

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

HACHETTE BOOK GROUP, INC.,
HARPERCOLLINS PUBLISHERS LLC, JOHN
WILEY & SONS, INC., and PENGUIN
RANDOM HOUSE LLC

Plaintiffs,

v.

INTERNET ARCHIVE and DOES 1 through 5,
inclusive

Defendants.

Case No. 1:20-CV-04160-JGK

**DECLARATION OF
BEN SEVIER**

Pursuant to 28 U.S.C. § 1746, I, **BEN SEVIER**, declare as follows:

1. I am Senior Vice President and Publisher of Grand Central Publishing, a publishing division of plaintiff Hachette Book Group, Inc. (“Hachette”). I submit this declaration in support of the motion for summary judgment filed in this action by Hachette and plaintiffs HarperCollins Publishers LLC, John Wiley & Sons, Inc., and Penguin Random House LLC (collectively, “Plaintiffs”). This declaration is based on my personal knowledge except as otherwise stated. This action concerns the Internet Archive’s free ebook website (“Website), which can be accessed either through the Internet Archive’s “Open Library” website, <http://openlibrary.org>, or the Internet Archive’s general website at <http://archive.org>, which actually hosts the ebook files, and specifically, the “Books to Borrow” collection of books uploaded by the Internet Archive rather than third parties.

BACKGROUND

1. I have worked in book publishing for my entire professional career and, over the course of two decades, I have worked at many of the most prominent book publishers. I also have had the pleasure of working closely with a wide spectrum of authors. Internet Archive’s massive

appropriation of literary works – by scanning, posting on the internet, and making more than 3 million free ebooks available to the world without compensation to publishers or authors – conflicts with the fundamental principles that inform my entire career. I believe passionately in the value of books and know first-hand the hard work and vast resources that go into the creation, development and publication of books. By providing the public with unauthorized ebooks that can substitute for the authorized versions – unlike public and academic libraries that properly license ebooks to make them available to their patrons – Internet Archive denies publishers and authors the basic fees they are entitled to. Ultimately, Internet Archive devalues the literary works and undermines the public interest served by authorized publication and distribution of books, including ebooks sold commercially and licensed to libraries.

2. The first job I took after I left college in 1999 was as an editorial assistant at HarperCollins Children’s Books. I subsequently became an editor at St. Martin’s Press where I specialized in mystery novels. After spending roughly six years at St. Martin’s, I briefly worked as a senior editor at Simon & Schuster, before being hired as an executive editor at Penguin Publishing (now a part of Penguin Random House) (“Penguin”) in 2007.

3. Approximately four years after I joined Penguin, I was promoted to Editor-in-Chief of Penguin’s Dutton imprint. An imprint is the trade name or brand under which books are published, and Dutton is a boutique imprint that publishes a wide range of general interest books. In 2014, I became the Publisher at Dutton. Publisher is the most senior role within the imprint and I was responsible for all aspects of Dutton’s publishing business.

4. In 2017, I started my current position of Senior Vice President, Publisher of Grand Central Publishing. Grand Central includes five imprints that collectively publish about 250 original books per year. In my current role, I am in charge of a team of about 75 people and

oversee all aspects of publication – from the acquisition of titles, to publicity and marketing, to sales. Together, we serve a list of thousands of authors ranging from David Baldacci to Min Jin Lee to Lin Manuel Miranda.

5. The history of Hachette in the United States stretches back nearly two centuries, to the 1837 founding of Little, Brown and Company (“Little Brown”). Today, Hachette is comprised of multiple publishing divisions – each responsible for several imprints – which include Grand Central Publishing, Little, Brown and Company, Little, Brown Books for Young Readers, Orbit, Hachette Nashville, Workman, Hachette Audio and Perseus Books. Last year, Hachette published more than 1,400 adult titles, 300 books for young readers and 450 audio book titles, running the gamut from literary classics to bestselling blockbuster titles, thrillers, romance novels, fantasy, science fiction, political nonfiction, and works for children of all ages. The roster of Hachette authors includes well-known figures like J.D. Salinger, Malcolm Gladwell, James Patterson, Lemony Snicket, Joel Osteen, Sandra Brown, Stephanie Meyer, Malala Yousafzai and James S.A. Corey. Hachette books and authors have won Pulitzer Prizes, National Book Awards, Newbery Medals, Caldecott Medals and Nobel Prizes.

6. Given the breadth of my experience with multiple book publishers, many of the standard publishing practices I discuss in this declaration are generally applicable to all publishers, not just Hachette. As a general rule, publishers and authors share the common goal of publishing the most successful books possible. “Success” is defined in countless ways, including literary quality, contributing new voices and expanding the breadth of knowledge, providing a means to serve the sheer pleasure of reading and, of course, commercial sales.

7. Hachette supports thousands of authors – including by paying advances upon acquisition, providing editorial support to improve the manuscript, providing marketing,

production, distribution services, managing royalties and many other publishing services. While Hachette publishes many successful authors, it also invests heavily in unknown first time authors and less celebrated career writers who make up the bulk of its list. In addition to the core publishing services central to the publishing relationship, Hachette provides many of its authors with the income needed to earn a living from writing books.

8. A basic principle of book publishing is that the publisher is the guardian of the authors' rights and assumes an obligation to exploit and protect those exclusive rights. To that end, Hachette may work with authors for years (often decades) in order to find the widest audience possible for their books. And it targets every viable sales channel by publishing the works in different formats to meet receptive audiences wherever they happen to be – ranging from hardcover editions sitting on local bookstore shelves, to mass market paperbacks in big-box stores, to audio books, in digital or analog form, to retail and library ebooks. Every sale in every format matters a lot.

INTERNET ARCHIVE THREATENS BOOK PUBLISHERS' ABILITY TO SECURE A RETURN ON INVESTMENT FOR THEIR AUTHORS

9. I understand that Internet Archive has posted verbatim, whole-book ebooks of more than *fifty percent* of the books in print and digital form in Hachette's catalog that were published through 2015. (*See* July 7, 2022 Declaration of Ian Foster ("Fosster Decl.") ¶ 116(j).) And it currently offers about 4,000 Hachette titles overall – which equates to more than one third of such books that Hachette currently has in print. *Id.* Virtually all of the books in which we control the ebook rights – and every work identified as a Hachette Work in Suit – are readily available as ebooks to be acquired and distributed by our retail partners and libraries. Internet Archive is acting as a direct competitor in one of our most significant (and growing) markets and it does so without paying the authors or publishers *any* compensation. In other words, it offers a free substitute for

authorized library ebooks and necessarily also draws readers and purchasers away from buying commercial ebooks.

10. I understand that Internet Archive tries to justify its free ebook website under a theory it calls “controlled digital lending,” which purports to cap the number of users that can simultaneously read its ebooks according to the number of physical copies owned by Internet Archive or its partner libraries. Internet Archive claims that the interests of rightsholders are protected because the unlicensed free ebooks it offers are scans of print books that libraries or other entities have already purchased (or otherwise legally acquired) – and that one-time purchase of the print book supposedly provides authors and publishers with the fair market value for their work.

11. This argument makes no sense to anyone who has even a passing familiarity with the book publishing business. The most basic error that Internet Archive makes is to assume that physical books are fungible with ebooks and that anyone can toggle between those two formats as if they were the same. In reality, ebooks and print books are two entirely separate products that have very different characteristics and often serve different markets. And it should be underscored that long before ebooks even entered the market, books were independently marketed in different formats, from hardcover, to trade paperback, to mass market paperback, to audio, and more. It is critical to our business to receive revenue for all formats of a title. And separate formats/separate markets is not a concept unique to book publishers. All creative works are available in different formats that are separately marketed and monetized, including music and movies. Finally, it appears that Internet Archive does not appreciate – or chooses to ignore – the many elementary reasons why flooding the ebook marketplace with large quantities of free ebooks is harmful to the publishing business.

12. This declaration provides the factual background based on my own personal experience that demonstrates why Internet Archive's practice of controlled digital lending is incompatible with sustainable publishing economics and why its Website hurts Hachette and its authors. Specifically, I address (i) the significant upfront investments publishers like Hachette make in their authors, (ii) the ways in which Hachette secures a return on investment by maximizing revenue from books over the long term and via multiple formats (including ebooks), (iii) Hachette's successful adoption of library ebook models and (iv) the harms that Internet Archive has caused Hachette.

HACHETTE INVESTS HEAVILY IN ITS AUTHORS AND THEIR BOOKS

13. Books enrich our culture. Successful book projects require large upfront investments of time, money and creative energy. Every book originates with an author, who may spend years writing and rewriting a manuscript before it is ready to publish. Fiction writers devote time to honing their craft and developing a distinctive voice. And the authors of non-fiction books are required to synthesize extensive research, gain special expertise or undergo unique personal experiences in order to collect the material that will ultimately go into their work. Authors and publishers invest in these works because they believe in the importance of the books.

14. Authors cannot sell copies of their books until after they are finished and published, which means that many years may pass between the moment when an author decides to write a book and the day that project can generate even a penny of sales income. It is imperative for authors, therefore, to secure a steady stream of royalty income in order to sustain themselves into retirement.

15. Publishers like Hachette invest heavily in authors to incentivize them to undertake writing projects and ultimately produce the best books possible. A crucial component of what

publishers do is to bear the onerous upfront costs – and virtually all of the financial risk – of getting a book published and sold through established book markets. To this end, in dollar terms, Hachette spends well over a hundred million dollars per year running its publishing business. (A true and correct copy of the spreadsheet reflecting this data is annexed hereto as Exhibit 1.) From the publisher’s perspective, the lion’s share of the costs incurred in publishing a book are sunk into the project long before the book hits the bookshelves or is even ready to go to press. Those expenses generally fall into two broad categories: (a) support for authors and (b) finding receptive audiences for their books.

Advances, Editorial Services and Managing Royalties

16. Getting a book to publication involves dozens of people employed or otherwise engaged by Hachette. For instance, Hachette employs roughly 165 people in editorial roles. It is the editor’s job to seek out promising new authors and original book projects for the publisher to publish, which editors typically do by reviewing submissions. If the publisher and author agree to work together to publish the book, they will sign a publishing agreement that sets forth the terms of their working relationship.

17. The publishing agreement sets forth the amount of the advance that the author will receive – which is an advance payment (or series of payments) against anticipated future royalties. Advances are recoupable but not refundable. This means that authors are not required to repay the advance if the book makes less money than was anticipated, but are equally not eligible to receive royalties until the publisher “earns out” (*i.e.*, recoups) its advance. Advance payments provide authors with reliable financial support during the long months or years in which they are writing their books.

18. Publishing agreements also delineate the rights granted and royalties earned on the various formats each work may be published in. These agreements reinforce the basic principle that royalty rates and earnings are different for the various formats we publish works in. This is because each format is distinct in terms of the associated costs and the revenues earned. Thus, for example, Hachette's form agreements explicitly break out and assigns specific royalty rates for electronic works and audio, which is typical for the major trade publishers. In addition to different royalties paid to authors for different formats, royalty rates can vary further by channels of distribution. Hardcover, trade paperback, and mass market books each have their own royalties rate based on the retail cover price of a book; ebooks royalties, in contrast, are based on a percentage of net revenue. Moreover, there are further breakdowns for high discount sales or in special markets outside ordinary bookstore trade.

19. In addition to providing authors with financial support, editors also work closely with the authors to enhance the quality of their manuscripts and provide critical feedback. In many cases, an author will work with a trusted editor on many books over the course of decades. To pick one example from many, I have personally worked with the novelist Harlan Coben for approximately fifteen years.

20. Hachette also pays copy editors to prepare the manuscript for publication by correcting grammar, fixing spelling mistakes and proofreading to ensure consistency. There is also an art department that engages freelance illustrators to design book covers and, in some cases, interior designers who lay out the pages of the book. And Hachette spends yet more money on producing various editions of the text in different formats. There are compositors who set the type for the various print editions of the book. An entirely separate team is responsible for creating ebook editions, which are specially formatted to be read on various devices and platforms.

Audiobooks versions are created by yet another division that engages voice actors and produces the recording. Each of these formats – print, ebook and audiobook – is a separate product that has special requirements and incurs its own of costs.

21. Legal counsel is yet another cost incurred by Hachette (and most publishers). Lawyers might be called upon to conduct a pre-publication review to mitigate the risk of various potential legal problems. And lawyers are employed to protect the author and publisher interests against copyright infringement. Thus, for example, Hachette devotes resources to combatting piracy, which it does in part by engaging the services of a specialist piracy vendor. This is all on top of the inherent costs of running a large business, including accountants, rent, broadband bills and other goods and services too numerous to list here.

22. The administration of royalties is another vital service that Hachette provides authors. The reliable handling of royalty payments is incredibly important for working authors who rely on this steady stream of income (hopefully) for the remainder of their lives and beyond – which is a powerful economic incentive to become a book author in the first place.

Creating Audiences – Marketing, Publicity and Sales

23. In addition to providing editorial and financial support, Hachette invests heavily in making the world aware of its books and encouraging people to buy and read them. Each division and imprint of Hachette has sizeable marketing and sales departments that work to accomplish this goal. Hachette spends tens of millions of dollars per year for this purpose. Optimum marketing varies by title, but money is often spent on trade and consumer advertising targeted to a variety of channels (including print, digital and broadcast), and social media campaigns, author tours, and retailer placement programs.

24. Hachette and other publishers also employ large sales departments that focus on getting books into the hands of readers via different formats and channels. In broad brush terms, there are multiple major channels through which trade books are sold. There are large chain bookstores like Barnes & Noble. There are also thousands of independent (or “indie”) bookstores serving local communities all around the country. Then there are big box retailers (like Walmart), online retailers like Amazon and the vast number of libraries across the country. Each channel has different characteristics and is marketed to differently.

25. The online marketplace is particularly complex and readily distinct from selling books into brick and mortar stores. Thus, Hachette employs dedicated salespeople to manage the online marketplace. These employees are responsible not only for ensuring that books and ebooks are being distributed via online retailers (like Amazon) or library aggregators (like OverDrive), but they must also help the publisher to merchandise their titles properly. Unlike brick and mortar bookstores, who are responsible for how to display books in a store, our sales reps work with online accounts and with our publisher information teams to provide high quality information (“metadata”) for each title that will help drive discovery by readers and get our books featured for consumers. Jacket images, book descriptions, author biographies, reviews, quotes and excerpts are just some of what is provided.

26. Pricing is also distinct by formats, driven by different market forces, the different channels that works are distributed in, and different characteristics of the formats and works.

27. Publishers like Hachette also frequently engage in price promotions, where books will be discounted. These kinds of promotions, often combined with other marketing, can be profitable if they ultimately cause a sufficient uptick in sales. But, for obvious reasons, giving away or discounting books can drive revenue down which is why publishers are very deliberate

about controlling the flow of cheap editions of their books into the marketplace and generally only give away free books in highly limited circumstances as a charitable donation, usually to underprivileged communities.

28. In short, just like the editorial services Hachette provides authors, these marketing, promotions and sales activities require huge upfront investments that must be sunk into every book before publication and before any income is generated.

Printing and Distribution

29. Publishers also assume the expenses related to printing and distributing hard copy books. While these costs are a fraction of the costs of acquiring and developing a book, publishers nevertheless spend significant amounts of money on nuts-and-bolts book publishing logistics like acquiring paper, printing and binding books in various formats, warehousing large quantities of books while they await distribution and finally shipping the finished article out to customers via the various channels discussed above.

30. In sum, Hachette spends millions of dollars per year on supporting authors and the substantial investments required to bring books into existence. On the other side of the ledger, Hachette must make money from the books it publishes in order to recoup its costs, pay its authors and make profits that can be ploughed back into the business to pay for new books.

HACHETTE RECOUPS ITS INVESTMENTS – AND ULTIMATELY PAYS ITS AUTHORS TO WRITE NEW BOOKS – BY FINDING NEW MARKETS AND AUDIENCES FOR ITS ENTIRE CATALOG OVER THE LONG TERM

31. As noted above, when an author signs a publishing agreement with Hachette, they grant Hachette a substantial portion of their copyright interest in the book – typically the exclusive right to publish the work in print, audio and ebook formats within the United States (and sometimes other territories) for the duration of the copyright term. In effect, the author grants the publisher the right and responsibility to hopefully secure a return on investment. And publishers do this by

keeping the books available long after their initial publication and making as many connections as possible with different audiences who will pay for the book. This is ultimately how Hachette makes the money it needs to recoup the heavy upfront costs it bears to publish a book and generate steady profits – which Hachette redistributes to book authors through royalty payments and investments in new projects.

32. I understand that Internet Archive suggests that the publisher’s exclusive rights are “exhausted” once a physical copy of a book is purchased so that the rightsholder suffers no economic harm if the purchaser then distributes an equivalent number of unauthorized ebook copies of that book on the internet. I also understand that one of Internet Archive’s expert witnesses in this action contends that, on average, sales in the first five years after a book is published account for between 45% to 86% of lifetime sales. Both of these assumptions misunderstand the economics of the publishing industry.

33. Based on my extensive experience in book publishing, book publishers are not focused on short term profits and they most certainly do not extract the vast majority of value from their books within the first few years of publication before simply moving on to the next slate of new releases. Nor do publishers look to one format as the means to recoup their investment in the works. Rather, publishers (and authors) look to revenue streams from *all* formats.

The Importance of Backlists

34. Book publishers have strong incentives to maximize revenue from every book that they publish over many years because long-term revenue streams from successful books pay for the inherently risky upfront investments publishers make in new books and authors. The commercial success (or failure) of a book is driven by countless factors – many not within the publisher’s control and many that may change over the life of the book. This is because every

book is unique. While some books are instant smash hits, most are not and many never earn out their advances, or only find success years down the road.

35. Publishers hedge against these risks – and keep themselves in business – by doing several basic things that contradict Internet Archive’s false assumption that their economic interests in any given book almost invariably diminishes within a few years of publication. Publishers are heavily dependent on backlist sales, for instance, particularly the steady revenue that “breakout” books generate over the course of many years. Hachette defines its “backlist” as in-print books that were published two years ago or more.¹

36. The backlist is comprised mostly of books that were published five or more years ago. The backlist drives Hachette’s profits. This is clearly reflected in sales data, which shows that revenue from backlist ebooks exceeded frontlist ebook revenue in 2019 and 2020. (A true and correct copy of the spreadsheet reflecting this data is annexed hereto as Exhibit 2.) Income from sales of physical backlist books has increased year on year between 2018 and 2020, while revenue from frontlist hardcopy books has decreased in each of those years. Indeed, the majority of Hachette’s most successful books do not earn the bulk of their earnings in the first five years. Rather, they have a long tail that runs for many years or even decades after the publication date.

37. Backlist revenue is crucially important for a number of reasons. Perennial classics generate a steady stream of income, year on year, for decades. The income is both substantial and relatively predictable (unlike the sales of new books). This is readily apparent from the sales figures of a book like *Catcher in the Rye*, first published by Little Brown in 1951, which generated tens of millions of dollars in sales between 1999 and 2020. (A true and correct copy of a

¹ When Hachette books go “out of print,” the exclusive publishing rights obtained by Hachette typically revert to the author, who is free to republish the book via any avenue they choose.

spreadsheet reflecting sales data for all of the Hachette Works in Suit is annexed hereto as Exhibit 3.) Part of that revenue goes to authors or their estates as royalties, but the remainder can be invested by Hachette into the riskier business of acquiring, developing and publishing new books.

38. The import of the company's backlist incentivizes publishers to be ever watchful to take advantage of new developments that may drive additional sales of a work. As I previously noted, book sales depend on myriad complex factors and the market for a particular book can change practically overnight – for instance, if a news story brings a particular subject into prominence or if an author receives an award or sudden fame or if a popular movie version of a book is released. For diligent publishers like Hachette, it can be hugely profitable to respond to advantageous market forces by quickly republishing or raising awareness of a relevant title (even if that book had not been selling well in the period immediately prior). An author may not “break out” before publishing multiple books and when an author does achieve success later in their career, the publisher will usually see a significant uptick in revenue from their earlier works, even if they did not sell well when first released. For example, Hachette's Forever imprint is currently in the process of repackaging and relaunching backlist titles for two long-standing authors that have only recently experienced a significant increase in front list sales.

Revenue is Derived from All Formats

39. Internet Archive's assumption that a publisher's rights are “exhausted” when the hardcover (or paperback) version of the book is sold ignores the structure of the publishing business. Publishers (and authors) historically have been paid, and need to be paid, for each format that a book is published in. Consequently, the publisher needs the ability to set different terms and conditions (including price) for each format. Publishers would have little incentive to invest in and develop new formats (like ebooks) and their related markets if their rights were somehow

“exhausted” upon the sale of a print book and third parties could unilaterally transform print books into digital books *en masse* and distribute them online.

40. The new formats that publishers help to develop benefit the public greatly, while simultaneously allowing publishers and their authors to reach different audiences. Recognizing those distinctions, publishers set different prices for different formats based on their specific characteristics, and get paid separately for each one. The pricing of physical books takes into account the expected, rather limited extent of distribution. Ebooks are distributed under an entirely different model in order to account for the fact that they have superior distribution capabilities. Internet Archive’s belief that book formats are freely interchangeable threatens Hachette’s business by breaking down the walls between print and ebook formats that make it possible to sell print books in a profitable manner according to their current carefully calculated prices.

41. Many authors (and some publishers) were initially wary of entering the ebook market, in large part because it emerged in the wake of the destruction that websites like Napster caused to the music industry. But Hachette has long understood that electronic formats offer immense potential benefits. Digital files can be easily replicated and freely distributed at virtually no cost to devices located anywhere in the world within a matter of seconds. This allows publishers to reach new audiences and new consumers. Some readers prefer ebooks. Other readers might choose paper books in certain situations and ebooks in others – for instance, a person who is travelling may prefer to load ebooks onto a device to read. All of this presents an opportunity to find new audiences to purchase Hachette books, which is entirely consistent with its business model.

42. But ebooks also carry special risks that can only be tamed by imposing limitations on how they are used. The downside of the replicability and portability of ebook files, for

rightsholders at least, is that a single unprotected ebook file can satisfy a vast swathe of global demand for a title if it is allowed to proliferate. And this is why Hachette's ebooks – like virtually all media companies that distribute content over the internet – are distributed to retail consumers and libraries with license terms limiting their use, as opposed to simple transfers of raw files to anybody who wants to buy them, with the rightsholders hoping for the best.²

43. Only by maintaining control over its ebook files was Hachette able to create economically viable markets for its ebooks, which required years of careful investment to build. For example, when ebooks first began being offered to consumers, each publisher was required to invest in producing and maintaining redundant ebook files with separate formats differentiated for each retail platform. Hachette actively invested in producing these formats for consumers to help build ebook retail spaces for the future and to provide access to readers on a variety of platforms. However each proprietary format had its own unique advantages and disadvantages, so consumers remained wary of purchasing digital content during this volatile period without a clear format leader.

44. Between 1999 and 2007, Hachette engaged with the International Digital Publishing Forum and its working group's efforts to create an ebook standard format, namely the EPUB ebook file format. Other publishers, including Penguin Random House, HarperCollins, Macmillan, and dozens of other international trade and academic publishers were also engaged in this effort to resolve the multiple competing format requirements and improve the consumer experience across all retailers.

² To be more precise, Hachette sells ebooks to library ebook aggregators, such as OverDrive, who in turn license them to libraries under the terms required by Hachette.

45. With the introduction of EPUB standards in 2007, Hachette asked its ebook retailers to support the new universal standard as Hachette’s primary ebook format, which ultimately led to an increase in consumer confidence in both ebook products and the development of new reading devices. Since those early years, Hachette has continued to support EPUB development. Hachette was ultimately able to embrace the opportunities offered by ebooks (while mitigating the risks) by imposing controls on the files it distributes – which it primarily did through digital rights management (“DRM”) technology and by licensing the ebooks under appropriate terms, which incorporate commercially viable pricing models.

46. Since Hachette started distributing ebooks through retail platforms like Amazon in or around 2010, their popularity has exploded and ebooks have become a vital part of our business. In 2021, ebook revenue from the retail and library channels made up approximately 15% of our business. Much of this revenue was shared with authors as royalty income or reinvested into new projects.

47. Hachette’s commitment to ebook markets is further underscored by the fact that virtually all of the original titles in its catalogs are available as ebooks – including all of the Hachette books at issue in this lawsuit. The few exceptions are mainly illustration-heavy books that are not suitable for ebook formats (or instances, such as reprint agreements, where we do not have the digital rights). And Hachette has invested heavily in converting older works into ebook form. Underscoring that ebook rights are independent from trade or paperback rights, in many instances Hachette had to obtain amendments to older contracts to allow those works to be published as an ebook.

48. This focus on developing new markets helps readers and authors. It means that books reach new readers that may otherwise not have been aware of them or had the inclination to

read them in a format they disfavored. It means that publishers can maximize revenues from successful books over the long term, which is crucial to the viability of its business model and longterm revenue to authors. And, perhaps most important, it diversifies the revenue streams that authors receive from royalties and helps ensure that they receive payment for their work for the remainder of their lives from every format of their work.

HACHETTE LICENSES VIRTUALLY ALL OF THE EBOOKS IN ITS CATALOG TO LIBRARIES AND LIBRARY PATRONS HAVE CHECKED OUT HACHETTE EBOOKS MILLIONS OF TIMES

Many Americans Are Obtaining Their Ebooks For Free From Libraries

49. The library ebook channel is very important to Hachette, as it is to all book publishers. Libraries are rightfully beloved institutions in this country – and they are an institution that I have an especially strong personal affinity for since both of my parents are career librarians. Libraries are keen to connect their patrons to books and are supporters of the multiple formats desired by their patrons. Libraries also help publishers reach new audiences for their authors, which advances publishers’ core mission of putting their books in the hands of potential readers. The majority of books Hachette sells to libraries are print books, but Hachette also offers libraries ebook versions of virtually all of the original titles in its catalogue.

50. Publishers have been selling physical books to public and academic libraries for hundreds of years, and a stable equilibrium has developed during that time. Publishers understand that libraries purchase books with the intention of lending them to their patrons – which means that a single copy of a book in a library can satisfy the demand of multiple readers (potentially dozens) who would otherwise be forced to buy their own copy. Publishers genuinely believe in the mission of libraries to advance literacy (and thus foster new readers). Public libraries also help publishers market their books, which they do by facilitating author talks and other promotional activities designed to increase library patrons interest in books. The services provided by librarians

to patrons are also important in helping patrons discover new books and authors, including our backlist titles which are an important part of a library's collection. A key component of the successful publisher/library relationship is that libraries serve defined geographic or academic communities.

51. These geographic and other limitations necessarily inform the viability of the library market for publishers. Thus, for example, physical books have inherent physical limitations that require libraries to repurchase copies over time. Library books are frequently lost, damaged or are read by readers so many times that they degrade and become unusable – and in each of these cases, the library would be required to purchase a new copy of the book if it wanted to keep it in the collection. It also takes libraries time to process and reshelve physical books when they are returned and this lag time imposes limits on the number of patrons who can read the book within a given period of time. These same limitations also make the process of transferring interlibrary loans costly in time, labor and money. All of these factors place natural limits on the number of library patrons who can read a single book, which incentivizes libraries to continue purchasing copies of popular books over a long period of time.

52. We believe that the “friction” involved in checking out physical books from libraries – the delays when a popular book is not available, the time and costs associated with traveling to the library to check out a physical book – may motivate some library patrons to purchase their own copy rather than check the book out from the library. And this has the beneficial effect of freeing up library books for those who genuinely do not have the option to buy books because they cannot afford them. For all these reasons, and many more, Hachette continues to enthusiastically distribute its titles through libraries.

53. The library ebook market is far more difficult because it is relatively new and, more fundamentally, because ebooks are different products than hardcover/paperback books. Even if libraries place DRM restrictions on the file to ensure that only one user can read it at a time, the economics of library ebook distribution are different. This is because a single ebook can satisfy the demand of far more library customers than its physical equivalent. Ebooks check themselves in and out automatically, which means that they circulate faster and more readers can read a popular title in a given period of time. And, because ebooks do not get lost or damaged, a library would not have to organically repurchase a title once it has paid for an electronic copy. Libraries can also obtain additional ebook copies to meet patron demand with immediate results of adding a title to their collection and getting it to a reader much more quickly than a physical equivalent.

54. Perhaps most importantly, the convenience of ebook lending – particularly the ability of users to check ebooks out instantaneously anytime and anywhere – makes it a highly attractive proposition to consumers who would otherwise purchase books instead of going to the library. Critically, the experience of checking out a library ebook is functionally identical to downloading a copy from Amazon. Thus, for those readers who prefer or are open-minded about reading ebooks, the library ebook provides an extremely easy way for them to obtain the title for free – something that they can do in minutes, from their home or office or on the run.

55. These considerations inform the evolving terms and prices for the library ebook market. But they also show that the library ebook market is operating remarkably well because a large proportion of Americans are reading ebooks for free that were authorized and licensed by publishers. In March 2021, Hachette conducted a three year analysis of the extent and impact of library ebook circulations on Hachette commercial ebook sales based on circulation data from OverDrive. (A true and correct copy of this overview is annexed as Exhibit 4.)

56. More specifically, Hachette examined the number of ebook circulations of its titles to library patrons through its largest library distributor, OverDrive, and the number of consumers purchasing their ebooks. Strikingly, Hachette found that between 2017 and 2020, library ebook circulations made up, on average, 50% of the total units of trade ebooks distributed. *Id.* In other words, half of its ebook readers were library readers obtaining the ebook for free. The related revenue figures attest to Hachette’s commitment to libraries. While library ebook circulations made up 50% of the total units downloaded of trade ebooks between 2017 and 2020, ebooks obtained by libraries which resulted in those circulations brought in only 13% of total ebook revenue for Hachette. *Id.* In other words, half of Hachette’s authorized ebooks were read by library patrons even though library purchases accounted for less than 15% of the revenue from this format, across all sales channels. This speaks to the efficiency of ebook lending and the availability of content that can be accessed by library patrons. And the trend appears to be increasing as the COVID-19 pandemic spurred new interest in library ebooks. In 2020, library ebook revenue was 16% of the total from ebooks overall, but 57% of ebook reads for that year were library ebooks. *Id.* This data underscores the accessibility of Hachette ebooks and the functioning market that has evolved.

57. The figures are all the more striking for the backlist. Hachette’s analysis concluded that, “Since 2017, the percentage of consumer reads has been shifting from retail towards library, especially for backlist. Of all HBG backlist ebooks either purchased or checked out in 2020, 38% were bought at retail and 62% checked out from libraries.” *Id.*

58. Hachette’s sales data shows the appeal of free ebooks to users – and hence of the harm threatened by the Internet Archive’s free ebook website. The data discussed above has led Hachette to conclude that readers who were previously purchasing retail ebooks are switching to

library ebooks, which means that we lose retail sales to free borrows. The data shows, for instance, that revenue for certain writers who have had strong and steady numbers have gone down while the circulation numbers for their library ebooks have gone way up. For instance, ebook revenue for books by one prominent author decreased by 12% for frontlist and 7% for backlist between 2017 and 2020, a period in which – due to COVID-19 – the expectation was that ebook revenue would go up. *Id.* During that same period, checkouts of her library ebooks increased 10%, with 52% of all reads coming from libraries. *Id.* It is also noteworthy that only 25% of that author’s backlist ebooks were purchased at retail in 2020 – down from 47% in 2017 – which offers powerful support for the idea that certain readers who previously paid for her ebooks via retail platforms are now borrowing them instead.³ *Id.*

59. The most obvious explanation to us is that readers are deciding not to purchase retail books because the licensed, free library ebook version is an equally convenient substitute. Given the long history of Hachette’s strong relationship with libraries – and the fact that library ebooks remain a revenue stream for authors and publisher – Hachette remains committed to providing libraries with ebook editions of its titles. But these trends strongly reinforce the notion that Internet Archive’s free bootleg copies of our titles will hurt our commercial ebook sales. They show that members of the public are understandably drawn to free ebooks, especially when they can be obtained conveniently by any user in any location with an internet connection and when the public would not be aware that the IA’s versions of our ebooks are unauthorized by the author or the publisher.

Hachette’s Library Ebook Terms Carefully Protect Its Authors

³ Similar trends are apparent from data for a prominent science fiction author. And another bestselling author saw library ebook checkouts rise while his retail revenue declined for frontlist titles and remained flat for backlist titles.

60. The data reviewed above also informs the evolving license models offered by Hachette (and other publishers) in this relatively new market. Hachette has worked closely with its library partners to address their concerns regarding the license terms offered by Hachette and to meet the ever increasing ebook demand from libraries while at the same time protecting the vital economic interests of authors.

61. Hachette has been broadly distributing ebooks to libraries and their patrons since about 2013. Like the other publishers who entered the library ebook market about a decade ago, Hachette initially offered libraries ebooks on a perpetual access model. From the library's perspective, this meant that they paid a fee to purchase access to an ebook file that could be lent to an unlimited number of patrons for an unlimited amount of time on a "one-copy, one-user" basis – *i.e.*, library users can check out ebooks one at a time. If demand is high, the library can acquire additional copies.

62. But in order for the perpetual model to make economic sense for Hachette, there were crucial conditions imposed on how the ebooks can be distributed. The key conditions of this perpetual model are reflected in the terms for digital book distribution for libraries that were effective in 2016. (A true and correct copy of the 2016 digital library terms is annexed hereto as Exhibit 5.) These terms bind ebook aggregators, like OverDrive, who receive ebook files from Hachette that the aggregators then license to libraries for library lending platforms. Many of these terms remain in place under the new models as they are central to the library/publisher relationship.

63. For instance, aggregators must limit their distribution exclusively to "Patrons of Permitted Library(ies)" within the United States. "Library(ies)" is further defined as a "not-for-profit public, school, college/university, military or research library which maintains a collection of digital books that it lends, but does not sell, for reading and research for its library members via

timed access/lending policies.” And a “Patron” is a person who has “evidence of membership in a Permitted Library.” In addition to DRM requirements, a key purpose of these limitations is to ensure that libraries may only distribute their ebooks to their own patrons, who – in the case of a public library – generally are local residents whose tax dollars ultimately funded the purchases. In other words, there is a critical geographic restriction on lending the ebooks.

64. Absent this geographic limitation, it would be possible for a relatively small number of ebook copies to satisfy large swathes of national or even global demand. While it is unlikely that a person would travel across the country to check out a physical book from a library, that same person has a much stronger incentive to check out an ebook from a far-off library’s website if it was technologically feasible to do so instantaneously and at the click of a button. At the same time, public libraries ensure that the tax dollars that go into their ebook purchases (like physical books) are used by residents of the community they serve.

65. As noted, the library ebook market is a relatively new market and it is evolving. After careful study of the market, Hachette changed its terms in 2019 to adopt a new two-year metered model. The perpetual model, as it turned out, was not serving the economic interests of Hachette authors.

66. Hachette engaged in consultations with librarians before deciding to move away from the perpetual model and was aware that it was not working for many libraries as well. Librarians are not uniform in their opinions, and some would prefer to keep the perpetual model. But a major concern for many was that pressure to purchase multiple copies of popular titles to meet a surge of demand for new and popular titles meant that libraries were forced to buy more ebooks than they needed over the long term. For instance, a library might buy twenty copies of the latest bestselling thriller novel to satisfy patron interests for six months or a year, but then be

left with nineteen ebooks that were rarely used after that – which would be a very inefficient use of taxpayer money. There were also libraries that demanded lower prices than what Hachette could offer for a perpetual term.

67. The two-year metered model was adopted as a compromise between the various competing concerns of Hachette, its authors and different library constituencies. (A true and correct copy of Hachette’s current digital library terms is annexed hereto as Exhibit 6.) The same requirements that libraries can only lend to their local patrons and must implement appropriate DRM remain from the previous terms. So too does the “one-copy, one-user” limitation that means that only one patron can check each ebook copy out at a time. But the key difference is that at the end of two-years from the date of purchase, “the Digital Book will expire and will no longer be available ... unless repurchased.”

68. Ultimately, Hachette believes that requiring libraries to periodically pay for ebooks they want to keep in their collection is necessary to secure a fair return on investment for itself and its authors. But the time-limit also enabled Hachette to cut the digital library price of its ebooks by approximately 15%, and in some cases up to a third, which makes each title more affordable. At the same time, libraries keep any ebooks acquired under the previous terms on a perpetual basis. Hachette also continues to offer perpetual terms to academic libraries.

69. Despite the complexity and competing demands from all sides, Hachette remains committed to the library ebook market and sees clear signs that it is thriving. Hachette offers its ebooks through approximately a dozen aggregators (primarily OverDrive) and these aggregators are collectively used by virtually every public, school and academic library in the United States. (A true and correct copy of a spreadsheet reflecting the list of aggregators that Hachette offers its

ebooks through is annexed hereto as Exhibit 7.) The number of ebooks read by library patrons nationally continues to rise year over year.

70. At the same time, Hachette responds and adapts appropriately when a crisis occurs. When schools and universities were closed down in the initial stages of the COVID-19 pandemic, for instance, Hachette adopted protocols under which teachers and professors could obtain up to 250 codes for their students to use to obtain ebooks that could be read in lieu of physical copies that were inaccessible. And Hachette also provided discount ebooks to academic libraries on a case by case basis, either under a simultaneous use option that allowed up to twenty students to read an ebook for two months for \$20 or a low priced “one-copy, one user model” of \$3 per copy for 3 month access.

71. Hachette also makes significant efforts to ensure that its ebooks are available in a format accessible to the blind and visually disabled, at no cost to those patrons. All of Hachette’s ebooks are designed to enable type resizing and/or zoom, so that readers can adjust the text to the display size of their preference. Hachette is also a contributing member to the World Wide Web Consortium (W3C) and has been actively involved in supporting EPUB specifications since the format’s inception with the International Digital Publishing Forum. Nearly all of Hachette’s ebook content is supplied to partners in EPUB format, which natively includes basic support for accessibility features across many devices and retail platforms. Hachette's long-term objective is to continuously improve our production standards for ebooks so that we can meet the highest accessibility standards whenever possible.

72. In addition, Hachette makes all of its active ebooks available via both the [National Library Service](#) and [Bookshare.org](#). The NLS, operated by the Library of Congress, permits registered local library patrons across the United States to download talking books and ebraille

versions through their free digital accessibility service known as BARD, with supported applications available for free to Apple and Android users, and supported devices available for free at participating libraries. Similarly, Bookshare® is the world's largest accessible online library for people with print disabilities. Bookshare is free for all qualified U.S. students. Individuals who are not students or international patrons can pay a nominal annual fee for their membership. If a reader requested title is print exclusive or has never yet been available in ebook format, Hachette produces a special PDF exclusive to Bookshare for the unique purpose of fulfilling this obligation to readers.

INTERNET ARCHIVE HARMS HACHETTE AND ITS AUTHORS

73. Hachette has sued Internet Archive for scanning and posting twenty seven titles to its Website – including Malcolm Gladwell's *Blink* and *Tipping Point*, the canonical works of J.D. Salinger, two novels by bestselling author Sandra Brown, and blockbuster children's titles such as the Mysterious Benedict Society series and books by Lemony Snicket. Internet Archive has also copied books like critically acclaimed thrillers *The Jury Master* by Robert Dugoni and *The Witness* by Sandra Brown, as well as the young adult dystopian novel and National Book Award Finalist *Ship Breaker* by Paolo Bacigalupi. As previously noted, this is a tiny fraction of Internet Archive's overall infringement of Hachette's titles, which includes more than 4,500 books. In short, Internet Archive operates outside of the established market Hachette (and other publishers) have in place to serve library patrons, and they pay no money to authors or publishers for the copying and distribution of free ebooks.

74. This conduct harms Hachette on a number of levels explained more fully in Section H of the Declaration of Chantal Restivo-Alessi of HarperCollins, which I have reviewed (excluding confidential material) and endorse. First, by scanning print books and distributing the

resulting ebooks, Internet Archive is usurping the many benefits of ebooks without paying the fees that libraries who distribute authorized ebooks pay. If Internet Archive claims that it is a library, and is engaging in short term loans of ebooks like libraries, it should be paying the rightsholders who created the work a fee. Multiplied out by all of the circulations of all of the Hachette books on Internet Archive's free ebook website, the lost fees would be in the hundreds of thousands of dollars at the least.

75. Viewed from another angle, my experience and the ebook data Hachette routinely reviews regarding public libraries clearly supports the conclusion that Internet Archive's Website deprives Hachette of significant revenue as a result of readers who decide to read titles on Internet Archive instead of paying for an ebook version.⁴ As is the case with library ebook reads that appear to cut into retail revenue, it stands to reason that many internet users will read ebooks in the free formats offered by Internet Archive rather than paying for their own ebooks. And if Internet Archive is allowed to scale up these activities or others create similar websites, the draw of these websites for consumers will increase exponentially – as will damage to Hachette's revenue and authors' royalties.

76. Internet Archive also threatens Hachette's library ebook revenue by reducing demand for library ebooks. In our experience, libraries are extremely responsive to their patrons' requests and to the popularity of titles according to their data – which means that they are very unlikely to spend money on titles that patrons are reading elsewhere. The declaration of Chantal

⁴ While Hachette contends that the Internet Archive also harms its print book sales revenues in the commercial and library markets, its summary judgment motion is solely based on ebook sales. Hachette reserves the right to address print sales in the event of a trial in this matter.

Restivo-Alessi of HarperCollins further illustrates the Internet Archive’s threat to our library ebook revenues – a threat evident in Internet Archive’s own pitches to libraries.

77. The negative effect on library ebook licensing fees caused by Internet Archive will only increase as the website becomes more widely used and offers more free ebooks. This was strikingly illustrated by Internet Archive’s “National Emergency Library,” which unilaterally lifted the cap on the number of people who could read a book at one time for three months at the outset of the pandemic. The number of users reading ebooks for free on Internet Archive’s websites predictably surged. I am informed, for instance, that *Catcher in the Rye* (a Hachette title) was “checked out” more times on Internet Archive’s websites during that time period than the licensed ebook edition was borrowed from OverDrive, Hachette’s authorized aggregator. (A true and correct copy relevant excerpts of the February 25, 2022 report of Rasmus Jørgensen, Ph.D. (“Jorgensen Report”) is annexed hereto as Exhibit 8.) (*See id.* ¶ 43.)

78. Internet Archive also harms Hachette in less obvious ways. Hachette has very high standards for its ebook products and the Internet Archive’s scans, while entirely legible, fall short of these high standards. Authors and consumers have come to expect our works to be distributed in high-quality formats and the availability of these works in a scanned format could reflect poorly on Hachette in their eyes, particularly since the Internet Archive presents itself as a legitimate actor. Moreover, the increasing availability of free ebooks on Internet Archive is likely to put downward pressure on library ebook prices. And Internet Archive’s conduct also exposes Plaintiffs to harm via the inadequate protection of our intellectual property – including harm caused by IA’s poor metadata that allows in-copyright books to be confused with public domain works and distributed without any restrictions, and by IA’s failure to comply with takedown notices.

79. I understand that the Internet Archive’s expert Rasmus Jorgensen has opined that the Internet Archive did not cause Hachette decreased OverDrive checkouts or lost ebook or paperback sales based solely on a comparison between the checkout and sales figures for the Hachette Works in Suit for the second and third quarter of 2020, and some broader industry data. As I understand, he looks at this period of time because Internet Archive’s National Emergency Library ended in June 2020 and the Hachette Works in Suit also were removed from the Internet Archive in that month. This analysis fails to take into account the basic fundamentals of book publishing.

80. Our long term experience teaches us that each title is unique, and there are myriad reasons why its sales or library checkouts in any particular format may go up or down over two quarters in a particular year. In most circumstances this makes it difficult, if not impossible, to isolate the impact of any one factor among the hundreds impacting a title’s sales and checkout figures at any given point. Indeed, even for older works, there is often fluctuation in demand by month or year – often for reasons that are hard to pinpoint. As we have witnessed, some of the myriad factors that may impact a title’s sales or library checkouts include the following:

- Seasonality, including whether school is in session;
 - The life cycle of the particular book;
 - Marketing, publicity and advertising by the author, publisher, or retailers, including store or website placement or promotions.
- Publicity for the work not directly initiated by the author or publisher, including but not limited to social media, reviews, press articles, and rankings and recommendations on retailer or other book sites;

- Publicity for the author unrelated to the title, including exposure from the authors' other professional activities or other works;
- Relevance of the topic or themes to current events -- or conversely, current events that divert attention elsewhere;
- Pricing, including promotional discounting by either the publisher or retailers/wholesalers
- Publication or success of other works by the author;
- Prizes;
- Author life events (including the death of the author);
- The release of movies, plays, art exhibits or other media related to book or author or related topics;
- The availability or popularity of competing books or formats (including prices of competing works, pricing and availability of used print books, and pricing of competing formats);
- School adoptions;
- Adoptions of a title for community reads or similar programs;
- The appearance of a major book such as the Obama biographies that may bring increased numbers of people into bookstores;
- Other external economic factors affecting consumer demand; and
- Supply chain issues, including printing capacity, paper availability and shipping.

81. Moreover, 2020 was a year like no other in every regard. COVID, the Black Lives Matter movement, and the presidential primaries and election all had a profound impact on book

publishing, including our titles. Different titles were impacted differently, and at different points in time, by these seismic events. As but a few examples, some of our titles frequently assigned in middle and high schools saw a decline between the second and third quarter of 2020, which we believe may have occurred because students in the spring needed to get additional copies of books locked in their closed school buildings, but had no school in the summer. We found that readers' interests in certain topics and genres shifted over the course of 2020. The closing and re-opening of bookstores and libraries impacted both our print book and ebook sales levels, again with some variation across titles. We encountered a range of complex supply chain issues that had different impacts on different books, often depending on the extent of our inventory for that title in the warehouse and the inventory for that title held by our wholesalers and retailers – and thus the timing of our need to print and ship books. For all these reasons, any given book may not perform in conformity with wider industry trends for numerous reasons, any of which would be exceptionally difficult to isolate, especially if its impact were relatively small in the larger scheme. Any sound analysis of the impact of any one factor, such as the Internet Archive, would need to take into account all the other factors impacting a given title's sales in a particular quarter.

82. In sum, Internet Archive poses a clear and present danger to Hachette's book publishing business. The seriousness with which Hachette takes this risk is clear from the hundreds of takedown notices listing thousands of URLs it has sent Internet Archive, including requests to remove certain Works in Suit that were self-evidently disregarded. (A true and correct copy of one such takedown notice is annexed hereto as Exhibit 9.) The harm caused by Internet Archive's infringement of Hachette books is real and must be stopped in order to prevent an escalation of harm that would have devastating effects on our business and our ability to provide authors with a return on investment for their life's work.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on July 7, 2022.



BEN SEVIER