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**Interview: Deciphering the Law: Hachette v. Internet Archive Pt. 1 (2023) with Dave Hansen**

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# Interview: Deciphering the Law: Hachette v. Internet Archive Pt. 1 (2023) with Dave Hansen

Dave Hansen
Authors Alliance

Interview by Tucker Taylor and Mariah Lewis

**Abstract**

This is the first in a series of interviews with those closely tied to the Hachette v. Internet Archive lawsuit. In March 2023, the court ruled against the Internet Archive and its use of the Emergency Lending Library causing a ripple throughout the library and education fields. Below, find the answers to some of the questions that the case elicited by JCEL contributors and copyright scholars Dave Hansen, Michelle Wu, and Kyle Courtney.

*Keywords*: Controlled Digital Lending, copyright, librarianship, fair use

## Interview: Deciphering the Law: Hachette v. Internet Archive Pt. 1 (2023) with Dave Hansen

Dave Hansen is the Executive Director of Authors Alliance. He holds a JD and an MSLS from UNC Chapel Hill and is a copyright attorney licensed to practice in North Carolina. Previously employed by Duke University, he was responsible for Duke University Libraries' core research, collections and scholarly communication support in his role as Associate University Librarian and Lead for Copyright and Information Policy. As a member of the Libraries' senior leadership, he helped guide organizational policy while also working closely with faculty and graduate student authors, publishers, and librarians on copyright and other legal issues. He also promoted information policy that benefits the public, testified before congress, and wrote amicus briefs submitted to a variety of federal courts.[1]

This Interview occurred on Friday, August 11th, 2023, just hours before the proposed judgment was submitted by the parties. For more information on the proposed judgment, check out the Authors Alliance update.

### Could you tell us about your work and how it ties in with this lawsuit?

I'm the Executive Director of the Authors Alliance. The Authors Alliance is a nonprofit that aims to support authors who write for the public benefit, primarily by wanting to see their works and their ideas achieve widespread dissemination. I think a lot of what motivates us is not only that authors want to see their works read, but they also want to support free inquiry and learning. So, it's been very natural for Authors Alliance to support Controlled Digital Lending (CDL). We view libraries as an important piece of the online dissemination system, as well as a critical piece of just information dissemination in general. What we are seeing with this lawsuit and the movement of libraries towards adopting Controlled Digital Lending is encouraging. It's a signal that libraries with a long-term, non-profit, cultural heritage point of view are working towards finding ways to make works that have been previously unavailable online, available.

However, if you look at the lawsuit, you'll find quite a few author organizations lined up as amici against Internet Archive. These organizations say "CDL is destroying our livelihood, this is negatively impacting our ability to continue to produce works." The Authors Alliance disagrees with these ideas for several reasons. For one, there are lots of problems with the publishing marketplace.

[1] *Welcome to Dave Hansen, the new executive director of Authors Alliance.* (2022, June 16) Authors Alliance, https://www.authorsalliance.org/2022/06/16/welcome-to-to-dave-hansen-the-new-executive-director-of-authors-alliance/

https://10.17161/jcel.v7i2.21337

Authors are not as well supported as they should be for many reasons. Librarians lending digital books in a controlled manner is not one of them. It's so far down the possible list of economic issues facing authors that it's laughable.

If we really want to fix the economic marketplace for authors, Amazon having a virtual monopoly on distribution is probably a good place to start. Or the fact that we have, in the trade books space, basically four publishers—recently they tried to make it three by merging together (thankfully the DOJ stopped that). And pirate websites on top of that. These problems cause real harm to authors. But Controlled Digital Lending does not. Any potential harm is far outweighed by the benefit of having libraries being able to offer readers books online in a responsible way. It's hard to even imagine how this is really harming authors from an income perspective.

There's this good book called *Chokepoint Capitalism: How Big Tech and Big Content Captured Creative Labor Markets and How We'll Win Them Back* by Rebecca Giblin and Cory Doctorow. The book discusses different creative industries and how consolidation of market power within those industries has resulted in a situation in which creators are left out in the cold, while these big corporations that control all the rights are making all the money. Corey Doctorow made a powerful analogy that I often think about: if you are sending your kid to school with a bunch of lunch money and every day the bully goes up to your kid and bullies them out of their lunch money, the solution isn't to give your kid more lunch money, the solution is to deal with the bully. Expanding creators' copyright rights will not be effective if those rights are just handed right over to publishers or other intermediaries. It will do nothing for individual creators.

**How is the Authors Alliance involved with the lawsuit?**

We filed an amicus brief in the district court arguing that Controlled Digital Lending has many ways of benefiting authors. For example, it raises the visibility of authors' works in libraries. It's well-established that readers who read books in libraries also buy books. I think there is a market advantage there. Another is that authors are researchers. To write good books you have to do good research and you need access to materials. CDL helps because it gives authors a pathway to obtaining access to other writings, often to books they can't otherwise get.

We are waiting to see when and what will happen on appeal, but we have every intention of filing another brief in front of the Second Circuit Court of Appeals arguing that the Internet Archive should win and that Controlled Digital Lending is fair use.[2]

[2] Editors' note: The Authors Alliance filed this amicus brief on December 21st, 2023, and it can be read here.

**What is a broad summary of the ruling of the case? What fair use factor(s) did the lawsuit fail on?**

A little bit of history on the case is important. This case was filed in the summer of 2020, four months after the entire world shut down due to COVID. That context is important for a couple of reasons.

First, the Internet Archive made a change in its lending policy at that time that really went beyond Controlled Digital Lending, called the National Emergency Library. Libraries all around the world were physically shut down, people could not get in. However, educators and students were desperately trying to move forward with teaching and learning. During the lockdown, the Internet Archive created the National Emergency Library (NEL) which eliminated the requirement of the owned to loaned ratio baked into the Controlled Digital Lending model. It was turned off once library access was more stable. The NEL wildly enraged publishers, so they filed suit. The suit didn't just attack the NEL, but also attacked Controlled Digital Lending. The complaint is both fascinating and frustrating at the same time. The complaint tries to drive a wedge between the Internet Archive and the rest of the library community. It attacks IA as if it's some online pirate library. In statements from publishers, they've described the Internet Archive as not a "real library" even though the Controlled Digital Lending model that they are doing is very, very similar to what we see hundreds of other libraries doing around the country.

In some court cases, if the parties agree on the facts of what happened, it doesn't make sense to have a trial to establish these facts. Trials are expensive and take a long time. If what you're disputing is the interpretation of these facts (i.e., that CDL is fair use), then you can present your facts to the court in briefs, and ask the judge to decide on the facts that were presented to them. This process is called "summary judgment," and it's how the parties proceeded in the Internet Archive case. You argue your interpretation of the law to the judge, based on largely undisputed facts, which is what the parties did that March. The judge issued his decision very soon after these arguments.

Unfortunately for libraries, the court completely rejected Internet Archive's fair use argument on all of the factors. I don't think there was much persuading this judge, even if there had been a full trial. The oral argument happened Monday, and the judge issued his opinion Friday. It was an over 60-page opinion. Clearly, it had been prepared before that oral argument earlier in the week.

Let's look at fair use case for CDL. For the first factor, purpose and character of the use, libraries argue that CDL is non-profit, educational, and for research and learning purposes. These purposes are all ordinarily favored under that factor. Further, CDL is non-commercial, and it could be argued that it is a transformative

use. Some Second Circuit cases discuss enhancing or making it easier to obtain access. Two examples of this are *TVEyes*[3] and *Capitol Records v. Redigi*.[4]

A better ruling would consider the purpose of copyright in light of other congressional objectives. In the HathiTrust case[5] millions of books were digitized. HathiTrust made these books available to blind and print-disabled users. The court found this use was fair, partly because those are favored objectives under the Americans with Disabilities Act. The court felt that the first factor ought to take into account other Congressional objectives. CDL helps fulfill this Congressional objective of allowing alienability and transferability of copies of copyrighted works just like what we see under the first sale doctrine for physical books. CDL supports that same economic policy objective but in that online space.

The second and third factor, as in many fair use cases, lean with the judge's overall thinking about the whole case. The second factor considers the nature of the work itself, often considering if the work is creative or factual. This factor typically doesn't weigh very heavily in comparison to the first and fourth factors. In this case, these works were highly creative works. Although discussed in the ruling, I don't think it was a major part of the reasoning. The third factor considers how much you are copying and the amount and substantiality of the copying. In this case, it's the entire work, but that's not always determinative. There are many cases where the whole work is copied.

The fourth factor considers market harm. In this case the market harm assessment turned more on a question of whose burden it is to prove or disprove market harm than it did any actual evidence of market harm. I'm disappointed that the court essentially decided that actual evidence indicating a lack of market harm didn't matter very much; instead, the court focused on Internet Archive's burden in proving its fair use defense and so concluded that it couldn't show a lack of market harm.

The judge in this case found for the publisher on each factor. The worst part of the entire opinion is the court concluding that the Internet Archive's uses were commercial, often disfavored under the first factor. The rationale there was a real stretch. The court found that Internet Archive's uses are commercial even though Internet Archive isn't charging money for access to these books, because they are operating a website and these works are generating traffic, and the website is monetized because the Internet Archive solicits donations from their website. If that is the correct framework for analyzing "commercial use" I have trouble differentiating Internet Archive from any other library because libraries (and almost

[3] *Fox News Network, LLC v. TVEyes, Inc.*, 883 F.3d 169 (2nd Cir. 2018)
[4] *Capitol Recs., LLC v. ReDigi Inc.*, 910 F.3d 649 (2d Cir. 2018)
[5] *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)

every other nonprofit) also solicit donations via their website. It's really hard to square that. I also think the judge missed some important precedent.

For instance, there was a case in the Second Circuit—*American Geophysical Union v. Texaco*.[6] Texaco is obviously a big multinational, for-profit company, definitely a commercial actor. This case involved a lawsuit for photocopying of scientific articles owned by the American Geophysical Union. The court was asked in that case to assess fair use.

The court gave some clear guidance on what "commercial" means. It defined commercial exploitation as: "when the copier directly and exclusively acquires conspicuous financial rewards from its use of the copyrighted material. Conversely, courts are more willing to find a secondary use fair when it produces a value that benefits the broader public interest."[7] Even for Texaco in that case, the court was unwilling to conclude that Texaco's use was commercial. It's hard then to understand how the district court found the Internet Archive's use is commercial. This aspect of the case could cause a dangerous ripple effect for other libraries.

As for the other factors, the district court in the Internet Archive case rejected the argument that replicating the economic circumstances of the sale of print books online is an appropriate purpose and valuable in the online space. It also rejected that this was an educational purpose. The court didn't give much weight at all to what, if any, public benefit was coming from Internet Archive's use. There was a line about how none of that is of greater weight than the potential loss to the market that the publishers could experience.

On the fourth factor, there was a substantial discussion about market harm. This was actually one of the more interesting parts of the decision. The Internet Archive made a strong point that the publishers were the ones that held the data that would show market harm, if such information existed, and also that it was impossible to get that information from other sources. At no point did publishers produce information that CDL had in any way affected their bottom line. In fact, the uses at issue in the lawsuit happened at a time where the publishers were recording record profits.

One of the big challenges for fair use defendants, as the district court explained it, is for the defendants to prove that there was no harm—even though they aren't the ones who would have access to that information. Defendants are unable to access the necessary information to prove their argument. But the court nonetheless laid it on the defendant's shoulders. The court said you haven't proven that this isn't causing harm, therefore it is presumed to be unallowed. This is something the Second Circuit will want to examine. It is important for any defendant

[6] *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994)
[7] *Id.* at 992.

to be able to understand what their burden is for proving market harm, or at least what type of evidence they need to offer in the face of an allegation of market harm.

One real challenge to library's risk management and analysis is: how are the defendants supposed to understand the rights that they have under fair use prospectively, looking forward, when they have no way of knowing what is financially going on with rights holders. Particularly when these big publishers are very secretive about that information.

It's the same issue that we had in the Georgia State e-reserves case years ago in the Eleventh Circuit.[8] The court, after the fact, had the benefit of discovery and was able to look at the effect on sales and other market information. But this was hindsight. It's very difficult for users who want to exercise fair use to know this type of information before their use with the incomplete information they have. If the district court's interpretation of the "market harm" factor is correct, I suppose they will just have to guess and hope that they're right.

**Logistically, what's next?**

The parties are required to file a proposed judgment. Meaning that the court has already said Internet Archive loses, but the question is what is the appropriate remedy. Should the court order the Internet Archive to stop lending the specific 127 books that are at issue in this case? Should the court order the Internet Archive to turn off its servers entirely? Or, is there something in between those two extremes? What we are waiting to see is what the two parties have negotiated. That then goes before the court, and the question is whether the court is going to approve or change it. Once that final judgment is entered, then the parties are free to appeal. The Internet Archive has already said it is going to appeal. And of course, appeals take a while too.

It is likely that briefs would happen towards the end of this year. If things move quickly with a final judgment being entered soon then we would expect the Internet Archive's brief going in November or so and then the other side would get their time to respond. I don't think we'd have, realistically, any sort of Second Circuit hearing on this until well into 2024 at the earliest.

**What do you think the recent Supreme Court cases on intellectual property cases mean for the potential future of this case?**

Prior to *Oracle v. Google*,[9] the Supreme Court really had not looked at fair use in a long time. They hadn't given much guidance on it since the 90s in *Campbell v.*

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[8] *Cambridge Univ. Press v. Patton*, 769 F.3d 1232 (11th Cir. 2014)
[9] *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183, 209 L. Ed. 2d 311 (2021)

*Acuff-Rose Music*[10] and then all of a sudden we have them paying a lot of attention, first in *Oracle v. Google* (about fair use in the context of computer software) and then in *Andy Warhol Foundation v. Goldsmith* (about fair use in the context of photography and art).[11] There were these two big cases. I don't know what that means. It is really hard to predict what cases the Supreme Court is going to take, but I think *Hachette v. Internet Archive* is an important one. A lot of people are paying attention to it and I think you can say that by just looking at the number of amicus briefs filed at the district court level, which is really unusual to have and shows that it is certainly high profile. Whether it would ever end up in front of the Supreme Court is really hard to predict.

**There have been varying levels of concern regarding the ruling; what are your thoughts?**

What I've been telling folks, especially librarians, is that it's not a good ruling. We all get that. But it's also not one to totally freak out about. There are hundreds of libraries that I am personally aware of—and probably more that haven't said it—that are doing Controlled Digital Lending around the U.S. and for now I think the smart thing to do is pay very close attention to what is going on in this case, but don't overreact. The district court decision isn't binding precedent on anybody except the parties in that case and so, for now, it is a ruling that says the Internet Archive can't do this thing. Once it makes it up to the Second Circuit, we will find out what the Second Circuit has to say on appeal. The Second Circuit, I presume, would issue a precedential decision in this case, meaning the decision would be binding law on anybody who is within the Second Circuit,[12] but of course that is not every library in the United States either and different Circuits are known to have different opinions on a variety of things related to copyright law. The Second Circuit is really important; they handle a ton of copyright cases so others Circuits look to them—but not always. So, for now I think it is wise to just take it for what it is and watch it very carefully. The other thing is: I don't know how this will work out on appeal, but it seems to be that there are distinguishable elements of many library Controlled Digital Lending programs that don't go quite as far as what the Internet Archive is doing. For instance, I talk to a lot of libraries that are doing CDL, but they are specifically avoiding any books for which there is a licensed e-book available. So

[10] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 114 S. Ct. 1164, 127 L. Ed. 2d 500 (1994)
[11] *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 143 S. Ct. 1258, 215 L. Ed. 2d 473 (2023)
[12] The United States District Courts for the Second Circuit have federal jurisdiction in six districts within the states of Connecticut, New York, and Vermont. See *About the Court*, (2019, May 2021). United States Court of Appeals for the Second Circuit. https://www.ca2.uscourts.gov/about_the_court.html

that, it seems to me, is a major factor potentially in a market harm analysis and could easily distinguish what others are doing even if the District Court decision stands.

**What does this mean for publishers?**

I think the big publishers view this as a real victory in not just their ability to squash Controlled Digital Lending as a concept, but also to secure a little bit more control of the ebook market. I think that is the big concern for publishers: how do they generate revenue and exercise control over the ebook market in ways that looks different than what they did in the print market. In the print market, publishers have always had to grapple with the problem of secondary markets: when a used bookstore sells a book, the publisher doesn't get a cut. When a library lends a book, the publisher doesn't get a cut. I think from the publisher's perspective that's lost revenue, so I think trying to stamp out CDL as a concept is really important for shoring up their market as one where they are able to fine tune price and access controls and all of those kinds of things—which is not always bad. The economic theory is that publishers can capture that value downstream by cutting out the secondary markets and theoretically they could offer some individual purchasers a lower price on the front end. The ideas is that I have one book and I know that there are ten different people are interested in that book at different price points, and I can price discriminate and charge different prices without worrying about diluting future prices through a secondary market.

But it's really problematic for libraries because the whole model for libraries is that they buy a book and then they lend it out to as many people as they are able to, to enable widespread access to the contents of the book. Not to diminish their role, but I view libraries as sort a reading and learning safety valve: certain consumers can go buy their own book and lots of people do, but there are that certain group of people that would never experience that book, who would never fork out the money on the front end or who just don't have the money but would benefit from it. If all of that access is only through licensed book access, I think it greatly diminishes what they offer to their users.

And I think this is one point where there's a big disconnect between what publishers think about the market and what librarians think about the market. I think publishers have this idea that if libraries can do CDL then they're just going to scan these books and lend them to their users and this represents a lost sale because libraries otherwise would have bought all of these e-book titles, and they would have a whole other revenue stream. And I think most librarians find that idea laughable because there isn't some extra hidden pot of money that libraries have access to for all those back issue purchases. What's really going to happen is

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libraries are just going to spend money on the same front-list, big-name titles that there's current demand for and all of the old stuff, the things that are no longer commercial priorities for the publishers, are just going to be sitting there and nobody is really going to engage with them. Because the publishers have no incentive given the small amount of potential profit, and the libraries just don't have the money anyway. And I say that coming from someone who used to be responsible for a very large collection budget at a very well-off institution. Even there, there's no way we would have said yes, let's spend millions and millions of dollars licensing back list content of books we have already purchased in print. It just would not have financially made sense.

**What do you think this means for authors? For all of the old, back-listed works that would be lost, in theory?**

I think that actually authors are some of the biggest losers in this decision, if the district court decision is left alone. It is primarily because their works do already languish. When you look at book publishing contracts, authors have very little control over dissemination or distribution of their books. They typically say something like, distribution and price are "at publisher's discretion." Unfortunately, what that means is that once publishers lose financial interest, the rights are all tied up with the publisher, but the books are left to sit on shelves.

There are some strategies authors have to get those rights back—for example, a lot of contracts will have rights reversion clauses that authors can trigger—but those are complicated and sometimes hard to do. There's also copyright termination that they can pursue, but that is super complicated. Basically, what you have is a situation where authors' works are held hostage by a rights thicket that the publishers prevent the library from cutting through with CDL or something else similar, but it's not like the publishers are exploiting or making great use of that. Actually, in a lot of instances—take away the Internet Archive case for a moment and the focus on major trade book publishers—the real people that are losing are the authors who wrote an academic monograph in the 1970s or 1980s and had a print run of say 500 or 1000 and there are maybe 300 copies sitting on shelves in various libraries around the country, and that's it. Then nobody else has access to those books unless you happen to have access to those big, fancy university libraries. CDL offers an opportunity to get those books online and reinvigorate them with new life, get them in front of new audiences, and unfortunately a ruling like this really hampers that. In a lot of those situations what I have found is that, not only have publishers lost financial interest—in a surprising number of cases they've lost track that they even have the rights, or they're confused about it, or all sorts of things that are blockers from preventing them from

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saying yes to putting that book online. It's sad and I think when you think about the purposes of the copyright system, it's designed to promote the progress of science and the useful arts. The theory is that if we give authors economic rights to exclusive control over their works that it will incentivize them to create more because they'll make money and they can trade those rights away to publishers who can then make money and distribute the book to the public. But when you have a situation where no one knows who owns the rights, where the only reason a book isn't being made available is because everyone is afraid of doing it, then that's not good for anybody and certainly not serving the purposes of promoting science and the useful arts.

**What are the most important takeaways from the district court decision?**

I think one big takeaway—and I hesitate because if it were on a poster, it would have many stars or asterisks—at least in this case is that the availability of books in a licensed ebook environment was viewed very negatively towards the fair use case for CDL. I think maybe that's the biggest practical takeaway for libraries engaged in CDL. I think another takeaway is that libraries often presume the uses that they are making are noncommercial, and this decision really puts in jeopardy that thinking and that's a real concern. A third is that, at least in this case, there was real skepticism of the value of a library taking steps to mimic the physical economic market. The judge in this case really didn't seem to care.

**What suggestions do you have for libraries based on this district court ruling?**

It's really important for libraries to continue to fulfill their mission. Any time you interact with copyrighted works online you have a certain level of risk and I think this case may, to a lot of folks, feels like it heightens the risk of potential liability. I'd say it's really important for institutions to take a hard look at their full risk profile, including what it means to be a library in a world where you can't actually make your collection available to users on the internet. What does that mean for inclusivity? What does that mean for accessibility? What does that mean just for academic libraries serving the needs of your faculty and students? I think it's really easy to minimize those risks, and to me those are more existential than a potential copyright lawsuit. If libraries can't continue to maintain relevance by providing materials to users in the format they've come to expect, I think it shouldn't be surprising then when we see libraries are slowly, agonizingly defunded in favor of other priorities. I think that's a real risk we've got to grapple with.

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**What suggestions do you have for authors based on the lawsuit or the ruling in general?**

For authors I think it's really important to speak up. I noticed it a lot in this lawsuit. The publishers take on the mantle for the entire creative world and say "this is bad for authors and creators." But I think there are a lot of authors that support CDL and it is important for them to speak up. I think authors should pay close attention to the publishers that have brought this suit and the publishers that are supporting it through their public statements and think about if they really want to publish with them. Authors actually do have a lot of power and can vote with their feet in that way. I think the third thing for authors, like I said earlier, is that they have very little control over the dissemination of their books because publisher contracts are usually very one-sided. They put a lot of trust in publishers to do the right thing and have aligned interests in the publication of the book. But I think lawsuits like this and others over the last ten or fifteen years demonstrate that the trust might be misplaced and so authors, I think, should ask a lot more questions and insist on language in their publishing agreements that allows libraries to provide access to their users.

**What are the strongest arguments in favor of Hachette [the publisher] and how would you refute these arguments?**

The strongest arguments in favor, really at a high level, is that the first sale doctrine, the thing that allows libraries to lend books, doesn't apply to digital works. Congress has repeatedly refused to modify or change that doctrine to explicitly allow for digital first sale. I think they have a decent argument there, because Congress has failed to do that. I don't think that's a winner, though, because that ignores the whole concept of fair use as a limit on copyright that allows for new technology to develop.

I guess another argument that they've really pushed, which I do think is important for libraries to think carefully about, is what's happening in the market for e-books. This is important for libraries to do a little bit more research on: what effect does the library have on the market more generally? We don't even have great data on normal, physical lending and its relationship to book sales. I think that given the district court's insistence that the publishers don't have to produce almost any evidence at all about market harm, it is incumbent on libraries then to do as much as they can to document what is really happening in that market and how their activity relates to the broader market place. My hypothesis there is that libraries are actually a net positive for the market.

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**What can supporters of the Internet Archive do?**

To stay informed, Internet Archive does a good job on their website of giving updates, so subscribe to their newsletter. I think at this stage there are several amici—friends of the court—briefs that will be filed on appeal. I think it's important that libraries, as organizations or maybe even as individuals, to be responsive to calls for involvement on those briefs. Stories on how controlled digital lending benefits their patrons and things like that are really helpful. Of course the court is not reading the newspapers and doing public opinion polls to figure out what they should rule, but there are also policy makers paying attention to this, too. That's where I like to think it's helpful for librarians to speak out in op-eds or other forums to talk about both the value of Controlled Digital Lending and the challenges of the current ebook market for their ability to effectively serve readers.

I think it is largely the same thing when it comes to authors supporting the Internet Archive: they can talk about it. I think authors have a unique voice in this space because the publishers so frequently cite them and say "see we're standing up for authors," and I think it's really powerful when authors are able to interject and say, "actually, no, we have a very different viewpoint."

There was this letter from thousands of authors that said publishers stop this lawsuit against the Internet Archive.[13] I think that made a real impact.

**What arguments were made by the Internet Archive, and why do you think they failed? Were there other points that you think should have been brought up?**

One thing that was a real challenge to oral argument that the judge seemed to either not understand or not fully want to engage with is the importance of prior precedent in the Second Circuit on full text copying and distribution to users. There was this line of questioning from the court asking "what prior cases say you can do this" and the judge at oral arguments seemed to think there were none. But there's actually a really important Second Circuit precedent in *Authors Guild v. HathiTrust*[14] that allowed for distribution of books that went, in some ways, well beyond what Controlled Digital Lending aims to do. In the HathiTrust case, the defendant made full text works available to users who are blind or print-disabled, and in that

[13] Johnson, T. (2022, September 29), Neil Gaiman, Cory Doctorow And Other Authors Publish Open Letter Protesting Publishers' Lawsuit Against Internet Archive Library. *Deadline*. https://deadline.com/2022/09/authors-open-letter-publishers-lawsuit-internet-archive-1235129802/

[14] *Authors Guild, Inc. v. HathiTrust*, 755 F.3d 87 (2d Cir. 2014)

scenario there were none of the limits—like maintaining an owned-to-loaned ratio—that you see in Controlled Digital Lending. It was just "they need a copy so we are going to provide it for them" and the court in HathiTrust said that was okay, even though it concluded it was not transformative and even though the library was providing full text access. It was disappointing that the district court didn't acknowledge this at oral argument. He was searching for precedent and it was right there, so that was a little bit frustrating. I don't think the Internet Archive could have anticipated that, but that's a place where I think stronger arguments about prior precedent could be helpful, and I think certainly with the Second Circuit that's one that I would focus on.

**How did this case come about? And why is this case important for all libraries, beyond just the Internet Archive?**

It is important not to understate the importance of this case. I don't think there's going to be another Controlled Digital Lending case anytime soon. This is it. This is going to have big ripple effects for most libraries and it's really, really important to pay attention to what's going on here. Speak out publicly; not that I think that will influence the case, but policymakers more generally pay attention to that.

**Do you have thoughts about why the publishers brought this lawsuit?**

I think it was really a real frustration with the National Emergency Library that prompted them to take action. I don't know, but that seems to be what it was because libraries have been doing Controlled Digital Lending for quite some time before this. I mean, there was a Wall Street Journal article about the Internet Archive doing this in, I think, 2011.[15] It's not like it was news to them that this was going on. It is a pretty long-standing practice so I think the National Emergency Library pushed them over the edge.

I do think it's worth noting that the AAP (Association of American Publishers) seemed to have a pretty important coordinating role with this lawsuit. I think if we want an answer for why this particular lawsuit was brought, anyone who wants to probe deeper should be looking into what AAP's role was in fomenting this.

[15] Fowler, G. A. (2010, Jun 29). U.S. News: Libraries Have Novel Idea For E-Books. *Wall Street Journal*. https://www.proquest.com/newspapers/u-s-news-libraries-have-novel-idea-e-books/docview/522811797/se-2

**What is some of the history of the case that you think is important?**

There is pretty long history of copyright reactionism. Groups like the AAP, unfortunately rely on leveraging public outrage to secure additional profit-making opportunities for their members. You see that over and over again across copyright-heavy industries. For example, back when photocopiers came along and the industry argued, "no one is going to buy books anymore because of photocopiers!" And then VCRs came along and the movie industry said that the movie industry is going to bleed and hemorrhage. Then MP3 players came along and it was the same thing for the music industry. It's like history on repeat. Anytime someone does something marginally new and innovative with technology to provide better access to copyrighted works, the industry predictably freaks out. They're seeing it as potential lost revenue and, at least at the top of the market, those corporate players have no interest in investing the time and the money to innovate, because they've got their golden goose.

**Is there anything that is not being discussed that you think should be part of the conversation?**

It's being discussed, but not in court: I think the connection between the dysfunctional ebook licensing market and the need for Controlled Digital Lending really could be discussed more. One of the things that the district court did was make a sort of passing-equivalence argument between CDL copies and licensed ebook copies. But the court really didn't get into all of the reasons licensed ebook copies are not equivalent at all to a library-owned and lended copy. Just one distinction, for instance, is that basically every ebook license has a bunch of clauses in there that, in a lot of ways, sacrifice patron privacy[16] and libraries don't have a lot of leverage to negotiate those things out; they don't have good tools to deal with that or to protect users. There's no discussion about how that makes licensed e-books fundamentally different from, and fundamentally offensive to, the library mission as compared to CDL copies. I think that connection is really important. There area groups that are talking about that like Library Futures, but it's a part of this discussion that I think needs to be threaded together a little more closely.

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[16] See, e.g., Lambert, A.D., Parker, M. & Bashir, M. (2015), Library patron privacy in jeopardy an analysis of the privacy policies of digital content vendors. *Proceedings of the Association for Information Science and Technology*, *52*(1), 1-9. https://doi.org/10.1002/pra2.2015.145052010044

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Editors' note: This interview was conducted on August 11th, 2023, based on the district court ruling. As of publication, the Court of Appeals for the Second Circuit has heard oral arguments on the case, but has not yet issued a ruling. You can read Dave's thoughts on the oral arguments in the appeal on the Authors Alliance blog.

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