



What the Internet Archive case in the U.S. means for digital book-lending

The site's archival efforts have democratised access to more than 835 billion web pages and 44 million texts for anyone with an internet connection. Two of IA's techno-legal experiments prompted a major copyright tussle with book publishers

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The Internet Archive (IA) is a non-profit that has digitally archived more than 835 billion web pages and 44 million books and texts. It has also archived millions of audio recordings, videos, images, and software programmes. Its archival efforts have democratised access to them for anyone with an internet connection. Books form a major part of IA's archival mission and the extent of access to digitised books is generally determined by the type of user. For example, persons with disabilities can get access to the full text of books that might be still under copyright protection, while others may generally get only a short preview of the book.

Problem experiments

Two of IA's techno-legal experiments prompted a major copyright tussle with book publishers.

The first is the idea of Controlled Digital Lending (CDL): books are digitised and available to readers on a 1:1 owned-to-loaned ratio. When a physical library has two physical copies of a particular book, only those two copies of that book can be lent. CDL used digital technologies to lend books online in this way. The maximum number of books

available to lend corresponded to the number of books IA or its partner libraries owned.

The second experiment was to liberalise the 1:1 policy during the COVID-19 pandemic as part of a 'National Emergency Library'. IA did this for less than three months, stopping when publishers initiated legal action citing violation of copyright, in *Hachette Book Group, Inc. and others vs. Internet Archive*.

The four horses of 'fair use'

The core issue before the district and the appellate courts was CDL's legality. That is, since CDL involved making digital copies of books, and since IA didn't deny lending those digitised books, did CDL constitute 'fair use' under U.S. copyright law? The district court took the view that IA did infringe copyright and that CDL didn't qualify as 'fair use'. When IA appealed, the appellate court reaffirmed the district court's verdict in favour of the publishers.

U.S. courts generally look at four factors as part of a 'fair use' analysis – purpose and character of use; nature of the copyrighted work; amount and substantiality of the portion used in relation to the copyrighted work as a whole; and effect of the use upon the potential market for or value of the copyrighted work. The appellate court's

perspective on two of these dimensions is worth reflecting on.

Whether the disputed use is 'transformative' is an important sub-factor of the 'purpose and character of use' condition. Drawing on legal precedents, IA argued its use made book-lending more efficient and enabled use-cases not possible with print books or physical lending. But the court held that IA's actions weren't 'transformative' as their copies served the same purpose as that of the original work, without meaningfully adding new features.

Second, some judges and scholars believe the 'effect of the use on the potential market for or value of the works' should be the most important factor in 'fair use' analysis. Here, the appellate court said IA bore the burden of proving there was no market harm for copyright holders. According to the court, while the publishers hadn't produced any empirical evidence, it was "reasonable and logical" to conclude IA's digital books worked as a competing substitute for licenced editions of physical books. The court also opined that if IA's practices were to become unrestricted and widespread, they would annihilate publishers' markets across formats. The court discarded the data IA had shared regarding the reportedly negligible effect CDL would have had on the sales of copyrighted work.

The future of CDL

It's possible the IA's 'National Emergency Library' project triggered a panic among the publishers and also predisposed the judges to this outcome. This said, the long-term consequences of the court's approach could matter more.

CDL has had a significant effect: it made the book-lending enterprise more efficient in the digital space and era and ensured people around the world could access books in a legitimate manner (without resorting to piracy, for example), and without causing substantial economic harm to the authors and the publishers.

On the flip side, if we extrapolate from the court's logic in this decision, we could argue that even lending by physical libraries falls afoul of the law because book publishers could argue that physical libraries are eating into the sale of their books. However, as experience has taught us, book-purchasing practices can work differently: readers will continue to buy books despite their being available in a library. Copyright laws in different jurisdictions have allowed libraries to let patrons borrow books in view of the broader public benefits, even if it may cause some economic harm to publishers and/or authors.

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