Beast or Misunderstood Prince? Internet Archive Denied Fair Use Claim

By Cooper Karras

The Southern District of New York issued an important ruling on an issue that is as old as time; however, this tale does not center on a conflict between a book loving princess and her misunderstood, transformed prince. This conflict, instead, centers on a group of book publishers who sued the nonprofit Internet Archive (IA) for scanning and lending digital copies of copyrighted books.[1] Whether you view IA as the misunderstood prince merely trying to promote fair use access to digital materials or an infringing beast undermining copyright protections, the development and implications of this holding has the potential to meaningfully impact copyright law.

The Publishers, Hachette Book Group, HarperCollins Publishers, John Wiley & Sons, and Penguin Random House, offer licenses to libraries typically through a one-copy, one-user model. [2] The libraries pay a single fee for an eBook and patrons will digitally checkout and access that copy.[3] From there, each publisher has variations in their licensing such as a pay-per-use model, time licensing models, or other various subscription models. [4] IA has scanned millions of print books and made these books available online for free while retaining the print copies in storage to keep them from circulation.[5] As part of their online collection, IA provides unauthorized access to 3.6 million protected books, including 33,000 of the Publisher's titles.[6] During the Covid-19 pandemic, IA removed technical controls which had previously limited the number of downloads for a work to the number of copies of that work that they had in storage.[7] Instead, thousands of patrons were now able to borrow each eBook on the website.[8]

IA defended themselves arguing that they were protected by a copyright term called "fair use."[9] The Court addressed IA's fair use claim. It stated there was nothing transformative about IA's copying and unauthorized lending,[10] IA uses its website to attract new members and solicit donations,[11] the nature of the works was the same,[12] the entire works were used,[13] and the IA's copying would have a major effect on the publisher's potential market.[14] The Court concluded

---

[1] *Hachette Book Grp., Inc. v. Internet Archive*, No. 20-cv-4160 (JGK), 2023 U.S. Dist. LEXIS 50749 (S.D.N.Y. Mar. 24, 2023).
[2] *Id.* at 5.
[3] *Id.*
[4] *Id.* at 5-6.
[5] *Id.* at 7.
[6] *Id.* at 8
[7] *Id.* at 12.
[8] *Id.*
[9] *Id.* at 16.
[10] *Id.* at 18.
[11] *Id.* at 26.
[12] *Id.* at 35.
[13] *Id.* at 36.
[14] *Id.* at 36-43.

each fair use factor favored the publishers argument that there was no fair use, and granted the publisher's motion for summary judgment.[15]

To many, this holding would not come as a surprise. However, the importance of IA's example should ring loudly in the ears of public libraries and like programs who seek to provide open access to copyrighted works. The Court's line that "even full enforcement of a one-to-one owned-to-loaned ratio, however, would not excuse IA's reproduction of the Works in Suit"[16] should provide some warranted concern for those who might follow IA's example. Improvements in technology and variations in facts will lead to further refining judicial application of the fair use doctrine. IA, the prince or beast of this story, will certainly learn from this holding and continue to find new ways to provide important works to the general public.

[15] *Id.* at 44.
[16] *Id.* at 32.