

## District Court Rules Internet Archive's Open Library Project is Not Fair Use

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A federal district court in New York held that the Internet Archive's Open Library project was engaging in copyright infringement by publishing digital copies of millions of books online. Even though the Internet Archive and participating libraries purchased print copies of the books and, for the most part, made them available to borrowers on a one-to-one basis, the court rejected the Internet Archives' fair use defense. The court refused Internet Archives' invitation to expand the boundaries of fair use jurisprudence and made it clear that owners of printed works cannot simply digitize them and make them available to the public – even if they limit distribution.

The court engaged in an extensive analysis of whether the purpose and character of Internet Archive's use was transformative. Ultimately, because Internet Archive simply scanned and distributed to the public complete copies of copyrighted works, the court found the use was not transformative. The court carefully distinguished cases in which defendants had scanned whole copies of books so that online users could search their contents, since in those cases the defendants had only made excerpts available to the public. The court found that simply changing the format of a work was not enough to show a transformative use.

The court rejected arguments that Internet Archive's use was transformative because it was simply making the works available to people who might not have easy access to libraries. Internet Archive argued its Open Library was analogous to the kind of "time shifting" [the Supreme Court found](#) to be fair use when it held, in *Sony Corp. of America v. Universal City Studios*, that home users of Betamax machines did not infringe copyrights when the recorded television content for later viewing. Here, however, the court found that the Open Library's practice of distributing the works as a substitute for the original could not fit within the bounds established by the Betamax decision since fair use there was for home use by authorized viewers. Here, Internet Archive was simply offering a substitute for the books sold by the publishers.

The court also rejected Internet Archives arguments that its use was entirely non-commercial. Even though Internet Archive is a non-profit entity, it was nonetheless engaged a commercial activity since it used the Open Library as a means of raising money and it received a portion of the profits from the sale of books located through its service. The court found it "largely irrelevant" that an Open Library patron's reading of an ebook is noncommercial since Internet Archive profited from its use.

The court also rejected Internet Archives' arguments that its use was consistent with the first sale doctrine, i.e., that the legitimate purchaser of a copyrighted work may re-sell that work. Internet Archive argued that it was controlling distribution of the works on a one-to-one basis, i.e., digital copies were only lent to one person for each printed copy owned by the Internet Archive or its participating libraries. Nothing in the first sale doctrine, however, permitted Internet Archive to *reproduce* the works for distribution without permission.

Finally, the court found that the Open Library was directed to the same consumer as the plaintiff publishers and competed with them. The court found that evidence submitted by Internet Archive suggesting that online libraries do not harm publishers' bottom lines was irrelevant since it did not show any causal relationship between the Open Library and benefits to the publishers. And, in any event, such evidence could not overcome the wholesale copying that the court ruled was not transformative.

How the court will implement its ruling remains to be seen. As of this writing, Internet Archives' Open Library still appears to be up and running. The court directed the parties to make proposals to implement its order within 14 days. Whether Internet Archive will face substantial statutory damages remains to be seen.

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