

UNDERSTANDING THE INTERNET ARCHIVE LITIGATION CASES

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This brief article examines two recent copyright cases brought against the Internet Archive and explains how the outcomes of these cases might impact the libraries and librarians, library patrons, and the general public. The first case, Hachette v. Internet Archive involves the development of the Open Library for controlled digital lending. The second case, UMG Recordings, Inc. v. Internet Archive involves music recording companies suing the Internet Archive for its “Great 78 Project.” In both cases, the impact will be felt by the general public and copyright law will inevitably be shaped by the outcomes as well. Thus far, the publishers are winning these lawsuits and while some authors may applaud the outcomes, librarians are watching them with interest and sadness. These battles will continue to be fought, if not in the courtrooms, in the legislative branches state by state.

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INTRODUCTION

You may have heard through the grapevine that the Internet Archive has been sued by book publishing groups as well as music record labels in the past few years. This short piece examines the factual bases for the lawsuits, the procedural outcomes (if any), as well as predictions for how the lawsuit will impact library lending and preservation practices considering the outcomes (or potential outcomes). Part I will provide some background on who the Internet Archive is, and the claim that it constitutes as a library. In Part II, the discussion will begin with the *Hachette v. Internet Archive* case history and legal decision by the Second Circuit Court of Appeals involving controlled digital lending.² Next, in Part III, the discussion will turn to *UMG Recordings, Inc. v. Internet Archive* case involving the “Great 78 Project.”³ Finally, the conclusion will sum up the state of the law in light of the two important copyright cases.

I. WHO IS THE INTERNET ARCHIVE? WHAT IS THE INTERNET ARCHIVE?

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² *Hachette Book Grp., Inc. v. Internet Archive*, 115 F.4th 163, 185 (2d Cir. 2024).

³ See, e.g., *UMG et al v. Internet Archive et al.*, Civil Action No. 23-CV-7133, Complaint (USDC SDNY Aug. 11, 2023), available at https://storage.courtlistener.com/recap/gov.uscourts.nysd.604258/gov.uscourts.nysd.604258.1.0_1.pdf.

The Internet Archive is a non-profit organization driven to preserve digital cultural artifacts, such as web sites, as well as older print material and music. Their publicly stated mission is to “provide Universal Access to All Knowledge.”⁴ While that may sound like a lofty goal, and it is, the Internet Archive is making great strides toward achieving it through projects like the Wayback Machine. Due to that project alone, 835 billion web pages⁵ have been preserved and it has never been more crucial to preserve them than right now where even standard governmental websites are being removed from the cultural memory. The Internet Archive is a collective project, and while “anyone with a free account can upload media to the Internet Archive” they also work closely with library partners and other cultural heritage institutions.⁶

The Internet Archive was founded by Brewster Kahle originally to focus on “digital collections, preserving web pages, archiving television news, and digitizing books.”⁷ Kahle is motivated by fighting against the current “structural attack on libraries”, relating to digital era publishing, where libraries “are prevented from buying any ebooks or MP3s.”⁸

One unresolved question is whether the Internet Archive is a library for legal and practical purposes. Interestingly, the main section of the Copyright Act that creates exceptions for libraries and archives, Section 108, never truly defines what it means to be a “library.”⁹ Some clues are contained in the beginning of the Section, however, where it requires that in order to take advantage of Section 108 exceptions, a library must be open to the general public (or at least to specialized researchers) and lend to patrons for non-commercial purposes only.¹⁰ This was the recommended definition to adopt for what constitutes a library by the Section 108 Discussion Group.¹¹ No court to date has ruled on whether the Internet Archive is a library for purposes of Section 108, however, it certainly relies on provisions in 108 to engage in many of its digitization practices.¹²

The Internet Archive states that “because we are a library, we pay special attention to books . . . scan[ing] 4,400 books per day in 20 locations around the world. Books published prior to 1928 are available for download, and hundreds of thousands of books can be borrowed through our Open Library site.”¹³ The pre-1929 date indicates work in

⁴ Internet Archive, About the Internet Archive, <https://archive.org/about/>.

⁵ *Id.*

⁶ *Id.*

⁷ Brewster Kahle, *I Set Out to Build the Library of Alexandria. Now I Wonder: Will There Be Libraries in 25 Years?*, INTERNET ARCHIVE BLOG, (June 20, 2024), originally published in TIME MAGAZINE as an Op Ed (2021), <https://blog.archive.org/2024/06/20/from-brewster-kahle-i-set-out-to-build-the-next-library-of-alexandria-now-i-wonder-will-there-be-libraries-in-25-years/>.

⁸ Anne Ford, *Newsmaker: Brewster Kahle On the Internet Archive’s Uncertain Future*, AMERICAN LIBRARIES, (June 4, 2025), <https://americanlibrariesmagazine.org/2025/06/04/newsmaker-brewster-kahle/>.

⁹ 17 U.S.C. § 108.

¹⁰ 17 U.S.C. §§ 108(a)(1), (a)(2).

¹¹ Elizabeth Townsend Gard, *Last Twenty (L20) Collections: Applying Copyright’s Section 108(h) in Libraries, Archives, and Museums Including the New Music Modernization Act for Pre-1972 Sound Recordings*, 2018 UCLA J.L. & TECH. 1, 12 (Fall, 2018).

¹² *Id.*

¹³ Internet Archive, About the Internet Archive, <https://archive.org/about/>.

the public domain, but they are scanning and making available works that are also still under copyright, and that's part of the source of the litigation. The first lawsuit discussed below involves the sharing, through the Open Library website, of in-copyright books for Internet Archive users to read (but not download and share). The second lawsuit involves the sharing of music through the Internet Archive's "Great 78 Project," which "is a community project for the preservation, research and discovery of 78rpm records."¹⁴

My home institution, the University of Illinois Library, is a contributor to the Internet Archive, with collections in "Illinois history, culture and natural resources; U.S. railroad history; rural studies and agriculture; works in translation; as well as extensive collections of 19th century 'triple-decker' novels and emblem books written between 1540 and 1800."¹⁵ The University of Illinois Internet Archive scanning project is done within the Library, by the digitization team, who scan both public domain and in-copyright materials. Of course, the in-copyright materials are not viewable by the public, but are searchable by "limited view" only (where you can see the page numbers and frequency counts for your search term only).¹⁶

Many of the works uploaded to the Internet Archive are copyright protected and the Internet Archive has not sought permission to copy or distribute those works. As such, they have been entangled in lawsuits relating to copyright infringement which are detailed below. One involves the use of the Open Library digital lending and the other involves their Great 78 Project.

II. *HACHETTE V. INTERNET ARCHIVE*

This lawsuit involves book authors and publishers suing the Internet Archive for its Open Library.¹⁷ *Hachette Book Group, Inc. v. Internet Archive*, 664 F. Supp. 3d 370 n.17 (2023).. The Internet Archive had engaged in digital lending for over a decade.¹⁸ The Open Library greatly expanded the model by lending in copyright books on a one-to-one basis through controlled digital lending.¹⁹

Under the controlled digital lending model, a library would shelf a book and not lend the physical book, but the Open Library would lend it on a one-to-one basis with the physical book.²⁰ The digital version of the book would include technical protection measures such that it could only be read and not downloaded or further distributed. Once that digital version was returned to the library, it would be lent again to another user.²¹ Unlike "normal" library lending, which involves a patron picking up and returning a physical book, the Open Library lent out a pdf or epub version of a book that was scanned by the lending library and the version viewed by the borrower includes technical

¹⁴ Internet Archive, The Great 78 Project, <https://great78.archive.org/>.

¹⁵ University of Illinois Library, Illinois Library Digital Collections, Internet Archive, <https://digital.library.illinois.edu/collections/8133b430-e3fb-012f-c5b6-0019b9e633c5-2>.

¹⁶ Copyright & Hathitrust Digital Library, University of Michigan Library Guide, <https://guides.lib.umich.edu/c.php?g=1049853&p=7620320>.

¹⁷ *Hachette Book Grp., Inc. v. Internet Archive*, 664 F. Supp. 3d 370 (S.D.N.Y. 2023).

¹⁸ *Id.* at 375.

¹⁹ *Id.* at 376.

²⁰ *Id.*

²¹ *Id.*

protection measures.²² Books are included in the Open Library from libraries and individual donations—the Internet Archive collects physical book donations to include in the digital library as well.²³

During the pandemic, the Internet Archive enabled an Emergency Library through the Open Library where it was lending books on a basis that was not a one-to-one basis, but in some instances, many copies of a digital book were being lent to patrons (with controlled technical protection measures) on the basis of a single physical book in a physical library.²⁴ That's when the publishers took notice of the Open Library and brought the lawsuit.

The Internet Archive quickly stopped lending books through the National Emergency Library, but the lawsuit continued. As such, the lawsuit focused on the Open Library regular lending, not the National Emergency Library lending.²⁵ But, the National Emergency Library provided the tipping point where publishers and authors decided to sue.²⁶

The lawsuit alleged that the Internet Archive was impacting market sales for the publisher's 127 titles by lending in copyright books in a digital version often when an e-book (electronic versions of books) was available for libraries to license for patron use.²⁷ In this way, the Open Library was impacting sales for e-books in the marketplace. The Internet Archive argued that the practice of controlled digital lending was a fair use and was not impacting market sales.²⁸ Both parties moved for summary judgment—a decision by the judge without a trial—and the judge ruled in favor of the plaintiff copyright owners.²⁹

If you are unfamiliar with fair use—it is an affirmative defense to copyright infringement based on a weighing of four factors: the purpose of the use including whether the use was transformative, the nature of the underlying work, the quantity of the work used, and the impact on the market value of the work.³⁰ A fair use analysis may also consider whether the use was transformative or provides a new meaning or message to the underlying work.³¹ Generally, the more transformative a use is, the more likely a court will find the use to be a fair use.³²

²² Internet Archive, Borrowing From the Lending Library, <https://help.archive.org/help/borrowing-from-the-lending-library/>.

²³ Internet Archive, About Open Library, <https://openlibrary.org/help/faq/about#contribute>.

²⁴ 644 F. Supp. 3d at 377.

²⁵ *Id.*

²⁶ Colin Dwyer, Publishers Sue Internet Archive for “Mass Copyright Infringement,” NPR (June 3, 2020), <https://www.npr.org/2020/06/03/868861704/publishers-sue-internet-archive-for-mass-copyright-infringement>.

²⁷ 644 F. Supp. 3d at 377.

²⁸ *Id.*

²⁹ *Id.* at 374.

³⁰ *Id.* at 379.

³¹ *Id.* at 380.

³² See, e.g., Barton Beebe, An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019, 10:1 N.Y.U. J. of Intell. Prop. & Ent. Law 1, 28 (2020).

The district court held that the lending of in-copyright books by the Internet Archive was not a fair use.³³ The most surprising finding from the district court, and the most boggling one to legal experts and laypersons alike, was the court's determination that the Internet Archive was operating on a commercial basis.³⁴ The court explained that the Internet Archive (IA) "exploits the Works in Suit without paying the customary price. IA uses its Website to attract new members, solicit donations, and bolster its standing in the library community. . . . Better World Books [BWB] [a used book seller] also pays IA whenever a patron buys a used book from BWB after clicking on the 'Purchase at Better World Books' button that appears on the top of webpages for ebooks on the Website."³⁵ For those who study commerciality under the first factor of the fair use test, the non-profit nature of the Internet Archive digital library seems to place it firmly in the non-commercial camp.³⁶ And, on appeal, this part of the district court opinion was justifiably overturned by the Court of Appeals for the Second Circuit.³⁷

After the summary judgment for the publishers was granted, the lower court issued an injunction (as well as the Consent Judgment) prohibiting the Internet Archive from distributing "copyrighted works, like the Works in Suit, that are available from the Publishers in electronic form."³⁸ However, the overall holding of the lower court, that the use of the copyrighted works in the Internet Archive Open Library was not transformative and was not a fair use was upheld on appeal.³⁹ When considering the fourth factor, market harm, the Court stated that the relevant market to consider was the "market for the Works in general, without regard to format."⁴⁰ The Second Circuit concluded that "it is reasonable and logical to conclude not only that IA's digital books currently function as a competing substitute for Publishers' licensed editions of the works, but also that, if IA's practices were to become 'unrestricted and widespread' [citation omitted] it would decimate Publisher's markets for the Works in Suit across formats."⁴¹ Ultimately, the parties entered into a negotiated consent judgment, wherein the Internet Archive agreed to a permanent injunction—"removing [in addition to the 127 books involved in the suit, additional] books from lending at their member publisher's requests."⁴² Ultimately, due to the consent decree and the injunction issued by the lower court, the Internet Archive had to remove the 127 Works in Suit from their

³³ 644 F. Supp. 3d at 391.

³⁴ *Id.* at 384.

³⁵ Hachette, 664 F. Supp. 3d at 383-84.

³⁶ Rachel Brooke, Judge Rules Against Internet Archive on Controlled Digital Lending, Author's Alliance (March 28, 2023), <https://www.authorsalliance.org/2023/03/28/judge-rules-against-internet-archive-on-controlled-digital-lending/>.

³⁷ Hachette Book Grp., Inc. v. Internet Archive, 115 F.4th 163, 185 (2d Cir. 2024).

³⁸ Hachette Book Grp., Inc. v. Internet Archive, 2023 U.S. Dist. LEXIS 142607 (S.D.N.Y. Aug. 11, 2023).

³⁹ 115 F.4th at 196.

⁴⁰ *Id.* at 185.

⁴¹ *Id.* at 195.

⁴² Chris Freeland, Internet Archive Blogs, End of Hachette v. Internet Archive (Dec. 4, 2024), <https://blog.archive.org/2024/12/04/end-of-hachette-v-internet-archive/>.

Open Library, as well as any additional books available as ebooks that the publishers later identified.

Libraries and librarians watched the lawsuit closely to see whether the actions of the Open Library would be seen as fair use.⁴³ Since the Circuit Court held that they were not, libraries may be more cautious to engage in controlled digital lending practices at their own institutions.⁴⁴ However, if libraries completely decide not to engage in controlled digital lending solely on the basis of this lawsuit, it would be an error, in my opinion. First, this lawsuit applies to the lending practices of the Internet Archive and is only precedential in the Second Circuit of the United States. Of course, other Circuit Courts of Appeals (and lower courts) can (and likely would) still look to this case for guidance if a similar lawsuit were to arise in a different jurisdiction. Second, this lawsuit (through the permanent injunction) ultimately prohibits the Internet Archive from lending (in a controlled digital lending format) works that are also available as ebooks.⁴⁵ Libraries that are engaging in controlled digital lending with older books that are not available as ebooks or books that are orphan works where no current copyright holder can be identified, are likely still engaging in a practice justified by fair use.⁴⁶ Why? Because there is no real market available to harm when works that are unavailable as ebooks or are orphan works are lent through controlled digital lending.⁴⁷ Third, other libraries engaged in controlled digital lending during the pandemic were not sued—likely because the result might have been very different. Take, for example, the HathiTrust Emergency Temporary Access Service where libraries that verified they could not lend physical books due to the pandemic were able to lend any of their books that were ingested into the HathiTrust Digital Library on a one-to-one basis while the physical library was closed.⁴⁸ The University of Illinois Library, for instance, is a major contributor to the HathiTrust corpus and participated in the Emergency Library during the pandemic.⁴⁹ Finally, the Open Library itself continues to lend books that are unavailable as ebooks even after the conclusion of the lawsuit.⁵⁰

⁴³ See, e.g., Jenna Allen, *Q&A: What's at State for Libraries in the Court Case Against Internet Archive*, COLO. STATE UNIV. (April 3, 2023), <https://source.colostate.edu/internet-archive-court-case>.

⁴⁴ Chris Lewis, *Why a Ruling Against the Internet Archive Threatens the Future of American Libraries*, MIT TECH. REV. (Sept. 11, 2024), <https://www.technologyreview.com/2024/09/11/1103838/why-a-ruling-against-the-internet-archive-threatens-the-future-of-americas-libraries>.

⁴⁵ Hachette Book Grp., Inc. v. Internet Archive, 20-CV-4160, Order (U.S.D.C. S.D.N.Y. Aug. 11, 2023), https://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/006/6316-1.pdf.

⁴⁶ David R. Hansen & Kyle K. Courtney, *A White Paper on Controlled Digital Lending* (2018), LIBRARY FUTURES CC-BY-4.0, <https://www.controlleddigitallending.org/whitepaper> (last visited Sep. 18, 2025).

⁴⁷ *Id.*

⁴⁸ HathiTrust, Emergency Temporary Access Service, <https://old.www.hathitrust.org/ETAS-Description.html>.

⁴⁹ HathiTrust, ETAS: Approved Libraries—Active & Deactivated, <https://old.www.hathitrust.org/etas-approved-libraries.html>.

⁵⁰ Internet Archive, Open Library, <https://openlibrary.org/>.

So, where does this leave the library community regarding controlled digital lending? It seems to rely on fair use, rather than other principles of copyright, or Section 108, the library exceptions in the 1976 Copyright Act. If eBooks are available, then controlled digital lending wouldn't apply. And finally, libraries that may not understand the result or outcome may now be more shy or worried about making available out-of-print, hard to find, and older books, maybe even when they are in the public domain, where there are no copyright restrictions. It is up to the library and copyright legal community to help libraries understand what this ruling means.

III. UMG RECORDINGS, INC. V. INTERNET ARCHIVE

This ongoing litigation involves the “Great 78 Project” initiated by the Internet Archive in 2006.⁵¹ The project sought to digitize and preserve 78rpm records.⁵² According to the Internet Archive “78s were mostly made from shellac, i.e., beetle resin, and were the brittle predecessors to the LP (microgroove) era. The format is obsolete, and just picking them up can cause them to break apart in your hands. There's no way to predict if the digital versions of these 78s will outlast the physical items, so we are preserving both to ensure the survival of these cultural materials for future generations to study and enjoy.”⁵³

Prior to the passage of the Music Modernization Act (MMA) in 2018, sound recordings published prior to 1972 were not protected by federal law in the United States and were only protected by state laws, which could vary greatly.⁵⁴ Under general preservation rules in Section 108(c) of the Copyright Act, if a format in which a work is stored is becoming obsolete (such as with 78rpm records), libraries can make up to three preservation copies of the work if the library has determined “after a reasonable effort” that “an unused replacement copy cannot be found at a fair price.”⁵⁵ Under that provision, digital copies of the preserved work cannot be shared openly.

However, under Section 108(h), works that are within the last twenty years of copyright protection may be shared digitally by a library if “the work is no longer subject to commercial exploitation” or “a copy of the . . . work cannot be obtained at a reasonable price.”⁵⁶ Notably, Section 108(h) does not apply to downstream uses of the work as it provides that “the exemption in this subsection does not apply to any subsequent uses by users . . .”⁵⁷ Presumably, when the Great 78 Project began, the legal justification for the

⁵¹ Ashley Belanger, Internet Archive's Legal Woes Mount as Record Labels Sue for \$400M, Arts Technica, available at <https://arstechnica.com/tech-policy/2023/08/record-labels-sue-internet-archive-for-digitizing-obsolete-vintage-records/> (Aug. 15, 2023).

⁵² *Join the Great 78 Project!*, THE GREAT 78 PROJECT, <https://great78.archive.org/> (last visited May 22, 2025).

⁵³ *Id.*

⁵⁴ U.S. Copyright Office, A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdictions, available at <https://www.copyright.gov/docs/sound/> (Dec. 28, 2011).

⁵⁵ 17 U.S.C. § 108(c) (2018).

⁵⁶ 17 U.S.C. § 108(h).

⁵⁷ *Id.*

use was a combination of Section 108(c), 108(h), and fair use. But until 2018, sound recordings were not federally protected, and so there was some question as to whether Section 108(h) would apply.⁵⁸

However, when the MMA passed in 2018, the analysis had to change (at least for entities that do not qualify as libraries under Section 108) because Congress now swept pre-1972 sound recordings into protection under federal law.⁵⁹ Congress used the MMA to expand Section 108(h) to apply under a new “safe harbor” for uses by libraries, extending the protections from Section 108(h) of the Copyright Act to all pre-1972 sound recordings (both published and unpublished).⁶⁰ Section 1401(f)(1)(b) applies Section 108 exceptions to “all covered activities, the ‘last twenty years’ exception from 108(h) also applies to uses of pre-1972 sound recordings.”⁶¹ However, the Act goes further by applying Sec. 108(h) to all pre-1972 recordings, not just those in the last twenty years of protection.⁶² However, if the Internet Archive does not qualify as a library with the protections of Section 108 at its disposal, it would need to avail itself of Section 1401(c) provisions, which require the person(s) wishing to use a pre-1972 sound recording for non-commercial uses to file a notification with the Copyright Office and wait for a 90 day period to see whether the rights owner opts out of the noncommercial use.⁶³

The music record labels argue that the MMA makes the ongoing reproduction and digital sharing of their music through the Internet Archive’s Great 78 Project illegal, as it does not fit within the safe harbor provisions of the MMA since record labels are still commercializing the works at issue (including thousands of copyright registered works managed by the labels).⁶⁴ After the case was successfully transferred to the Northern District of California, the Internet Archive countered that the Great 78 Project is lawful under the defense of fair use in Section 107 and 1401 of the Copyright Act.⁶⁵ The fair use argument goes something like this: the Internet Archive is a non-commercial entity that is engaging with libraries to preserve otherwise fragile copies of 78rpm physical records. The recordings are then able to be listened to by the public, but only in a limited way—unlike Spotify, listeners have to navigate to the Internet Archive website and listen

⁵⁸ Elizabeth Townsend Gard, *supra* note 11, at 88.

⁵⁹ United States Copyright Office, A Study on the Desirability of and Means for Bringing Sound Recordings Fixed Before February 15, 1972, Under Federal Jurisdictions, <https://www.copyright.gov/docs/sound/> (Dec. 28, 2011).

⁶⁰ 17 U.S.C. § 1401(f)(1)(b).

⁶¹ Eric Harbeson, The Orinn-Hatch–Bob Goodlatte Music Modernization Act: A Guide for Sound Recording Collectors, (2021), https://www.loc.gov/static/programs/national-recording-preservation-plan/publications-and-reports/documents/Hatch-Goodlatte-Music-Modernization-Act_Guide-for-Sound-Recording-Collectors.pdf

⁶² *Id.*

⁶³ § 1401(c).

⁶⁴ UMG et al v. Internet Archive et al., Case No. 3:23-CV-06522-MMC, Amended Complaint (U.S.D.C. N.D. Cal. March 12, 2024), available at <https://storage.courtlistener.com/recap/gov.uscourts.cand.422515/gov.uscourts.cand.422515.95.0.pdf>.

⁶⁵ UMG et al v. Internet Archive et al., Case No. 3:23-CV-06522-MMC, Answer to Plaintiff’s Amended Complaint (U.S.D.C. N.D. Cal. May 31, 2024), available at <https://storage.courtlistener.com/recap/gov.uscourts.cand.422515/gov.uscourts.cand.422515.105.0.pdf>.

to them through the website “as they were originally created.”⁶⁶ Additionally, the recordings are used primarily for teaching and learning and are accessed in much smaller counts than traditional music streaming services, such as Spotify.⁶⁷

As a librarian, I completely understand the mission of the Internet Archive in starting the Great 78 Project. While record labels and other copyright holders may preserve older materials, they also have little to no incentive to do so with more obscure (read: less commercially viable) works, and the general public has no cost-free way to access these works, as they do with books and periodicals (unless it is in the public domain).⁶⁸ And, in some cases, libraries must step in to help preserve content that would otherwise be lost, such as the Library of Congress digitization project to preserve the content of old newspaper content.⁶⁹ Libraries routinely collect content contained in obsolete formats (think VHS tapes) to preserve them for future generations of educators, students, researchers, and the public.⁷⁰ Some of the many, many sound recordings included in the Great 78 Project are not consistently available for commercial purchase—not to mention the fact that the listening experience is quite different through the IA platform (which tries to mimic the 78rpm listening experience) rather than through a streaming service.⁷¹ The question also might be are the 78s being sold, rather than the sound recordings, and is that different from other formats.

However, for those works that are still being sold, of which there are also many listed in the lawsuit (more than 2,700 works),⁷² the passage of the MMA may make the Internet Archive’s fair use argument harder to justify as Congress clearly intended to allow music publishers to recoup some of the money they otherwise lost when sound recordings before 1972 were not protected under federal copyright law.⁷³ On the other hand, Congress also very clearly intended to expand the scope of the Section 108 exceptions for both published and unpublished pre-1972 sound recordings as well. And, as any good

⁶⁶ Chris Freeland, Internet Archive Responds to Recording Industry Lawsuit, Internet Archive Blog (Aug. 14, 2023), <https://blog.archive.org/2023/08/14/internet-archive-responds-to-recording-industry-lawsuit-targeting-obsolete-media>.

⁶⁷ *Id.*

⁶⁸ United States Copyright Office, The Music Modernization Act, <https://www.copyright.gov/music-modernization/>.

⁶⁹ Library of Congress, National Digital Newspaper Program, available at <https://www.loc.gov/ndnp/> (last visited May 22, 2025).

⁷⁰ For instance, see Academic Libraries Video Trust, available at <https://www.videotrust.org/> (last visited May 22, 2025).

⁷¹ Ashley Belanger, Music Labels will Regret Coming for the Internet Archive, Music Historian Says, Arts Technica available at <https://arstechnica.com/tech-policy/2025/03/music-labels-will-regret-coming-for-the-internet-archive-sound-historian-says/> (March 7, 2025).

⁷² Ashley Belanger, Internet Archive’s Legal Woes Mount as Record Labels Sue for \$400M, Arts Technica, available at <https://arstechnica.com/tech-policy/2023/08/record-labels-sue-internet-archive-for-digitizing-obsolete-vintage-records/> (Aug. 15, 2023).

⁷³ United States Copyright Office, The Music Modernization Act, <https://www.copyright.gov/music-modernization/>.

librarian knows, Section 108 does not exclude, but rather specifically includes fair use rights for libraries.⁷⁴

The parties are now in settlement talks.⁷⁵ If the settlement fails and the case goes to trial, a negative outcome (a finding of copyright infringement with no fair use justification) could mean hefty damages for the Internet Archive, but likely would not impact library lending outside of the issue in this case in general that is that significant.⁷⁶ Libraries tend to be fairly careful when sharing digital versions of complete musical works and sound recordings that are still in copyright—as they share the recordings only with verified patrons and after checking that the music is unavailable on the commercial market.⁷⁷ I would venture to guess that other libraries sharing works like those identified in the Great 78 Project would first do a thorough check of the marketplace before widely sharing digital versions of pre-1972 music. If the works are not being commercially exploited, it is hard to argue against fair use because in that analysis the most significant factor to be considered is whether the library's sharing negatively impacts the commercial value of the work. If there is no current commercial value (i.e. recording industries are no longer sharing the music), fair use should be easy to justify.

The case ultimately settled out of court in a confidential settlement agreement on September 15, 2025, so we will never know what the court ultimately would have found in this case.⁷⁸

CONCLUSION

The two lawsuits against the Internet Archive signal a few things. First, publishers of books and music are willing to sue and battle it out in court to determine where the limits of fair use may be. Especially when it involves digital lending, which can reach a very broad audience. As noted above, anyone can sign up for an Internet Archive account for free, so the potential audience for the Internet Archive, unlike more traditional libraries where patrons are limited to students or people living within a certain geographic zone, is vast. The general public (and librarians as a whole) have benefited from the Internet Archive immensely.⁷⁹ The Wayback Machine, for instance, is currently being used to archive government resources that are mysteriously being deleted from government

⁷⁴ 17 U.S.C. § 108(f)(4).

⁷⁵ Dylan Smith, "Optimistic" Major Labels and Internet Archive Confirm Advanced Copyright Suit Settlement Talks, Digital Music News, available at <https://www.digitalmusicnews.com/2025/04/10/internet-archive-lawsuit-settlement-talks/> (April 10, 2025).

⁷⁶ *Id.*

⁷⁷ See, e.g., Yale's project to catalogue (not widely share) historical 78rpm sound recordings issued singly. Yale University Library, Cataloging 78 RPM Recordings, available at <https://web.library.yale.edu/cataloging/music/78cataloging>.

⁷⁸ Joint Notice of Settlement, UMG et al v. Internet Archive et al., 3:23-cv-06522, (N.D. Cal. Sep 15, 2025) ECF No. 180

⁷⁹ Chris Stokel-Walker, We're Losing Our Digital History. Can the Internet Archive Save It? BBC (Sept. 15, 2024), <https://www.bbc.com/future/article/20240912-the-archivists-battling-to-save-the-internet>.

websites.⁸⁰ The mission of the Internet Archive is a laudable one. On the other hand, these cases demonstrate that in some instances, when pursuing their mission, the Internet Archive may be pushing the limits of the law a bit too far (especially in the eyes of the publishers).⁸¹ And the courts, thus far, have been siding with the publishers rather than the Internet Archive. These lawsuits, then, can be expensive to litigate and costly to the organization on both a monetary and publicity basis. And yet, libraries, especially public libraries, understand the need to push back against outrageous e-book licensing terms.⁸² While e-books can be rented by public libraries from publishers, the price-gauging is unjustifiable and the instinct of the Internet Archive to push back through the Open Library is just one of the fights waged currently against this practice.⁸³ Library Futures—a non-profit group working on behalf of library workers, educators, lawyers, activists, and researchers—is also waging war, but in the area of legislation—where we have already seen some progress in a recently passed ebook licensing law in the State of Connecticut.⁸⁴

Why should the general public care about these lawsuits? Well, with the prices offered to public libraries for e-book licensing, you just may not be able to read your favorite fiction book anytime soon if you rely on the library to do so.⁸⁵ Libraries—both academic and research libraries—do not have unlimited budgets and the exorbitant licensing practices may very well force many libraries to forgo licensing many publications.⁸⁶ Furthermore, publishers control the license packages at will and can “turn

⁸⁰ Naseem S. Miller, *Researchers Rush to Preserve Federal Health Databases Before They Disappear from Government Websites*, *The Journalist's Resource* (Jan. 31, 2025), <https://journalistsresource.org/home/researchers-rush-to-preserve-federal-health-databases-before-they-disappear-from-government-websites>.

⁸¹ AAP Celebrates Final Victory in Infringement Case Against Internet Archive, AAP Press Release (Dec. 4, 2024), <https://publishers.org/news/aap-celebrates-final-victory-in-infringement-case-against-internet-archive>.

⁸² See, e.g., *Libraries Push Back Against Publishing House Decision to Limit their Access to E-Books*, CBC News (Oct. 15, 2019), <https://www.cbc.ca/news/canada/british-columbia/libraries-push-back-against-publishing-house-decision-to-limit-their-access-to-e-books>.

⁸³ Daniel A. Gross, *The Surprisingly Big Business of Library E-Books*, *The New Yorker* (Sept. 2, 2021), <https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books>.

⁸⁴ *An Act Prohibiting Libraries From Agreeing To Certain Terms In Electronic Book And Digital Audiobook License Agreements Or Contracts*, Ct. Senate Bill No. 01234 (2025), https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&which_year=2025&bill_num=01234; Jennie Rose Halperin, *Connecticut Passes Landmark Ebook Bill Based on Library Futures Model Legislation*, *Library Futures* (May 18, 2025), <https://www.libraryfutures.net/post/connecticut-ebook-bill>.

⁸⁵ See, e.g., *Libraries Push Back Against Publishing House Decision to Limit their Access to E-Books*, CBC News (Oct. 15, 2019), <https://www.cbc.ca/news/canada/british-columbia/libraries-push-back-against-publishing-house-decision-to-limit-their-access-to-e-books>.

⁸⁶ Caitlin Dewey, *Librarians and Lawmakers Push for Greater Access to E-Books*, *Stateline*, <https://stateline.org/2022/09/06/librarians-and-lawmakers-push-for-greater-access-to-e-books/> (Sept. 6, 2022).

off” access to book titles from packages already purchased by libraries as they wish (so, the book you were waiting for may suddenly disappear).⁸⁷ As a student, you may be unable to access your textbook for class, which can be devastating if you did not reserve the funds to purchase the book yourself.⁸⁸ And, the public will lose free access to much of the music being shared from the Great 78 Project if the lawsuit (as I suspect) will force the Internet Archive to stop lending the digital music files—or, at the very least, stop lending the digital streaming files of music at issue in the lawsuit. This loss may impact researchers and students alike, who might forgo access completely if they would otherwise need to pay for access to files when they only need to listen to one single song. Of course, libraries and librarians are very familiar with these issues and have been following the lawsuits closely.⁸⁹ While the impact of the *Hachette* settlement will likely not completely stop libraries from engaging in controlled digital lending, they may reconsider lending books that are otherwise available in current licensing schemas.⁹⁰ The UMG Recordings lawsuit is less likely to have a negative impact on library practices, as most libraries will preserve but not widely share older music recordings (unless they are in the public domain).⁹¹

⁸⁷ Susan D’Agostino, Publisher Blocks Access to Ebooks, Scrambling Fall Courses, Inside Higher Ed, <https://www.insidehighered.com/news/2022/09/28/publisher-blocks-access-ebooks-students-faculty-scramble> (Sept. 27, 2022).

⁸⁸ *Id.*

⁸⁹ Jenna Allen, Q&A: What’s at Stake for Libraries in the Court Case Against Internet Archive, Colorado State University, (April 3, 2023), <https://source.colostate.edu/internet-archive-court-case/>.

⁹⁰ Chris Freeland, What the *Hachette v. Internet Archive* Decision Means for Our Library, (Aug. 17, 2023), <https://blog.archive.org/2023/08/17/what-the-hachette-v-internet-archive-decision-means-for-our-library/>.

⁹¹ See, e.g., Historical Sound Recordings, Yale Library, <https://library.yale.edu/visit-and-study/libraries-locations/gilmore-music-library/historical-sound-recordings> (noting that “if you request [a 78rpm] from the Yale Library catalog, you will receive an email to schedule a listening session.”)