

Libraries in the Digital Age:

A Proposal to Establish E-book Accessibility

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Executive Summary

We take into consideration the goals of copyright law and existing copyright restrictions on print books in order to recommend federal legislation to promote these goals once e-books become more prevalent. In libraries, e-books are currently only available through a select few systems with the funds to arrange deals with publishers or third parties to buy more expensive e-book licenses.

E-books and print books are different in many ways which benefit end-users, but in order to preserve the spirit of copyright law, some of the limits of print books must be emulated. Many parties already try to place print restrictions on e-books, but this is done inconsistently. In order to give the reader a lens through which to view this issue, we provide a background of the history and legal issues surrounding libraries and e-books. We start with a history of libraries and an update on their current legal status and the implications thereof, including the current state of e-book lending in libraries and the active players and the rules by which they must abide. We then provide a summary and analysis of several pieces of legislation we deemed relevant to our investigation, namely: the United States Copyright Act, *Capitol Records, LLC v. ReDigi, Inc.*, *Authors Guild v. Google*, and Connecticut H.B. 5614. We lay out the issue of e-book accessibility and then a proposed solution for it which specifically provides suggestions for restrictions on distribution, use, and sourcing of e-books for libraries. Included in our proposal are several alternate routes to consider for implementing legislation regarding e-books in libraries, followed by the specific advantages of our proposal, and the risks associated with it, along with their rebuttals.

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I. Introduction

In this proposal, we lay out a recommendation for federal legislation pertaining to the interactions between users and e-books, e-books and libraries, and libraries and publishers in order to ease the transition of libraries into the digital age. Our recommendation is motivated by three central premises. First, we maintain that e-books and print books are inherently different media, but artificial similarities must be applied to legislation concerning them in order to preserve intellectual property. Second, the ultimate beneficiary of our copyright legislation is the public, especially the subset that gains most from easier access to e-books. Third, all stakeholders affected by such legislation would benefit from the legal standardization implied by federal regulation. The proposal includes recommendations for details about ebook licensing terms to libraries, specifically dealing with the potential restrictions on end-user copying, number of simultaneous users per copy, purchase origination, works available for purchase, total number of checkouts, and checkout duration.

Copyright legislation was written at a time when certain freedoms and limits were implicit in libraries' interactions with print books due to the physical restrictions inherent in print media. However, the advent of electronic books (e-books) has rendered traditional copyright law insufficient to manage interactions between copyright holders and libraries. There have been three major revisions of copyright in our country's history when no major technological changes to books or libraries occurred. Now that digital books and libraries exist, new legislation is necessary to handle the vast differences between the old and new paradigms. Publishers and authors want federally-backed protection for their intellectual property, but without a legal framework surrounding the use of e-books in libraries, publishers have been forced to resort to inconsistent licensing practices in order to find a model best suited to their interests.

This legislation is necessary to ensure a cemented place for libraries in our digital future. With it, we intend to further a sense of community around reading books, foster youthful curiosity, facilitate student research, and make books more accessible to members of the public spanning all income levels. As of November 23rd, 2013 an Ohio library system has formally asked their state's Congressmen to "ensure public access to e-book materials through public libraries."¹ We aim to assist in guiding the leaders of our nation to a compromise which will enable all parties, from readers to authors to publishers to libraries, to transition smoothly into our digital future.

¹ "Library asks Congress to protect access to e-books," <http://www.thisweeknews.com/content/stories/grovecity/news/2013/11/19/library-asks-congress-to-protect-access-to-e-books.html>

Interested Parties

Before proposing specific federal legislation, stakeholder analysis must be performed to determine the parties involved in such legislation and who would be affected by a national law regulating publisher-library interactions dealing with e-books. Authors, publishers, libraries (as well as other third-parties interested in filling the role traditionally served by libraries), and the public at large all have a significant stake in the outcome of any federal legislation on this topic. Authors want fair compensation for their work and the ability to produce art while still making a living.² It is crucial to protect this part of our society's culture even as short-form communication becomes more popular. Publishers try to entice the public to read with widely-popular works and "create an audience for the author,"³ but they also desire proportional compensation for their services. Just as libraries wish to provide everyone with equal access to knowledge, some third-parties with interests in e-books have the same end-goal: "Google's mission is to organize the world's information and make it universally accessible and useful."⁴ The public has a desire for readily-accessible books which conform to their ever-more digital lifestyle.⁵ Any law must balance the interests of all of these parties, but in order to follow the aforementioned motivation for copyright law in the first place, the public should be the ultimate beneficiary. This is in accordance with the goal of United States copyright law as stated in the U.S. Copyright Act, that copyright exists primarily for the benefit of the public.⁶

² "How Can the Average Writer Make Money Self-Publishing E-Books?"

<http://www.writersdigest.com/online-editor/how-can-the-average-writer-make-money-self-publishing-e-books>

³ "On e-books: A Publisher's View of the Digital Transformation,"

<http://www.source-books.com/blog/on-e-books-a-publishers-view-of-the-digital-transformation.html>

⁴ "About Google," mission statement: <http://www.google.com/about/company/>

⁵ "As Demand for E-Books Soars, Libraries Struggle to Stock Their Virtual Shelves,"

http://articles.washingtonpost.com/2012-01-14/local/35438130_1_e-book-checkouts-e-books-libraries-struggle

⁶ "Notable Dates in American Copyright 1783-1969," <http://www.copyright.gov/history/dates.pdf>

II. Libraries

In order to understand the problems for e-books in libraries today, it is necessary to understand the rise of libraries in the United States, their current legal status, and the implications that this status holds for the future of e-books in libraries.

A. History of Libraries

Libraries today include more than just the books, maps, and charts they contained in the 18th century. With the rise of new technologies and the invention of new media by which to deliver content, libraries have adapted to contain more types of material. One such medium, which will be the focus of the rest of this paper, is the e-book, which is simply an electronic version of a print book that can be read on the computer or on a specifically-designed device.⁷ As we discuss e-books in this paper we refer only to digitized books that were originally written for print. We are not considering the legal implications of or possible accessibility issues with media such as interactive fiction, which is a broader issue.

U.S. libraries arose in the 18th century as a means of sharing physical copies of intellectual property, namely books and articles. In 1731, Benjamin Franklin along with some members of a philosophical association called the Junto drafted up a contract called the “Articles of Agreement” and founded the Library Company of Philadelphia.⁸ Its purpose was to utilize members’ combined purchasing power and share otherwise unavailable resources. The United States was involved with libraries from the very start, as the Library Company of Philadelphia lent its books to the First Continental Congress as resources to contest the Intolerable Acts and to the Second Continental Congress to aid in the preparation of the Declaration of Independence.

Since then, the United States public library system has expanded considerably. The late 1800s to early 1900s especially exhibited considerable growth in number, staff, and collection size. Scottish-American steel magnate Andrew Carnegie was extremely influential in the expansion of the library system during this time. Before Carnegie’s influence, there were many restrictions on library use: libraries were accessible only to the upper classes or to scholars, they were only open during the day when working classes could not visit them because they had to work, and many of them placed age restrictions on membership.⁹ Carnegie had the opinion that access to intellectual property such as books and articles should be available to the entire public. Unsurprisingly, he was met by political resistance both from parties who opposed the collection of taxes from the working class and those who opposed the use of

⁷ Definition of “e-book,” http://www.oxforddictionaries.com/us/definition/american_english/e-book

⁸ “A Journey Through Franklin’s Philadelphia,” <http://www.ushistory.org/franklin/philadelphia/library.htm>

⁹ “How Did Public Libraries Get Started?”

<http://www.straightdope.com/columns/read/2236/how-did-public-libraries-get-started>

taxes for libraries. To further his goal of making intellectual property more accessible to the public, the Carnegie estate both before and after his death donated over \$50 million to build thousands of public libraries all over the country. The modern library system in the United States is considerably based on Carnegie's contributions.

Through the early founding of libraries in the 18th century, and their considerable expansion in the late 19th and early 20th centuries, the U.S. library system was built and developed with the idea that information should be easier to access and more available to the public. Currently, a public library is defined as a library that "(a) is accessible by the public; (b) is part of a not-for-profit or government-funded institution other than an institution of higher education under the Carnegie Classification¹⁰; and (c) allows patrons to take books and other materials off the premises."¹¹ Only the public library user is relevant to this definition; there is no mention anywhere in the definition of a library what the interactions of authors and publishers should be with it or how those relationships are governed.

B. Current Library Legal Status

In the age of the Internet and the computer, libraries have become more than just houses for book storage. E-books, for instance, cannot be stored on a physical shelf; they must be stored digitally on a hard drive. To this end, digital libraries were born to house e-books and allow users to borrow electronic materials. A digital library is generally accepted to be a library that stores material in electronic formats and is accessible by computer, but the concept of a digital library is not yet legally well-defined.

A library or archive falls under a different category of government copyright law; under certain conditions such as lack of commercial advantage libraries may reproduce copyrighted work. Only one section of the entire United States Copyright Act specifically mentions libraries and what constitutes fair use of works for them; this is §108. Specifically, subsection §108(b) of the Copyright Act states that one of the reasons that libraries or archives can make copies is to preserve works or give them to other libraries. Other subsections of §108 elaborate upon those instances when the digital copies are publicly accessible, but only in limited form and number.

Federal copyright legislation mentions libraries only briefly, and certainly does not distinguish digital libraries from print ones. There is not currently federal copyright legislation removing the legal grey area

¹⁰ The Carnegie Classification is a framework for classifying institutions of higher learning in the United States, namely colleges and universities.

¹¹ "A Guide For the Perplexed: Libraries and the Google Library Project Settlement," http://courses.washington.edu/mlis550/au10/pdf/Module_3_GBS_1_-_Band.pdf

from book digitization; books and e-books are under the same copyright jurisdiction.

Implications of Ambiguity

Library digitization efforts have been hindered by the lack of clarity in the legal definition of a library or archive and the rights these entities have. All ambiguities have been contended in court numerous times throughout the history of the Copyright Act, but with the rapid pace of technology development, they have consistently been brought with increasing frequency in recent years.

III. Legal History

The legislation that follows is presented as a legal backdrop for copyright and its relation to both print and electronic books. The U.S. Copyright Act is the federal copyright law of the United States, and has evolved in over two centuries to reflect both changes in existing technology and the status of copyright law in other countries. *Capitol Records, LLC v. ReDigi, Inc.* is a 2013 case which decided that digital media (and therefore e-books) are not covered by the first sale doctrine, and an important part of the legalities of ebooks and copyright specific to libraries. *Authors Guild v. Google* is another case decided in 2013, declaring that the controversial Google Books project that began in 2002 is legal under the fair use doctrine. It is an unfortunate example of case law as an insufficient substitute for federal legislation, and further demonstrates the need for federal legislation to regulate e-book accessibility. Connecticut H.B. 5614 is a good, if incomplete, model for legislation regulating e-books in libraries, but also shows how desperate the situation has become that individual states are attempting to solve a nation-wide problem.

A. Copyright Act

United States copyright law has evolved and grown throughout this country's history. There have been a total of only three major revisions to the United States Copyright Act after its initial creation, in over two centuries of history.

United States copyright law has existed since 1790, when the First Continental Congress implemented the copyright provision to the United States Constitution.¹² The Copyright Act of 1790 stated its purpose to be “the encouragement of learning.”¹³ The law covered only books, maps, and charts, and granted American authors a fourteen year long copyright with a right to renew it for a second fourteen year term. U.S. copyright law from the start has had an increased focus on books: books are one of the three media mentioned by the Copyright Act of 1790, which is several hundred times shorter than the United States Copyright Act of today.

The first revision to this law was in 1831. The reason for this revision was to give American authors the same copyright protections as European ones. England had just extended its copyright protections to twenty eight years plus the remainder of the author's life, if he were still living, France to fifty years plus the remainder, and Russia to twenty years plus the remainder.¹⁴ The amendment of the U.S. Copyright

¹² “Copyright Timeline: A History of Copyright in the United States,”
<http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline>

¹³ *Copyright Act of 1790*, <http://www.copyright.gov/history/1790act.pdf>

¹⁴ “The Copyright Clause of the United States Constitution and Its Historical Background,”
<http://www.copyrightextension.com/page00.html>

Act in 1831 was significant in that it was the first time United States copyright law was changed to reflect the contemporary social, political, and economic values emerging in international law. The Copyright Act of 1831¹⁵ extended the first fourteen year long copyright to twenty-eight years. It added musical compositions to the list of copyrightable works and extended the copyright actions statute of limitations from one year to two. The changes applied not only to future works, but past works whose copyright had not expired.

Eight decades after the initial draft of copyright law, the distribution of copyright was placed under national jurisdiction. This next revision to the Copyright Act was in 1870. It extended copyright protections to photographs; however, it explicitly excluded from protection works authored outside the United States by non-U.S. citizens.¹⁶ In addition, it stipulated that works cannot be translated without permission from the author. Interestingly, only works derived from the original design were prohibited; the acts of reprinting a portion of a book or publishing adaptations were considered legal and ethical. In addition, the Library of Congress Copyright Office was now in charge of administering all copyright registrations, taking this responsibility from the individual district courts.¹⁷

The third revision to U.S. copyright law clarified that copyright existed for the benefit of the public, not for the benefit of the author. The first major revision since 1790, this was the Copyright Act of 1909.¹⁸ This version of the act was considerably longer than its predecessors. It extended the renewable term of protection, rather than just the first term, to twenty-eight years from the original fourteen, and also expanded the types of works protected to all works of authorship rather than just books, photographs, and the other media listed. However, protection extended only to works that were both published and affixed with a notice of copyright; published work without a notice of copyright became part of the public domain. What is important about this is that acknowledges a statement made by the Committee on Patents to accompany H.R. 28192 (H. Rept. 2222, 60th Cong., 2d sess.) that copyright is “not primarily for the benefit of the author, but primarily for the benefit of the public.”¹⁹ This is something which must be kept in mind when examining present U.S. copyright law.

Copyright law today is primarily based on the United States Copyright Act of 1976,²⁰ which was motivated by a desire to bring United States copyright law into accord with international copyright law.

²¹ The 1976 Act codified the fair use doctrine and changed the length of copyright protection to fifty

¹⁵ “First General Revision of U.S. Copyright Law,” http://www.ellenwhite.info/copyright_law_us_1831.htm

¹⁶ “Second General Revision of U.S. Copyright Law,” http://www.ellenwhite.info/copyright_law_us_1870.htm

¹⁷ “Copyright Timeline: A History of Copyright in the United States,”

<http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline>

¹⁸ “An Act to Amend and Consolidate the Acts Respecting Copyright,”

<http://www.copyright.gov/history/1909act.pdf>

¹⁹ “Notable Dates in American Copyright 1783-1969,” <http://www.copyright.gov/history/dates.pdf>

²⁰ “The Copyright Act of 1976,” <http://www.copyright.gov/title17/92appa.pdf>

²¹ “Copyright Timeline: A History of Copyright in the United States,”

<http://www.arl.org/focus-areas/copyright-ip/2486-copyright-timeline>

years following the author's death, which is much greater than the previous maximum of fifty-six years. It also enumerated the specific rights that copyright holders have over their work. These changes somewhat detract from the 1909 idea that copyright is more for the benefit of the public than it is for the benefit of the author. The decision to revise the Act was influenced by the improvements in technology over the course of the 20th century.

Current Status of Copyright Law

Currently, copyright law is ambiguous and broadly-tailored such that only a court ruling truly determines the legality of many uses of copyrighted works. The United States Copyright Act²² lays out the current legal framework for copyrighted works in general, and §106-§109 specifically are most relevant to our investigation. These sections cover the fair use and first sale doctrines which govern much of the discussion surrounding copyright as pertains to e-books.

§106 outlines the particular protections for copyright holders against invasive reproduction. This section preserves the ability of authors and publishers to make revenue on literary works, but copyright is still ultimately for the benefit of the public. In order for literary works to continue being produced, there must be a way for their creators to benefit. For this reason, authorship claims and the actual right to copy the work solely belong to the author (for a limited period of time). Exceptions to these rules are in the following sections.

§107 lays out the general fair-use doctrine for most commercial entities, giving four specific points for judicial consideration: the purpose of the use, the nature of the copyrighted work, the size of the used portion compared to the size of the full work, and the effect the use may have on the value of the copyrighted work or the potential market for it. Unfortunately, all of these points are very broad and leave much to interpretation. Though these fair-use doctrine guidelines dictate the ability of patrons to copy snippets of books, libraries in particular are dealt with more directly in the following sections.

§108 deals most specifically with libraries and their fair use of works, though all sections are applicable to reproduction efforts. As mentioned previously, traditional libraries are not distinguished from digital libraries in the Copyright Act. This section does, however, clarify the ability of libraries to make digital copies for archival and replacement purposes: libraries are, under subsection (b), allowed to reproduce a work in order to replace a deteriorating copy.²³ This is significant because this implies that every book purchase by a library is essentially an unlimited-checkout copy; we intend to preserve the intent of this section in the case of e-books through our proposed legislation.

§109 deals with the doctrine of first-sale, which dictates that the purchaser of a copyrighted work has the right to re-sell or lend that work without restriction.²⁴ This would seem to imply that anyone can sell their e-books to libraries, and that libraries should, for instance, be able to purchase books on Amazon.com and lend them at will. However, the key word in the previous description of the first-sale doctrine is “purchaser”: in the case of e-books, the general practice is to simply buy the rights to read

²² *Copyright Law of the United States of America* <http://www.copyright.gov/title17/92chap1.html>

²³ *Copyright Law of the United States of America, Section 108* <http://www.copyright.gov/title17/92chap1.html#108>

²⁴ *Copyright Law of the United States of America, Section 109* <http://www.copyright.gov/title17/92chap1.html#109>

the e-book instead of buying the e-book itself. This has been clarified in case law, described in the next section. The lack of the applicability of the first-sale doctrine to ebooks is significant: without such an idea governing the procurement of ebooks, licenses are the only way to obtain e-books. These licenses can be much more restrictive, and the inherent availability of works is limited to what the publishers desire to license to libraries rather than what is available to the general public.

B. Capitol Records, LLC v. ReDigi Inc.

In looking at this case we establish that the fair use doctrine mentioned above does extend to cover e-books. ReDigi Inc. is a company who maintains a digital marketplace of used digital music. Their service functions by letting users upload purchased tracks to their servers before deleting it from their personal devices and letting other users then purchase these “used” songs. While this seems immediately comparable to the concept of re-selling a used compact disc, the legality of the service was brought to court by Capitol Records, LLC.²⁵ As mentioned above, the ability to resell works once purchased is laid out in §109 of the Copyright Act and is called the “first-sale doctrine”: copyright-holders only have control over the initial sale of a copyrighted work, and once the copy is sold once, they have no further say in the new owner’s loan or sale of that copy. In this case, the main point of contention was the question of whether digital tracks are actually bought: Capitol asserted that the songs were merely licensed, not purchased. In March of 2013 a New York District Court sided with Capitol Records and asserted that first sale does not apply to the online resale of digital media.²⁶ Because e-books go through the same channels and have the same legal status as digital media does, this case made it clear that, until the law is changed or a superior court overturns this judgment, e-books are similarly not covered by the first sale doctrine.

²⁵ “Capitol wins digital records lawsuit vs ReDigi start-up,”

<http://www.reuters.com/article/2013/04/01/us-capitolrecords-redigi-lawsuit-idUSBRE9300GB20130401>

²⁶ “Capital Records v. ReDigi, Inc.: New York District Court Determines that First Sale Doctrine does NOT apply to Digital Media. Did They Get it Right?,” <http://www.jdsupra.com/legalnews/capital-records-v-redigi-inc-new-yo-65673/>

C. *Authors Guild v. Google*

Nowhere is the legal ambiguity surrounding the question of digitization more apparent than in the recent case of *Authors Guild v. Google*, in which the Authors Guild sued Google for massive copyright infringement over its book scanning project. Though Google won the case, the court's decision affects only Google's project rather than copyright law in general, and so the case is only a small step in realizing the legal standardization of digital copyright legislation in the United States.

In 1996, Larry Page and Sergey Brin, co-founders of Google, decided to expand into the growing market of digital libraries. They decided to build an application that people could use to index the content of and analyze the connections between various books.²⁷ To make such an application useful, their digital library needed to be much more extensive than the collections of other private and public libraries.

In 2002, the Google Books project began. Its mission was to digitize the world's collections of books on a massive scale. Google did research and developed ways to scan books as efficiently as possible. In addition, software engineers were tasked with figuring out how to process the type in books spanning centuries and written in hundreds of different languages.²⁸ In other words, the scale of the Google Books project was huge and had never been done before, significantly enough that Google was developing new technologies to do it. This means that there was no legal precedent for the Google Books project, and this would soon be reflected in the legal scandal that was to follow.

In 2005, only three years after the project began, the Authors Guild filed a class action lawsuit against Google for the Book Search project.²⁹ The Authors Guild claimed that Google was engaging in massive copyright infringement by digitizing and publicizing copyrighted works.³⁰ Specifically, Google "has infringed, and continues to infringe, the electronic rights of the copyright holders of those works."³¹ Since Google had been reproducing both copyrighted and public domain books through its partnerships with several academic universities as well as public libraries, some authors and publishers became concerned about how the library-scanning project could negatively impact their profits.

Authors Guild v. Google resulted from the legal controversies surrounding this book digitization

²⁷ "Google Books History," <http://www.google.com/google-books/about/history.html>

²⁸ "Google Books History," <http://www.google.com/google-books/about/history.html>

²⁹ *Authors Guild v. Google, Inc.* from the Association of Research Libraries:
<http://www.arl.org/focus-areas/court-cases/2469-authors-guild-v-google-inc>

³⁰ "Authors Guild Sues Google, Citing 'Massive Copyright Infringement,'" <http://www.authorsguild.org/advocacy/authors-guild-sues-google-citing-massive-copyright-infringement/>

³¹ *Authors Guild v. Google*:
<http://www.authorsguild.org/wp-content/uploads/2008/10/Authors-Guild-v-Google-09202005.pdf>

project. In the eight years of continued conflict that has followed, the Author's Guild has continued to claim that Google's project is simply a commercial enterprise "intended to give it an advantage over other search engines and increase ad revenue" at the expense of continually putting authors' work at risk.³²

Authors Guild v. Google attempted a resolution with a proposed settlement in 2008. The settlement had to be approved by a judge before it was allowed to take hold. It involved paying over \$45 million to authors and publishers whose copyrighted texts had been already digitized without approval.³³ In addition, they would receive a share of the revenue from institutional subscriptions to the book collections as well as sales of online access to the books. Public libraries would also be given free, read-only access to the collection.

The motion to have this settlement was denied in 2011. District Judge Denny Chin of the United States Court of Appeals for the Second Circuit decided that the settlement was too much in Google's favor. He reasoned that while book digitization and the creation of an extensive online digital library benefits many, Google would be granted significant rights to exploit entire books without the permission of the copyright owners.³⁴ In other words, he thought the Google Books project was in theory beneficial to the public but agreed with the Authors Guild that its implementation would harm authors by infringing on their intellectual property rights.

Google experienced a legal victory in 2012 when District Judge Harold Baer ruled that Google's library partners' book-scanning was protected by the fair use doctrine of copyrighted works.³⁵ In order to continue to move the project forward, Google settled with large publishers as well as the Authors Guild in response to several of these lawsuits that cited the project as "massive copyright infringement."³⁶ In all of this, however, the issues surrounding book digitization have not been resolved either for the long-term or for analogous situations dealing with different companies; "as a practical matter, the settlement probably will have limited applicability to in-copyright, commercially available books."³⁷

As of November 14th, 2013, the case has been decided. The Google Books project is completely legal

³² "Guild Disputes Google's Fair Use Claim, Says Scanning Project Puts Authors At Risk," <http://www.authorsguild.org/advocacy/guild-disputes-googles-fair-use-claim-says-scanning-project-puts-authors-at-risk/>

³³ "\$125 Million Settlement in Authors Guild v. Google," <https://www.authorsguild.org/advocacy/125-million-settlement-in-authors-guild-v-google/>

³⁴ *Authors Guild v. Google* opinion of District Judge Danny Shin: http://www.copyright.gov/docs/massdigitization/statements/gbs_opinion.pdf

³⁵ "A Guide for the Perplexed: Libraries and the Google Library Project Settlement," http://courses.washington.edu/mlis550/au10/pdf/Module_3_GBS_1_-_Band.pdf

³⁶ "An Act Concerning E-Books and Libraries," <http://www.cga.ct.gov/2013/TOB/H/2013HB-05614-R01-HB.htm>

³⁷ "A Guide for the Perplexed: Libraries and the Google Library Project Settlement," http://courses.washington.edu/mlis550/au10/pdf/Module_3_GBS_1_-_Band.pdf

under United States copyright law. District Judge Denny Chin ruled that Google’s book scanning project constituted fair use due to its limited use of the work, even though on the surface it is a violation of authors’ copyrights: “It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders.”³⁸ While Google will continue to scan books and make them digitally available to the public, the Authors Guild is still of the mind that the book scanning is copyright infringement and plans to appeal the decision.³⁹

³⁸ *Authors Guild v. Google* ruling by District Judge Danny Chin, 2013:

<https://s3.amazonaws.com/s3.documentcloud.org/documents/834877/google-books-ruling-on-fair-use.pdf>

³⁹ “Siding With Google, Judge Says Book Search Does Not Infringe Copyright,”

<http://www.nytimes.com/2013/11/15/business/media/judge-sides-with-google-on-book-scanning-suit.html>

D. State Legislation

There has been very little state legislation in the United States regulating library use of e-books. In fact, the only state with a bill dealing with this issue is Connecticut, which passed a short and undetailed bill on it in June of 2013.

Connecticut H.B. 5614 deals with the issue of library use of e-books and how publishers can limit library use of such media. The purpose of this legislation is “[t]o require publishers of electronic books to offer e-books for sale to libraries on reasonable terms that would permit libraries to provide their users with access to such books.”⁴⁰ In order to do so, the bill restricts limits to being reasonable, which includes such measures as putting a cap on the number of days an e-book is checked out or number of simultaneous users of an e-book, or using technological protections to prevent piracy.

With such a law now passed, predatory practices by publishers attempting to charge exorbitant rates for books or exploitative practices by libraries or third party institutions seeking to give users unlimited access to copyrighted materials are much less likely in Connecticut.

Unfortunately, the bill is not as complete as it could be. For example, it does not differentiate public libraries from academic ones. It also does not mention usage terms. In general, licenses for library e-books expire. There is no case-handling for the common practice of having a certain number of checkouts per electronic copy, and the pricing associated with it.

Still, state legislation is a step towards the federal regulation of digital libraries. Though the problem may have been mitigated in Connecticut, it remains an issue for libraries throughout the country.

⁴⁰ “An Act Concerning E-Books and Libraries,” <http://www.cga.ct.gov/2013/TOB/H/2013HB-05614-R01-HB.htm>

IV. Current Issue: E-book Accessibility

The rise of the Internet has opened up a litany of legal issues surrounding distribution of digital materials. §108 of the U.S. Copyright Act enumerates what constitutes fair use of works for libraries, such as replication for replacement of a deteriorating work. However, these provisions are not preserved in the transition to ebooks because of the substitution of a license for a purchase, as mentioned above. This means that publishers can now force libraries to purchase limited-checkout licenses of books which must be renewed when some number of checkouts have occurred. Furthermore, publishers can place restrictions on which books are available at all, which many have begun to do. This is in stark contrast to the intent of the first-sale doctrine, which allows libraries to purchase any book available to the public.

Currently, e-books in libraries are available only through a select few systems who have individually arranged deals with publishers or third parties and have the money to pay for the higher costs almost always associated with e-books. Those who interact with publishers directly must deal with a myriad of pricing schemes, such as those of one title per user, simultaneous access or subscription, metered access, cost per checkout, and buy-it-now.⁴¹ Those who interact with third parties fare no better. One third party in particular, OverDrive, “serve[s] over 90% of...US public libraries,”⁴² and there are only two other serious competitors in the space (3M⁴³ and Baker & Taylor⁴⁴). This means that ready access is only available to those who already belong to more robust library systems that have negotiated with publishers or third parties, often in wealthier areas, bringing to mind the same accessibility issues that Carnegie faced in the early 20th century. People in these areas can afford the transportation costs associated with travelling to the library, whereas such travel can be much more difficult for people with less money or less time. Therefore, those who would benefit most from e-book access are those with the most limited access to print books. This is a problem for society at large, and one that needs to be addressed. We lay out a proposed solution for e-book accessibility in the following sections.

⁴¹ “You’ll Need a PhD To Make Sense Of The Pricing Schemes Publishers Impose on Libraries,” <http://www.forbes.com/sites/avaseave/2013/11/19/youll-need-a-phd-to-make-sense-of-the-pricing-schemes-publisher-s-impose-on-libraries/>

⁴² “Are Digital Libraries A ‘Winner-Takes-All’ Market? OverDrive Hopes So,” <http://www.forbes.com/sites/avaseave/2013/11/18/are-digital-libraries-a-winner-takes-all-market-overdrive-hopes-so/>

⁴³ “3M Cloud Library Now Includes Titles from All Big Six Publishers,” <http://news.3m.com/press-release/product-and-brand/3m-cloud-library-now-includes-titles-all-big-six-publishers>

⁴⁴ “Axis 360 Frequently Asked Questions,” <http://www.baker-taylor.com/pdfs/FAQ-Axis360.pdf>

V. Proposed Solution

A. Proposal

Libraries have, as previously mentioned, played a central role in our nation's development. In order for our nation to continue to shape its future for the better, its ability to provide content to the masses is in dire need of legislative protection. As e-books become more prevalent and libraries shift from hard texts to more digital media,⁴⁵ it is becoming increasingly more important to ensure reliable e-book access for all libraries in the United States. This can only be achieved by passing and signing legislation which sets restrictions, similar to those in the aforementioned Connecticut law H.B. 5614, on interactions between publishers and libraries.

Terms must be laid out concerning end-user interactions with e-books, restrictions on whether a user can have multiple copies of an e-book as well as how many users can simultaneously check out one copy of an e-book, restrictions on the origin of a license purchase as well as which works should be available for purchase, and e-book checkout restrictions both on the total number of allowed checkouts for an e-book license as well as the duration of each checkout. After analyzing the stakeholders in publisher-library interactions, we make specific recommendations. E-books must be available for users to check out using an online system. Only members of a library lending an e-book should have rights to access it. Newly released e-books should have limited accessibility to end-users. Libraries should be allowed to purchase e-books only directly from a publisher or from an available licensed source. In return, they should also be allowed to purchase any book available in a publisher's catalog. The pay model we recommend for this transaction is that of a higher price for e-book licenses in exchange for an unlimited number of user checkouts per license. Finally, we stipulate that the duration of these checkouts should be the same length as the duration of checkouts of print books.

These regulations all work together to provide a framework which emulates the benefits publishers get from physical books while providing some of the benefits of e-books to libraries and their users. Many of these recommendations have already been successfully implemented in various library systems. It only remains to enact them into federal law.

End-User Interactions

In this section we set up our vision for end-user interaction with future digital libraries. In terms of end-user interactions with books, the ultimate purpose of any book, whether it be print or digital, is the

⁴⁵ "As Demand for E-Books Soars, Libraries Struggle to Stock Their Virtual Shelves," http://articles.washingtonpost.com/2012-01-14/local/35438130_1_e-book-checkouts-e-books-libraries-struggle/2

same – to be read. Because one major benefit of having e-books in libraries is their accessibility by patrons who otherwise do not have the time or means to travel to a library, e-books must be accessible for checkout using an online system. This would then allow download onto any registered device, such as a computer, tablet, or dedicated e-book reader. Additionally, it would be ideal for libraries to provide in-house access to dedicated e-book readers, perhaps even providing a notice on the physical copies when an e-book is available. Giving library patrons the option to read books digitally would aid in the preservation of physical books which succumb much more quickly to wear and tear than digital media does.

Restrictions on End-User Copying

There must be protections in place to ensure that only members of the library lending the e-book can access it because e-books are by their very nature more readily copyable than print books. Chief among these protections is the requirement for the online system to restrict access to those who have a library card and use this card for checkouts. Enforcing digital rights management (DRM) on e-books means that copying is limited to a certain number of devices, or to devices which have been registered with a particular user.⁴⁶ A DRM requirement may reduce authors' and publishers' piracy concerns, though we make a note about the caveat with this in a subsequent section. Once the time period is passed for a check-out, the e-book should be remotely deleted from the user's device, something which has been proven possible and implemented by Amazon.⁴⁷ Many digital libraries already implement DRM; implementing it on a federal level would garner little to no resistance from libraries and publishers. In order to foster community excitement about books, it should remain possible to copy snippets of the work, in a quantity similar to that established in *Authors Guild v. Google*.⁴⁸

Restrictions on Number of Simultaneous Users per Copy

E-book accessibility should be limited on releases for reasons similar to those above, again functioning analogously to print books. Print books can only be checked out by one person per purchased copy at a time. This limits the accessibility of new releases so that everyone cannot simply go to their library at the release date and read the book, thereby interfering with sales of popular recent works. It is reasonable for publishers to enforce a similar restriction on e-books, since, as mentioned previously, they are merely a license for the digital version of books. This should be reflected in the draft of the law in order to protect the interests of all parties involved.

⁴⁶ "About Open Books," <http://drmfrees.com/about#drm>

⁴⁷ "Amazon Erases Orwell Books From Kindle,"

http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0

⁴⁸ *Authors Guild v. Google* ruling by District Judge Danny Chin, 2013:

<https://s3.amazonaws.com/s3.documentcloud.org/documents/834877/google-books-ruling-on-fair-use.pdf>

Restrictions on Purchase Origination

In order for publishers to regulate the validity of e-books and ensure that multiple unregistered copies are not resold, legislation should include a clear statement that libraries can only purchase e-books directly from the publisher or a licensed source when available. If this were not the only means of purchase, end users could potentially pirate copies of e-books and resell them to libraries, thereby directly detracting from publishers' revenue.

Restrictions on Works Available for Purchase

The law should dictate that libraries are permitted to purchase any book which is available in a publisher's catalog. It might be tempting for publishers to take advantage of the rise of e-books by restricting libraries' ability to purchase popular books in order to compensate for the diminished sales that libraries sometimes cause at popular franchises. Physical books are subject to the first-sale doctrine, so this is not a luxury afforded to publishers in print media. It is because publishers are gatekeepers to the licenses of e-books in this next generation of digital libraries that they must not be allowed to exclude popular books from purchase simply to protect sales.⁴⁹ The above stipulations adequately correct for the difference between popular and unpopular books.

Restrictions on Total Number of Checkouts

We further recommend that e-book licenses be offered at a potentially higher, yet still reasonable, price relative to print books, but also that these licenses provide an unlimited number of checkouts in total. Pricing for libraries to access e-books is of paramount concern to both authors and publishers, and in the long-term to society at large. With physical books, libraries essentially purchase a limited number of checkouts per book because after a certain point, books must be replaced. This model has been deemed acceptable to publishers for physical books, but would directly go against one of the main benefits of e-books: durability. For this reason, we have determined that legislation should include a clause making publishers give libraries the option to buy licenses with an unlimited number of checkouts per single-user license of an e-book. This recommendation most directly furthers the goals of libraries, but also benefits the public greatly because it ensures that works will not be removed from libraries over time or because of too much popularity, which, under some pricing schemes, would cause libraries to have to purchase the book numerous times.

In order to protect the interests of publishers and authors, we would also recommend a higher price for

⁴⁹ *Copyright Law of the United States of America*, Section 109 <http://www.copyright.gov/title17/92chap1.html#109>

these e-book licenses in order to fairly compensate for books which are checked out a disproportionate number of times in total. In order to determine a fair markup, we also recommend a study be performed on what markup would be roughly equivalent to the purchase price for equivalent print books, taking into consideration the need for periodic replacement. Furthermore, it would be beneficial for publishers to be made aware of the number of times each book has been checked out, with anonymous data, in order to compensate authors proportionally and better gauge the popularity of particular works. This recommendation would not be a significant hindrance to a bill being passed, as one of the largest publishers, Random House, has already made licensing terms with the same pricing model.^{50, 51}

Checkout Duration

The checkout duration of e-books should not be different from that of print books. A print and electronic version of a novel arguably take a reader the same amount of time to process, so in the interests of the public there is no reason to have the checkout duration for one less than the checkout duration of the other. In the past, publishers have tried to impose shorter checkout durations for e-books than regular books when licensing them to libraries. Because the public should be the end beneficiary of this legislation and most publishers have willingly licensed e-books without such restrictions, it is important that the ability to restrict e-book checkout duration is set to be analogous to that of its print counterpart. This would ensure two things: first, that libraries and their patrons would not have to worry about ceasing their use of e-books due to overly restrictive checkout times, and second, that authors and their publishers rest assured that people do not have free, permanent electronic copies of published works. In this way we benefit both our primary stakeholder, which is the public, and other parties greatly affected by this legislation, which are authors, publishers, and libraries.

⁵⁰ “Random House Makes History, Says It Will Sell Books to Libraries with No Restriction on Number of Loans,” <http://www.mhpbooks.com/random-house-takes-the-plunge-says-it-will-sell-books-to-libraries-with-no-restriction-on-number-of-loans/>

⁵¹ “Libraries, Publishers at Odds over E-Books,” <http://www.minutemannewscenter.com/articles/2013/05/05/westport/news/doc51857df16ed3a909227141.txt?viewmode=fullstory>

B. Alternate Solutions

There are two main routes to consider when drafting a guideline for federal legislation dealing with public access to e-books: state laws and federal laws. There are also two routes to consider when determining the best pricing model for access to e-books: the model of lower price and limited access to e-books and the model of higher price and unlimited access to e-books. In this section we explain why we rejected state legislation in favor of federal legislation, and the model of lower price and limited access in favor of higher price and unlimited access.

State Laws Versus Federal Laws

The first route is a federal mandate for all states to implement laws similar to Connecticut's H.B. 5614. This leaves several possibilities for failure. States may draft inconsistent laws or the implementation of these laws may be delayed for a significant amount of time. This would also create gaps in the legislation dealing with interstate issues, such as a situation where a library purchases a book from an out-of-state seller. For these reasons we decided that the implementation of state legislation would not adequately solve the problem of limited e-book accessibility in libraries.

The second route is to make a recommendation for Congress to pass a federal law which dictates acceptable publisher pricing practices. We have chosen to follow this route for the reasons enumerated in our proposal. Copyright law is a federal matter under the United States Copyright Act. This means that any legislation with far-reaching copyright implications such as our proposal to regulate interactions between publishers and libraries in a way that has not been done before should be federal legislation as well.

Lower Price and Limited Access Versus Higher Price and Unlimited Access

We considered enforcing prices for libraries to pay comparable to those they pay on print books with the added stipulation that publishers could restrict total number of checkouts per copy. We rejected this because it did not benefit most of our identified stakeholders. It would be bad for libraries because it would eliminate the lack of need for replacing copies of books that libraries can benefit from with e-books, even if a good system for determining the "wear" on an e-book could be developed. It does not take advantage of the aforementioned differences between print and digital books and libraries. With a different medium for delivering content there is no guarantee that the same pricing model would be effective and profitable; this would be bad for authors and publishers. The outrage surrounding

publishers who attempted this pricing model in the past,⁵² the counterintuitivity of such a proposal, the disadvantages for relevant stakeholders, and the successful implementation of an alternate model by Random House⁵³ led us to decide in favor of a higher price and unlimited access model instead of a lower price and limited access model.

⁵² “ALA attacks new HarperCollins ebook lending policy,”
<http://www.mhpbooks.com/ala-attacks-new-harpercollins-e-book-lending-policy/>

⁵³ “Random House Makes History, Says It Will Sell Books to Libraries with No Restriction on Number of Loans,”
<http://www.mhpbooks.com/random-house-takes-the-plunge-says-it-will-sell-books-to-libraries-with-no-restriction-on-number-of-loans/>

C. Advantages

There are numerous advantages to the legislation proposed. In this section we examine the benefits to all of our stakeholders, namely publishers, authors, libraries, and public users.

Benefits to Publishers

Because of the requirement for publisher-sourced purchases of e-books, publishers would get payment from every e-book license in the library. This contrasts with the current situation, in which often users buy books from a second-hand source.⁵⁴ Instead of trying “to impose a minimum resale price on books by putting a notice in every copy”⁵⁵ as they did in the early 1900s in order to minimize their losses, publishers would not have to concern themselves with any resale potential. Furthermore, e-books lend themselves to ready conversion from a checked-out book to a purchase; a simple purchase link could suffice to remove the checkout expiration on the e-book.

Benefits to Authors

The twofold benefit to authors from our proposed legislation is a possible increase in publicity as well as an improved source of income. Authors stand to gain publicity from more pervasive e-book access in libraries because library patrons get greater exposure to their work. With improved e-book accessibility and an easier means of checking out materials, patrons can read more books. A higher initial price for e-book licenses gives authors more upfront and guaranteed access to profits. This is one of the motivating factors for authors to use publishers in the first place.⁵⁶ Just as publishers would benefit from this legislation in having the guarantee of selling all the books they license, authors would benefit from the consistency of a profit to receive a share of.

Benefits to Libraries

As mentioned previously, the current state of library lending consists primarily of a single company, OverDrive, which has a massive share of library e-book deals. With any near-monopoly, the threat of price-gouging looms heavily: “[a]ll OverDrive has to do is wait for [their competitors] to fail before

⁵⁴ *Intellectual Property and Open Source: A Practical Guide to Protecting Code*,

<http://books.google.com/books?id=89-B1pTiPw8C&lpg=PA99&ots=EDvMgJpqI3&dq=first%20sale%20doctrine&pg=PA99#v=onepage&q=first%20sale%20doctrine&f=false>

⁵⁵ “The “First Sale” Doctrine,” <https://www.eff.org/files/firstsale2.pdf>

⁵⁶ “What Is the Future of Publishing?,”

<http://www.forbes.com/sites/nickmorgan/2012/07/12/what-is-the-future-of-publishing/>

raising prices very much.”⁵⁷ Should this legislation be implemented so that it provides a clear way for libraries to increase their accessibility to e-books, libraries would not “[n]eed a PhD to [u]nderstand the [p]ricing [s]chemes [p]ublishers [i]mpose on [them],”⁵⁸ and as such would be insulated from the potential harm from the current near-monopoly.

Benefits to Public

The benefits this proposal has for the public are derived from a simple supply and demand curve. Demand for e-books has consistently risen⁵⁹ and as such, legislation to enable more consistent and better access to electronic resources would help to satisfy such demand. Library patrons would benefit greatly from an expansion of the availability of e-books in libraries as well, since the community benefits of libraries⁶⁰ could also encourage increased excitement around books in general. This, combined with the study mentioned above which shows that people read more e-books than print books, points to the conclusion that the implementation of this legislation may very well positively affect the levels of culture and education in our society.

⁵⁷ “Ebooks for Libraries: Still a Ripoff,”

<http://lj.libraryjournal.com/blogs/annoyedlibrarian/2013/11/21/e-books-for-libraries-still-a-ripoff/>

⁵⁸ “You’ll Need a PhD To Make Sense Of The Pricing Schemes Publishers Impose on Libraries,”

<http://www.forbes.com/sites/avaseave/2013/11/19/youll-need-a-phd-to-make-sense-of-the-pricing-schemes-publishers-impose-on-libraries/>

⁵⁹ “Struggling to Satisfy Demand,” <http://libraryrenewal.org/2013/03/18/struggling-to-satisfy-demand/>

⁶⁰ http://nycfuture.org/pdf/Branches_of_Opportunity.pdf

D. Risks and Rebuttals

Negative Consumer Practices

One potential problem with this plan is that DRM for e-books can often be circumvented, causing concerns about increased copyright infringement. However, piracy would not increase because of circumvented library DRM; infringers can already access this content from every other e-book source, and it is not trivial enough to circumvent DRM for it to become a common consumer practice. There would also be little motivation for consumers to circumvent DRM just to permanently copy books onto their device from a library when they could simply renew the loan. Therefore, no one would be less motivated to purchase a copy of the book because the proposed legislation would not change the copyright infringement landscape by any appreciable amount. Another potential detrimental consumer practice is automated content crawling of library websites. This risk, however, is mitigated by our recommended requirement for a library card and associated identification number.

Negative Publisher Practices

Another risk to consider is that of publishers who attempt to abuse the system and the concurrent-user restrictions put in place by the proposed legislation. Should a publisher decide that a book is losing too much revenue from being checked out at libraries, that publisher could attempt to make multiple accounts in order to lock up all the copies as already-checked-out. However, this would not be a problem because we recommend a library card requirement, which publishers could not get en masse because of identification and/or address requirements.⁶¹

Decreased Sales

Publishers and authors are concerned by the possibility of a reduction in sales from easier access to e-books in libraries. However, as previously mentioned, there is certainly a potential for increased sales because of ease of access. Furthermore, if e-book consumption is not pushed by everyone in the industry, sales of books in general will only continue to decline⁶² as all media becomes more pervasively digital. For this reason, the legislation proposed here, and the potential for renewed excitement for books in general that it brings, could even serve to stave off declining book sales. In addition, we have specified that the checkout restriction for print and digital books be the same. This is reasonable for

⁶¹ New York Public Library card application: <https://catalog.nypl.org/selfreg~S1/patonsite>

⁶² “Total US Book Market Down 2.5% Last Year,” http://www.mediabistro.com/appnewser/total-us-book-market-down-2-5-last-year_b24730

authors and publishers especially to expect, so the previously-mentioned issue of print and digital libraries not being recognized as separate under the U.S. Copyright Act does not apply. There is no reason for publishers to have issues with e-book checkouts if they do not have issues with print book checkouts if they are regulated as per our recommendation.

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