



EVALUATING THE BOUNDS OF FAIR USE IN EDUCATIONAL CONTEXTS: WITH REFERENCE TO CASE STUDY OF THE INTERNET ARCHIVE'S E-LENDING PROGRAM

Ankita Bhattacharjee¹

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Abstract

With the occurrence of pandemic and the emergence of the digital libraries it has immensely redefined the accessibility of information and knowledge through various educational resources, challenging the fair use doctrine at a debatable discussion where the conflict between rights of copyright holders and its incentives and that of the accessibility of works for the benefit of greater public arises.

The paper analyzes the recent case of Hachette Book Group v. Internet Archive where major publishing houses challenged the Archive's practice of Controlled Digital Lending (CDL) program, through which the Archive provided to its users' digital accessibility to the scanned copies of copyrighted works which it owned physically by an unauthorized manner, which enabled broader educational and research access focusing in particular research scholars, students and academicians who need not to rely upon library accessibility and can have access to books of art, science and literature all over the globe.

The paper highlights upon the various legal challenges and legal boundaries of the fair use doctrine within the ambit of digital e-lending on grounds such as the market impact on the traditional publishers, the transformative use of CDL and its impact upon reducing the vacuum for accessibility of educational resources and the legal implications which are necessary to balance the interest

of copyright holders and the public educational needs and requirements.

Using the doctrinal research method in analyzing the U.S. Copyright law by focusing upon the fair use jurisprudence in particular, this paper studies each factor of fair use in 17 U.S. Code Section 107 as applied in Hachette Book Group v. Internet Archive regarding the purpose, nature, amount and market effective of the Archive's digital e-lending practice. The research in this paper highlights upon the ongoing discussions on reforming the copyright law in par with the improvement and development of digital era, proposing various routes for institutions and legislators and for the courts to keep a balance of the rights of the copyright holders with equal accessibility to educational resources for the betterment of the society in an increased digital world.

Keywords: Controlled Digital Lending, Fair Use Doctrine, Internet Archive, Digital e-lending, public interest.

Introduction

The concept of the copyright if can be practiced well, then new works by the author shall be made available to the public without any hindrance from the founders or the authors.² However with the development in technology especially in today's era of web 3.0 the very simplicity of copyright whereby the author could create a work before the user would be having a copy of such

1. Assistant Professor, ISBR Law College, Bangaluru.

2. Michelle M. Wu, *Defeating the Economic Theory of Copyright: How the Natural Right to Seek Knowledge Is the Only Theory Able to Explain the Entirety of Copyright's Balance*, 64 IDEA 135 (2023).

work and in the process both the authors incentive for creative work was given importance as well as the availability of work to the public was also in existence. This smooth function of copyright has been tampered today by the vast technological advancement. This advancement made through technology has not only caused lacuna existing in our legal system to pop but also the applications of such is also a hindrance.

The economic rationale that is present in copyright is the encouragement given to the authors or the creators for the dissemination of their works by the publishers is motivated and encouraged by giving them the facility as means of protection under statutory provision which acts as a barrier for infringers to copy their work in an unauthorized manner. Here the role of legislators comes whereby through the mode of statutory legislation, the protection is given to the authors and the publishers from getting their work copied and circulated in the market. However, the question arises as to the accessibility of such copyrighted works to be available in the public domain. Here the balance of copyright comes wherein copyright law acts not only as an economic incentive to the creators where they restrict the access of the work in the public domain, but the doctrines of fair use inserted by the Congress when passed the U.S. Copyright Act 1976, codified fair use which initially was undefined and was subject to having no specific rules.³

The four-factor test laid down under Section 107 of the Copyright Act 1976, whereby the courts “shall” check whether an unauthorized use of copyrighted work falls within the parameters of non-infringement under the “fair-use” doctrine.⁴ The doctrine fair use provides the right to use a copyright work under certain terms and conditions without taking the permission from the copyright owner. This doctrine allows one to develop

upon already existing copyright works in such a manner that does not deprive the prior copyright owners from their rights as well as the right to get benefit from their works. After the codification under Section 107 of the US Copyright Act 1976, which provides exceptions that do not fall within the purview of copyright infringement, resulting that such unauthorized usage to be under the “fair use” concept.

The four-factor test which determines the work to be within the parameters of fair use are:

- The purpose and character of the use which includes whether the usage falls under commercial nature and adheres strictly to non-profit educational purpose.
- Nature of the copyright work.
- Amount and substantiality of the material used in relation to such copyright work (the heart of the work); AND
- The market effect or the value of such copyright work.
- Even though Section 107 of U.S Copyright Act 1976, consist for three parts as per the provision i.e., the preamble, the four factors and regarding the unpublished work which was added in 1992, it has been observed that nearly all the courts emphasize mostly upon the four-factors.⁵ Although these four-factors are not exclusive in nature however, the Supreme Courts in many cases have examined the concept of fair use by determining and applying the four-factor test.⁶

When it comes to library and its various operations and working system, the libraries must carry out their required working functionalities without disturbing or

3. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 2546: 17 U.S.C Section 107.

<https://www.copyright.gov/title17/title17.pdf>

4. *Id.*

5. Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 J. Intell. Prop. Ent. L. 1 (2020).

6. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569(1994); *Stewart v. Abend*, 495 U.S. 207(1990); *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Sony Corp. of Am v. Universal City Studios, Inc.*, 464 U.S. 417 (1984)

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disrespecting the owners of copyright and the copyright law.⁷ When it comes to U.S Copyright Act 1976, Section 108 was enacted by the Congress which authorized the archives and the libraries to distribute as well as to reproduce copyrighted works without authorization for a limited basis or duration which can be used for the purpose of research, replacement or for preservation.⁸ This was done when in the year 1935, a group of publishers and researchers in order to give legal protection for such scholars and also to obtain non-commercial works of all the textual works from the libraries, the “Gentlemen’s Agreement” was made which was a non-binding and limited agreement which helped the scholars, librarians and publishers for many years.⁹ For proper functioning of libraries one of the fundamental as well as social aspect for operation of libraries is when wide access or broader dissemination of information is passed to the communities by lending books and other materials. To lend books and other materials in a smooth and easier way, libraries can opt for Control Digital Lending (CDL) to all their collections. This CDL technique not only shall fulfill the mission of libraries, but such techniques are designed to cater traditional practice of library which is permissible by copyright law.¹⁰ If CDL is properly implemented then this this technique of CDL will enable a library to disseminate or lend a digitized title over a physical copy in a controlled way and also the technical system of CDL restricts users to restrain a permanent copy or to make additional copies and distribute such.¹¹

In the year 1996, Brewster Kahle founded the Internet Archive with the intent of having an internet library by offering a permanent accessibility to all the users of internet remnants through the digitalized format. It also operated like a traditional library but in digital format. Internet Archive followed the CDL technique. It was during the COVID-19 pandemic that the Archive

decided to withdraw from CDL technique and allowing many users to lend the same book as well as at the same time. National Emergency Library was created to cater the requirements of research scholars and students during the times when there was an emergence of lockdown and there existed no accessibility of schools and universities and the libraries across the globe was shut down. This initiative by the Archive was criticized by various publishing houses terming such a practice as copyright violation which resulted in the case of *Hachette v. Internet Archive*.

The purpose of this paper is to identify the conflict that exists between the holders of copyright and their consequent rights in the form of economic incentives and that of accessibility of knowledge and information of the copyrighted works through the digital libraries. Section II of the paper examines the case of *Hachette Book Group v. Internet Archive* where we focus upon the legal arguments from both the parties and the key outcomes which has impacted upon on e-lending practices. Section III of the paper discusses the controlled digital lending by libraries and how it is applied in educational forums especially for research scholars and students and the challenges faced by them in accessing copyright materials. Section IV of the paper discusses the various impacts of restricting the fair use application on education forums especially for research scholars and students and the impact on broader societal implications it might have due to such restriction in accessibility of information. Section V of the paper examines the comparative analysis between fair use in U.S. and fair dealing in India and how the case navigates the copyright law and the digital accessibility to the public. Finally, Section VI of the paper provides conclusion

7. Prabuddha Ganguli et al., Ministry of Educ., Gov’t of India, Copyright Guide for Indian Libraries (2021), <https://standrewscollege.ac.in/wp-content/uploads/2022/11/Copyright-Guide-for-Indian-Libraries-NDLI-Release-August-12-2021.pdf>.

8. Copyright Act 1976: 17 U.S.C. Section 108.

<https://www.copyright.gov/policy/section108/#:~:text=Congress%20enacted%20section%20108%20of,enacted%20in%20the%20analog%20age.>

9. Register of Copyrights, Library Reproduction of Copyrighted Works (17 U.S.C. § 108): Second Report (1988).<https://www.copyright.gov/reports/library-reproduction-1988.pdf>

10. Lila Bailey et al., *Controlled Digital Lending by Libraries* (2022), <https://perma.cc/Z974-NQYB>.

11. *Id.*

Case Study: *Hachette Book Group V. Internet Archive*

The Internet Archive, which is a digital archival and library project,¹² is a nonprofit digital library which preserves and provides accessibility of knowledge and information to cultural artifacts of different kinds through digital platform or electronic format.¹³ The Internet Archive after losing the case against the publishers had to forcefully remove 500,000 books from its archival collection. The Archive alleged that such removal had a strong negative effect upon its users and patrons who might not be having any accessibility to libraries. Prominent publishers including Hachette, Harper Collins, Wiley, and Penguin Random House had filed the lawsuit against Internet Archive for their Open Library Program. The publishers contended that such Open Library Program constituted and violated copyright law which harmed the publishers' economic interests.

Internet Archive founded by Brewster Kahle in the year 1996, is a digital library intended to offer permanent accessibility to users through various cultural artifacts in electronic or digital format. It began by offering accessibility to data base through a Wayback Machine which today contains almost 835 billion pages. With the growth of the Archive the platform provided accessibility to other published works like newspapers and movies.¹⁴ The Archive also started Open Library Program, a project which constituted separate webpage for every published books. During the COVID-19 pandemic the Archive decided to withdraw the CDL technique of digital lending practice and permit the borrowers to borrow the same books at the same time as required. The National Emergency Library which was also created by the Archive to help the research scholars and students by facilitating them with accessibil-

ity of knowledge at the time of lockdown when all the schools and universities were closed, and libraries were also shut down. This initiative by the Archive were contended and heavily criticized by the publishers who found both the Open Library program and the National Emergency Library to be copyright violation. The Archive defended its practice of CDL and the National Emergency Library program as an example of fair use and contended that the practice of National Emergency Library and CDL comes within the ambit of the four-factor test of fair use. The Archive argued that their practice comes within the parameter of fair use as they are in promoting knowledge and information through the progress of science and useful arts by allowing people to have accessibility rather than preserving and restricting the information from the public.

The four major publishers argued to the New York District Court and challenged the lending programme and argued that the Internet Archive's mode business was "parasitic and illegal".¹⁵ The complainant claimed that without pursuing any license or any mode of payment to neither the authors nor the publishers, Internet Archive scans and print books as well as uploads such materials to its servers while distributing the verbatim digital copies of such books.¹⁶ This act by Internet Archive as well as their National Emergency Library has infringed upon the economic interest of the publishers and such distribution of copyrighted works to the public at free of cost has also violated the publishers interest.

The Second Circuit's Judgement and Analysis of "Fair Use" using the four-factor test-

The Appellate Court using the four-factors which are non-exclusive factors codified under the 17 U.S. Code Section 107, determined whether the Archive's distribution of copyrighted works which were digitally scanned without having permission from the authors

12. Sharveya Parasnis, *Deep Dive: The Internet Archive Lawsuit and Its Impact on Digital Libraries*, MediaNama (July 8, 2024), <https://www.medianama.com/2024/07/223-deep-dive-the-internet-archive-lawsuit-and-its-impact-on-digital-libraries/>.

13. *Hachette v. Internet Archive*, Elec. Frontier Found. (2023), <https://www.eff.org/cases/hachette-v-internet-archive>.

14. Supra note 11.

15. *Id.*

16. *Id.*

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or publishers resulted in fair use.¹⁷ The four-factor test used were as follow:

1. Purpose and Character of the use- The court examined that the Archive's act of distribution of copyrighted works which were digitally scanned was not "transformative". The court using the precedent of *Campbell v. Acuff-Ross Music Inc.*¹⁸, that although there was no commercial usage done by the Archive or any motive of profit making was present, however the lack of transformativeness that the Archive had, has favored the publishers. The court pointed out that there were no commentaries or criticism which were present. The digital copies acted as a replacement to that of the original copyrighted books which provided the users to use the digital copies for in comparison to buy books.¹⁹ In the case of *Warhol II* this issue was discussed, and the issue was called as "problem of distribution".²⁰

2. Nature of the Copyrighted Works- Although the work involved non-fiction books, the Court while applying this factor examined that the Archive's books which were digitally scanned were representative of the original books of the authors and also highlighted the expressions of the authors books.²¹

3. Amount and Substantiality of the use- The Archive contended that making and distributing the unauthorized digital copies can be under transformative use. However, the court in case for Archive held that there

were no transformative use or service provided by the Archive unlike that of the *Hathi Trust* case²² law.

4. Effect on Potential Market or Value of the Works- The work done by the Archive had "usurped" the market for the original copyrighted works causing negative impact upon the authors and publishers' economic interest by providing free of cost of all the copyrighted books to the public demotivated the authors in creating new work. Hence the accessibility to public for unauthorized copyrighted books by Archive had caused disturbance in balancing the incentive or the rights of copyright holders- authors and publishers.²³

The court ruled in March 2023 Justice John G. Koetli,²⁴ that there was no transformative use from Archive's side hence the unauthorized digital printing of copyrighted books and lending of books did not constitute the fair use defense which was claimed by the Archive. The court held that though the Archive has a right to lend the print books to the users which the Archive had acquired or purchased lawfully however it do not have the right scan the copyrighted books and digitally lend such scanned books or copies of such scanned books to public.²⁵ The Court also held that the entire work of the copyrighted book which was copied by the Archive of an already existed eBook licensing market had infringed the copyright holders rights and such practice of the Archive did not fell under the four factors of fair use.²⁶

17. Tanishka Goswami, *Hachette Book Group v. Internet Archive: Archiving Access to Information or Strengthening Copyright Laws?* *Spicy Ip* (October 9, 2024)

<https://spicyip.com/2024/10/hachette-book-group-v-internet-archive-archiving-access-to-information-or-strengthening-copyright-laws.html>

18. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569(1994)

<https://supreme.justia.com/cases/federal/us/510/569/>

19. *Id.*

20. *Andy Warhol Foundation for the Visual Arts, Inc. v. Goldsmith et al.*(2023)

https://www.supremecourt.gov/opinions/22pdf/21-869_87ad.pdf

21. *Supra* note 16.

22. *Authors Guild v. Hathi Trust*, 755 F. 3d 87(2nd cir.2014)

<https://www.copyright.gov/fair-use/summaries/authorsguild-hathitrust-2dcir2014.pdf>

23. *Supra* note 16.

24. *Hachette Book Grp., v. Internet Archive*, No.20-cv-4160 (JGK) (S.D.N.Y. Mar.24,2023)

25. *Supra* note 11.

26. *Id.*

Controlled Digital Lending by Libraries and Its Impact on Educational Forum – for Research Scholars and Students

Internet Archive has been highly criticized by authors and publishers due to its way of digitizing and lending e-books to its users and readers, while several authors and publishers who claimed that the Archive do not hold any right to distribute or copy such copyrighted works in an unauthorized manner without taking any license or permission.²⁷ The archive also hold a huge collection of literature and historical works which was all available in public domain.²⁸ The Hachette's case specifically was focused upon the 127 books which the publishers licensed such books digitally.²⁹ The court's ruling in Hachette's case may be disappointing for the research scholars and students and the academicians for the concept of the controlled digital lending which is praised and highly supported by public libraries, as the practice done by the Archive was to circulate as well as to preserve specifically concerning the orphan works³⁰ or for such books which are copyrighted books however they are unlikely to be offered digitally by any means of commercial services.³¹

What is CDL and its purpose?

Control Digital Lending or CDL is digital way which is similar or equivalent to the traditional library system of lending books. Digitizing book can be done by library over a book that the library already owns, and such can be lent out as a digital version to one reader or user at a time in place of lending the book in physical way. There are three components that defines CDL and its principle- firstly, the library must purchase and own a physical copy of print book which can be either through way

of purchase made by the library or by way of gift made to the library. Secondly, the library must not simultaneously lend a greater number of copies that it does own legally. Library must maintain an "owned to loaned" ratio.³² And thirdly, the library must ensure proper technical measures to check upon no further of the digital file to be copied or redistributed.³³

When it comes to the purpose of CDL, it generally varies from libraries to libraries based upon their mission and vision. However, some of the common purposes are:

1. To make print of materials in a much easier way
2. To make materials available for the public use which have not been circulated and distributed for years.
3. To provide and facilitate for an efficient delivery of maximum library resources.
4. To preserve and to protect the collections of the library especially from natural disasters and in cases of emergency like fire, etc.
5. To create more user friendly for disabled people or users who are unable to access physical copy through digital format.

The CDL supports and helps in wider accessibility to academicians, research scholars and students and such accessibility in the educational environment through digitally fills the vacuum for underprivileged students and for those who due to various circumstances cannot get hold of the physical copy which provides hindrance to learning ability. The CDL provides immense benefits for all professionals and students engaged in education environment especially focusing upon the disabled students and the remote learners. The CDL technique

27. Sahana Venugopal, *What does Internet Archive's failed appeal mean to free access to digital materials?* (September 9, 2024)

<https://www.thehindu.com/sci-tech/technology/what-internet-archives-failed-appeal-means-to-free-access-to-digital-materials-explained/article68613509.ece>

28. *Id.*

29. Matt Enis, *Internet Archive Loses Appeal in Copyright Case*, *Library Journal*, (September 6, 2024).

<https://www.libraryjournal.com/story/internet-archive-loses-appeal-in-copyright-case>

30. Orphan works are those works the holders or authors of the copyright are not known.

31. *Supra* note 28.

32. Controlled Digital Lending, <https://controldigitallending.org/faq/>

33. *Id.*

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helps to overcome the traditional format of borrowing book from library and gives a wider accessibility to knowledge and information. The concept of CDL can be termed as an innovative solution for accessibility of educational materials in today's digital era. The Hachette's case portrays that the fair use defense which was taken by the Archive was not accepted by the court due to the factor of market impact.

The Fair Use Doctrine and its implications on Legal Foundations-

When it comes to fair use the courts have applied the four-factor test to determine whether the unauthorized use of copyrighted work comes and satisfies the parameters of fair use. The legality or the legal basis for CDL can be often attached to the fair use doctrine. Although we find that the nature and purpose of CDL is noncommercial however the question of transformative use is highly debatable and that what the court observed for the Hachette's case which ruled not in favor of the Archive due to it lacked the transformativeness. However, this is very debatable as the mission of CDL is to provide accessibility and disseminating knowledge and information and to promote learning to larger section of students and research scholars and academicians and not for transformative use which can be beneficial as well as legally challenging.

For educational purpose, CDL deals with the non-fictional books which includes academic textbooks, research articles which the courts consider under fair use doctrine than the works which are purely creative in nature. If we consider this aspect of CDL, then the non-fictional works do support the fair use doctrine. However, the reproduction of the full text of the copyrighted books do go against the fair use. The supporters of CDL argue that the digital accessibility that the libraries provide is simply an extension to the tradition system of library lending. However, it is the commercial impact that is a concern for the copyright holders, and this was the issue which was involved in Hachette's case.³⁴ The court held that CDL's unrestricted digital

lending can harm the market and the copyright holders' rights for the licensed e-books and the digital contents.

Restricting Fair Use Application on Education Forums and Its Impact on Broader Society

During the beginning of the pandemic in the year 2020, the Archive had received numerous requests from scholars, students and the educators due to the hindrance in accessibility of books which were very difficult to receive due to the global lockdown.³⁵ Neither the school students nor the scholars from universities were able to have access over the books due to lockdown at libraries and also getting accessibility for reliable information was not easily available. It was during such time of emergency when most of the professionals checked and was dependent to the Archive where they could borrow books digitally especially during the pandemic times books and manuals with respect to medicines and medical support manuals were on demand.³⁶

The Archive took the mission to distribute and disseminate knowledge and information during such critical times. By following the National Emergency Library, the Archive also focused and checked upon the technical controls which were keeping a limit control over the lending of books. Under such sensitive circumstance, the method used by Archive to lend books was in a way amounts to fair use. The act done by the Archive during such pandemic times could be termed as "Gift to Readers Everywhere"³⁷ By imposing restriction and not allowing the fair use defense made by the Archive put forth a negative impact especially in educational forums, where the consequences are suffered by the research scholars, educators, and students affecting a broader society.

When a restriction is imposed on fair use, it is the research scholars and students especially those students who are from underfunded institutions. The ultimate purpose of fair use is to disseminate knowledge and information in public domain for greater benefit to

34. Supra note 23.

35. Redacted Memorandum of Law in Support of Defendant Internet Archive's Motion for Summary Judgment at 39, *Hachette Book Grp., Inc. v. Internet Archive*, No. 1:20-cv-04160-JGK-OTW (S.D.N.Y. July 7, 2022), ECF No. 106

36. *Id.*

37. Jill Lepore, The National Emergency Library Is a Gift to Reader Everywhere, *The New Yorker* (March 26, 2020) <https://www.newyorker.com/books/page-turner/the-national-emergency-library-is-a-gift-to-readers-everywhere>

society especially concerning the research scholars and students. However, restriction to fair use acts as a barrier to access knowledge and information. This can further create a vacuum for scholars focused upon various interdisciplinary studies where accessibility of information and such sources can be highly expensive and difficult to avail. The limitation upon fair use also affects the students from lower socioeconomic background for whom accessibility of expensive books and sources acts as a barrier in accumulation of gaining knowledge and information and restricting the academic achievements for those students who can afford it.

There also arises numerous challenges while conducting comprehensive research. When the imposition of fair use becomes difficult or stricter to apply, then for research scholars who due to their research use multiple copyrighted excerpts for the purpose of writing a commentary or for review as they might struggle with reference to such important works fully, especially if a permission is required to be taken which becomes expensive and difficult to achieve. The CDL technique helped the students and the research scholars to have accessibility of out of print books and works which were very difficult to get hold of especially the historical materials. However, the Hachette case,³⁸ proved to be a challenging scenario for the researchers working in fields requiring historical information as the accessibility of out-of-print books is restricted to be used.

This restriction on fair use has also impacted largely upon society and accessibility of public knowledge. Restrictions limits the benefits of public and the public's ability to get hold of the sources, which further results in less diverse range of accessibility of knowledge and information which could affect the balance of dissemination of knowledge to public domain. Fair use doctrine enables and encourages further innovations and creativity which can be derived from existing copyrighted works. Putting a restriction cap hinders the encouragement for the students and research scholars to further contribute to the field of art, science and literature, affecting the advancement of broader society. The fair use restrictions come as a barrier to all such students and research scholars who mostly rely upon

the digital sources for accessibility to information and knowledge due many reasons – especially if students hail from rural or remote or developing areas where physical libraries may not be available. Fair use especially in digital format helps to erase the vacuum for accessibility of information and helps to gain knowledge without any financial barriers all over the globe. Hence, a stricter imposition of fair use could bifurcate and limits access to knowledge and information to all section of public in the society.

Examining the Comparative Analysis Between Fair Use in U.S. and Fair Dealing in India—How Does the Case Navigate Copyright Law and Digital Accessibility to the Public?

The judgement given in Hachette's case can be analyzed from CDL perspective which is discussed in the third Section of this paper. Apart from the CDL perspective, the case can further be analyzed in the purview of fair dealing jurisprudence in the U.S. as well as the scenario in Indian with respect to digital libraries and copyright laws.

1. The jurisprudence of fair dealing in U.S.

The defense which was taken by the Archive was rejected by the court not because of the commercial use (which was not present) but because there did not existed “transformative use” done by the Archive. To understand this context, we can refer to the case of Fox News,³⁹ where the court found the TV Eyes media's compilation of TV and radio recordings and also the facility provided by them with communication of a ten minute long clip of the compiled content, were found to be “modestly transformative” and the court analyzed that the harm caused in potential market is the most important component in the discussion, pertaining to fair use.⁴⁰ In this context if we look at the Archive's mission in lending of copyrighted materials in an unauthorized manner by violating the CDL norms⁴¹ it indeed lacks of being transformative in nature which the first factor of fair requires. But the difference between the

38. Supra note 23.

39. Fox News Network, LLC v. TVEyes, Inc., 883 F.3d 169 (2d Cir. 2018).

40. Supra note 16.

41. Supra note 31.

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motive of TV Eyes media and Archive were not the same as the Archive had a non-commercial purpose however in for TV Eyes' the court found the commercial nature which was present.⁴²

2. The First Sale Doctrine and its connection with the Hachette Case

The first sale doctrine permits the copyright owner to allow a copy of a copyrighted book or work to sell or to dispose of without seeking permission or taking the consent of the copyright owners. In 17 U.S. Code Section 109,⁴³ the concept of first sale doctrine is discussed. Although the Archive contended about the first sale doctrine, the court in this case overlooked this argument made by the Archive. However, keeping the first sale doctrine in context the Archive who neither had any ownership or any license taken from the copyright holders when they digitally scanned the copies of copyrighted works, would not fall within the protection and safeguard of the first sale doctrine.⁴⁴ The first sale doctrine principle is helpful for libraries and other second-hand stores like book outlets as it gives them the allowance to lend or to resell books and also expanding the horizon for preservation, the availability of the work as well as the affordability of such works.⁴⁵ The digital approach that libraries follow in the form of CDL should be more likely to be protected under the fair use doctrine because they treat the digital copyrighted copies as equally as they treat to the physical copies, which in further ensures that libraries may continue to access to books which are even in the form of digital format. This can be somewhere should be acknowledged as the practice which is done through CDL technique indeed is lawful which are owned by the libraries as this is permissible under the first sale doctrine.⁴⁶ However, the Court analyzed that both sections 108 and 109 of the 17 U.S. Code try to balance

the rights of both the authors and the publishers as well those of public accessibility to literature and arts and other information's and knowledge.⁴⁷

3. Fair Dealing and Digital Libraries under Copyright Act 1957

The libraries and its professionals are involved in maintain both the copyrighted as well as non-copyrighted works by maintaining collection of various books, reports, journals, etc. to ensure proper distribution and accessibility of knowledge to public as well preservation of such works. Today with the advancement of technology libraries provide with electronic links of all their collections through in electronic platform through digital libraries.⁴⁸ When it is concerned with the digital storage of for the purpose of archival and for the purpose of reproduction, library's books whose availability is not there for sale in India are for two exceptions which is enjoyed only by "non-commercial public libraries".⁴⁹ If a library is having a digital copy of a copyrighted work for the purpose of preservation, then such is allowed to be made a new physical copy (non-digital) from that digital version. This can only be permitted if the original physical copy of the library is either lost or damaged or destroyed which cannot be used in future. This helps the libraries to keep their collections available for use, even if original copies of the books wear out over time.

The meaning of Digital preservation is to keep the files in a manner which ensures that they can be accessible for users and readers in future, even with changing technology. The Digital Library of India in short DLI is a program which collects books and manuscripts which are scarce in nature from various libraries across India. To preserve the culture and heritage of India, and its art and literature, the DLI needs to expand and digi-

42. Supra note 16.

43. 17 U.S.C Section 109. <https://www.law.cornell.edu/uscode/text/17/109>

44. Supra note 16.

45. Lila Bailey et al., *Position Statement on Controlled Digital Lending by Libraries*, Controlled Digital Lending, <https://controlleddigitallending.org/statement/>

46. Supra note 16.

47. *Id.*

48. Supra note 6.

49. The Copyright Act, 1957 (14 of 1957): Section 52(1)(n) and 52(1)(o)

tize these works and materials from every corner of the country.⁵⁰

To easy accessibility and dissemination of information platforms like NDLI, Parliament Digital Library, etc. have become a handy and popular resources for students and research scholars. However, the NDLI with the guidance of Copyright Guide⁵¹ have listed out guidance which need to be adhered for digital libraries while reproducing the copyrighted works. If the libraries would like to reproduce any copyrighted works which do not adhere with the context of “fair dealing” codified under section 52(1)(a) of the Copyright Act 1957, then such would result to legal problems causing copyright infringement. For the benefit of public and society at large digital learning, especially in equational forums and for research purpose, the CDL should be recognized as a legal context under the Indian legal system through Section 52(1)(a) of Copyright Act 1957, i.e., fair dealing. This inclusion of CDL would benefit the accessibility of information and knowledge and further could expand the accessibility to digital learning throughout the country.

Although there had been multiple amounts of debated with analysis and interpretation done by the Delhi High Court DU Photocopy case⁵² under Section 52(1)(a) of the Copyright Act 1957, the court’s decision even today has impacted accessibility to knowledge and information in India. The ongoing case which is against the Sci-Hub and Lib-Gen, whereby these two websites provided free accessibility of academic papers for students and research scholars, which at present is a heavy debatable issue based upon the right to information and how it reconciles to digital lending. It is this case which would in future provide us with more clarity with respect to the acceptability of the digital lending technique in

India. No matter whatever the decision or the outcome of this case might bring forth however, it brings forth an important and crucial question is that what brings several users to access such type of websites in India for research work or books? The common answer would be the lack of accessibility of such materials. This lacuna is created due to high cost of educational materials, be it books or journals or other research materials, which makes the path of learning extremely difficult for research scholars, students and academicians.⁵³ Education plays a crucial role in a country’s development and accessibility of knowledge and information should not be caged which results in barrier to progress.

Conclusion

The Internet Archive had removed 500,000 books from its Open Library project after the court’s decision which was against the Archive, leading to have larger effect in the society. This removal of 500,000 books has made the accessibility of digital books extremely difficult for research scholars, students and academicians. It is a massive loss for individuals who due to multiple reasons do not have the access to well- funded libraries which makes the situation extremely challenging for such research scholars and students to have access upon literature and other sources. Although the appeal made by the Archive depicted upon the recognition of CDL as a legal concept, just like a traditional library lending, however due to the question of transformative use under the four-factor test in fair use, it failed to justify its practice as legal. If digital libraries start to purchase the expensive e-books licenses, then, it shall become a much harder situation to provide accessibility to public and dissemination of information will become more difficult to gain for the society.

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