



fair use of “*foul play*”? sdny judge says no!

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practice areas

intellectual property

In ***Hachette Book Group, Inc. v. Internet Archive***, No. 20-CV-4160 (JGK), 2023 WL 2623787 (S.D.N.Y. Mar. 24, 2023), Judge John G. Koettl ruled that the “digital lending library” operated by Defendant Internet Archive (“IA”) infringed copyrights owned by the Plaintiffs in books that IA had reproduced and distributed to the public on the theory that it could run an “emergency library” during the pandemic. The court rejected IA’s defense that their conduct constituted fair use under Section 107 of the Copyright Act.

Plaintiffs are a consortium of U.S. publishers that hold the copyright in the 127 books at issue in the case. IA offered to “lend” to the public electronic versions of these books, among the millions they possess, including, for example, Janet Evanovich’s *Foul Play* (1989), William Golding’s *Lord of the Flies* (1954), Toni Morrison’s *The Bluest Eye* (1970), and Zora Neale Hurston’s *Their Eyes Were Watching God* (1937). IA justified this conduct by relying on so-called and legally untested “Controlled Digital Lending” (“CDL”), whereby the number of digital copies lent would not exceed the number of print copies owned. At the start of the COVID-19 pandemic, IA abandoned its CDL because the pandemic allegedly “took 650 million print books out of circulation,” and allowed up to ten-thousand users to borrow one eBook simultaneously. Plaintiffs sued for copyright infringement, and IA defended on the grounds of fair use.

Applying the four non-exclusive factors under Section 107, the district court rejected IA’s fair use defense and found copyright infringement. The first fair use factor focuses on the purpose and character of the use, and particularly whether the work is transformative. The court determined that converting an



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entire printed book into an eBook is non-transformative, rejecting the argument that "efficient and convenient" delivery was sufficient to establish an expanded utility of the original work. The court distinguished *Authors Guild v. Google, Inc.*, 804 F.3d 202 (2d Cir. 2015) and *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87, 94 (2d Cir. 2014). In *Google*, the court permitted wholesale copying to provide snippets of books showing the context of a user's search results. In *HathiTrust*, the court permitted wholesale copying to create a searchable database of books that displayed primarily bibliographical information about the book and the page numbers where search terms appeared; except, when it provided full copies to readers with disabilities.

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