Digital Content and First Sale:

The Challenges of Ebook Lending in Modern Libraries

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Introduction

For most people, the subject of libraries evokes an image of rooms filled with books and the smells of dust and aging paper. Yet these days physical books are only one part of what libraries offer. Increasingly libraries are moving to integrate digital materials into their collections, and not only in the form of ebooks. Electronic magazines, comics, and journals, streaming video, online language learning and skill-building resources, and more are now integral parts of a library's collections. And the demand for digital content is growing rapidly. According to *Campus Technology*, library collections in higher education now contain more digital items than physical ones: 59% in 2018, up from 39% only three years prior (Scaffhauser, 2018). Public libraries are seeing an increase in digital content use as well. In 2009, OverDrive - one of the largest ebook and audiobook providers - reported over a million checkouts through their platform (Ashcroft, 2011, p. 402). Skip forward to 2018 and over 65 individual public library systems circulated upwards of a million ebooks each, with a total number of ebook circulations through Overdrive of over 274 million (Rakuten Overdrive, 2019).

Of course, rapid transitions such as this do not happen in a vacuum but tend to go hand in hand with other societal changes. In 2010, Luciano Floridi referred to the rise of digital media as part of a new cultural shift: an Information Revolution wherein "objects and processes are de-physicalized" and instead become informational objects. These informational objects are by their nature perfectly cloneable, which means copies and originals are identical and interchangeable. In this new landscape, the right of ownership as it applies to physical objects cannot be viewed in the same way. Instead Floridi predicted that the right of usage would become the coequal, if not dominant, form of control applied to digital objects (2010, p. 12). This paper will consider Floridi's prediction in the context of ebook acquisition in public and academic libraries, as well as the ramifications of this shift from physical to digital materials: what new challenges does it create, and how libraries are responding to these

challenges. Though the focus here will be on ebooks, these same challenges apply broadly to the full spectrum of digital media.

Digital vs Physical Books

What distinguishes ebooks from paper books? Aside from the obvious differences in physical representation, ebooks offer some very practical benefits for both libraries and library users that their paper brethren lack. Positive features often mentioned by library patrons include portability, 24/7 access to new titles, the ability to change font size, and not needing to worry about returns or late fines (Scardilli, 2019, p. 14). On the library side, ebooks have the potential to cut costs by reducing loss rates and simplifying collection management (Ashcroft, 2011, p. 403).

Yet the differences between the digital and the physical extend beyond surface distinctions. In order to fully explore these differences, it is necessary to look at copyright law: specifically, the First Sale Doctrine. First recognized by the United States Supreme Court in 1908 and later codified in the Copyright Act of 1976, the first sale doctrine authorizes the owner of any copyrighted work to "sell, lend, or otherwise dispose of the owned copy of that work without authorization of the copyright holder" (Chiarizio, 2013, p. 616). In short, once a person (or a library) has purchased a book, they have full rights to loan that copy out or otherwise use it in any way they please. It is the very legal basis on which libraries are able to exist and operate. But therein lies a problem: the first sale doctrine does not apply to digital content.

The problem here with the first sale doctrine is that it retains one right exclusively for the copyright holder: that of reproduction. Purchasing a book does not give its owner the right to make and distribute copies of that book. This is a relative non-issue when it comes to physical materials, where production costs are high, and a given work can only have a single owner at any given time. But digital objects by their very nature may be easily reproduced with no loss of quality, placing them far outside what was originally envisioned when first sale was established (Sanchez, 2015, p. 10). In fact, the act of

loaning digital materials cannot be accomplished without reproducing them. In order for a library to "lend" an ebook to a patron, the ebook file is copied from the library's repository and reproduced on the library patron's device. At that time the file itself exists simultaneously in two places, and thus technically constitutes a breach of copyright under 17 U.S.C. § 106 (Chiarizio, 2013, 626).

So if ebook lending via traditional library acquisition models is technically illegal under US copyright law, then it follows that new acquisition models must be developed. However, the removal of the first sale doctrine from the picture, and the lack of any other legal regulatory framework around e-lending, has given publishers enormous latitude in establishing new acquisition terms that work to their benefit. Access to ebooks is now obtained through temporary licenses rather than purchasing books outright. These licenses, paired with End User License Agreements (EULAs), explicitly waive first sale and typically include numerous complicated and restrictive terms of use (Sanchez, 2015). Yet digital content sites still feature "Buy" buttons and other vestiges of the traditional modes of acquisition. As a result, many librarians remain unaware that they do not actually "own" their ebook content. Nor are any of the big publishers offering alternate models, so even those that do have little choice but to go along with the terms presented.

Libraries and publishers have long had a complex relationship, with libraries being one of book publishers' largest and more consistent customers, yet also as a potential threat to book sales elsewhere. As library director Joseph Sanchez of Mesa County Colorado recently put it, though librarians have long viewed publishers as "more or less willing partners" who support the existence of libraries, publishers "always have been skeptical of the evidence that print borrowers are also buyers" (2015, p. 9-10). And indeed, there have been signs of anti-library attitudes from publishers. Brian Napack, the U.S. president of Macmillan Publishers infamously stated that, "The fear is I get one library card and never have to buy a book again" (O'Brien, Gassar, & Palfrey, 2012, p. 9). Though this leaves out the very salient

point that libraries themselves are still buying those books, and generally at a significant markup, it does

speak to the anxieties publishers have around library lending.

It is of course easy to paint publishing companies as greedy and grasping, but do they have

legitimate cause for concern when it comes to ebooks? It's true that there is a long-established market

segmentation between book consumers and library patrons, driven in part by the need to physically

travel to the library to check out and return books. Yet this barrier does not apply to ebooks. Publishers

might rightly worry about loss of revenue when checking an ebook out from a library is as fast and

simple as purchasing one from a retailer (O'Brien et al, 2012, p. 22-23). And some evidence does point

towards this being the case, at least in part. Many public libraries report that ebooks bring in new

patrons who didn't previously use library services (Ashcroft, 2011, p. 403), and a case study conducted

at the University of Massachusetts Amherst found that 40% of ebook users never check out print

materials, suggesting that the availability of ebooks is creating new users and circulations which

otherwise would not have occurred (Lewellen, Bischof, & Plum, 2016, p. 150).

The numbers are less conclusive, however, as to whether these new users would have

purchased these ebooks directly had they not been available from the library. Yet that belief has steadily

gained traction within the publishing world. Online retailers, too, are doing their part to stoke the

anxieties of publishers. It recently came out that Amazon has been promoting a narrative to authors and

publishers that libraries are responsible for declining ebook sales, using data they've collected on

consumer sales and Kindle ebook circulations As a result some publishers have already responded by

raising prices and enforcing even more restrictive licensing terms (Enis, 2019). And it is this landscape

that librarians must navigate in order to continue offering these services to their communities.

Ebook and Challenges Faced by Libraries

With all of this in mine, it is clear that integrating ebooks and other electronic materials into

library collections presents a number of unique challenges. Beyond collection development and library

programming, librarians must now become conversant in information technology and contract law,

among other things. Below are a selection of some of the biggest challenges libraries face in acquiring,

maintaining, and supporting their ebook collections.

Acquisitions and Licensing Practices

As was touched on briefly before, the process of ebook acquisition is vastly different and

significantly more complicated than that of purchasing and lending physical books. Librarians often

express frustration with the bewildering array of ebook licensing and business models on offer, as well

as the difficulty of reading and understanding complex licensing terms (Ashcroft, 2011). And acquiring

ebooks often involves more than just getting access to the book itself but must also consider the terms

under which the title can be lent to patrons and the platform(s) on which the title can be read.

The first immediate difference is that ebooks are rarely purchased from the publishers directly.

Instead the vast majority of ebook sales are made through intermediary distributors or "aggregators"

such as OverDrive or cloudLibrary, which generally carry titles from many publishers. Libraries may

license ebooks from these distributors under a variety of different business models, with the two most

common being the perpetual access model and the subscription model (O'Brien et al, 2012, p. 10).

Under the perpetual access model, a library acquires individual copies of ebook titles, which are

typically limited to use by one patron at a time for a predetermined loan period set by the distributor.

Often titles have an established expiration trigger, such as a number of loan circulations, after which the

title expires and must be relicensed if the library wishes to continue offering that title (O'Brien et al,

2012, p. 14-15). The subscription access model, on the other hand, allows a library to purchase access to

a larger, curated collection of ebook titles, often grouped by subject area, for a specified period of time

(usually one year). This model allows for unlimited simultaneous uses by patrons, but is typically limited

to low demand, "back list" titles (O'Brien et al, 2012, p. 17). This kind of ebook bundling is often

appealing to librarians as a way to save money and time, but many also express frustration that they

aren't able to purchase some titles separately from these bundles and view the system as "bad digital collection management" (Ashcroft, 2011, p. 400).

Digital Collections Expense

Beyond the amount of time and expertise needed to acquire and develop ebook collections, libraries are further faced with the issue that ebooks are expensive. For each title they license, libraries pay roughly three-to-five times the consumer price (LaRue, 2015). And because these titles expire, libraries must pay this price over and over if they wish to keep the title in their collection. When considering that libraries are not purchasing ebooks *instead* of paper books, but rather *in addition to* (Lewellen et al, 2016, p. 163) the cost of maintaining these collections starts to present a real problem.

Barriers to Patron Use

Even after a library has successfully navigated the ebook acquisitions process, there remain many challenges in making ebook titles available and accessible to patrons. High demand titles often accrue long wait lists, yet the expense of ebook titles limits the number of copies libraries can afford to license (Feldman, 2019). Lack of simultaneous access can also present a problem in academic libraries, such as when a professor assigns an ebook for class reading (Ashcroft, 2011, p. 401-402). Ebook licenses also greatly restrict libraries' ability to share ebooks between libraries through interlibrary loan (ILL). Even in cases where the license allows such sharing, the conditions are so burdensome and esoteric that most academic libraries adopt a blanket policy against ebook ILL rather than risk being in breach of contract (Murphy, 2019, p. 176).

But the most significant factor making ebooks difficult for library patrons to access is Digital Rights Management, or DRM. In a 2011 survey of library ebook users, 69% rated DRM as a significant or very significant hindrance to ebook use (Ashcroft, 2011, p. 401). DRM limits how ebooks may be accessed and on which ebook readers it can be read. In the case of disabled persons, it can sometimes

restrict the use of assistive technologies that make digital content accessible to the vision impaired

(O'Brien et al, 2012, p. 26). Many vendors have now developed their own proprietary apps as well, such

as OverDrive's Libby, in which only e-content licensed through that vendor is discoverable. This puts

librarians in the position of either having to offer assistance and technical support for multiple platforms

or choosing to only purchase from a single provider regardless of cost (O'Brien et al, 2012, p. 22). Yet it

is true copyright infringement remains a significant threat to publishers, and without DRM they likely

would not be willing to offer ebooks to libraries at all. And there has been some improvement in ebook

platforms over time, particularly since OverDrive's new app removed the need for patrons to use the

notoriously complicated and difficult Adobe Digital Editions to download ebooks to their devices

(Polanka, 2015, p.6). But it remains a significant barrier, and one which libraries have little leverage to

push back against.

Embargoes

The aforementioned challenges have been the status quo of electronic resource librarianship for

some time. Recently, however, some publishers have moved even further to limit access to digital

content in libraries. In 2018, Macmillan announced a four-month embargo to libraries on all ebook titles

from Tor, their science fiction imprint, claiming library lending as having a "direct and adverse" impact

on sales. Their stated plan was to use this embargo as a test before possibly expanding it to other

Macmillan-owned imprints, and statements as of this year indicate that the publisher believes their

concerns have been validated by the test and they intend to move forward with the embargoes

(Feldman, 2019). Librarians have of course questioned Macmillan's claims. ReadersFirst, a coalition of

more than 300 libraries focused on improving library access to ebooks, cited internal polling which, they

say, makes it "almost inconceivable that library lending could be adversely impacting Tor's retail ebook

sales" (Albanese, 2018). Others have suggested that publishers are being short-sighted and that the

small increases in individual sales due to embargoes would not balance out the loss of profits publishers

make from sales to the libraries themselves.

Library Response and Advocacy

Despite the considerable challenges libraries face in providing ebooks and other electronic

content, the growing demand from patrons makes it impossible for librarians to simply throw up their

hands and give up. Yet the problem remains that ebook collections are expensive to maintain. Demand

is increasing exponentially, yet library budgets are not expanding at a commensurate rate (Peet, 2018).

Small libraries in particular struggle with this, having neither the money, staff, nor in-house expertise to

buy or manage digital acquisitions.

Some libraries have attempted to tackle these issues by forming consortia and obtaining ebooks

under a group license. A library consortium can pool the resources of all its libraries and negotiate better

prices and licensing terms than individual libraries could on their own (Machovec, 2015). Yet there are

downsides to this as well. Consortial ebook collections are typically communally available to the patrons

of all its member libraries, yet the single simultaneous user restrictions still apply, leading to

prohibitively long waitlists for popular titles. Some services have attempted to address this issue, with

varying levels of success. Bibliotheca's new cloudLink program allows libraries in a consortium to

maintain private collections and prioritize their own patrons in wait lists, but make titles not currently

checked out available to users from other consortium libraries. But only ebooks purchased through

Bibliotheca may be shared through this system, effectively forcing these libraries to purchase all of their

books from a single source. Libraries have attempted other methods of ebook interlibrary lending, but

managing difference license restrictions make this a challenge (Murphy, 2019).

Other efforts to reduce the power of ebook aggregators include the creation of open-source,

vendor-neutral ebook platforms. The hope is that if libraries could purchase ebooks from multiple

sources but still make them available to their patrons on a single unified platform, then ebook vendors

would be forced into competition with each other rather than keeping their customers trapped within a single ecosystem. Now free to seek the best prices and terms available, libraries would find themselves in a far better position to negotiate pricing and terms. One such platform, SimplyE, was recently developed by the New York Public Library and has been adopted by a number of other public libraries and consortia since. Plans are currently in the works to open the app up to academic libraries and e-journals as well (Beswick, Khan, & Lewis, 2017). SimplyE has managed to integrate many of the major ebook vendors, including Overdrive, Bibliotheca, EBSCO, and RBDigital. Amazon continues to be a holdout, however, declining to make the app available on Kindle devices.

Librarians have also been increasingly vocal in the political sphere with regards to the growing power imbalance between libraries and publishers. In response to the MacMillan embargoes and other anti-library moves by publishers, the American Library Association reformed its Digital Content Working Group and announced a joint initiative with other library advocacy groups to Lobby Congress and "explore all fair options for delivering content digitally in libraries," and ensure their continued ability to provide democratic access to information (Enis, 2019).

Why it Matters

Every so often, some poor soul will take to social media to question why libraries even need to exist in this day and age. *New York Observer* columnist Andre Walker was brutally ratioed on Twitter after declaring that "Nobody goes to libraries anymore" and that they should all be closed and the books given to schools. He later repented and admitted that the 110,000 people who replied to his tweet in a single day suggested that maybe libraries weren't so unpopular after all (Felix, 2017). Just one year later, when an article in *Forbes* suggested that libraries should be replaced with Amazon stores to "save taxpayers money and boost Amazon stock," the response from librarians and library supporters was so overwhelming that *Forbes* ultimately took the article down (Yorio, 2018).

Libraries clearly have public support, and yet the significance of libraries goes even deeper. Argyri Panezi (2014) at the European University Institute Department of Law centers libraries as the caretakers of culture and knowledge: collecting, organizing, and providing access. But he questions libraries ability to continue in this role in the digital realm under the current legal landscape, particularly with regards to preserving out of print and orphaned works. To address this, he urges libraries to lobby for a copyright law amendment giving libraries a special exemption relative to e-lending - a kind of digital First Sale.

Librarians argue, too, that the relationship between libraries and publishers need not be so combative. Indeed, many argue that libraries play an important role within the publishing ecosystem: offering recommendations and helping readers discover new authors and series they may not have taken a chance on otherwise. Others have pointed to Amazon's outsized influence in this arena. Overdrive CEO Steve Potash recently attributed declining ebook sales to the rise of Amazon's self-publishing platform (Enis, 2019), and Bibliotheca senior VP Tom Mercer openly accused Amazon of manipulating lending data to whip up fear among authors and literary agents that libraries pose a threat to their livelihoods (Albanese, 2019). But publishers have limited leverage to use against Amazon and far greater control when it comes to libraries and digital licensing terms. Libraries are working diligently to push back against Amazon and take control of the narrative, but it seems likely that until libraries can gain a more equal legal footing, they will continue to be at the mercy of whatever restrictions publishers decide to impose.

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