UC Office of the President

Keynote

Title

Standing Up for the Library Mission: Access, Law, and Resistance in an Age of Control

Permalink

https://escholarship.org/uc/item/5460491n

Authors

Courtney, Kyle K., Esq.
Garrity, William
Davidson Squibb, Sara
et al.

Publication Date

2025-10-21

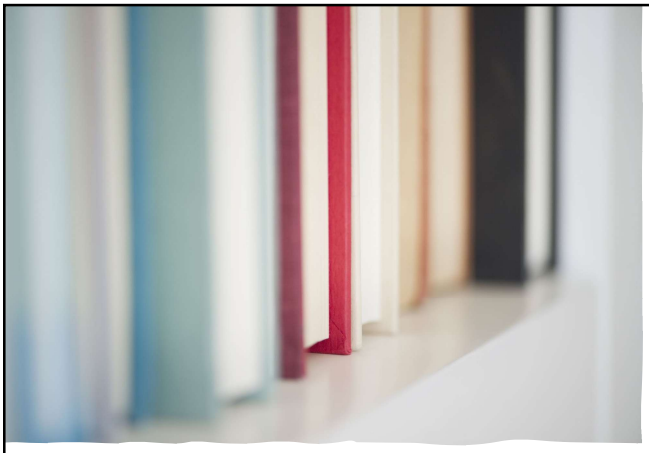
Supplemental Material

https://escholarship.org/uc/item/5460491n#supplemental

Copyright Information

This work is made available under the terms of a Creative Commons Attribution License, available at https://creativecommons.org/licenses/by/4.0/

eScholarship.org Powered by the California Digital Library
University of California



Kyle K. Courtney, Esq.
Director of Copyright & Information Policy, *Harvard University*
Co-Founder & Chair, *eBook Study Group* and *Copyright First Responders*

Standing Up for the Library Mission: Access, Law, & Resistance in an Age of Control

© Kyle K. Courtney 2025

My work and scholarship frames "the law" as the foundation empowering the mission of all knowledge & cultural institutions to **acquire**, **preserve**, **maintain**, and **share** materials.

All things good on this Earth flow into the [libraries], because of the [libraries'] greatness.

- Pericles, Athenian Mayor

3

Maybe Congress can help . . .?

Archives/Libraries as the “holders of forever”

Harvard University, Harvard University Archives, W291208_1

Who Gets to Decide?

ACCESS IS POLITICAL. CONTROL IS POWER.

The right to know is a public good, not a market commodity.

The Library Mission in Turbulent Times

Preservation. Access. Equity. Freedom.

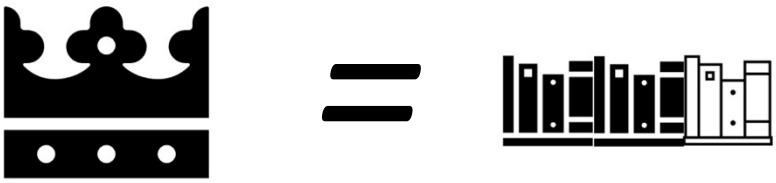
These are not abstract ideals; they are our **operating principles**.

Richard II - Act 3, scene 2

For God's sake, let us sit upon the ground
And tell sad stories of the death of kings
How some have been deposed, some slain in war,
Some haunted by the ghosts they have deposed
For within the hollow crown
That rounds the mortal temples of a king
Keeps Death his court…

The Fragility of Power and Control

Richard II says, *"let us sit upon the ground / And tell sad stories of the death of kings."*



Identity and Mission Under Pressure

Richard II vacillates between despair and self-awareness.

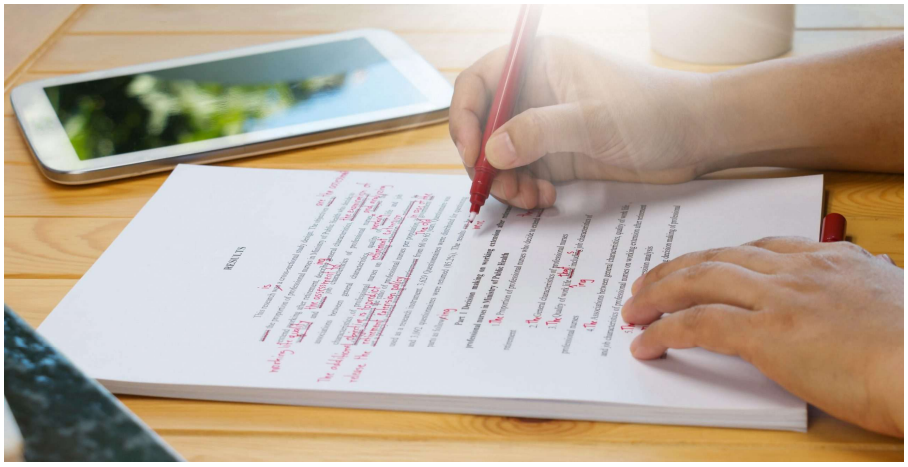
He begins to understand himself not as “King,” but as human.

Humility and Renewal?

Richard II’s downfall is painful, but it’s also transformative.

His recognition of mortality and loss leads to deeper moral clarity.

Let me fix this….



Let us sit upon the ground
And tell sad stories of the death of library collections;
How once they thrived, bold, generous, and free

‘Til licensing crept in with clauses sharp and sly,
Binding our stacks with contracts iron-clad,
Where books once passed from hand to hand,
Now gate-kept by platforms, passwords, and fees.

How noble interlibrary loan was slain
Not by sword, nor silence, but by “terms of use,”
Crafted in fine print, in boardrooms dim-lit,
Far from readers, far from reason.

Let us speak of vendors crowned as kings,
Who hold dominion o’er our digital shelves;
And libraries, still mighty, but forced low,
Petitioning access to knowledge they once owned.

Oh, fair California, with mountain & ocean air,
Can such heavy truths abide your heights?
Yet here we gather, learned and defiant,
To read, to write, to rise.

Let censors beware; for though it struts and frets
Upon the digital stage, its hour draws near.
The law remembers, the librarians awaken,
And the commons longs to breathe again.

Libraries “rising” as a “release valve”

- When printing was monopolized by the crown, libraries preserved unlicensed texts
- When publishers limited access, libraries built interlibrary loan networks
- When digital platforms gated knowledge, libraries created open repositories, community archives, and metadata standards to keep the record alive.
- And more….

From Ownership to Access

WE USED TO OWN. NOW WE RENT.

Ownership meant autonomy.
It meant stewardship.
It meant permanence.

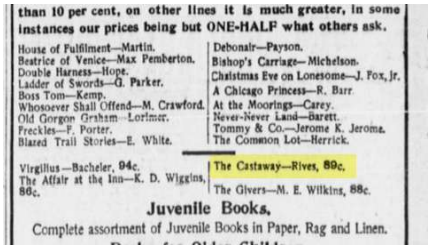
This is not just a budget problem….

…..it's a values problem.

Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908)

The book in question, *The Castaway*, had a notice on the copyright page that read:

"The price of this book at retail is $1 net. No dealer is licensed to sell it at a less price…" or grounds for infringement.


than 10 per cent, on other lines it is much greater, in some instances our prices being but ONE-HALF what others ask.

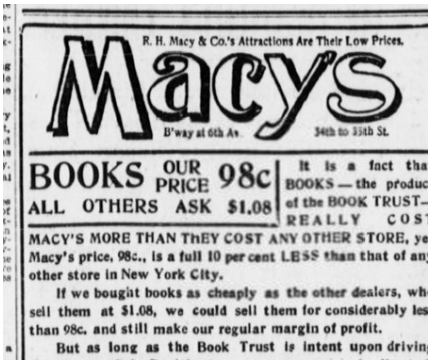
House of Fulfilment—Martin.
Beatrice of Venice—Max Pemberton.
Double Harness—Hope.
Ladder of Swords—G. Parker.
Boss Tom—Kemp.
Whosoever Shall Offend—M. Crawford.
Old Gorgon Graham—Lorimer.
Freckles—F. Porter.
Blazed Trail Stories—E. White.

Debonair—Payson.
Bishop's Carriage—Michelson.
Christmas Eve on Lonesome—J. Fox, Jr.
A Chicago Princess—R. Barr.
At the Moorings—Carey.
Never-Never Land—Barrett.
Tommy & Co.—Jerome K. Jerome.
The Common Lot—Herrick.

Virgilius—Bacheler, 94c.
The Affair at the Inn—K. D. Wiggins, 86c.

The Castaway—Rives, 89c.
The Givers—M. E. Wilkins, 88c.

Juvenile Books,
Complete assortment of Juvenile Books in Paper, Rag and Linen.


R. H. Macy & Co.'s Attractions Are Their Low Prices.

Macys

B'way at 6th Av. 34th to 35th St.

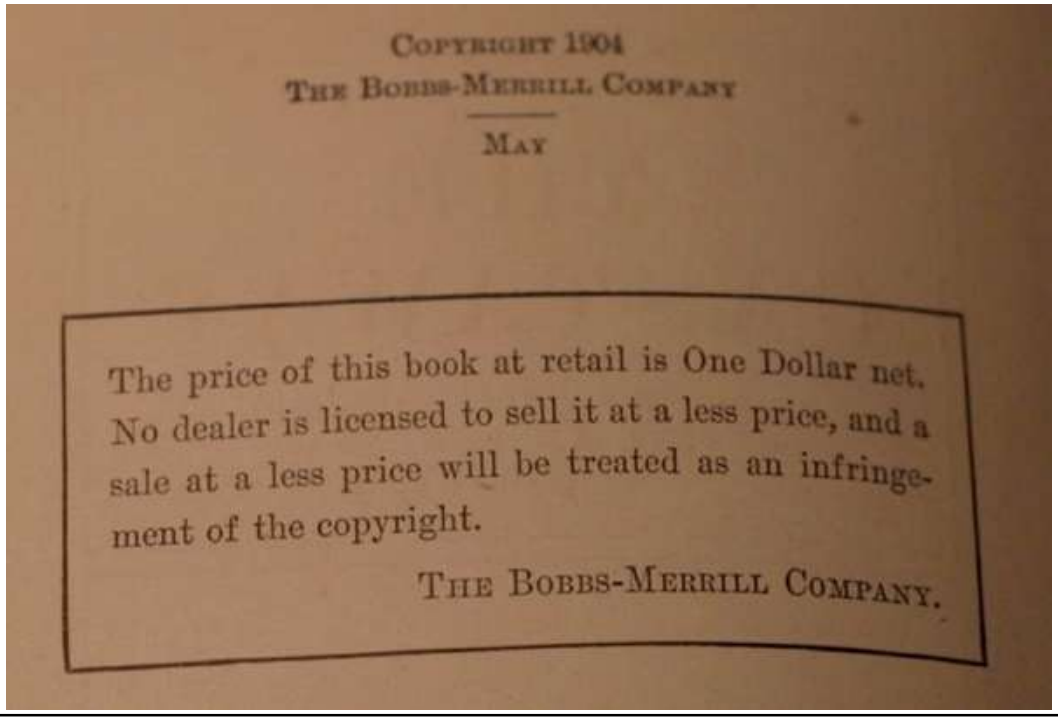
BOOKS OUR PRICE 98c
ALL OTHERS ASK $1.08

It is a fact tha
BOOKS — the produc
of the BOOK TRUST—
REALLY COS

MACY'S MORE THAN THEY COST ANY OTHER STORE, ye
Macy's price, 98c., is a full 10 per cent LESS than that of an
other store in New York City.

If we bought books as cheaply as the other dealers, wh
sell them at $1.08, we could sell them for considerably les
than 98c. and still make our regular margin of profit.

But as long as the Book Trust is intent upon drivin



COPYRIGHT 1904
THE BOBBS-MERRILL COMPANY

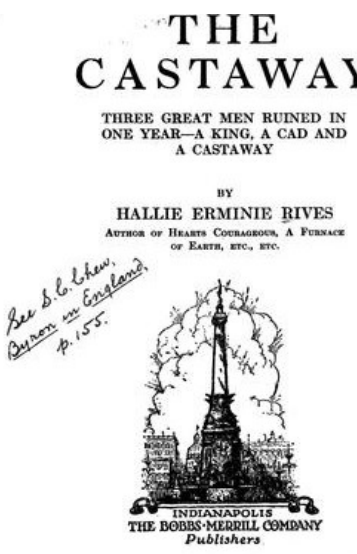
MAY

The price of this book at retail is One Dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright.

THE BOBBS-MERRILL COMPANY.

Bobbs-Merrill Co. v. Straus, 210 U.S. 339 (1908)

- Held: Copyright owner could not enforce price limits on downstream sales of its book.
- But the Court recognized that **if a *license agreement existed***, the analysis would, potentially, be different…



THE CASTAWAY

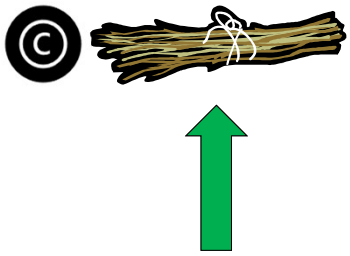
THREE GREAT MEN RUINED IN ONE YEAR—A KING, A CAD AND A CASTAWAY

BY
HALLIE ERMINIE RIVES
AUTHOR OF HEARTS COURAGEOUS, A FURNACE OF EARTH, ETC., ETC.

See S.C. Chew, Byron in England, p. 155.

INDIANAPOLIS
THE BOBBS-MERRILL COMPANY
Publishers

The Birth of modern "First Sale" (a.k.a. exhaustion)



"**Notwithstanding the provisions of section 106(3),** the owner of a particular copy or phonorecord lawfully made under this title …is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy…"

First Sale, 17 U.S.C. §109

First Sale Doctrine (§109)

- The term first sale focuses on whether there has been a *first*, *authorized* sale of a particular copy;
  - if so, the copyright owner may not prevent subsequent loans or sales downstream

First Sale Doctrine

- Entire industries and enterprises are built upon the *first sale rights* - codified in the Copyright Act § 109
  - Libraries can lend copies of printed books that they acquired to their faculty, students, and patrons
  - Used CD/Record/Book stores sell copyrighted protected works in stores
  - eBay relies on this provision when it permits users to sell copyrighted protected works through its site

First Sale Doctrine (§109)

- Section 109(a) does not require a **sale** – it refers only to a copy being "*lawfully made under this title*,"
  - "exhaustion" is the better description
- For a library, archives, museum, or other cultural institutions?
  - *Purchases, donations, acquisitions, bequeathments, etc.*

A familiar system?

One acquired copy
Checked out to one person at a time
Limited time period, returned
Made available to next person
Repeat

[**Without permission** from, or **more fees paid** to, the © holder]

Book Loaning Workflow

One acquired copy
Checked out to one person at a time
Limited time period, returned
Made available to next person
Repeat

[**Without permission** from, or **more fees paid** to, the © holder]

Reserves Workflow

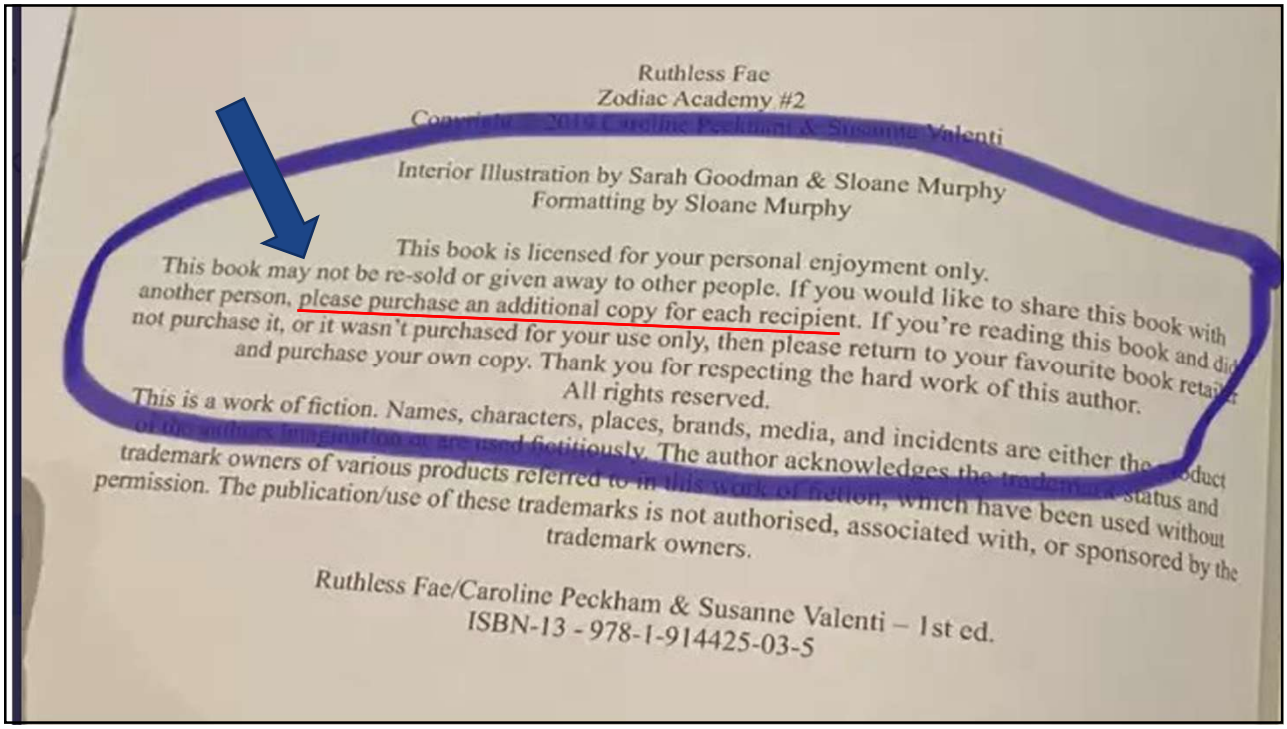
One acquired copy
Checked out to one person at a time
Limited time period, returned
Made available to next person
Repeat

[**Without permission** from, or **more fees paid** to, the © holder]

Interlibrary Loan Workflow

One acquired copy
Checked out to one person at a time
Limited time period, returned
Made available to next person
Repeat

[**Without permission** from, or **more fees paid** to, the © holder]



Paper of interest:
https://bit.ly/PubPlaybook

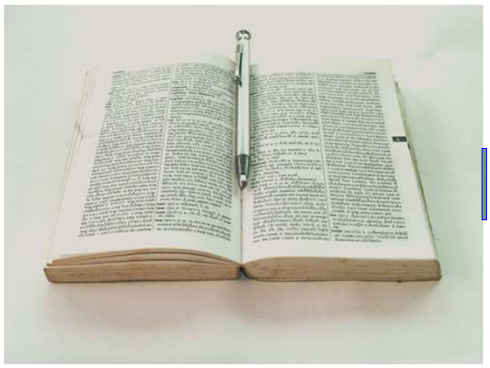
The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission

Citation

Courtney, Kyle K. and Juliya Ziskina. 2023. "The Publisher Playbook: A Brief History of the Publishing Industry's Obstruction of the Library Mission." Pre-print.

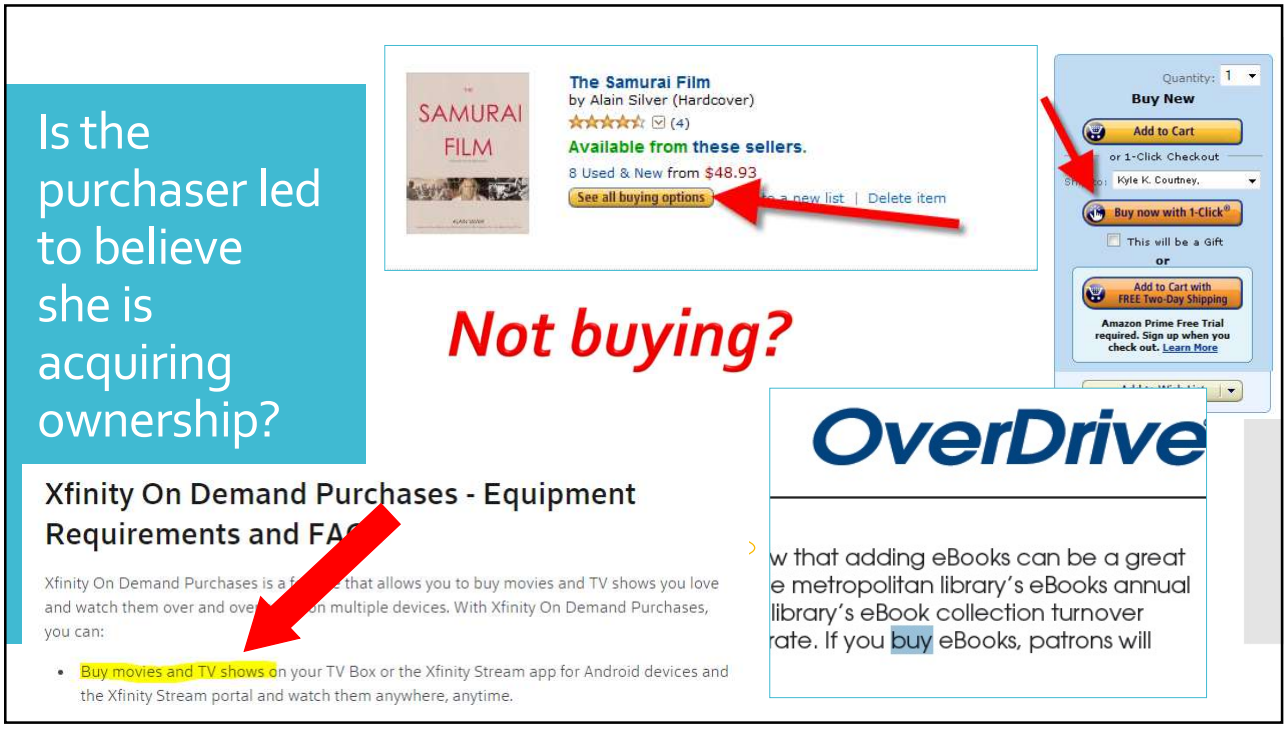
Abstract

Libraries have continuously evolved their ability to provide access to collections in innovative ways. Many of these advancements in access, however, were not achieved without overcoming serious resistance and obstruction from the rightsholder and publishing industry. The struggle to maintain the library's access-based mission and serve the public interest began as early as the late 1800s and continues through today. We call these tactics the "publishers' playbook." Libraries and their readers have routinely engaged in lengthy battles to defend the ability for libraries to fulfill their mission and serve the public good. The following is a brief review of the times and methods that publishers and rightsholder interests have attempted to hinder the library mission. This pattern of conduct, as reflected in ongoing controlled digital lending litigation, is not unexpected and belies a historical playbook on the part of publishers and rightsholders to maximize their own profits and



Example: e-Media Licenses

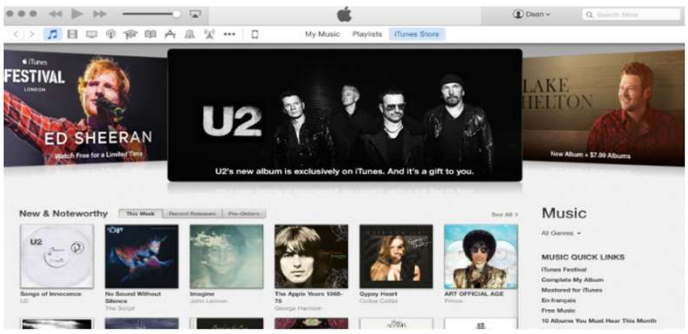
"Purchasers" of e-media are not the owners of that content and cannot rely on §**109** to convey ownership or even possession of such content to a 3rd party without consent.



POLITICOMAGAZINE

OUR LATEST | EMAIL S

Facebook
Twitter
Comment
Print



Wikimedia Commons

IN THE ARENA

Think You 'Own' What You 'Buy' on the Internet?

Think again.

By KYLE K. COURTNEY

Buy or License?
California Disclosure Law

In 2024, Gov. Gavin Newsom signed AB 2426 into law

- Requires companies that sell online-only digital goods to CA consumers using terms like "buy" or "purchase" to **clearly state** whether the transaction conveys *ownership* of the goods or merely grants a *license*

38

Licensing **destroys** the secondary market

Supreme Court, later after Bobbs-Merrill, described the destruction of secondary markets as:
"*…hateful to the law from Lord Coke's day to ours, because it is* ***obnoxious to the public interest****.*"

Example:
Controlled Digital Lending and Hachette v. Internet Archive

Case Study: Hachette v. Internet Archive (S.D.N.Y. 2023)

2010:

DJIA 43740.21 0.27% ↑ S&P 500 6000.98 0.77% ↑ Nasdaq 19251.10 1.18% ↑ Russell 2000 2197.52 1.26% ↑ U.S. 10 Yr 0/32 4.295% ↑ VIX 17.90 -7.87% ↓ Gold 2926.

THE WALL STREET JOURNAL.

Subscribe Sign In

FLASH SALE

English Edition | Print Edition | Video | Audio | Latest Headlines | More

Latest World Business U.S. Politics Economy Tech Markets & Finance Opinion Arts Lifestyle Real Estate Personal Finance Health Style Sports

Libraries Have a Novel Idea

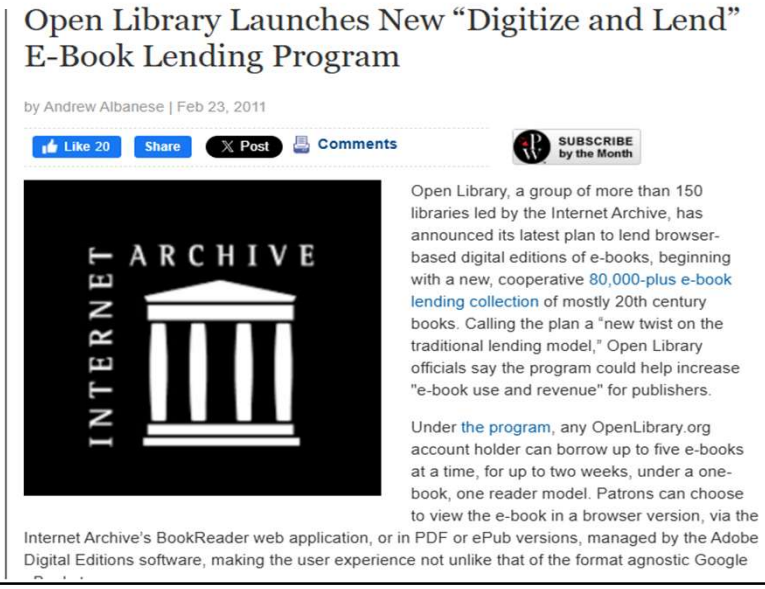
Lenders Join Forces to Let Patrons Check Out Digital Scans of Shelved Book Collections

By Geoffrey A. Fowler

Updated June 29, 2010 12:01 am ET

Share Resize

2011:



Open Library Launches New "Digitize and Lend" E-Book Lending Program

by Andrew Albanese | Feb 23, 2011

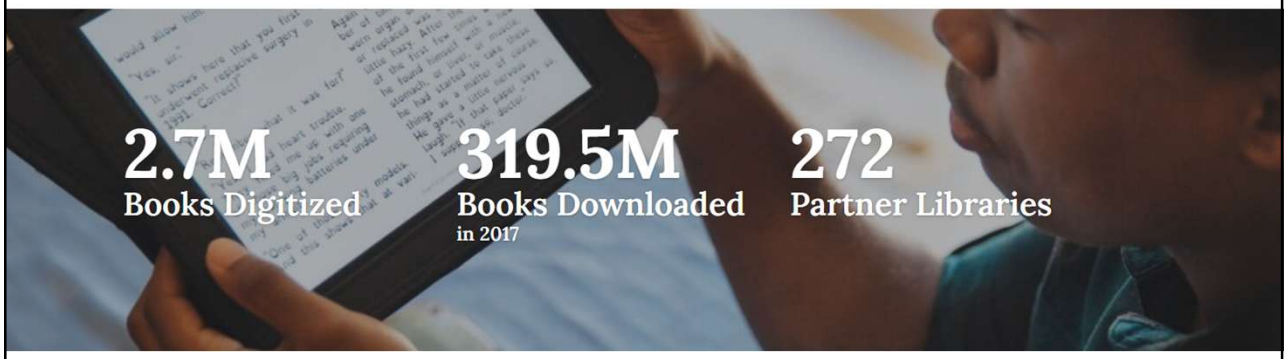
Like 20 Share Post Comments SUBSCRIBE by the Month

INTERNET ARCHIVE

Open Library, a group of more than 150 libraries led by the Internet Archive, has announced its latest plan to lend browser-based digital editions of e-books, beginning with a new, cooperative 80,000-plus e-book lending collection of mostly 20th century books. Calling the plan a "new twist on the traditional lending model," Open Library officials say the program could help increase "e-book use and revenue" for publishers.

Under the program, any OpenLibrary.org account holder can borrow up to five e-books at a time, for up to two weeks, under a one-book, one reader model. Patrons can choose to view the e-book in a browser version, via the Internet Archive's BookReader web application, or in PDF or ePub versions, managed by the Adobe Digital Editions software, making the user experience not unlike that of the format agnostic Google

2012-17:
Open Libraires Program Grows



2018:

Kyle K. Courtney & David R Hansen,
"*A White Paper on Controlled Digital Lending of Library Books*"
http://bit.ly/CDLWhitePaper18

We name the legal concept

“Controlled Digital Lending”

The CDL Methodology

Digital Copy is Loaned

Loan to users, with technical limits:
No copying,
No downloads,
Limited duration
w/ no permanent copy retained

No Access to Print Copy

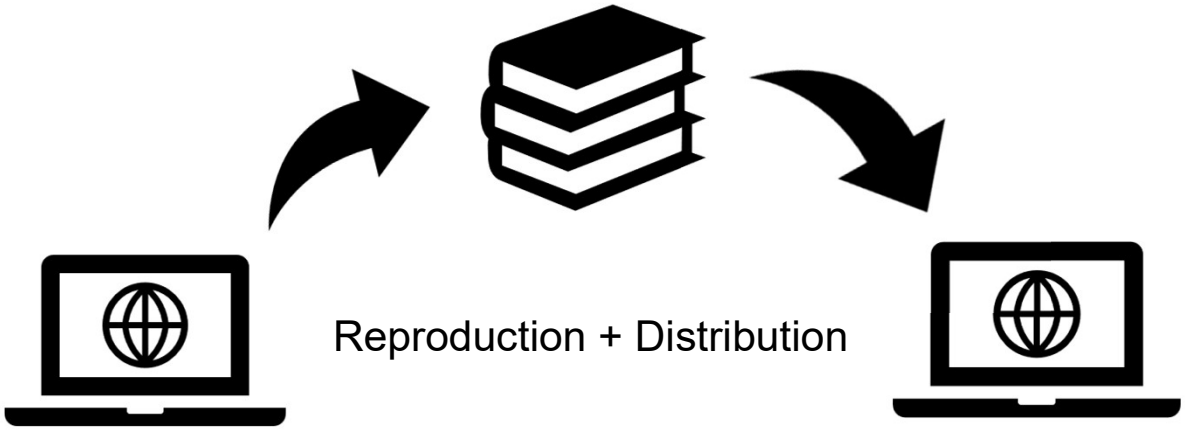
Risk Factors:

- Careful for Market Harm
- Pre-Existing Licensing
- Low Risk Works

2018 – 2021
Digital Loan Experimentation

- Increased willingness to explore alternative access options ("read and use the White Paper")
- Efforts such as HathiTrust ETAS, digital reserves programs, *CDL for ILL* and a variety of local implementations
  - NYU's Shanghai Library CDL system
  - Caltech's DIBS ("Digital Borrowing System")
  - University of Florida Libraries' Textbook-focused digital loan program
  - University of Miami Ohio's LOLA ("Limited Online Library Access'')
  - CMU Libraries' Digital Loaning Book Program

CDL as a Fair Use
Through the Lens of First Sale



The *Hachette v. IA* Procedural Case History

- Complaint ☒
- Answer ☒
- Discovery ☒
- Motion(s)* ☒
- Decision ☒
- Appeal ☒
- 2nd Decision ☒

Other fair use copyright cases (timelines):

- *Authors Guild, Inc. v. Google Books* (Sept. 2005 to November 2013)
- *Authors Guild, Inc. v. HathiTrust* (Sept. 2011 to June 2014)
- *Cambridge University Press v. Patton* (April 2008 - Sept. 2020)

oceancopyright

The Bad: Market Harm Argument

- Court's Flawed Analysis
- Publishers didn't provide evidence of market harm
- Court relied on assumptions that digital lending affects sales

The Bad – Court's Flawed Market Analysis

"Although they *do not provide empirical data of their own*," the court said, the "Publishers assert that they (1) have suffered market harm due to lost ebook licensing fees and (2) will suffer market harm in the future if IA's practices were to become widespread."

Every loan of an (e)book is <u>not</u> a lost sale

The Bad: Court's Flawed Market Analysis

The court continued that "IA argues that Publishers cannot rely on the 'common-sense inference' of market harm **without data to back that up** … We agree with Publishers' assessment of market harm."

- Yet, who has the proprietary market data to prove this? Publishers.
- And if the publishers had evidence of market harm, they *surely* would have presented such evidence to the court

So, despite IA presenting experts and data showing *minimal impact* on book sales, the court still ruled that "*unrestricted and widespread conduct of the sort engaged in by [IA] would result in a substantially adverse impact on the potential market for [the 127 books]…*"

:… it is '**self-evident**' that if IA's use were to become widespread, it would adversely affect Publishers' markets"

JOB ZONE | Marketing & Publicity Coordinator - Milkweed Editions - Minneapolis, MN. | NEXT JOB ▸

America's Biggest Publishers Keep Posting Profits

By Jim Milliot | Apr 01, 2022

The second year of a global pandemic was not enough to stop the country's four largest trade publishers from posting impressive gains in earnings in 2021 over 2020. The largest gain came at Simon & Schuster, whose operating income soared 51.1% in the year. Lagardère publishing, parent company of Hachette Book Group, saw recurring EBIT jump 42.7%, while HarperCollins had a 15.5% increase in EBITDA.

Penguin Random House's operating EBITDA increased 9.2%, on a 6% rise in revenue. Global revenue at PRH increased to €4 billion, and earnings were €755 million, parent company Bertelsmann reported. The company's margin improved to 18.7%, from 18.2% in 2020. The U.S. accounted for 56.5% of total revenue (about $2.51 billion at the current exchange rate), down from 58.6% in 2020.

"The court here is asking defendants to prove a negative, while allowing plaintiffs to actively *withhold the only information that the court will accept as dispositive*.

The Second Circuit has replaced the fourth factor analysis with 'vibes.' Franz Kafka would be proud."

- Meredith Rose, *Public Knowledge*

The Ugly: Derivative Work Confusion

What is a Derivative Work?

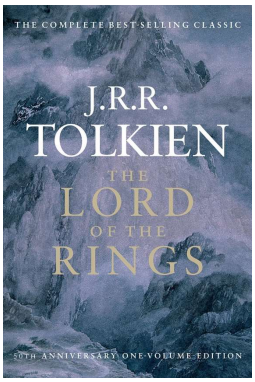
- Defined by copyright law as a new creation based on an original work.
- Examples include adaptations like films based on books or enhanced editions of works or translations

Are eBooks derivative works?

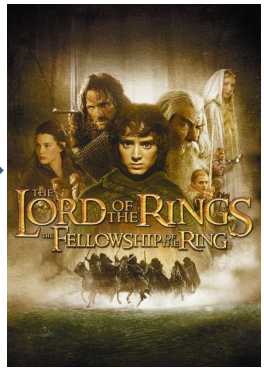
- NO: eBooks represent the same underlying content, only in a different format.
- Appealable error?

Right to Prepare Derivative Works

Original Work



Derivatives

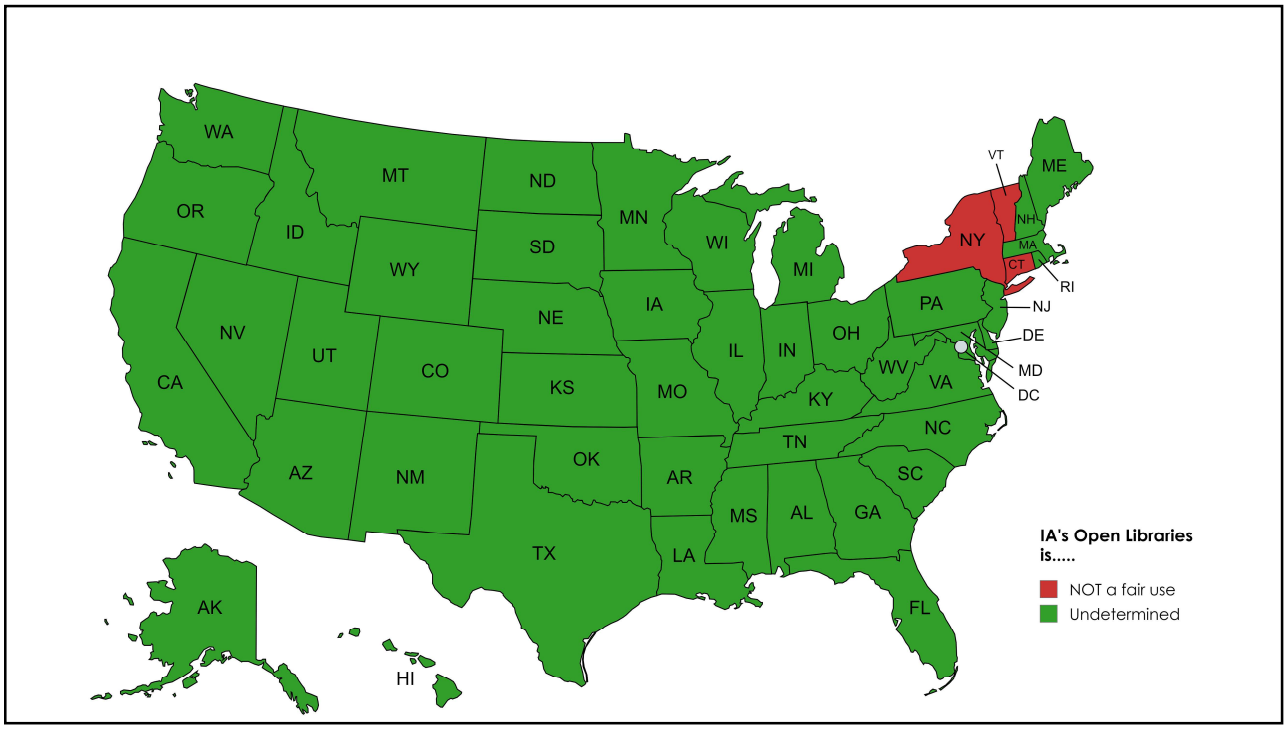


According to the court, a legally purchased book that is digitized is a violation of the right to derivative work….

Under this analysis, what else might be a derivative work?

- Digital reserve chapters
- Digitized interlibrary loan requests
- Digital preservation copies
- Document delivery requests
- Any digitization done without a paid fee or license (!)

Is there still hope? Yes.



The Historical Echoes of Licensing

CENSORSHIP ISN'T ALWAYS OVERT.
SOMETIMES IT'S CONTRACTUAL.

Example:
The Stationers' Company Licensing Act of 1662

By the King.

A PROCLAMATION

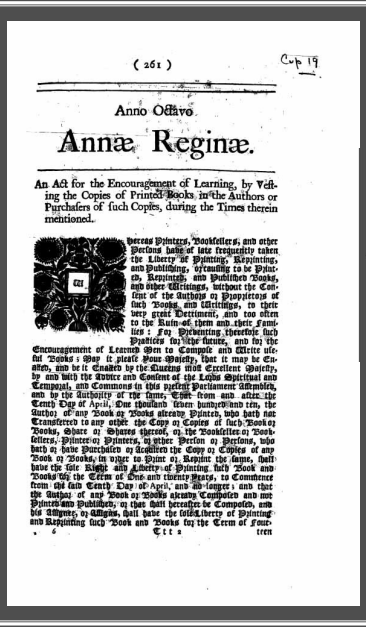
CHARLES R.

GOD SAVE THE KING.

LONDON: Printed by John Bill and Christopher Barker, Printers to the Kings and Queens Most Excellent Majesty, 1662.

Historical Parallels

- Technology controlled by private industry and government
- "Approve" every book before publication
- Gatekeeping through permission (licensing?)



(261)

Anno Octavo

Annæ Reginæ.

An Act for the Encouragement of Learning, by vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned.

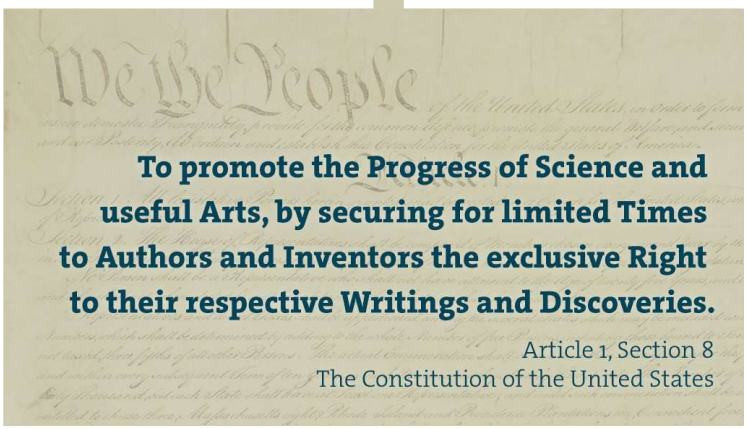
Columbian Centinel.

By Authority

Copyright as a Public Good

COPYRIGHT'S ORIGINAL PURPOSE:
***PROMOTE LEARNING AND KNOWLEDGE*.**

U.S. Law Example:



LAWS of the UNITED STATES. PUBLISHED
By Authority.
CONGRESS of the UNITED STATES:
AT THE SECOND SESSION,
Begun and held at the City of New-York, on Monday the 4th of January, 1790.
An ACT for the ENCOURAGEMENT of LEARNING, by securing the Copies of Maps, Charts and Books, to the Authors and Proprietors of such Copies, during the Times therein mentioned.

1790: "An Act for the Encouragement of Learning…."

Let me repeat:

The first copyright law in the U.S. was an "*Act for the Encouragement of Learning….*"

Copyright as a Public Good

Feist Publications, Inc. v. Rural Telephone Service Co., Inc., 499 U.S. 340 (1991): copyright's primary objective is **not to reward authors' labor *but to promote the progress of science and useful arts***.

Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994): *Limited monopoly copyright privileges* are intended to motivate the creative activity of authors by the provision of a "special reward," but **these privileges are limited in nature and must ultimately serve the public good**.

Balanced role of copyright:

Copyright creators get ***some*** *(<u>not</u> total) protection;*

Users of those copyrighted materials are allowed ***some*** user rights

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

Sec.

Definition of rights

101. Definitions.
102. Subject matter of copyright: In general.
103. Subject matter of copyright: Compilations and derivative works.
104. Subject matter of copyright: National origin.
104A. Copyright in restored works.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
106A. Rights of certain authors to attribution and integrity.

Fair use!

107. Limitations on exclusive rights: Fair use.

Limitations & exceptions

108. Limitations on exclusive rights: Reproduction by libraries and archives.
109. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord.
110. Limitations on exclusive rights: Exemption of certain performances and displays.
111. Limitations on exclusive rights: Secondary transmissions of broadcast programming by cable.
112. Limitations on exclusive rights: Ephemeral recordings.
113. Scope of exclusive rights in pictorial, graphic, and sculptural works.
114. Scope of exclusive rights in sound recordings.
115. Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords.
116. Negotiated licenses for public performances by means of coin-operated phonorecord players.
[116A. Renumbered.]
117. Limitations on exclusive rights: Computer programs.
118. Scope of exclusive rights: Use of certain works in connection with noncommercial broadcasting.
119. Limitations on exclusive rights: Secondary transmissions of distant television programming by satellite.
120. Scope of exclusive rights in architectural works.
121. Limitations on exclusive rights: Reproduction for blind or other people with disabilities.
122. Limitations on exclusive rights: Secondary transmissions of local television programming by satellite.

Statutory Copyright Exceptions

A *statutory exception* allows individuals to exercise one or all of copyright's "bundle of rights"

- **without obtaining the permission** of the copyright owner
- **without the payment** of any license fee

Example:
Authors Guild v. Google (2015)

The Modern Licensing Trap

LICENSES FORBIDDING LIBRARY OPERATIONS FORCES A BREAK IN THE SOCIAL CONTRACT BETWEEN LIBRARIES AND THE PUBLIC.

The Modern Licensing Trap

License terms can:

- Override copyright exceptions
- Restrict preservation
- Limit accessibility
- Forbid sharing and ILL

Common License Example: Netflix Terms of Service

4.2. The Netflix service and any content viewed through our service are for **your personal and non-commercial use only and may not be shared with individuals beyond your household**. **During your Netflix membership, we grant you a limited, non-exclusive, non-transferable right to access the Netflix service and view Netflix content through the service.** Except for the foregoing, no right, title or interest shall be transferred to you. **You agree not to use the service for public performances.**

Common License Example: Historical eBook Collection Terms of Service

Section 5: You agree to use the service...in accordance with all applicable laws, rules and regulations….Except as explicitly authorized in these Terms of Use, **you agree not to archive, download, reproduce, distribute, modify, display, perform, publish, license, create derivative works from, offer for sale, or use content and information contained on or obtained from or through the service. You also agree not to circumvent, remove, alter, deactivate, degrade or thwart any of the content protections in the service; or use any data mining, data gathering or extraction method**….

Example: Amazon Kindle License

"Unless specifically indicated otherwise, you may not **sell**, **rent**, **lease**, **distribute**, **broadcast**, **sublicense** or otherwise assign any rights to the Digital Content or any portion of it **to any third party**, and you may not remove any proprietary notices or labels on the Digital Content."

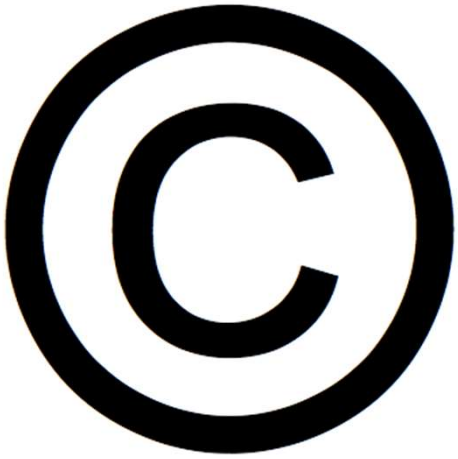
77

Example: Problematic Licensing

- Licenses eviscerate the library mission
  - Licenses do not allow purchase/ownership of materials
  - Licesnes do not allow traditions loans
  - Licenses do not address preservation
- Some publishers refuse to license at all: no site license, library license, campus license, etc.

RESULT: No ILL/Doc Del rights, no ownership, no preservation rights, no exhaustion (loaning books)….

V.



Licensing is a grave threat to libraries including colleciton development, acquistions, budgeting, long term preservation, and equitable access to culture (books, music, film, art, and more)

$ Cost $
&
Ownership

End result?
Libraries turn into Hulu, Netflix, or Spotify

Libraires rent/lease materials; we don't own them; we can't keep them.

How can libraires prevent “swapping out the library card for a credit card?”

The Cost of Privatization

PUBLIC MISSION, PRIVATE CONTROL.

Example: Platform/Publisher Dependency

Five
~~Four~~
Big ~~Five~~
Publishing Houses

Harper Collins
SIMON & SCHUSTER
hachette LIVRE
Penguin Random House
macmillan

ProQuest
RELX Group

- When one company controls dissertations, newspapers, and theses...
- When five (or four after mergers) companies control most eBook publishing….
- When one company buys up OA infrastructure….
- When two legal publishers try to "own" the law….

Elsevier Acquires Bepress, a Leading Service Provider Used by Academic Institutions to Showcase Their Research

Bepress to benefit from Elsevier's technology and analytics to expand offerings to more institutions, while helping Elsevier drive further adoption of its research data management tools

NEWS PROVIDED BY
Elsevier →
Aug 02, 2017, 11:07 ET

SHARE THIS ARTICLE

NEW YORK, August 2, 2017 /PRNewswire/ --

Elsevier, the global information analytics business specializing in science and health, today acquired **bepress**, a Berkeley, California-based business that helps academic libraries showcase and share their institutions' research for maximum impact. Founded by three University of California, Berkeley professors in 1999, bepress allows institutions to collect, organize, preserve and disseminate their intellectual output, including preprints, working papers, journals or

Academia.edu

ResearchGate

#ICanHazPDF

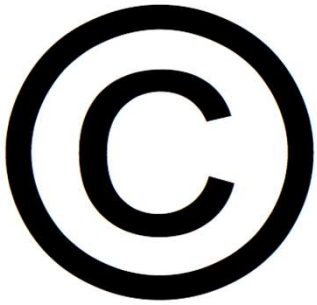
Surveillance and the Erosion of Privacy

EVERY CLICK IS TRACKED. EVERY SEARCH RECORDED.

Fair Use as Counterpower

To utilize EXCEPTIONS is to resist control.

Does Fair Use Survive The License?



vs.

Does Fair Use Survive?

Myth: Fair use doesn't apply to licensed materials

Reality: Fair use and contract are separate sources of authority

Does Fair Use Survive?

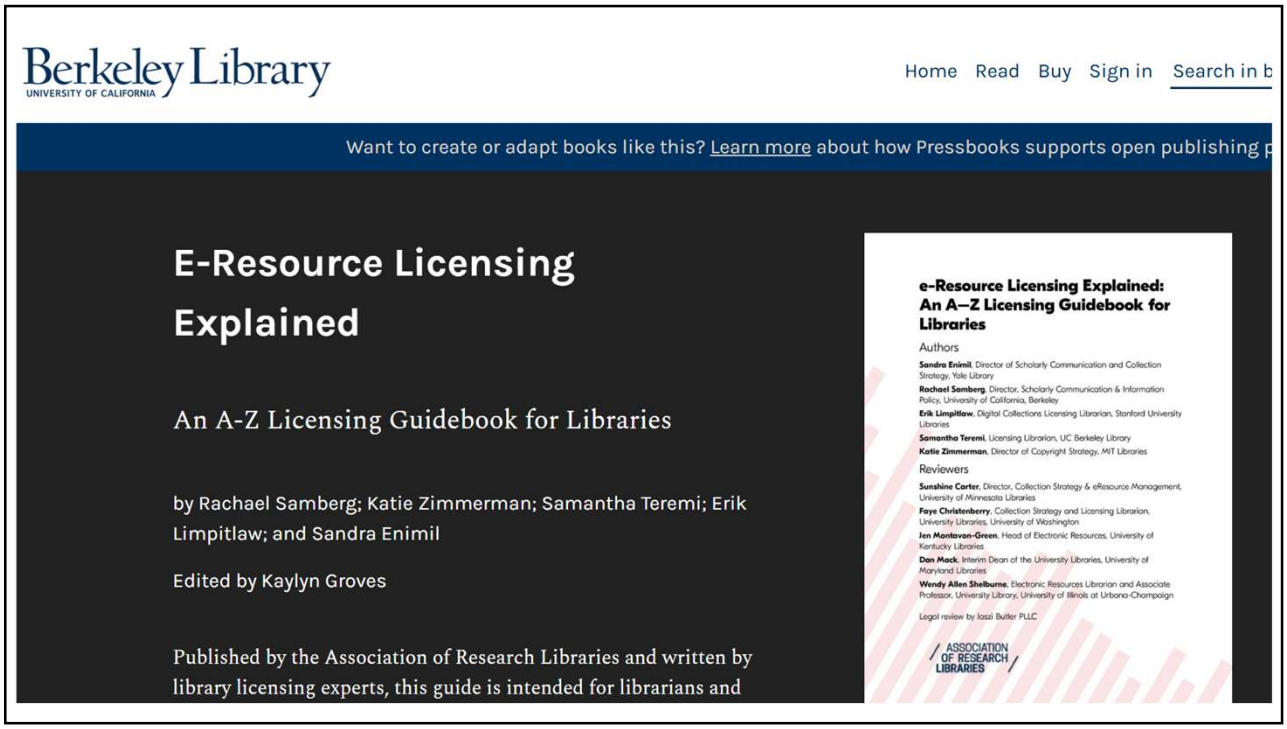
Remember: a license is authorization to exercise a © right, and when your use is *fair*, **you don't need authorization**!

But a contract is a legally-enforceable promise, and you can promise NOT to exercise fair use rights

Everything depends on the specifics of the language in the TOU/contract/license

Does Fair Use Survive?

Language type	Example	Fair use consequence
Clear prohibition	*"User shall not…" or "User shall not...without additional permission"*	License trumps
Limited license	*"This license is for personal use only…"*	Fair use survives
Silence (nothing in the license explicitly or implicitly addresses your use)	...	Fair use survives
Savings clause	*"Notwithstanding any other provision in this contract, nothing shall bar lawful uses...."*	Fair use survives
Ambiguity	...	Fair use favored



Librarians as Counterpower

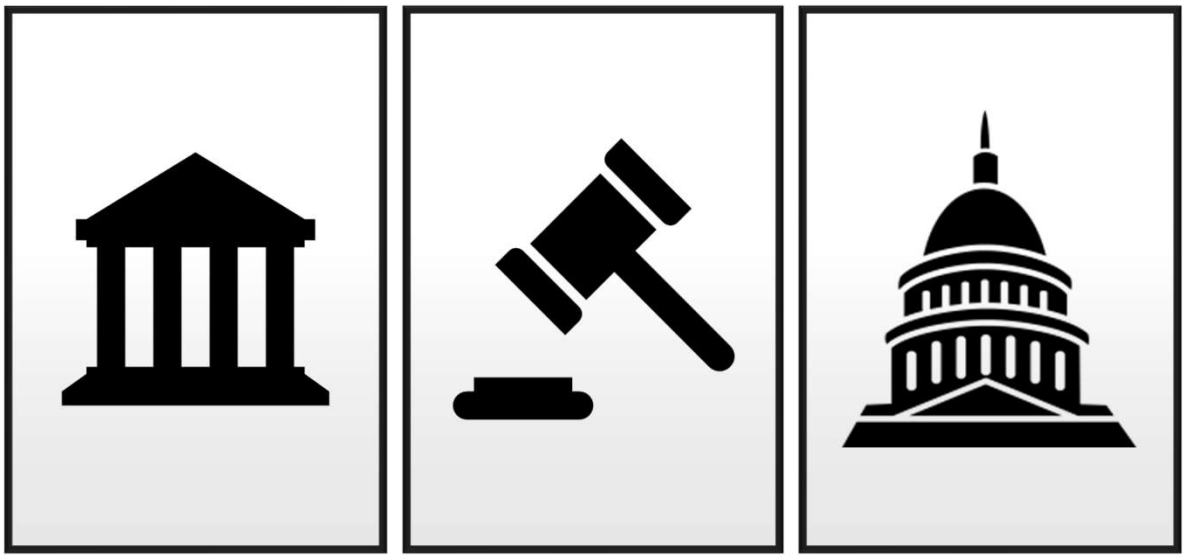
To defend ACCESS is to resist control.

EBOOK STUDY GROUP

Case Study:
eBooks and the Public Good

ESG asked "What if we changed library licenses to be more reflective of core library operations and mission?"

And what if we used **existing state law** as the mechanism for change?



Librarians as Counterpower

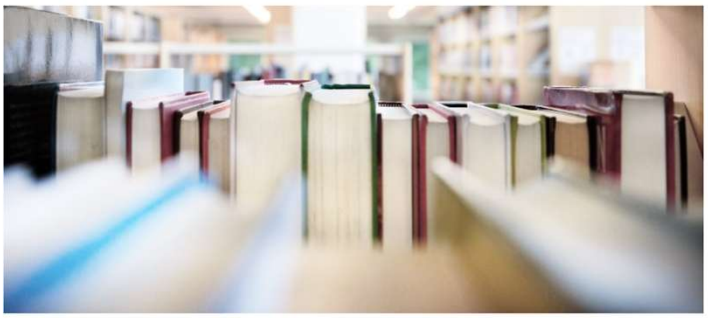
Harness law that's already "on the books"

- State Consumer Protection Laws
- State Contract Law
- Uniform Commercial Code
- Procurement Laws and Policies
- State Administrative Law
- Executive Office powers

Education, News

High Licensing Costs Threaten E-Book Library Collections Across State

— Emilia Otte, 12.7.2023



Share

The 40 libraries in Connecticut's LION Library Consortium will lose $1 million worth of e-books by

NEWS > CONNECTICUT NEWS

SUBSCRIBER ONLY

'Tens of thousands down the drain': CT officials aim for first-in-the-nation action to address eBook costs

mirror *Connecticut's Nonprofit Journalism.*

EMAIL SIG

TRENDING Health Care CT's Remote NY Workers Education Funding Chris Murphy

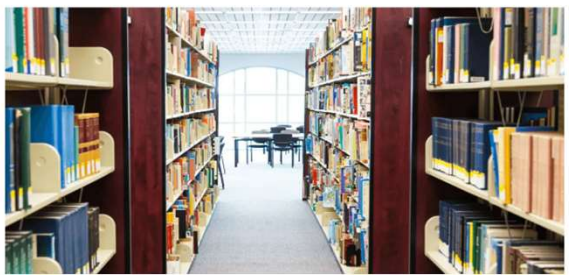
CT VIEWPOINTS

CT library users want more e-books. Libraries can't meet the demand

by Alice S. Knapp
February 8, 2024 @ 12:01 am

For the past two years, State Sen. Tony Hwang has proposed legislation that would require publishers to adhere to certain contract terms. Last year, Rep. Eleni Kavros DeGraw and Rep. Matt Blumenthal also championed an e-book bill. The resulting bill is a good one that is grounded in Connecticut Unfair Trade Practices law (Chapter735a, Section 42-110b) and would ensure that contractual agreements between libraries and publishers contain equitable licensing terms for the acquisition of e-books, among other protections.

We hope to see eBook legislation introduced in the next session.



MUNGER, TOLLES & OLSON LLP

601 MASSACHUSETTS AVENUE NW
SUITE 500E
WASHINGTON, D.C. 20001-5369
TELEPHONE (202) 220-1100
FACSIMILE (202) 220-2300

350 SOUTH GRAND AVENUE

The Honorable Matthew Ritter
Speaker of the Connecticut House of Representatives
Legislative Office Building
Room 4106
Hartford, CT 06106-1591

Re: Analysis of Connecticut House Bills Nos. 6800 and 6829

Dear President Looney and Speaker Ritter:

We represent the Protect the Creative Economy Coalition (the "Coalition"), which includes the Association of American Publishers, the Authors Guild, the American Booksellers Association, the Copyright Alliance, the Independent Book Publishers Association, the Motion Picture Association, the News Media Alliance, and the National Music Publishers' Association. As you know, the Coalition is deeply concerned that House Bills Nos. 6800 and 6829 (the "Bill"),[1] if enacted into law, would not only fundamentally undermine the currently robust dissemination

Who Is "The Coalition to Protect the Creative Economy?"

ABA AMERICAN BOOKSELLERS ASSOCIATION

AAP ASSOCIATION OF AMERICAN PUBLISHERS

AG The Authors Guild

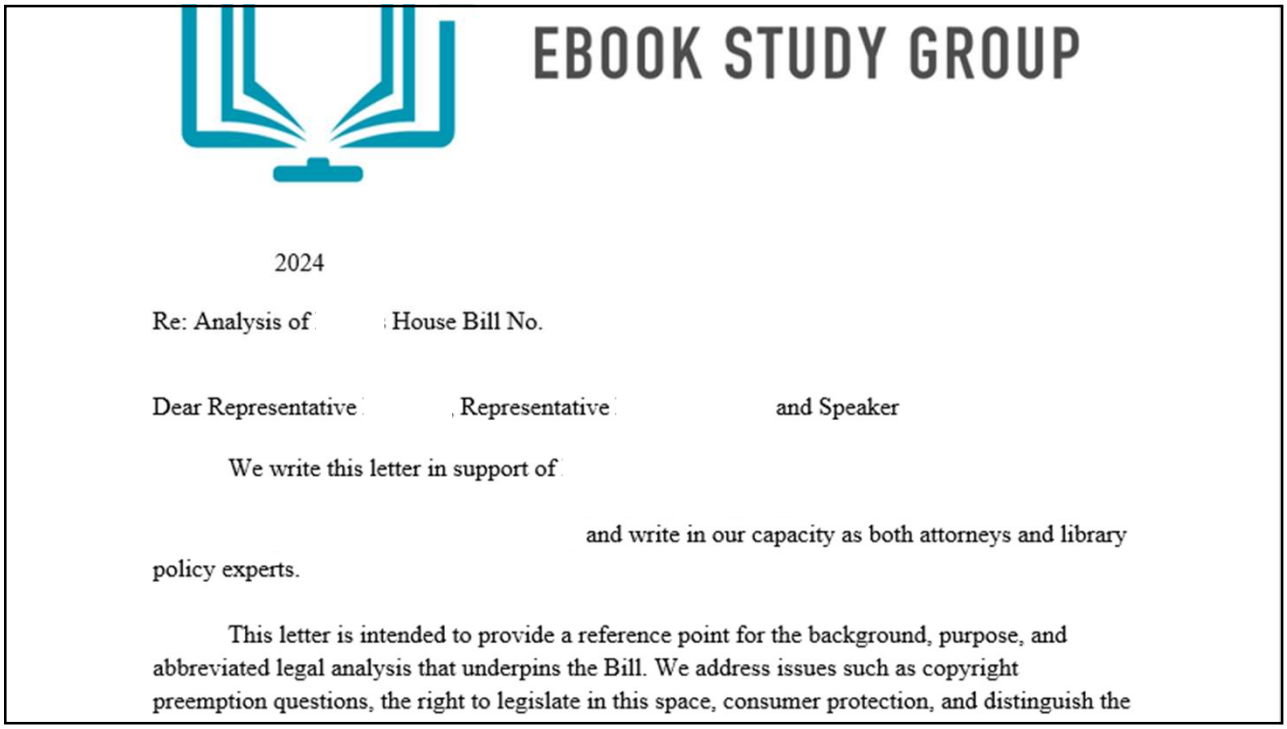
copyright alliance

INDEPENDENT BOOK ibpa PUBLISHERS ASSOCIATION

MOTION PICTURE ASSOCIATION

NEWS MEDIA ALLIANCE

NMPA



EBOOK STUDY GROUP

2024

Re: Analysis of House Bill No.

Dear Representative , Representative and Speaker

We write this letter in support of

and write in our capacity as both attorneys and library policy experts.

This letter is intended to provide a reference point for the background, purpose, and abbreviated legal analysis that underpins the Bill. We address issues such as copyright preemption questions, the right to legislate in this space, consumer protection, and distinguish the

“The [CT] Attorney General’s Office is prepared to zealously defend these bills if they become law.”

Lobbyists were sent to Connecticut to "kill" the 2024 eBooks bill!

AAP
ASSOCIATION OF AMERICAN PUBLISHERS

NEWS // POLITICS

CT House kills bill allowing librarians to bargain for expensive e-books after three-hour debate

By Ken Dixon, *Staff Writer*
April 30, 2024

Technology

After Fierce Debate In House, Digital Books Bill Is Tabled

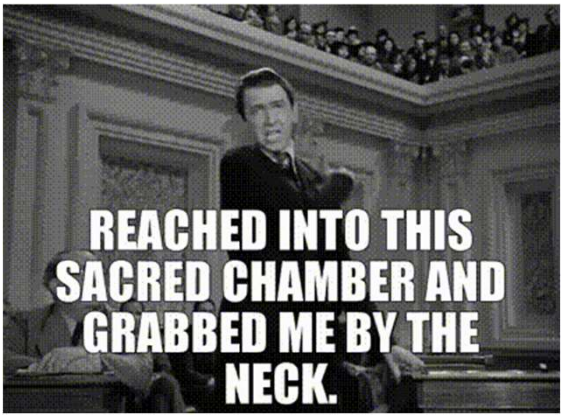
by Jamil Ragland May 1, 2024, 5:00 am

Twitter Facebook LinkedIn Reddit

"They made clear that they have significant opposition to it and just are going to *talk and talk and talk and talk*."

– House Majority Leader Jason Rojas (CT)

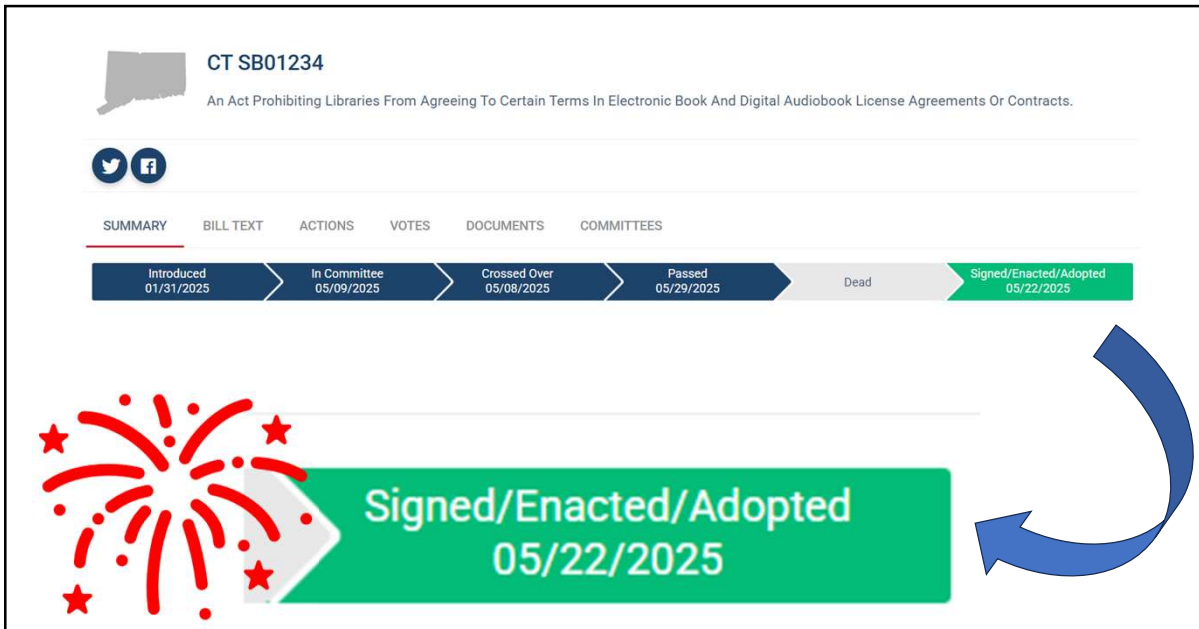
AAP
ASSOCIATION OF AMERICAN PUBLISHERS



But CT librarians endured and **reversed** the AAP's influence!

How?

Educating fellow librarians, legislators, outreach to public, and statewide support!


CT SB01234
An Act Prohibiting Libraries From Agreeing To Certain Terms In Electronic Book And Digital Audiobook License Agreements Or Contracts.
SUMMARY
BILL TEXT
ACTIONS
VOTES
DOCUMENTS
COMMITTEES
Introduced 01/31/2025
In Committee 05/09/2025
Crossed Over 05/08/2025
Passed 05/29/2025
Dead
Signed/Enacted/Adopted 05/22/2025
Signed/Enacted/Adopted
05/22/2025

CONNECTICUT HOUSE DEMOCRATS
USING OUR TAX DOLLARS WISELY TO SUPPORT OUR LIBRARIES

STATE OF CONNECTICUT

QUI TRANSTULIT SUSTINET

Substitute Senate Bill No. 1234

Public Act No. 25-9

AN ACT PROHIBITING LIBRARIES FROM AGREEING TO CERTAIN TERMS IN ELECTRONIC BOOK AND DIGITAL AUDIOBOOK LICENSE AGREEMENTS OR CONTRACTS.

Be it enacted by the Senate and House of Representatives in General Assembly convened:

Massachusetts eBook Bills

I think last year's was better…..

Example: MA Bill H.3595
Forms "eBook Commission" of following members

- 2 members of the House
- 2 members of the Senate
- Executive director of the MBLC
- President of the MLS
- President of the MSLA
- President of the BPL
- ED of the MA Center for the Book
- Attorney General
- 1 Director of the Massachusetts Office on Disability
- 1 research librarian from a public
- 1 research institution of higher education
- 1 representative of the **Association of American Publishers**
- 1 digital distributor of ebooks (such as **Overdrive, Inc.**)
- 1 of whom shall be an expert in the field of intellectual property or copyright law

State	Decision	Reasoning
California (CA)	Strongest jurisdiction	**Executive Orders (Relevant or On Point)** ○ CA has passed EOs and released press releases related to reading, literacy, educational freedom, and textbooks. **Strong Procurement Laws** ○ AB 1825 California Freedom to Read Act prevents public libraries from restricting access to library materials based on the topic, ideas, or opinions contained in the materials. ○ California Library Laws 2025 provides information about state laws affecting public libraries, including procurement. **Strong Consumer Protection Laws** ○ CA has broad consumer protection laws, including the California Consumer Protection Act (CCPA). **Strong Contract Laws** ○ California library laws are strong; they also broadly mention transfer of licenses in Section 99.02, but nothing directly related to inequitable licensing terms. **Flourishing Library Ecosystem** ○ Over 1,200 libraries across CA.

Standing Up and Standing Out

We stand up by:

- Learning and harnessing the law
- Questioning unjust contracts
- Demanding transparency
- Centering privacy and equity
- Building open systems
- Collaborating across institutions

The mathematician Pascal once famously said that if he had more time, *he would have written a shorter letter*.

I feel that way about this presentation?

The Future We Build

ACCESS ISN'T A GIFT. IT'S A RIGHT.

“Libraries will get you through times of no money better than money will get you through times of no libraries.” – Anne Herbert

Discussion & Questions

A newsletter about constitutional law, the current state of affairs, coffee, and principled dissent.
https://mostlylawful.substack.com/

Copyright, power, and the politics of access. All in service of promoting the progress.
https://copyrightfightclub.substack.com/