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Internet Archive to Face the Music for Mass Copyright Infringement

by

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On August 11, the owners of copyrighted music recordings filed a lawsuit alleging mass online infringement by the Internet Archive. According to the complaint, the Internet Archive, through its "Great 78 Project," unlawfully copied, stored, distributed, and publicly performed thousands of copyrighted music recordings without authorization. This harmed the copyright owners by diminishing the revenue streams they would enjoy through legitimate commercial use of their creative works.

The case of *UMG Recordings v. Internet Archive* comes just months after the Internet Archive suffered defeat in [Hachette v. Internet Archive](#) (2023), a mass infringement case involving copyrighted books. The scale of Internet Archive's alleged infringing operations at issue in *UMG Recordings* parallels that of its operations at issue in *Hachette*. And just as a court found Internet Archive liable and rejected its fair use defense in *Hachette*, a similar outcome should be expected in *UMG Recordings*. If there is a lesson to be learned from these cases against Internet Archive, it is simply that big undertakings to make digital copies of creative works free for everyone on the Web amount to infringement if the copyright owners don't consent.

Section 106 of the Copyright Act secures exclusives rights over the reproduction, distribution, preparation of derivative works, and display or public performance of creative works such as

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music sound recordings, as well as the creation of derivatives. And the Music Modernization Act of 2018 (MMA) secures exclusive rights in public performances via digital audio transmission of sound recordings made before 1972.

Internet Archive is a non-profit corporation that operates what its website calls "a non-profit library of millions of free books, movies, software, music, websites, and more." This includes something called the "Great 78 Project," which focuses on making digital copies of 78 rpm (revolutions per minute) phonographic records and making those copies accessible to the public via downloads or Internet streaming. For roughly the first half of the twentieth century, the 78 rpm record was the music industry standard. The Great 78 Project's website states that "[w]hile the commercially viable recordings will have been restored or remastered onto LP's or CD, there is still research value in the artifacts and usage evidence in the often rare 78rpm discs and recordings." The website boasts that it has over 400,000 recordings and that "[t]he digitization will make this less commonly available music accessible to researchers in a format where it can be manipulated and studied without harming the physical artifacts."

Plaintiff copyright owners allege that several thousand copyright-protected sound recordings are among those old 78 rpm records. Included are copyrighted sound recordings by notable artists such as Louis Armstrong, Chuck Berry, Nat King Cole, Bing Crosby, Buddy Holly, Elvis Presley, and Frank Sinatra. According to plaintiffs, Internet Archive infringed exclusive rights in those music sound recordings by copying them into digital files, storing new copies of those files on their servers, distributing those works via downloads that result in new copies on individual user devices, and publicly performing the work via digital streaming – all of this without authorization from copyright owners.

The plaintiffs' complaint presents a straightforward case of mass copyright infringement by Internet Archive. The pre-72 recordings allegedly were copyrighted, and they were copied, distributed, and publicly performed without authorization, thereby harming copyright owners by depriving them of revenues and potential revenues they would enjoy through legitimate sales and licensing of those sound recordings.

Additionally, Internet Archive has no basis for receiving safe harbor from liability for infringement under the Music Modernization Act. Under the statute, noncommercial use of a pre-72 sound recording does not constitute infringement if the music sound recording is not being "commercially exploited by or under the authority of the rights owner." Yet all of the sound recordings listed in the plaintiffs' complaint *are* being commercially exploited by the copyright owners or under their copyright authority. According to the plaintiffs' complaint, those sound recordings are all publicly available for purchase at places like Apple's iTunes Store or for licensed use via streaming services like Tidal.

Moreover, it does not appear that Internet Archive attempted to fulfill other requirements for safe harbor under the MMA. For instance, the Act requires the filing of notices with the Copyright Office that identify the pre-72 sound recordings to be used and the nature of the uses. The plaintiffs allege that Internet Archive never filed any such notices.

Importantly, any fair use defense of Internet Archive's unauthorized uses of the plaintiffs' pre-72 sound recordings most likely would come up short. The fair use doctrine, codified in Section 107 of the Copyright Act, recognizes that there are case-specific situations in which

copyright restrictions can stifle creativity and speech on matters of public importance. When the user of a copyrighted work raises "fair use" as an affirmative defense to infringement claims, courts apply four non-exclusive factors in evaluating whether the specific use of the creative work is "fair" under the circumstances: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use upon the potential market for or value of the copyrighted work."

The decision by the District Court in *Hachette Book Group, Inc.*, is instructive for *UMG Recordings v. Internet Archive* on the matter of fair use. At issue in *Hachette* was Internet Archive's scanning 33,000 book titles and loaning digital copies of those works to the public. The first fair use factor – regarding the purpose and character of the use – was central to the court's analysis in *Hachette*. According to case law, the first fair use factor includes a consideration of whether a secondary use of a copyrighted work is "transformative." A use is "transformative" if it adds something new, with a further purpose or different character – or by expanding the utility of the original work.

In *Hachette*, Internet Archive argued that its copying and distributing of the books was transformative because it "facilitate[d] new and expanding interactions between library books and the web." But the District Court disagreed. It cited the Second Circuit's decision in [Authors Guild, Inc. v. HathiTrust](#) (2014) that "a use does not become transformative by making an invaluable contribution to the progress of science and cultivation of the arts." And the *Hachette* court concluded that Internet Archive's copying and distributing ebooks didn't create any new efficiencies in delivering the works to those entitled to receive them – but instead replaced ebook copies that were authorized by the publishers and unreasonably encroached upon their commercial entitlements.

The court in *Hachette* also determined that the commercial-noncommercial component of the first fair use factor analysis favored the copyright owners. It determined that Internet Archive's non-profit entity status was not dispositive for fair use analysis and quoted the Supreme Court in [Harper & Row Publishers, Inc. v. Nation Enterprises](#) (1985) that "[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." And the court in *Hachette* found that Internet Archive attracted new members, solicited donors, and upped its standing in the library community as a direct result of offering copyrighted books in ebook format without paying for licenses.

The first fair use factor also is likely central to any claimed fair use defense in *UMG Recordings v. Internet Archive*. As with Internet Archive's unauthorized copying and distributing of books in *Hachette*, the Great 78 Project is not "transformative" according to fair use doctrine. Internet Archive copies old 78 rpm records and makes them available in their entirety, along with their album labels. Nothing new or of a different purpose or character is added by Internet Archive to those copyrighted sound recordings. Rather, Internet Archive's unauthorized copies effectively serve as replacements for authorized copies offered on major commercial distribution platforms like iTunes, Spotify, and Deezer. This undermines the ability of the owners of the copyrighted sound recordings to market their creative works and receive financial returns. And as in *Hachette*, Internet Archive's non-profit

status and the fact it hasn't made direct sales do not support a finding of fair use for the Great 78 Project. The fact that Internet Archive benefits from offering unauthorized copies of copyrighted sound recordings to the public through publicity, donations, and new memberships dictates against fair use.

Although Internet Archive holds itself out as a library and the declared mission of the Great 78 Project is "the preservation, research and discovery of 78 rpm records," it is unlikely that Internet Archive could – or would – defend its actions under Section 108 of the Copyright Act's provision allowing for limited copying of creative works by libraries and archives. Section 108(h) specifies that no reproduction, distribution, display, or public performance of a copyrighted sound recording is permitted if the work is subject to normal commercial exploitation or if a copy can be obtained at a reasonable price.

Notably, Internet Archive did not try to use Section 108 to justify its infringements of copyrighted books in *Hachette*. And it is doubtful it would try to do so in *UMG Recordings v. Internet Archive* because apparently all of the music sound recordings at issue are being commercially exploited. Also, digital copies of many, if not all, of those sound recordings could be obtained for a reasonable price through download or Internet streaming services. And it is likely that physical copies of many of the sound recordings at issue in the case also are available at a reasonable price, including CD format and 33 rpm or 45 rpm records. According to a March 2023 [report](#) by RIAA, revenues for vinyl records totaled \$1.2 billion in 2022, the sixteenth consecutive year of growth for records. Insofar as one seeks music specifically in 78 rpm record format – certainly a narrow niche – copies of 78 rpm records are readily available for purchase at secondary market outlets, including eBay.

In the end, whatever Internet Archive's ambitious vision for making information or creative content free for all, its mass copying and related activities for the Great 78 Project – like its actions in mass copying books – almost certainly are violative of copyright law because the copyright owners did not authorize Internet Archive's use of their creative works. The law secures exclusive rights in reproducing, distributing, and publicly performing copyrighted works, and the copyright owners of music recordings will get their day in court to vindicate those rights.

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