Position Statement on Publishers Seeking Summary Judgment Against the Internet Archive
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Introduction

The Independent Book Publishers Association (IBPA)—the largest publishers association in the US with over 4,100 members—stands in full support of the plaintiffs in their copyright infringement lawsuit against the Internet Archive.

On July 7, 2022, the Hachette Book Group, Inc., HarperCollins Publishers LLC, John Wiley Sons, Inc., and Penguin Random House LLC (the plaintiffs) filed a motion for summary judgment\(^1\) in their case against the Internet Archive (the defendant). As this case directly affects the rights and property of publishers of all sizes, the Independent Book Publishers Association (IBPA)—in its capacity as the largest publishers association in the US with over 4,100 members—publishes this Position Statement to declare its full support for the plaintiffs in this case.

IBPA is a national non-profit trade association working to promote the rights and professional interests of its over 4,100 members, who collectively publish tens of thousands of new titles each year. As such, IBPA understands that its membership is directly and negatively impacted by the mass infringement of copyright being perpetrated by the Internet Archive under the invented term “Controlled Digital Lending (CDL).”

\(^1\) “Publishers Seek Summary Judgment Against Internet Archive for Blatant Scanning and Distribution of Literary Works on Industrial Scale,” Association of America Publishers (AAP), July 7, 2022
IBPA supports real libraries in their mission to bring content to the people while also supporting the Copyright Act

IBPA acknowledges and fully supports the interdependent relationship between libraries and publishers. Publishers provide the material for libraries to fulfill their mission of providing information to the public, while libraries support publishers and their authors by purchasing access to print books, ebooks, and audiobooks. Based on this arrangement, IBPA enthusiastically supports libraries in their mission to make books available to their patrons in all formats. It must be known, however, that the Controlled Digital Lending (CDL) scheme invented by the Internet Archive circumvents long held agreements related to copyright and library licensing via a fabricated theory that has no support in the Copyright Act.

CDL asserts that purchasing a physical copy of a book gives a library permission to scan it and lend it to the number of patrons equal to the number of print copies possessed. This is an incorrect reading of the Copyright Law of the United States, but even if it weren’t, the Internet Archive failed to adhere to this most basic rule of its invented concept when it circumvented the “one book/one patron” clause through its now-defunct National Emergency Library.

Even more problematic than not adhering to an invented concept, however, is that by equating print books with ebooks, CDL undermines and devalues a unique digital market that publishers have invested in for years. In addition, this illegal activity directly violates the Copyright Act.

As the court previously ruled in the Google Books case:

“As an author’s right to control and profit from the dissemination of [their] work ought not to be evaded by conversion of the work into a different form.”

The Internet Archive, under the direction of tech mogul Brewster Kahle, has amassed a collection of more than three million unauthorized in-copyright ebooks and lends them out over 25 million times annually without obtaining licenses to do so or paying the rightsholders for exploiting their works in digital format. Anyone, anywhere in the world, can instantaneously access these stolen works via the websites operated by the Internet Archive.

As the plaintiffs rightly argue in their motion:

“This lawsuit is not about a billion-dollar industry seeking to hinder the lawful conduct of a real library. It is about a multimillionaire ideologue hijacking the author’s livelihood for his own commercial gain and because he believes he knows best how the world should work.”

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2 Copyright Law of the United States (Title 17)
3 “Internet Archive to End 'National Emergency Library' Initiative,” Publishers Weekly, June 12, 2022
4 Copyright Law of the United States (Title 17), Section 102
The Internet Archive exploits copyrighted works for financial gain

The Internet Archive tries to portray itself as a real, ordinary library. The founder, Brewster Kahle, argues:

“What libraries do is we buy, preserve, and lend books to one reader at a time. Why do we do it? Libraries are a pillar of our democracy. We are a great equalizer, providing access to information for all. We also have an age-old role as custodians of culture, preserving knowledge for future generations.”

But under careful examination, the Internet Archive is anything but a real library or, in fact, an altruistic enterprise. It’s worth noting, for example, that while independent publishers and authors struggle to make their businesses profitable, members of the Internet Archive Board of Directors are each paid more than $160,000 per year from monies that the Internet Archive has generated by wrongfully exploiting in-copyright works.

In many respects, the Internet Archive is perpetrating a copyright-infringement scheme resembling the A&M Records, Inc. v. Napster, Inc. case. A U.S. Copyright Office analysis of the Napster case stated that “courts are reluctant to find fair use where the original work is merely retransmitted in a new medium.” Obviously, this is exactly what the Internet Archive is trying to do: find fair use when the original work (i.e., a physical book) is merely retransmitted in a new medium (i.e., a digital book). This is not fair use. This is not how copyright works.

IBPA believes that by offering free ebooks, the goal of the Internet Archive is not to be a “custodian of culture” as Kahle would have everyone believe, but to maximize its userbase and to generate revenues for itself and its for-profit affiliates. In the Napster case, the appeals court found that “ample evidence supports the district court’s finding that Napster’s future revenue is directly dependent upon ‘increases in userbase.’” Obviously, again, the same is true of the Internet Archive, which—while operating under the guise of a non-profit—ties its activities to the for-profit Better World Books, an organization that was acquired in 2019 by Better World Libraries, a shell company also controlled by Brewster Kahle. The Internet Archives’ own director of finance testified that “every single page of the Archive is monetized.”

Consider, also, that Better World Books processed nearly three million physical books into ebooks and “donated” them to the Internet Archive between July 2019 and the middle of 2021. Today, Better World Books continues to funnel physical books to the Internet Archive for shipping to offshore super-scanning centers in the Philippines, where they are digitized for inclusion on the Internet Archive’s website. As the plaintiffs rightly state in their motion for summary judgment:

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6 A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001)
7 Copyright Law of the United States (Title 17), Section 107
8 “Just What is Fair Use Anyway?”, Gryphon Publishing Consulting, LLC, February 21, 2017
“The highly commercial ‘synergies’ between IA and BWB are hallmarks of commercial activity, like the ‘Purchase at Better World Books’ buttons that appear at the top of the browser window on the Website whenever a book is checked out.”

In considering all above, one shouldn’t lose sight of Kahle’s declared goal of making “all the published works of humankind available to people, permanently.” IBPA understands this to mean Kahle intends to continue profiting from the hard work of publishers without ever compensating them for their efforts. This action violates the copyright laws and directly threatens free speech and free enterprise, the foundations of a democratic society. As such, IBPA concurs with the court in the case of Eldred v. Ashcroft, which stated:

“The economic philosophy behind the [Copyright] [C]lause ... is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors.”

So, while the Internet Archive claims to be an ally of libraries, nay to be a library, it is quite the opposite. In fact, it is IBPA’s firm belief that the Internet Archive’s success could ultimately lead to the shuttering of real libraries across the country as it renders those institutions obsolete.

**The impact on IBPA members**

IBPA members are uniquely affected by the illegal actions of the Internet Archive. Most small and mid-size publishers lack the financial resources to pursue legal action for copyright violations against a large tech company like the Internet Archive. By making copyrighted works freely available outside of agreed upon licensing, the Internet Archive is violating our members’ copyright, devaluing the work and impacting the bottom line for both publishers and authors. If third parties can unilaterally transform print books into digital books en masse, republish them for any one on the internet, and pay the rightsholders nothing for doing so, the incentive and the market for publishers to invest in new formats and to publish new titles is diminished.

Independent publishing is the lifeblood of our democracy. Independent publishers collectively invest millions of dollars to produce quality works that would otherwise be unavailable in the marketplace. They assume the risk in undertaking these efforts. The actions taken by the Internet Archive subvert their efforts and imperil them by denying publishers and authors proper remuneration for their work in all formats. This directly impacts the revenues received by independent publishers and authors who are already struggling in this challenging economic environment.

Even more importantly, IBPA’s vision, as stated on its website, is “a world where every independent publisher has the access, knowledge, and tools needed to professionally engage in all aspects of an inclusive publishing industry” (emphasis added). As independent publishers are champions of diversity and inclusion and often represent the only outlet for under-represented

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9 Eldred v. Ashcroft, Wikipedia
voices to be heard, the actions of the Internet Archive are detrimental to the goal of a diverse and inclusive publishing industry.

Ultimately, the actions of the Internet Archive undermine free speech instead of—as they wrongfully claim—promoting it. Under no uncertain terms, these actions are harmful to independent publishers generally, and independent publishing writ large.

As Benjamin Franklin once said, “Whoever would overthrow the liberty of a nation must begin by subduing the freeness of speech.” If the actions of the Internet Archive and the multi-millionaires who sustain it are left unchecked by the courts, freedom will be lost, the goals of a diverse and inclusive society will be undermined, and the damage to our culture will become irreparable.

The Independent Book Publishers Association, on behalf of its membership, asks the court to side with the plaintiffs against the Internet Archive and protect the integrity of copyright along with the vibrancy of an inclusive publishing industry.