

IP Forecast: NY Judge To Hear Internet Archive 'Piracy' Case

By **Andrew Karpan**

Law360 (March 16, 2023, 8:55 PM EDT) -- A New York federal judge will consider next week whether copyright law's fair use doctrine protects the Internet Archive's lending library of digitized books or if the nonprofit is committing what major publishers call "digital piracy on an industrial scale."

On Monday afternoon, U.S. District Judge John Koeltl will hear Internet Archive argue that publishers like Hachette, HarperCollins and Penguin Random House have the wrong idea about the website's goal of creating a "web page for every book ever published," the subject of a contentious lawsuit filed nearly three years ago.

"Internet Archive's [controlled digital lending] program seeks to do something major publishers can't imagine: without seeking payment or profit, improve the value of physical books for libraries and their patrons," says the nonprofit, which is being defended, in part, by lawyers at the Electronic Frontier Foundation, a digital rights group

The website's program has drawn support from allies. A flurry of amicus briefs, endorsed by more than 30 legal academics, have backed the Internet Archive's efforts to end the case. But 14 other professors are siding with the publishers, urging Judge Koeltl in their amicus brief last year to rule that the website's "conduct falls outside of any plausible interpretation of fair use."

"Internet Archive presents itself as an altruistic enterprise, though it is part of a portfolio of business interests operated by millionaire businessman Brewster Kahle," the professors wrote. Kahle, Internet Archive's founder, is a computer engineer who made his fortune selling the Alexa brand he co-founded to Amazon for \$250 million.

"The fundamental question here is whether a library can take a book that it owns a physical copy of and lend that book to one patron at a time, either physically or digitally," Internet Archive lawyer Joseph Gratz of Morrison & Foerster LLP told Law360 in an interview.

The nonprofit absolutely cannot do so, said Davis Wright Tremaine LLP lawyer Elizabeth McNamara, who represents the publishers in the case.

"There is really no law that supports what Internet Archive is doing," McNamara told Law360. She said the website's project eats into the "tens of millions of dollars a year" that publishers earn from licensing their books to libraries directly through retailers that they approve.

"There are significant differences between a digital work and a physical book. [The digital work] has greater distribution capacities. You can order it from your couch at home versus physically going into a library," she said.

If Internet Archive wins, McNamara warns in the briefs that it "would turn copyright law upside down."

The publishers are represented by Elizabeth A. McNamara, Linda J. Steinman, John M. Browning, Jesse Feitel and Carl Mazurek of Davis Wright Tremaine LLP and Scott Zebrak, Matt Oppenheim, and Danae Tinelli of Oppenheim & Zebrak LLP.

The Internet Archive is represented by Joseph C. Gratz and Jessica E. Lanier of Morrison & Foerster LLP and by Corynne McSherry, Kit Walsh and Cara Gagliano of the Electronic Frontier Foundation.

The case is Hachette Book Group Inc. et al. v. Internet Archive et al., case number 1:20-cv-04160, in the U.S. District Court for the Southern District of New York.

On Appeal

On Tuesday, Tenth Circuit judges in Denver are set to review an appeal in a case from a training services company that says educational nonprofit Edwell is ripping off its trademark-protected brand name. M. Welles and Associates wants to overturn a federal judge's ruling last year that determined customers were not confused by Edwell's use of the name and Welles' older use of the name "edwel." Welles calls this "a result entirely inconsistent with the logical conclusion to be drawn from the facts of record."

The Tenth Circuit will hear a copyright case on Wednesday over the ownership of footage used in the Netflix documentary series "Tiger King." Last year, an Oklahoma federal judge ruled that Timothy Sepi, a former photographer employed by Joe Exotic's Garold Wayne Zoological Park, did not actually own videos he took during his employment there, scuttling his case alleging Netflix used his footage without permission. But Sepi says he "was making [the] footage on his own time" because "Joe Exotic was content gold."

At Trial

On March 24, Delaware's U.S. District Judge Richard Andrews will kick off a six-day jury trial over the sale of personal "hydrofoil" surfing boards by Chinese company Shenzhen Waydoo. A Puerto Rican company called MHL Custom, which makes its own line of boards, says the ones Waydoo sells infringe a pair of MHL patents. Waydoo will tell jurors, however, that the patents were old news by the time they were issued and that MHL's patents cover boards that are "dynamically stable," which are unlike those that Waydoo sells.

At the PTAB

The Patent Trial and Appeal Board will take a look Wednesday at a patent covering a type of "telecommunications node" that was issued to Dutch telecom KPN in 2017 and challenged by telecom giant Ericsson. The KPN patent should not have been issued because of an assortment of older patent paperwork Ericsson has produced, according to the Swedish company. KPN agreed to drop that patent from a suit shortly before a jury trial last year that ended in a \$31.5 million verdict against Ericsson.

--Additional reporting by Tiffany Hu and Dani Kass. Editing by Jill Coffey.

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