

INTELLECTUAL PROPERTY LITIGATION

Second Circuit Affirms That Scanning and Distribution of Print Books by Nonprofit is Not Transformative Fair Use

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On Sept. 4, 2024, the United States Court of Appeals for the Second Circuit affirmed a district court decision that a defendant nonprofit's copying of physical books and distributing them for free online did not constitute "fair use." See *Hachette Book Group, Inc. v. Internet Archive*, 115 F.4th 163, 174-75 (2d Cir. 2024).

The plaintiffs, comprising a group of publishers (the Publishers), sued defendant Internet Archive, a nonprofit, for infringing the Publishers' copyrights for certain books, with the defendants responding that their copying and distribution activities amounted to transformative fair use. See *id.* at 174, 177.

In affirming the district court, the Second Circuit found that all four fair use factors favored the Publishers. See *id.* at 196. As of Dec. 3, 2024, the deadline for Internet Archive to request Supreme Court review passed with no petition for a writ of certiorari filed. As a result, the Second Circuit's decision is final.

The Copyright Act and the Fair Use Defense

The Copyright Act of 1976 (the Copyright Act or the Act) grants the author of an original work "a bundle of exclusive rights" that include the right to

reproduce the copyrighted work, distribute copies of the work, and display the copyrighted work publicly. See 17 U.S.C. §106.

Copyright owners also have the exclusive right to prepare derivative works. See *id.* Derivative works are defined via a list of activities, such as translation, abridgement, condensation, "or any other form in which a work may be recast, transformed, or adapted." See 17 U.S.C. §101.

However, these rights are not absolute. The Copyright Act allows for "fair use" of copyrighted work, "including such use by reproduction in copies or phonorecords or by any other means specified ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research." 17 U.S.C. §107.

The Act provides four non-exclusive factors for courts to consider when assessing "fair use." See *id.* These four factors are: (i) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (ii) the nature of the copyrighted work; (iii) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (iv) the effect of the use upon the potential market for or value of the copyrighted work. See *id.*



Case Background and the District Court's Decision

The plaintiff Publishers are, per the district court, “four of the leading book publishers in the United States.” See *Hachette Book Group, Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 374 (S.D.N.Y. 2023). They obtain from authors exclusive rights to publish books in print and digital formats, including, as relevant here, the electronic copies of books (i.e., eBooks). *Id.*

The Publishers use various licensing models to profit from distributing eBooks to libraries, which the Publishers’ expert described as a “thriving” licensing market. See *id.* at 375.

Internet Archive is a nonprofit whose mission is to provide “universal access to all knowledge.” *Id.* at 374. Responsible for popular projects such as the “Wayback Machine,” which archives public webpages to document the history of the Internet, Internet Archive also scanned “millions” of print books and made the scanned eBooks publicly available online. See *id.* at 374-75.

Internet Archive did not make the books available for download. Rather, they could be checked out from an online library on a one-to-one “owned to loaned ratio” (i.e., if three physical copies of a book were owned, three eBook versions could be checked out at any one time). See *id.* at 375-76.

In June 2020, the Publishers filed suit, claiming that Internet Archive had infringed their copyrights in 127 books, including *Lord of the Flies*, *The Bell Jar*, and *Catcher in the Rye*. See *id.* at 377; 115 F. 4th at 176-77. Internet Archive, in turn, claimed that

its lending of the Publishers’ works constituted “fair use.” 664 F. Supp. at 377.

Following discovery, both parties moved for summary judgment on the Internet Archive’s liability for copyright infringement. *Id.* Internet Archive did not dispute that it violated the Publishers’ rights as copyright holders but asserted that the “fair use” doctrine excused its infringement. *Id.* at 378-79.

In its opinion, the district court found that all four “fair use” factors favored the Publishers. See *id.* at 390-91. The district court subsequently entered a permanent injunction barring Internet Archive from distributing and reproducing the 127 works at issue; Internet Archive appealed. See 115 F. 4th at 177.

Second Circuit Opinion

On appeal, Internet Archive challenged the district court’s rejection of its “fair use” defense. See *id.* at 179. The Second Circuit’s opinion therefore assessed the four factors for that defense, ultimately upholding the district court’s determination.

Purpose and Character of the Use

The court explained that the first “fair use” factor—the purpose and character of the use—focuses “primarily on the extent to which the secondary use is transformative; that is, whether the new work merely supplants the original, ‘or instead adds something new, with a further purpose or different character, altering the [original] with new expression, meaning, or message.’” See *id.* at 179 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994) (alteration in original)).

Internet Archive maintained that its digital library was transformative because it used technology “to make lending more efficient” and “enable[d] uses not possible with print books and physical borrowing,” thereby serving a new and different function. *Id.* at 180. However, the court was not convinced, explaining that the eBooks served the exact same purpose as the originals, and the change in format was not a transformation. See *id.* at 180-82.

In fact, the court found that to deem Internet Archive’s use transformative would “significantly narrow—if not entirely eviscerate—copyright owners’ exclusive right to prepare (or not prepare) derivative works.” See *id.* at 181.

The court then continued its analysis of the first “fair use” factor, determining in *Internet Archive’s* favor that its activities were not commercial. However, as the central focus of the factor is transformativeness, the court found that the factor favored the publishers.

Nature of the Copyrighted Works

In assessing the second factor, courts consider (i) whether the work is expressive or creative and (ii) whether it is published or unpublished. See *id.* at 187. The factor is more likely to favor a “fair use” defense where the work is factual (rather than expressive or creative) and where the work is published. See *id.*

Internet Archive attempted to argue that the factor did not favor either party because the works at issue, while published, were a mix of fiction and non-fiction. *Id.* The court was not persuaded, explaining that non-fiction works, while factual, “represent the authors’ original *expressions* of [] facts and ideas.” *Id.* at 187 (emphasis added). Accordingly, the court concluded that the second fair use factor also favored the Publishers. *Id.*

Amount and Substantiality of the Use

The court quickly dispensed with the third factor. The court explained that “[g]enerally, a finding of fair use is more likely when ‘small amounts, or less important passages [of the work] are copied than when the copying is extensive, or encompasses the most important parts of the original.’” *Id.* at 187.

Though Internet Archive argued that the factor weighs neutrally because copying of entire works was necessary to carry out its lending activity, the court pointed out that such an argument depended entirely on an assumption that the use is transformative. *Id.* at 188. As the court had already determined that the use was *not* transformative, the court found the third factor favored the Publishers. See *id.* at 188-89.

Effect on the Potential Market Value of the Works

The court then considered the final factor, which “focuses on whether the copy brings to the marketplace a competing substitute for the original, or its derivative, so as to deprive the rights holder of significant revenues because of the likelihood that

potential purchasers may opt to acquire the copy [rather than] the original.” *Authors Guild v. Google, Inc.*, 804 F.3d 202, 223 (2d Cir. 2015).

This broad inquiry focuses not only on the market harm caused by the infringement, “but also the market harm that would result from unrestricted and widespread conduct of the same sort.” See *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169, 179 (2d Cir. 2018) (cleaned up) (citation omitted).

The court defined the relevant market as the works “in general, without regard to format” given the breadth of the exclusive rights the Publishers received from the authors. 115 F. 4th at 189. The court reiterated that Internet Archive’s use was intended to act as a substitute for Publishers’ own copies of the eBooks, further agreeing with the Publishers’ assessment of the market harm—that as the rights holder, they lost eBook licensing fees and would also suffer future harm if Internet Archive’s practices become widespread. See *id.* at 190, 192.

The court determined that any public benefits from Internet Archive’s lending practices would not outweigh the harm to the Publishers’ markets. In fact, the court concluded that both the Publishers *and* the public would benefit from rejecting Internet Archive’s “fair use” argument. See *id.* at 195.

The court reasoned that permitting this sort of copying and free dissemination would result in “little motivation to produce new works,” and a resulting “dearth of creative activity would undoubtedly negatively impact the public.” See *id.*

With the fourth “fair use” factor also favoring the Publishers, the court stated that Internet Archive’s defense failed as a matter of law and affirmed the district court’s ruling. *Id.* at 196.

Conclusion

The Second Circuit’s decision may have significant downstream implications for other digital lending services, making it more difficult to operate absent licensing agreements with copyright holders of the various works they seek to distribute. With Internet Archive deciding against petitioning the Supreme Court, we may well see similar litigation pop up in other jurisdictions outside the Second Circuit until the issue is more widely settled.