A Look at Hachette v. Internet Archive

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KENNEALLY: In March in a New York City courtroom, Judge John Koeltl awarded summary judgment to a group of book publishers in their copyright infringement litigation against the Internet Archive over certain forms of digital book lending. Judge Koeltl ruled that the Internet Archive, which calls itself an online library, does not have the right to scan books and then lend them out like a library on the Web.

Welcome to CCC's podcast series. I'm Christopher Kenneally for Velocity of Content.

At the recent Copyright & Technology Conference, presented by the Copyright Society and Giant Steps Media, I moderated a panel discussion on the Internet Archive case, looking especially at fair use as a defense of infringement.

My guests were Bhamati Viswanathan, a faculty fellow at New England Law, Boston, where she teaches copyright, trademark, current issues in intellectual property law, and constitutional law; Lisa Janicke Hinchliffe, professor/coordinator for research and teaching professional development in the University Library at the University of Illinois at Urbana-Champaign; and Maria Bustillos, a journalist, editor, and information activist whose writing has appeared in *The New York Times*, *The Nation*, *The New Yorker*, *The Guardian*, and elsewhere.

Bhamati Viswanathan began the discussion with a look at the case and the legal principles involved, particularly the first-sale doctrine.

VISWANATHAN: For those of you who aren't complete copyright geeks like some of us, a little bit of a basic overview of the case. Chris gave a wonderful view from 6,000 feet. I'm going to dive in just a little bit to 1,000 feet, so for those of you who aren't familiar with the case, you can get up to speed on what are we talking about here and then about the implications legally for first sale and other copyright principles and also some of the potential implications, which I will leave to my fellow panelists as well.

Let's start. What is the Internet Archive? For those of you who don't know, it's a pretty ambitious organization founded by Brewster Kahle in 1996. Their goal – a modest goal – is to provide universal access to all knowledge. That is my goal as a professor, and I just want to say right now – not happening, at least in my classroom. But this was their goal, and they created a digital library – self-styled digital library – and started scanning all manner of materials to include in that library. They created the Open Library.

When the pandemic hit, they felt particularly strongly that access to materials was ever more important and restricted by the restrictions of the pandemic, so they started expanding the lending that they had been doing under this thing called controlled digital lending, CDL. Again, for those of you who don't know what that is, it's a relatively new model that many libraries say is the way forward. We'll discuss that on this panel. Controlled digital lending basically works like this – one owned, one loaned. That's just the catchphrase to remember. If you have a print book and you have a digital book, if you lend the digital book where you would have loaned a print book, it substitutes for the lending action. That is, at least, the theory of the case. These two works can be treated as fungible. Again, this is under the theory of controlled digital lending. And controlled digital lending has had a lot of press over the last few years. There's a coalition of very intelligent and important librarians who have backed it.

And the Internet Archive backed this wholesale. They launched a National Emergency Library in 2020, and they sort of expanded their controlled digital lending during the beginning of the pandemic in March 2020. This instigated a lawsuit brought by four major publishers, including the lead name, Hachette, in June 2020.

So the judge went through the four factors of fair use, and on every factor, IA was found to be infringing and to not have met the strictures of each of the four factors. So the purpose and character of their use – the judge flatly said there is nothing transformative about this use – that it violates the derivative works right, that it really expands this – Internet Archive had an argument that this was more efficient and convenient, and the judge says no, not so much. And that instead of serving a new and different function, that the works in Internet Archive that were being lent were just working as a substitute, and that it was in fact not non-commercial as well.

First sale, as most of us in this room, I think, know – Section 109(a) – is really not new to this case. The judge looked back to the famous *ReDigi* decision and said, look, the laws of first sale are not suspended in the digital space. So Section 109, and I quote the court, "does not excuse Internet Archive's unauthorized reproduction of the works in suit." He leaned upon the fact that Internet Archive was violating the right-holders right of control under Section 106(1) over reproduction of a copy, and he said unauthorized reproduction is not protected under 109(a), as it was not in *ReDigi*.

Furthermore, he says factually, Internet Archive did not even engage in controlled digital lending. They didn't ask the partner libraries about what they were doing with their physical books. Remember, I said one owned, one loaned. In theory, at least, the physical book has to be retired when the digital copy is being lent. Furthermore, multiple, multiple, multiple copies of digital books were being lent out. There was no attempt at checking how many or checking what libraries were doing or controlling the amount of digital lending. There was no controlling in the controlled digital lending.

And the judge also said you cannot make new unauthorized copies. This violates the reproduction right. It also, importantly, as we all can imagine, violates the derivative works right. This is critical. Essentially, if there's nothing transformative about it and it violates the derivative works right, you can imagine how it's looking bad for IA.

The nature of the work – these are paradigmatic creative works. There were fiction works and nonfiction works, but many literary works. The amount – factor three – all of the works, of course, were included in the IA archives. And then the effect on the potential market or the value of the copyrighted work – the judge says it usurped the market for the works – flashes of *Warhol* I hope you all have. If you're my students, it's probably PTSD from hearing too much about *Warhol*. But essentially *Warhol* says is this a substitute? And the judge said, yes, this is functioning as an effective substitute. So kind of a slam dunk for the publishers, a sense that publishers have the right to determine whether, how, under what circumstances they will create digitized versions of their books, in what format, under what licensing agreements, and so forth.

On to the consent judgment that the court entered on August 11th – the parties agreed that the Internet Archive's activities constitute copyright infringement, and there was a permanent injunction strictly prohibiting the Internet Archive from distributing books over which their publishers hold rights, both in the US and abroad.

The parties could not agree on one issue, which they posed to the court. This is a really interesting twist of this case – whether the Internet Archive had to remove books that were available in print, but not for e-licensing. And in a decision that surprised many, I think, on both sides of the aisle, the court adopted the Internet Archive's proposal and limited the injunction to books also available for electronic licensing. This is a little bit of gray area right now. There has been quite a bit of vocal opposition from out-of-print book authors, from groups representing authors like the Authors Guild, and so forth.

That, I think, pretty much summarizes the case.

KENNEALLY: Bhamati Viswanathan, thank you very much for that.

With that, it's an appropriate way to transition to Lisa Janicke Hinchliffe. Lisa, welcome again. You have some thoughts prepared on the role of fair use and particularly how libraries apply it and what this case is saying or not saying about all of that.

JANICKE HINCHLIFFE: I think one of the things that I'd like to bring to this conversation is that there's a particular use of the term controlled digital lending that is operating in this case, and certainly there's a scholarly piece behind this saying this is what controlled digital lending is. The entire library community has not said, yes, that's actually the definition that we agree with.

So I do think one important thing to note is that the term controlled digital lending is being used elsewhere in the profession to actually more narrowly apply to the notion of having a digital copy that is lent digitally in a controlled way and is actually lent to an individual, as opposed to being made available through IP-based authentication or other mechanisms that – if you're in academia, you might be used to articles just sort of probably appearing as if it's magically opening, but there's a lot of technology behind the scenes, where you're not getting a personal loan. You're just getting access to an article. So there are places where we are using the technology of controlled digital lending without using the claim around, oh, we can digitize a print copy we own.

I think that's one important thing, because that is part of what I think caused more panic originally than not – which is, oh, this was striking down controlled digital lending. No. It was saying one particular definition – which, again, there's a whole paper – is different than saying, oh, this technology is not OK.

In fact, just to be clear, if we say this is a technology, we see this actually being used in a number of cases in libraries – for example, when rights-holders tell us we can do it. Sometimes, we'll say, hey, we've got this print copy, and there's actually interest in it. Would you mind? And they're like, oh, this is great. Fantastic. Please. Right? Sometimes, people want their thing lent this way. It is actually arguably – a version of this might be the technology that libraries are using under the Marrakesh Treaty and other agreements to provide access to people with print disabilities who need a digitized copy of a work in order for it to be accessible to them for the purpose of study. That doesn't mean we pop it up on the internet for everyone to have access to it.

Oh, and then libraries actually – sometimes, we own stuff ourselves. Like we actually do end up being rights-holders. So we might choose to use as the rights-holder controlled digital lending. So it's just a couple examples to sort of make it clear it's not just me positing it's possible. It does actually exist.

The other interesting thing to me about this case is that for all of the Internet Archive's sort of public press advocacy to position itself as a library, it did not actually defend itself as a library. It defended itself under a defense that arguably is available to any of us, which is fair use. Now, libraries defend their work under fair use quite a bit, so I'm not saying that no library ever avails themselves of 107. But Internet Archive did not avail themselves of 108 or special library protections in this case. Now, I'm not in the room. I don't know why not. I will say that those 108 privileges aren't super-expansive. They would allow for things like preservation copy, but obviously that wouldn't be the same as uncontrolled lending it out to the public during a pandemic.

The other interesting thing that it does allow us to play around with, and the judgment part of this plays to this case, which is this whole question of whether something has to be available in the market electronically, which is actually a major challenge for libraries in that so many print materials have moved from being available for purchase – I should say text materials. They're not in print. Text materials have moved from being available for purchase to a licensing model. So it is a major problem for libraries that we are in many cases unable to acquire a license at all, or when a license is available, it is only available at a price point that is prohibitive for libraries. Which is not quite the same as saying, OK, therefore you can go make a copy yourself, right? (laughter) So I want to say there's a major issue sitting on the side of this that isn't about this lawsuit per se that is probably something that's pressing on the daily lives of librarians much more, which is just the ability to actually license content.

The other thing I'll just say is I think the other thing that for some of us is a little bit of concern is that it feels like what counted as commercial activity got really expanded in the judge's thing. Like, oh, you have ads on your website – certain things like this – that any kind of income-generating or revenue-generating activity would be a sign of commercial activity. For libraries, this mostly won't be a problem, in the sense that we don't put ads on our websites. We usually try not to. But it is an interesting thing that people are also trying to figure out of, OK, wait, is there anything, then, that's non-commercial if we read some of those aspects?

The final thing I'll just say is I think that if the library community had already broadly believed that this was fair use, you would have seen us doing it. Because we kind of like fair use. (laughter) In fact, we've probably been on the other side of the aisle with some of you, saying, no, no, this is fair use. And we've over time actually won some of those cases that, yes, it's fair use. In fact, fair use isn't a defense for infringement. It's actually definitionally then not infringement, right? So the fact that libraries broadly were not doing this would at least be a signal that broadly speaking, we weren't convinced that we could do this, because we certainly had the technologies to do it. There's a lot of question here – the degree to which we should look to Brewster Kahle, a self-identifying librarian,

as indicative of what the library profession itself would sort of by consensus view in this issue.

KENNEALLY: Lisa, thank you very much for that. It is time for our second CLE code word. And the second code word is lending.

With that, I want to turn to Maria Bustillos, who comes to us with the perspective of authors here, but also particularly as a – you know Brewster Kahle closely. You've worked with him. And you have some feelings about the real importance of the public good that's being served in all of this. So please tell us about your views.

BUSTILLOS: I have worked with Brewster Kahle. I met him for the first time about 10 years ago, when I interviewed him for *The New Yorker*, because he was defending the rights of library patrons to privacy. He had received a national security letter and refused to divulge the information about a patron that the government was asking for, and he sued the government and won. After that judgment, part of the settlement was that he would be able to talk about this in public. He was one of only like four or five people in the world at that point who could talk about what it was like to receive a national security letter.

So I got in touch with him and called him. Even at that point, I considered the Internet Archive our greatest digital library. He called himself a digital librarian then. I knew him as that and admired him for that for even longer. Like the last 25 years, he's a great pioneer for libraries and has worked with so many libraries.

The thing I think people are misunderstanding about this case is what it's really about is the future and role of libraries in the digital age. We have laws – very specific laws and practices in place for paper that were put in very, very early in the Constitution. It's a constitutional issue that libraries should be able to enjoy the right of first sale, basically.

So when the digital realm kind of burst into all our lives, it's become – like an earlier speaker said, as soon as there's a new technology, it will be exploited by people who can make money by it. That's what this has become. Just like you can rent a movie at Netflix but never own it, this is where publishers are trying to go with books. So the concept of digital ownership itself is really like the key issue in this whole situation.

I would also argue that it's very, very important that the judge was not able – for whatever reason, a very industry-friendly judge did not order the Internet Archive to stop doing controlled digital lending in the same way it had been doing it. The only thing he's forbidding is they have to not loan books for which the publishers are offering a competing digital book. What it's really saying is he agreed that the market harm that the Internet Archive was causing for profits with respect to ebooks alone would be worth making this

decision. I personally consider that that leaves the whole basic issue on the table of is it OK or not to preserve the traditional role of libraries in the digital age? Can a library own a digital book?

I felt so strongly about this, I immediately – you know, I have a little publishing platform, a co-op, and we made a digital anthology, and I immediately went and sold a digital copy of it to the Open Library and wrote about it at *The Nation*. I feel really strongly that libraries should have the right to own their materials. We live in a time where there's book bannings and all kinds of attempts at control over the intellectual wealth of communities for all kinds of reasons. And if libraries don't have the right to own their materials, you're basically leaving an on/off switch for library books in the hands of commercial publishing. I think that's really dangerous at this moment in our history.

So I kind of come at this as an author. I am a lifelong beneficiary of libraries. I am a huge admirer of the Internet Archive and all of the library work and the digitization work that they've done. I think it's really important for people to understand that the reason this thing developed the way it did is that Brewster Kahle and his team at the Internet Library (sic) were already in possession of digitization tools – scanning technologies. They have helped so many libraries. They have over 600 libraries they've helped digitize their archives and helped preserve culture for the digital future. You all know how much stuff has a way of disappearing off the internet when publications are acquired and archives are lost, servers degrade, all kinds of stuff. The old internet – so much of it wouldn't exist if it wasn't for the Internet Archive's Wayback Machine.

I think if I could just give you one thing to take away, the Internet Archive is a library. It is the greatest library in the world. If they overstepped during the pandemic, I think that's an argument that you could make. The National Emergency Library was overstepping. It wasn't sort of true to the original principles, maybe, of controlled digital lending in certain ways. I think you could make the argument either way. But it's important to remember they stood down the minute the lawsuit was filed. The publishers weren't actually really interested in the National Emergency Library. The purpose of the lawsuit is to make it so that ebooks can be considered as a different class, a new class, of unownable property that can be licensed only, that you would never be able to buy. I think it's very dangerous that books should ever, ever be in that position.

KENNEALLY: Thank you all for participating. Journalist, editor, and information activist Maria Bustillos. From the University Library at the University of Illinois Urbana-Champaign, Professor Lisa Janicke Hinchliffe. And faculty fellow at New England Law, Boston, Bhamati Viswanathan. Thank you all very much.

(applause)

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