

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC, JOHN WILEY :
SONS, INC., and PENGUIN RANDOM HOUSE LLC, :
: Case No. 1:20-cv-04160-JGK
: Plaintiffs, :
: :
-against- :
: :
INTERNET ARCHIVE and DOES 1 through 5,
inclusive, :
: :
Defendants. :
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JGK

~~PROPOSED~~ CONSENT JUDGMENT AND PERMANENT INJUNCTION SUBJECT
TO RESERVATION OF RIGHT OF APPEAL

WHEREAS, on June 1, 2020, Hachette Book Group, Inc., HarperCollins Publishers LLC, John Wiley & Sons, Inc., and Penguin Random House LLC (the “Plaintiffs”) commenced this action (the “Action”) against Internet Archive alleging copyright infringement of literary works, namely unauthorized creation of ebooks from print copies of books and public display, distribution, and performance of the ebooks through www.archive.org and/or www.openlibrary.org; and

WHEREAS, on March 24, 2023, the Court issued an “Opinion and Order” in the Action (ECF No. 188) (“Opinion and Order”) granting the Plaintiffs’ motion for summary judgment and holding the Internet Archive liable for copyright infringement of the Plaintiffs’ works in suit;

WHEREAS, prior to the entry hereof, the Internet Archive has worked in active concert and participation with the Open Library of Richmond, the owner of physical books scanned and made available to the public by the Internet Archive on its website under its “Books to Borrow” collection;

WHEREAS, in the interest of efficiency and judicial economy, Plaintiffs and Internet Archive (the “Parties”) have agreed to a stipulated monetary judgment payment in the Action under and subject to the terms set forth in a separate confidential agreement (“Monetary Judgment Payment”), expressly conditioned upon the Internet Archive’s reservation of its right to appeal the finding of liability for copyright infringement set forth in the Opinion and Order and as incorporated into any final judgment; and

WHEREAS, in the interest of efficiency and judicial economy, Plaintiffs and the Internet Archive stipulate to the declaratory relief and terms of a permanent injunction set forth below expressly conditioned upon Internet Archive’s reservation of its right to appeal the finding of

liability for copyright infringement set forth in the Opinion and Order and as incorporated into any final judgment and its right to appeal the Permanent Injunction on the ground that the Internet Archive should not have been held liable for copyright infringement and as further described below.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

- A. This Court has subject matter jurisdiction over this action, which arises under the Copyright Act of 1976, 17 U.S.C. §§101 et seq, pursuant to 28 U.S.C. §§ 1331 and 1338.
- B. Judgment is entered for Plaintiffs and against Defendant on Plaintiffs' claims against Defendant for copyright infringement under 17 U.S.C. §501.
- C. The activities of the Internet Archive in engaging in "controlled digital lending" of the 127 Works in Suit as further described in the Opinion and Order constitute copyright infringement;
- D. The activities of the Internet Archive in engaging in the "National Emergency Library" in connection with the 127 Works in Suit as further described in the Opinion and Order constitute copyright infringement; and
- E. The Court hereby enters the following permanent injunction (the "Permanent Injunction"):
 1. "Covered Book" shall mean any in-copyright book or portion thereof, whether in existence as of the date hereof or later created, in which any Plaintiff (or any subsidiary or corporate affiliate of a Plaintiff) (a) owns or controls an exclusive right under the Copyright Act and makes the title commercially available for sale or license ~~in any format OR in any electronic text format~~; and (b) has provided notice to the Internet Archive regarding such title by sending the Internet Archive a machine readable catalog in a standardized form identifying such commercially available titles (including any updates thereto in the Plaintiffs' discretion), or other similar form of notification, once 14 days have elapsed since the receipt of such notice. A "Covered Book" includes all in-copyright editions of such title.
 2. Subject to the terms of Paragraphs 4, 5 and 6 below, the Internet Archive, its officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with such persons (collectively, the "Internet Archive Parties" and each individually an "Internet Archive Party"), are permanently enjoined and restrained from engaging in any of the following acts in, from or to the United States:
 - a) the distribution to the public, public display, and/or public performance, of Covered Books in, from or to the United States in

- any digital or electronic form, including without limitation on the Internet Archive website (collectively “Unauthorized Distribution”);
- b) the reproduction of Covered Books for Unauthorized Distribution;
 - c) the creation of derivative works of the Covered Books for Unauthorized Distribution;
 - d) inducing, or knowingly and materially contributing to, any individual or entity’s infringing reproduction, public distribution, public display and/or public performance of Covered Books in any digital or electronic form, as those terms are used in the law of contributory copyright infringement applied by the Second Circuit; and/or
 - e) profiting from another individual or entity’s infringing reproduction, public distribution, public display and/or public performance of Covered Books in any digital or electronic form while declining to exercise a right to stop or limit it, as those terms are used in the law of vicarious copyright infringement applied by the Second Circuit.
3. This Permanent Injunction is effective immediately and shall not be stayed pending appeal of the Opinion and Order. Internet Archive shall provide a copy of this Permanent Injunction to each of its officers, agents, servants, employees, and attorneys. Internet Archive shall also provide a copy of this Permanent Injunction to Open Library of Richmond, libraries whose print books have been counted by Internet Archive toward its maximum lendable digital copies on Internet Archive’s website, and all persons in active concert or participation with Internet Archive or its officers, agents, servants, employees, or attorneys in connection with the Covered Books.
4. The Internet Archive Parties shall not be in violation of the terms of Paragraph 2 with respect to:
- a) Any uses to which exceptions and limitations set forth in 17 U.S.C. § 108, and §§ 110-122 are properly applicable (with Plaintiffs reserving all rights to contest such applicability);
 - b) An Internet Archive Party’s use of any Covered Book for which such party obtains express written authorization for that use from a party that owns or controls the applicable rights to such Covered Book, provided such authorization is in force and valid at the time of such party’s use of the Covered Book;
 - c) An Internet Archive Party’s use of Covered Books for the purpose of accessibility for “eligible persons,” as that term is defined in 17

U.S.C. § 121(d)(3), provided that such use meets the statutory conditions of 17 U.S.C §§ 121 or 121A, or is consistent with fair use, for example as set forth in *Authors Guild v. Hathitrust*, 755 F.3d 87 (2d Cir. 2014); or

- d) Notwithstanding the foregoing definition of a Covered Book as including a portion thereof, an Internet Archive Party's use of Covered Books for the purpose of distribution, public display, or public performance of short portions of a Covered Book, provided that such use is consistent with fair use, for example as set forth in *Authors Guild v. Google, Inc.*, 804 F.2d 202 (2d Cir. 2015) and *Andy Warhol Foundation v. Goldsmith*, 143 S. Ct. 1258 (2023).
5. By way of clarification:
 - a) nothing herein constitutes a grant to the Internet Archive Parties or any other person of a license, right, permission, consent, or authorization with respect to any copyrighted works, whether any Covered Books or otherwise;
 - b) nothing herein means that acts outside the scope of the specific prohibitions in Paragraph 2 are non-infringing or excused under any of the exceptions or limitations set forth in the United States Copyright Act or that Plaintiffs waive any claims regarding such acts; and
 - c) nothing herein impacts any right of Plaintiffs to seek to recover damages under 17 U.S.C. § 504, or costs, including attorneys' fees, under 17 U.S.C. § 505.
 6. By way of further clarification and without modifying Paragraph 2(d) or 2(e) of this Permanent Injunction, nothing herein (i) limits any Internet Archive Party's ability to assert that it is not liable for monetary relief, or injunctive or other equitable relief, with respect to any infringement of copyright that arises from acts described in 17 U.S.C. § 512(a)-(e) ("Section 512"), or (ii) enjoins any act which qualifies for a limitation on remedies under Section 512.
 7. Nothing herein limits the Internet Archive's right to appeal the finding of liability for copyright infringement as addressed in the Opinion and Order and as incorporated into any final judgment.
 8. Nothing herein limits the Internet Archive's right to appeal this Permanent Injunction on the ground that Internet Archive should not have been held liable for copyright infringement. Further, nothing herein limits any Party from appealing the Court's resolution of the Parties' dispute concerning whether the definition of Covered Book in Paragraph E(1) of this Consent

Judgment pertains to books “in any format” or only “in any electronic text format.”

9. Internet Archive shall provide a sworn declaration of compliance with this Court’s Permanent Injunction within 30 days of its issuance.
10. During the first 60 days following the entry of this Permanent Injunction, in the event that any Plaintiff believes that any enjoined party is not in compliance with this Permanent Injunction and wishes to seek appropriate relief from the Court, such Plaintiff shall first provide notice to the Internet Archive Party of its intent to file for relief 7 days prior to such filing, except in instances in which the Covered Book was initially published within five years preceding such notice. Such notice to the Internet Archive Party does not need to identify individual Covered Books. This provision has no effect after the expiration of the 60 day period.
11. This Court shall retain exclusive and continuing jurisdiction over the parties and over the subject matter of this Action for purposes of interpreting, implementing, and enforcing the Permanent Injunction.
12. Pursuant to the Opinion and Order, the Clerk of the Court shall enter judgment for Plaintiffs. The Clerk of the Court is directed to close this case.

APPROVED AND ORDERED THIS 11TH day of August, 2023



John G. Koeltl, U.S.D.J.