow, Rachael Samberg, Pamela Samuelson, Jason Schultz, Kevin Smith, and Michelle Wu. Thanks also to staff, participants, and attendees who helped hone our thoughts in sessions we held on this topic at the 2018 American Association of Law Libraries Annual Meeting, the 2018 Kraemer Copyright Conference, the Lillian Goldman Law Library at Yale University, the 2018 Copyright First Responders Pacific Northwest workshop, and the 2018

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

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

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1
through 5, inclusive,

Defendants.

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

**BRIEF OF AMICUS CURIAE AUTHORS ALLIANCE, INC. IN SUPPORT OF
DEFENDANTS**

PARTNERSHIP

The Canadian Journal of Library and Information Practice and Research
Revue canadienne de la pratique et de la recherche en bibliothéconomie et sciences de l'information

vol. 17, no. 2 (7100)
Features (peer-reviewed)
DOI: <https://dx.doi.org/10.21083/partnership.v17i2.7100>
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Controlled Digital Lending of Library Books in Canada

Le prêt numérique contrôlé des livres de bibliothèque au Canada

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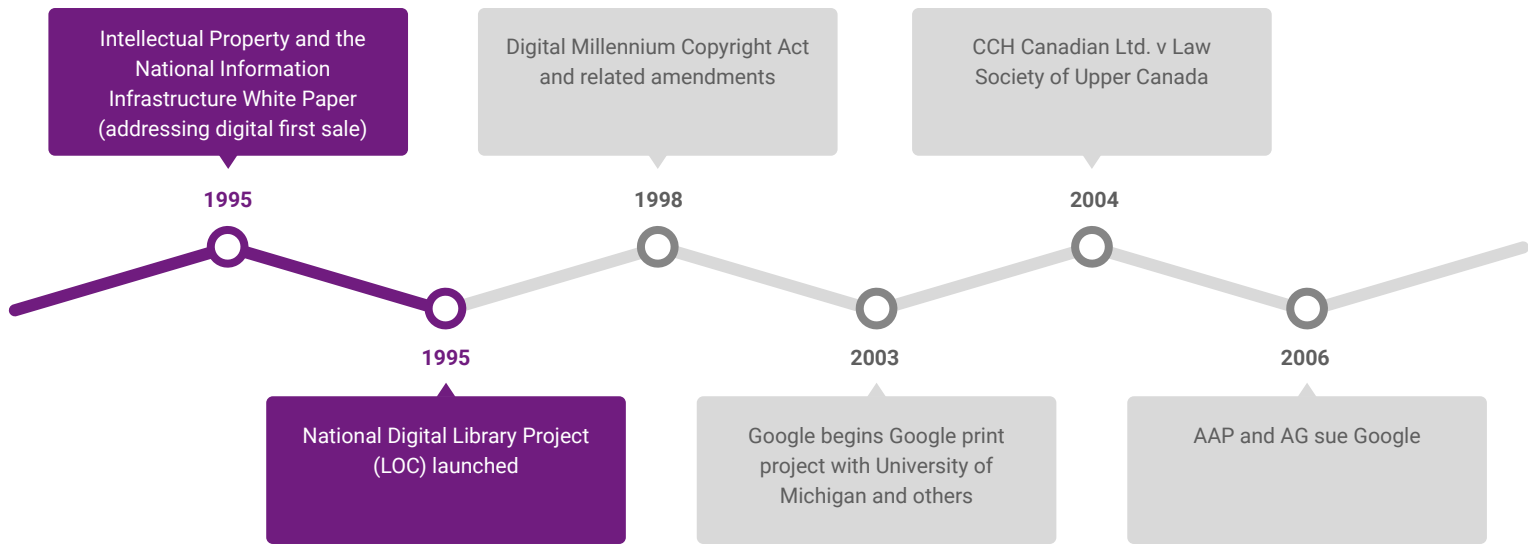
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Abstract / Résumé

This paper explores legal considerations for how libraries in Canada can lend digital copies of books. It is an adaptation of *A Whitepaper on Controlled Digital Lending of Library Books* by David R. Hansen and Kyle K. Courtney, and draws heavily on this source in its content, with the permission of the authors. Our paper considers the legal and policy rationales for the process—"controlled digital lending"—in Canada, as well as a variety of risk factors and practical considerations that can guide libraries seeking to implement such lending, with the intention of helping Canadian libraries to explore controlled digital lending in our own Canadian legal and policy context. Our goal is to help libraries and their lawyers become better informed about controlled digital



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Placeholder



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sale at a less price will be treated as an infringement
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INTELLECTUAL PROPERTY
AND THE
NATIONAL INFORMATION
INFRASTRUCTURE

THE REPORT OF THE WORKING GROUP ON
INTELLECTUAL PROPERTY RIGHTS

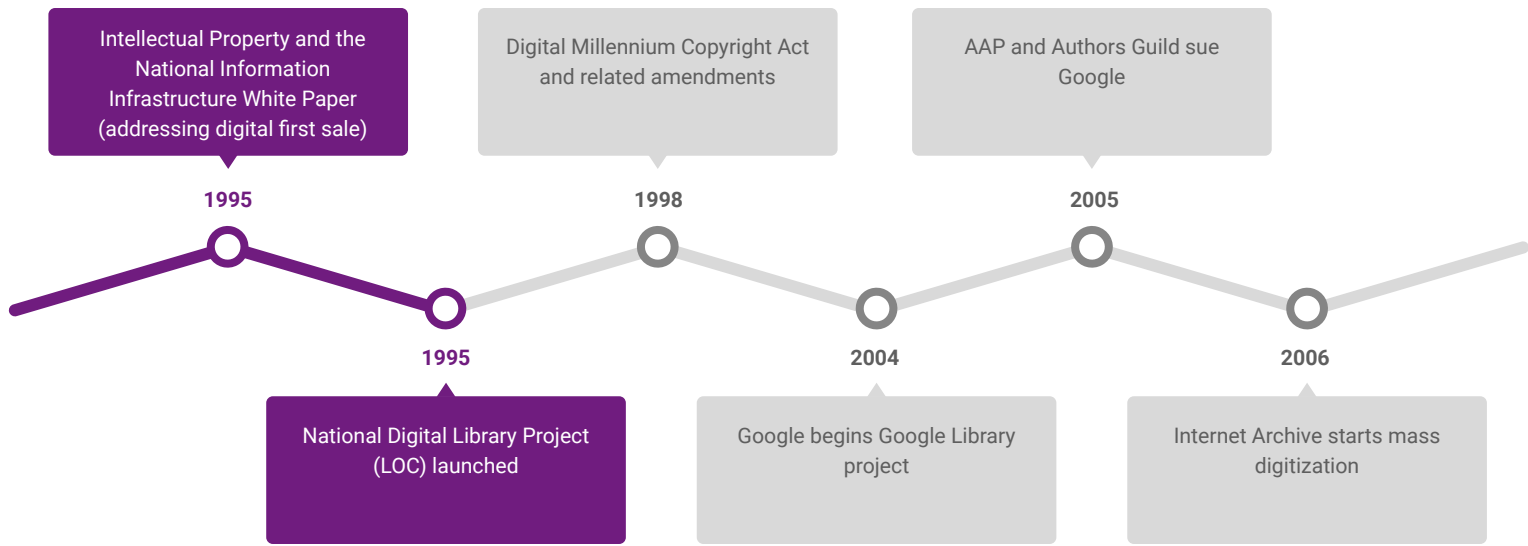
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INFORMATION INFRASTRUCTURE TASK FORCE

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11226

RONALD H. BROWN
Secretary of Commerce
CHAIR





Report to Congress: Study Examining 17 U.S.C. Sections 109 and 117 Pursuant to Section 104 of the Digital Millennium Copyright Act

March 21, 2001

INTRODUCTION

Congress enacted the Digital Millennium Copyright Act (the "DMCA" or "the Act")⁽¹⁾ as part of an effort "to begin updating national laws for the digital era."⁽²⁾ It was designed to "facilitate the robust development and world-wide expansion of electronic commerce, communications, research, development, and education in the digital age."⁽³⁾

The DMCA seeks to advance two mutually supportive goals: the protection of intellectual property rights in today's digital environment and the promotion of continued growth and development of electronic commerce.⁽⁴⁾ The Act attempts to accomplish these priorities through, *inter alia*, the interaction of two carefully crafted imperatives. First, as a means of preventing the theft of copyrighted works, the Act affords copyright owners legal protection and remedies against unauthorized circumvention of technological measures employed to prevent unauthorized access to copyrighted works.⁽⁵⁾ Second, as a means of advancing a more efficient electronic marketplace, the Act guides legitimate consumers and businesses to create and use appropriate devices, conduct, and models in the course of their electronic transacting.⁽⁶⁾ The DMCA reflects Congress' understanding that the melding of these concepts into workable legislation was critical to determining the extent to which electronic commerce realized its potential.

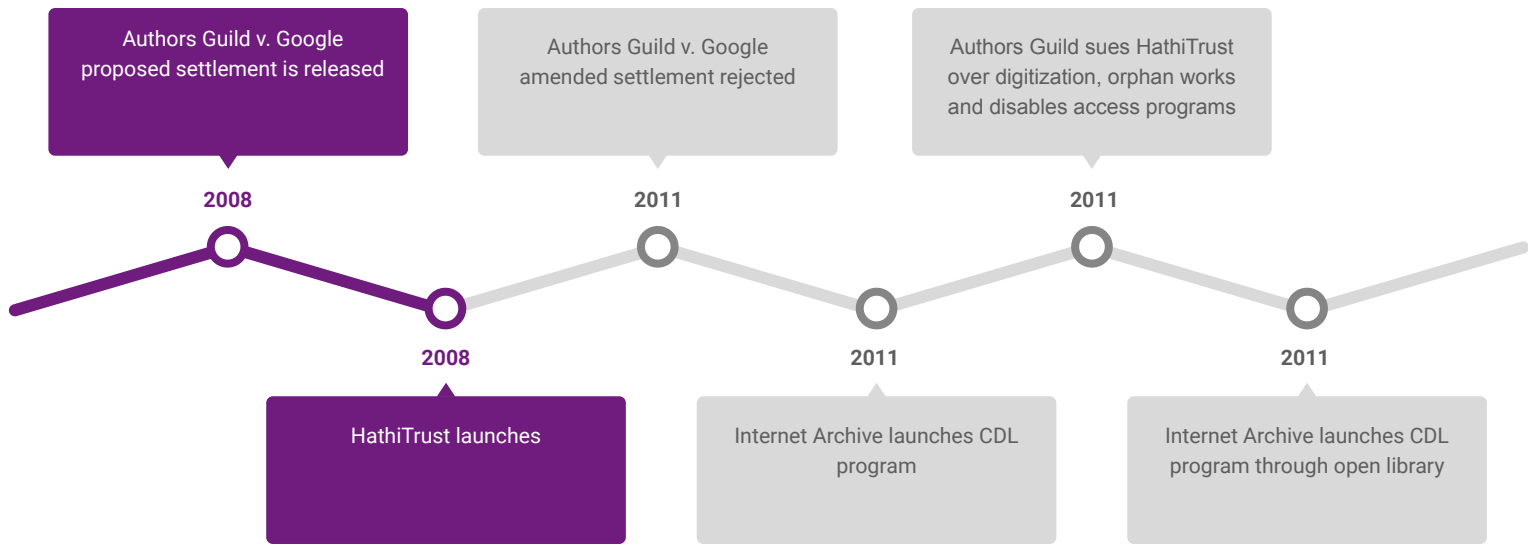
Scanning for the
Digital Books Project is
in progress in this Library

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Lib

Thank you for your patience

Google™

MBoo



13-4829-cv

United States Court of Appeals

for the

Second Circuit

THE AUTHORS GUILD, BETTY MILES, JIM BOUTON, JOSEPH GOULDEN, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

HERBERT MITGANG, DANIEL HOFFMAN, individually and on behalf of all others similarly situated, PAUL DICKSON, THE McGRAW-HILL COMPANIES, INC., PEARSON EDUCATION, INC., SIMON & SCHUSTER, INC., ASSOCIATION OF AMERICAN PUBLISHERS, INC., CANADIAN STANDARD ASSOCIATION, JOHN WILEY & SONS, INC., individually and on behalf of all others similarly situated,

Plaintiffs,

– v. –

GOOGLE, INC.,

Defendant-Appellee.

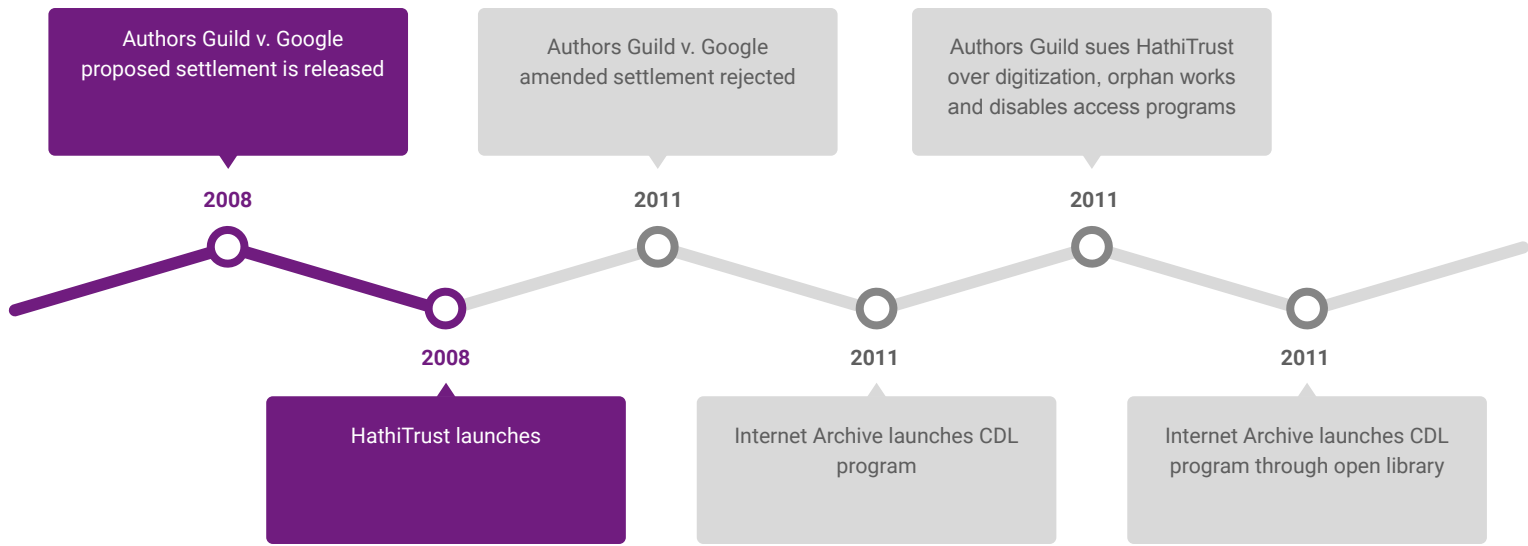
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**BRIEF FOR *AMICUS CURIAE* AUTHORS ALLIANCE IN
SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE**

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Libraries Have a Novel Idea

Lenders Join Forces to Let Patrons Check Out Digital Scans of Shelved Book Collections

By Geoffrey A. Fowler

Updated June 29, 2010 12:01 am ET



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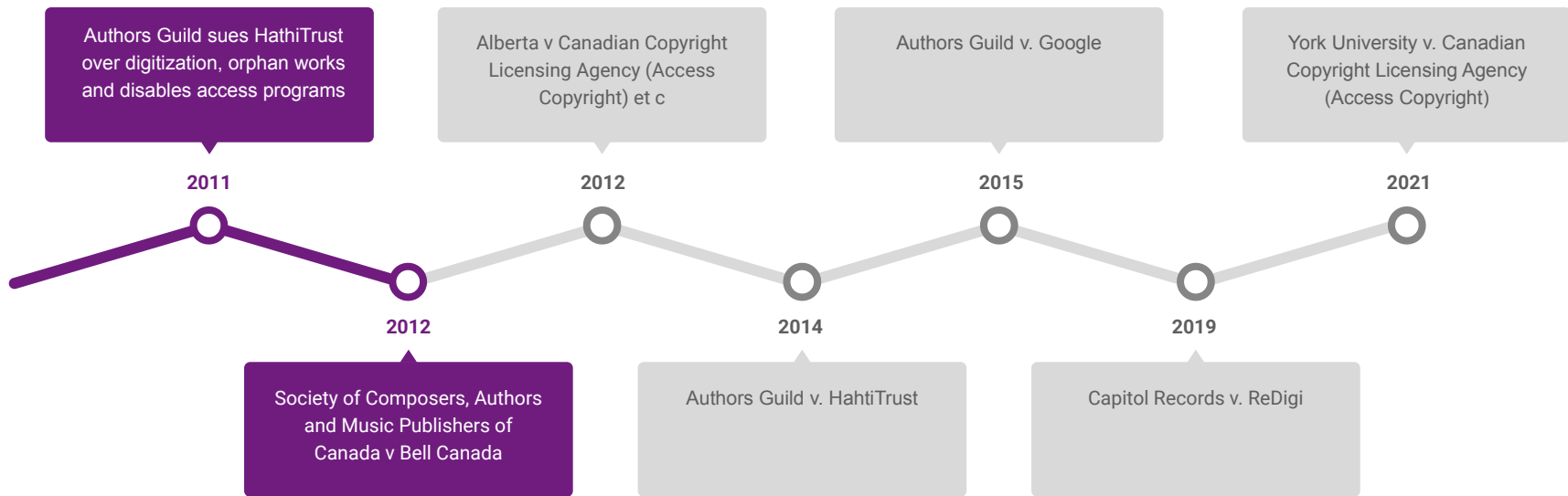


Resize



Several public libraries, including Boston's, plan to launch a novel approach to loaning books: letting patrons check-out digital scans over the Internet of books still protected by copyright. Geoffrey Fowler discusses.

Starting Tuesday, a group of libraries led by the Internet Archive, a nonprofit digital library, are joining forces to create a one-stop website for checking out e-books, including access to more than a million scanned public domain books and a catalog of thousands of contemporary e-book titles available at many public libraries.



Controlled Digital Lending

An emerging method that allows libraries to loan print books to digital patrons in a “lend like print” fashion.

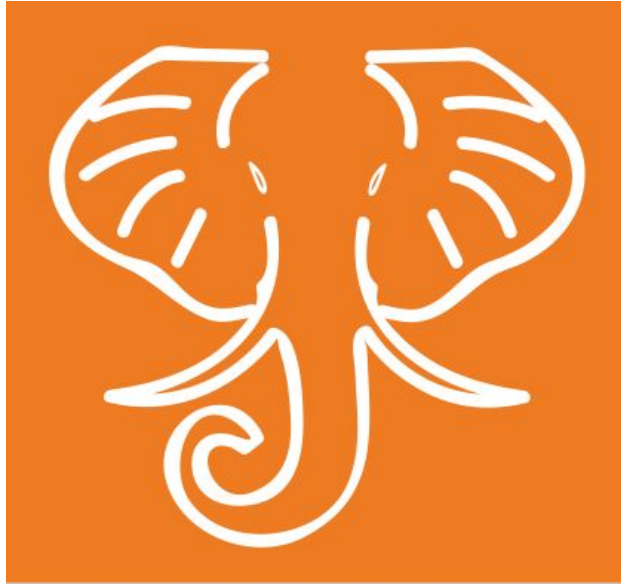
Through CDL, libraries use technical controls to ensure a consistent “owned-to-loaned” ratio, meaning the library circulates the exact number of copies of a specific title it owns, regardless of format, putting controls in place to prevent users from redistributing or copying the digitized version.

When CDL is appropriately tailored to reflect print book market conditions and controls are properly implemented, CDL may be permissible under existing copyright law. CDL is not intended to act as a substitute for existing electronic licensing services offered by publishers. Indeed, one significant advantage of CDL is addressing the “Twentieth Century Problem” of older books still under copyright but unlikely ever to be offered digitally by commercial services.

The CDL Methodology

- (1) ensure that original works are acquired **lawfully**
- (2) apply CDL only to works that are **owned** and **not licensed**
- (3) limit the total number of copies in any format in circulation at any time to the number of physical copies the library lawfully owns (maintaining an “**owned to loaned**” ratio)
- (4) lend each digital version only to a **single user** at a time (**just as a physical copy** would be loaned)
- (5) **limit the time** period for each lend to one that is parallel to physical lending
- (6) use digital rights management to **prevent wholesale copying and redistribution**





HATHI
TRUST

Emergency Temporary Access System (ETAS)

Hachette Book
Group, Inc. v.
Internet Archive
(1:20-cv-0416)
District Court, S.D.
New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

HACHETTE BOOK GROUP, INC., :
HARPERCOLLINS PUBLISHERS LLC, JOHN : 20 Civ. _____
WILEY & SONS, INC., and PENGUIN RANDOM :
HOUSE LLC, : ECF Case

Plaintiffs, :

-against- : **COMPLAINT**
: TRIAL BY JURY DEMANDED

INTERNET ARCHIVE and DOES 1 through 5, :
inclusive, :
Defendants. :

----- x

Plaintiffs Hachette Book Group, Inc. (“Hachette”), HarperCollins Publishers LLC (“HarperCollins”), John Wiley & Sons, Inc. (“Wiley”), and Penguin Random House LLC (“Penguin Random House”), by and through their attorneys Davis Wright Tremaine LLP and Oppenheim + Zembrak, LLP, for their Complaint, hereby allege against Defendant Internet Archive (“IA” or “Defendant”) and Does 1 through 5 as follows:

Publisher's Complaint

“Defendant [IA] is engaged in **willful mass copyright infringement.**”

“**Without any license or any payment to authors or publishers,** IA scans print books, uploads these illegally scanned books to its servers, and distributes verbatim digital copies of the books in whole....”

“[W]hile [IA] claims to serve an educational purpose, **education has long been a primary mission and market of publishers.**”

“In short, [IA] merely exploits the investments that publishers have made in their books, and it does so through **a business model that is designed to free-ride on the work of others....**”

Internet Archive Defense

“All CDL does, and all it can ever do, is offer a **limited, digital alternative to physically handing a book to a patron.**”

“Libraries deciding how to meet their patrons’ needs for digital access to books are not making a choice between paying ebook licensing fees or getting books for free. **Libraries pay publishers under either approach.**”

With CDL “librarians can continue to maintain permanent collections of books, to preserve those books in their original form for future generations, and **to lend them to patrons one at time,** as they have always done.”

Modern Transformative Fair Use

Four Factors of Fair Use:

- (1) the purpose and character of the use;
- (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.

Development of Transformative Fair Use

- (1) Does the use **transform the material**, by using it for a **different purpose**?
- (2) Was the **amount taken appropriate** to the new purpose?

The case for CDL in the United States:
First Sale (exhaustion) + Fair Use

Purpose and Character of Use

- Possibly transformative
- Not commercial
- Underlying purpose is the same as the exhaustion doctrine
- No additional copy is being used

Nature of & Amount Used of Work

- Largely neutral
- Context dependent

Market Effect

- Library owns a legitimate copy of the book
- The digital copy substitutes for the owned copy
- Same damage as using its acquired item

The case for CDL in the Canada:
Technological Neutrality + Exhaustion
Fair Dealing

Technological Neutrality

Entertainment Software Association v Society of Composers, Authors and Music Publishers of Canada (ESA)

- Question about the application of a separate tariff on the basis of format
- *“In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.”*

Society of Composers, Authors and Music Publishers of Canada v Bell Canada (SOCAN)

- Goal of technological neutrality is so the copyright act “operates consistently, regardless of the form of the media involved, or its technological sophistication.”

Exhaustion

Théberge v Galerie d'Art du Petit Champlain Inc

- Appellants purchased lawfully reproduced posters of the respondent's paintings and used a chemical process that allowed them to lift the ink layer from the paper (leaving it blank) and to display it on canvas.
- “[T]he proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature. In crassly economic terms it would be as inefficient to overcompensate artists and authors for the right of reproduction as it would be self-defeating to undercompensate them. Once an authorized copy of a work is sold to a member of the public, it is generally for the purchaser, not the author, to determine what happens to it.”
- “[the dissent] takes the position that if the image were transferred from one piece of paper to a different piece of paper with no other “change”, there is a new “fixation” and that would be “reproduction”. But in what way has the legitimate economic interest of the copyright holder been infringed? The process began with a single poster and ended with a single poster. “

Fair Dealing

Sec. 29, 29.1, 29.2 of the Copyright Act (research, private study, education, parody, satire, criticism or review and news reporting)

CCH Canadian Ltd. v Law Society of Upper Canada: Fairness

- Purpose of the dealing
- Character of the dealing
- Amount of the dealing
- Alternatives to the dealing
- The nature of the work
- The effect of the dealing on the work

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HACHETTE BOOK GROUP, INC.,
ET AL.,

20-cv-4160 (JGK)

Plaintiffs,

OPINION & ORDER

- against -

INTERNET ARCHIVE, ET AL.,

Defendants.

JOHN G. KOEHL, District Judge:

The plaintiffs in this action, four book publishers, allege that the defendant, an organization whose professed mission is to provide universal access to all knowledge, infringed the plaintiffs' copyrights in 127 books (the "Works in Suit") by scanning print copies of the Works in Suit and lending the digital copies to users of the defendant's website without the plaintiffs' permission. The defendant contends that it is not liable for copyright infringement because it makes fair use of the Works in Suit. See 17 U.S.C. § 107. The parties now cross-move for summary judgment. For the following reasons, the plaintiffs' motion for summary judgment is **granted**, and the defendant's motion for summary judgment is **denied**.¹

¹ The Complaint also names five John Doe defendants. ECF No. 1 ("Compl."), § 27. The cross-motions for summary judgment concern only Internet Archive, the named defendant.

What did the court say?

- Not transformative; same purpose (reading books)
- Commercial in nature; IA uses website to drive traffic, which in turn drives donations, etc.
- Fulfillment of public benefit mission not relevant
- Uses the entire work
- Directly competes with market because ebooks are available to be licensed

Where do we go from here?

- Internet Archive has appealed to the Second Circuit Court of Appeals
- Briefs filed earlier this year and oral argument is next week! June 28.
- Oral argument on June 28
- Timeline for a decision is likely to be within 12 months, but can vary
- Decision of the Second Circuit will likely be binding precedent for all parties within that jurisdiction (NY, VT, CT)
- Will either side attempt to appeal further to the US Supreme Court (and will the court take the case?)

Some different legal contexts

Statutory damages (up to \$150,000 per work infringed in the US, though not available in cases of good faith assertion uses of fair use by libraries)?

Aggressive litigation environment



● March 16, 2023

The Internet Archive Is a Library

A lawsuit against the Internet Archive threatens the most significant specialized library to emerge in decades, say a group of current and former university librarians.

By [Dave Hansen](#) , [Deborah Jakubs](#) , [Chris Bourg](#) , [Thomas Leonard](#) , [Jeff MacKie-Mason](#) , [Joseph A. Salem Jr.](#) , [MacKenzie Smith](#) and [Winston Tabb](#)

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State Library Agencies



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Institute for the Study of
Knowledge Management
in Education



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OF RESEARCH
LIBRARIES

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ASSOCIATION OF SOUTHEASTERN RESEARCH LIBRARIES



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Alma

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RESHARE

The future of library resource sharing

OCCAM'S
READER



box

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Questions?

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