



not just your neighborhood library: second circuit rejects argument that internet archive's e-book database is fair use

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On September 4, 2024, in *Hachette Book Group, Inc., et al. v. Internet Archive*, the U.S. Court of Appeals for the Second Circuit affirmed a ruling that a defendant that has created a massive database of copyrighted print books and allows users to access the books for free cannot rely on the copyright law's fair use defense, 17 U.S.C. §107, to evade liability for copyright infringement. The opinion marks a significant development in copyright law following the United States Supreme Court's ruling in *Andy Warhol Foundation Visual Arts v. Goldsmith*, 598 U.S. 508 (2023) ("*Warhol*").

Defendant Internet Archive maintains the so-called "Free Digital Library," by which it has created digital copies of print books and makes those books available on the internet for free. Except for a period in 2020, Internet Archive has limited the amount of "checkouts" to the number of print copies that it or its partner library possesses.

In 2020, Plaintiffs, four book publishers, sued Internet Archive for copyright infringement. Internet Archive asserted the defense of fair use. Pre-*Warhol*, the district court rejected that defense and granted summary judgment for Plaintiffs. On appeal, the Second Circuit affirmed, but for reasons differed somewhat from the district court's ruling. Applying section 107's four-factor test for fair use, the Court held as follows:

First Factor: The Purpose and Character of the Use. In assessing this factor, a court will consider whether a defendant's work is "transformative" of the original and whether the defendant's use is "commercial." Notably, the Second Circuit stressed that the transformative nature of the secondary work remains the most important consideration under the first factor—even though some

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commentators have interpreted the Supreme Court's *Warhol* opinion as elevating commerciality to the primary inquiry.

In asserting fair use, Internet Archive argued that its Free Digital Library is transformative because the library makes "lending more convenient and efficient" and "delivers the work to one already entitled to view it—the one person borrowing the book at a time." Internet Archive further contended that its database allows authors writing online articles to link directly to digital books, another purportedly transformative purpose.

The Second Circuit rejected this argument and found Internet Archive's use to be non-transformative, concluding that the digital copies do not provide criticism, commentary, or information about originals—illustrative examples of fair use set forth in Section 107. Neither does the Free Digital Library add something new to the originals, with a further purpose and character, altering the originals with a new meaning or message—other indicia of a transformative use. On the contrary, according to the Court, Internet Archive's digital books serve the exact same purpose as the originals, namely "making authors' works available to read." Put differently, the Free Digital Database substitutes for the original copyrighted works, which are available online and are the subject of the copyright owners' thriving e-book market. That Internet Archive has changed the media of the originals was of no moment—to be transformative, a work must do something more than package the original. Indeed, Internet Archive's digitized Free Library merely creates derivative works and offers no efficiencies beyond those that the copyright owners already offer through their own e-book offerings.

Turning to the issue of commerciality, the Court concluded that Internet Archive's use is *not* commercial. In this regard, the court of appeals' holding rejected the district court's finding that the use was commercial because Internet Archive solicits donations on its website and takes a cut of the proceeds of certain sales of physical copies of books. Because Internet Archive provides the books for free, it makes a noncommercial use of the copyrighted works.

Nonetheless, the Court found that "transformativeness remains the central focus of the first factor." It therefore concluded that the first factor weighed in favor of the Plaintiff publishers.

Second Factor: The Nature of the Copyrighted Work. The second fair use factor inquires into, among other things, whether a plaintiff's work is creative (thus weighing against fair use) or rather factual or informational (leaning in favor of fair use). Because its Free Library contains both fictional and non-fictional works, Internet Archive asserted that the second factor weighed neutrally. The Second Circuit rejected the argument, noting that even the nonfiction books in Internet Archive's database contained original expression "close to the core of intended copyright protection." For this reason, the second factor, too, weighed in favor of the Plaintiffs and against fair use.

Third Factor: The Amount and Substantiality of the Use. Internet Archive copied the entirety of each copyright work. While complete copying does not automatically weigh against fair use, the Court found it highly significant that Internet Archive copies the works in their entirety *and makes them available in their entirety to the public*. As a consequence, the case before the Court was distinguishable from cases like *Authors Guild v. Google, Inc.*, 804 F.3d 202, 214 (2d Cir. 2015), in which the defendant copied entire books but made only snippets available to the public. Because the use was not transformative and the Internet Archive copies the entire works, the third factor also



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weighed in favor of Plaintiffs.

Fourth Factor: The Effect of the Use Upon the Potential Market or Value of the Copyrighted Work. In analyzing the fourth fair use factor, the Second Circuit reiterated that—except for identifying relevant markets—a defendant has the burden under the fourth factor. Significantly, although the Plaintiffs had argued the relevant market was the market for e-books, the Court concluded that the relevant market was for the copyrighted works in general, regardless of format. That is, the Court considered the effect on the market for print books as well.

The fourth factor, too, weighed in favor of Plaintiffs and against fair use. Rejecting the declarations of Internet Archive's experts as unpersuasive, the Court noted that Internet Archive's Free Digital Library not only serves as a substitute for the copyrighted works but also is *intended* to do so. Because Internet Archive "appropriates" the copyrighted works without paying the customary licensing fee, the Plaintiffs suffered market harm. Moreover, unrestricted and widespread conduct of the type in which Internet Archive engages would have an adverse impact on the potential market for the copyrighted works.

Finally, in considering the fourth fair use factor, the Second Circuit inquired into whether the public benefits from the Free Digital Library outweigh the harm to the Plaintiffs' market. The Court concluded that both the Plaintiffs *and* the public would benefit from a finding that Internet Archive does *not* make fair use of Plaintiffs' works. Noting that any copyright infringer may claim to benefit the public by increasing access to the copyrighted work, the Court held that, on the facts before it, a finding of fair use would impede the purposes of the Copyright Act by depriving authors of fair compensation and thus discouraging them from producing new expressive works. Thus, the fourth factor weighed in favor of Plaintiffs.

Because all four factors weighed against fair use, the Court held that Internet Archive's fair use defense failed as a matter of law.

Hachette Book Group is a notable opinion for a number of reasons. Among others, the Court clarifies the effect of the *Warhol* opinion in analyzing the first factor; focuses the inquiry under the fourth factor to an entire market, irrespective of a work's format; and reaffirms that wholesale copying of works into massive databases is not automatically fair use, even when a defendant offers the works for free.