

Appeals court ruling backs big publishers' lawsuit against the Internet Archive

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6 September 2024

On Wednesday, a three-judge federal appeals court panel upheld an earlier ruling in favor of major book publishers and found that the Internet Archive was guilty of violating copyright law by scanning books and lending them to the public for free.

In its 64-page decision, the US Court of Appeals for the Second Circuit in Manhattan ruled in favor of the lawsuit filed in 2020 by four of the 10 largest book publishers in the world against the San Francisco-based nonprofit Internet Archive and its Open Library project.

The court rejected the Internet Archive's appeal which was based on the argument that lending digital copies to the public at no charge should be considered "fair use" of copyrighted content. The court also rejected the Internet Archive's novel policy of "controlled digital lending" in which electronic copies of books can be borrowed by readers one copy at a time in the same manner readers have been borrowing print books from public libraries for 235 years.

The appeals court ruling states:

This appeal presents the following question: Is it "fair use" for a nonprofit organization to scan copyright-protected print books in their entirety, and distribute those digital copies online, in full, for free, subject to a one-to-one owned-to-loaned ratio between its print copies and the digital copies it makes available at any given time, all without authorization from the copyright-holding publishers or authors? Applying the relevant provisions of the Copyright Act as well as binding Supreme Court and Second Circuit precedent, we conclude the answer is no.

The four publishers—Hachette Book Group, Inc.,

HarperCollins Publishers LLC, John Wiley & Sons, Inc. and Penguin Random House LLC—mounted their lawsuit in the first year of the pandemic after they learned that the Internet Archive had launched the National Emergency Library (NEL). The NEL was created in response to the closure of libraries during the public health emergency and the calls from readers and librarians to provide a means for people to obtain access to millions of books.

The NEL was an extension of the Internet Archive's previously existing Open Library, minus the controlled digital lending, and permitted large numbers of people to borrow digital copies all at the same time. This response by the non-profit to an unprecedented crisis of access to books then became the subject of a ferocious campaign by the \$25 billion book publishing industry which claimed, "willful mass copyright infringement" and demanded damages in its lawsuit.

After Judge John G. Koeltl of US District Court for the Southern District of New York forcefully ruled in favor of the publishers in March 2023, the Internet Archive removed 500,000 titles from its digital library and filed an appeal in September 2023.

One aspect of Koeltl's ruling overturned by the appeals court was the contention that the Internet Archive was engaged in commercial activity. The judge ruled that the nonprofit was soliciting donations from readers and visitors to its Open Library website, gained non-monetary reputational benefit from its lending program and also received a small percentage of the sales of books from its Better World Books subsidiary.

The appeals court was not prepared to go as far as the lower court judge in stripping the Internet Archive of any financial resources whatsoever. However, the appeals court had no difficulty defending the market interests of the big book publishers who saw the limited initiative of the Internet Archive as a threat to its profits.

As the appeals court ruling states, "IA copies the Works

in full and makes those copies available to the public in their entirety. It does not do this to achieve a transformative secondary purpose, but to supplant the originals.”

While the appeals court decision is directed at protecting the multibillion-dollar book publishing monopolies, it sought to hide this behind claims that it is defending the rights of authors. The ruling states:

With each digital book IA disseminates, it deprives Publishers and authors of the revenues due to them as compensation for their unique creations. Though IA and its amici [supporters] may lament the consolidation of editorial power and criticize Publishers for being motivated by profits, behind Publishers stand authors who are entitled to compensation for the reproduction of their works and whose “private motivation” ultimately serve[s] the cause of promoting broad public availability of literature, music, and the other arts.

As pointed out by Dave Hansen, executive director of the Author’s Alliance, a nonprofit that advocates expanded access to digital books, the presentation of the relationships between authors and publishers by the court is a distortion. Hansen asserted:

Authors are researchers. Authors are readers. IA’s digital library helps those authors create new works and supports their interests in seeing their works be read. This ruling may benefit the bottom line of the largest publishers and most prominent authors, but for most it will end up harming more than it will help.

There is no doubt that the aggressive legal posture of the publishers toward the Internet Archive is aimed at bankrupting and shutting down the organization. Alongside the book publishers’ case, the Internet Archive also is facing a new lawsuit filed on August 11 by Universal Music Group, Sony Music Entertainment and other record labels for copyright infringement.

The labels’ lawsuit says that the Internet Archive’s “Great 78 Project” is an “illegal record store” for songs

by musicians including Frank Sinatra, Ella Fitzgerald, Miles Davis and Billie Holiday. The recording industry has achieved considerable experience with digital rights management and has aggressively pursued actions against anyone and everyone it considers a threat to the commercial distribution of online music.

The global record industry labels, which had sales of \$17.1 billion in 2023, have identified 2,749 recording copyrights that have been violated and they are claiming damages of \$412 million. The annual budget of the Internet Archive, a US 501(c)(3) nonprofit, is \$37 million derived from grants, donations and foundation funds.

The Internet Archive was founded in 1996 to provide free access to collections of digitized media including websites, software applications, music, audiovisual and print materials. The organization is an advocate of an open and free internet. As of this writing, the archive has more than 42.1 million print materials, 13 million videos, 1.2 million software programs, 14 million audio files, 5 million images, 272,660 concerts and over 866 billion web pages in its Wayback Machine.

The Wayback Machine is an archive of the World Wide Web that allows readers to go “back in time” and see how websites looked in the past. It is a repository of the internet that is archiving and preserving online content from defunct websites.

Responding to Wednesday’s appellate court ruling, the Internet Archive issued a statement that said, “We are disappointed in today’s opinion about the Internet Archive’s digital lending of books that are available electronically elsewhere. We are reviewing the court’s opinion and will continue to defend the rights of libraries to own, lend, and preserve books.”

Speaking to the *New York Times*, Brewster Kahle, computer engineer and founder of the Internet Archive, said, “People are worried about book bannings and the defunding of libraries, but I don’t know that there is really an awareness of what’s going on in the movement toward license-only access to electronic material.”

Kahle continued, insisting that libraries are “not just a Netflix reseller of books to their patrons. Libraries have always been more than that.”



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