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Legal Sidebar

COVID-19 and Libraries: E-Books and Intellectual Property Issues

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With many states issuing stay-at-home orders, and many public library buildings closed during the COVID-19 pandemic, members of the public looking for reading material have increasingly turned to e-books. Yet even before the pandemic, libraries faced challenges in meeting patron demand for e-books. For example, in November 2019 the Washington Post reported months-long wait times to borrow high-demand e-books from major public libraries.

The legal framework for lending physical books is different than that for e-books. While a library may generally lend a physical copy of a book in any manner it chooses, under current law a library may only lend an e-book in the manner approved by the copyright holder (usually the publisher). Thus, for example, the publisher may limit the length of time during which the library may lend the e-book, the number of times the e-book may be checked out, or both. These limitations may restrict a library's ability to meet patron demand. This Sidebar explains how copyright law governs e-book lending; describes how the COVID-19 pandemic has affected e-book accessibility; and outlines some possible legal approaches Congress may consider.

Legal Background

A copyright gives its owner the exclusive right to take or authorize certain actions involving the underlying work, including the exclusive right to distribute and reproduce the copyrighted work. If any person violates the copyright owner's exclusive rights (for example, by distributing or reproducing the copyrighted work without the owner's permission), then that person generally has infringed the copyright.

A person held liable for copyright infringement may be subject to a court order to stop infringing (an "injunction") or may be required to pay monetary damages. The amount of damages may include both the copyright owner's actual damages and any profits made by the infringer, or an amount set by statute ("statutory damages"). Courts have discretion to award statutory damages between $750 and $30,000 per work infringed, or up to $150,000 if the infringement was willful. The prevailing party in an infringement action may also be able to recover its attorney's fees. In certain circumstances, copyright infringement may even be a criminal offense.

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Copyright law, however, does not allow the copyright owner to control how others, after purchasing a lawfully made copy of the work, distribute that copy. Under 17 U.S.C. § 109 (§ 109), the owner of a lawfully made copy may "sell or otherwise dispose of the possession" of that copy "without the authority of the copyright owner." This concept, referred to the "first sale doctrine," thus protects conduct which would otherwise infringe the copyright owner's exclusive rights. For example, under the first sale doctrine, the owner of a physical copy of a book may sell or lend that copy to another person without fear of infringement liability.

Instead of selling a copy of a work to a user, a copyright owner may use a contract to grant permission to another person to use a copy subject to certain conditions (a "license"). In this arrangement, the party granting permission to use the work (i.e., the copyright owner) is the "licensor," and the party receiving permission to use the work (i.e., the user) is the "licensee." For example, the license may permit the licensee to make a certain number of copies of the work, or allow the licensee to distribute copies of the work for a period of time. Importantly, the copyright owner's granting of a license is generally *not* regarded as a sale that would trigger § 109 protections. Thus, the copyright owner retains greater control over subsequent distributions of the work by transmitting rights via a license as opposed to a sale.

Libraries and the First Sale Doctrine

The first sale doctrine protects libraries from liability for lending physical books, so long as the library purchased a lawfully made copy of the book. In general, distributing copyrighted works without the copyright owner's permission infringes the copyright. Thus, without § 109, a library would infringe the copyright whenever it loaned out a book. Avoiding this result was an intended result of § 109's passage. The House of Representatives Judiciary Committee Report accompanying § 109's enactment specifically indicated that libraries would be protected, stating that "[a] library that has acquired ownership of a copy is entitled to lend it under any conditions it chooses to impose." Notably, § 109 links the first sale doctrine's protections to the "owner" of the copy in question; if the library does not *own* the copy, the first sale doctrine does not protect it from infringement liability for distributing the work.

The first sale doctrine created a balance between the rights of copyright holders and the mission of libraries. Libraries could maintain and grow their collections as their budgets and storage space allowed, purchasing physical books at retail or used books on the secondary market. Even so, the physical impediments to checking out a book from a library (e.g., library membership, traveling to the library, physical limitations on the number of copies) maintained incentives for consumers to buy physical copies from publishers, and there was little risk of piracy through physical copying. The development of e-books, however, arguably shifted this balance.

Libraries and E-books

E-books are generally governed by different legal doctrines than physical books because a user typically does not own an e-book, but instead receives a limited license to use the e-book. When a reader or library pays to access an e-book (e.g., "buys" an e-book on Amazon.com), that transaction generally does not transfer ownership of the copy to the reader. Instead, the reader merely receives a license to download and read the e-book for personal use. Accordingly, the first sale doctrine does not apply because the reader or library does not own the copy. In addition, the nature of e-book technology prevents the development of a secondary market for "used" e-books. When a reader downloads an e-book onto a device, it creates a new copy of the e-book in the memory of that device. If the reader attempted to "sell" his digital copy to another person, the transaction would require an additional copy of the e-book to be produced and stored in the memory of the purchaser's device. This implicates the copyright owner's *reproduction* right, and the first sale doctrine protects potential users only from infringement of a copyright owner's *distribution*

right. In other words, § 109 protects purchasers of legal copies from liability for infringement from distributing their copies, not from reproducing or duplicating them.

From the publishers' perspective, this difference in treatment is justified because e-books seemingly present a greater threat to retail sales than physical books. Unlike physical books, library patrons can check out, download, and read e-books on their smartphones from their home. Accordingly, whereas there are numerous barriers to checking out a physical book from a library, there are nearly no barriers to checking out, reading, and returning an e-book, beyond having access to the requisite technology (e.g., a compatible device, the correct app). This ease of access concerns publishers as unrestricted library lending could lead to lost sales of e-books, unreasonably low compensation for authors and artists, and thus less of an incentive for writers to produce books. One publisher noted that the revenue from library reads was "a small fraction" of the revenue from a retail purchase, and decreases as time goes on.

The difference in treatment has important implications for libraries. Libraries must acquire e-books from the publisher because a license purchased at retail does not include the right to further distribute to the library's patrons. Moreover, there is no secondary market to provide another, less expensive option for purchase. Thus, if libraries wish to lend e-books, they must pay for a special license that permits subsequent distribution, and then follow the publisher's licensing terms.

Exclusive rights are an intended feature of intellectual property law, which gives copyright holders (here, the publishers) the right to control distribution of the copyright work as a way to encourage creativity. However, those licensing terms may also cause difficulties for libraries. Because licenses to libraries include a limited distribution right, they are nearly always more expensive than licenses to individuals—often several times more expensive. As an example, for one publisher, an individual e-book copy costs $14.99; a library copy costs $84. Licenses to libraries often expire after a certain amount of time (for example, two years), after the e-book has been checked out a certain number of times (for example, twenty-six), or both. Most e-book licenses to libraries will also provide that each e-book may only be checked out by a single user at once, just as a physical copy may only be checked out by a single user at any given time.

Certain publishers have experimented with more restrictive policies. For example, in November 2019 Macmillan implemented a policy where it would not license e-books to libraries during the first eight weeks after a title's release. Macmillan explained that those early weeks were key for profits and that libraries were "cannibalizing sales." This led to many libraries boycotting Macmillan purchases entirely. Macmillan eventually ended this policy in March 2020.

E-Book Lending During COVID-19

During the COVID-19 pandemic, several entities have attempted various methods in an attempt to address issues of e-book accessibility. For example, the Internet Archive ("Archive") maintains an "Open Library" where it allows users to check out digital scans of physical books the Archive owns. The Open Library would only lend as many scans as it owned physical books at any given time, similar to the lending practice required under e-book licenses; if all scans of a book were checked out, users would join a waitlist. On March 24, 2020, however, the Archive announced that it was suspending waitlists and allowing its physical scans to be checked out by any number of users. The Archive justified the suspension (which is scheduled to run until the later of June 30, 2020 or the end of the current national emergency) as "ensuring that students will have access to assigned readings and library materials" and allowing borrowing for those who cannot physically access their local libraries.

Nevertheless, the legality of such unrestricted digital lending is uncertain. Although publishers did not challenge the Archive's original practice in court, writers' groups and individual authors have harshly criticized the new practice. Senator Thom Tillis, Chairman of the Senate Judiciary Committee

Subcommittee on Intellectual Property, wrote to the Archive that he was "deeply concerned that" the Open Library "is operating outside the boundaries of the copyright law."

Because creating a digital copy of a work infringes the copyright, the Open Library's practice is likely an infringement absent an exception. The Archive's response to Senator Tillis contended that the practice is permitted by copyright's "fair use" doctrine, which protects copyright use "for purposes such as criticism, comment, news reporting, teaching . . . , scholarship, or research." (This CRS sidebar on COVID-19-related copyright issues provides more information on fair use.) While the Archive contends that fair use "provides flexibility to libraries and others to adjust to changing circumstances," others argue that there is "no basis in the law for scanning and making copies of entire books available to the public." The fair-use argument may be difficult for the Archive in view of a recent case holding that fair use does not apply where the defendant made direct copies of a work that competed with the copyright holders' legitimate market. Because fair use is a fact-intensive determination, however, it is unclear how a court would rule.

Implications for Congress

Particularly in the time of stay-at-home orders, limits on e-book availability raise questions about public access to information. For example, long wait times at libraries can bar access altogether to those who cannot afford to purchase e-books or physical books. On the other hand, lowering restrictions on the dissemination of e-books could undermine authors' ability to receive fair compensation for their work.

One option for Congress would be to maintain the legal status quo. When publishers introduce new restrictions, libraries often push back. As Macmillan's response to the libraries' boycott shows, those efforts can be successful. Thus, the market may yet lead to an equilibrium whereby libraries are able to lend e-books to fulfill their mission (albeit not as easily as they might like) and publishers and authors are able to profit (albeit not as much as they might like).

Another option for Congress could be to amend the copyright laws to introduce a digital version of the first sale doctrine. For example, Congress could enact legislation providing that when users receive the right to read an e-book or other digital media file for personal use, they also receive the right to re-sell or otherwise distribute that e-book. Congress considered the possibility of a "digital first sale doctrine" when it enacted the Digital Millennium Copyright Act (DMCA) in 1998 by ordering the Register of Copyrights to report on "the relationship between existing and emergent technology and the operation" of § 109. The report recommended not enacting such a digital first sale doctrine to allow the market to develop, and at that time Congress took no further action. Congress could now reexamine the market and determine whether it has matured sufficiently and in a manner that would warrant further action.

Congress could also amend the copyright laws to provide limited copyright immunity for library e-book lending, while stopping short of a full digital first sale doctrine. For example, 17 U.S.C. § 110 (§ 110) exempts certain performances and displays of copyrighted works from infringement liability (for example, when a religious work is performed "in the course of services at a place of worship or other religious assembly") and 17 U.S.C. § 108 allows "a library or archives" to make a limited number of copies, in certain circumstances, for archival purposes without infringing the copyright. Congress could consider broadening § 108 or § 110 by adding protection from infringement when a library makes a copy of an e-book for the purposes of or as incidental to lending. Such an amendment might require additional action to shield libraries from breach of contract actions, assuming that a library's license with the publisher bars copying. Congress could render any legal changes temporary by, for example, having them expire on a particular date or when the current national emergency ends.

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