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7 Unintended Consequences of the Digital Shift

Abstract: This chapter identifies and examines areas where the use of digital content in a library context is different from print. It pinpoints the exceptions needed in copyright legislation to ensure effective information access through libraries in a digital environment, and highlights significant trends in the policy environment that are beginning to shape the way libraries may be able to use ebooks and other digital content in the future. The chapter also identifies emerging issues in copyright law, where changes in content creation and distribution require attention from libraries to understand how public access and libraries’ ability to carry out their responsibilities may be affected, and where engagement in policy discussions may be appropriate for libraries and library organisations.

Keywords: Copyright – Electronic information resources; Copyright infringement; Digital libraries; Electronic books

Introduction

The transition from print to digital content has been rapid when considered from the perspective of the worlds of publishing and libraries. In the more than five hundred years since the invention of the printing press, the production of books changed very little up to the year 2000. However, with the introduction in North America of the Amazon Kindle in 2007, and the Apple iPad in 2010, recreational reading began to change for the first time for a significant proportion of the population, first in North America and parts of Europe, and increasingly around the world. Previously academic and public library environments had been experiencing a digital shift towards full text sources from the 1990s, primarily for journals, news media and research materials.

Initially, the digital shift promised greatly increased access to content, and people imagined a world of universal access to information. Project Gutenberg began in 1971, based on the premise “anything that can be entered into a computer can be reproduced indefinitely” (Hart 1992). The idea that digital content should be able to be freely reproduced has planted itself firmly in the public’s mind. Communicating the reality, that there are limits to copying in the digital realm, and all content is not free to re-use, requires that librarians understand copyright and the ways in various legal systems that the use of digital content
differs from print. In this chapter, the focus is on ebooks that are produced for a consumer market, and content that is published on the internet for a general audience, such as news media. The need for policy change is relevant in all types of libraries, as consumer-facing content producers are the source of intense pressure on policy makers to create copyright regimes that limit access for all purposes, including research and education.

Copying print for access and preservation is permitted through copyright exceptions and limitations that apply to libraries and their users. The application of exceptions and limitations has not kept pace with the print to digital shift (Crews 2015), and is particularly hampered by the licensing environment for digital content. While fair use and fair dealing offer more flexibility in addressing new formats, they require interpretation by libraries and users, with the result that the full scope of allowable uses may not be exercised due to fear of misinterpretation. At the WIPO Standing Committee on Copyright and Related Rights in 2010, IFLA commented that libraries’ ability to fulfil their mission to preserve and access cultural heritage was impeded by barriers such as contracts and technological protection measures “that make it impossible to use the exceptions some countries’ copyright laws already allow in support of the print-disabled, students, educators, and the many other users our libraries exist to serve” (IFLA 2010). Libraries and their users continue to experience barriers, and continue to argue for exceptions and limitations that will bring copyright law into the digital age.

Without the exceptions and limitations that exist for print content, libraries face a future where collections do not grow over time and cannot be preserved, because digital content is often purchased on an annual basis. If the library’s budget is inadequate in a certain year, the accumulation of previously purchased material in digital format risks being lost when the annual licence is not renewed. Libraries’ collections will become transitory if they do not have the ability to copy and preserve content in digital formats in environments featuring balanced policies.

The digital environment has brought about many other changes that libraries, publishers, platforms and governments are studying and discussing, to consider how print-based laws and regulations apply. The changes under examination range from reconsideration of the fundamentals of copyright, such as exhaustion or the right of first sale, to new forms of content creation that exist entirely outside the traditional publishing environment. Economic models for content creation have changed fundamentally since 2000, and copyright law is far from catching up. Those who advocate for libraries and public access must follow the evolving developments, and act to ensure that access and preservation of content continue while new voices emerge and new economic models appear.
The Failure of Copyright Exceptions to Address Digital Lending

Digital formats have been distributed to libraries by publishers through licences, rather than through permanent sales of content as with print works. The licence sets terms on how the library can use the content, and how many times or in what ways the content can be used before the licence ends. For academic, scientific and technical content, particularly in periodical formats, licences are frequently negotiated between library representatives and rightsholder representatives. Licences for trade or commercial content are typically offered on a non-negotiable basis.

The licensing environment creates numerous barriers to continuing the ways that libraries have preserved and shared content historically. While libraries have worked both individually and collectively with rightsholders over the past twenty years to address the barriers, rightsholder resistance to models that reflect the print environment has continued. IFLA and library associations worldwide have identified that legislative solutions are necessary, and have worked together to advocate for policy change both nationally and internationally. IFLA, together with the International Council on Archives (ICA), Electronic Information for Libraries (EIFL) and Corporación Innovarte, developed a Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives (TLIB) in 2009 with subsequent updating to guide WIPO’s Member States in amending limitations and exceptions for libraries worldwide. The limitations and exceptions in the treaty proposal are intended to govern the use of all copyright works and materials protected by related rights, in digital and non-digital formats (IFLA 2013a).

When the ability for libraries to exercise the rights described in TLIB is considered, it is apparent how much the existing digital content market compromises libraries’ traditional activities. The issues occur at the most fundamental level, the right of the library to acquire works, described in Section 6 of TLIB. The treaty proposal identifies that an exception enabling a library to acquire works is necessary because digital works available to the public may not be offered for sale to libraries, or may be offered on unreasonable terms. Both situations have occurred in the English language trade publishing environment, among others, and it is often multinational trade publishers that withhold content access from libraries. More limited markets, whether national or because of language, may have more reciprocal relationships among authors, publishers and libraries. However, among multinational trade publishers, withholding of works from libraries has been a consistent pattern, with Macmillan, for example, allowing each library to license only one copy of a newly published ebook under a perpetual licence at a high price in 2019, and allowing no further licences for eight weeks. The approach taken was claimed
to be a method of protecting the publisher from the loss of sales that would occur if the book were available in libraries during the first eight weeks (Albanese 2019).

Beyond the traditional multinational trade publishers, it is Amazon and Audible, an Amazon company, that are most egregious in promoting exclusivity agreements that withhold content from libraries, and also from other distributors. Their exclusivity agreements limit authors’ and publishers’ sales on other distribution platforms, resulting in the elimination of sales to libraries, as Amazon and Audible do not sell or license to libraries directly. Until late 2020, Amazon had expressed no interest in changing its policy, and the position continues for Audible and Amazon KDP (Albanese 2020). In North America, it has been common to discover that authors and publishers are unaware of the impact of their Amazon or Audible exclusivity agreements on access to their ebooks in libraries. Sharing information about the impact of exclusivity agreements on availability in libraries is one way that libraries can help to educate authors and publishers, and influence the market towards greater access. The announcement by the Digital Public Library of America (DPLA) in 2021 of an agreement with Amazon Publishing to bring ebooks and audiobooks to the DPLA Exchange, its not-for-profit ebooks marketplace, may mark a pivotal moment (Kimpton 2021).

Following the acquisition of a work, a library must have the ability to lend it, or provide temporary access to it. The right to lend is established for physical materials through exhaustion or the right of first sale. Exhaustion means that when a work has been sold by the rightsholder or with consent, permission of the rightsholder is not required for subsequent use of the work, such as lending or reselling. In print, exhaustion, or right of first sale as it is known in the US, enables the lending of books and other materials by libraries, as well as the ability for libraries to sell discarded books. In the IFLA treaty proposal, Article 7 is the “Right to Library and Archive Lending and Temporary Access” and is intended to ensure that libraries can provide temporary access to users or other libraries of copyrighted works in digital format or other intangible media, where the library has lawful access (IFLA 2013a).

As IFLA stated in the preamble to the Principles for Library eLending in 2013: “The exhaustion of rights for digital content is an issue of increasing legal debate and uncertainty. Rights holders operate on the assumption that they can control all subsequent uses of digital works following initial access by the purchaser... Should the rights holders interpretation prevail that they can control all post-first sale uses of digital works, the library’s public service mission of ensuring societal access to written culture over time will be undermined” (IFLA 2013b). The issue of exhaustion has attracted attention in recent years in court legal action: Capitol Records v. ReDigi in the US, Vereniging Openbare Bibliotheken v. Stichting

1 Capitol Records, LLC v. ReDigi Inc., No. 16-2321 (2d Cir. 2018).
Unintended Consequences of the Digital Shift

At present, most use of digital content by library users takes place through licences, which bypasses the unresolved nature of exhaustion for digital content. However, if future judgments recognise exhaustion for digital content, libraries could have more flexibility in the ways that they purchase and provide access to ebooks and other digital material. As a result, it is an important area for libraries’ attention to ensure appropriate policy changes globally.

Court Rulings

The United States

In North America, the decision most frequently referred to as relevant to the question of exhaustion for ebooks is Capitol Records LLC v. ReDigi [hereinafter Capitol Records]. In this US case Capitol Records and other record labels sued ReDigi for copyright infringement. ReDigi was a service for the resale of digital iTunes files that allowed the user to upload an iTunes file to ReDigi, which transferred the file by breaking it into small digital packets. Following upload, ReDigi removed the file from the user’s computer. An important question in the case was whether the upload process created an unauthorised copy of the original file.

The New York District Court found that ReDigi was creating an unauthorised reproduction of the original work, and that the first sale doctrine, Section 109(a) of the US Copyright Act, did not apply because it is a limit on the distribution right, not the reproduction right. The court also considered fair use, Section 107 of the US Copyright Act, finding that the use was not criticism, commentary or information about the work, nor was it providing a more usable form. Further, the court found no transformative purpose, and identified the commercial aspect of the copying as weighing against a finding of fair use. It was also observed that the copy made by ReDigi was identical to the original work, and selling the copy would directly compete with the market for the original work (Capitol Records 2013). The Association of American Publishers filed an amicus brief in support of Capitol Records, stating that a decision in ReDigi’s favour “would be catastrophic for the entire publishing industry” because used copies are perfect substitutes for

new copies and digital lending allows multiple readers to access a single digital
copy simultaneously (Capitol Records 2017). While the decision was appealed in
the Supreme Court, the Court declined to hear the appeal. The appeals court rec-
ognised in its opinion that the ReDigi system was designed in good faith, with
the hope that it would be found to conform to the Copyright Act. However, the
court did not find that Section 109 was intended to accommodate digital resale,
and stated “If ReDigi and its champions have persuasive arguments in support of
the change of law they advocate, it is Congress they should persuade.” (Capitol
Records 2018). The decision on the appeal was issued on December 12, 2018,
affirming the district court’s decision of 2013 (Capitol Records 2013). Jonathan
Band commented that the decision was “the most analogous precedent to library
sharing of digital files of copyrighted works,” and that it “could be read as implicit-
ly rejecting the argument that the first sale right should have a positive influence
on the analysis of the first fair use factor” (Band 2018).

Europe

Moving to the European policy environment, two cases directly address the
lending of ebooks and their use in libraries. One is Vereniging Openbare Biblio-
theeken (VOB) v Stichting Leenrecht in the Netherlands, and the other is Technische
Universität Darmstadt (TU Darmstadt) v Eugen Ulmer in Germany. In the Nether-
lands, the case VOB v Stichting Leenrecht explored the right of libraries to lend
ebooks in a digital environment. Vereniging Openbare Bibliotheken (VOB) is
the association of public libraries of the Netherlands and Stichting Leenrecht is
the foundation that collects and distributes payments to authors for the public
lending right (PLR) in the Netherlands. Under European Union (EU) law, authors
and publishers have the right to control the distribution of their books within
copyright law, and when policy makers provide an exception for lending by
libraries, a payment must be made, known as public lending right. VOB took the
case forward seeking clarity on whether digital lending was permitted in Dutch
copyright law, whether exhaustion applied to the lending of ebooks, and whether
a licence covering elending was required under the legislation.

The European Court of Justice was asked to consider Articles 1, 2 and 6 of the
ber 2006 on Rental Right and Lending Right and on Certain Rights Related to
Copyright in the Field of Intellectual Property [hereinafter Rental and Lending
Harmonisation of Certain Aspects of Copyright and Related Rights in the Informa-
The case did not consider the library’s right to digitise print works that had been legally acquired. Ultimately, the judgment found that libraries did not need prior permission for certain forms of lending ebooks, that is a licence, and that lending was permitted if the ebook had been acquired lawfully and remuneration was paid as required in the public lending right (Vereniging Openbare Bibliotheken 2016; EBLIDA 2017).

Unfortunately, the case did not resolve the question of the availability of ebooks to libraries, or how a library could legally acquire a digital copy of a book other than by licence. The judgment did identify that PLR payments would apply to library lending of ebooks. If a library cannot acquire a digital work at all, or cannot acquire it other than by a licence with unreasonable terms, the ability of the library to digitise becomes necessary. In print, libraries have the right of reproduction and supply for the purpose of education, research or private use, as identified in TLIB through Article 8. While the right of reproduction in these circumstances is generally well established in the print world, the question of the right of a library to digitise a work and supply it digitally is under discussion.

The leading case in Europe on the ability of libraries to acquire digital works through digitising print works is the 2014 case of Darmstadt. In Darmstadt, a research university in Germany was challenged by a publisher for providing a digitised version of a book in the library using a dedicated terminal. The library digitised its legally acquired print copy and refused the offer of a digital licence for the material. The InfoSoc Directive Article 5(3)(n) permits “use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections” (Directive 2001/29/EC 2001). At the time of the case this was implemented in the Urheberrechtsgesetz – UrhG/Copyright Act of Germany under Section 52(b). The court found that a library is not required to purchase a licence, and can legally digitise works in its collection that have been legally acquired, in order to make them available on dedicated terminals under exception 52(b). The case also found that users could print the displayed pages within the boundaries of the exception for private or educational use in Germany, as they are able to make photocopies of print material. It further found that if an EU Member State made the exceptions

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5 Section 52(b) has since been repealed and replaced by Section 60e Libraries, which states at (4) Libraries may make a work from their holdings available to their users for personal research or private studies at terminals on their premises...” (https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html).
subject to remuneration, the publisher was entitled to compensation (Technische Universität Darmstadt 2014; Rauer 2016).

While the judgment offered progress on the ability of libraries to digitise, it limits the allowable access to an unreasonable degree, as it does not allow for use of digitised works away from the premises of the library. The judgment also left libraries with unresolved questions about the meaning of a dedicated terminal that may limit libraries’ full use of the available exceptions.

**Controlled Digital Lending**

The question of a library’s right to digitise and provide access to print works is being tested. The concept of controlled digital lending (CDL), an initiative best known through the Internet Archive in the United States, proposes that a library can digitise a print book that it has legally acquired and lend it to one user at a time, instead of lending the print book. The concept requires that the library never lends out, in print or digital format, more copies of the book than it has legally acquired, and that the library uses technological protection measures to ensure that the digital file cannot be copied or distributed by the recipient (Controlled Digital Lending n.d.).

Advocates for CDL argue that it makes digital content available under the same terms that libraries have always lent print books, and therefore that it should be allowable under fair use in copyright law in the United States and does not require the permission of the rightsholder. They argue that digitisation can benefit copyright holders through improving the ability to discover older or less popular works, and that digitisation is not likely to affect demand for the print work. Under Section 108 of the Copyright Act in the United States, libraries are permitted to make copies for preservation purposes, and for providing the work to users.

The application of CDL in the United States will be relevant to other countries with fair use in their copyright regimes, while the testing of the concept in Canada will be relevant to countries with fair dealing legislation. The necessity to explore mass digitisation of print works in libraries was highlighted during the COVID-19 pandemic in 2020, when the closure of libraries around the world meant that print collections could not be accessed by users without digitisation.

CDL faces a legal challenge filed in June 2020 against the Internet Archive by the Hachette Book Group, HarperCollins Publishers, John Wiley & Sons and Penguin Random House (AAP 2020). The complaint claims that both the Open Library, which is the Internet Archive’s implementation of CDL, and the National Emergency Library, which lifted lending restrictions during the COVID-19 pandemic, are forms of piracy, and that providing access to 1.3 million scanned works through the
platforms is mass copyright infringement (Hachette 2020). The complaint alleges that the Internet Archive “undermines the balance and promise of copyright law by usurping the Publishers’ ability to license and sell the books that they have lawfully produced on behalf of authors and for the benefit of readers.” The argument is that section 109 of the US Copyright Act allows the owner of a lawfully acquired print book to dispose only of a particular print copy, and that the creation and distribution of reproductions of that print copy is “outside the bounds of the law”.

CDL as an approach for libraries could offer a solution to the limitations of digitising and lending that were discussed in Darmstadt, as access is provided offsite. However, it has yet to be tested outside North America, and the outcome of the lawsuit against the Internet Archive will be significant and further clarify the interpretation of existing exceptions and limitations to digital content. Each case discussed, ReDigi, VOB, Darmstadt and Internet Archive, tests the boundaries of what is allowable for libraries, and provides learning that can guide proposals for legislative solutions by libraries, with the goal that libraries can exercise rights established in print and described in IFLA’s treaty proposal (IFLA 2013a).

Public Lending Right

In European countries, and in several others, payment is made to authors in recognition of the lending of their works in libraries. The concept is known as public lending right (PLR) and has been mentioned above. The term applies both to the right in copyright law, and the programs that implement remuneration schemes to authors related to library lending. In the EU, PLR is part of copyright legislation under section 6(1) of the Rental and Lending Rights Directive (Directive 2006/115/EC 2006), which allows a Member State to derogate from an author’s exclusive right to authorise lending provided the author is compensated for the lending. In other countries, such as Australia and Canada, PLR programs exist, but they do not fall under copyright legislation. In Australia, the program is separate legislation, while in Canada it is a cultural program. There is no PLR program in the US. In countries where PLR is not within copyright legislation, libraries' ability to lend typically depends on exhaustion, or the right of first sale, which gives the owner the ability to lend or resell a book once it has been purchased, as already described.

Whether PLR programs are part of copyright legislation or not, they operate by gathering information about libraries’ holdings and/or loans of books and applying a compensation rate based on the findings. The administration may be managed by a collective acting on behalf of the authors, like Stichting Leenrecht in the Netherlands, or by an agency of government as in the United Kingdom, where it is operated by the British Library. Since the first PLR program was intro-
duced by Denmark in 1946 (Parker 2018), payments have applied to print books. With the advent of ebooks, questions began to arise about whether payments under PLR applied to ebooks and under what circumstances. *VOB v Stichting Leenrecht* established in Europe that PLR would apply to the loan of ebooks, as it did to print. Starting in 2016, countries outside of Europe with significant ebook lending began to include ebooks in their PLR programs, with Canada’s program the first. In the UK, ebooks lent remotely also became eligible for compensation under PLR in 2018 (British Library 2018).

**Unintended Barriers to Acquisition and Cooperation Among Libraries**

Copyright exceptions and limitations enable both the acquisition and lending of print materials by libraries to their members, both locally and internationally. However, in the digital realm, the barriers libraries face in acquiring material are greater when the work must cross borders. Article 5 of IFLA’s treaty proposal, TLIB (IFLA 2013a), provides a right to parallel importation, which is an exception to the distribution right that enables libraries and archives to acquire copyrighted works that are legally available in any country, when those works are not available within their own countries, without the permission of the rightsholder. Since digital content is frequently available only through a licence, and most distributors operate nationally, there is no mechanism for libraries to acquire a licence to lend an ebook from another country. The licence is typically national and issued only to an organisation within the same borders as the distributor. National limitations demonstrate the need for international policy action to address the acquisition and lending of digital content across borders by libraries.

Where previously a library could have ordered a print book from another country, from any legal supplier, a publisher or distributor of digital material must now negotiate with the rightsholder for separate licence terms for each country before a library purchase can take place. Without separate licences, libraries are put in a position where the only way to purchase content requires contacting publishers or distributors to request negotiation of new agreements specific to their regions. In the early days of ebooks, the issue arose frequently in Canada, where American distributors had negotiated agreements with Canadian rightsholders for distribution in the United States, but works by Canadian authors could not yet be purchased in Canada. Canadian libraries were successful in communicating demand for Canadian ebooks in Canada, and the situation changed rapidly. Any library seeking to address problems of a lack of availability of local content may
find that contacting the publisher or rightsholder directly is the most effective means to achieving access.

Similarly, interlibrary loan is restricted by licence terms. While libraries have long-established traditions of interlibrary loan and document sharing, the national and local nature of digital licences generally prohibits provision of content to users not included in a library’s defined user group. In addition, many digital licences have pricing linked to the library’s user population, which is often strictly defined. IFLA’s treaty proposal identifies the need for a right to cross-border uses, which would allow libraries to share resources across borders under appropriate exceptions, to enable interlibrary loan and document sharing. At present, the terms of licences, and the precedence of licences over exceptions and limitations in copyright in most countries, frequently prevent interlibrary loan of digital works (IFLA 2019).

Unintended Consequences in the Content Marketplace

The following section addresses five areas in copyright law that are related to the work of libraries and relevant for library organisations to monitor: digital rights management (DRM), new economic models for content production, press publishers’ right, platform responsibility for content, and fan fiction. The areas affect continued access to information by the public and create potential liabilities for libraries in their service provision. Libraries and library organisations may find it helpful to monitor developments in the areas highlighted, and choose to participate in activities to influence policy making.

Digital Rights Management

When libraries bought print books, and in the early days of multimedia formats, the physical nature of the material meant that user and library rights to modify, copy and preserve material continued generally unhindered. However, beginning around 2010, digital delivery became the norm for many content areas. With digital delivery came the increasing use of DRM or digital locks, frequently referred to as technological protection measures (TPMs) in English language copyright law. The Encyclopedia Britannica defines DRM as “protection of copyrighted works by various means to control or prevent digital copies from being shared over computer networks or telecommunications networks” (Encyclopedia Britannica n.d.). TPMs can be described as “software, components and other devices that copy-
right owners use to protect copyright material. Examples of TPMs include encryption of software, passwords, and access codes” (Australia Parliament 2006). In copyright law, restrictions may be placed on developing technology that bypasses TPMs, and on circumventing or breaking TPMs to access works.

A significant driver of discussion of TPM in copyright law is the **US Digital Millennium Copyright Act (DMCA) of 1998**. Anti-circumvention provisions based on DMCA have been included in bilateral free trade agreements with numerous countries. **Article 11** of the 1996 **WIPO Copyright Treaty** required that “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law”. However, the DMCA hinders the circumvention of technological protection measures altogether, preventing users and libraries from acts that are otherwise permitted under copyright law, such as bypassing locks so that a user can create a copy for scientific research or a copy for preservation.

When library organisations advocate for exceptions and limitations, whether at WIPO, or within their own countries, they seek to ensure that legal protection and remedies against the circumvention of technological measures do not prevent libraries and archives from enjoying the limitations and exceptions provided in the copyright law (IFLA 2013a). In IFLA’s treaty proposal, it is noted that legal protection is limited by the requirement that the library, archive or user has lawful access to the work or material, and that acquiring the tools or services needed for the circumvention must also be permitted.

Beyond the legislative context within which libraries operate to purchase and lend content, DRM has many consequences that could be considered unintended by policy makers but that might be intentionally implemented by the rightsholder or content provider. DRM can result in the following:

- Lack of interoperability with purchased ebooks trapped in a vendor’s system
- Need for extensive user support due to the steps needed by interacting technologies to verify a user has permission to use the digital work
- Limits on research and preservation activities such as copying and printing even when allowed by copyright law, such as when applying assistive technology for users with disabilities, and
- Privacy risks created by DRM system operation in relation to information passed between the user’s device and the system that verifies permission.
Among academic publishers, some provide DRM-free titles on their platforms (Roncevic 2020). However, in public libraries, DRM is used to manage lending systems and licence terms, and ebooks are rarely available without DRM.

**Implications of New Economic Models for Content Production**

WIPO identifies that copyright includes “**economic rights, which allow the rights owner to derive financial reward from the use of their works by others**” and goes on to say that “Most copyright laws state that the rights owner has the economic right to authorize or prevent certain uses in relation to a work or, in some cases, to receive remuneration for the use of their work” (WIPO n.d.).

The internet has transformed the production and consumption of news media. Where daily print newspapers relied on subscriptions and advertising to operate and compensate journalists, the shift to online has moved advertising revenue to distributors of information, such as Google and Facebook, and has greatly reduced subscriptions to print news media. The enormous change was described by WIPO in 2018 as the “collapse of traditional revenue models” (WIPO Secretariat 2018, 3). The digital shift has rapidly transformed both educational publishing and news media. In news media, there are fewer newspapers and paid journalists, and new ways to generate revenue are required. People discover news differently, shifting from paid print subscriptions to search engines and social media channels. The changes have given rise to new copyright issues, such as the press publishers’ right described below, and have affected user perceptions of information access. The rise of user-generated content, distributed through blogs, Twitter, YouTube videos and other platforms for social media mean that anyone can become an author and a publisher, and gain an audience for ideas.

The role of traditional gatekeepers, such as publishers, has been declining rapidly. Easier content distribution has positive impacts, because it means that more diverse voices can be heard, and the ability of a publisher to distribute and sell enough print copies of content to recover costs is no longer a limit on what can be read. Many people writing blogs and self-publishing content online do not expect compensation for their work, or produce revenue through other means, such as promoting products or selling advertising. The result is a shift in public expectations about paying for content, compounded by the understanding that digital copies can be produced indefinitely at little or no cost. Libraries confront new user expectations when explaining why a digital copy of a book is not available immediately and cannot be infinitely reproduced. Users often do not understand that copyright law and licences limit the ability of libraries to copy and lend digital works, and determine how libraries pay for content.
Press Publishers’ Right or Link Tax

The effects of the changing economics of content can be seen in copyright law and the discussion of snippets. Snippets are short text extracts from the content of a web page. They are displayed by search engines to preview content, so that the user can determine relevance, similar to historic practices of the inclusion of abstracts in indexes used by libraries for decades. The snippet or abstract supports the user’s research needs by providing a preview of the content, and helps the user determine relevance of the article. Reducing the use of snippets or content previews risks reducing the value and ease of using the internet for research.

Through copyright law, some publishers are seeking compensation from search engines for the use of snippets, described as a press publishers’ right or “link tax” (Reda n.d.). Google has claimed its use of snippets benefits publishers by driving traffic to their sites (Waterson 2018). However, a 2017 policy report in Canada said “In a form of vampire economics, the new portals channel and exploit the content of traditional news organizations, through newsfeeds and ranked search results, even as they siphon away the revenue these outlets require to generate the content in the first place” (Public Policy Forum 2017).

A report to the European Parliament describes the context of the press publishers’ right through reference to developments in Germany in 2013 with “the one-year neighbouring right for press publishers covering the making available for commercial purposes of publications and fragments thereof (but not the smallest text excerpts). This is known as the Leistungsschutzrecht and is found in Sections 87f through 87h of the German Copyright Act (European Parliament 2017, 13–14). The right would obligate news aggregators to pay licence fees to the publishers. In 2019, after several years of discussion, the EU established similar law that would require news aggregators, such as Google, to pay publishers for snippets, or for social media, like Facebook, to filter out protected content. EU Members must implement the regulations within two years of the 2019 implementation (Chee and Lauer 2019).

Article 15 of the EU Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC [hereinafter DSM Directive] (Directive (EU) 2019/790 2019) gives publishers the right to demand paid licences for using snippets of their stories within two years of publication, excluding use by individuals or non-commercial uses. The final definition of press publication in European law excludes scientific journals, an adjustment sought and achieved by libraries and universities (Stratton 2019). France was the first country to implement the EU press publishers’ right in national law, and Google made the decision in late 2019 to stop including snippets in Google News rather than pay publishers a fee (Tobitt 2019). In Spain, which had implemented the press pub-
lishers’ right in 2014 following Germany, Google took the approach of shutting down Google News, and the result was a significant decline in traffic to news publishers’ sites (Waterson 2018).

During copyright reform in Europe, the original directive was clearly aimed at Google and its news services. However, the press publishers’ right initially included non-commercial uses, which could have affected libraries by encompassing the delivery of research to users, as well as snippets in indexes, catalogues and research guides. Ultimately, article 15(1) of the DSM Directive was clear that non-commercial use was not included in the scope (IFLA 2019a). In addition to concerns over application in libraries, the new right also raises questions about how to judge what amount of content qualifies as substantial, and as a result how the treatment of quotations in copyright could change as the approach potentially develops and expands to other countries.

The success by publishers in Europe has led to campaigns in other countries for similar rights. In both Canada and Australia, publishers raised the issue of compensation paid by Google to news media during copyright review processes (Canada. Parliament House of Commons 2019; Australian Competition and Consumer Commission 2019). Australia has since introduced a mandatory news media bargaining code to address the imbalance between Australian news media businesses and digital platforms, specifically Google and Facebook. News media businesses can bargain individually or collectively with the platforms over payment for the inclusion of news on their services (Australian Competition and Consumer Commission 2021). As publishers in other countries follow the lead of European publishers, libraries and educational institutions will need to engage in copyright reform to limit the scope and retain user rights, in particular to ensure that scientific journals are excluded, and that individuals’ ability to use links and quotations are protected, learning from the success of the efforts undertaken in Europe.

**Platform Responsibility**

Emerging issues in the regulatory environment for content platforms affect libraries in circumstances where libraries act as platforms or internet providers themselves, and influence information access more broadly. For library users, concerns about platform responsibility generally arise when the platform is expected to control or censor the content that users post and the concerns arise most often for social media sites. Platform responsibility issues also arise for internet service providers, including services that provide publicly accessible internet via wifi or wired computers. Libraries that offer catalogues or other platforms that allow user participation, and libraries that offer internet access via wifi or public com-
puters, need to be aware of laws related to platform responsibility and liability in their regulatory environments.

Three issues relevant to libraries have emerged for platform providers: intermediary liability for internet providers related to copyright infringement, requirements for providers to implement copyright notice or takedown regimes, and more recently, the level of responsibility that a platform should take in relation to content that does not conform to laws or social norms and could be defined as hate speech. The third issue is outside the realm of copyright, but important to libraries given the potential for certain points of view to be censored or suppressed outside the limits imposed by law.

European copyright reform adopted in 2019 discussed the need for filters at any site hosting large volumes of user uploaded content to check for copyright infringement, and potential liability for infringement if they did not. In addition to concerns about liability, any automated use of filters could risk the incorrect application of copyright law, resulting in legitimate content being removed from repositories in error. Although aimed at repositories like YouTube and Instagram, Article 17 of the DSM Directive (Directive (EU) 2019/790 2019) had the potential to affect scientific and open education repositories. Joint efforts by library and university groups across Europe advocated for the exclusion of not-for-profit educational and scientific repositories from liability, and in its final form, there is an exception for these types of sites (IFLA 2019).

In some countries, the regulatory environment for the digital realm includes protection for platforms like Facebook and Google from liability for unlawful or harmful content posted by their users. Such liability is known as intermediary liability. Protections from intermediary liability are present in the US Communications Decency Act, and appear in the Canada-United States-Mexico Agreement (CUSMA). However, CUSMA and more recent proposals in Europe indicate a shift towards placing more responsibility for content in the hands of platform providers, and expecting them to judge and remove content that does not comply with the law and has the potential to cause harm (European Commission n.d.). Increasingly, platforms are acting on these expectations, and in their efforts to limit hate speech and illegal content, risk restricting the free expression of ideas that are controversial yet within the law.

**Fan Fiction**

Fan fiction is writing inspired by an existing work, written by a consumer of that work, which expands on the characters and storylines of the original work. Wikipedia states “The author uses copyrighted characters, setting, or other intellectual properties from the original creator(s) as a basis for their writing” (2021).
Fan fiction is rarely produced for commercial gain, although at times works that began as fan fiction have been developed into commercial publications. In the English language, the most well-known example of a commercial work that began as fan fiction is *Fifty Shades of Grey*, by E.L. James, which began as fan fiction inspired by *Twilight*, by Stephanie Meyers. The story first appeared online in 2009 as *Master of the Universe* and was later published by an independent Australian publisher “after removing references to *Twilight* from *Master of the Universe*, a practice known as ‘filing off the serial numbers’” (Cuccinello 2017).

Fan fiction communities generally consider their works to be intended as non-commercial. While fan fiction began prior to the Internet, platforms like fanfiction.net and Archive of Our Own have connected fans with each other and created new ways to find fan fiction works. For libraries, issues related to fan fiction may arise due to inquiries by library users who are interested in creating fan fiction works, or because of the large body of fan fiction that could be promoted by a library, but is likely to include copyright violations. In copyright law, most fan fiction is likely to be considered an unauthorised work, because it is produced without the permission of the copyright owner. Permission would be required by law, in particular by the moral rights of the author found in article 6 of the Berne Convention, which allows that the author shall have the right to “object to any distortion, mutilation or other modification of, or other derogatory action in relation to the work, which would be prejudicial to his honour or reputation” (Berne Convention 1979). While it is an option for authors to take action against creators of fan fiction, it has not been common in its evolution thus far, and as a result is a generally untested area.

In the US, the Organization for Transformative Works aims to protect and defend fan works from commercial exploitation and legal challenge. The Organization for Transformative Works is a non-profit organisation with a website Archive of Our Own that hosts transformative non-commercial works like fan fiction mentioned above. In a submission to New Zealand for its copyright review, it was argued that “Research establishes that remix creation historically comes disproportionately from minority groups such as women; gay, lesbian, bisexual, transgender, and queer people; and racial minorities of all sexes and orientations. This is unsurprising, because ‘talking back’ to dominant culture using its own audiovisual forms can be particularly attractive to and empowering for disempowered speakers” (Lantagne 2019). Fan fiction offers opportunities for more diverse voices in content creation, but also presents risks for the fan who is inspired to create.

If the source work is no longer protected by copyright, the fan is free to create fan fiction without copyright-related barriers. However, if it is still protected by copyright, the copyright owner has exclusive rights over the work, and the owner could take legal action against the fan fiction author for using protected elements
in the work, such as the characters. The non-commercial nature of fan fiction on the internet may support arguments for fair use in the United States, however, in countries with fair dealing or other regimes, fan fiction may be harder to defend. In Canada’s copyright law, a copyright exception exists for non-commercial user-generated content that gives users the right to use published work to create a new work and to authorise an intermediary to disseminate it, as long as it is done solely for non-commercial purposes, the source work is recognised if reasonable to do so, the source work was not infringing copyright, and the new work does not have a substantial adverse effect on the original. In the United States, consideration would be given to the purpose and character of the use, the nature of the work being copied, the amount being copied, and the effect on the market.

Fair use and user-generated content exceptions may be arguments which could be used to support fan fiction. Authors whose work is the subject of fan fiction seem to have mixed opinions, with many supporting fan fiction recognising the benefits to promoting the original works. Libraries and library organisations may find it relevant to monitor the development of law in this area to support aspiring authors, and to consider the implications for collection development.

Conclusion

While the expansion of digital formats, and increasing access to the internet, has created an explosion in information conveniently available to the public, it has also created a range of challenges for libraries in meeting their mandates. The licensing environment for digital content means that access rights and copyright exceptions that have existed for decades, or centuries, can no longer be fully exercised. As policy and practice develop in countries around the world, library organisations must consider the perhaps unintended ways that policy makers are failing to protect user rights, and work to ensure that the copyright exceptions and limitations enabling the work of libraries to support education, research, and creativity, continue to thrive and expand.

References


