

# Internet Archive's digital library has been found in breach of copyright. The decision has some important implications

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Credit: AI-generated image ([disclaimer](#))

"Information wants to be free"—but at what cost?

The [Internet Archive](#) was founded in 1996 as a non-profit digital library, aiming to provide "[universal access](#) to all knowledge." It started with a

project to preserve the World Wide Web. Its [Wayback Machine](#), developed in 2001, made the automatically archived content available to the public.

In 2005, Internet Archive started digitizing books and began archiving television programs in the late 2000s. Since 2006, it has also provided a web archiving [subscription service](#) to institutions and individuals, allowing them to create digital archives and preserve collections of digital content.

Also in 2006, it established the Open Library. Its vision was to become a universal book database with a web page for every book ever published, and a web-accessible public library offering full access to books in digital formats.

In 2020, a group of publishers sued. Three years on, the Internet Archive has [lost](#).

## Copyright issues

The lending of books that are out of copyright is not controversial, but Internet Archive's distribution of copyrighted works is problematic.

The Open Library portal has been relying on a practice known as [controlled digital lending](#), which allows libraries to lend a digitized title in place of a physical one in a controlled manner under fair use and fair sale doctrine. Only one person can borrow any given copy at a time for a limited period. Borrowers are not allowed to copy, retain or distribute the file.

Facilitating access to books in this manner without permission from, or payment to, publishers or authors has been [condemned](#) as a "flagrant violation of copyright and authors' rights."

In March 2020, when Internet Archive created the [National Emergency Library](#) in response to the COVID-19 pandemic, they removed the waiting restriction. It was this development that galvanized four major publishers—Hachette, HarperCollins, John Wiley & Sons, and Penguin Random House—to file a lawsuit against Internet Archive in June 2020.

The lawsuit was supported by some authors' organizations, such as the [Authors' Guild](#) in the United States and the [Australian Society of Authors](#), but not by all. In September 2022, over 300 authors signed an open letter calling for publishers to "cease efforts to undermine the essential contributions of libraries to an accessible and inclusive world of books," a campaign that was broadly [condemned as misleading](#).

There is a significant difference between a company sharing digital files with global audiences without any license or payment to authors or publishers, and [public libraries](#), which participate in traditional sales channels and cater for specific audiences.

## Legal implications

In response to the lawsuit, the National Emergency Library, which included 1.4 million "recent" books and over two million books in the public domain, was closed on June 16, 2020.

The Southern District of New York court issued its final order in *Hachette v. Internet Archive* on March 24, 2023. It found that Internet Archive was liable for copyright infringement. The consent judgment of August 11 has banned the Open Library from scanning or distributing commercially available books in digital formats.

This decision leaves a concerning gap: it does not apply to physical books that are not currently available digitally. As Olivia Lanchester, CEO of the Australian Society of Authors, observed to me in an email:

"There is a commercial market for digital book licensing, as evidenced by the Untapped Project in Australia. By allowing Internet Archive to retain digitized versions of print books so long as no ebook edition is available, a valid future market for authors is undermined. For example, authors of out-of-print works may choose to later publish their work in an ebook format and monetize that edition. The deficiency in the court's ruling is that the Internet Archive can beat them to it—and supply their work for free."

The [Association of American Publishers](#) saw the ruling as a strong sign of support for the copyright holders, who should be able "explore, create, and license a variety of copyright markets for their works without fear of appropriation from actors who do nothing to invest in or transform the author's expression."

Internet Archive received the ruling—which is subject to appeal—as an attack on "the traditional right of libraries to own, lend, and preserve books." But as the director of its library services [Chris Freeland concedes](#),

"This case does not challenge many of the services we provide with digitized books including interlibrary loan, citation linking, access for the print-disabled, text and data mining, purchasing ebooks, and ongoing donation and preservation of books."

## Consequences

The outcome of the court case may affect the fate of controlled digital lending more broadly. Other libraries in Canada and the US have adopted the practice as an alternative to far more expensive and restrictive ebook licensing.

The scale, however, is different. While Internet Archive claims to share

the mission of libraries to provide access to books for the public good, the court rebuked it for exploiting and profiting from copyrighted material without compensating publishers and creators.

Though the Internet Archive is based in the US, its activities have an effect on the earnings of authors in Australia. In 2019, the Australian Society of Authors advised authors to search the Open Library for their works, contact the platform, and request the removal of their publications.

In contrast to Canada and the US, controlled digital lending is, in general, not allowed in Australia. Jo Kaeding, lecturer in Library and Information Management at the University of South Australia, has written to me that libraries can, however, scan books for preservation purposes, or to make them available to patrons with print disabilities if an accessible copy is not commercially available.

Australia's lending rights schemes were established in 1975 by the Whitlam government. They aimed to offset the income lost from works being available to borrow in public and educational libraries. Until recently, the scheme only covered books in print.

In January 2023, Prime Minister Anthony Albanese and Minister for the Arts Tony Burke announced the expansion of the [Australian Lending Right Schemes](#) to include ebooks and audiobooks, as part of the national cultural policy, Revive. The reform recognizes the right of authors to earn a living from the lending of digital formats.

When I asked her to comment on the Internet Archive injunction, Olivia Lanchester observed:

"It's beyond time that readers and consumers of all cultural output recognize the cost of creating cultural material. If we want authors to

survive, we've got to stop assuming that authors' intellectual labor is a public commodity. In the broader context of current generative AI discussions, I think our whole community is fed up with short-sighted arguments that aim to justify the ripping off of authors—whose earnings sit at an average of \$18,200 per year."

For the record, the national minimum wage in Australia is \$45,905 per year.

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