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NAVIGATING COPYRIGHT FOR LIBRARIES

PURPOSE AND SCOPE

Edited by Jessica Coates, Victoria Owen, and Susan Reilly

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Navigating Copyright for Libraries

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About IFLA

www.ifla.org

IFLA (The International Federation of Library Associations and Institutions) is the leading international body representing the interests of library and information services and their users. It is the global voice of the library and information profession. IFLA provides information specialists throughout the world with a forum for exchanging ideas and promoting international cooperation, research, and development in all fields of library activity and information service. IFLA is one of the means through which libraries, information centres, and information professionals worldwide can formulate their goals, exert their influence as a group, protect their interests, and find solutions to global problems.

IFLA's mission to inspire, engage, enable and connect the global library field can only be fulfilled with the co-operation and active involvement of its members and affiliates. Currently, approximately 1,600 associations, institutions and individuals, from widely divergent cultural backgrounds are working together to further this mission. Through its formal membership, IFLA directly or indirectly represents some 500,000 library and information professionals worldwide.

IFLA pursues its vision of a strong and united library field powering literate, informed and participatory societies through a variety of channels, including the publication of a major journal, as well as guidelines, reports and monographs on a wide range of topics. IFLA organizes webinars and workshops around the world to enhance professional practice and increase awareness of the growing importance of libraries in the digital age. All this is done in collaboration with a number of other non-governmental organizations, funding bodies and international agencies such as UNESCO and WIPO. The Federation's website is the key source of information about IFLA, its policies and activities: www.ifla.org.

Library and information professionals gather annually at the IFLA World Library and Information Congress, held in August each year in cities around the world.

IFLA was founded in Edinburgh, Scotland, in 1927 at an international conference of national library directors. IFLA was registered in the Netherlands in 1971. The National Library of the Netherlands (Koninklijke Bibliotheek) in The Hague, generously provides the facilities for our headquarters. Regional offices are located in Argentina, South Africa and Singapore.

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Preface

Copyright law is intrinsic to the functioning of libraries. It protects incentives for creators to produce and share the works that fill our institutions whilst providing a legal framework for the use and preservation of these works. Copyright enables libraries, through exceptions and limitations, to fulfil a public good: empowering our communities both now and in the future to create, communicate, discover, access, use and preserve knowledge and information.

Copyright law can be extremely difficult to navigate. The complexity is increasing in the digital environment. New technologies have necessitated the revisiting of key concepts in copyright law such as copying, communication to the public and, in the cases of artificial intelligence, the very definition of the creator of a work. Despite the increasing complexity, or perhaps because of it, librarians and other information professionals play an essential role in clarifying and testing the application of copyright law and particularly of exceptions and limitations to creators' rights in pursuit of the fulfilment of the societal function of the institutions they serve.

Librarians support the production of knowledge by promoting copyright literacy and educating users, and creators, on their rights. In addition, from an International Federation of Library Associations and Institutions (IFLA) perspective, there is the role that the profession plays in making the case for balance in the copyright system between the rights of creators and the rights of users. This balance is constantly under threat of erosion in favour of stronger control for rightsholders but information professionals, through collaboration with other stakeholders, can successfully redress imbalances. There are legal mechanisms, such as open licensing and rights retention, that can be deployed by creators to ensure equitable and effective access to and maximum public benefit from their work.

As a primer on the relationship between copyright law and libraries, this book sets out to provide librarians and information professionals with the grounding necessary to understand and articulate how copyright law and library functions interact, consider approaches to supporting copyright literacy, and engage more fully with copyright policy and advocacy at local and international levels.

The target audience for this book is broad. It should be of interest to both students in librarianship and early career information professionals seeking a general grounding in copyright law and libraries along with those in the profession who have been engaged with copyright for some time and wish to stay abreast of recent and emerging international developments. Although not intended as an academic legal text, the book may also be of use to lawyers and legal academics seeking insight into the practical implications of copyright law for libraries.

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As a librarian who first ventured into the world of international copyright advocacy almost ten years ago, I now know that this book constitutes the primer that I needed. Instead, I was lucky to be educated by the more experienced members of the IFLA Standing Committee (now Advisory Committee) on Copyright and Other Legal Matters (CLM) and the many legal experts with whom IFLA collaborates on important overarching issues of access to information and freedom of expression. Several of these experts have contributed to the book, no doubt recognising that to continue to make the case effectively for balanced copyright, the global capacity of librarians must be enhanced and increased to engage with the issues. The very existence of IFLA CLM denotes the vital importance of taking action to deliver copyright reforms and promote open knowledge. It is therefore unsurprising that CLM is where the idea for a book on libraries and international copyright law was first proposed by then committee member Tom Lipinski in 2018. In 2019 the project moved forward with the appointment of three editors drawn from current and past CLM committees: Jessica Coates, Victoria Owen and Susan Reilly.

From the outset we, the editors, have had a clear vision for this book as an open and accessible primer which would provide librarians with a solid grounding in the origins and fundamentals of copyright law, and insight into the international dimensions of copyright law both in terms of what is currently at risk and what can be achieved with effective advocacy. Editors and authors alike were keen to put these ideas into practice and publish the book under a Creative Commons attribution licence. We would like to acknowledge the role of the IFLA Professional Committee in securing the funding to cover the cost of making this book open access.

As work on the book progressed, we began to think of it as an open education resource (OER). We expect and hope that parts of the book will be reused, remixed, translated, updated and integrated into local or more targeted educational resources. Although the book is structured in thematic sections each chapter is intended to stand alone. This occasionally results in some repetition, but it also allows the chapters to be more easily reused and reflects the varying levels of knowledge of the target audiences.

Although three years is a short span of time relative to the hundreds of years that copyright laws have been in existence a great deal has happened since the first planning meeting between the editors, IFLA Series Editor, Janine Schmidt, and then IFLA Officer, Camille Françoise, in Athens in August of 2019. We did not realise then that it would be our last opportunity to meet in person before the finalisation of the book. The global pandemic has highlighted inequities in access to information more clearly than ever before and emphasised the imperative to facilitate timely access to knowledge on a global scale. The new and unprece-

dented context makes the contents of this book all the more relevant today and has also left the editors with the feeling that several more chapters on emerging issues could have been added had time and resources allowed.

This book is dedicated to every librarian who has taken the time to read and interpret their national copyright statues in the hope of finding a solution to an access challenge, and to those who have spoken up and continue to highlight inequalities in access to information and call for change. The road may be long but you are not navigating alone.

Susan Reilly

Acknowledgements

The editors acknowledge the contribution of many people who helped make this book possible. We thank all those individuals and organisations who make content available in open access. Ensuring appropriate links to open online resources in an open access book on copyright has been challenging. The links apply as of May 2022 and we acknowledge that some may be difficult to locate in future use of the book.

Many thanks to:

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Jessica Coates, Victoria Owen and Susan Reilly

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Part I: **Copyright Basics**

An introduction to the history and concepts of copyright

Tom Cochrane

1 Foundations of Copyright

Abstract: In this chapter, the way that the concept of the creator as owner grew is described, along with the tensions and motives in initially seeking to control printing through copyright. The rationale for an apparently anglophone focus in considering the foundation of copyright is given. The way that the concept of author rights came to displace the rights of printers and publishers is described. An early and ongoing contestation of the notion of balance between monopoly and exclusive benefit on the one hand, and public good and the spread of knowledge on the other, is discussed. In this, reference is made to the disentanglement of copyright from censorship and its emergence as a property concept. The development of early legislation and parallel and continuing developments beyond British law are described. The chapter briefly touches on challenges posed by new technologies and forms of expression in the late 19th and 20th centuries. It is argued that the concept of balance has come under new pressures, and some of the most notable directions in contemporary copyright law making have interesting resemblances to the copyright landscape before Statute of Anne. The chapter provides the background to further discussion of rights developments in the digital era which occurs in subsequent contributions.

Keywords: Copyright – History

Introduction

Copyright is widely recognised as having been introduced in 1710, with the Statute of Anne in Britain being the first record of a law which specifically provided for the vesting of authors' rights to control the production of copies of books. In 1710, the world population was approximately seven percent of its level in the early 21st century, Historical Estimates of World Population (US Census Bureau n.d.) and a significant proportion of the much smaller population was illiterate (Roser, and Ortiz-Ospina 2018). In the full 5,000-year sweep of human history, the chronicle of copyright as a legal concept has not been lengthy. Yet even in its comparatively short 300 years, it has undergone enormous and accelerating changes, particularly in the latter half of this period.

The initial changes in copyright legislation went hand in hand with the invention and rapid growth of printing, and the steady development and extension of the role of libraries as collectors and preservers of printed works. The extraordinary flourishing of knowledge and education which provided the foundation

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of modern societies and their economies, was enabled by the rapid growth in, and impact of, printing and publishing. Libraries played their part by taking on responsibility for the custody and accessibility of the ever-expanding universe of recorded human knowledge, and copyright became the legal organising principle in encouraging and sharing the benefits of authorship and discovery.

In the British context, at least, notions of the universality of basic education, suffrage and a range of health and public services were either unknown or in their infancy. The Crown and the Church wielded authority on a scale not now recognizable.

The purpose and function of libraries are deeply intertwined with the concept of copyright and with the advent and impact of the printing press. In thinking about copyright's foundations, it is instructive to consider developments in the two centuries leading up to the first Statute, which have been characterised as the "pre-modern era" by the distinguished copyright legal scholar Pamela Samuelson (Samuelson 2003, 323). Examining the early development is not just a matter of historical curiosity. The circumstances and conditions which gave rise to a law of copyright are important to understand, as the issues involved have continued well into the modern era.

In the following discussion it should be noted that until new forms of reproduction and the making of copies appeared in the 19th century, copyright protection applied to printed works, including maps, music scores, illustrations and artistic reproductions.

Early Developments

Protection of Crafts: The Example of Renaissance Venice

Much of the detailed discussion of the development of copyright focuses on its first enactment in Britain, followed by early legislation in the newly formed United States. Accordingly, anyone seeking to understand copyright's development may be concerned that there is an anglophone bias in the way its history has been written.

On a global basis, as summarised over a period of 2700 years by Hesse (2002), a notion of copyright as property did not evolve in the other great human cultures in the same way. The conception of copyright that most nation states in the 19th and 20th centuries have signed up to through international treaties, derives from European developments that can be described from the 15th century onwards. These occurred in several countries with important precursor developments in

Renaissance Italy. In Britain, the legal concepts that became the foundation of contemporary copyright are readily traced over a period of more than two centuries. While it is true that there were some parallel developments in France, both before and during the French Revolution, there were no significant legislative and judicial developments in other countries and contexts until well into the 19th century, as in the example of Germany.

In Europe, the world into which the invention of printing arrived featured an economy in which guilds and crafts were keen to protect the livelihoods of their members. It is perhaps no surprise that the Venetian Republic in Renaissance times was the home of some initial seminal developments. And as Kostlyo has argued, new attitudes towards authorship and intellectual production were more about trade than artistic or creative expression. Such new attitudes "...did not spring from the immaterial realm of ideas and books but from the very material realm of craftsmanship and mechanical inventions" (Kostylo 2010, 22).

Notions of granting privileges and monopolies went hand in hand with the steady growth in ideas of craft secrecy and protection from theft within the guild system (Kostylo 2010, 32). A key conceptual development was marked by the Venetian Statute of 1474. At this point, the focus of the stipulated protections and rewards moved to the individual inventor or author from the previous practice of providing monopolies collectively to guilds. It established a property right at the individual rather than the corporate level (Kostylo 2010, 39).

The granting of privileges and monopolies certainly preceded the invention of printing and applied to knowhow and trade secrets. But even when printing was in its infancy, authors such as Ludovico Ariosto sought and obtained privileges from the Venetian state which prevented the reproduction of their works. Hundreds of such privileges had been granted by the mid-16th century, and evidence suggests that the motivation was economic rather than "aesthetic or moral claims" by authors (Kostylo 2010, 30).

Early printed works in Venice often contained technical details about a particular artisanal process. Guarding the process was the object of any intent to protect. The idea of industrial monopoly fused to some extent with the notion of a granted printing privilege in what has been described as a "convergence between proto-patent and proto-copyright" more than a century before the Statute of Anne (Kostylo 2010, 49). Importantly the protections provided were not specifically identified as copyright.

The Early Impact of Printing

If printing threatened new ways of disseminating and therefore allowing the possible appropriation of hitherto more easily protected knowledge, it also heralded another menace. In the eyes of the Church and State authorities, the controllers of orthodoxy, the dissemination of heretical texts would now be much harder to control than previously, which was a major concern. Examples include new translations of the Bible into the vernacular. The work of William Tyndale, who translated the Bible into English from Hebrew and Greek, was regarded as unacceptable, and in 1536 he was executed. While it may be too much to claim that the Reformations born a few years apart in Wittenberg and England were caused by the advent of printing, the technology greatly accelerated the development and dissemination of new and radical ideas. Martin Luther's theses, originally in Latin, were translated and printed in German soon afterwards and became widely available, as were his translations of the Bible. Such access would have been inconceivable just a few short years before. There were two threats to the order of things. The first and more tangible was the notion that unorthodox or heretical ideas would circulate much more widely than previously imaginable. What is more, the control of sacred texts by dint of their availability in a language other than the vernacular was subverted by the mere act of translation and then printing. But a second further danger lay in the idea that a lay population that might previously have been almost completely ignored in the spread of unorthodox ideas, would now have access to them.

England: The Fusion of Censorship and Monopoly Control

The pre-modern era in England has been the subject of considerable scrutiny and scholarship in understanding the rise of the more modern concept of copyright. The Tudor and Stuart periods in English history neatly encompass the 200 years which run from the very infancy of printing to the debates in the Parliament that ushered in the Statute of Anne in the early 18th century. The central institution during this time was the Brotherhood of Stationers, often referred to as the Stationers' Guild and later as the Stationers' Company. As in the Venetian example, guilds took steps to protect their livelihoods and as printing developed, the crafts associated with book production, including binders, printers and booksellers, sought protection for the works they created. The term bookseller gradually became synonymous with publisher.

The first book printed with "a privilege from the sovereign" (Patterson 1968, 42) was produced in 1518. By mid-century, the stationers' guild was seeking a

royal charter, which it obtained in 1557 during the reign of Mary Tudor thereby marking the beginning of what has been called the Stationers' Copyright. It became the dominant feature of the copyright landscape through, to and beyond the Statute of Anne. With the receipt of the charter in the mid-16th century, the Stationers' Company's desire for economic protection through establishing its monopoly fused with the need to suppress dissent, however defined. The aims were expressed with increasing stridency by Mary Tudor in her short reign. The granting in 1557 of a Royal Charter to the Stationers' Company was clearly for the purpose of suppressing prohibited books (Patterson 1968, 28ff).

Through the Charter, the needs of the State in terms of censorship were integrated with the protection of business aspirations in the book trade. Members of the guild were entitled to protection from unauthorised printing of a work over which they had the privilege or monopoly, and they could be relied upon to align with the Crown's purposes in controlling printing for the purpose of censorship. (Patterson 1968, 43). There were gradual changes in the role and influence of participants in the book trade through this period. An initial relatively strong position of the printer, who in business terms took most of the risk through the need to invest capital in printing presses, steadily gave way to the greater influence of the booksellers who as already noted, gradually came to be known as publishers during this period.

It is worth mentioning that the control of printing and publishing exercised through the Stationers' Copyright, was not the only method in play during the pre-modern era. There were in addition, printing patents, but they did not align fully with the interests of the Stationers' Company. A patent could be issued for a class of works rather than just individual works. The issuing of patents carried the risk of providing competitive protection to a degree that was not welcomed by the members of the Stationers' Company. A printing patent meant that a copyright protection was being granted by the Crown, whereas the Stationers' Company process was a private, commercial assertion of protection.

The Mechanism of Control by Licensing

It is important to understand that the method of establishing that a copyright existed was through a process called entrance in the register book of the Stationers' Company. Each work was entered into the register and copyright thereby assured. To print without such entrance became an offence (Patterson 1968, 51). There was however a gap between practice and theory. Various incidents and cases occurred before entrance was unequivocally established as the proof that a copyright was held, or in the converse case, that failure to make entrance was

an offence and that a book could not be printed unless it was registered. The 1637 Star Chamber decree reinforced the absolute requirement for entrance to be undertaken (Patterson 1968, 61).

Printing of works expanded along with the market for books. The continuation of the booksellers' monopoly was needed even more to ensure profit. The monopoly continued to have dual objectives: the protection and furthering of the interests of the publisher, and the continuing exercise of responsibility by the Stationers' Company for ensuring printed works did not infringe laws of censorship. These laws were an extension of the initial purpose of controlling content represented by the terms of the Royal Charter of 1557 and took the form of the Star Chamber's decrees of 1586 and 1637, followed by the Licensing Act of 1662 (Patterson 1968, 115). The Company's adjudications on what should not be printed were backed by the power and authority of the Star Chamber in enforcing judgments (Samuelson 2003, 324).

However, mid-17th century Britain was in turmoil. For reasons related to the power conflict between Crown and Parliament and the English Civil War, the Star Chamber, which had operated as a higher court appointed at the sovereign's prerogative, was abolished in 1641. The abolition had the immediate apparent effect of unleashing "an explosion of print" (Rose 2010, 71). And with this, it has been argued, came the emergence of a nascent public sphere, which had no preceding equivalent.

The Role of the Stationers' Company and the Concept of Public Good

The Stationers' Company continued to seek the extension of its monopoly, and in the absence of the Star Chamber, sought the direct support of Parliament, which responded by continuing the licensing of works under its own authority. It was in the context of this re-asserted control, and an associated action by the Company citing the great poet and intellectual John Milton, that the seminal work *Areopagitica, a speech of Mr John Milton for the Liberty of Unlicens'd Printing*... was written and printed in 1644. There were some features of this work beyond its intellectual content that were conspicuous and significant in what was to come in terms of copyright concepts. First, the title page described only the title, the author, the year and a quotation in Greek and English. This was exceptional in that no space was given to identification of licensor or publisher, as was the norm. Second, "Throughout... books and authors are conflated. Books are seen as the embodiments of authors and authors are presented as living in their books" (Rose 2010, 75).

Milton contributed significantly to the notion of the primacy of the author, as well as arguing for the "liberty of printing" as "a principle of vitality" (Rose 2010,

77). The pursuit of the advancement of knowledge stood in contrast to the Company's concern with order and propriety. By the close of the century, the objections raised to the proposed renewal of the Licensing Act in the 1690s included reference to the free circulation of ideas and the concept of public good.

The Development of Property as the Central Concept

As the 17th century proceeded, the direct connection between copyright and censorship gradually diminished. A series of bills for the regulation of printers gave evidence of the trend by the 1690s and marked the "beginning of the shift of emphasis from censorship to property" (Patterson 1968, 141).

Modern Copyright and the Statute of Anne

By the late 17th century, three trends could be discerned leading to the legislation presented in 1709.[1] The first was that copyright might be more about property than about censorship; the second was the rise of the concept of the author's primacy in copyright; and the third was the notion of a public sphere, a public good. In political and commercial terms there was discontent about the stranglehold over the book trade that continued to be exerted by the Stationers' Company.

Samuelson has listed eight ways in which the Statute of Anne implemented significant changes which became the foundation of the modern copyright system: first, the granting of rights to authors not publishers; second, the recognition of a purpose of inducing the writing and publishing of books; third, the promotion of learning as a larger societal purpose; fourth, the restriction of granted rights to newly authored books, with the concomitant condition that existing books were in the public domain; fifth, the limit of the duration of copyright protection to fourteen years, renewable, thereby abolishing perpetual copyright; sixth, limiting the conferred rights to printing and reprinting; seventh, the deposit of copies to particular libraries; and finally, a system of redress of grievances on prices. (Samuelson 2003, 324–325).

The role of libraries as formal collectors and preservers of published outputs was formally recognised in the first copyright Statute. The three-way association of the creation and publishing of works, the vesting of copyright in them, and

1 The Statute of Anne was enacted in 1709 and came into force in 1710, and either date may be associated with it.

the custodial role of libraries in holding the works, thereafter, was formalised from that time onwards. Most significantly, the combined effect of seeking to encourage writing and publishing with a general purpose of the advancement of learning, served to describe and support a goal of promoting the public good in the legislation. As a transition arrangement, the Statute extended the term of copyrights held by the Stationers' Company at the time of enactment for 21 years, which was in itself a termination of perpetual protection (Patterson 1968, 143).

Two further radical changes were associated with the Statute. Control of publishing by state regulation was not mentioned, thereby severing the connection to censorship (Rose 2010, 83). Second, provision was made for a right to acquire copyright being available to all persons (Patterson 1968, 145). The existence of a right controlled by the book trade *per se* disappeared, though in practice the Stationers' Company used the acquisition right to obtain the right from the author as a condition of publishing, establishing the pattern which has become familiar ever since. It can be seen that the Statute implied a concept of balance between property and its protection on the one hand, and on the other, a public interest in the availability of books and the advancement of learning. The latter of the two sides of the equation was relatively novel and had not previously featured in law or regulation. The State would turn to other remedies to pursue the control of publishing and dissemination for the purpose of censoring and suppressing material and the issue of the balance between control and free speech was to become a recurring, dominant and durable theme in the development of modern societies and their governance. It is a continuing significant issue in the third decade of the 21st century.

In the immediate aftermath of the Statute, the booksellers, that is the publishers, sustained a campaign throughout the 18th century to protect and extend their monopoly. It came to an end with their failure in the landmark *Donaldson v Beckett*[2] case in 1774 (Hesse 2002,37). Although the publishers sought redress by turning to Parliament, they failed and had by then exhausted any significant support for the notion that their monopoly should be preserved. As described by Patterson, the "Battle of the Booksellers" had come to an end (Patterson 1968, 179). Copyright ceased to be a publisher's right and became an author's right in the year 1774, coincidentally the same year that saw the passage of the Coercive Acts bill aimed at punishing rebellion in the American colonies. But soon afterwards the United States was formed, and its own copyright received early attention in its newly forming Constitution.

2 Donaldson v Beckett (1774) 2 Brown's Parl. Cases (2d ed.) 129, 1 Eng. Rep. 837; 4 Burr. 2408, 98 Eng. Rep. 257; 17 Cobbett's Parl. Hist. 953.

Modern Copyright in Selected Jurisdictions

The United States

There is a continuity between the development of copyright law in Britain, and the continuation of its core elements by the framers of the US Constitution. The relevant section of the Constitution, Article 1, Section 8, Clause 8, provides that Congress would "promote the progress of science and useful arts" by securing exclusive rights for authors and inventors (Samuelson 2003, 325). The key elements were the same as in Britain. Copyright must be registered to be exercised; limited terms (14 years renewable once) would apply; and the persons to whom rights were granted were the authors.

A ferment of new ideas and thinking informed the foundation documents and emergence of the fledgling republic. The ideas were debated, discussed, and written about by the leading figures of the day. One idea crystallised as one of the most fundamental and durable issues that has arisen since the foundation of copyright, namely the issue of defining copyright as property. Writing with great clarity about the immense implications for copyright of new digital technology, John Perry Barlow, in his seminal article "Selling Wine Without Bottles", first drafted in 1992, commenced his analysis with the words of Thomas Jefferson from the late 18th century:

> If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. (Barlow 2019, 8).

Jefferson highlighted one of the fundamental concepts of copyright. The content of human communication cannot be contained, although expressions of it may be fixed in material form. Or as Barlow put it, "Throughout the history of copyrights and patents, the proprietary assertions of thinkers have been focused not on their ideas but on the expression of those ideas" (Barlow 2019, 9). It should be added that in addition to the foundational concept that an idea cannot in itself be treated as property, there is another fundamental tenet, which concerns limits to originality.

All events in human activities or decisions, have their origins in preceding activities or circumstances. It is impossible to understand people as individuals or their collective histories without acknowledging this essential and central fact.

Fundamental to many of the deeper debates about what copyright represents, is a recognition that fundamentally nobody is a sole inventor *de novo* of any work or artefact that is brought into being. None of society's creators operates in a void, as a hermitic originator in total seclusion. The balancing of interests in the initial legislative conception of copyright had the effect of seeking to progress learning by allowing authors to share their work for the benefit of others, while being justly recognised and supported. Almost all the subsequent debates about copyright law have been about the extent to which that balancing is even-handed.

France and Germany

In France, similar trends to those in Britain could be seen in the 18th century, in which works requiring approval by censors came to be replaced by new ideas about limitations to privilege in the context of the French Revolution. At one stage the National Assembly decided that an author's work would be public property if s/he had died more than five years before. However, by 1793, the notion of an exclusive right to sell and distribute, with the specification of the term of effect, was enshrined in law (Wikipedia 2022).

In the German states, prior to unification in 1870, there were uneven developments in the granting of copyright to authors. These were strongly influenced by the French civil codes imposed during the Napoleonic period. It is worth noting the broad similarity of developments in Britain, France and the German states from the 18th into the 19th centuries. All embraced the concept of a limited property right in striking the balance between public interest and remuneration to authors (Hesse 2002, 39).

However, an interesting theory advanced by contemporary historian Eckhard Höffner is outlined by Thadeusz (2010) and describes a flourishing publishing industry in the German principalities in the 19th century which stood in complete contrast to the dissemination of works in the Britain. The absence of a law of copyright in various states well into the 19th century, it is argued, led to a much stronger production of titles at comparatively low prices and a flourishing trade based on widely disseminated scientific work.

Global Harmonisation

From the late 19th century onwards starting with the establishment of the Berne Convention in 1886, the notion of minimum standards of national copyright legislation has developed. The concept of the centrality of the author and reference

to limitations and exceptions to copyright, with a threshold provision for what can constitute an exception, including the three-step test, were key features. The three-step test proposed the following three boundaries to the way the exclusive rights of the copyright holder might be limited: *viz* that such limitations ought to apply only in certain special cases; that they should not conflict with the normal exploitation of the work; and that they should not unreasonably prejudice the legitimate rights of the author.

Berne was instigated at least in part through concerns about the author's right/*droit d'auteur* being protected in a world where there was an increasing amount of publishing in countries other than the country of origin with no return to the author. An essential feature was the agreement that copyright exists automatically, that is, it requires no formal process such as registration to be recognised. Subsequent revisions in the 20th century considered the rapid development of new forms of expression with the invention and take-up of new technologies.

Impact of New Technology

It can be seen that the arrival of the technology of printing drove new industries, new economic activity, and new attempts at the monopoly protection of the new activities which in turn generated a reaction and response, particularly as authors and creators developed new ways of thinking about rights in works. Thus far, copyright had been about the protection of printed works.

But in the 19th century, new techniques of reproduction, that is of copying, developed, and ultimately had to be considered in thinking about the relevance and appropriateness of copyright law and regulation. Consider for example the issue of the portability of music. Until recording was possible it could only be reproduced by live players and the only technique available to support such reproduction was the printing of music scores. If an audience in France wished to experience the latest from Beethoven in early 19th century Vienna, the only way to do so was through a real-time performance by live artists. Supporting portability through transcription for smaller ensembles could partly meet the need.

A change in the way that music could be reproduced was just one example of the enormous impact of new techniques and technologies that developed from the mid-19th century. The ability to record visually a person or scene through photography, to record sounds to be played back later via the phonograph; to transmit and amplify sound in new ways to a remote audience in real time, to broadcast to large and dispersed audiences and to capture images visually and

subsequently sound through film have all been technologies which arrived in a few short decades.

The rate of development and refinement accelerated with some essential concepts merging, as in the case where film and broadcast merged to become television. With the arrival of each innovation came the need to think about what might constitute copying. In seeking to protect various creative activities in the context of the intellectual framework of the rights of the author and co-creators, the impetus to update and reframe copyright law, nationally and internationally, gathered a relentless momentum. The way in which these trends developed and the way in which limitations and exceptions to the monopoly of the author came to be considered and legislated are addressed in the succeeding chapters of this book, along with the drive towards global harmonisation of the emerging national approaches.

Back to the Future

Finally, it can be useful and instructive to think about how the initial concepts of copyright described in this chapter have re-emerged in recent decades and become once again unexpectedly relevant. It has been argued that in many ways, eleven to be precise, pre-modern practices and concepts in copyright are being revisited in the 21st century. The similarities include:

- Concentration of power in the exercise and enforcement of copyright in copyright industries similar to the Stationers' Company
- Economic interest taking precedence over a general commitment to the promotion of access and learning
- Overpricing, resulting from the successful exercise of monopoly
- The return, in practice, of perpetual copyrights, remembering that term limitations were not prescribed as matters of law until the Statute, but have been progressively eroded at the behest of large rights holder companies since
- Expansion of exclusive rights, and
- Increasing significance of private ordering and enforcement (Samuelson 2003, 327–338).

In addition to these six, the other similarities are the subsidence of the author, the decline of originality as a constraint on publishers, the unclear origin of rights, the rhetoric of piracy and the increase in criminalisation and penalties associated with infringement. Conspicuously, the expansion of exclusive rights has been realised through extensions of term and the expansion of subject matter with the

result that monopoly has been extended in a way reminiscent of the pre-modern period.

Another similarity can be seen in the contemporary use of private orders and enforcements. As mentioned earlier, the Stationers' Company was a system of private enforcement of copyrights. Recently the rise of private ordering and enforcement has seen surges in activity in the 21st century, to the point where the issue of contracts overriding legislation has been the object of significant attention and formal inquiry, as for example in Australia in 2001–2 (Australia. Copyright Law Review Committee 2002).

In summary, in the two centuries from the invention of printing to the Statute of Anne, the foundation concepts of modern copyright law developed as a result of the impact of the new technology of printing together with the common purpose of the book trade and the State and Church authorities seeking to exercise control over its use. In the context of the development of printing and the new ideas that could be more rapidly disseminated and shared, new views about authorship and a public good developed, and the resulting tensions were resolved to some degree by the crafting of the first copyright law. The law ushered in a new primacy for the rights of the author, but constrained these rights significantly, particularly in comparison with later developments, in the allowable term of operation of the author's monopoly to fourteen years, and in requiring registration.

The role of the initial foundation legislation and approach in relation to subsequent developments and the evolution of an international framework for copyright law, together with widely understood and agreed limitations and exceptions are described in the remaining chapters of this book. Libraries and their roles were specifically recognised in the very first law, and their growing role in acquiring and making available copyright works and furthering the advancement of knowledge and learning, came to signify a pivotal role in the developing pursuit of the goals envisaged at the dawn of the modern copyright era.

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Jessica Coates

2 Fundamentals of Modern Copyright

Abstract: This chapter builds on the historic context of copyright to discuss copyright in the digital era. The fundamentals of the modern international framework are identified along with the norms in terms of subject matter, term and ownership, as well as limitations and exceptions. How copyright operates in practice through licensing is addressed. Finally, the related rights that have emerged over the last century, including moral rights, digital rights management and database rights are touched on. The discussion of the practicalities of copyright is used to demonstrate the ongoing importance of basic concepts, such as balance and the public good. In particular, the ongoing and arguably increasing importance of limitations and exceptions to ensure the efficacy of copyright in the digital age is emphasised. The chapter constitutes both a high level copyright overview for those reading it independently, and a leveller for the rest of the book, ensuring all readers have the common understanding of modern copyright necessary to understand the more complex concepts and aspects addressed in other parts of the book.

Keywords: Copyright – History; Intellectual property

Introduction

This chapter builds on the historic context of the previous chapter to outline copyright in the modern era. It covers the fundamentals of the modern international copyright framework, the current norms of subject matter, term, ownership, exceptions and other essential elements of copyright, including practical aspects of assignment and licensing. This discussion of the practicalities of copyright is used to demonstrate the ongoing importance of basic concepts such as the broad reach of copyright and the role of limitations in maintaining balance and protecting the public good.

The overview is provided in three parts:

- Growth of modern copyright, which provides historical background to the development of modern copyright norms, emphasising the role of copyright treaties in spreading global copyright standards, and
- The broad scope of copyright, which covers the materials protected and the rights provided to creators, emphasising how decisions made in global agreements have led to copyright having an extremely broad reach, arguably more than other intellectual property rights such as patents and trademarks

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– Limits to copyright, which examines the important role limitations and exceptions play in balancing the monopoly granted by copyright and describes how a finite copyright term and sufficient user exceptions are essential to a healthy copyright ecosystem, to ensure copyright itself does not become a barrier to creativity, innovation and cultural growth.

The chapter functions as an elevated copyright overview for independent reading and provides a guide to the copyright fundamentals, ensuring all readers have a common understanding of the basics of modern copyright that underpin the more complex concepts dealt with elsewhere in the book. Most importantly, this chapter seeks to emphasise the importance of balance in copyright law. In order to achieve its purpose of promoting creativity, copyright must provide a balance between the rights of creators to control the use of their works and the rights of others to access and build on the knowledge contained in those works.

Growth of Modern Copyright

The concept of copyright was first codified by the Statute of Anne, passed by the UK Parliament in 1710 to encourage "Learned Men to Compose and Write useful Books", that is, to promote creativity (Paragraph I). It rewarded creators by granting them a monopoly over the reproduction of their works; however, this monopoly was temporary, a mere 28 years, to ensure that it did not become a barrier to the sharing of ideas and the growth of knowledge (Deazley 2003). Over the next few centuries different countries experimented with the best legal settings to encourage creative production without stifling the sharing of knowledge. However, with the emergence of globalism in the early 20th century, modern copyright began to emerge in a surprisingly stable form.

The progress towards a stable global copyright system arguably began in 1883 with the Paris Convention for the Protection of Industrial Property, one of the first international intellectual property treaties. While this treaty did not explicitly deal with copyright law it did introduce the concept of national treatment for intellectual property. In Article 2 members of the treaty agreed to grant each other's citizens the same rights over intellectual outputs their own citizens enjoyed (Bodenhausen 1968, 27). This principle has been retained in most subsequent intellectual property treaties and remains a major incentive for new countries to join the conventions.

Several competing copyright and intellectual property treaties followed, including the 1910 Buenos Aires Convention (BAC), which encouraged use of the

term All Rights Reserved, and the 1952 Universal Copyright Convention (UCC). However, unquestionably the most influential treaty on modern copyright and the only one of this early set which remains relevant is the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention). The Berne Convention was initially completed in Paris in 1886 and revised numerous times until it reached its modern form in 1979 (WIPO 1986). Berne set strong minimum standards for copyright law and, importantly, applied national treatment to copyright for the first time (Article 3). Article 22 took an important step, establishing the body which would eventually become the World Intellectual Property Organization (WIPO), the intellectual property arm of the United Nations and the principal source of global copyright standards today.

Initially, the Berne Convention was signed by only ten countries: Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunisia (Solberg 1908, 9). However, its influence slowly grew and by 1970 it had 60 members. During the 1980s there remained some notable holdouts, including the United States, China and Russia. In 1995 the central Berne requirements were incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and made compulsory for membership of the World Trade Organization. This created the motivation required for global adoption and as of 2021, 179 of 195 countries worldwide have ratified the Berne Convention.

With almost all countries being members of Berne, the non-WIPO conventions such as the UCC and BAC are essentially obsolete (Fishman 2011, 332). However, WIPO itself has continued to develop the global copyright regime, introducing additional treaties such as the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonographs Treaty (WPPT). These treaties are not linked to TRIPS, but nevertheless have had rapid uptake globally, with the WCT and WPPT having 110 and 109 members respectively as of 2021.

Global adoption of copyright has been greatly influenced by human rights law and policy. Article 17 of the Universal Declaration of Human Rights of 1948 (UDHR), for example, recognises the right of a creator to the benefit from "the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." Similar language appears in Article 15 of the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR). The link between intellectual property and human rights has historically been strongest in civil law systems which emphasise the creative work as an extension of the artist as a human being. Taking this into account, copyright protection itself becomes a fundamental human right (Ginsburg 1990).

In recent years the focus in international copyright policy has turned to how human rights support the limitation of copyright. The growing recognition of human rights such as the rights to education (UDHR Article 26 and ICESCR Article

13) and freedom of expression (UDHR Article 19) has been used to argue for the need to balance creators' rights with exceptions that support access to knowledge. In the context of development, scholars argue that the current framework for limitations and exceptions in international copyright law, or lack thereof, does not adequately support human welfare goals such as economic growth in low- and middle-income countries (Okediji 2019).

It is this line of reasoning that has brought us the latest of the WIPO treaties, the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (hereinafter Marrakesh Treaty). This treaty builds on obligations set out in the UN Convention on Rights of Persons with Disabilities (CRPD) to ensure that people with a disability have the same fundamental rights as others to full and effective participation and inclusion in society (CRPD Article 3). Encouragingly, the Marrakesh Treaty has had the fastest adoption rates of any WIPO treaty, with 84 members at the time of writing.

The Broad Scope of Copyright

The cumulative result of the treaties is that, at least at a high level, in the early 21st century copyright law looks reasonably standardised the world over (Ginsburg, 2000). Some question the benefits of such a globalised intellectual property system, especially one with rules and norms drawn from the dominant economic powerhouses of Europe and the United States (Willis 2013; Archibugi and Filippetti 2010). While this chapter touches on such questions, including what the true purpose of copyright should be, its primary focus is a simpler question: what are the rules and norms of copyright? This section outlines the scope of copyright law, including automatic protection, the qualifying requirements for materials, and the materials and activities covered by copyright.

Automatic Protection

The first principle of modern copyright law, enshrined in both the Berne Convention (Article 5) and the TRIPS Agreement (Article 9), is that copyright law applies automatically, without the need for registration, notice or other formalities. Specifically, Article 5(2) of Berne states:

> The enjoyment and the exercise of these [authors'] rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work.

In essence, the moment a qualifying work is created it receives full copyright protection in any Berne or TRIPS Member State.

Prior to Berne, the position on registration was inconsistent across the globe. Article II of the Statute of Anne required registration of a book with the Company of Stationers before protection was conferred and it was common for similar requirements to be applied by common law countries such as Australia and the United States (Australia. Parliament. 2000, 3.28; Gervais and Renaud 2013). Civil law systems were more likely to apply copyright automatically because of their emphasis on copyright as a fundamental human right (Ginsburg 1990). The decision to endorse automatic protection under Berne was controversial and is the principal reason the United States did not join the treaty until 1989 (WIPO 1986, 24–5).

The automatic protection conferred by copyright contrasts with other intellectual property systems, such as patents and trademarks, which explicitly require formal registration for protection. The difference in approach can be explained both by the authors' rights basis of copyright and by the stronger focus on commercial use in other intellectual property systems. Copyright aims to be inclusive of both commercial and non-commercial works and automatic protection maximises its reach, applying it to everything from simple doodles to feature-length films. The lack of formalities ensures the same rights are conferred on all creators, whether professional or amateur, and creates a level playing field, ensuring disadvantaged artists and creators are not required to become legal experts to protect their works.

However, automatic protection also causes problems (Carroll 2014). The supposed level playing field is dramatically undermined by the cost and complexity of enforcing copyright in most systems. As the 2013 report of the US Copyright Office into *Copyright Small Claims* highlights, in practice it is primarily large companies and high-profile creators who are able to enforce their rights. Some of the complexity arises from the lack of registration itself and the difficulty this causes for proving copyright ownership (Van Gompel 2013).

The broad net cast by copyright results in the protection of a large number of works which are rapidly forgotten by their creators. As a result, a large proportion, if not the majority, of copyright material is orphaned, that is unable to be legally used because there is no identifiable copyright owner to provide permission (Lessig 2005; Lessig 2008). This problem is exacerbated by long modern

copyright terms which see many works being protected for more than 120 years after their creation.

The possibility of introducing registration to address these problems has been considered by various governments (Australia. Productivity Commission 2016; Pallante 2013, 337) and countries such as the US and Canada maintain optional registration systems. But in practice the principle that copyright protection should not require formalities is now embedded in both domestic and international systems, and there is no realistic prospect of change in the foreseeable future.

Qualifying Materials

Material granted automatic rights under copyright must still meet certain requirements to receive protection. To attract copyright protection, a creative work must be:

- Original, and not a mere copy
- An expression, as opposed to an idea, and
- In material form, that is fixed in a tangible medium.

Originality

The originality requirement is, on the face of it, straightforward. Copyright protection is not conferred every time a work is printed, photocopied or even pirated but only when a new original work is created. However, determining the exact meaning of original becomes complex. The term is not explicitly defined by the Berne Convention, although the term "original materials" is used (Ricketson 2009; Margoni 2016). Originality is instead prescribed and defined at the domestic level, leading to variance across countries.

Most countries, civil and common law, require a link to an author to be deemed original. The US, for example, requires a work to be the independent creation of its author while German law speaks of personal intellectual creations (Margoni 2016, 6). The European Union (EU) and US also require a creative element, albeit minimal, with a modicum of creativity sufficing in the US.[1] In contrast, other common law countries such as the UK and Australia apply a sweat of

1 For example Feist Publications, Inc., Petitioner v. Rural Telephone Service Company, Inc. (1991) 499 U.S. 340.

the brow test which requires the creator to put only sufficient effort into a work's preparation, regardless of creativity.[2]

For cultural institutions, the inconsistency in approach to originality has come to the fore recently in relation to technical reproductions of public domain works, that is works which are no longer protected by copyright. The issue was highlighted when the UK's National Portrait Gallery challenged the uploading of high-quality images of public domain paintings taken from its website to Wikimedia Commons. Whether reproductions of public domain material count as sufficiently original to attract copyright protection is undecided internationally. Germany recognises copyright in high resolution reproductions of public domain works because of the skill put into creating them[3] (Beck and Von Werder 2019). In contrast, the US in case of *Bridgeman Art Library v. Corel Corp*. rejected such protection without extra creative elements such as composition.[4] Both the European Court of Justice and the UK Copyright Office require the work to be more than a high quality digitisation of an older work (UK Intellectual Property Office 2021a; Rahmatian 2013).

Another hot topic in determining originality is whether the author needs to be human. The debate has been spurred by the famous monkey selfie case[5], which confirmed that, at least in the US, a work created by an animal does not receive copyright protection (Hooker 2020; Guadamuz 2018). The status of works created by artificial intelligence is more challenging and the question as to whether such works are protected by copyright has been the subject of multiple academic papers (Butler 1982; Palace 2019; Ravid 2017). Some countries have legislated to clarify the issue. The UK's Copyright, Designs and Patents Act 1988, for example, protects computer-generated works, granting the rights to "the person by whom the arrangements necessary for the creation of the work are undertaken" (Section 9(3)). However, most countries do not have this level of certainty and the norms regarding protection of non-human created works still need to be settled internationally (Guadamuz 2017).

Expression Versus Idea

The expression versus idea rule states that it is the exact form of expression, for example the sentence or image, which is protected by copyright, not the idea or

2 For example, University of London Press v University Tutorial [1916] 2 Ch 601. 4.
3 Bundesgerichtshof, Urteil vom 20.12.2018 - I ZR 104/17.
4 Bridgeman Art Library v Corel Corp., 36 F. Supp. 2d 191 (S.D.N.Y. 1999).
5 Naruto v Slater, 888 F.3d 418 (9th Cir. 2018).

information it contains. The rule is implied by Article 2(1) of the Berne Convention, which limits protection to the "form or expression" of a work, but is more explicitly stated in Article 9(2) of TRIPS: "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".

The idea versus expression dichotomy is one of the defining characteristics of copyright. It serves a similar purpose as the registration requirement for other intellectual property regimes in that it seeks to ensure monopoly rights granted by copyright do not inhibit the sharing of ideas. The normal exchange of information essential to human society would not be able to continue if, for example, the weather forecaster had a monopoly over the information contained in his report.

Limiting protection to expression ensures common tropes and styles cannot be monopolised. For example, no one owns copyright in the concept of bad guys wearing black, though one might own the characters of Darth Vader and Voldemort. This rule is subjective, however, and its common interpretation has been challenged by the recent US decision of *Williams v Gaye*[6], in which the US Ninth Circuit Court found the 2013 hit *Blurred Lines* infringed the "feel" and "sound" of Marvin Gaye's 1977 hit *Got to Give It Up* (Legaspi 2018). More than 200 musicians (AP 2016) filed an *amicus curiae* brief against the ruling on the basis that it "threatens to punish songwriters for creating new music that is inspired by prior works" (Gardner 2016). The verdict was nevertheless upheld. This decision illustrates the continual vagaries and challenges that are part of modern copyright. Whether it will impact the expression versus idea principle at a global scale is yet to be seen.

Material Form

The final requirement for protection is that the work must have been fixed in material form, that is written down or recorded in some way.[7] One can make the most beautiful, insightful and original speech ever uttered, but if it is not recorded there is no copyright protection. The notion flows from the expression versus idea principle; it is only the expression as it is captured in material form that is protected, not the information or ideas contained. The material form requirement prevents people from claiming monopolies over ephemeral concepts that cannot be verified and helps to determine the point in time when a work has been created and protection begins (Adeney 2009).

6 Williams v Gaye - 895 F.3d 1106 (9th Cir. 2018).

7 For example, Canadian Admiral Corp. v Rediffusion Inc., [1954] 20 C.P.R. 75.

The concept of material form is perhaps the area of copyright forced to adapt the most to rapid technological development over the last century. Traditionally, material form would have meant captured on paper, written down, painted or notated. In the digital era it includes materials recorded electronically on tape, vinyl, hard drive or the cloud. Luckily this adaptation has been fairly successful and the question of whether a work is captured in material form does not usually become a problem in copyright cases.

Protected Materials

As well as meeting the minimum requirements, to qualify for copyright material must fall into specified categories of protected works. Article 2(1) of the Berne Convention provides an extremely broad list of materials eligible for copyright protection, including:

> ...every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Most countries in their legislation summarise this list into categories of protected materials along the lines of the following:

- Literary works, including books, letters, lyrics and tweets
- Artistic works, including maps, photographs, sculptures and works of artistic craftsmanship, that is a one-off handcrafted goods with artistic merit
- Musical works, including compositions and arrangements
- Dramatic works, including choreography and mime
- Cinematographic works, including films and documentaries, and
- Sound recordings, including recordings of music and the spoken word.

The WIPO Copyright Treaty added two new protected classes of materials: computer programs (Article 4) and databases (Article 5). Computer programs have been added to the category of literary works by most countries, with the standard protections and limitations. However, the protection of databases has been more

varied globally (Vincent and Crooks 2014). Some countries, such as Australia and the US, grant databases standard copyright protection as long as local originality requirements are satisfied. On the other hand, the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection Of Databases (hereinafter the European Database Directive) grants low level copyright protection to databases as collections but also creates a separate *sui generis* right specifically to protect databases where there has been a "substantial investment in either the obtaining, verification or presentation of the contents". The additional right was intended to encourage the production of databases in Europe but has been criticised as overly broad and not fit for this purpose (Vollmer 2018). The variable approach makes it difficult to determine whether a particular database is protected under local law. It is usually safe to assume that using information from a database will not be a problem, but copying large sections, including the format and layout, will.

Materials Not Protected By Copyright

The broad categories of protected materials mean that copyright has a very wide reach. As a general rule it is best to assume any creative material is, or at some stage has been, protected by copyright. There are, however, some notable exceptions. Materials generally excluded from copyright protection include:

- Mass produced, utilitarian items. Fashion or furniture, for example, are protected only if they are one-off, handmade objects, such as costumes or couture, that qualify as works of artistic craftsmanship (Scruggs 2007). These mass-produced works might, however, be protected by design law
- Instructions or data, such as mathematical formulas and recipes. While the sentences and illustrations used to describe such instructions can be protected, the basic information, for example, mix one cup of flour with one cup of water, is not (Bonadio and Weissenberger 2021)
- Extremely short works such as titles, headlines and personal names, although they may attract protection in some systems (Hughes 2005). UK courts, for example, have found that headlines may be protected by copyright, and[8]
- Hyperlinks, both as mere instructions and extremely short works. However, this may be changing, with free linking to news stories being challenged in recent years as part of the debate around the future of news services online (Ginsburg and Budiardjo 2017).

8 The Newspaper Licensing Agency Ltd v Meltwater Holding BV [2011] EWCA 890 Civ; [2012] R.P.C. 1.

Creators' Rights

Despite its name, copyright does not simply give creators the right to prevent copying. Copyright grants creators a bundle of monopoly rights which allow them to control different uses of their works. These creators' rights are the focus of the WIPO treaties and are spelled out in detail in the Berne Convention, the WCT and the WPPT. The various rights conferred by copyright are outlined below.

Economic Rights

The primary category of creators' rights is economic rights. They have been included in Berne since its inception, are the principal rights applied by countries globally as part of their TRIPS accession, and are what most people mean when they think of copyright. The bundle of economic rights granted by the WIPO treaties includes:

- Reproduction (Berne Article 9) which prohibits copying of substantial parts of a work. Domestic implementation can differ as to what amounts to a copy and what is substantial. For example, countries differ in their treatment of temporary copies made in the Random Access Memory (RAM) of computers[9]
- Public performance (Berne Article 11) which covers acts such as performing plays, playing music and reciting literary works
- Adaptation and arrangement (Berne Article 12) which covers translations, audiovisual versions and other derivative works. An adaptation will generally receive protection as a separate work, but the permission of the original author must be obtained to make it[10]
- Communication to the public (WCT Article 8) defined as making works available "in such a way that members of the public may access these works from a place and at a time individually chosen by them". This right was introduced by the WCT as part of its modernisation of copyright for the digital age and incorporates the broadcasting right previously prescribed by Berne Article 11bis along with other electronic communications such as making material available online
- Distribution (WCT Article 6) which essentially covers authorisation of sales or transfer of ownership, and

9 Compare the US case of MAI Systems Corp. v Peak Computer, Inc 991 F.2d 511 (9th Cir. 1993) with the UK case of Kabushiki Kaisha Sony Computer Entertainment Inc (t/a Sony Computer Entertainment Inc) v Ball and Others ChD 17-May-2004 ([2004] EWHC 1192 (Ch).

10 Christoffer v Poseidon Film Distributors Ltd [1999] EWHC 262 (Ch).

– Commercial rental (WCT Article 7) which applies only to computer programs, sound recordings and cinematographic works in some circumstances. Importantly, it does not restrict the non-commercial lending of materials by libraries.

Anyone who undertakes an activity covered by these rights with a protected work without the permission of the copyright owner will infringe copyright, unless the use is covered by an exception, as outlined below. The potential infringer could be sued by the copyright owner and in some circumstances, such as commercial scale activities, might be guilty of a crime (TRIPS Article 61).

Economic rights usually vest in the first instance in the author or creator of a work, including works for hire, commissioned works, and works of joint authorship. However, there are common exceptions to this rule, such as works created by employees.[11] Importantly, economic rights can be assigned or transferred to others, usually for remuneration. This enables creators to make economic decisions about their works. For example, an artist may license the right to use a work for certain purposes or sell the rights over the work to a publisher, producer, or commissioner. More detail on licensing and assignment is provided below.

Moral Rights

The transferability of economic rights contrasts with the second category of creators' rights, moral rights. Moral rights were introduced as Article 6bis in the 1928 revision of the Berne Convention and are derived from the civil law tradition's focus on creation as an extension of the artist (Rigamonti 2006). They are designed to protect the authors' personal rights in their works rather than to provide economic recompense. Importantly, moral rights always remain with the original creator of a work and cannot be assigned or waived, although specific consents may be permitted (Rigamonti 2007). The moral rights set out in Article 6bis of Berne include the:

– Right of attribution, incorporating the right to be credited as the author of a work and the right not to have work falsely credited to another, and
– Right to prevent derogatory treatment of the work, that is the right to object to uses that harm or mutilate the work, or in any other way damage the reputation of the author.

11 MEI Fields Designs Ltd v Saffron Cards and Gifts Ltd [2018] EWHC 1332(IPEC).

Although moral rights have existed since at least the late 19th Century, their implementation at a domestic level can still be controversial (Rigamonti 2007, 69). Moral rights are not required for accession to TRIPS and consequently have not been formally adopted by many countries. The US, for example, has chosen not to introduce explicit moral rights provisions into its federal copyright law, instead relying on a patchwork of underlying principles at the federal and state level to provide the protection required by Berne (US Copyright Office 2019).

Technological Rights

The modern WIPO internet treaties, WCT and WPPT, introduced additional rights designed to facilitate control of works using digital technologies. They include the following:

- Prohibition against circumvention of effective technological measures used to protect against copyright infringement (WCT Article 11), that is, technologies designed to restrict unauthorised use of the material, such as copy protection technologies, also known as digital rights management (DRM) or technological protection measures (TPMs), and
- Prohibition on the removal or alteration of rights management information (WCT Article 12), that is, information attached to an electronic work that identifies the rightsholder of the work or otherwise assists with its licensing, such as metadata embedded in a photograph.

Of these rights, the prohibition against circumvention of effective technological measures has proven most controversial. The protection of TPMs has been frequently criticised, primarily for allowing copyright owners to extend their rights beyond those provided by law (Samuelson 1999; Litman 2006; Von Lohmann 2010; Greenleaf et al 2007). Copy protection technologies generally make no allowance for use of material under exceptions like fair use or fair dealing, and do not recognise when materials enter the public domain. While some jurisdictions provide exemptions for permitted uses, such exemptions are often difficult to apply in practice. The Australian *Copyright Act 1968* for example, permits the circumvention of TPMs for a broad range of activities, including anything legal under the library and archive exceptions (s116AN(9) and in the *Copyright Regulations 2017* s40(1)) but does not permit the manufacture, sale or supply of circumvention devices for this purpose (*Copyright Act 1968* ss116AO and 116AP).

Uses Not Controlled By Copyright

The above makes clear the extremely broad reach copyright can have. As a general rule it is advisable to assume any use of creative material is controlled by copyright. However, some activities are not controlled by copyright and can be undertaken without permission. They include:

- Reading or otherwise looking at a work
- Lending a hard copy of a work
- Reselling or gifting a hard copy of a work, which is known as the first sale doctrine. Sale of second-hand goods plays a particularly important part in the copyright balance in many countries (Reese 2003)
- Creating a collage, as long as pre-existing copies of a work are used, and
- Copying of an extremely small or insubstantial part of a work. This is a qualitative rather than quantitative test; it can be extremely difficult to determine what amounts to a substantial part. For example, in Kipling v Genatosan[12] a single verse of a poem was held to be a substantial part (Sale 2020); and in *Hawkes & Sons (London) Limited v. Paramount Film Service, Limited* 28 bars of music was held to be substantial[13].

However, such uncontrolled uses have become increasingly challenged in the digital era. Trying to read or lend a digital work necessarily involves making a copy of it, whether directly by adding it to a friend's device or indirectly via the copy created in a computer's memory when it is opened. Uses can now be controlled or prohibited by rightsholders in ways not possible in the analogue realm. This is a particular problem for libraries in relation to ebooks, with electronic loans illegal in most countries without a licence from the copyright owner. However, the licences offered by publishers frequently limit lending in egregious ways that make it challenging for libraries to purchase electronic works (Giblin et al 2019).

Licensing and Transfer of Rights

Perhaps the most important power granted to creators, central to the copyright bargain, is the right to license or transfer their exclusive rights. This allows creators to make decisions about their works, providing permission for use by others, or selling or hiring the works for remuneration. The rules of licensing and transfer are not prescribed by the WIPO copyright treaties and vary greatly from country

12 Kipling v Genatosan [1917-23] MacG Cop Cas 203.
13 Hawkes & Sons (London) Limited v. Paramount Film Service, Limited [1934] 1 Ch. 593 (C.A.).

to country (Strowel and Vanbrabant 2013). Nevertheless, some standard requirements have emerged internationally from a combination of the basic principles of contract law, deliberate harmonisation, and government replication of successful systems. Assignment versus licence, statutory licences and open licences are discussed in this section.

Assignment Versus Licence

An assignment or transfer of rights is when one or more of the rights of the copyright owner is given to another person or entity, who consequently owns the right/s exclusively. Most countries require such transfers to be formalised in writing and signed. As already noted, moral rights cannot be transferred.

If creators wish to allow someone to use their work without transferring their rights, they use a licence. A licence grants permission for certain uses and may be subject to any number of conditions. A licence may, for example, be limited to certain rights, times, or locations, or can require the licensee to take steps such as attributing the author. Licences can be exclusive, with the person or persons granted the licence becoming the only one/s authorised to exercise the specified rights, even to the exclusion of the copyright owner. However, licences are more commonly non-exclusive, allowing the same material to be licensed repeatedly to different people. In general, legal systems are flexible about the terms and conditions of such agreements and will honour informal licences, such as verbal or implied agreements, as long as they are supported by sufficient evidence.

Any transfer or licence should be voluntarily entered into by the rightsholder after negotiations, although in many cases a power imbalance affects the ability for the parties to negotiate fairly. For example, libraries are often offered *pro forma* licences over resources with little or no chance to bargain or determine terms (Hargreaves 2011, 51–2). Similarly, creators are often given no option to negotiate the end user licence agreements governing the use of their works on popular digital platforms (Elkin-Koren 2009).

Statutory and Collective Licences

Copyright has a strong tradition of statutory or collective licences, where legislation permits specific uses as long as certain terms and conditions are met. Statutory licences have some similarities to exceptions, as they limit the monopoly rights of copyright owners. However, they differ from exceptions as they gener-

ally, though not always, require users to compensate the copyright owner and to meet detailed compliance requirements, such as reporting or tracking of uses.

Statutory licences are commonly employed to facilitate large-scale uses of copyright material not suitable for individual direct licensing but for which compensation is deemed appropriate, such as playing songs on the radio or making study guides for education. The licence is administered by a collective licensing or copyright management organisation, which collects fees from users and distributes them to the relevant beneficiaries including creators and/or publishers. The Australian Law Reform Commission (ALRC) in its Discussion Paper on Copyright and the Digital Economy provides a good discussion of statutory licensing (ALRC 2013, Chapter 6).

Statutory licences are recognised in Article 13 of the Berne Convention, which allows countries to place statutory restrictions on the licensing of musical works as long as equitable remuneration is provided to the author, with the amount to be determined through agreement or by a competent authority. However, today statutory licences come in many forms and apply in many areas beyond music, including educational and government use of copyright materials.

A recent trend in Europe has seen the growing use of a variant of statutory licences called Extended Collective Licensing (ECL). ECL is a collective licence agreed to by the members of a collecting society and extended to non-members' content, allowing the society to collect money for uses now and subsequently seek creators to whom it might be distributed. A mechanism is usually provided to allow rightsholders to opt out of the licence but agreement is assumed in the absence of definitive action. This distinguishes ECL from statutory licences, where rightsholders are entitled to compensation but not to withhold their consent. Such licences have been applied extensively in Scandinavia for broadcasting and other uses and have been used with mixed success for orphan works in the UK (Martinez and Terras 2019). ECL is intended to increase efficiency and reduce transaction costs but has attracted criticism as often being expensive and inefficient (Samuelson 2016). An IFLA Background Paper prepared in 2018 further explores ECL (IFLA CLM 2018).

Open Licences

Another growing global trend in copyright permissions is open licensing. With open licensing, a copyright owner applies a licence to a work which allows anyone who wishes to make use of the work to do so, as long as the person complies with the licensing conditions. Open licences are most commonly applied to works made freely available online, and provide a useful tool to creators who

wish to encourage wide distribution and reuse of their works, whether for philosophical or commercial reasons.

Creators may use personalised licences to achieve this purpose and many website terms of use effectively act as open licences. However, open licensing as a movement has been popularised by a number of standardised licence suites supported by non-profit organisations and dedicated communities. Standardised licences are offered free for any who wishes to use them and have the benefit of:

- Being drafted by highly qualified and experienced lawyers
- Having been tested and upheld in courts
- Ensuring the licensed materials will be compatible for use with other open material, and
- In some cases being supported by technical tools that simplify implementation and increase the discoverability of materials.

Open licensing first came to public attention in the 1990s through the free and open source software movements. These emerged from grass roots programming circles revolving around products such as the Linux operating system and licences such as the GNU General Public Licence. Free and open source licences allow software to be shared freely between users, and edited and modified as necessary to create interoperable and downstream products (O'Reilly n.d.; Volpi 2019). In general, such software licences provide strict rules about how and when materials can be reused, often incorporating copyleft terms that require a downstream product to be licensed on the same terms as the source work to ensure availability for reuse by others (Stallman 2015).

With the arrival of the internet, the ability to share and adapt copyright materials other than software became desirable, and open licensing schemes specifically designed for creative works such as text, images, music and film emerged. Today, the international standard for such content is the Creative Commons (CC) licensing scheme. Launched in 2002, by 2015 more than 1 billion works, from books and films to UN publications and Wikipedia, were using CC licences (Merkley 2015). CC licences are more flexible than the software licences and provide creators with six licensing options derived from different combinations of four basic licence terms: attribution, non-commercial, share alike and no derivatives. CC licences are machine-readable and incorporate metadata which allows people to search for CC licensed materials to suit their purposes. Open licensing has spawned a number of sub-movements, including:

- Open education, which focuses on educational resources and aims to reduce the costs and increase the quality of works such as textbooks by sharing materials

- Open access, which focuses on sharing of academic and research works, challenging the licensing models of the major academic journals, which often couple strict restrictions on access with high licensing fees, and
- Open science, which similarly encourages the sharing of research outputs and supports scientific collaboration and communication of outcomes beyond research communities. It promotes not only open access, but also open licensing of data sets, software and materials needed to reproduce scientific outcomes (Tennant et al 2020).

Although founded in the private law principles of copyright, open licensing was seen initially as disruptive to the traditional copyright ecosystem due to its focus on permitting rather than restricting use of materials (Liang 2007). There has been occasional debate about the enforceability of open licences, as they may not incorporate the offer-acceptance requirements of standard contracts (Wacha 2005). However, open licences have now been upheld by many international court cases and today constitute a common and accepted part of the copyright ecosystem.

Limits to Copyright

As already outlined, the monopoly rights granted by copyright are extensive, covering a broad range of materials and uses. However, copyright is not limitless. From the outset, limitations and exceptions have been an essential part of the copyright ecosystem, as important as the rights themselves to ensure that copyright reaches its goal of encouraging creative productivity and the growth of human knowledge. While the protection afforded by copyright provides an incentive for creators to create and ensures they can recoup costs and earn money from their efforts, the limitations and exceptions ensure copyright does not itself become a barrier to creativity by locking up the previous works on which all creative effort is built.

The discussion of limitations begins with a discussion of the importance of the public domain and the role of copyright terms in fostering the public domain, and moves on to exceptions, discussing why they are needed, the norms in modern exceptions and their growing recognition internationally.

The Public Domain and Copyright Terms

The Importance of the Public Domain

When the term of protection ends for copyright material it is said to have entered the public domain. That is, it becomes part of the vast pool of knowledge that is available for everyone to use and reuse without the need for permission or compensation. This in turn encourages innovation and cultural growth as new creators learn from and build on what has come before them. The ultimate goal of copyright is a rich and vibrant public domain.

To foster the public domain it is essential that the monopoly rights provided by copyright law eventually end. The need for a finite term of protection is a basic bargain central to all intellectual property systems. When someone creates or invents something the law grants that person a monopoly over its use to allow them to recoup costs and even obtain a profit. This gives them an incentive to create. However, the monopoly is only provided on the basis that, eventually, the knowledge contained in the work can be used by others. This trade-off is even more apparent in some other intellectual property systems, such as patents and trademarks, which require material to be published before it can receive protection.

To quote Victor Hugo in speaking to the Congress of Literary, Industrial and Artistic Property, Paris in 1878:

> The book, as a book, belongs to the author, but as a thought, it belongs – the word is not too extreme – to the human race. All intelligences, all minds, are eligible, all own it. If one of these two rights, the right of the writer and the right of the human mind, were to be sacrificed, it would certainly be the right of the writer, because the public interest is our only concern, and that must take precedence in anything that comes before us (as quoted in Boyle 2014).

Challenges to the Public Domain

Despite its importance to copyright, the public domain is constantly being challenged as people seek to restrict or monetize it (Samuelson 2003). Key challenges include the use of TPMs and private licences, as well as moves to extend copyright terms and privatise public domain material through legislative means. Library organisations are often the primary groups resisting these measures and librarians are rightly proud of the important role they play in nurturing and protecting the public domain.

One challenge to the health of the public domain is the occasional call for the removal of copyright terms, either through the introduction of perpetual copyright (Halperin 2007) or the slightly less controversial concept of indefinitely renewable copyright (Landes and Posner 2003). Such calls are usually based on the argument that if other property rights last forever, so should intellectual property rights. However, from a practical point of view, perpetual copyright is extremely problematic. There are strong arguments against perpetual copyright on the basis of economics, as the cost of accessing works rapidly outstrips any benefit to creators; and pragmatism, as all but the most famous works soon become orphaned as copyright owners and their heirs die or become impossible to trace (Australia. Productivity Commission 2016, 132–33).

While some common law countries, including the UK, Canada and Australia, until recently did maintain perpetual copyright for unpublished works, the last twenty years has seen each jurisdiction introduce legislative amendments to introduce finite terms for such material (Deazley and McCarthy 2018). A finite copyright term is essential to, in the words of the Australian government, "allow greater use of the considerable cultural value of these materials… [and] promote the right to enjoy and benefit from culture" (Australia. Parliament. House of Representatives 2017, 48).

Nevertheless, modern copyright is not as finite as it once was. Over the last century there has been a continuous creep in the length of copyright protection, with the US government alone granting eleven extensions in 40 years (Lessig 2005). The result is that today's copyright terms extend far beyond the fourteen years provided by the Statute of Anne or even the life of the author from the original French copyright term (Ginsburg 1990). The frequent extension of copyright terms over the last one hundred years has been criticised by many (Ginsburg 2002). Most famously, in the case of *Eldred v Ashcroft*[14] a group of applicants challenged the US Copyright Term Extension Act 1998, arguing that the repeated extensions amounted to, in Peter Jaszi's words "Perpetual copyright 'on the instalment plan'" (Boyle 2009). The challenge was unsuccessful; however, it did increase public awareness of the importance of the public domain and the threats to it. There have been no petitions for further copyright term extensions as protected works have once again begun entering the public domain over the last few years (Lee 2019).

A more current challenge to the free public domain is the paying public domain (PPD). This is a system adopted by several countries globally which requires those who wish to republish public domain works to pay a fee or tax to the government (Marzetti 2021). The money is then used to support authors or

14 Eldred v Ashcroft, 537 U.S. 186 (2003).

cultural initiatives. The concept of the paying public domain was conceived by Victor Hugo in late 19th century France (Dusollier 2010, 18) but was not adopted by any legal system until Uruguay in 1937, followed closely by Bulgaria in 1939 (UNESCO 1949). Today PPD systems are used primarily by countries in Latin America and Africa as a way of supporting otherwise underfunded artistic sectors or protecting traditional knowledge and folklore against exploitation by commercial entities (Dusollier 2010). PPD systems are often expensive to administer with little benefit to authors, leading many countries which used PPD systems in the past to abolish them (Marzetti 2021; Dusollier 2010). PPD is criticised as an unjustifiable restriction on the public domain which encourages the privatisation of knowledge, reducing innovation and the chance for new creativity (Dusollier 2010). PPD is also criticised as an inadequate tool for protection of traditional knowledge because it provides only economic compensation and does not allow communities to control their knowledge.

Modern Standards for Copyright Terms

So what are the current norms in global copyright terms? The question is not as easily answered as one might think, with copyright terms varying across the globe.

Both the Berne Convention (Article 7) and the TRIPS Agreement (Article 12) prescribe the following minimum copyright terms:

- The life of the author plus 50 years for most published works
- 50 years from publication for anonymous or pseudonymous works
- 50 years from publication or creation, whichever is later, for audiovisual works, and
- A mere 25 years from creation for photographs.

Both Berne and TRIPS mandate that the terms expire on 1 January, making it Public Domain Day, celebrated by many in the copyright community globally (Jenkins 2021).

However, these terms are simply minimums, and neither Berne nor TRIPs sets a maximum copyright term. Many countries have adopted longer copyright terms based on their own legal traditions. Mexico's Ley Federal del Derecho de Autor/Federal Law of Copyright, for example, protects most materials for the life of the author plus 100 years (Article 29) and Samoa's Copyright Act 1998 has life of the author plus 75 years as its standard term (Article 16). However, most countries treat the minimum requirement as the default, and for much of the 20th century the Berne/TRIPs standard of life plus 50 years was the norm for copyright globally.

Over the last two decades this standard has been disrupted by a second de facto international standard arising from bilateral and multilateral agreements. Domestic lobbying by rightsholders coupled with a program of harmonisation as part of Free Trade Agreements (FTAs) has seen many influential countries, including the US, Australia, UK, Singapore, Brazil and most recently Canada and Mexico, extending their copyright terms to life of the author plus 70 years. Article 20.62 of the US-Mexico-Canada Agreement, for example, states "the term of protection of a work, performance, or phonogram … shall be not less than the life of the author and 70 years after the author's death".

These extensions have been criticised as unnecessary and economically harmful to countries which are net importers of IP (Vollmer 2018). However, they are only part of a trend of international copyright norms being challenged by bilateral and multilateral agreements over the last twenty years (Rimmer 2006; Thomas 2007). Those with an interest in promoting stronger copyright laws have found trade agreements to be an easier route for copyright extension than treaties, where a wider range of voices from developing and non-western nations may be heard.

The Berne term of life plus 50 is at times criticised. There is an argument that current terms are economically unjustifiable, as the commercial life for most copyright works is only five to twenty-five years from publication (Australia. Productivity Commission 2016, 127–132). However, others highlight the moral importance of granting creators rights throughout their lifetime (Giblin and Weatherall 2016). Either way, the inclusion of life plus 50 in the WIPO and TRIPS agreements means there is no prospect of the global copyright term dropping below this in the foreseeable future.

Exceptions

The second primary mechanism for limiting the monopoly provided by copyright is the adoption of exceptions which allow materials to be used in certain circumstances without permission. Exceptions protect the general public's rights to access and make use of works during the copyright period and are an essential part of ensuring copyright balance. Whole books are dedicated to discussing exceptions and why they are important. A brief overview of the importance of exceptions and the modern international norms is introduced in this chapter and explored in more detail elsewhere in the book.

Why Have Exceptions?

Exceptions are essential to a functional copyright system. As IFLA puts it:

> Limitations and exceptions benefit society at large as they safeguard fundamental individual user rights, including freedom of access to information and freedom of expression as required in the UN Declaration on Human Rights. They also promote commerce, competition and innovation by fostering the dissemination of knowledge. Finally, they enable the dissemination of knowledge and information by including provisions for libraries, people with disabilities and educators for teaching and research. In many developing and least developed countries, the library is the only source of information for those engaged in educational or training programmes (IFLA n.d., 3).

In summary, exceptions play the following roles in a healthy copyright ecosystem:

- Pragmatic, for example, where it would be impossible to realistically obtain licences for a frequent or valuable use, such as classroom copying or small quotations
- Functional, to fix the inefficiencies or inequities that inevitably arise from a monopoly. For example, exceptions allowing criticism and review counter the risk creators will refuse to provide licences to those critical of their work, and
- Principled, where an exception is required to protect a human right or activity valued by society, for example, creating accessible format texts for people with print disabilities.

It is extremely problematic when exceptions are absent or neglected in a copyright system. It creates barriers to people's participation in society and harms a range of social goods, from free speech to cultural participation to knowledge sharing. When people are unable to legally make use of material in the ways they think reasonable, for example using a quote in a book or blogpost or accessing research material for their study, they are more likely to infringe copyright, whether due to ignorance or disrespect for the law. It can also be economically harmful, with evidence that overly strict copyright reduces innovation and the number of works created (ALRC 2013, para 2.34-2.38).

Exceptions in Berne

Unfortunately, the primary WIPO treaties, Berne, WCT and WPPT, are not strong champions of exceptions. In direct contrast to creators' rights, they do not pre-

scribe a list of minimum exceptions Member States must adopt. The only exception guaranteed under Berne is a right to quotation, with Article 10(1) stating:

> It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.

Berne permits countries to adopt additional exceptions beyond quotation, but provides little guidance on their content. Instead, it allows Member States to make their own judgements as to which exceptions are desirable, stating in Article 9(2): "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases". Article 9 goes on to prescribe minimum requirements that an exception must meet to be allowable, in the so-called Berne three-step test. This states that exceptions must be limited to:

- Certain special cases
- That do not conflict with a normal exploitation of the work, and
- That do not unreasonably prejudice the legitimate interests of the author.

The Berne Convention lists examples of activities, such as teaching, which may satisfy the three step test but which are explicitly not required for ratification (Article 10(2)).

The Berne three-step test is frequently criticised as overly complex or too strongly weighted towards the rights of the creator (Goold 2017). Nevertheless, it is without doubt the global standard in determining appropriate copyright exceptions, and is repeated in TRIPS Article 13, WCT Article 10 and WPPT Article 16. Some nations have even written it into their domestic legislation, with mixed results (Griffiths 2009).

The result of the loose approach to copyright exceptions when compared to creators' rights is that the application of exceptions is far more varied globally. It is not uncommon for countries which have brief copyright statutes designed to satisfy WTO requirements, such as Tuvalu, to have no exceptions in their copyright law. The significant trouble this can cause for the library and education sectors in particular has only been highlighted by the COVID 19 lockdowns of 2020 and 2021, with lack of adequate exceptions becoming a significant barrier to access to information (IFLA 2021; 2022). WIPO's 2015 *Study on Copyright Limitations and Exceptions for Libraries and Archives* notes that 28 countries worldwide have no library exceptions in their domestic copyright statutes (Crews, 2017). As a result, basic library activities such as preservation and digital supply are technically illegal in those countries.

Global Exception Norms

While the main WIPO conventions do not prescribe specific exceptions that countries should apply, global norms have developed around the structure and content of exceptions. Modern copyright exceptions take different forms. There are:

- Flexible or principle-based exceptions, which provide a broad set of rules with which a use must comply to be permitted. Such exceptions give courts discretion to determine whether a particular activity falls within the exception and to adapt the scope of the exception as new technologies and behaviours arise. The primary example is the fair use exception, which allows uses of copyright material that are deemed fair. Fair use originated as Section 107 of the US Copyright Act but has been adopted by many countries globally, including Israel, South Korea and, in a revised form, Singapore (Elkin-Koren and Netanel, 2020). Similar but slightly less flexible are the fair dealing exceptions used by most common law countries, including the UK, Australia, Canada, New Zealand and India, which allow uses that are both fair and for certain prescribed purposes, such as reporting the news or criticism and review (Suzor 2017). IFLA provides an outline of the differences between fair use and fair dealing.
- User-specific exceptions, which grant specific classes of users, such as libraries, schools and organisations assisting people with a disability, the right to use copyright material without permission in certain circumstances. Such exceptions, for example, commonly allow libraries to preserve materials and supply them to clients (Crews 2017).
- Use-specific exceptions, which permit prescribed activities in prescribed circumstances. They can generally be used by anyone but frequently require the user to meet complex compliance steps. As a result, they are more certain than principle-based exceptions, but cannot adapt easily as technology and behaviour changes. An example is the private copying exception in Article 31(2) of the Spanish Copyright Act.[15]

Civil law countries tend to favour the certainty provided by use- and user-specific exceptions, while common law countries are more likely to use a combination of flexible and specific exceptions. Individual exceptions themselves often combine functions and forms. For example, s200AB of the Australian *Copyright Act 1968* allows specific users, that is, cultural and educational institutions, to

15 Law 21/2014, of 4 November, amending the consolidated text of the Copyright Act, approved by the Royal Legislative Decree 1/1996, of 12 April, and the Civil Procedure Act 1/2000, of 7 January ("Law 21/2014").

make flexible uses of copyright materials. It has a pragmatic purpose, permitting uses too unusual to be captured by other exceptions; a functional purpose, ensuring libraries and schools are able to operate efficiently and effectively; and a principled purpose, protecting the rights of education and access to knowledge.

Most countries with a well-developed copyright system will at a minimum include exceptions in the following areas, each of which represents a socially beneficial use correlated to a recognised human right such as access to education and freedom of speech:

- Research and study
- Reporting the news
- Criticism and review
- Teaching
- Library and archive activities, and
- Access for people with a disability.

These norms came close to codification at the international level in Article 18.66 of the now defunct Trans-Pacific Trade Partnership, which in its final form mandated:

> Each Party shall endeavour to achieve an appropriate balance in its copyright and related rights system, among other things by means of limitations or exceptions ... giving due consideration to legitimate purposes such as, but not limited to: criticism; comment; news reporting; teaching, scholarship, research, and other similar purposes; and facilitating access to published works for persons who are blind, visually impaired or otherwise print disabled.

Despite the emergence of such norms, the treatment of even common and valuable activities such as parody and pastiche is far from uniform, with conflicting rules across the world. For example:

- French law protects "parody, pastiche and caricature"[16]
- Australian law provides no protection for pastiche but does allow "parody and satire" (*Copyright Act 1968 (Cth)* s41A)
- US fair use decisions have protected parody and pastiche, but not satire, as demonstrated in *Dr Seuss Enterprises LP v Penguin Books USA Inc*[17], and
- UK and South African law provides no clear protection for any of the above, unless the activity can also be held to be criticism and review (Visser 2005).

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16 Article 122-5.4 n 4° of the Loi du juillet 1992 relative au code de la propriete intellectuelle (WIPO English translation. https://www.wipo.int/edocs/lexdocs/laws/en/fr/fr467en.pdf).

17 Dr Seuss Enterprises LP v Penguin Books USA Inc & An 75109 F 3d 1394 (9 Cir 1997).

Legislative change to clarify or add exceptions is today harder than ever, with significant lobbying power marshalled globally against proposals to allow greater user rights. The strong opposition that can arise to new exceptions is demonstrated aptly by the recent US government decision, spurred on by large US rightsholder representative groups, to threaten trade sanctions against South Africa if it adopted a fair use principle based on the US model (Kayali 2020). Opposition to new exceptions is less of a problem in countries with flexible copyright exceptions which can adapt to the changing world. However, in those countries that rely primarily or exclusively on specific copyright exceptions it can lead to absurd results, such as the use of video recorders being illegal in Australia until 2006 (Giblin 2019).

Problems arise when exceptions can be excluded by private agreement. Currently there is no global rule about which should take precedence when a private contract prohibits a use permitted by a legislative exception. Some countries, such as the UK and Ireland, have sought to clarify through legislation which of their laws can be overruled by a licence and vice versa; but the laws of most countries remain silent as to whether a licence can exclude or override a copyright exception on the matter. IFLA has provided an overview of the situation (IFLA 2020).

Exceptions in Treaties

The tide may, however, be turning towards improved recognition of copyright exceptions, with their importance increasingly acknowledged in global copyright policy in recent decades. For example, the Preamble of the 1996 WCT explicitly recognises "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information".

The increasing emphasis on exceptions in international forums culminated in 2013 when, after over 120 years of global copyright treaties, WIPO adopted its first exceptions-based copyright treaty, the Marrakesh Treaty. The Marrakesh Treaty translates human rights such as the right to education and the right to inclusion in society into copyright law by requiring its members to adopt specific exceptions that recognise the right of people with a disability to access knowledge. It aims to address one of the biggest ongoing areas of discrimination against people with a disability, namely the book famine (Inés Simón 2020). This is a market failure which has left very few published materials available in formats accessible to people who experience barriers to reading, such as those with a vision impairment.

Upon signing the Marrakesh Treaty, States agree to ensure that copyright law does not prevent:

- The making of accessible format copies
- The supply of accessible format copies by authorised entities, for example disability groups, educational institutions and libraries
- The making of personal use copies where an individual has lawful access to an accessible format copy, and
- The import and export of accessible format copies, where they could have been legally made domestically.

Importantly, the Marrakesh Treaty applies not only to those with visual impairments or reading difficulties but also to any person who has a physical disability that prevents them from reading, for example because they are unable to hold or manipulate a book (Article 3).

The Marrakesh Treaty was strongly resisted by publishers and other rightsholder groups worried about the precedent it would set on global norms for copyright exceptions (Suzor 2013). During negotiations rightsholder advocates argued the rights of people with a disability were more appropriately recognised at the domestic level, and that a global treaty was unnecessary. Disability advocates, in contrast, pointed out that without a cross-border instrument such as a treaty it was impossible to support international sharing of accessible materials between markets, which is essential to address the book famine (Harpur and Suzor 2013). Vigorous lobbying for restrictive interpretations of the text still exists in many countries (Inés Simón n.d.).

The success of Marrakesh and its rapid adoption globally is held up as an example by communities seeking to persuade WIPO to develop treaties that set minimum user rights in other areas. The library community, for example, has advocated for many years for a treaty similar to Marrakesh to cover the basic exceptions required to support the operation of libraries, or at the very least the cross-border preservation and access exceptions necessary to preserve culture in the context of climate change (IFLA 2017).

Conclusion

There is no question copyright law varies greatly from country to country. An activity which is legal in one country may not be in another and vice versa. Nevertheless, thanks primarily to a series of international treaties supported by WIPO and the WTO, a common set of values and norms underpins all copyright globally.

This stable international framework has arguably allowed copyright to adapt to the rise of the internet and the globalism it has brought. However, technological advancement has seeded competing trends. As copyright owners have used digital locks, licences and free trade agreements to extend their already broad reach, a growing awareness of the importance of user rights and the need to provide balance through limitations and exceptions has emerged. It is important that the library and legal communities continue to track the norms of copyright and where necessary work to shape them, to ensure copyright continues to serve its ultimate goal of the growth of creativity and all human knowledge.

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Part II: **User Rights and the Public Interest**

The importance of the public interest in copyright policy and practice, and the vital role libraries play in supporting it

Victoria Owen

3 With Respect to Rights – In the Public Interest

Abstract: This chapter deals with respecting copyright: the rights of the author, the rightsholder and the rights of the user in digital and print environments. It reviews the rights, the balance of rights, and how balance is upheld from the perspective of information professionals. It covers approaches to consider as librarians and archivists interpret and navigate the rights and limitations of copyright in practice and seek to understand the international framework of copyright in the context of international treaties and trade agreements. The role played and the responsibility exercised by librarians and information professionals in the copyright space is addressed. Librarians and information professionals must continuously clarify the boundaries of exceptions and limitations to creator rights; respect hard boundaries of rights where they exist; make use of ambiguity in the law to fully occupy the public policy space created for users' rights; and articulate the associated rights, such as access to and preservation of works for society's benefit.

Keywords: Library copyright policies; Copyright – Electronic information resources; Fair use (Copyright)

Introduction

Copyright involves a plethora of rights. This chapter is directed towards information professionals and discusses the rights involved in copyright and the balance of rights. It presents a users' rights and public interest approach to navigating the rights vested in copyright. The societal role of libraries, archives, and museums (LAMs) to provide access to information and preserve knowledge is incessantly under threat from extension of rights and the creation of new rights in the digital environment (Craig 2017, 6). LAMs staff must master the issues related to digital content, especially in regard to preventing overreach from rightsholders. Equally importantly, staff must advocate for the public policies required to fulfil government mandated objectives to provide access, support research, innovation, and lifelong learning, and recognize and champion the human rights that underpin them. Simultaneously, the limits of copyright must be recognized along with the existence of the multiplicity of rights schemes that exist, for example, with Indigenous knowledge, similarly underpinned by customary law and international convention.

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The unique functions and guarantees of LAMs are threatened by online tracking of all uses of works, expansion of rights in the digital realm, and the encroachments on the public domain through the continuous expansion of rights-holder rights. In the copyright regime, the purpose of users' rights, including exceptions and limitations for LAMs, is to ensure the essential balance in the rights scheme, and safeguard the public interest to protect it from incursion and from being subverted and subsumed by private interests. LAMs are society's safe havens, where access to information and cultural preservation are facilitated and safeguarded. The role of information professionals must be specific, and clearly articulate, promote, and represent information rights in the public interest, and defend against incursions into the public interest in information curation and transmission.

Preliminary Note

This chapter is written in the context of the western tradition of copyright and provides examples from Canadian law and cases. The rights of copyright from this perspective are entirely determined by statute and jurisprudence. In other non-western rights contexts, such as Indigenous societies, a multiplicity of regimes of rights and laws exist (Nayyer 2021, 197). Indigenous knowledge systems, recognized internationally under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2007), are governed by Indigenous laws which dictate who can access certain works as well as if and how works can be used, copied or articulated (Callison et al 2021). Information professionals need, at a minimum, to be aware of the multiple systems of rights and conflicting laws; recognize, respect, and integrate other legal norms and processes into professional practice; and create a relationship with the originating communities to develop culturally appropriate protocols around copyright (Callison et al 2021). A chapter on Indigenous knowledge elsewhere in this book explores the issues further.

The Rights of Copyright

Libraries, archives, and museums deal with copyright as an integral part of their operations. The acquisition, use, and preservation of works puts information professionals squarely in copyright's frame: LAMs staff regularly negotiate terms to allow access, at a price, and prevent overreach from licensors or the waiving of statutory rights of access and use (Brown 2008, 182). As a result, there is wide-

spread awareness among information professionals of many of the rights of copyright.

Economic and moral rights are granted through copyright, along with their limitations (Brunet and Wakaruk 2019, 61), and originate in national legislation. Copyright statutes normally establish three sets of rights: (1) economic rights; (2) moral rights, vested in creators and rightsholders; and (3) users' rights, often expressed through limitations and exceptions to economic rights.

Economic rights are enumerated rights and the most prominent rights in the copyright regime. They include the right to produce and reproduce; to make sound recordings or cinematographs; to perform in public; to translate; to convert to another type of work; to communicate the work; and to authorize any of the creator's exclusive rights. The rights of copyright are listed in the legislation of most countries, for example, in section 3 of Canada's Copyright Act. Broadly stated, copyright embodies the right to copy and to communicate the work. The rights of copyright are limited, and they expire after a certain period of time (Kur 2009, 289). The creators are generally the first owners of copyright, and can assign the copyright to an entity, such as a publisher (Vaver 2011, 125).

Moral rights are less prominent: they are usually relevant to the individual author, (Vaver 2011, 10) and "act as a continuing restraint on what purchasers can do with a work once it passes from the author" (*Théberge v. Galerie d'Art du Petit Champlain inc.* 2002, 22).[1] Moral rights are seldom invoked, and not as frequently mentioned or widely studied as economic rights (Théberge v. Galerie d'Art du Petit Champlain inc. 2002, 12; Wilkinson 2016, 116). Moral rights relate to the ongoing relationship between the creator and the work and protect the work from any modification or association that prejudices the honour or reputation of the creator (LaFrance 2020, 43). They can be the only remaining connection between the author and the work once all other rights have been transferred to a corporate entity, such as a publisher (Wilkinson 2016, 115) and in some jurisdictions moral rights cannot be transferred from the copyright owner. Moral rights typically pertain to attribution, that is the right to have the author's name associated with the work, and they provide recourse if the work is distorted, altered, or associated with a product that impugns the reputation of the creator (Judge and Gervais 2011, 69). While the more familiar right of attribution is a moral right that is frequently cited as a standalone right, it is not often referred to in association with the umbrella term. Moral rights are not as universally understood in comparison to economic rights.

Users' rights are less well understood (Patterson and Lindberg 1991, 191), however they are beginning to be expressed more positively (Vaver 2013, 667).

1 Théberge v. Galerie d'Art du Petit Champlain inc., [2002] 2 S.C.R. 336, 2002 SCC 34.

Users' rights pertain to uses of works where no permission or authorization is required. Limitations and exceptions to copyright, referred to as users' rights, are "entitlements to the products of authors" (Fewer 1997, 58), activities that by law are not infringements and so are "beyond the owner's control" (*Reference re Broadcasting Regulatory Policy and Broadcasting Order*[2] 2012, 58). Copyright statutes provide "user rights such as fair dealing and specific exemptions that enable the general public or specific classes of users to access protected material under certain conditions" (*Reference re Broadcasting Regulatory Policy and Broadcasting Order* 2012, 36). An interpretation of the CCH fair dealing case, *CCH v. Law Society of Upper Canada*[3] often referred to as the librarians' case in Canadian jurisprudence, states that "[t]he Court posits the existence of a conflict, as it were, between the author's exclusive right and the user's 'right', and concludes that Parliament decided on public policy grounds to halt authors' rights at the wall of fair dealing" (Judge and Gervais 2011, 83). "Users thus have rights to do what owners had no right to stop them from doing; user rights began where owner rights stopped" (Vaver 2013, 661). Indeed, the CCH case gave fair dealing a "special status among exceptions" and placed it on a "normative level close or equivalent to" creator rights (Judge and Gervais 2011, 82).

The most common users' rights include unsubstantial uses, fair use/fair dealing provisions, exceptions for educational institutions, libraries, archives, and museums, and for creating works in alternate formats for people with print disabilities. The great majority of the rights of copyright, listed above, belong to the creator or rightsholder, but they are limited and offset by users' rights (Figure 3.1). Economic and moral rights protect the private interests of creators and rightsholders; the public interest in copyright is vested in users' rights (Owen 2012, 808). While often fewer in number, users' rights provide and protect the important and significant aspects of the public interest in copyright that is associated with "the encouragement and dissemination of works of the arts and intellect" and bring balance to the rights of copyright (*Théberge v. Galerie d'Art du Petit Champlain inc*. 2002, 30). Along the margins of rights exists a legal grey area where the ambiguities in the law are worked out through the courts with context-specific fact sets brought before them (Figure 3.1). The legal grey areas offer a space for users to experiment and allow the nuances integral to copyright law and its public policy objectives to be thoughtfully considered (Gillespie 2007, 59).

2 Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168, 2012 SCC 68, [2012] 3 S.C.R. 489.

3 CCH Canadian Ltd. v. Law Society of Upper Canada, [2004] 1 S.C.R. 339, 2004 SCC 13.

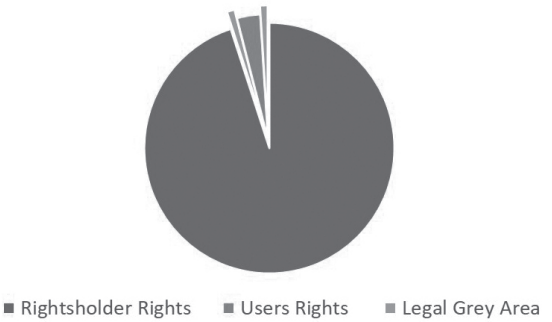

Figure 3.1: Conceptualization of the allocation of the rights of copyright

The International Context

The rights of copyright are underpinned by international treaties and trade agreements. Copyright exists as a cultural policy tool, to achieve societal benefits and to incentivize creators. Dating from England's Statute of Anne in 1710, copyright was originally conceived to promote learning and regulate trade by curbing the monopoly of publishers (Patterson and Lindberg 1991, 28). It is where the concept of balance originates. The Statute of Anne introduced a limited term to copyright, with renewal provisions, and in so doing ended perpetual copyright and created the public domain (Patterson and Lindberg 1991, 29). Other countries, such as the United States, modelled their copyright laws on the Statute of Anne, however it was the Berne Convention for the Protection of Literary and Artistic Works in 1886 that markedly advanced statutory provisions and international norms in copyright regimes worldwide (Crews 2008, 19).

Berne created a union of states that agreed on a standard set of rights for creators. In addition, the Berne Convention established that limitations and exceptions to copyright must comply with the minor exceptions article, Article 9(2). This provides the following three-step test: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". However, there is an awareness "that certain public interest considerations related to information and the press trump exclusive copyright rights", forcing rightsholder interests to yield beyond current exceptions (Gervais 2008, 10). The right to information and the rights of the press extend the flexible boundaries of exceptions in Berne. The minor exceptions article in Berne is non-binding

and guides legislative enactments of exceptions and limitations, with exceptions open to legal interpretation.

Copyright interests appear in other international documents. The Universal Declaration of Human Rights (UDHR) of 1948 includes both Article 19 (https://www.un.org/en/about-us/universal-declaration-of-human-rights), which provides for freedom of expression and the right to seek, receive and impart information, and Article 27, which provides for the right to participate in the cultural life of the community, and the right of authors for the protection of moral and economic interests in their productions (United Nations. 1948). The International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966 (United Nations. General Assembly 1966) provides within Article 15 that everyone has the right to take part in cultural life and enjoy the benefits of knowledge, and that the author has the right to benefit from economic and moral interests in their productions. Copyright law becomes explicitly and firmly fixed within the human rights charter (Wilkinson 2016, 110), both for the creator and the user.

The international, independent copyright framework, established with Berne, became part of the public international law system in 1974 under WIPO, a United Nations organization (WIPO n.d.). Copyright law subsequently entered the ambit of international trade and since 1994, the World Trade Organization (WTO) has incorporated and expanded many of the Berne provisions into the Agreement on Trade-Related Aspects of Intellectual Property [hereinafter TRIPS] (World Trade Organization n.d.). TRIPS made enforceable the Berne provisions through WTO mechanisms and made manifest the impact of trade agreements in shaping domestic law and cultural policy (Crews 2008, 20). As a result, today copyright law is shaped by both public international law and international trade agreements.

Users' rights are recognized in many countries yet remain conspicuously absent in international treaties and trade agreements, in contrast to rightsholder rights. The agenda of the WIPO Standing Committee on Copyright and Related Rights (SCCR) has included limitations and exception for libraries, archives and museums for more than a decade, supported by studies (Crews 2008; 2015; 2017; 2019) and draft treaty proposals including Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives WIPO SCCR/22/12 2011 (WIPO SCCR 2011a) and Proposal on Limitations and Exceptions for Libraries And Archives Document presented by Brazil, Ecuador and Uruguay SCCR 23/5/11 (WIPO SCCR 2011b) have been discussed. In addition to the Canadian and American courts' views of fair dealing and fair use as rights, the law of users' rights, with variations, "are recognized in Australia, New Zealand, Singapore, India, South Africa, the United Kingdom, Israel, Malaysia, Poland, and South Korea" with implications in the

international sphere. However, with one exception, no substantive, international engagement with users' rights has taken place (Logvin and Smydo 2020).

The one exception to the recognition of users rights in treaties is the recent adoption of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. The Marrakesh Treaty is distinctive and historic because it is the first treaty with a human rights focus at its core (Helfer et al 2017, 2; WIPO 2013) and it is the first users' rights treaty in the history of WIPO. It seeks to ensure that the "discriminatory barrier to access" to alternate format works, caused in part by "laws protecting intellectual property rights" is resolved through mandatory limitations and exceptions to copyright (United Nations Convention on the Rights of Persons with Disabilities 2006, Article 30(3)). While the Marrakesh Treaty is a momentous international agreement, and significantly, the fastest moving treaty in the history of the WIPO organization (Gurry 2018), it remains the only international agreement dealing with users' rights and the harmonization of limitations and exceptions. It offers a counterpoint to the continuous push for international harmonization and expansion of rightsholder rights (Khan 2008). The record rate of positive response and adoption of the Marrakesh Treaty and the recognition, by WIPO Member States, without exception, of the national value of libraries and archives (Wilkinson 2016, 125) supports engagement at the international level to advance the work on mandatory limitations and exceptions for libraries, archives, and museums.

Achieving Balance in Copyright

Copyright law is framed in terms of balancing the interests of content creators with the public interest of providing the widest possible access to content (WIPO n.d.). Balance in copyright is the weighing of the competing rights and interests of rightsholders and users; it is an elusive and pliable concept (Hutchison 2016, 2–3). The balance metaphor in copyright can be conceptualized as "simultaneously advancing all interests and concomitantly not overly advancing any one interest" (Hutchison 2016, 2). In Canada, the Supreme Court explained that the balancing of rights between the copyright owner and the public interest is the objective of the copyright statute: "The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator. The proper balance among these and other public policy objectives lies not only in recognizing the creator's rights but in giving due weight to their limited nature" (*Théberge v. Galerie d'Art du Petit Champlain inc.* 2002, 31).

Balance in copyright is not an equilibrium of opposites, nor is it a static balance, but rather a continuous adjustment of social, cultural, economic, and legal inputs and processes (Mandic 2011, 14). Users' rights are regarded "as an important tool to balance "protection and access" sensitively, to further the public interest in making culture widely available" (Vaver 2013, 669).

The role of LAMs is intrinsically entwined with the public interest in copyright as they inhabit a unique societal role and public policy space to provide equitable access to culture and information and to preserve knowledge. Legislatures worldwide recognize the special function of libraries and employ copyright exceptions and limitations for libraries to deliver on government public policy objectives around research, innovation, and lifelong learning (Crews 2015, 6).

Balancing the copyright owner's rights with the public interest is the objective of copyright and governments achieve that balance "by granting extensive (but limited) economic rights and moral rights to creators and copyright owners, and by granting a few exceptions to these economic rights to users, libraries, archives, museums, educational institutions. These exceptions are intended to serve the public interest" (Owen 2017).

Users' Rights in The Public Interest

Apart from the Marrakesh Treaty, the copyright system has been in a continuous process of expanding or "ratcheting up" the rights of authors and rightsholders (Sell 2010, 1) and in a rush to claim new territory in the digital realm (Craig 2017, 6). At the same time, the absence of mandatory limitations and exceptions for society's cultural institutions, LAMs, "is increasingly a key impediment to access to knowledge goods" (Okediji 2017, 491). At the international level, negotiations on a draft treaty for limitations and exceptions for LAMs, after initial progress when the draft treaty was introduced in 2011, have largely stalled (Okediji 2017, 492). The topic of limitations and exceptions for LAMS remains on the SCCR agenda in 2021 (WIPO 2021b), but since 2014, with the lack of consensus among Member States to continue text-based work on the draft treaty, progress is halting (Wilkinson 2016, 124). This imbalance in attention and norm-setting work leaves essential stakeholders in the copyright environment without adequate users' rights.

Users' rights remain largely unwritten (Patterson and Lindberg 1991, 5). They reside within the scope of fair use or fair dealing, within other exceptions, in non-substantial takings, in ideas and facts, and any uses or area of rights that are not otherwise captured. They exist in relation to rightsholder rights, and "are

in tension with the rights of the copyright holders" (Hutchison 2016 25). Because users' rights are often unwritten, or written in statutes in purposefully ambiguous language "to indicate indeterminacy" (Poscher 2012, 1), the ambiguity of users' rights must be resolved through context (Poscher 2012, 3). Ambiguity and indeterminacy are valuable and beneficial constituent parts of the copyright regime that can be claimed by information professionals in asserting rights for users. For example, information professionals regularly confront ambiguity when applying the concept of technological neutrality in digitizing works and making them available in a controlled digital lending program. "The lack of certainty, i.e., whether certain acts fall within the scope of an exception to copyright infringement, should not be a bar *per se* to qualify exceptions as rights giving rise to claims" (Chapdelaine 2013, 32).

There is a dynamism in the ambiguity and indeterminacy of the law that depends on corresponding, dynamic, nuanced legal flexibilities and principles (Patry 2011, 13). While "the acts for which it is uncertain that the exception would apply could be ascertained later on, e.g., through court judgments", the information professional should utilize the ambiguity and indeterminacy integral to the scope of users' rights when uses do not clearly fall within the exception, recognizing that asserting such claims invoke fears of liability (Chapdelaine 2013, 32). The prospect of taking court action is intimidating, but this venue is the locus of the determination of user rights.

Copyright is a public system of property rights that confers private rights in return for societal benefits, the public interest stake in the copyright regime (Owen 2014, 8). The public interest in copyright is advanced through LAMs because of their unique societal role to provide equitable access to information and to preserve knowledge in all its forms. The public interest can be used as a proxy for fairness in the discourse around access (Mysoor 2018, 9). LAMs "are inextricably linked to the encouragement of learning and the dissemination of knowledge" (Owen 2012, 808) and around the world "they represent the most accessible and dependable sources of information, scientific materials, and knowledge" (Okediji 2017, 493). Legislatures worldwide have long recognized the special function of libraries and many of the government's public policy objectives around research, innovation and lifelong learning are achieved through copyright's exceptions and limitations for libraries (Crews 2015, 6). Balancing the copyright owner's rights with users' rights in the public interest is the objective of copyright and in tackling that balance governments endeavour to resolve "the central problem of copyright law" (Landes and Posner 1989, 326).

Advocates: The Role for Information Professionals

LAMs are integrally involved in the historical and statutory copyright environment. Libraries have a long history, predating copyright, of acquiring and lending works for free (Katz 2016, 82) and reducing financial barriers to access to information (Williams and Sloniowski 2012, 11); they provide access to a wide range of material, in both the public domain and copyright, long after works are no longer commercially viable. LAMS preserve all forms of works and fulfil an essential societal role of facilitating access to all forms of knowledge and cultural expression. New intellectual property is predicated on the foundation of the old and is fuelled by the holdings of works entrusted to LAMs (Henderson 2019, 2). "Libraries [archives and museums] are the places where the public and the proprietary meet. The multiple roles of [LAMS] as social organizations address the balance in the law, and are shaped by it" (Henderson 2019, 2). In serving the public interest in copyright, LAMs "are critical to providing access to information to the public, supporting learning and research, promoting the free flow of information, preserving cultural heritage and encouraging free expression" (Owen 2012, 808).

LAMs operate at the fulcrum of copyright's balance (Owen 2012, 808) respecting and acknowledging rightsholder rights, mindful of their limits and attempts to overreach (Twigg 2012, 31) and simultaneously promoting users' rights in the public interest. Information workers and their professional associations are deeply involved in advocating for cultural institutions and their users (Wilkinson 2016, 122). Copyright scholar, Daniel Gervais, recognizes the unique role of librarians as advocates and actors in fulfilling the purpose of copyright:

> [Librarians] allow end-users to access human knowledge, whether in the form of books (CCH) or via the internet. Those end-users have a right of access and that right must not be interfered with lightly. As facilitators of this kind of access... librarians and ISPs interests must be safeguarded" (Gervais 2005, 325).

Information professionals are ideally situated to uphold the statutory balance in the rights of copyright, in the digital and analogue environments and to advocate for fairness and equivalence as digital rights are shaped (Henderson 2019, 2). Without adequate, international, mandatory exceptions for LAMs for preservation and access, the record of the world's cultural history is at risk.

> A consistent, coherent international approach to users' rights becomes more important as copyrighted works continue to circulate digitally without regard for international borders. With the rise of artificial intelligence (AI) in particular, stakeholders ... have asked that users' rights... be expanded to allow for an AI to view or analyze copyrighted works

> without this infringing copyright, as AIs need to "use" large volumes of works in order to learn. With AIs accessing works on the internet and then in turn disseminating the results around the world, a consistent international approach to users' rights will become increasingly necessary. This is also an ongoing issue in more traditional industries, such as educational publishing, as publishers may sell their works in multiple jurisdictions, each of which may have a different approach to users' rights in the education sector (Logvin and Smydo 2020).

Mastery of the current copyright challenges by information professionals requires skills to advocate in an environment where users' rights are largely unwritten, and knowledge of the rights of copyright as they are expressed in the statutes. If the right is not stated in the law, the right does not exist, and there is no prohibition on any undefined or unenclosed use. Users' rights and the rights of LAMs are elusive and pliable; they are ambiguous and need a context for the framing and capturing of rights for the public interest. The information policy statute is skeletal for a reason. The courts make decisions on specific fact sets, and the consistent actions by librarians and information professionals shapes and influences customs and practices and can be influential in the courts (Patterson and Lindberg 1991, 10). In the end, the courts are the sole arbiter of the public interest in copyright (Owen 2012, 839) and LAMs and information professionals are responsible for creating the compelling fact sets that are placed before the courts, to influence and shape jurisprudence in their home policy space.

National associations in the LAMs sector have a role to play in advocating for information policy at the national level, and in concert with international initiatives. For example, the International Federation of Library Associations and Institutions (IFLA) and in particular its Copyright and Other Legal Matters (CLM) Committee, works through its membership of national associations to advocate for the importance of copyright changes and the SCCR agenda for limitations and exceptions to libraries (IFLA 2013). Mandatory, harmonized limitations and exceptions for LAMs to enable the public interest role of libraries would include cross-border uses of works; library lending; preservation of library and archival materials; use of works for education, research and private study; use of works for personal and private purposes; unenforceability of contractual clauses to override exceptions to copyright; the bypass of technological protection measures that block use of exceptions; text and data analysis; and limitation on liability (IFLA 2018). IFLA is a part of an international group of information professional advocates that operates at the international level at WIPO, as representatives from their respective national and international library, archive, and museum organizations (WIPO 2021a). They deliver a consistent and coherent, principle-based, advocacy position (IFLA 2009). LAMs that exist to serve the

public and are recognized by the state to discharge their responsibility in serving the public interest, are striving to create an international treaty to protect users' rights (Wilkinson 2016, 125).

Conclusion

Globally, copyright law is at the forefront of a formative turning point as it pertains to public interest and access to information. Copyright statutes seem "designed by big business for big business", with advocates for the public interest cast as "passive viewers – to be affected, but not themselves to affect anything" (Vaver 2011, 667). The time is now for LAMs and information professionals to inhabit their malleable policy space, with its legal grey areas (Figure 3.1) and statutory flexibilities, and actively shape copyright law in the public interest, by seeking to present context-specific fact sets in front of the courts.

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Jonathan Band and Brandon Butler

4 Why Libraries Need Limitations and Exceptions

Abstract: Limitations on the exclusive rights granted to authors are essential to maintain a balance between the interests of established creators and new creators, and between copyright holders and the public. Balance in copyright is also crucial to ensuring that libraries can serve their essential functions of collecting, preserving, and making available diverse collections in support of the public interest. Digital technology presents libraries with opportunities and challenges. On the one hand, digital technology facilitates the making of preservation copies, the creation of new research tools like databases for text and data mining, and the transmission of copies to users. On the other hand, it often is unclear how an exception written for a pre-digital world applies to digital technology. An increasing number of countries are prohibiting the enforcement of contractual terms that purport to limit copyright exceptions. Whether libraries can continue to fulfill their missions in the digital era may depend in part on whether they continue to benefit from robust copyright limitations and exceptions. If the law fails to keep up with technology, libraries may find themselves unable to collect, lend, and preserve important cultural materials, and the market power of rightsholders will have grown to the point where copyright no longer serves the public interest from a utilitarian point of view and has become an impediment to the important competing rights claims of libraries and their users from a natural rights point of view.

Keywords: Fair use (Copyright); Library copyright policies; Copyright and digital preservation; Electronic information resources – Fair use (Copyright)

Introduction

The exclusive rights provided by copyright, if they were absolute, would stifle free expression, criticism, and creativity. The issue of exceptions and limitations is fraught with controversy. In the theoretical realm, limitations and exceptions are grounded either in appeals to the public interest in utilitarian frameworks, or to competing fundamental rights and justice claims in natural rights frameworks. In the political realm, rightsholders and libraries are often at odds over the expansion or contraction of limitations and exceptions. Rightsholders often oppose the adoption of exceptions, or seek remuneration for the exercise of exceptions, to maximize their revenue and control over their works. Libraries, in

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contrast, often cannot afford the fees rightsholders seek, and believe some uses in the public interest should not be subject to remuneration. Libraries and their users rely heavily on limitations and exceptions. Some general limitations, like first sale or exhaustion, give libraries and the public vital rights to lend, donate, or resell copies they own. Other exceptions or limitations are specifically tailored to library needs, enabling critical services such as making replacement copies, preservation copies, or copies for users.

Fair use and fair dealing provide broader, more flexible protection for anyone working with in-copyright materials and have become especially crucial to libraries as they adapt to the digital age. For example, digital technology provides libraries with the means to digitize their collections and make them available to users during crises such as the Covid-19 pandemic, but the copyright laws in some countries may not permit such activities. Another challenge of the digital era is that many publishers distribute digital content subject to license agreements. The terms of license agreements may prohibit libraries from exercising their rights under limitations and exceptions available under national copyright laws.

The International Framework

Copyright exceptions and limitations are adopted on the domestic level by national legislatures. However, countries are constrained by treaty obligations. The most significant treaty in the copyright space is the Berne Convention, which is administered by the World Intellectual Property Organization (WIPO) and contains exceptions for quotations and education, and permits further exceptions in accordance with the three-step test. The Berne Convention was first adopted in 1886, and the most recent version of the Convention was adopted in 1971. Most countries have joined the Berne Convention and adopted similar exceptions in their national copyright laws. The vast majority include exceptions favoring libraries and research. Article 10(1) contains a mandatory exception for quotations; all countries must permit the making of "quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose…." Under Article 10(2), countries also are empowered to adopt exceptions for the use of works by way of illustration for teaching.

The Three-Step Test

In addition, Article 9(2) of the Berne Convention sets forth the so-called three-step test for all other exceptions to the reproduction right. The three-step test provides that "it shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". The vague standards of the three-step test have been the source of much controversy and debate in academic circles but have been applied by an international tribunal only once (World Trade Organization 2000). Accordingly, there is little concrete guidance concerning the meaning of the three-step test and how it should be applied. As a result, the three-step test often is used in a conclusory manner to oppose the adoption of an exception. After all, virtually any exception could be described as conflicting with the normal exploitation of a work and as prejudicing the legitimate interests of the author.

The three-step test in the Berne Convention applies only to the reproduction right. The Agreement on Trade Related Aspects of Intellectual Property Rights [hereinafter TRIPS] (World Trade Organization n.d.), adopted by the World Trade Organization in 1995, expanded the application of the three-step test to all exclusive rights under copyright and related rights, for example, to public performance or making available to the public. The WIPO Copyright and Performances and Phonograms Treaties, adopted in 1996, confirmed that the three-step test applies to all copyrights and related rights. Various free trade agreements also repeat the three-step test, as do the Marrakesh and Beijing Treaties. Indeed, the Marrakesh Treaty provides countries with a roadmap for the adoption of a three-step test compliant exception for the benefit of people with print disabilities.

Exceptions provided in national legislation for libraries must comply with the three-step test. Given the three-step test's vague standards, it is difficult to determine how expansive library exceptions can be before running up against the three-step test. A group of intellectual property scholars convened by the Max Planck Institute issued a declaration stressing the need for considering the interests of all stakeholders when applying the three-step test, not only the interests of rightsholders (Hilty 2010). The Declaration states that the three-step test should be interpreted in a manner that respects the legitimate interests of third parties, including:

- Interests deriving from human rights and fundamental freedoms
- Interests in competition, notably on secondary markets, and
- Other public interests, notably in scientific progress and cultural, social, or economic development.

Further, the Declaration states that "limitations and exceptions do not conflict with a normal exploitation of protected subject matter, if they...are based on important competing considerations...." (Geiger et al 2010).

The three-step test is intended as a guide to legislatures when enacting copyright exceptions. Unfortunately, some national copyright laws incorporate the three-step test as conditions for the exercise of exceptions. For example, the exception for libraries in the Tunis Model Law on Copyright for Developing Countries, which has been adopted by several African countries, permits libraries to make reproductions "provided that such reproduction and the number of copies made are limited to the needs of their activities, do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author". Inclusion of the three-step test in specific exceptions undermines the utility of the exception. A librarian would have no certainty whether a particular use she seeks to make satisfies the exceptions requirements.

In addition to international treaties, regional agreements also provide a framework for copyright limitations and exceptions. Most notably, directives adopted by the European Union (EU), such as the Information Society (Directive 2001/29/EC 2001), and the Digital Single Market (Directive (EU) 2019/790 2019), specify what exceptions to copyright a Member State may adopt. Both directives contain specific provisions relating to libraries and other cultural heritage institutions. While the three-step test is very general, and provides countries with great latitude, the EU directives are quite specific, and provide little flexibility. Nonetheless, Article 2(5) of the Information Society Directive states that exceptions adopted pursuant to the Directive may be applied only in compliance with the three-step test.

General Theoretical Justifications

Just as copyright itself is justified by reference to a variety of normative theories, limitations and exceptions to copyright protection can be grounded in multiple theoretical bases. An influential introduction to leading theoretical bases for intellectual property is provided by William Fisher (2001). A more recent survey, with proposals for future development, is described by Jeremy N. Sheff (2018). At the highest level of abstraction, these theoretical perspectives are the same overarching approaches that dominate ethical theory generally: utilitarianism or consequentialism, and deontological or natural rights theory. Joyce and others describe utilitarian and natural law as competing, inconsistent rhetorics of copyright, with the former driving the development of the law in the US and other common law jurisdictions, while the latter have served as the basis for copyright

systems in France and Germany, and later for the Berne Convention for the Protection of Literary and Artistic Property (2016, 44). The approach to limitations and exceptions in different legal regimes can be informed by the general normative or theoretical approach that underwrites the copyright tradition in each regime.

In the utilitarian or consequentialist approach to copyright, the copyright system is justified because it serves a higher social good, however that good may be defined. This approach is perhaps most clearly embodied in the US Constitution Section 8, Clause 8, which grants the legislature the power "to promote the Progress of Science and Useful arts, by securing, for limited Times, to Authors and Inventors, the exclusive Right to their respective Writings and Discoveries." The "to" and "by" structure suggests a means-end relationship between securing rights and promoting progress; exclusive rights are secured as a way of achieving a social benefit, the promotion of progress (Oliar 2006). The most strident expressions of commitment to the utilitarian view among US founding fathers may be Thomas Jefferson's letters to James Madison, giving his reaction to early drafts of the Bill of Rights. Jefferson expresses grave concern about all monopolies and suggests placing a ceiling on all copyright and patent terms, or else a complete ban, rather than risk their growing out of proportion to their benefit to the public. A strong articulation of the utilitarian view is found in a speech by Lord Thomas Babington Macaulay in opposition to a copyright term extension bill before the English House of Commons in February 1841:

> It is good that authors should be remunerated; and the least exceptionable way of remunerating them is by a [copyright] monopoly. Yet monopoly is an evil. For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good.

If copyright is justified as an expedient means of rewarding authors to ensure they produce new work, but at the same time copyright limits access to those works, the copyright system should be carefully calibrated to ensure that incentives for creators are no stronger than necessary to secure reasonable levels of creativity. In the US Supreme Court's recent decision in *Google v. Oracle*[1] Justice Breyer quoted with approval Macaulay's description of copyright as a "tax on readers for the purpose of giving a bounty to writers," adding that "Congress, weighing advantages and disadvantages, will determine the more specific nature of the tax, its boundaries and conditions, the existence of exceptions and exemptions, all by exercising its own constitutional power to write a copyright statute".[2] Justice

1 Google LLC v. Oracle Am., Inc., 141 S.Ct 1183 (2021).
2 Google LLC v. Oracle America, Inc., 141 S.Ct. at 1195-96.

Breyer further noted that "[C]opyright has negative features. Protection can raise prices to consumers. It can impose special costs, such as the cost of contacting owners to obtain reproduction permission. And the exclusive rights it awards can sometimes stand in the way of others exercising their own creative powers".[3]

One justification for copyright limitations and exceptions is that they promote the same goal as copyright's exclusive rights: encouraging free expression, advancing education, expanding access to knowledge, promoting cultural progress, and maximizing gross domestic product. Any or all of these may be the desired consequences of copyright protection. If protection of exclusive rights is a means to an end rather than an end in itself, and unlimited exclusive rights undermines that ultimate goal, then limitations and exceptions are an essential part of a balanced copyright system. For example, if copyright is meant to "encourage… learning" (as both the Statute of Anne and the first U.S. *Copyright Act* asserted), then copyright law should provide the capacity for libraries to build collections and make them available for free use in support of research and teaching. Otherwise, copyright would make access to broad swaths of knowledge so expensive that it would discourage scholarship and teaching in a wide variety of contexts. Limitations and exceptions thus fit very comfortably into copyright systems based on consequentialist or utilitarian theories, and beneficiaries like libraries can lay claim to equal normative status relative to authors since both derive their claims from the same goal of promoting social good.

In most European legal systems, authors' rights are viewed as ends in themselves rather than as a means to a social end. The theoretical basis for authors' rights of this kind may be derived from thinkers like Hegel and Kant which are often expressed in terms of protecting the author's interest in controlling works that are invested with their will or personality, or from John Locke, who argued private property rights arise whenever someone mixes his or her labor with resources held in common. In authors' rights systems, limitations and exceptions can be understood in several ways. One possibility is that exceptions and limitations are just one way of defining the scope of the author's exclusive rights (Schauer 1991). The combination of a broad general right of reproduction together with an exception or limitation that permits reproduction of less than a substantial portion of a work is equivalent to the right to reproduce a substantial portion of a work (Borghi 2020). Alternatively, limitations and exceptions may reflect the competing rights of users to self-expression or to access knowledge, which may in some cases supersede the rights of authors or copyright holders. The doctrine of exhaustion, which is explained later in this chapter, may reflect the limits of an author's right since it does not extend to control of a particular copy once that copy has been law-

3 Google LLC v. Oracle America, Inc., 141 S.Ct. at 1195.

fully distributed, or the intervention of a more fundamental right to personal property for the owner of an individual copy, or even the intervention of the public's right to access knowledge which operates through the encouragement of public libraries and secondary markets for expensive copyrighted goods.

The theoretical basis for limitations and exceptions can be significant in a variety of circumstances. For example, judges and other decision makers may invoke intellectual property theory as the basis for construing limitations narrowly or broadly. Until recently the Court of Justice for the EU has read copyright exceptions as derogations from authors' rights, which must be interpreted strictly (Borghi 2020). Theory may also arise in political battles about law reform, both within and across national borders, as partisans evoke authors' rights or the public interest in support of particular positions. For those working in and for libraries, understanding theory can also be helpful to understanding why exceptions are important, and why taking advantage of limitations and exceptions to pursue the library's mission is as legitimate as respecting copyright's exclusive rights.

Political Battles

Libraries generally seek the broadest possible copyright exceptions and limitations to ensure that they can fulfill the mission to serve their users. Libraries have invested significant, often public, resources in building their collections, and seek a reasonable return on the investment. In particular, libraries believe that taxpayers should receive the benefit of funds spent on their behalf by libraries. Rightsholders, for their part, desire the narrowest possible exceptions to maximize their revenue. Indeed, many rightsholders believe that all, or virtually all, uses should require remuneration. The divergence of interests has often led to pitched policy battles as copyright laws are being updated to address the digital environment.

Battles occur in the various fora in which law reform efforts occur, internationally, regionally, and nationally. The library community participated in the long struggle in WIPO that resulted in the Marrakesh Treaty, which requires countries to adopt exceptions permitting the creation and distribution of copies accessible to people with print disabilities. Libraries will use exceptions adopted pursuant to the Marrakesh Treaty to create and distribution accessible format copies. Libraries attempted to convince WIPO to pursue a treaty establishing minimum standards for exceptions for libraries, archives, and museums (IFLA 2013).

Libraries have engaged at the regional level, particularly in the EU. For example, libraries educated the EU Commission, Council of Ministers, and Parliament on the needs of libraries in connection to preservation and text and data mining. The

engagement resulted in positive provisions in the EU Digital Single Market Directive (Directive (EU) 2019/790 2019). Finally, libraries seek to influence national governments on local copyright legislation. For example, libraries in many countries are working on national implementations of the Marrakesh Treaty and are seeking library exceptions more appropriate for the digital age. Many copyright laws refer to specific forms of frequently outmoded reprographic technology or the making of a limited number of copies and do not accommodate digitization.

Libraries' efforts to secure exceptions often are opposed by organizations representing publishers and authors. The opposition is frequently presented as concern that broader exceptions could lead to piracy, but libraries have always sought to respect copyright and understand that they are part of an ecosystem in which certain classes of creators rely on the economic incentive provided by copyright law. One example of the library perspective is provided by Butler who outlined a letter signed by copyright experts working in libraries. The experts acknowledged "We understand that copyright is a complex ecosystem of people who occupy different roles at different times (and often at the same time), not a zero-sum struggle between opposing sides. That ecosystem thrives in our libraries" (2016). In many cases, the rightsholders' real motivation is a desire to extract additional fees from uses of works for which libraries have already paid, rather than preventing infringement. Unfortunately, libraries are often outdone in policy discussions. The rightsholders typically have deeper pockets and are better positioned for lengthy battles over copyright legislation.

Exhaustion/First Sale

A basic function of many libraries is to circulate books and materials in their collections. In many countries, however, a rightsholder's bundle of rights includes the exclusive right to distribute copies of the work to the public. In some countries, the distribution right is limited to the sale of copies, but in other countries, the distribution right includes sale, rental, or lending. Most countries that have a distribution right impose a limit to the right with respect to a particular copy after the first authorized sale of that copy. In other words, the distribution right with respect to a particular copy is exhausted after the first sale of that copy and is referred to as the exhaustion or first sale doctrine. It is the exhaustion doctrine that typically allows a library to circulate the books in its collection; the distribution right for the books in the collection was exhausted when the publishers sold those books into the stream of commerce, to wholesalers, retailers or directly to libraries.

While most countries recognize the exhaustion doctrine with respect to domestic sales, there is more diversity in the treatment of international sales. That is, if a person in country A purchases a copy of a book from country B, the distribution right in that copy might not be exhausted in country A. This is because some countries believe that the rightsholder should have the ability to control imports into a country. In some countries, the law is ambiguous. For example, for many years it was unclear whether the US *Copyright Act* provided for international exhaustion, and whether the sale of a copy in another country exhausted the distribution right in the United States. The US Supreme Court in 2013 in *Kirtsaeng v. Wiley*[4] interpreted the statute containing the first sale doctrine as providing for international exhaustion. This is important for libraries because it allows them to circulate materials purchased overseas. Indeed, in its decision, the Supreme Court noted how an international exhaustion rule would benefit US libraries, which contain many books published and purchased outside of the United States.

Some countries have sought to limit the ability of libraries to lend materials by adopting a Public Lending Right (PLR). PLR does not provide a library with the right to lend a book to the public. On the contrary, it provides rightsholders with a payment for the lending of materials by libraries. The theory behind PLR is that library lending leads to the loss of sales by rightsholders. It ignores that libraries help readers discover authors, leading potentially to readers purchasing other titles by those authors, or asking libraries to purchase them. Furthermore, libraries promote literacy, and thereby help create the market for books.

The EU adopted a Directive requiring Member States to adopt a PLR but left the details to the Member States [hereinafter Rental and Lending Rights Directive] (Directive 2006/115/EC 2006). In some Member States, libraries must pay annual fees to a collecting society for the privilege of lending the works in their collections. In other Member States, the fees are paid by the national government. The Directive does not set the level of fees, so there is a disparity among the Member States. Only a handful of countries outside the EU have enacted a PLR, but rightsholders are actively advocating for broader adoption.

It should be noted that the exhaustion doctrine applies only to the circulation of physical copies of books and other materials. It does not apply to electronic lending, which involves the making of a copy in the user's computer. The exhaustion doctrine typically is viewed as a limitation on the distribution right, or its equivalent, not the reproduction right. When a public library lends an ebook, it typically is doing so under a license from the publisher.

In countries with an open-ended fair use exception, discussed below in greater detail, arguably there are circumstances when the lending of an ebook might be

4 Kirtsaeng v. John Wiley & Sons, Inc., 568 U.S. 519 (2013).

permitted as a fair use. Particularly in the United States, many libraries believe that fair use allows Controlled Digital Lending (CDL), where a library uses technical controls to circulate digitally the exact number of physical copies of a specific title it owns while preventing users from redistributing or copying the digitized version. A position statement on Controlled Digital Lending prepared in the US in 2018 has many signatories. During the Covid-19 pandemic, academic libraries have relied on various forms of CDL to provide access to works in their collections, even though the libraries have been physically closed, thereby enabling students and faculty to continue essential research and educational activities. Additionally, during the pandemic, the Internet Archive established the National Emergency Library (NEL) (Internet Archive 2020), under which it suspended the owned to loaned ratio of its Open Library because almost all the libraries in the United States were closed, preventing free public access to many titles. A group of publishers sued the Internet Archive in US federal court for operating the NEL as well as its pre-existing Open Library. The lawsuit was still pending at the writing of this chapter.

Specific Exceptions for Libraries, Archives, and Related Entities

First sale and exhaustion apply to copies lawfully owned by anyone, and fair use and fair dealing, described in detail below, are likewise available to all users. But some exceptions and limitations to copyright are specifically for libraries, archives, and similar institutions. Libraries around the world benefit from a variety of limitations and exceptions. Of the 191 member countries in WIPO, "161 of them have at least one provision in their copyright statutes that explicitly applies to libraries or archives" (Crews 2017). The provisions included refer to preservation, copies for patrons, interlibrary lending, in-class performances and displays, and distance or online learning. Some are treated in detail elsewhere in this book. This section discusses some of the reasons for including specific limitations and exceptions for libraries in copyright law. Here they are discussed briefly, emphasizing the policy goals they serve with respect to libraries and their users.

Preservation

Ensuring the preservation of expressive works has long been a core function of libraries, archives, and related institutions. Some preservation activities do not implicate copyright. Maintaining or repairing physical copies, for example, may

not require copying or other copyright-regulated activities, although sometimes damaged or missing pages in a particular copy may be replaced using facsimiles. Many preservation activities, however, require copying and other regulated activities. Some collection items are rare or fragile, for example, and responsible preservation entails making them accessible for research only by means of a surrogate copy. For example, in the case of *Sundeman v. Seajay Society*[5] the Society held a rare manuscript and "made the copy so that [scholar] would not damage the fragile original during her analysis". Preservation of digitized works, or of born-digital works, requires making and storing multiple digital copies, in multiple physical locations if possible. Without copyright limitations and exceptions, these activities would require permission from the copyright holder. Obtaining permission could be a major barrier to library preservation activities. Not surprisingly, specific limitations and exceptions favoring preservation can be found in many jurisdictions (Crews 2017, 9).

One reason to include limitations and exceptions for preservation by libraries and archives is that the market does not typically provide adequate incentives for copyright holders or licensees to preserve works they control. The commercial life of most copyright-encumbered works is much shorter than the term of copyright (Akerlof 2002); most commercial works do not achieve long-lasting success in the marketplace. With little hope for a financial return, commercial copyright holders will predictably, rationally choose not to invest in preserving copies of works that are no longer in commercial circulation.

The history of media is replete with stories of copyright owners destroying copies of old works to make room for new ones or treating works with inadequate care relative to their long-term cultural and historic value. Most films of the silent era are lost forever, for example, because studios actively destroyed them, literally throwing them into the ocean, or were not equipped to safely manage volatile nitrate film stock, which can go up in flames when stored at normal room temperature. More recently, a trove of hundreds of master audio and video recordings owned by Universal Music Group was believed to have been destroyed in a fire in 2008 after they were stored for years on a film studio lot near a theme park ride (Rosen 2019). Universal has disputed Rosen's claims in this article, and a subsequent one, about the extent of the permanent losses from the fire, but the occurrence of the fire and Universal's role in exposing materials on the studio lot to risk are undisputed.

The relative commercial longevity of musical recordings and motion pictures makes the history of their treatment even more striking. If such materials have been treated so shortsightedly, then even worse treatment for more ephemeral works, such as television programs or video games can reasonably be expected.

5 Sundeman v. Seajay Society, Inc., 142 F. 3d 194 (4th Cir. 1998).

"[In the 1960s and 70s,] erasing and reusing videotapes was standard practice at the BBC and many of the major TV networks here in America. This was, in part, a cost-cutting measure on the part of these companies, as the price of these cassettes at the time was often prohibitive. And since they were producing fresh content and programs at such a rapid clip, it was deemed necessary to keep recycling through these tapes" (Ham 2016). Atari's dumping of unsold video game cartridges and hardware into a landfill in New Mexico is another example of disconnect between commercial value and long-term historical value.

From a utilitarian perspective, in the case of preservation, copyright's exclusive rights clearly fail to serve the long-term societal goal of ensuring access to cultural heritage. From a fundamental rights perspective, authors themselves are better served by a copyright system that ensures their work endures regardless of the vicissitudes of the market. Similarly, the right of the public to have its collective cultural heritage preserved and available for future generations, and the right of those generations to access their heritage, should receive substantial weight relative to the copyright holder's seemingly slight individual economic interest in most works over the long term. Limitations to copyright in favor of preservation are easily justified under both major theoretical frameworks.

Another reason for specific copyright exceptions favoring preservation is the vast scale of the preservation challenge facing libraries as they wrestle with the explosion of creative works and media formats published in the last century and a half. The challenges range from audio recordings stored on wax cylinders that melt, break, and deteriorate with every play, to radio broadcasts etched on aluminum discs that shed their lacquer coating. Half the titles recorded on cylinder records have not survived (Lukow 2014). During World War II, glass was used in place of aluminum, and many of the discs have been lost to breakage (Council on Library and Information Resources 2010). The concerns continue all the way to modern CDs and DVDs, some of which appear to be subject to disc rot phenomena that render them unreadable decades before the end of their advertised lifespan (Smith 2017). Compounding the problem of storage media fragility is the obsolescence of the playback devices for media. As new formats become popular and old ones fall into disuse, it becomes more difficult to source spare parts to refurbish and repair legacy machines. In addition, as technical experts familiar with older formats retire or pass away, even the knowledge of how to repair old players becomes scarce (Casey 2015).

Limitations and exceptions that favor preservation are thus extremely important to libraries and to the broader culture. Without them, works that form our cultural heritage could be lost forever. Many such works have already been lost. Given the size of the challenge and the numerous barriers to preservation, as well as the strong ethical case for preservation, it is important that copyright recognize and empower institutions dedicated to preservation.

Research and Study

Supporting research and study is a core element of any library's mission. Research is just as central to users of public libraries as to users with formal affiliations to universities or other research institutions. Researcher as used here includes amateur genealogists and curious schoolchildren as well as graduate students or tenured faculty. The limitations and exceptions favoring research and study can be included in the special rights of libraries, as in Section 108(d) and (e) in the US *Copyright Act*, or they may be framed as rights of the researcher, in which case the existence of libraries from which copies are made is assumed. Like preservation, research and study do not always implicate copyright. Research and study use is often enabled by the general first sale/exhaustion principle and does not require a special exception. However, some common recurring activities associated with research do implicate copyright's exclusive rights and could be discouraged if they required payment or permission.

Permitting researchers to make copies for private research and study is one important exception that exists in many copyright systems. Section 108(d) of the US *Copyright Act* permits libraries to provide researchers with copies of articles, chapters, and other portions of published in-copyright works for purposes of private research and study. Section 108(e) goes further, permitting libraries to provide copies of entire published works to patrons on request if the library determines that copies are not available for purchase at a fair price. Finally, Section 108(h), passed as part of the 1998 *Copyright Term Extension Act*, permits libraries to "reproduce, distribute, display, or perform in facsimile or digital form a copy or phonorecord of such work, or portions thereof, for purposes of preservation, scholarship, or research" as long as the work is not "subject to normal commercial exploitation", is not available for purchase at a "fair price," and the copyright owner or its agent has not sent notice to the Copyright Office indicating its objection to such uses. At the time of this writing, no copyright holder has ever provided such a notice to the Copyright Office, which may be an indication of the extremely low commercial value of works in the last 20 years of their term, especially where the other two conditions in 108(h) of no commercial exploitation and no copies available at a fair price are met. A clause in the *Music Modernization Act*, which created a new public performance right in sound recordings first fixed prior to February 14, 1972, among other things, applies Section 108(h) to certain sound recordings, giving libraries a new right to share old sound recordings that have fallen out of commerce. The provision is new and relatively untested at the time of this writing, however. It remains to be seen how libraries in the US will apply the provision. Exceptions like these affirm the central role of libraries in supporting research and study. Libraries ensure that all researchers have access to a broad

range of resources and to deep, rich collections that no individual scholar could hope to build for themselves. An essential part of making a shared collection work for all its users, however, is enabling the library to provide copies to researchers who need access off-site or for extended periods of time, in contexts where lending would not be sufficient or appropriate. Exceptions for research and study ensure that copyright does not block an essential library function.

Like those for preservation, limitations favoring research and study can be justified under both utilitarian and fundamental rights frameworks. Indeed, the key difference between 108(d) and (e), the additional market check requirement associated with copying entire works, seems to track, albeit imperfectly, the differences in normative justification for each. Allowing the availability of used copies at a fair price to defeat the applicability of 108(e) is inconsistent with both utilitarian and fundamental rights theories, as there is no benefit to the copyright holder and thus no incentive, nor any vindication of fundamental rights from requiring purchase of second-hand copies. The right to copy portions of works is available regardless of market alternatives because in such cases the difficulty and cost associated with either purchasing an entire work, when only part is needed, or else procuring a license for partial copying is likely to do more harm to research than benefit to the copyright holder. In the case of entire works, however, the interests may not be so consistently tilted in favor of the researcher, and a market check may be seen as a way to ensure that the copyright holder is remunerated in cases where doing so is either warranted by the reconciliation of competing rights or justified by the balance of incentives.

Interlibrary Lending

Interlibrary lending is a long-established practice designed to help libraries provide to local researchers access to materials from other institutions. Since no library can afford to buy or license every resource that might be of interest to its users, interlibrary arrangements help libraries work together to ensure researchers can access materials important to their work. When interlibrary lending takes the form of lending physical copies from one institution to a patron at another, first sale or exhaustion will be the key enabling provision. However, as early as the 1970s, when the last major revision of the US *Copyright Act* took place, it was clear that libraries could use copying technologies to fulfill more efficiently researcher requests made at partner libraries. The language in the library and archives provisions in Section 108 of the *Copyright Act* was carefully drafted to ensure that interlibrary lending could take advantage of photocopying and successor technologies to lend or make available partial copies or facsimiles to better serve researchers.

However, the provision was also carefully limited, barring any interlibrary arrangement where a borrowing institution makes requests "in such aggregate quantities as to substitute for a subscription to or purchase of such work".

Because interlibrary lending facilitates research and preservation, the justification for enabling interlibrary loan without permission or payment is similar. In many cases, if interlibrary lending required an additional charge or procedural step, libraries would not support the practice and researchers would simply have to do without access. From a utilitarian point of view, the copyright holder would not gain any revenue, but the public would lose the benefit of research access, a net social waste. From a competing rights point of view, the author's right to control the work will have trumped the public's right to research in a case where there seems to be little benefit to the author; it makes more sense for the public's right to prevail.

In-class Performance and Display

Exceptions permitting in-class performance and display of visual and audio-visual works may seem on initial examination to be for the benefit of teachers and students rather than libraries, but in fact these exceptions are extremely important to libraries. Most libraries affiliated with schools and other academic institutions have built media collections to support their institutions' curricular needs, which can diverge sharply from the interests served by the mainstream commercial market. Exceptions favoring in-class performance ensure that library collections can serve one of their core functions. The shorter commercial lives of film and television works means that many works that are of interest to professors of film and media studies are no longer available to purchase or license; it can be even more difficult to identify or locate rightsholders to seek permission. In addition to the justifications already provided above, teaching uses may be susceptible to the argument that they are transformative, a concept used in US fair use jurisprudence and described in more detail below, to describe uses that serve a new, socially beneficial purpose relative to the original purpose of the work, and do not merely substitute for that work in its ordinary consumer context. When instructors show films and clips in class, they are often engaged in their own critical work, repurposing films, and clips in service of their own pedagogical goals and perspectives. Exemptions serve not only to ease the cost burden and friction associated with in-class performances, but also to protect the interests of instructors and society's interest in fostering new insights, meanings, and messages.

Distance Education

Limitations and exceptions that foster distance education are typically focused on facilitating the kinds of performances and displays that might take place in a classroom in a traditional in-person course and the justification for their applications is more-or-less the same, with the additional element of a kind of media-neutrality principle: that a change in technology, or in the physical location of the students or the instructor, should not create a new copyright obligation for the teacher, the students, the library or parent institution. However, in practice the shape of distance learning exceptions can differ substantially from exceptions for in-person teaching. For example, Section 110(1) of the US *Copyright Act*, which applies to traditional classroom teaching, is a simple, one-paragraph provision that exempts almost all in-class performances and displays from copyright's exclusive rights. Section 110(2), which applies to online distance learning, covers several pages of the codified statute, limits authorized performances to "limited portions" of audiovisual works, and saddles institutions with a long list of technical and policy requirements.

Rightsholders argue for differential treatment of in-person and online learning by alleging a different balance of public benefits and private harm in the online case, tipping the scale in favor of narrower rights for educators. In a physical classroom, the chances of a student retaining, and further distributing, a copy of works shown, are slim to none; however, in an online course, a savvy student could retain and share a digital copy of works made available to her. Another explanation might reference the economic contexts of the drafting of the two provisions: in-class performances were common and rarely or never monetized at the time of Section 110(1)'s adoption, but by the time Section 110(2) was drafted online performances were seen as a potential source of new revenue, as well as a piracy risk.

Fair Use

In addition to the specific exceptions favoring libraries, archives, and related users and activities outlined above, international copyright system permits, and many national regimes include broad, flexible exceptions that are key tools for libraries and archives. The most well-known of these is the fair use doctrine in the US, but similar provisions exist in many legal systems around the world. This section discusses both US fair use and the fair use and fair dealing provisions that exist outside the US.

Fair Use in the US

Fair use is an equitable, common law doctrine first created by judges to ensure that an author's exclusive rights do not frustrate socially beneficial uses, particularly uses that advance the progress-oriented goals of copyright law in the US. Unlike the limitations and exceptions discussed so far, fair use was not written to accommodate specific uses or specific users. Instead, fair use creates a broad user's right that applies equally to giant commercial uses like the automated web-crawling that powers Google's search engine and to small, private uses like recording a television program to view later. Political disagreements over fair use sometimes devolve into semantic debates about whether fair use is a right or a mere defense. Among other reasons, fair use can be considered a right because Section 108 of the *Copyright Act* refers to the right of fair use. In addition, Section 107 explains that: "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright". The language used in referring to Section 106 and the statement that fair use is "not an infringement," suggests that fair uses are not merely excused infringements but rather are outside the copyright holder's exclusive rights and are reserved as rights of the public.

Libraries and archives in the US have benefited tremendously from fair use because of its flexibility, and in particular its adaptability to new technologies and the challenges and opportunities they present. Where specific exceptions fall short due to unforeseen circumstances, fair use ensures the copyright system does not impact significantly on important cultural activities.

The modern history of fair use in the United States is often traced to Judge Joseph Story's opinion in *Folsom v. Marsh*[6] the first opinion to describe what have become the four statutory factors that courts consider in deciding whether a use is fair:

- The purpose of the use
- The nature of the work used
- The amount used, and
- The market effect of the use.

Story stated: "[L]ook to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prej-

6 Folsom v. Marsh, 9 F. Cas. 342, 2 Story, 100.

udice the sale, or diminish the profits, or supersede the objects, of the original work". As already noted, fair use was later codified in US law as Section 107 of the *Copyright Act* of 1976. Congress included non-profit, educational use, as well as scholarship, criticism, and commentary, as examples of favored purposes in the statute. The 1976 Act also added a provision at 17 U.S.C. § 504(c)(2) "to provide innocent teachers and other non-profit users of copyrighted material with broad insulation against unwarranted liability for infringement". Congress thus reassured libraries and educational users that their uses were among those that would be found fair under appropriate circumstances and lowered the stakes in cases where non-profit educational users might fear making a mistake.

The four-factor test has been criticized as indeterminate (Butler 2015a), but the courts have added important definition to the doctrine, using the concept of transformative use to drive consistent and predictable outcomes in fair use cases. Judge Pierre N. Leval, then a federal district judge for the Southern District of New York, first described the concept of transformative use in his groundbreaking article "Toward a Fair Use Standard" (1990, 1111). Leval proposed a theory grounded in the utilitarian philosophy of copyright expressed in the Constitution, that copyright's objective is to "stimulate activity and progress in the arts for the intellectual enrichment of the public" (1107). Judge Leval reasoned that fair use should apply when "excessively broad protection would stifle, rather than advance, [that] objective" (1109).

The Supreme Court gave its imprimatur to Leval's standard in *Campbell v. Acuff-Rose*[7] quoting with approval Leval's explanation that transformative uses contribute to the intellectual enterprise by using existing material for a new purpose, adding value, and creating "new information, new aesthetics, new insights and understandings".[8] The Supreme Court goes on to say these uses "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright", and that therefore "the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use". Scholars have documented the growing dominance of transformative use, concluding that it is by far the most important element of fair use jurisprudence (Asay, Sloan and Sobczak 2020; Netanel 2011; Sag 2012), and that applying transformative use makes fair use a coherent, predictable doctrine that empowers users to exercise their rights without fear (Aufderheide and Jaszi 2018). In its 2021 *Google v. Oracle* decision, the Court again embraced transformative use, describing it as a use that "adds something new and important" to the original work.[9]

7 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).
8 Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
9 Google LLC v. Oracle America, Inc., 141 S.Ct. at 1203.

Libraries in the US benefit immensely from fair use. Mass digitization for preservation, search, text and data mining, and other transformative uses, was blessed as fair use in the *Google Books* and *HathiTrust* cases, with the latter case also holding that providing accessible format copies to persons with disabilities was protected by fair use.[10] In another high-profile case, fair use was found to apply to most electronic excerpts from books made available to students as part of their university coursework.[11] The victories are worth celebrating, but cases like these garner attention in part because litigation over library fair use is extremely rare; most fair uses are uncontroversial everyday practices like researchers scanning pages from archival collections for future reference, or a teaching assistant taking clips from a library DVD for an instructor to use in a class lecture. Finally, fair use serves as an important safety net when specific exceptions fall short, allowing libraries in the US to continue to meet their missions even as technology challenges aging legal provisions (Band 2011).

One of the most powerful developments in fair use over the past decade has been the growing body of community statements and codes of best practices in fair use described by writers like Aufderheide and Jaszi (2018) and organizations like the Center for Media and Social Impact. These documents are facilitated by experts in copyright and community organizing, but they are initiated, developed, and endorsed by the communities they address. The statements identify recurring situations where copyright would create undue barriers to meeting the professional mission of the affected community, and where fair use can be applied to avoid that outcome. Each code identifies the various scenarios and uses principles and limitations to describe community norms for a consensus approach to each. They do not purport to map the entire universe of fair use, or to draw definitive lines beyond which fair use cannot apply; rather, these documents describe a safe harbor of common practice beyond which some practitioners may choose to explore, according to their own needs and reasoning. Documentary filmmakers and scholars, visual art makers and scholars, media studies teachers and authors, and many others have developed the statements, and have documented their salutary impact (Falzone and Urban 2010). Many of the uses identified implicate libraries indirectly, but libraries themselves have participated in the development of several fair use best practices proclamations, including statements for research libraries (Adler et al 2012), collections containing orphan works (Aufderheide et al 2014), dance collections (Dance Heritage Collection 2009), and software preservation (Aufderheide et al 2019).

10 Authors Guild v. Google, Inc., 804 F. 3d 202 (2d Cir. 2015); Authors Guild, Inc. v. HathiTrust 755 F.3d 87 (2d Cir. 2014).

11 Cambridge Univ. Press v. Becker, 446 F. Supp. 3d 1145 (N.D. Ga. 2020).

Fair Use and Fair Dealing Outside US

The US fair use doctrine, like much of US copyright law, is based on English law. The concept of fair dealing was first developed by courts in England in the 18th century and was codified in 1911. In the UK *Copyright Act* legislation, an exception to infringement was provided for fair dealing with a work for the purposes of "private study, research, criticism, review, or newspaper summary". Fair dealing became incorporated into copyright laws of the former British Imperial territories, now referred to as the Commonwealth countries, like Australia and Canada. Over the past century, however, the fair dealing statutes have evolved in most Commonwealth countries. The primary distinction between fair dealing and fair use has been that fair dealing typically applies to a closed list of specific purposes, while fair use is an open-ended exemption that can apply to unforeseen purposes. Michael Geist pointed out that "the key difference between fair use and fair dealing lies in the circumscribed purposes found under fair dealing" (Geist 2013).

While in some countries, fair dealing remains, as in the UK, restricted to the original purposes of the 1911 Act, in other countries, for example the Bahamas, the purposes have become a non-exclusive list of examples. In still other countries, for example Australia, legislatures have added factors a court must consider in determining fair dealing. Moreover, some countries have replaced the term fair dealing with fair use, for example Bangladesh. Thus, the fair dealing statutes in many countries have over time increasingly come to resemble the fair use statute in the United States, bearing in mind as noted above that fair use in the United States is attributed to Justice Story's 1841 decision in *Folsom v. Marsh*, which was based on the English fair dealing case law.

Judicial interpretations of fair dealing in countries such as Canada are now similar to judicial interpretations of fair use in the United States. In 2004, the Supreme Court of Canada in *CCH Canadian Ltd. v. Law Society* considered copying services provided by a law library. The library provided single copies of legal articles, statutes, and decisions to those who requested them. It also allowed visitors to the library to use photocopiers to make individual copies of works held by the library. The library was sued by publishers for copyright infringement. The Supreme Court ruled in favor of the library based on a broad interpretation of Canada's fair dealing statue. The Court held that it would take a "liberal approach to the enumerated purposes of fair dealing". The Court then established six principal criteria for evaluating fair dealing: the purpose of the dealing; the character of the dealing; the amount of the dealing; the alternatives to the dealing; the nature of the work; and the effect of the dealing on the work.[12] As a practical

12 CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13 (CanLII), [2004] 1 SCR 339.

matter, the Law Society decision erased any differences between fair use in the United States and fair dealing in Canada.

Additionally, several countries, such as Israel, Korea, and Taiwan, have replicated the US fair use statute in their copyright act. In Israel, the fair use statute provides the basis for electronic reserves offered by academic libraries (Katz 2013).

More than 40 countries with over one-third of the world's population have fair use or fair dealing provisions in their copyright laws (Band and Gerafi 2015). These countries are in all regions of the world and at all levels of development. The broad diffusion of fair use and fair dealing indicates that there is no basis for preventing the more widespread adoption of the doctrines, with the benefits their flexibility brings to libraries as well as to authors, publishers, consumers, technology companies, museums, educational institutions, and governments.

Digital Challenges and Opportunities

The transition to digital media and digital networks as the primary modes of information storage and distribution has created a series of challenges and opportunities for libraries and the framework of copyright limitations and exceptions on which they depend. This section will briefly introduce some of them and describe why libraries need current or improved limitations and exceptions more than ever to continue their work in the 21st century. The challenges divide roughly into two broad categories: the challenge of bringing analog collections into the digital realm, and the challenge of vindicating analog rights and values in a digital economy. Another way to think of the two categories is on a timeline: libraries are pivoting from acquiring primarily physical materials on an ownership model to acquiring primarily networked digital materials on a licensing model. It remains to be seen whether copyright's limitations and exceptions can ensure copyright continues to serve the public interest and strike the appropriate balance between public and private rights as libraries move through this pivot point. Libraries and librarians have an important role to play in speaking out about these challenges and seizing the opportunities afforded by this pivotal moment.

Bringing the Past into the Future: Digitizing Legacy Collections

Libraries have invested billions of dollars to build and preserve their physical collections, and digital technology creates new opportunities to turn that investment into knowledge and learning. Libraries have not hesitated to leverage those

opportunities, but copyright has been a major concern at every turn. Digitization for preservation, text and data mining, and public access to special collections are three recurring uses that raise copyright issues.

As discussed above, libraries face an urgent need to migrate works stored on deteriorating or obsolescing formats to preserve their content. As legacy formats and the equipment to play them become more inaccessible by the day, digital storage has never been more ubiquitous or affordable, although it is not free, and server farms have real climate impacts. Networked storage of multiple copies in geographically dispersed locations helps guard against loss of content. The copying required for best practices in digital preservation may exceed what was envisioned in specific exceptions like Section 108 of the US *Copyright Act*, which includes a three-copy limit based on best practices for microfilm, yes, microfilm: "The three-copy limit under the current section 108...was based on microfilm preservation practices" (US Copyright Office 2017, 25). Flexibility of fair use is essential to powering mass digitization for preservation in projects like the HathiTrust Digital Library.

Text and data mining promises to create new insights and information from existing collections by exposing texts and other works to analysis by computers. Before any analysis can take place, a target corpus must be created and properly formatted for analysis. The process might include converting analog works to digital formats, but it could also involve modifying digital texts to make them more comprehensible to computers through the addition of metatags and other coding. The changes made create new copies and even, arguably, derivative works, activities that are regulated by copyright laws. Were it not for exceptions and limitations, digital manipulation of content would be extremely difficult, if not impossible. Seeking permission at the scale required for a corpus like the HathiTrust Digital Library, which holds millions of in-copyright works, would be prohibitively expensive, time-consuming, and, in the case of orphan works, whose rightsholders cannot be identified or located, pointless. It would also be unjust.

Text and data mining is a clearly transformative use, and one that powerfully serves the public interest generally and the narrower interest in learning and cultural progress typically associated with copyright. By discovering and freeing facts without providing readers with an alternative mode of full-text access for traditional reading, text and data mining also advances the law's interest in allowing facts to circulate freely while protecting expressive works that may contain facts, or may give rise to facts, such as the prevalence of a given word or phrase across a corpus, when analyzed in combination with other works (Butler 2015b). Library special collections and archives contain a wealth of material that simply does not exist anywhere else. The content may never have been published or intended for commercial exploitation, and copyright holders may be impossible to identify or locate. Libraries rarely hold copyright in the items. Library

deeds of gift and contracts for sale throughout the 20th Century included broad transfers of *all right, title, and interest* with respect to physical items donated or sold to the library but were typically silent about copyright. The consensus view is that the copyright remains therefore with the donor, in cases where the donor held copyrights or, more commonly, with third parties who were not parties to the transaction. Digitizing materials and making them available on the public web empowers anyone in the world to consult materials that used to be the sole province of scholars at elite institutions and those with the resources to travel to research libraries and archives.

Acquiring Materials Subject to Licenses

Libraries increasingly are acquiring digital content, such as ebooks and ejournals which typically are made available by publishers subject to license agreements. The license agreements often contain terms inconsistent with the exceptions provided under the copyright law. The license terms might prohibit a library from making a preservation copy of an article or providing a copy of an article to a user. License terms frequently prohibit automated and bulk downloading of content, which can be an important first step in text and data mining research. Resolution of the conflict between copyright and contract is one of the most pressing issues currently facing libraries.

Most jurisdictions have yet to address the conflict. The EU, however, has long recognized the need to nullify contractual terms inconsistent with statutory exceptions. For nearly thirty years, the EU has included contract preemption clauses in its directives. It has recognized that it would be pointless to require Member States to adopt exceptions if private parties could simply override them by contract. Such contract preemption clauses can be found in the Software Directive (Directive 2009/24/EC 1991 updated 2009) and the Database Directive (Directive 96/9/EC 1996). Of particular relevance to libraries, the EU Marrakesh Directive (Directive (EU) 2017/1564 2017) provides that the exceptions it mandates to permit authorized entities like libraries to make and distribute accessible format copies cannot be overridden by contract. Similarly, the 2019 Digital Single Market Directive provides that contractual provisions contrary to the mandatory exceptions for (Directive (EU) 2019/790 2019) preservation and text and data mining and preservation by cultural heritage institutions including libraries shall be unenforceable. All EU Member States must implement the contract preemption provisions in their own laws.

Some Member States have adopted more extensive contract preemption provisions than those required by EU directives. The copyright laws of Germany,

Ireland, Portugal, Montenegro, and Belgium prevent the enforcement of contractual provisions restricting activities permitted by a wide range of exceptions. Likewise, the United Kingdom has declared unenforceable a term of a contract purporting to prevent the making of copies permitted by many of its exceptions, including a library's supply of copies to other libraries, a library's making of replacement copies, and a library supplying a single copy to a user.

In contrast, the US *Copyright Act* does not contain any provisions preempting contract terms inconsistent with copyright exceptions. There are other legal theories that could be employed to invalidate such terms, but the theories are relatively untested, and their effectiveness is unknown. Not surprisingly, rightsholders are not perturbed by a world in which library uses are governed by licenses rather than copyright limitations and exceptions. Given the uneven bargaining strength between large multimedia conglomerates and libraries, rightsholders often are able to impose unfair terms on libraries.

Where license agreements are not in place, such as for analog content in libraries' collections, some rightsholders' preferred solution for libraries' desires to enhance access by digitization is Extended Collective Licensing (ECL) rather than unremunerated exceptions. Under ECL regimes, typically, legislation designates a Collective Management Organization (CMO) as the official licensor for rights with respect to a type of work, for example, performances of musical compositions or reproductions of literary works. Users must pay royalties at rates established by the CMO, and the CMOs distribute the royalties to the rightsholders. Rightsholders can often opt out of the ECL regime. In theory, CMOs provide an efficient means for the payment and distribution of royalties.

Unfortunately, CMOs have a long history of corruption, mismanagement, lack of transparency, and hostility towards users and artists alike (Band and Butler 2013). They often operate with insufficient oversight from government and individual artists. In 2014, the EU adopted a Directive on the collective management of copyright and related rights (Directive 2014/26/EU 2015). The Directive established rules on transparency and good governance for CMOs. The Member States hoped the Directive would address CMOs' chronic lack of transparency and abusive practices. Likewise, WIPO saw the need to publish a *Good Practice Toolkit for Collective Management Organizations* (WIPO 2018). However, even where CMOs are well-managed, the royalties they impose are burdensome for libraries. To the extent that paying royalties in this way does little to promote creation or distribution of new works, while burdening the public access missions of libraries, licensing schemes are inconsistent with the utilitarian purpose of copyright.

Conclusion

Limitations and exceptions have played a vital role in ensuring that the copyright system serves the public interest and vindicates the rights of authors, distributors, and the public. Libraries have been leading advocates for robust limitations and exceptions, in both theoretical and political disputes. Libraries are among the most vital stakeholders in the copyright system, and their reliance on limitations and exceptions is a testament to the importance of balancing provisions. Fundamental rights like first sale, tailored exceptions for activities like preservation, and flexible, open-ended provisions like fair use all play a role in the daily work of libraries.

The digital transition presents libraries with opportunities to serve their users in new and powerful ways, but it also challenges libraries as they try to perform their most basic functions. Whether libraries can seize new opportunities and maintain basic operations in the digital era will depend in part on whether they continue to benefit from robust copyright limitations and exceptions. Strong and reliable limitations and exceptions could power a golden age of access to information. Weak and marginalized limitations and exceptions will leave libraries unable to collect, lend, and preserve, much less innovate. Where licenses are allowed to trump these legal protections, the market power of rightsholders will override the public interest from a utilitarian point of view and impede the competing rights of libraries and their users from a natural rights point of view. Libraries and librarians should engage vigorously in debates about the future of copyright limitations and exceptions, as their own future hangs in the balance.

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5 Applications of Limitations and Exceptions in Higher Education in the European Union

Abstract: Copyright law in the European Union (EU) asserts the interests of rightsholders in the internal and digital single markets, balancing them with the legitimate concerns of consumers in their uses of creative output. The balance is struck through a framework of exceptions and limitations to the general economic property right, which has emerged progressively from the EU's legislature and judiciary over the last three decades. The framework is built both on essential international principles and on common practices laid down in more detailed national regimes, refashioned to accommodate emerging technologies and business models. Academic libraries have been adapting to both the everyday shift to digital content and accompanying regulatory changes, ensuring that print and online resources continue to be delivered fairly and efficiently to staff, students and researchers. This chapter focuses on the exceptions and limitations relating to academic libraries in their internal operations, and in the wider use of collections and services within their parent establishments. Particular attention is drawn to the provisions facilitating individual study and research, education practices in group and class environments, library services for users, and collective interventions to manage the remuneration of rightsholders. The more granular approach in national regimes, and the interrelationship with EU law is illustrated through an examination of the detailed system of exemptions operating in Ireland. The chapter concludes with an assessment of potential future developments, with specific regard to academic concerns and practices.

Keywords: Academic libraries; Copyright; Education, Higher; European Union; Fair use (Copyright); Ireland

Introduction

Copyright legislation strikes a complex balance between the rights and interests of creators of works and those who obtain and use them. In the academic context, as in the trade generally, publishers put the main emphasis on how authors and other producers are recognised and remunerated for their output, and on how that output can be effectively organised as property and distributed. The general rights around reproduction, communication and distribution are counterbal-

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anced with public interest exceptions and limitations to vindicate the interests of academic consumers. The earliest iterations of international copyright principles and exceptions were introduced in the Berne Convention of 1886 (Berne Convention 1886), the most recent amended revision of which was settled in 1979 (Berne Convention 1979). The impact of modern communication technologies was addressed in the World Intellectual Property Organization (WIPO) Copyright Treaty of 1996 (WIPO 1996) and the concerns of specific users recognised in the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled [hereinafter the Marrakesh Treaty] of 2013 (WIPO 2013).

From the academic user perspective, higher education libraries, and the educational establishments in which they reside, occupy a key position in this balance of interests. They assign substantial financial and human resources, often publicly funded, to the acquisition of information in a variety of formats for research, study, and teaching purposes, and to the storage, circulation, and preservation of information resources. Educational establishments are also, in their own right, direct employers and funders of creators and their works, sometimes acting as publishers themselves, and in other cases as sponsors of open access platforms. Academic libraries in educational establishments are frequently repositories of published memory, not least through legal deposit schemes and historic collections, and they invest heavily in maintaining works for posterity, at considerable cost. Libraries take account of the challenges posed by various formats, and, in more recent times, the issues posed by the emergence of the digital sphere. In recent decades, higher education has had to adapt to the costly business of online distribution of content, accompanied by investment in secure digital infrastructures for mediating access to users.

The European Union was founded in 1957 and has been variously known as the European Economic Community, the European Communities and latterly the European Union. Its highest court has been known as the European Court of Justice and more recently the Court of Justice of the European Union (CJEU). The EU produces three primary types of legislation: the regulation, the directive, and the decision. The main instruments of EU copyright legislation are the directive. They lay down general principles and provisions to be implemented at national level. However, if any provision is sufficiently clear and precise, it can be applied directly. International copyright provisions have changed in response to social and technological developments and been progressively implemented in national regimes, and also in the EU system particularly since the establishment in 1992 of its single market. The Berne Convention as revised has been acceded to by all 27 current EU Member States (WIPO n.d.). The Members are the founding parties of Belgium, France, Germany, Italy and Spain (contracting in 1886); Luxembourg

(1888); Denmark (1903); Sweden (1904); Portugal (1911); Netherlands (1912); Austria, Bulgaria, Finland, Greece, Hungary, Ireland, Poland, and Romania in the 1920s; Cyprus (1960); Malta (1968); and certain successor states of the former Czechoslovakia and Yugoslavia (Croatia, Czech Republic, Slovakia and Slovenia), Estonia, Latvia and Lithuania in the 1990s. The WIPO Copyright and Marrakesh Treaties have been implemented in EU directives and through them executed in the Member State systems.

Since 1993, the EU has adopted laws to support the production and dissemination of copyrighted works in the context of a single market. Its primary method for performing the task is to adopt directives, which lay down provisions which are then implemented in the Member State regimes. There might be divergences between different national regimes but where directive provisions are clear and unambiguous, they must be respected nationally. For instance, the provision in the Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights [hereinafter Harmonisation Directive] (Council Directive 93/98/EEC 1993) harmonised the term of copyright at 70 years and had to be directly implemented nationally.

The principal developments at EU level have essentially been threefold. The first substantial step was the adoption of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [hereinafter the InfoSoc Directive] (Directive 2001/29 2001) establishing an outline framework of rights and exceptions to be harmonised in national systems with a view to developing an information society in the EU single market. The InfoSoc Directive resulted in a number of significant cases finding their way to the Court of Justice of the European Union (CJEU), many relating to exceptions and limitations concerning, for instance, compensation for private copying in *Padawan SL v. Sociedad General de Autores y Editores de Espana (*hereinafter *Padawan v. SGAE)* [1] (2010), digitisation of works for user access on terminals in *Technische Universität Darmstadt v. Eugen Ulmer KG* (hereinafter *TU Darmstadt v. Ulmer*)[2] (2014) and the use of hyperlinks in *GS Media BV v. Sanoma Media Netherlands*[3] (2016).

Other cases have developed the concept of exceptions and limitations as a form of user right with fundamental principles being applied to underpin stated lists of exceptions as with *Funke Medien NRW GmbH v. Bundesrepublik Deutsch-*

1 Padawan SL v. Sociedad General de Autores y Editores de España (SGAE) C-467/08 ECLI:EU:C:2010:620.

2 Technische Universität Darmstadt v. Eugen Ulmer KG, C-117/13, ECLI:EU:C:2014:2196.

3 GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, C-160/15. ECLI:EU:C:2016:644.

*land (*hereinafter *Funke Medien)*[4] (2019) and *Spiegel Online GmbH v. Volker Beck (*hereinafter *Spiegel Online)*[5] (2019). The third phase could be characterised as a transition from the InfoSoc Directive listed exceptions approach to a more detailed set of mandatory provisions applying to specific, substantial scenarios as laid out in the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC [hereinafter DSM Directive] (Directive (EU) 2019/790 2019).

This chapter focuses primarily on EU copyright exceptions and limitations as they apply to the operations of higher educational establishments and their libraries. Typically, these entities are involved in teaching and research, on a not-for-profit basis, driven by public interest missions. Of course, the EU exceptions and limitations regime applies to a much broader range of actors, including public libraries, archives, cultural and heritage institutions, public sector entities, media and broadcasting concerns, and producers and distributors of audiovisual works and recognises the wider context of technology, new access models and cross-border uses. However, a substantial proportion of relevant EU provisions is specific to libraries or to their parent institutions and attracts the bulk of attention here.

National copyright provisions are frequently more detailed and relevant to local operational practices. National systems are not discussed in detail. However, the extensive and detailed provisions on copyright and exceptions and limitations in the legislation of Ireland are examined to illustrate the interrelationship of national and international law. The Irish Free State acceded to the Berne Convention in 1927 at a time when it had produced its own limited provisions on copyright as part of a law on industrial and commercial property (Ireland 1929). A standalone copyright act was enacted in 1963 (Ireland 1963), but it was only in 2000 that Ireland adopted a comprehensive regime which incorporated the provisions of the framework copyright EU legislation then at an advanced stage of preparation (Ireland 2000).

Exceptions and Limitations in the International and EU Context

The earliest reference to an exception and limitation in an international context which specifically relates to education is to be found in the Berne Convention

4 Funke Medien NRW GmbH v. Bundesrepublik Deutschland, C-469/17 ECLI:EU:C:2019:623.

5 Spiegel Online GmbH v. Volker Beck, C-516/17 ECLI:EU:C:2019:625.

(1886). Article 8 permitted the "liberty of extracting portions from literary or artistic works for use in publications intended for educational or scientific purposes". The convention went through several iterations until it settled on the text in the Paris Act of 1971. Under Article 10 of the 1971 act, amended in 1979, the exception formulation was extended in Paragraph (2) to "permit the utilisation, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilisation is compatible with fair practice" (Berne Convention 1979). Paragraph (1) also permitted "quotations from a work which has already been made lawfully available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries". In both cases, sources are to be mentioned, including the author if the name appears on the work.

While the convention provides for mutual recognition of the rights of authors of works, and permitted uses, it also introduced in its 1967 Stockholm revision a formulation to enable reproduction exceptions in national regimes, but in a controlled manner, the so-called three-step test. Article 9(2) of the 1967 revision, which is unchanged in the 1979 revised and amended text provides that "[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". Contracting States are permitted to introduce specific, limited exceptions which do not subvert the essential rights attaching to a work or its creator.

For the purposes of this chapter, the net contribution of the Berne Convention as revised and amended is to permit countries to provide for reproduction exceptions for users of copyrighted works under strict conditions. It also provides for a specific exception for teaching purposes. National regimes have developed limited exceptions over time to accommodate uses of works. Around the time of the 1967 Stockholm revision, for instance, the now repealed French law no. 57–298 (France 1957) provided in Article 41 for the making of copies for strictly private use, and for short quotes to be used for educational, scientific, or other purposes, among various other exceptions. In Ireland, the defunct Copyright Act, 1963 permitted in Section 12 "fair dealing", uses of copyrighted works for research, private study and criticism or review (Ireland 1963). Fair dealing uses were also permitted for press reporting in print, broadcast, or cinematic form. Other specific uses outside fair dealing terms were listed.

By the time the EU acted to address copyright in light of expanding economic activities in its new single market established in 1992 pursuant to the Single Euro-

pean Act, 1986, there was already a wide range of familiar exceptions and limitations operating in many national legal systems. Early EU directives on copyright addressed specific issues, such as Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs [hereinafter Computer Programs Directive] (Council Directive 91/2501991) which addressed the protection of computer programmes subject to limited exceptions and the previously mentioned Harmonisation Directive establishing of a 70-year copyright term for all Member States (Council Directive 93/98 1993). The introduction by the EU of legislation on computer programmes also found wider international expression in the WIPO Copyright Treaty of 1996 (WIPO 1996) which recognised computer programmes and databases as protected works in Articles 4 and 5, allowing for national exceptions and limitations complying with the three-step rule in Article 10 (WIPO 1996).

The first systematic EU approach to rights and permissible exceptions appeared in 2001 in the InfoSoc Directive. The legislation attempted to provide a framework for exceptions and limitations, listing the full extent of permitted classes which various users of copyrighted works could avail themselves of, with a view to encouraging harmonisation between national regimes over time in order to avoid distortions in the operation of the overall single market. The directive did not intent to create a codified system, but to ensure that any national provisions would conform to the exhaustive list of classes, with further exceptions permitted in pre-existing cases of "minor importance" concerning non-market distorting analogue uses.

The InfoSoc Directive could be described as the EU's first decisive step in staking out its regulatory territory in reconciling the interests of creators and users of copyrighted works. Several disputes arose from the Directive which enabled the CJEU to develop case law on balances of interests of concerned parties, and the impacts of developments in technology and the marketplace. A renewed contribution at international level was made by the Marrakesh Treaty, implemented in turn by the EU. The EU itself independently introduced two further pieces of legislation aimed at resolving identifiable issues in some detail, such as orphan works, text and data mining, and digital and cross-border teaching. The cumulative effect of these developments has been the emergence of a more coherent EU framework of permitted uses of copyrighted works, complemented by a suite of laws mandating obligations and solutions concerning clearly identified types of work or uses of them.

Approaches to Exceptions and Limitations in EU directives

The 2001 InfoSoc Directive – A Framework for Exceptions and Limitations

The intention and approach of the InfoSoc Directive (Directive 2001/29/EC 2001)), is explained in detail in the recitals appearing in the earlier part of the instrument's text. Recitals are preliminary explanatory paragraphs in EU legislative acts designed to assist in the understanding of the legally applicable provisions appearing after them as laid out in the Interinstitutional Style Guide, 2.2(b). They can provide practical context and explain policy considerations. They are not legally binding in themselves although they are, for instance, frequently referred to in, and incorporated into the reasoning of cases at the CJEU.

Recital 31 of the InfoSoc Directive states that there must be a fair balance of rights and interests between rightsholders and users. The balance must take into account digital developments, with an ongoing need to reassess relationships, rights, and exceptions and limitations in light of the "new electronic environment". Although the formulation is two decades old, the injunction to be mindful of developments in digital content and its mediation is explicit. Regarding the academic environment, recital 14 recognises the public interest in promoting learning and culture through permitting exceptions or limitations on the general property rights of authors and performers for the purposes of education and teaching. Recital 32 recognises the specific traditions in Member States and makes clear that the directive respects the way laws on copyright have evolved in various countries, and that the EU approach is iterative and not necessarily intended to introduce a fully codified regime. However, recital 32 asserts a constraint on national autonomy by characterising the directive's list of exceptions and limitations as an "exhaustive enumeration" requiring "coherent application" by the Member States. When read alongside the Berne Convention three-step test formally introduced into the directive by Article 5(5), it becomes clear that national legislators have a "much narrower margin of appreciation to determine their copyright policies" than the largely optional nature of the language in Article 5 might suggest (Sganga 2020, 314).

The Legal Provisions of the Directive Relating to Education and Libraries

Articles 2 to 4 of the InfoSoc Directive specify the rights of authors and performers of creative works, namely rights on the authorisation and prohibition of reproduction, communication to the public, and distribution. The reproduction and communication rights are subject to a lengthy enumeration of exceptions and limitations, formulated to take account of the legitimate interests of users. The Berne Convention three-step-test is incorporated into the directive by Article 5(5) which states that the exceptions and limitations provided for in the article shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter, and which do not unreasonably prejudice the legitimate interests of the rightsholder. Article 5 proceeds to list the classes of exceptions and limitations which can be applied by EU Member States, although only a minority apply to the typical activities of academic institutions. Those that have substantial practical academic application are outlined below in relation to reproductions rights only, and to reproduction and communication rights.

Reproduction Rights

Pursuant to article 5(2), Member States may provide for exceptions or limitations concerning:

- Reproductions on paper or any similar medium, with the exception of sheet music, provided rightsholders receive fair compensation
- Reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightsholders receive fair compensation which takes account of the application or non-application of technological measures, and
- Specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.

The activity class most directly relevant to educational establishments and libraries is "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage", as provided for under Article 5(2)(c). The acts concerned are not themselves specified in the Directive, but as they relate to reproduction, and not access, they are clearly of an internal nature. Academic libraries would understand them to include, for instance, copying for pres-

ervation purposes, or for replacing items missing from their collections. There is no reference to any form of compensation for rightsholders, so there is no need to make financial provision for such activities.

Educational establishments and their libraries need to be mindful of Article 5(2)(a) and (b) "reproductions on paper or similar medium" and of "reproductions on any medium made by a natural person for private use" for non-commercial ends. The provisions are generally applicable and underpin copying to paper in any environment, and all manner of copying, including digital, by individuals. They are clearly distinguishable from Article 5(2)(c) copying by academic libraries for non-commercial purposes including for library users in limited circumstances. However, they can apply in an academic library or educational establishment environment where copying to paper is by persons other than library staff, or where copying in any form is made by an individual for private, non-commercial purposes. Where Member States provide for exceptions or limitations relating to reproductions, they must also make provision for the receipt of fair compensation by rightsholders in relation to such uses of their works. Appropriate compensation is discussed below.

Various copying scenarios have been the subject of case law in the EU. The Article 5(2)(a) "reproductions on paper" category was referred to as the "reprography exception" in paragraph 29 of *Hewlett-Packard Belgium SPRL v. Reprobel SCRL*[6] (hereinafter *Hewlett-Packard v. Reprobel*) (2015). Those affected are not specified and accordingly paragraph 30 stated they "must be regarded as covering all categories of users, including natural persons, whatever the purpose of the reproductions, including those made for private use and for ends that are neither directly nor indirectly commercial". Article 5(2)(b) "reproductions on any medium", the so-called "private copying exception", includes "those made onto paper or a similar medium" and was reinforced in paragraphs 31 and 32 as "not excluding from its scope reproductions effected by the use of any kind of photographic technique or by some other process having similar effects". *Copydan Båndkopi v. Nokia Danmark A/S*[7] (2015) tested the nature of the medium, referring to "DVD, CD, MP3 player, computer, etc" and files from the internet or other sources (paragraph 16). Accordingly, it is clear that the court is prepared to adopt wide interpretations of both users and methods of copying, adapting to new technological means as they arise.

Both the exceptions discussed above cover activities which can be performed in educational establishments concerning works accessed through their libraries, whether for private research or study purposes. The reproductions are subject to

6 Hewlett-Packard Belgium SPRL v. Reprobel SCRL C-572/13 ECLI:EU:C:2015:750.

7 Copydan Båndkopi v. Nokia Danmark A/S C-463/12 ECLI:EU:C:2015:144.

the fair compensation clause. The CJEU has determined that fair compensation is an autonomous concept of EU law to be interpreted uniformly in Member States applying the private copying exception, and "calculated on the basis of the criterion of harm caused to the author" as noted in *Padawan v SGAE*, paragraphs 37, 40 and 42. The interpretation also applies to the reprography exception and all other article 5 exceptions for which fair compensation is required as noted in *Hewlett-Packard v Reprobel*, paragraph 37.

Reproduction and Communication Rights

Article 5(3) of the InfoSoc Directive provides for an extensive list of classes of exception and limitation within which Member States may operate. Only three are of specific relevance to educational establishments and their libraries. The most obvious educational category is Article 5(3)(a) use of material "for the sole purpose of illustration for teaching or scientific research" for a non-commercial purpose. The source must be cited unless this is not possible. Materials may also be used to the "benefit of people with a disability". Such use must be directly related to the disability and to the extent required by the specific disability, and non-commercial in nature (Article 5(3)(b)).

Article 5(3)(n) on "communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals" on their premises is relevant to educational establishments and their libraries, insofar as those acts relate to materials in their collections and no purchase or licensing terms are contravened. The exception would appear to apply to acquired or licensed digital products and to items in a library's collections lawfully digitised locally. The CJEU has ruled that the provision entitles an establishment to digitise a work in its collections to make it accessible through a terminal, on the understanding that the ancillary right does not extend to entire collections. Indeed, Article 5(3)(n) would be meaningless if there was no ancillary right to digitise the works in question. The offer by the publisher of the opportunity to acquire a licence for the publisher's digital version does not override this right as found in *TU Darmstadt v. Ulmer*, paragraphs 30, 43 to 45, 47 and 49.

There are two other uses permitted under Article 5 which may be of relevance to educational institutions and their libraries. They are Article 5(3)(i) "incidental inclusion of a work or other subject-matter in other material" and Article 5(3)(o) "cases of minor importance" already excepted or limited under national law.

Of the remaining exceptions listed in Article 5, four classes of use could be reasonably expected to be invoked by persons from educational establishments in their private capacities outside of direct teaching and research duties, namely

in the course of publishing activities, for quotation for criticism or review, for political speeches or public lectures, or for caricature, parody, or pastiche. Where any activity involves the use of works sourced in the library of an educational establishment, and not for conventional teaching or research purposes, academic or other educational establishment, users need to be mindful of the liabilities which may devolve on them personally for any breaches of copyright, especially of conditions specifically attached to uses such as proper attribution. Libraries themselves are advised to draw to the attention of potential users to the types of reproduction and communication which might fall within academic and non-academic purposes. None of the article 5(3) scenarios makes any specific mention of compensation for rightsholders.

The 2012 Directive on Orphan Works

It is not always possible to identify all rightsholders for a published work. If none of a work's rightsholders can be identified or located, despite a diligent search, the work is considered an orphan work. There are problems for educational establishments and other similar entities in managing and making such works available, particularly through digitisation. Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works [hereinafter Orphan Works Directive] (Directive 2012/28/EU 2012) addresses the issues. The recitals in the Orphan Works Directive explicitly refer to large scale digitisation activities and the problems of managing materials for which no rightsholders can be identified or located. They suggest practical approaches on permitted uses of orphan works bearing in mind existing national solutions for digitising out-of-commerce works and recognise the need for due diligence in searching for ownership, recording outcomes in a centralised publicly accessible database, and for a process to vindicate rightsholders should they subsequently come forward, including the ending of orphan status, and compensation for any uses made up to that point. The recitals also recognise the value of not-for-profit entities in managing collections in, for instance, educational establishments, and the need for an exception or limitation to enable public interest work in preserving and providing access to orphan works.

Article 6 of the Directive provides for the right of reproduction and making accessible orphan works by educational establishments and other entities, including digitisation. The use is restricted to public interest missions and specifically for the preservation, restoration, and provision of cultural and educational access to material in the library's collections. The specified uses are primarily non-commercial, although revenue may be generated to cover the costs of digitisation and

making the results available to the public. For as long as a work retains orphan status, no compensation is due to rightsholders. However, if a rightsholder becomes known and puts an end to an orphan status, as is provided for under Article 5, "fair compensation" will be due as determined at a national level.

The directive sets out criteria for searching for rightsholders, provides for authorisation by a rightsholder of use as an effective orphan work, and establishes mutual recognition within the EU. It also requires the outcome of searches determining works to have orphan status to be recorded through Member State offices in a single publicly accessible online database, currently in operation as the European Union Intellectual Property Office (EUIPO) Orphan Works Database.

The Directive features a review clause to facilitate the inclusion of additional matters, most notably photographs and other images, to assess the development of digital libraries, and to permit Member States to notify the Commission of undue interference in national management of rights (Article 10). The review clause arguably suggests that the orphan works regime is to some extent experimental, particularly considering the juxtaposition of a clear property right with a desired public interest outcome. The Directive is founded on non-commercial principles, yet not-for-profit entities must conduct a relatively costly investigative item-by-item search process; fund digitisation activities, storage, and access management systems; and make provision for commercially related compensation should rightsholders subsequently emerge.

The 2017 Directive on Blind, Visually Impaired and Print-Disabled Users

Exceptions and limitations concerning access to materials in accessible formats to blind, visually impaired or otherwise print-disabled persons were extended by Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on Certain Permitted Uses of Certain Works and Other Subject Matter Protected by Copyright and Related Rights for the Benefit of Persons Who Are Blind, Visually Impaired or Otherwise Print-disabled and Amending Directive 2001/29/EC on the harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [hereinafter the Marrakesh Directive] (Directive (EU) 2017/1564 2017) bringing the provisions of the Marrakesh Treaty into force within the EU. The recitals in the Directive refer to the access barriers to books and other printed materials experienced by people who are visually impaired. It is mandatory for the production and dissemination throughout the EU of suitable copies of materials for use by visually impaired people, including from digital

and audio sources in educational establishments and libraries. Where harm to a rightsholder is minimal, no compensation obligation arises.

The provisions of the Marrakesh Directive expand on the reproduction and communication exception for visually impaired users already provided for in Article 5(3)(b) of the InfoSoc Directive. The actors authorised to use the Directive comprise the disabled beneficiary concerned, a person acting on her or his behalf, and "authorised entities". The range of permitted uses is expanded, specifically on the making of copies in accessible formats for visually impaired users and how such copies may be communicated to them, including across borders within the EU. As originally provided for under the 2001 InfoSoc Directive, the use must relate to the disability concerned and to the extent required by it.

The authorisation of the rightsholder concerned for the permitted uses under the Marrakesh Directive is not required. However, the Directive does place obligations on authorised entities when they become involved, reflecting wider distribution capacities, particularly in cross-border lending between entities in the various member states. The obligations include the maintenance of records on works and copies, and the provision of lists of works copied into accessible formats to interested parties and reporting on exchange of copies. The Directive is clear that authorised entities are required to limit such services to visually impaired users and other authorised entities, must take steps to prevent copies entering the public domain, and be accountable in terms of compliance. Finally, under Article 3(6), it is left to each Member State to decide whether it wishes to require authorised entities within its jurisdiction to subscribe to a compensation scheme, and where it does, the scheme must be limited to the terms of the directive. Recital 14 gives substantial guidance, including a statement that any such scheme must not require payment by beneficiary persons.

Additional Exceptions and Limitations Under the 2019 DSM Directive

The DSM Directive (Directive (EU)2019/790 2019), was adopted to take account of developments in digital and cross-border uses of content, with accompanying exceptions and limitations. Two aspects relate to educational establishments.

The first concerns text and data mining (TDM) of lawfully accessed works by a "research organisation", meaning "a university including its libraries, a research institute or any other entity, the primary goal of which is to conduct scientific research or to carry out educational activities involving also the conduct of scientific research". Secure copying and retention of text and data in digital form are permitted to generate "information". Rightsholders and research organisa-

tions are encouraged to agree on "best practice" in relation to various activities. An exception and limitation provided for by a Member State may be overridden in the case of an express reservation of use of a work by a rightsholder in an appropriate manner with no requirement to compensate the rightsholder.

The second aspect concerns the use of works in non-commercial digital and cross-border teaching activities. An educational establishment is to ensure such uses are at a venue it controls, or in a secure electronic environment accessible only to its students and teaching staff, and that the source is indicated. Works do not extend to materials primarily intended for the educational market or to sheet music where either is easily available on the market. Fair compensation for rightsholders may be provided for. The provision is in stark contrast with the provisions on illustration for teaching or scientific research purposes in article 5(3)(a) of the InfoSoc Directive where citation, but no compensation is required, and to the Berne Convention where fair use of works or quotations for teaching requires only mention of the source or author.

In addition, the DSM Directive provides for two other exceptions and limitations not specifically aimed at educational establishments or their libraries: the preservation of works in the collections of cultural heritage institutions, and cultural heritage projects relating to out-of-commerce works.

Fair Compensation in EU Directives

It is important for academic libraries and their parent establishments to understand the costs that potentially flow to rightsholders from using copyright exceptions and limitations. The two InfoSoc Directive Article 5(2) reproduction exceptions relevant to education establishments and their libraries provide for "fair compensation", as does the Orphan Works Directive where previously unknown rightsholders emerge. The DSM Directive allows Member States to provide for fair compensation for the use of works in digital and cross-border teaching activities. The Marrakesh Directive permits Member States to impose compensation schemes on authorised entities under limited circumstances, but, consistent with Article 5(3)(b) of the InfoSoc Directive, not on users themselves, with no reference to "fair compensation".

As a rule, compensation is not due for the use of the InfoSoc Directive Article 5(3) reproduction and communication exceptions and limitations, for the provision of accessible formats for visually impaired users, or for TDM. In the latter cases, it should be reiterated that the free use of works is conditional on their reproduction only to the extent justified by the authorised act, in a manner that

does not conflict with the normal exploitation of the work, and which does not unreasonably prejudice the legitimate interests of the rightsholder.

Although Articles 5(2)(a) and (b) of the InfoSoc Directive provide for "fair compensation" for resort to the reprographic and private copying exceptions, they contain no criteria to assess the level of compensation, and it has fallen to the CJEU to provide guidance. First, as "fair compensation" is an autonomous concept of EU law, it must be interpreted uniformly in all the Member States that have introduced a private copying exception, as indicated in *Padawan v SGAE* paragraph 37(2010). The concept of private, non-commercial use has been brought into play for both reprographic and private copying even though the criterion is strictly present only in the private copying exception. CJEU case law has determined that as copying on paper is common to both exceptions, the criterion of private, non-commercial use can be used to help assess the level of harm caused to authors in determining the level of fair compensation in the reprography exception. The court made direct reference to the different levels of harm suffered as a result of non-commercial versus commercial use in *Padawan v SGAE*, paragraphs 40 and 42 (2010) and in, *Hewlett-Packard v Reprobel*, paragraphs 41 and 42 (2015).

The manner of the method and calculation is relevant to the practical assessment of fair compensation. In *Hewlett-Packard v. Reprobel*, the court was asked to consider two forms of remuneration, lump sums levied in advance on equipment based on reproduction speed, and a unit price applied to numbers of copies made in real time. The court in *Padawan v. SGAE* acknowledged in paragraphs 46, 48, 55 and 56 the practical difficulties in identifying users, and deemed it more practicable to apply a levy to the persons making the copying equipment available to users, and to pass on the cost of the levy to them. The court in *Hewlett-Packard v. Reprobel* went on to acknowledge in paragraphs 83 to 86 that Member States could introduce systems combining lump sums on equipment and proportional remuneration after the fact so long as such remuneration did not result in overcompensation to the detriment of particular categories of user thereby upsetting fair balance between the interests of rightsholders and users.

In contrast, the delivery of fair compensation in relation to the Article 5(2)(b) of the InfoSoc Directive private copying exception through a particular mechanism in Spain financed from a general state budget was precluded by the court in paragraph 42 of the case of *Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Derechos de Autor de Medios Audiovisuales (DAMA), Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v. Administración del Estado, Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los conteni-*

dos Digitales (Ametic)[8] (2016), on the grounds that the scheme overall was set up in such a way "that it is not possible to ensure that the cost of that compensation is borne by the users of private copies" (paragraph 42).

While it is difficult to ascertain precise quantums of harm and appropriate compensation, the solutions offered by the CJEU are reasonable and point to an approximation of fair balances of interests in which practical technical considerations are applied. The court has inferred solutions from limited legislative guidance, but in doing so has indicated clear paths to arrangements negotiated between interest groups and aligned with legislation and case law.

How compensation is to be effected is largely left to the discretion of national regimes, necessitated by resistance in the preparation of the InfoSoc Directive to the proposed adoption of an EU-wide levy system (Ulmer-Eilfort 2003, 454). The recitals to the InfoSoc Directive provide useful background on how rightsholders are to be compensated for defined uses, including through a licence fee, and through national reprography schemes. Factors to weigh in determining the application of compensation include possible harm to rights, and any prior payment made, such as a licence fee. Where prejudice would be minimal, no obligation for payment may arise. In practice, levies can by imposed on equipment which can be used to reproduce works, at levels which reflect the rate at which reproduction can take place. For instance, Austria, Belgium, Germany, and Sweden have applied equipment levies to copiers and scanners, and Germany to printers (Ulmer-Eilfort 2003, 448–450) assuming that costs will be passed on by operators of the equipment to end users. Costs can be applied directly on a usage basis, although perhaps to do so is administratively impractical. Finally, educational establishments, and other user classes, can enter into licensing arrangements with collection management organisations. Such licences provide an opportunity to administer compensation for various classes of exception and limitation through a single negotiated instrument and are considered in more detail in the following section.

8 Entidad de Gestión de Derechos de los Productores Audiovisuales (EGEDA), Derechos de Autor de Medios Audiovisuales (DAMA), Visual Entidad de Gestión de Artistas Plásticos (VEGAP) v. Administración del Estado, Asociación Multisectorial de Empresas de la Electrónica, las Tecnologías de la Información y la Comunicación, de las Telecomunicaciones y de los contenidos Digitales (Ametic) C-470/14 ECLI:EU:C:2016:418.

Collective Management Organisations

Organisations constituted to represent the interests of authors and other creators of works, and to collect fees on their behalf are arrangements of long standing in EU Member States and known as collective management organisations (CMOs), subject to the provisions of Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Use in the Internal Market [hereinafter the Collective Rights Management Directive] (Directive 2014/26/EU 2014). CMOs represent the interests of distinct classes of rightsholders and manage the collection of rights revenues from users of copyrighted works for distribution to the rightsholders subject to the terms of licences negotiated with users. The Collective Rights Management Directive recognises the operation of CMOs at Member State level and provides for national rules for copyright management. The directive does not mandate the creation of CMOs, which is at the discretion of Member States. Neither does it supplant the determination of fair compensation at national level for the application of exceptions and limitations to the reproduction right in Article 5(2) of the InfoSoc Directive.

The Collective Rights Management Directive does, however, lay down essential provisions to be respected by CMOs constituted in the Member States, including membership rules, treatment of non-member rightsholders, CMO/user licences, user obligations and public disclosure. Concerning licences, Article 16 stipulates that they are to be negotiated by CMOs and users "in good faith", with tariffs being "reasonable" and "in relation to economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work". CMOs negotiate arrangements with various sectoral users, including in higher education.

The CMO in the Netherlands is the Stichting Reprorecht/Reprographic Reproduction Rights Foundation which was appointed by ministerial regulation in 1985. §6 Article 15 of the Netherlands *Auteurswet*/*Copyright Act* (The Netherlands 1912) provides mechanisms for the collection by agencies of fees for reprography by libraries and educational institutions. The counterpart organisation in Ireland is the Irish Copyright Licensing Agency (ICLA)) which commenced as a trade entity in 1992, and was established in its current form pursuant to section 149 of the *Copyright and Related Rights Act, 2000* (Ireland 2000). The activities have expanded over the years copying fuller ranges of resources and formats, broadening the range of reprography to include scanning, and facilitating online learning through licensing access to digital resources on virtual learning platforms.

The terms of the licence scheme for higher education institutions are set down by ministerial order in Statutory Instrument No. 277/2020 (Ireland 2020)

which established a scheme for educational establishments covering sections 57, 57A and 57B of the 2000 Copyright Act with respect to illustration for education, teaching or scientific research, distance learning and use of work available through the internet. The terms are clear reflections of the language of Article 5(3)(a) of the InfoSoc Directive and Article 5 of the DSM Directive. The order sets out quantitative limits for the copying of works and uses in courses of study, including through virtual learning environments (VLEs). The terms of the licence override equivalents in the 2000 Act itself, albeit in certain instances more generously, and are binding on the educational establishments concerned.

Lending Information Resources in Educational Establishments

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property [hereinafter Rental and Lending Rights Directive] (Directive 2006/115/EC 2006) requires Member States to provide for a right to authorise or prohibit lending of works, subject to a possible derogation for lending by "establishments which are accessible to the public", broadly understood as public libraries. Where a member state takes up this derogation, remuneration must be provided for authors.

The status of lending by libraries in educational establishments is not specifically addressed. Is educational lending covered by the directive? The reference to public lending in both the recitals and the active legal provisions, and to the provision of "a right" could infer the existence of other rights concerning other forms of lending, of which educational lending is a clear instance. Author rights and exceptions arguably remain within the realm of national legislation operating within the constraints of the Berne Convention, principally the three-step test.

The Case of Ireland

Although general copyright principles and exceptions have existed at the international level for well over a century, and the EU approach has evolved over the last thirty years, exceptions and limitations have tended to be drafted in greater detail at the national level and the copyright regime in Ireland has been chosen to illustrate how one European country has reacted. Traditionally, the Irish legal system is heavily influenced by the common law approach, with copyright exceptions based on fair dealing and other specified limited uses in the United Kingdom

Copyright Act of 1911 (United Kingdom 1911) carried forward into the legal system of the independent Irish state by the *Copyright (Preservation) Act, 1929* (Ireland 1929). A more comprehensive statute was introduced in 1963 (Ireland 1963), which was in turn replaced by the Act of 2000 (Ireland 2000), which forms the basis of current Irish copyright law. The principal legislation in Ireland is the *Copyright and Related Rights Act, 2000* as amended in the Acts of 2004, 2007 and 2019 (Ireland 2004; 2007; 2019). One of the features of the 2000 Act, and the instruments which have amended it since, is the clear influence of EU law. The provisions of the InfoSoc and DSM Directives, to name the most prominent, are closely reproduced in the Irish legislation in substantial detail in the 2000 and 2019 Acts respectively. The 2000 Act was effectively a reworking and augmenting of domestic provisions in light of the draft provisions of the InfoSoc Directive which was at an advanced stage in the EU legislative process. The 2019 Act was a major piece of amending legislation which incorporated the spirit and the letter of the new approaches being introduced by the DSM Directive. While common law principles, such as fair dealing, are still retained in the language of the Irish legislation, they have been progressively overlain by more specific provisions.

Copyright is primarily governed by Part II of the 2000 Act and is characterised as a property right attaching to an owner, section 17(1), being the author creating a work as defined in chapter 2 of the Act, sections 21 to 23. The rights of a copyright owner are set out in chapter 4, the main expression being the exclusive rights of the owner of the copyright in a work having an exclusive right to copy it or make it, or an adaptation, available to the public in section 37(1). "Exemptions" are "acts permitted in relation to works protected by copyright" and schemes for organising them, and are laid out in detail throughout the act. The more typical scenarios found in higher education establishments and their libraries are dealt with in chapter 6 of the Act which describes exemptions in the various classes outlined below. For the sake of comparison, these are categorised where possible under the classes of exception and limitation laid out in EU directives.

Lending and Fair Dealing

By way of preliminary observation, lending of copies of works by educational establishments does not infringe Irish copyright law, section 58 as amended by section 8 of the *Copyright and Related Rights (Amendment) Act 2007*. No provision is made for remuneration. In contrast, lending by public libraries and remuneration due to authors is subject to distinct arrangements made under ministerial regulations from 2008 and 2013 (Ireland 2008; 2013).

Copyright exemptions are introduced through the principle of fair dealing by section 50 of the 2000 Act. Fair dealing is the use of a publicly available work for a purpose and to an extent which does not unreasonably prejudice the interests of a copyright owner. Specifically, the use of copyrighted works is permitted for research or private study. Fair dealing implicitly includes copying on behalf of a researcher or private student but is breached where a librarian exceeds multiple copying limits under section 63, or where another person copies in excess of usage for a single act of research or study. Various changes were made in the *Copyright and Other Intellectual Property Law Provisions Act 2019* (Ireland 2019). Section 12 amends Section 51 which permits fair dealing for the purposes of criticism or review where accompanied by sufficient acknowledgement. The concept of fair dealing appears in other specific scenarios throughout the 2000 Act.

Reproduction and Communication Rights

Where another copy cannot be reasonably purchased, a librarian may copy a work in a permanent collection for preservation purposes (section 65) and undertake copying in a different form for preservation purposes (section 68A). Librarians may make copies of articles and tables of contents from periodicals for supply to a person for the purposes of research or private study subject to quantitative limits (section 61), which are overridden where a section 173 certified licensing scheme is in place (section 57C). Librarians may copy and supply part of a work to a person for the purposes of research or private study (section 62). The extent of the part is not specified and is overridden where a section 173 certified licensing scheme is in place (section 57C). A copy of a periodical article and the whole or part of a work may be supplied between libraries (section 64). A librarian should make reasonable enquiries to obtain consent to do so from a person entitled to authorise copying.

Where another copy cannot be reasonably purchased, a librarian may copy a work in a permanent collection and supply it to replace a lost, destroyed, or damaged work in another library for preservation purposes (section 65).

Copies of works communicated on dedicated library terminals, and brief and limited displays by librarians or in a public lecture in a library are permitted in an amendment to the 2019 Act as fair dealing for education, teaching, research or private study purposes with sufficient acknowledgement (section 69A). Copying and distribution of works for persons with disabilities, including by designated bodies is permitted under section 104 as amended by the 2019 Act. A fixation of a broadcast or cable programme may be made by an educational establishment for its educational purposes, except where a section 173 certified licensing scheme

is in place (section 56). Inclusion in an incidental manner in another work, and copies of same, are not infringements of copyright (section 52).

Orphan Works, Text and Data Mining, Digital and Cross-Border Teaching and Licensing

Various legal changes (Ireland 2014) and sections of the 2019 Copyright Act responded to EU directives and regulations and updated previous provisions. Section 70A of the Act provides for permitted uses of orphan works by educational organisations and other bodies. Such uses include copying, digitisation, preservation, restoration and making output available. Non-commercial computational analysis of a work for research purposes and with sufficient acknowledgement is permitted (section 53A).

Sections 57 to 57B cover a range of uses of works for educational purposes including illustration or reproduction for display, communication for distance education and availability through the internet, again in the absence of a certified licensing scheme.

Licensing schemes are provided for in section 173 of the 2000 Act. Licensing bodies may, subject to ministerial certification, operate on behalf of a substantial representation of rightsholders in a category of works across a wide range of formats. Where so certified, the licence supplants the operation of individual exemptions. Most higher education activities are covered, including education uses, as discussed above.

Future Developments

Full Adaptation of Exceptions and Limitations to Digital Works

In 2001, the EU did not see the need to introduce in the InfoSoc Directive "new concepts for the protection of intellectual property", settling instead for adaptations and supplementations of current law "to respond adequately to economic realities such as new forms of exploitation" (Directive 2001/29/EC 2001, recital 5), and their "harmonisation into a framework" within which action at national level would respond to technical challenges and maintaining the integrity of the EU internal market (recitals 6 and 7). Accordingly, the exceptions and limitations in Article 5 take on the appearance of a classified list of uses from which Member

States are to limit divergences. No attempt was made in the InfoSoc Directive to introduce measures such as quantitative limits, or operational guidance.

However, legislative, and judicial developments since then suggest the EU is responding to changes in technology and publishing, focusing on more specific issues and outlining solutions in substantial detail. For instance, the introduction in 2012 of the Orphan Works Directive was intended to facilitate large-scale digitisation projects by removing the obstacle of not being able to identify rightsholders. Detailed procedural requirements were laid down to regulate the specific problems raised by orphan works. Questions on the success of the Directive aside, the new procedures constituted a clear break with the approach of the InfoSoc Directive.

The Marrakesh Directive built on the 2001 InfoSoc Directive categorisation by providing for an extension of beneficiary rights to include the authorisation of a system for managing reproduction and distribution of relevant works, including by libraries, a broadening of the copying mechanisms for those works, and a recognition of cross-border sharing. The provisions on TDM in the DSM Directive contain conditions on storage purpose and security, and the relationship between stakeholders. On digital and cross-border teaching purposes, the 2001 InfoSoc Directive formula of non-commercial "use for the sole purpose of illustration for teaching" is expanded to include digital uses, subject to provisos on platform security and compliance with specific content licensing constraints.

The CJEU has played a decisive role in the development of the balance of copyright interests. Academic authors have posited the nature of exceptions and limitations as user rights in themselves (Geiger and Izyumenko 2019). This is significant insofar as the clear property right underlying the creation of works has some manner of public interest counterpart where certain freedoms of use are specified. For instance, Geiger and Izyumenko emphasised the judgments of the CJEU in the *Funke Medien* and *Spiegel Online* cases that the exceptions and limitations listed in Article 5 of the InfoSoc Directive in themselves "confer rights on the users of works". The same authors highlighted the ruling of the CJEU in the *TU Darmstadt v. Ulmer* case that the communication or making available of works on terminals under article 5(3)(n) of the InfoSoc Directive extended to the ancillary right to be able to digitise works in collections to this end without the rightsholder's consent (Geiger and Izyumenko 2019), implying that the court may tend towards liberal readings of exceptions in coming years.

What this means for academic libraries is that the transition from print to digital is now understood as a seamless development in EU legislation and case law. The principles applying to print are being translated to digital formats, together with mechanisms to ensure that the extent of access is equivalent in order to protect the economic interests of creators, without prejudicing the legit-

imate public policy interests of users. Contractual opt-outs to limit application in the digital sphere are not being accepted. Accordingly, licences for access to digital content cannot override the benefits of exceptions and limitations for users of works.

Legitimate Exploitation of Digital and Digitised Works

The *TU Darmstadt* v *Ulmer* case discussed above concerned the use of works in an academic context, with the court extending the permission already provided for in legislation for communication through terminals in educational establishments to include the digitisation of print items for that express purpose. The consent of the rightsholder was not required and constituted an acceptance by the court of an equivalence in principle between the exploitation of print and digital formats, a matter of considerable practical interest to academic libraries.

The court encountered the question of the equivalence of print and digital lending in the *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*[9] case. The CJEU was asked to consider whether a copy of an ebook obtained through a licensing agreement could be made available for downloading from the server of a public library in a manner equivalent to a physical loan. The court concluded that there was no decisive ground to exclude lending of digital copies from the scope of the Rental and Lending Rights Directive. The court further noted that recital 4 of that Directive states that copyright must adapt to "new economic developments such as new forms of exploitation", and that lending carried out digitally is indisputably such a new form. Consequently, lending under the Rental and Lending Rights Directive also means the lending of a digital copy, so long as there is equivalence in the manner of access rendering the practice of digital lending to be of similar volume and duration to print access.

The facts of this decision related to a public library operating under a specific Directive which does not refer directly to educational establishments and their libraries. However, the principle of equivalence of print and digital lending is explicitly tied to a generally applicable economic context and suggests that the same reasoning would be applied to lending by academic libraries. The ruling in the *TU Darmstadt v. Ulmer* case suggests furthermore that there are strong grounds to support the contention that under CJEU case law, a copy of a print item in an academic library's collections which has been digitised by the library, as opposed to an item available to it by licence, could be placed on a server for the

9 Vereniging Openbare Bibliotheken v. Stichting Leenrecht C-174/15 ECLI:EU:C:2016:856.

purposes of lending, as long as access volume and duration equivalent to print lending is ensured.

Adjustments to Orphan Works and Out-of-Commerce Rules

The rules applying to orphan works place substantial burdens on educational establishments, including making provision for payments to authors emerging to end an orphan status. This onus on not-for-profit academic establishments puts digital access to holdings such as grey literature, pamphlets, or unpublished materials at risk. Without libraries to preserve such content, orphan work holdings are likely to diminish in real time. Perhaps the provisions on use of such works and compensation could be rebalanced to reflect a public interest role, for instance by permitting access to such materials without the requirement to provide compensation if orphan status is ended.

Going a step further, it has even been suggested that the real problem at the heart of digitisation, not just of orphan works, but cultural heritage more widely is "the lack of a rule that allows digitization for specific purposes, regardless of the right holder's authorization" (Montagnani and Zoboli 2017, 210). The exception and limitation on out-of-commerce works could be applied to other entities. The DSM Directive currently permits cultural heritage organisations to enter into arrangements with collective management organisations to reproduce and distribute such works to the public. It will take some time to ascertain the effectiveness of the provision, but should it prove successful, it may be worth considering extending the same facility to educational establishments for holdings in their libraries, at least for their teaching and research audiences, if not for the public at large.

Open Access

The relationship between authors, publishers and users in the various models of open access are already substantially conditioned by the terms of voluntarily applied creative commons licence conditions, and in the EU context by support for open access in research funding programmes such as Horizon 2020 and the promotion of open science principles in its successor Horizon Europe. Open access and open science are also supported by the European Research Council, for instance through its policy of making access to peer-reviewed outputs funded by it freely available shortly after publication, albeit substantially reliant in turn on the support of institutions and their scholars (Koutras 2018, 47).

Solutions mandated through copyright legislation seem unlikely for the foreseeable future. However, as open access voluntarily but fundamentally alters the economic basis of the relationship between rightsholder and user, there may be grounds to base an exception or limitation on reproduction and communication rights concerning openly published works in terms which are centred on author attribution, at least as a statement of principle.

Conclusion

European Union legislation and case law has brought considerable order to the copyright regimes operating in the Member States, building on the substantial foundations laid by the Berne Convention. Both legislators and judiciary are careful to emphasise that the EU is not attempting to codify laws. However, the EU has evolved its approaches, first to delimit the extent to which exceptions and limitations can be placed on creators' rights, and latterly to propose self-contained solutions to address specific problems, such as for orphan and out-of-commerce works. The EU has also been creative in adapting rules to address real-world changes in the marketplace, for instance in the sphere of digital and cross-border education. In doing so it appears to be concentrating regulatory oversight on large-scale activities with substantial ramifications for interested parties, thereby capturing benefits for creators, and providing orderly mechanisms for users to provide due recognition, protections, or compensation. It will be interesting to see if this specific approach succeeds or not, particularly considering the disruptive potential of open access and scholarship, and the application of creative commons-style permissions.

Accordingly, it is reasonable to assume that for the foreseeable future, academic libraries and their parent establishments will have to contend with the realities of commercial, digital delivery of scholarly and research works, and account for the accompanying creative and publishing rights which have to be protected. It is not a given that the increasing influence of open access will completely supplant this model. Accordingly, the interplay between property rights and exceptions to them will continue to be a subject of legislative and judicial consideration and innovation.

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6 The Public Domain and Libraries: History, Contexts, Threats and Opportunities

Abstract: This chapter provides an introduction to the history and philosophical justifications for the existence of the public domain in copyright legislation around the world, with a primary focus on common law jurisdictions. It discusses expanded definitions of the public domain that have been proposed in the literature and examines current and evolving threats to the public domain. The intersection of libraries with the public domain is examined, specifically libraries' roles in collecting, preserving, sharing, and defending the ever-expanding body of knowledge. Issues related to other types of organizations committed to upholding the public domain, all in the name of public interest, are explored. Some attention is given to Indigenous and traditional knowledge areas with the growing recognition that they have not been well served by copyright law.

Keywords: Public domain (Copyright law); Public interest

Introduction

For much of the world, the first day in January is not just the beginning of a new year, it is also Public Domain Day, the day when, in most countries, a new cohort of previously in-copyright works enter the public domain, the term used to describe the collective body of creative works for which intellectual property restrictions including copyright do not apply. The expiration of copyright in particular works enables a wide variety of creative activity: suddenly all the works that were protected by copyright can be used for any purpose, with potentially some exceptions in select jurisdictions where moral rights might extend beyond the duration of copyright. The impact of the change is enormous: plays and music can be adapted and publicly performed, books can be digitized and made available to all, and such activities are no longer limited to organizations with funds to pay for the rights.

In addition to works for which the period of copyright protection has lapsed, the public domain is also generally understood to include any intellectual content that is not protected by copyright either because it does not meet the originality threshold for copyright coverage, for example facts, data, words or names, or because it is exempted from copyright from the moment of creation as is the case with government publications in certain jurisdictions. Public Domain Day is celebrated in different ways including book readings and performances by

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a variety of organizations, such as Project Gutenberg, Communia, the Internet Archive, Creative Commons, and by libraries around the world.

In the United States, 2019 was a particularly significant year. Due to a copyright term extension enacted in 1998, 2019 marked the entry of works in the US into the public domain for the first time in over 20 years. In the years before 2019, the Center for the Study of the Public Domain at Duke University had been marking each Public Domain Day with gloomy posts on their website (web.law.duke.edu/cspd/) entitled "What Could Have Entered the Public Domain". The posts lamented the ever-increasing length of copyright in the United States, outlining what could have been open to reuse if the public domain had not been extended for an extra 20 years by the *Copyright Term Extension Act* (CTEA) of 1998. The CTEA extended the term of copyright in the US from 50 years after the year of death of the author to 70 years, resulting in a 20-year lull where not one work entered the public domain in the United States.

In contrast to earlier posts, the 2019 blog post for Public Domain Day on the Center for the Study of the Public Domain was jubilant and featured a long list of items that had become available in the public domain in the United States. Works included those by Malcolm X, Lucy Maud Montgomery, A.A. Milne, Virginia Woolfe, and many others, most of which were already in the public domain in other countries. Duke University and other organizations continue to publicise concerns about the length of copyright by posting details of works which would have been available if the term had not been extended. Through its activities, the Center for the Study of the Public Domain demonstrates the power of the public domain and the harm that can result if the term of copyright continues to be extended in countries around the world as it has in the United States.

This chapter explores the literature and presents a brief historical context around the public domain, with a primary focus on common law jurisdictions, and the related concepts of orphan works. The central role for libraries in defending the public domain is emphasised as they work to facilitate access to knowledge and speak out in defence of the public good in an increasingly digital world. Current threats to the public domain are identified and defined, such as legislated copyright term extensions that result in long stagnant periods where the public domain stops growing. Several current projects that seek to preserve and nurture the public domain are presented. Finally, possible measures to mitigate term extensions and strategies are suggested for libraries and librarians to help ensure a healthy and robust public domain in the years to come.

Rationale for Copyright and the Public Domain

Some of the common philosophical justifications that have been used for copyright law are outlined to demonstrate the relationship between the public domain and copyright.

According to Murray and Trosow, there are two main philosophical justifications for copyright law: rights-based theories and utilitarianism. Rights-based theory, as expounded by John Locke, holds "that each person has a natural entitlement to their person and to the fruits of their labour" (2013, 7). The theory, firmly rooted in the concept of individual ownership, could be claimed as a justification for perpetual copyright, in that a natural entitlement could be framed as lasting forever, but Murray and Trosow note that even Locke himself was not an advocate for perpetual rights. A stronger rationale for the existence of the public domain as it relates to copyright is reflected in the theory of utilitarianism. Utilitarianism, which is commonly associated with philosophers Jeremy Bentham and John Stuart Mill, is a school of thought that posits that all actions should be judged on their consequences; the ideal consequence is that the greatest possible happiness or benefit to society is produced. In copyright, the theory is most famously reflected in the clause in the US constitution that "empowers Congress to enact intellectual property laws as a tool for general benefit – that is, 'to promote the progress of science and the useful arts'" (Murray and Trosow 2013, 7). The public domain as the antithesis of copyright fits best within the utilitarian rationale, since works not protected by copyright become a public good to be used for any purpose. Public domain works become major drivers for knowledge creation resulting in significant benefits for society.

Another concept central to the utilitarian approach to copyright law and the public domain is the public good. In his book *Moral Panics and the Copyright Wars*, William Patry argues that "bad business models, failed economic ideologies, and the acceptance of inapposite metaphors have led to an unjustified expansion of our copyright laws", and that rectification of the problem requires a return to the guiding, utilitarian purposes of the law (2009, xvi). In the book's introduction, Patry uses the example of a UK parliamentary speech from 1841 by Sir Thomas Macaulay spoken in opposition to a bill in the British House of Commons to increase the term of copyright. Macaulay argued that the rights in question should only be granted if doing so would benefit the public good. "Copyright is a right that exists only by government decree, created for the public good, which must be regulated by the government to ensure that the public purpose is fulfilled" (Patry 2009, xvi–xvii). According to Patry, current conversations on copyright reform ought to focus on a question that is rarely considered: "Will the proposal actually serve the public good by promoting learning?" Such a conversation would present a strong argument against the ever-extending term

of copyright which damages the public good by delaying the entry of works into the public domain.

An important term related to public domain is the commons. The term refers to early English practices around shared land and is frequently used when describing the public domain, recognizing shared knowledge resources which belong to all for the benefit of the public good. The expression digital commons is used to describe data and information created and stored online and made available for wide use, sharing and development, optimising the Internet's ability to connect an immense collection of content with potential users.

Murray and Trosow (2013) note that a more modern rationale for copyright is economic. Copyright law provides economic incentives to encourage the creation of new works. The economic argument is commonly used to justify the ever-expanding term of protection for copyright by governments around the world. For example, in the review of the *Canadian Copyright Act* in 2018–2019, the argument was often cited, even to the point that the Standing Committee on Canadian Heritage was charged with undertaking a subsidiary study to the copyright review focused entirely on remuneration models for creators. One of the main themes in the final report issued by the Committee was a suggestion that there is a significant "value gap", or "disparity between the value of creative content enjoyed by consumers and the revenues that are received by artists and creative industries" and that one way to help fill that gap would be to extend the term of protection by 20 extra years (Dabrusin 2019, 22).

A key perspective on the economic rationale for copyright has been provided by Landes and Posner (1989). They present a detailed model arguing that the economics behind copyright law promote economic efficiency and describe the economic rationale as a balancing act between the benefits of protection and the drawbacks of limiting access:

> Copyright protection, the right of the copyright's owners to prevent others from making copies, trades off the cost to limiting access to a work against the benefits of providing incentives to create the work in the first place. Striking the correct balance between access and incentives is the central problem in copyright law. For copyright law to promote economic efficiency, its principal legal doctrines must, at least approximately, maximize the benefits from creating additional works minus the losses from limiting access and the costs of protection (Landes and Posner 1989, 326).

The economic model resembles the utilitarian model in postulating that there is no benefit to providing economic protection to works for which no market exists and can be used to justify limits on copyright owners' rights. However, due to the power dynamics and relationships that frequently drive policy change, the economic model is more often used by content owners to support the argument

that changes in favour of the copyright holders are needed. The use of economics has been particularly noticeable over the last few decades as publishers and creator groups lobby to "update an outmoded copyright regime for the digital age" (Trosow 2003, 222) to provide a solution for perceived reduced compensation.

Traditional and Indigenous Knowledges

It is worth noting that the rationales and concepts central to copyright and the public domain are based upon Western philosophies that do not align with many principles that underpin traditional and Indigenous knowledges. The World Intellectual Property Organization (WIPO) noted in 2010, for example, that within traditional knowledges "there are often social restrictions on who, if anyone, can use certain knowledge, and under what circumstances. Some knowledge is considered secret, sacred, and an inalienable part of indigenous cultural heritage from time immemorial to time unending" (WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 2010, 2).

Trevor Reed describes how non-Indigenous uses of traditional knowledge through legal measures allowable under copyright exceptions parallel other abuses against Indigenous peoples, and remain problematic: "Thus, telling Indigenous peoples' stories for them, singing their songs, and publishing their oral histories without permission diminishes Indigenous sovereignty in the same ways dispossession of Indigenous lands and the assimilation of Indigenous peoples into the settler-state diminished that sovereignty" (Reed 2021, 18). The public domain has been used as a justification for the appropriation of traditional and Indigenous knowledges for centuries. Ruth Okediji provides the following example of how works purportedly in the public domain are exploited: "scientists, fashion designers and artists proceed on the assumption that these cultural knowledge goods and/or traditional knowledge are freely available for use. Given this background, developing countries and Indigenous groups justifiably perceive the quintessentially progressive concept of the public domain with deep hostility" (Okediji 2018, 4).

Okediji asserts that it is crucial to recognize the "importance of a public domain and to acknowledge that limits to traditional knowledge rights must be carefully circumscribed to advance clearly exceptional national goals" (Okediji 2018, 16). She proposes modification of the three-step test for Indigenous knowledge reuse, in conjunction with the use of specialized exceptions and limitations for copyright designed around a tiered approach to traditional knowledge, to help reconcile the conflict between copyright, the public domain and traditional knowledge.

A Limited Term Right

The concept of the public domain has been central to copyright from its origins. In England, the Statute of Anne in 1710 recognized that some works were free of rights and established the limited duration of copyright, despite not using the term public domain until later. Throughout the centuries following the Statute of Anne with its copyright term of fourteen years and an additional fourteen-year renewal option, the duration and scope of copyright protection expanded. By the 20th century, most countries had similar copyright terms referring to the "life of the author plus 50 years", that became the base for international copyright through the Berlin Act, the 1908 revision to the Berne Convention for the Protection of Literary and Artistic Works which was first accepted in 1876.

The Berne Convention was one of two major international intellectual property treaties negotiated in the late 19th century, the other being the Paris Convention for the Protection of Industrial Property. The Paris Convention covered patents, trademarks, designs, and unfair competition, while the Berne Convention covered author rights. The first signatories to the Berne Convention consisted primarily of European countries, with much of the rest of the world following over the next 100 years. One of the main advocates for the Berne Convention was Victor Hugo, the author of famous works such as *Les Misérables* and *Le bossu de Notre-Dame* and the founder of the Association littéraire et artistique internationale, the organization primarily credited with the creation of Berne. Hugo was a proponent of copyright as a limited right and an early supporter of a related concept, that of the *domain public payant*/paying public domain. As described in a 1949 UNESCO report, the paying public domain is a concept whereby, "when a work falls into the public domain, it cannot be freely used, as it could be in the case with the normal public domain. Instead, a user must pay a royalty, generally to the authors' societies, who utilize such funds for cultural purposes or to aid needy authors or their families" (UNESCO 1949, 1). Numerous countries adopted, and have since abolished, paying public domain systems. However, the system is still in place in some countries around the world, primarily in South America and Africa, for example Algeria, Kenya, Rwanda, and Paraguay (Dulong de Rosnay and Maurel 2018, 298).

The Berne Convention has undergone multiple revisions over the years, as summarized by the Association of Research Libraries:

> The treaty has been revised five times since 1886. Of note are the revisions in 1908 and 1928. In 1908, the Berlin Act set the duration of copyright at life of the author plus 50 years, expanded the scope of the act to include newer technologies, and prohibited formalities as a prerequisite of copyright protection (Association of Research Libraries n.d.).

The role that international treaties like the Berne Convention play in standardizing copyright around the world is a crucial piece of the public domain puzzle. Copyright laws are territorial, and the legislation and its contents will be different in each country. The term of copyright is a good example of how countries opt for different approaches: many countries set the term of copyright to 50 years after the year of death of the creator, the minimum term required by Berne, while others have terms that are life plus 60, 70, 80, 95, 99 and even 100 years. The size and nature of the public domain differs depending on the country where the work is being used. For example, works by Frida Kahlo have been in the public domain since 2004 in all countries with life plus 50-year terms, but will not enter the public domain in other countries like the US, Mexico, Japan, Brazil, and Russia until 2024 or later.

While laws and the term of copyright may differ, international treaties like the Berne Convention ensure that countries adhere to a set of basic principles and minimum protections in their national laws. Importantly, Berne requires that countries grant protection, as a rule, for 50 years after the author's death. Most countries around the world, as signatories of Berne, meet at least the base standard specified in the treaty. While the public domain is not the same in every country, there is standardization as a result of Berne and other treaties like the Universal Copyright Convention (UCC) and the Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS] (World Trade Organization n.d.), an agreement administered by the World Trade Organization.

More recently, trade agreements, frequently those involving the United States, have required the inclusion of provisions relating to copyright, like the proposed, but never implemented, Anti-Counterfeiting Trade Agreement (ACTA), the Australia-United States Free Trade Agreement (AUSFTA), and the United States-Mexico-Canada Agreement (USMCA). Trade agreements like these are one of the major drivers behind the ever-lengthening term of copyright. For example, the original draft of the Trans-Pacific Partnership (TPP) and the USMCA required that any members of the agreement extend their minimum term of copyright to 70 years after the year of death of the creator. The inclusion of copyright in trade agreements is a notable shift in the evolution of copyright internationally. Trade agreements are less transparent than the public legislative process and involve negotiations often behind closed doors with the potential to undermine the standardization achieved by international instruments like Berne.

Trade agreements can be a way for governments and rights-holders from specific jurisdictions to ensure that their interests are reflected in the laws of other countries. For example, "One of the specific objectives for negotiating ACTA was to extend the existing international IP enforcement norms in the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) to the online environment, and this is due to major US and EU copyright industry rightsholder groups

seeking stronger powers to enforce intellectual property rights across the world" (Electronic Frontier Federation 2017). Another example of the power of trade agreements is the term extension that was proposed in the TPP, which was clearly a requirement imposed by the US. The US withdrew on 3 January 2017, and the subsequent trade agreement (the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) no longer required members to extend their copyright terms. It is worth noting that international pressure can significantly influence copyright laws, including the term, outside of formal trade agreement negotiations, for example in the case of South Africa's recent, and now abandoned, copyright reform (Heald 2020).

While extending the term of copyright is often conflated with economic benefits for creators, there are significant costs for consumers of copyrighted works. A study commissioned by the New Zealand government in 2009 to consider the economic impact of expanding the term of copyright from 50 to 70 years as required at that point in the TPP found that the average yearly cost to expand the term of copyright would be 55 million dollars per year. The methodology used in this study "estimated the total cost for New Zealand of copyright term extension for books and recorded music in terms of net present value, that is, the equivalent amount of money that, if invested today, would cover all future costs for every year. The study considered a period of 70 years for recorded music (the extended copyright term, which is generally calculated from time of production) and 110 years for books. The study estimated a net present value of $208–239 million for recorded music and $263–300 million for books" (New Zealand. Ministry of Economic Development 2015).

Term extensions represent a major issue for libraries around the world. A longer term means that there are fewer works in the public domain, complicating library initiatives that relate to digitization and access, and exacerbating the issues that surround a class of materials that make up a significant portion of library collections: orphan works.

Commercial Availability, Orphan Works, and Lost Culture

In the first chapter of his book *The Public Domain: Enclosing the Commons of the Mind*, James Boyle uses the contents of the Library of Congress catalogue to demonstrate how the term of copyright extends well beyond the commercial viability of most works. In a search of the catalogue, Boyle finds that while it represents a vast repository of material, most titles, perhaps as much as 95 % in the case of books, are commercially unavailable, and many do not have locatable rightsholders:

> Much of this, in other words, is lost culture. No one is reprinting the books, screening the films, or playing the songs. No one is allowed to. In fact, we may not even know who holds the copyright.... These works – which are commercially unavailable and have no identifiable copyright holder – are called "orphan works". They make up a huge percentage of our great libraries' holdings (Boyle 2008, 9).

Orphan works make up a smaller percentage of library collections than those not commercially available, but the amount is significant enough to impact both libraries and other cultural institutions. The Orphan Works FAQ page on the European Commission website states that "orphan works represent a substantial part of the collections of Europe's cultural institutions and refers to "British Library estimates that 40 percent of its copyrighted collections – 150 million works in total – are orphan works". A snapshot of percentages and number of orphan works can be found in the UK Intellectual Property Office report *Copyrighted Works: Seeking the Lost*. The report categorises orphan works using evidence provided by the BBC, the British Library and consultation respondents, and provides a conservative estimate of 91 million orphan works (UK Intellectual Property Office 2014, 62–3).

Jurisdictions around the world have both licensing and legislative solutions to the orphan works issue. Two countries that employ licensing solutions are Canada (cb-cda.gc.ca/en/unlocatable-owners) and the UK (gov.uk/guidance/copyright-orphan-works). These systems allow individuals and organizations to apply and pay for a license to use orphan works after they have conducted a diligent search for the rightsholder. Another attempted solution has been undertaken through an EU directive, Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on Certain Permitted Uses of Orphan Works [hereinafter the Orphan Works Directive] (Directive 2012/27/EU 2012), which allows for some permitted uses of orphan works across the EU. An Orphan Works Database is available. A single publicly accessible online portal has been established by the European Union Intellectual Property Office (EUIPO), the EU Out-of-Commerce Works portal. Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market [hereinafter the DSM Directive] (Directive (EU) 2019/790 2019), introduced a legal framework to support cultural heritage institutions in the digitisation and dissemination, including across borders, of out-of-commerce works.

Licensing systems are burdensome for libraries, as the processes in place for clearing permissions for orphan works around the world are complicated, expensive, and impractical for most digitization projects in galleries, libraries, archives, and museums. For example, "the BBC's Archive Trial reported that checking 1,000 hours [of programming] of the most straightforward content – factual programming – for rights clearance cost them 6,500 person hours. Extrapolating from avail-

able figures on clearance and the associated costs, the UK Intellectual Property Office has estimated that it would take between £6.6 billion (7.3 € billion) and £8.4 billion (9.3 € billion) to fully search and clear the content of the BBC archives and the British Library" (Giblin and Weatherall 2017, 227). Many institutions use both library-specific and general copyright exceptions like fair use and fair dealing to digitize and make orphan works available to their users, but the spectre of copyright restrictions looms large over any orphan-works-related projects and services.

Losing Control: Licensed Works and Digital Rights Management (DRM)

Another threat to the ability of libraries to provide access to works in the public domain is the shift from direct purchasing in the print environment to the licensing or renting of collections of digital works that has become the standard for libraries. Under the new model, works are hosted on password-protected external platforms and often locked down using Digital Rights Management (DRM), or digital locks. Artificial technological controls are imposed by publishers or aggregators, that control how users either access or copy digital works. Common library examples include allowing access to an ebook to one user at a time or limiting the amount of an ebook that users can print or download on a computer. The publishers exert control over use, including downloading and printing, but also searchability and indexing, and control the fate of items purchased by libraries into the future. Unlike libraries' own digitization projects, where the copyright status of works entering the public domain is carefully tracked and documented, collections of licensed works lack transparency, and make it difficult or even impossible to extract content and make it freely available when it does enter the public domain.

Complicating the issues, circumventing DRM is frequently prohibited under copyright law, thus limiting the ability of individuals to remove controls from copyright-protected works and preventing users from exercising rights like fair use or fair dealing, and other exceptions to copyright infringement. Legislation like the US 1998 *Digital Millennium Copyright Act* (DMCA) limits the upholding of DRM only in works that are covered by copyright. While DRM should not extend to public domain works, the problem remains that many works originally published with DRM may be trapped in perpetuity by technological controls. Publishers may also mix public domain and copyrighted works in one DRM-protected resource, compounding issues that relate to use and reuse.

James Neal argues in his paper "The Copyright Axis of Evil: The Academic Library Must Confront Threats to User Rights" that, in combination with other

factors, the "rampant licensing of information and new technological controls" are making it very difficult for libraries to serve their users. Neal poses the question: "Will licensing and contract supplant the role of copyright in governing access to information in our nation's libraries?" (Neal 2013, 120). With licensing comes a myriad of issues, but the main impact on the public domain is that libraries lose control over future uses of works. They are unable to provide free, unhindered access to works and cannot guarantee ongoing public access. Hence, even more works within the public domain may be lost for generations to come.

In addition to the threat to the public domain discussed in this section, the next section of this chapter will show that any erosion of exceptions and limitations to copyright can be seen as damaging to the public domain.

Shifting and Expanding the Definition of the Public Domain

The public domain has traditionally been expressed as a negative concept, characterized by the absence or expiration of copyright. Even in the Berne Convention it is mentioned only in the section relating to a work whose term has ended. In opposition, there has been a move in recent years to define the public domain from a more positive stance. James Boyle has suggested: "The public domain is not some gummy residue left behind when all the good stuff has been covered by property law. The public domain is the place we quarry the building blocks of our culture. It is, in fact, the *majority* of our culture" (Boyle 2018, 40–41).

The public domain is often discussed, like all aspects of intellectual property, in metaphorical terms. Expanding on Lyman Ray Patterson and the work of others in the early 90s proposing an expanded view of the public domain, Yochai Benkler characterized the traditional definition of the public domain as being an enclosed domain, and instead recommended a more functional definition: "The public domain is the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged" (Benkler 1999, 362). Samuelson further illustrated the expansion as a "contiguous terrain" to the public domain, which she described as "a penumbra of privileged uses under fair use, experimental use, and other copyright rules that permit unlicensed uses and sharing of information to take place" that are "outside the public domain in theory, but seemingly inside in effect" (Samuelson 2003, 149).

Similarly, the Public Domain Manifesto drafted by the organization Communia in 2010 and endorsed by over 3,500 individuals and organizations as of June 2021, recommends a more active defence of not only what it calls the "structural

public domain", the traditional definition, but the related area that includes "the voluntary commons and user prerogatives" embracing works for which rights are relinquished by the copyright holder and uses made under exceptions and limitations to copyright. A 2014 study by Andres Guadamuz for WIPO's Committee on Development and Intellectual Property found that in nine countries, creators can opt to choose to put content into the public domain. However, the study also found that "in four of them the law permits voluntary declarations leading to the inclusion of a work in the public domain, while in the other five, the question was open to interpretation, with varying degrees of certainty, whether negative or positive" (Guadamuz 2014, Annex 31). Rather than giving up copyright completely, creators around the world are more likely to choose to apply licences such as those developed by Creative Commons to ensure their works are free to be used by all, very much in the sense of the "voluntary commons" proposed by the Public Domain Manifesto. The legality of the approach is largely untested in the courts.

Treating the exercising of user rights as synonymous with uses of the public domain could enable a shift from the passive concept of a collection of works lying in wait for someone to access them to an active undertaking. Works would be pulled into the public domain through reliance on fair dealing, fair use, or other exceptions instead of merely falling into the public domain.

Libraries and Archives – Ensuring Access to the Public Domain

Libraries and archives have always sought to preserve and ensure access to the documentary heritage. In fact, early copyright legislation recognized and emphasized this important role (as discussed in Katz 2017). Long before digitization and the Internet, libraries were trusted access points for works in the public domain, whether they were early editions of classics with hundreds of subsequent reprints or fragile copies of works long out of print and unavailable elsewhere. Katz stresses that historical contexts "reiterate that copyright law was never intended to hinder librarying, and that the public interest in the various social and cultural interactions that libraries facilitate was preserved and etched into the copyright system from its very beginning" (Katz 2017, 87).

Victoria Owen points out in: "Who Safeguards the Public Interest in Copyright in Canada", that the Statute of Anne included the subtitle "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" and suggests that libraries and educational institutions generally are entities specifically com-

mitted to the encouragement of learning. Owen further states that "librarians espouse a professional ethos on access" which is built on support for the public interest and that statements from library associations frequently "conflate the public interest with access to works and freedom of expression", a core tenet of librarianship (Owen 2012, 806–7).

While libraries once existed primarily to acquire and provide access to physical materials, digitization has provided an important avenue for connecting people to the public domain. Libraries are increasingly taking on the role of making rare and unavailable works available and accessible to all via the Internet, through digitization and the creation of digital collections, and increasingly, as publishers, as demonstrated by the existence of the Library Publishing Coalition.

The Internet and the Changing Nature of the Public Domain

The Internet both enables the dissemination of public domain works and provides a low-barrier publishing platform for billions of creators worldwide. Organizations around the world, like the Internet Archive, the Digital Public Library of America, Hathitrust, Google through the Google Books Library Project, Librivox, and Project Gutenberg, have made billions of public domain works available to library users and to the world. While galleries and museums are known for monetizing, limiting and selling access to digitized versions of public domain works in their collections, several are releasing content for free on the Internet, with the J. Paul Getty Museum in Los Angeles, the Rijksmuseum in Amsterdam, the National Gallery of Art in Washington, the Tate Modern in London, the Met in New York, the Museum of New Zealand, the Paris Musées/City of Paris' Museums and many others making vast digital repositories of images available.

National libraries have similarly opened up their collections, for example the Library of Congress in the US, the National Library of Bulgaria, the Biblioteca Nationala a Romaniei in Romania, while large-scale digital projects have also emerged, like Europeana, the Bibliotheca Alexandrina in Egypt, Google Arts & Culture, the GLAM – Wikimedia initiative by Wikipedia, and the Digital Library of the Caribbean. Libraries have developed focused digital collections, such as the British Library's various collections of historical maps and the New York Public Library's collection of Hebrew illuminated manuscripts. All these initiatives enable the searchability and reusability of images from a wide variety of sources and include many galleries, libraries, and museums. There are also independent specialized collections that focus on specific types of content, like the Petrucci

Music Library for musical scores. Finally, blogs like Open Culture help bring the public's attention to the collections. And this is just a tiny snapshot of the billions upon billions of public domain works that are now available in ever-growing collections across the internet.

The Internet has changed the context for copyright and the public domain. It provides a low-cost, accessible publishing and sharing platform available to anyone with a connection. The Internet derives value from sharing content and knowledge, and from building connections and relationships around that content (Lessig 2004). The Internet has created a new type of commons with similarities to the public domain, with massive numbers of new works being made available for free and licensed in ways that facilitate reuse. These works include open-source software, open access scholarly resources, open educational resources, and open data. All of this sharing is enabled by licences like the General Public License for software and Creative Commons licences for cultural goods, which produces a more fine-tuned copyright structure by replacing "all rights reserved" with "some rights reserved" for those who want to allow others to share and build upon their works (Boyle 2008).

Libraries and Like-Minded Organizations: Upholding and Defending the Public Domain

In addition to being an access point for materials, libraries play another important role regarding the public domain. Library associations have for decades made it part of their work to speak in defence of user rights and the public interest aspects of copyright and the public domain. This is not surprising, as the exceptions within copyright that shape users' rights are precisely the means for maintaining the importance of public interest within the balance of rights within copyright (Owen 2013). Boyle suggests that aside from librarians and some academics, until the 21st century there were few other groups taking up anything other than "an industry position" regarding the public domain (Boyle 2008, 243).

There are many examples of library advocacy. In 2012, the International Federation of Library Associations and Institutions (IFLA) and a number of other international library associations released a statement on the Trans-Pacific Partnership Agreement (TPPA) negotiations, expressing concern that "agreements like ACTA and the TPPA erode the fundamental balance in copyright law and do not seriously consider and protect the interest of the broader community in having equitable access to knowledge and cultural expression". Similarly, in response to the release of the text of the United States-Mexico-Canada Agreement (USMCA), now known in Canada as CUSMA, the Canadian Association of Research Libraries

(CARL) released a statement decrying the extension of Canada's copyright term from 50 years after the death of the creator to life plus 70.

There are fewer organizations committed to defending the user side of copyright than to upholding copyright holders' rights. Libraries must remain central in defending the benefits of the public domain for the sake of the public interest. It is not an easy task, as it depends largely on intangibles that are difficult to qualify and quantify but the role played by libraries in seeking to ensure that creators of tomorrow can continue to build on their predecessors' works through performance and adaptation is a vital one.

Traditional libraries are not alone in defending the public domain. There are research centres at universities worldwide that are committed to intellectual property and who weigh in during specific jurisdictions' copyright reviews to dispel the myth that extending the duration of copyright can produce greater economic benefits for creators. In recent years, other types of organizations have also made important contributions.

As with libraries, many of the organizations involved in both the dissemination of public domain works and the creation of new, openly licensed works on the Internet, such as the Internet Archive and Creative Commons, are actively involved in defending and advocating for both the maintenance and expansion of the public domain. They are joined by organizations like the Communia Project, the Open Knowledge Foundation, the Open Rights Group, La Quadrature du Net, Knowledge Ecology International, and the Electronic Frontier Foundation (EFF), and by scholarly initiatives like the *Center for the Study* of the Public Domain at the Duke Law School and the Public Domain Review as well as work by the Instituut voor Informatierecht/Institute for Information Law at the University of Amsterdam, the Centro Nexa su Internet & Società/Nexa Center for Internet & Society at the Politecnico di Torino/Polytechnic University of Turin and the Haifa Center of Law and Technology. This is just a sample of the many organizations around the world that help ensure that the public domain stays in the public eye by celebrating its virtues and protecting it through robust scholarship and sound policy.

What Does the Future of the Public Domain Look Like and What Can Be Done About It?

With looming copyright reforms and trade agreements always on the horizon, the public domain continues to be threatened. Nevertheless, the achievements in the digital realm are considerable, and there is optimism about the future. The

public domain has, inside and outside of libraries, legions of supporters, who are working tirelessly to ensure that the public domain continues to grow every year. Committed individuals and organizations are lobbying governments, creating resources, promoting tools like the CC0 "no rights reserved" dedication, and ensuring that works that have made it into the public domain are available and accessible to individuals around the world.

As stated in this chapter, the best way to maintain a robust public domain is to stop the expansion of the term of copyright, and to stay as close to the Berne minimum term as possible. However, there are other measures that countries can take to mitigate the harm of a longer term of copyright. The first would be to ensure that copyright users have a strong suite of exceptions and limitations available in their national laws, including open-ended exceptions like fair use. One positive development was the creation of the first user-rights-focused international treaty in 2013: the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled. The treaty establishes international norms that require countries to provide exceptions in their national laws to facilitate the availability of works in accessible formats, such as braille and audiobooks, for persons who are blind, visually impaired or print-disabled. Canada like other governments has adapted its existing legislation accordingly.

Hopefully, the Marrakesh Treaty will be one of many to address user rights. IFLA's "Treaty Proposal on Copyright Exceptions and Limitations for Libraries and Archives" includes many elements that would strengthen the public domain, such as exceptions that relate to the right to use orphan works and limitations on liability for libraries and archives. The proposal also includes elements that both disallow contracts and allow for the circumvention of technological protection measures in cases where such uses would be permitted using another exception or limitation to copyright. IFLA is seeking adoption of the proposal's inclusions by WIPO Member States.

Another action that could help libraries in an environment defined by an ever-lengthening term of copyright is a return to copyright registration (Boyle 2008). In the book chapter "Copyright Formalities: A Return to Registration", Dev Gangjee argues that the public interest may be served with a return to a registration system, as it would improve the quality of the ownership information available, foster licensing for registered works, and potentially help solve issues related to orphan works (Gangjee 2017). Depending on how a registration system were to be implemented, it could also be used to mitigate the harm caused by term extensions. For example, if a country decided to extend copyright, it could also require registration from a rightsholder for the ability to exploit the additional term of protection. This would leave most works in the public domain, while allowing rightsholders to exploit works if they were still commercially viable. Yet,

a return to registration is unlikely, as it would require a major re-examination of the international copyright system.

The public domain would benefit from giving creators more power over their works, specifically through rights reversion mechanisms. Rights reversion, if written into legislation, can allow creators or their estates to reacquire control over their works after a specific period of time, or if certain conditions are met. Rights reversion exists in the copyright law of many countries (Towse 2017, 487), and can bolster the public domain by giving creators more control over their works and allowing them to make works open access with a CC license or a public domain dedication. As articulated by the Authors Alliance, "society benefits from widespread access to scholarly works and the preservation of our cultural heritage. Public access to knowledge is restricted when works are out of print, undigitized, or otherwise unavailable. Reversions of rights can help authors remedy these problems and increase readers' access to their works" (Cabrera, Ostroff, and Schofield 2015, 9). Heald drew attention to benefits of such provisions, showing that US reversion rights enabled independent publishers to reproduce out-of-print books after rights had reverted to creators (Heald 2019).

There are many ways in which individual librarians, libraries, and library associations can contribute to ensuring a healthy future for the public domain in their countries and worldwide. They can make a point of celebrating and promoting Public Domain Day every January 1; they can sign onto and promote the Public Domain Manifesto; they can include education on the public domain in their copyright literacy instruction for both users and creators of content; they can provide responses to their governments' copyright reform consultations that speak to the benefits of a healthy public domain for the public good and for the creation of works that build on what has come before.

Finally, while it is essential to continue to defend and preserve the public domain, it is also important to consider those instances where unfettered use may not be in the public interest, notably when it comes to Indigenous and traditional knowledges. As the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore continues its work in the area, it is likely that nations will develop exceptions in their copyright systems in consultation with their local Indigenous communities and acknowledge the need for special considerations to safeguard Indigenous knowledge.

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Christina de Castell

7 Unintended Consequences of the Digital Shift

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

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

Introduction

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

Initially, the digital shift promised greatly increased access to content, and people imagined a world of universal access to information. Project Gutenberg began in 1971, based on the premise "anything that can be entered into a computer can be reproduced indefinitely" (Hart 1992). The idea that digital content should be able to be freely reproduced has planted itself firmly in the public's mind. Communicating the reality, that there are limits to copying in the digital realm, and all content is not free to re-use, requires that librarians understand copyright and the ways in various legal systems that the use of digital content

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differs from print. In this chapter, the focus is on ebooks that are produced for a consumer market, and content that is published on the internet for a general audience, such as news media. The need for policy change is relevant in all types of libraries, as consumer-facing content producers are the source of intense pressure on policy makers to create copyright regimes that limit access for all purposes, including research and education.

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

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

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

The Failure of Copyright Exceptions to Address Digital Lending

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

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

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

to be a method of protecting the publisher from the loss of sales that would occur if the book were available in libraries during the first eight weeks (Albanese 2019).

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

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

As IFLA stated in the preamble to the Principles for Library eLending in 2013: "The exhaustion of rights for digital content is an issue of increasing legal debate and uncertainty. Rights holders operate on the assumption that they can control all subsequent uses of digital works following initial access by the purchaser... Should the rights holders interpretation prevail that they can control all post-first sale uses of digital works, the library's public service mission of ensuring societal access to written culture over time will be undermined" (IFLA 2013b). The issue of exhaustion has attracted attention in recent years in court legal action: *Capitol Records v. ReDigi*[1] in the US, *Vereniging Openbare Bibliotheken v. Stichting*

1 Capitol Records, LLC v. ReDigi Inc., No. 16-2321 (2d Cir. 2018).

Leenrecht[2] in the Netherlands, *Technische Universität Darmstadt v. Eugen Ulmer* [hereinafter *Darmstadt*][3] in Germany, and the action filed against Internet Archive by a group of publishers[4] in 2020, again in the US. Details are discussed below.

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

Court Rulings

The United States

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

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

2 Vereniging Openbare Bibliotheken v. Stichting Leenrecht, C-174/15 ECLI:EU:C:2016:856.
3 Technische Universität Darmstadt v. Eugen Ulmer KG, C 117/13 ECLI:EU:C:2014:2196.
4 Hachette Book Group, Inc. v. Internet Archive (1:20-cv-04160) District Court, S.D. New York.

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

Europe

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

The European Court of Justice was asked to consider Articles 1, 2 and 6 of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property [hereinafter Rental and Lending Rights Directive] (Directive 2006/115/EC 2006) and Article 4 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Informa-

tion Society [hereinafter the InfoSoc Directive] (Directive 2001/29 2001). The case did not consider the library's right to digitise print works that had been legally acquired. Ultimately, the judgment found that libraries did not need prior permission for certain forms of lending ebooks, that is a licence, and that lending was permitted if the ebook had been acquired lawfully and remuneration was paid as required in the public lending right (Vereniging Openbare Bibliotheken 2016; EBLIDA 2017).

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

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

5 Section 52(b) has since been repealed and replaced by Section 60e Libraries, which states at (4) Libraries may make a work from their holdings available to their users for personal research or private studies at terminals on their premises…" (https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html).

subject to remuneration, the publisher was entitled to compensation (Technische Universität Darmstadt 2014; Rauer 2016).

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

Controlled Digital Lending

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

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

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

CDL faces a legal challenge filed in June 2020 against the Internet Archive by the Hachette Book Group, HarperCollins Publishers, John Wiley & Sons and Penguin Random House (AAP 2020). The complaint claims that both the Open Library, which is the Internet Archive's implementation of CDL, and the National Emergency Library, which lifted lending restrictions during the COVID-19 pandemic, are forms of piracy, and that providing access to 1.3 million scanned works through the

platforms is mass copyright infringement (Hachette 2020). The complaint alleges that the Internet Archive "undermines the balance and promise of copyright law by usurping the Publishers' ability to license and sell the books that they have lawfully produced on behalf of authors and for the benefit of readers." The argument is that section 109 of the *US Copyright Act* allows the owner of a lawfully acquired print book to dispose only of a particular print copy, and that the creation and distribution of reproductions of that print copy is "outside the bounds of the law".

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

Public Lending Right

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

Whether PLR programs are part of copyright legislation or not, they operate by gathering information about libraries' holdings and/or loans of books and applying a compensation rate based on the findings. The administration may be managed by a collective acting on behalf of the authors, like Stichting Leenrecht in the Netherlands, or by an agency of government as in the United Kingdom, where it is operated by the British Library. Since the first PLR program was intro-

duced by Denmark in 1946 (Parker 2018), payments have applied to print books. With the advent of ebooks, questions began to arise about whether payments under PLR applied to ebooks and under what circumstances. *VOB v Stichting Leenrecht* established in Europe that PLR would apply to the loan of ebooks, as it did to print. Starting in 2016, countries outside of Europe with significant ebook lending began to include ebooks in their PLR programs, with Canada's program the first. In the UK, ebooks lent remotely also became eligible for compensation under PLR in 2018 (British Library 2018).

Unintended Barriers to Acquisition and Cooperation Among Libraries

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

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

find that contacting the publisher or rightsholder directly is the most effective means to achieving access.

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

Unintended Consequences in the Content Marketplace

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

Digital Rights Management

When libraries bought print books, and in the early days of multimedia formats, the physical nature of the material meant that user and library rights to modify, copy and preserve material continued generally unhindered. However, beginning around 2010, digital delivery became the norm for many content areas. With digital delivery came the increasing use of DRM or digital locks, frequently referred to as technological protection measures (TPMs) in English language copyright law. The Encyclopedia Britannica defines DRM as "protection of copyrighted works by various means to control or prevent digital copies from being shared over computer networks or telecommunications networks" (Encyclopedia Britannica n.d.). TPMs can be described as "software, components and other devices that copy-

right owners use to protect copyright material. Examples of TPMs include encryption of software, passwords, and access codes" (Australia Parliament 2006). In copyright law, restrictions may be placed on developing technology that bypasses TPMs, and on circumventing or breaking TPMs to access works.

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

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

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

- Lack of interoperability with purchased ebooks trapped in a vendor's system
- Need for extensive user support due to the steps needed by interacting technologies to verify a user has permission to use the digital work
- Limits on research and preservation activities such as copying and printing even when allowed by copyright law, such as when applying assistive technology for users with disabilities, and
- Privacy risks created by DRM system operation in relation to information passed between the user's device and the system that verifies permission.

Among academic publishers, some provide DRM-free titles on their platforms (Roncevic 2020). However, in public libraries, DRM is used to manage lending systems and licence terms, and ebooks are rarely available without DRM.

Implications of New Economic Models for Content Production

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

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

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

Press Publishers' Right or Link Tax

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

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

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

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

lishers' right in 2014 following Germany, Google took the approach of shutting down Google News, and the result was a significant decline in traffic to news publishers' sites (Waterson 2018).

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

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

Platform Responsibility

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

puters, need to be aware of laws related to platform responsibility and liability in their regulatory environments.

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

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

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

Fan Fiction

Fan fiction is writing inspired by an existing work, written by a consumer of that work, which expands on the characters and storylines of the original work. Wikipedia states "The author uses copyrighted characters, setting, or other intellectual properties from the original creator(s) as a basis for their writing" (2021).

Fan fiction is rarely produced for commercial gain, although at times works that began as fan fiction have been developed into commercial publications. In the English language, the most well-known example of a commercial work that began as fan fiction is *Fifty Shades of Grey*, by E.L. James, which began as fan fiction inspired by *Twilight*, by Stephanie Meyers. The story first appeared online in 2009 as *Master of the Universe* and was later published by an independent Australian publisher "after removing references to *Twilight* from *Master of the Universe*, a practice known as 'filing off the serial numbers'" (Cuccinello 2017).

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

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

If the source work is no longer protected by copyright, the fan is free to create fan fiction without copyright-related barriers. However, if it is still protected by copyright, the copyright owner has exclusive rights over the work, and the owner could take legal action against the fan fiction author for using protected elements

in the work, such as the characters. The non-commercial nature of fan fiction on the internet may support arguments for fair use in the United States, however, in countries with fair dealing or other regimes, fan fiction may be harder to defend. In Canada's copyright law, a copyright exception exists for non-commercial user-generated content that gives users the right to use published work to create a new work and to authorise an intermediary to disseminate it, as long as it is done solely for non-commercial purposes, the source work is recognised if reasonable to do so, the source work was not infringing copyright, and the new work does not have a substantial adverse effect on the original. In the United States, consideration would be given to the purpose and character of the use, the nature of the work being copied, the amount being copied, and the effect on the market.

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

Conclusion

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

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8 Rights Issues in the Digitization of Library Collections

Abstract: This chapter addresses the copyright issues that might arise in the digitization of materials held in academic library collections. Developing a clear understanding of the copyright status of digitized materials can be complicated, frustrating, and even at times, with orphan works, impossible, leading to the copyright conundrum. Nonetheless, when curating and managing digitized library collections, a copyright review and management plan should be followed to maximize the availability of open access and public domain items and minimize the confusion of researchers and the public when using such digitized objects. A copyright review protocol, or a map of how to proceed through the copyright analysis, will aid librarians in making decisions regarding what rights metadata to include for a digital work and will, in turn, aid patrons in determining how digitized works can be effectively used.[1]

Keywords: Library materials – Digitization; Copyright and digital preservation; Copyright (Orphan works)

Introduction

The majority of this chapter is written from the US law perspective and focuses mainly on Section 108 of the US *Copyright Act*, Title 17 of the US Code, Limitations on Exclusive Rights: Reproduction by Libraries and Archives, as well as fair use (US Copyright.gov n.d.). While there is no single source of international copyright law, the chapter begins with an overview of the Berne Convention for the Protection of Literary and Artistic Works [hereinafter Berne Convention] (Berne Convention 1979) and also later addresses the Agreement on Trade-Related Aspects of Intellectual Property Agreement [hereinafter TRIPS] (World Trade Organization n.d.a), as they pertain to digitization issues in libraries. The Berne Convention and TRIPS Agreement are necessary starting points, not ending points, when con-

1 This chapter is based on: Sara R. Benson. 2019. "Copyright Conundrums: Rights Issues in the Digitization of Library Collections" in *Digital Preservation in Libraries: Preparing for a Sustainable Future*, edited by Jeremy Myntti and Jessalyn Zoom. Chicago: American Library Association, and is included in this volume with the permission of ALA. Available at https://www.ideals.illinois.edu/bitstream/handle/2142/102161/EDITIONS-ALCTS-Digital-CH17-002.pdf?sequence=2&isAllowed=y.

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sidering library digitization issues, as national laws vary. This chapter explains digitization issues from the perspective of one particular country that was a late adopter of the Berne Convention, the United States, which waited until 1989 to ratify the agreement.

There is a significant distinction that readers should note, however, between determining whether to digitize a particular item at all, say for preservation purposes, and whether to make a particular digitized work publicly available. While Section 108 of the *US Copyright Act* [hereafter Copyright Act] permits librarians to make up to three copies of works for preservation purposes, it does not always allow those copies to be available digitally outside of the premises of the library. Furthermore, when works are not in the public domain, a library may determine that it is willing to make a copy of the work available in a digital format on the library website either with the express permission of the copyright holder or, after conducting a risk assessment, by asserting a fair use right. It is important to note that these kinds of decisions may fall outside the scope of this chapter, which is more focused on workflows relating to opening up the public domain, such as with the HathiTrust digital library copyright review process, or with accurately labeling previously digitized works with the University of Miami's digital library (University of Miami Libraries n.d.). The decision on whether to begin digitizing a particular collection at all, especially under a fair use analysis, very well may be the subject of another future book chapter, but it is outside the scope of this particular discussion.

The copyright conundrum begins with an initial copyright review to determine whether a digital copy can be made of a particular item. There are many models available for this type of copyright review, including the HathiTrust digital library copyright review process (Levine et al. 2016). Regardless of the method used, the process should be streamlined, and knowledgeable individuals should engage with the materials to determine their copyright status and, where possible, obtain permission to place the materials online in an open, publicly accessible digital collection. The copyright discussion continues by presenting the challenge of deciding whether and how to include a copyright notice on the online work. This chapter includes common mistakes and misperceptions, such as copyfraud and overreaching. The final piece of the copyright puzzle involves responding to public inquiries to use the library's digital copy of the work in further academic or commercial pursuits. Rights metadata, when properly applied to a digital work, will include information allowing the patron to understand how the work may be used.

The Berne Convention and the TRIPS Agreement

Although there is no one international copyright law, as copyright law depends largely on the national laws of each country, almost all countries in the world are signatories to the Berne Convention, an international agreement concerning minimal rights protection for copyright (WIPO n.d.). Similarly, to be a member of the World Trade Organization, a Member State must adhere to the TRIPS Agreement and, as such, most countries are members of that agreement as well (World Trade Organization n.d.b). The Berne Convention requires signatory countries to adhere to some common requirements for their copyright laws (Berne Convention 1979), as does the TRIPS Agreement and, as such, it is easier to understand international copyright laws in the context of these international agreements.

One requirement of the Berne Convention, adopted in TRIPS, is that the national law must not require formalities, such as copyright notice or copyright registration, for a copyright to exist (Copyright Act Article 5 §2). Thus, when the US signed the Berne Convention in 1989, the copyright law of the US had to be changed. As a result, in the US no notice is required for a valid copyright; however, including a notice on a copyrighted work can invalidate the so-called innocent infringer defense whereby the infringer has a more difficult time arguing that s/he did not know that the work was legally protected (Copyright Act §405 and §504(c)(2)). Likewise, no copyright registration is required to have a valid copyright in the United States; however, registration is required to file a copyright infringement lawsuit in a court of law (Copyright Act §408(a) and §411).

The Berne Convention (Article 7, §1) and TRIPS (Article 12) require a minimum copyright term of the life of the author plus 50 years after death. In the US, the current copyright term is the life of the author plus 70 years after death of the author as contained in the Copyright Act's §302(a), which complies with the minimum term provided for in the Berne Convention. Another requirement of the Berne Convention is that any exceptions to the exclusive rights of the author must meet a three-part test. Article 9 sub-part 2 requires it to "be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author". As such, exceptions to the exclusive rights of the copyright author must be (1) "special cases" where (2) "reproduction does not conflict with normal exploitation of the work;" and (3) "does not unreasonably prejudice the legitimate interests of the author" (Electronic Frontier Federation n.d.).

TRIPS also adopts the three-part test, but adds in Article 13 that the exception may not unreasonably prejudice the legitimate interests of the "right holder". The Berne Convention also adopts the national treatment principle, which is incorpo-

rated in Article 5 §3. This means that an author of a work from another country will be protected in the same manner as an author from the home country when considering copyright laws. Indeed, in the US, authors from different nations are often given greater rights than authors from the US, for example in Copyright Act §104A which emanated from the Uruguay Round Agreements Act. When preparing to digitize works from authors of other nations, it is important to recognize that they have, at least, as many rights to their works under national law as home authors do, and perhaps even more.

Article 6bis of the Berne Convention provides for moral rights enforcement, as further developed in the laws of the signatory country. In the US, for instance, moral rights are quite narrow and in Copyright Act §106A are restricted to authors of works of visual art, which is defined as a painting, drawing, or sculpture or photograph that is limited to a single signed copy or a series of less than 200 copies. In countries where moral rights are more robust, however, they must be considered when digitizing works for library collections.

The Copyright Law Landscape in the United States

Elements of the copyright law in the US have already been described. In the US today, there are no formalities required for copyright to attach to a given work. If a literary, musical, dramatic, choreographic, pictorial, graphic, or sculptural work, a motion picture and other audiovisual work, a sound recording, or an architectural work is minimally creative and fixed, generally meaning that it was written or recorded, it is protected by copyright (Copyright Act §102). Copyright for works created today in the US lasts a considerable time period: the length of the author's life plus 70 years if the author is an individual. For works authored by a corporation, or works made for hire, the length of copyright is longer: either 95 years from first publication or 120 years from the year of creation, whichever is the shorter length of time as indicated in the Copyright Act §302.

In determining who the actual copyright holder might be when undertaking a copyright review, the *US Copyright Act* provides some guidance. The Copyright Act defines in §101 the work of employees and certain independent contractors: "(1) a work made by an employee within the scope of his or her employment; or (2) a work specifically ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire". The Copyright Act §305 stipulates that all terms of copyright run through the "end of the calendar year in which they would otherwise expire".

In contrast to the law that is in effect today after US accession to the Berne Convention, which mandated that the United States omit the use of formalities for copyright protection, the copyright status of works first published in the US between 1925 and 1978 can be more difficult to decipher. This is due to changing laws in that era, and the requirement of copyright formalities such as including a copyright notice on the work, registering the work with the US Copyright Office, and renewing the registration at the appropriate time with the agency concerned. Failure to comply with the formalities led to many works published in the period between 1925 and 1978 falling into the public domain, which means that they are not subject to copyright protection, although what constitutes the percentage of the total published works from the period that are in the public domain is disputed (Wilkins 2017). It is important to understand some basic principles when searching for rights information during the era.

Between 1925 and 1978, formalities, such as a copyright notice and renewal of copyright registration, were required for the copyright in works to be fully enforceable. For instance, a work published in the US without a copyright notice between 1925 and 1977 is in the public domain, as is a work published between 1925 and 1963 with a copyright notice but a failure to renew the copyright registration (Hirtle, Hudson, and Kenyon 2009, 45). Furthermore, during that time period, the length of the copyright was 95 years from the date of publication, whereas it is generally the life of the author plus 70 years beginning in 1989 (Hirtle, Hudson, and Kenyon 2009, 45). In the period between 1978 and 1989, the failure to include a copyright notice did not push a work into the public domain, so long as the copyright owner registered the work within five years of publication (ibid, 45; Cornell University 2021).

However, a significant challenge in examining digital collections is that many works were never published, which is further complicated by a lack of knowledge regarding the identity of the works' creators, let alone the date of the death of the works' creators. It is worth noting that the definition of an "unpublished work," while it may seem fairly straightforward, gets complicated quickly. The Copyright Act defines publication as "the distribution of copies … of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending". The Act also notes in §101 that "the offering to distribute copies … to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication". But the Act excludes public performance or the display of a work, alone, from constituting publication. And courts, when interpreting the language of the Act, also struggle with the definition of what it means for a work to be published, often in cases predating the 1976 Copyright Act, which provided the above definition (Gerhardt 2011, 163). In the era before 1976, it was even more difficult to determine what kind of work was an unpublished work, and it was even

more crucial in that era to make a decision due to the attachment of copyright formalities as detailed above. The cases from this era demonstrate that judges tended to "rely heavily on the copyright owner's intent with respect to authorized copies. When the facts show that [works] are distributed freely, it weighs in favor of publication. When the work is made accessible in a way that demonstrates that the copyright owner is retaining control over the copies, publication is less likely to be found" (Gerhardt 2011, 204). Determining the publication status for works created before 1976 gets complicated quickly and can depend on what a court might interpret as publication.

For previously unpublished works, such as diaries, photographs, manuscripts, and the like, the default rule for copyright term in the US applies when the date of death of the author is known: the life of the author plus 70 years. Unpublished works by authors who died before 1950 are in the public domain in 2020, for example. If the death date of the author is unknown, the term extends to 120 years from the date of creation. Finally, for unpublished anonymous or pseudonymous works, or for works that were commissioned by an employer in a work made for hire situation, the length of copyright is also 120 years from the date of creation (Hirtle, Hudson and Kenyon 2009, 42).

When analyzing copyright ownership, one should also consider any transfer of copyright through contractual agreement. With older copyright agreements, even if the publisher owns the copyright and could ostensibly provide permission for the use of the work, the potential exists that the publisher is currently defunct or that the copyright has been further transferred to another party. A further complication in locating the owner of the copyright may arise because in certain circumstances authors or their heirs can take back their copyright from a publisher or other owner within a given period of time, 35 or 40 years after the execution of the transfer of copyright by the author after January 1 1978, depending on the circumstances as described in Copyright Act §203. Additional rules apply to pre-1978 transfers as outlined in Copyright Act §304. As already noted, potentially in a copyright review, a reviewer may run into the problem of so-called orphan works, where no copyright owner can be determined at all (Wilkins 2011). Or the reviewer may encounter foreign works, which may have even longer copyright protection terms in the US, due to restoration, than in their home countries (Hirtle, Hudson, and Kenyon 2009, 49–51).

If a particular two-dimensional work, such as a painting, is determined to be within the public domain, then an exact picture of that piece of art is also in the public domain, as found in *Bridgeman Art Library v. Corel Corp*.[2] In this case, a photographer attempting to merely document an exact "slavish" copy in a photo-

2 Bridgeman Art Library v. Corel Corp., 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999.

graph of a public domain work was deemed not to represent the minimal amount of creativity necessary to create an original work capable of copyright protection (*Bridgeman Art Library* 1999). Thus, if a library attempts to make an "exact" digital replication of an existing two- or three-dimensional work of art without additional creative choices added to the process of digitization, including the photography, the library likely does not hold a copyright in the digital replication (Sims 2017, 80). As such, libraries in the US generally do not treat duplicate copies of images as having a separate copyright.

Library patrons consulting digital collections will also note that there may be terms of use or terms of service associated with the library's website. By accessing the web page, patrons consent to the contractual terms of service. Copyright provisions do not preempt contractual terms, at least in the US although jurisdictions may vary. Should a library wish to charge for access to a particular item, even if that item is in the public domain, the library may do so under a value-added or fee-for-service proposition, a charge for the staff time used in producing the image, or the argument that the preservation and archiving of the particular item is worth the licensing fee provided for in the terms of service (Browar, Henderson, North, and Wenger 2002, 129). This is not to say that the author condones such a practice, but rather to note that contract law and copyright law are different legal regimes.

The Potential for Copyfraud

The term copyfraud was coined by Jason Mazzone and is intended to describe instances when a non-copyright holder asserts rights in a work over which s/he has no copyright ownership (Mazzone 2006, 1038–9). For instance, if a work is in the public domain, but a library asserts that it holds copyright over the work with a copyright statement such as "© 2017 Library," then Mazzone would likely assert that the library is engaging in "copyfraud." Note that if a person does this intentionally and with a fraudulent intent, the individual may be guilty of a criminal violation as well. Criminal penalties may be assessed under the Copyright Act if a person "with fraudulent intent, places on any article a notice of copyright … that such person knows to be false" (Copyright Act § 506(c)). The term copyfraud is quite serious because, technically, fraud is an act involving malicious intent. The library is typically not engaged in an intentionally illegal act, but rather is merely unclear or ignorant of the copyright laws. A library may inadvertently mislead the public, but not in any malicious or intentional way. Regardless, the consequence is the same: the public may be left with the impression that the copyright of the

object in question is owned by the library when, indeed, it is not. Because of errors or imprecision in rights metadata and an absence of a standard approach to rights statements in general, the Digital Public Library of America (DPLA) and Europeana created standardized rights statements (International Rights Statements Working Group 2015) with a white paper which has since been updated and made available under Rightsstatesments.org through a larger collaborative group (Rightsstatements.org. 2018). The standardized rights statements will be discussed later in this chapter.

Local Approaches to Rights Statements

In order to accurately describe digital collections, and before the development of standardized rights statements (SRS), a few conscientious librarians had developed local approaches to rights management system processes.

One locally produced system was developed by Maureen Whalen in 2009 for the Getty Museum. Whalen developed rights metadata to apply on a consistent basis across the Getty Museum's online digital collections (Whalen 2009, 17–18). It is helpful to note that all of the works held in the Getty Museum were owned by the Getty family and explicitly willed to the museum, so in that respect, this particular system may not be as useful to other librarians wishing to apply standardized rights metadata to their own digital collections. Nonetheless, the choices made by Whalen regarding which fields to incorporate into the Getty rights statements are informative. The Getty included five priority metadata fields: creator name, copyright status of the work, publication status, copyright notice, and credit line (ibid, 23–6). Other fields were also included, such as potential claimants, creator role, special notes, and the like (ibid, 26–8). The copyright status field was further divided into eight separate sub-indicators: copyright owned by institution; copyright limited license to institution; copyright owned by third party; public domain; orphan work; unknown where "research was conducted and, as of that date, no reliable rights information has been found"; additional research required where "research had been conducted, but it is [in]conclusive"; and not researched (ibid, 23–4). Interestingly, many of the copyright fields map well onto the subsequently developed standardized rights statements. However, the SRS do not take into account rights other than copyright, such as potential claimants based on a right of privacy or publicity, while the Getty metadata does, perhaps because of the fact that many of the individuals featured in the photograph collection are or were famous.

The system for rights metadata developed in 2005 by Karen Coyle, who worked for over twenty years at the California Digital Library, to address copyright in all digital collections was a precursor to the project which developed the standardized rights statements. Coyle asserts that copyright metadata should be accurate, even when licensing agreements exist, because "a license does not remove the copyright status of an item; it establishes an agreement between the parties that is founded on the ownership rights that copyright law defines" (Coyle 2005). Thus, while she recognizes the importance of licensing, her metadata development does not include a field to input licensing information. Rather, she included the following rights fields in her copyright metadata:

- General rights information
  - Copyright status: copyrighted, public domain, unknown
  - Publication status: published, unpublished
  - Dates: year of copyright or creation, year of renewal of copyright
  - Copyright statement: from the piece
- Country of publication or creation
- Creator: creator name, dates, contact
- Copyright holder: contact
- Publisher: publisher name and contact, year of publication, and
- Administrative data: Source of information (piece itself or other resources), contact information, the rights research contact (Coyle 2005, 7)

This important work predates the development of standardized rights statements. Although local approaches have been helpful, and better than including no copyright metadata at all, a standardized approach across institutions is preferable so that librarians and patrons can best understand the copyright status of a work.

Copyright Review Models

First, it is important to note that there may be no one-size-fits-all copyright review process, even though there is a standardized metadata input mechanism such as the SRS. Why? Because each institution's holdings are different and their records may be more or less detailed. Additionally, library staff at individual institutions may be more or less familiar with copyright laws as well, and may feel uncomfortable conducting any type of copyright review if the materials in the digital collection are not owned by the institution. Although it is preferable to conduct a thorough copyright review of each digital item in a given online library collection, it is understandable that a library may not have the staff or the time to do

so. However, at the bare minimum, libraries should attempt to input accurate data, and not use a default metadata rights identifier such as "©Library" when it is incorrect.

Second, copyright is often impacted by licensing and/or terms of use limitations. However, when licensing or terms of use details are placed in the rights field, the user may be unnecessarily confused. Information about licensing and/or terms of use should be separated from the rights information in a clear fashion; when appropriate, libraries should also use the "No Copyright—Other Known Legal Restrictions" label for the metadata (Coyle 2005, 28). Various models have been developed for copyright review and are outlined below.

Copyright and Cultural Institutions Guidelines by Hirtle, Hudson, and Kenyon

Peter Hirtle, Emily Hudson, and Andrew Kenyon detail helpful information for librarians wishing to engage in rights status analysis for digital collections in their open-access digital book: *Copyright and Cultural Institutions: Guidelines for Digitization for U.S. Libraries, Archives, and Museums*. Some of the most useful portions of the book, from the perspective of a librarian conducting a copyright review, are the charts and checklists. Specifically, Table 3.2.1 details the copyright term length for unpublished works (Hirtle, Hudson, and Kenyon 2009, 42). Table 3.2.2 similarly details copyright term length, but for works first published in the US (ibid, 45). Flowchart 3.2 explains how to determine the rights status for works published in the United States between 1925 and 1989 (ibid, 48). Table 3.2.3 demonstrates how to calculate the rights status for foreign works (ibid, 49). Finally, flowchart 6.1 details when digitized copies of works may be made available under Section 108 of the Copyright Act, specifically when they are in the last twenty years of the copyright term and the work is not subject to normal commercial exploitation, no copy of the work can be obtained at a reasonable price, or the copyright owner has notified the Register of Copyrights that either of these preceding two conditions have been met (ibid, 110). Of course, the entire book is helpful to those wishing to engage in a thorough rights analysis, but the checklists and charts highlighted are very handy guides to apply when devising a review process.

More recently, the Society of American Archivists (SAA) further built on the work by specifically writing a guide for the implementation of rights statements "produced by the SAA Intellectual Property Working Group for the use of archivists and other cultural heritage professionals making digital materials available

online in the United States" (Society of American Archivists n.d.). The guide is freely available (Society of American Archivists 2016).

HathiTrust Copyright Review Management System Model

The HathiTrust Digital Library is "a digital preservation repository" that provides "access services for public domain and in copyright content from a variety of sources, including Google, the Internet Archive, Microsoft, and in-house partner institution initiatives" (HathiTrust Digital Library n.d.a). It has a very detailed copyright review model, the Copyright Review Management System (CRMS), which is documented through an open access ebook (Levine et al 2016). The most interesting part of the CRMS model, perhaps, is that it is collaborative in nature. Many libraries dedicate staff members to participate in HathiTrust's review process, resulting in a large-scale review of the copyright of published works. In the review process, each book is reviewed by two non-experts and one expert reviewer, in case of a conflict between the reviews by the non-experts (Levine et al 2016, 115). Only following rigorous review is the book made openly available through the HathiTrust Digital Library if it is in the public domain. Alternatively, if a book is still in copyright, the record display in response to a search includes the page numbers and the number of times the search term appears on relevant pages. Verified researchers can access in-copyright materials for non-consumptive, or text-mining, research, through an application process to the HathiTrust Digital Library (HathiTrust Digital Library n.d.b; HathiTrust Digital Library 2017).

Note that HathiTrust is currently focused on reviewing works that were published in the US between 1925 and 1963 (class A books), published in the United Kingdom before 1943, or published in Canada and Australia before 1963. Other areas of work include the ongoing evaluation of US state and local governmental material that was published between 1925 and 1977.

The copyright management decision tree is one piece of the documentation created by the CRMS project that is valuable to anyone wishing to review the copyright for works published in the United States between 1925 and 1963 ("Copyright Review Management System Decision Tree 1.5.6." n.d.). Indeed, all of the decision review documents created by the CRMS team, as well as the book published on the subject: *Finding the Public Domain* are invaluable tools for those wishing to engage in a metadata rights determination project with an example to build from (Levine et al 2016; University of Michigan 2017). Once the rights decision tree is followed and an appropriate copyright determination is made, the DPLA/Europeana SRS may be applied. HathiTrust currently uses metadata through Zephir, a

bibliographic programming system managed by the University of California and the California Digital Library.

University of Miami Libraries

In 2015, the University of Miami Libraries commenced a project to assign rights statements to their digital collections by using standardized rights statements. The libraries noted that before the project was undertaken, "a review of the digital collections revealed that most metadata records contained little to no rights-related information" (Capell and Williams 2018, 6–7). In some ways, the lack of metadata may have made the implementation of the SRS easier, since it is probably simpler to add a rights field than to change imposed rights data. The libraries created a copyright decision matrix (University of Miami Libraries 2016), drawing largely on the work of Peter Hirtle outlined above. In essence, the University of Miami Libraries combined a decision matrix with SRS implementation to provide a model approach for libraries wishing to begin assigning rights statements to their digital collections. Interestingly, large amounts of the University of Miami Libraries collection came from Cuba, so the decision matrix includes a country of creation designation specifically to notify staff when a given work had been created in Cuba. The University of Miami undertook an effort to understand Cuban copyright law for similar reasons (Capell and Williams 2018, 8, 14). Additional information about the approach taken by the University of Miami is available on the libraries' website (University of Miami Libraries n.d.).

Pennsylvania State University's Workflow

The Pennsylvania State University Libraries, commonly known as the Penn State Libraries, are the most recent example of the implementation of standardized rights statements. In spring 2016, the Penn State Libraries held a retreat with relevant library stakeholders to discuss the workflow surrounding metadata for digital collections (Ballinger, Karl, and Chiu 2017, 152). Many currently digitized collections at the Penn State Libraries require metadata revisions to satisfy the requirements for deposit to the DPLA collection (ibid, 152). Newer collection deposits would, of course, follow the new protocol for rights metadata. The first step in the digitization process at the Penn State Libraries is for the copyright officer to determine whether the collection items are public domain, whether the library owns the rights, or a fair use determination positively supports digitization. If not, the process may be put on hold pending permission requests to the

copyright holder (ibid, 153). Next in the process, the copyright officer assigns a relevant rights statement using the language of the SRS. Finally, the metadata librarian records the rights information in the record for the item (ibid, 154). Penn State discovered through trial and error that the Uniform Resource Identifiers (URIs) for the rights statements are case-sensitive which in DPLA will resolve "to display the official [rights statement] icon near the item's thumbnail image" (ibid, 155).

Standardized Rights Statements

As noted above, standardized rights statements were launched in April 2016 by the Digital Public Library of America (DPLA) and Europeana to create an unambiguous, uniform system for inputting rights metadata. DPLA provides many services including the DPLA Exchange, an e-content acquisitions platform for public libraries across the US, online exhibitions, and sets of primary source materials from libraries, archives and museums across the United States, making millions of materials from cultural institutions across the country available to all in a one-stop discovery experience. Europeana is an initiative of the European Union and seeks to empower cultural institutions across Europe in their digital transformation. Europeana works with thousands of archives, libraries and museums to share cultural heritage and provides online exhibitions and galleries.

Rightsstatements.org has developed from the initial impetus of DPLA and Europeana who developed the basic principles and technical infrastructure, and comprises six organizations with the addition of the National Digital Library of India; Trove, a partnership of the National Library of Australia and other Australian cultural institutions; the Canadian National Heritage Digitization Strategy/Stratégie canadienne de numérisation du patrimoine documentaire (NHDS/SNPD) which is working on the digitization of Canadian memory institutions' collections and the National Library of New Zealand.

Rightsstatements.org provides best practice for use by both international, national and regional aggregators of cultural heritage data on simple and standardized terms or rights statements to summarize the copyright status of objects in the collections of cultural institutions, as well as describing how those objects may be used so that cultural heritage institutions might communicate details of digital objects to their users. The White Paper already mentioned in this chapter sets out the details of the statements which are also available separately on the rightsstatements.org website. There are three main categories of rights statements contained in the statements:

- In Copyright
- No Copyright, and
- Other.

The three categories are further subdivided. In Copyright works, for instance, include the following subcategories:

- In Copyright
- In Copyright – EU Orphan Work
- In Copyright – Rights–holder(s) Unlocatable or Unidentifiable
- In Copyright – Educational Use Permitted, and
- In Copyright – Non-Commercial Use Permitted.

The EU Orphan Work subcategory applies only in Europe and is not discussed here. Separate rights statements for each subcategory are provided by rightsstatements.org. The simplest subcategory is In Copyright. When a work is still protected by copyright and the rightsholder is known, the 'In Copyright' rights statement would be deemed appropriate and used. Other designations listed permit Noncommercial or Educational uses only. Finally, a designation for Unlocatable or Unidentifiable Rights Holder is appropriate when the work is clearly still in the copyright term, but the rightsholder is unknown, and would be appropriate for an orphan work.

Each category of rights statements is fully described and detailed both on the righsstatements.org website and in the White Paper (Rightsstatements.org. 2018). The No Copyright rights statements are further subdivided into four subcategories:

- No Copyright – Contractual Restrictions
- No Copyright – Non-Commercial Use Only
- No Copyright – Other Known Legal Restrictions, and
- No Copyright – United States.

The first subcategory, Contractual Restrictions, would be appropriate if a work was no longer under the copyright term restrictions, but by license or contractual obligation the work has additional restrictions. For example, if a vendor has commercialized a public domain work and has imposed terms of use, the designation 'Contractual Restrictions' would be deemed appropriate. The Non-Commercial Use Only subcategory would be suitable for works that are designated with a license to be open, but only for noncommercial uses. The Other Known Legal Restrictions designation would be used for a work not restricted by copyright, but rather by other legal rights such as privacy or moral rights. In the US, the only recognized moral rights are those contained in the Visual Artists Rights Act (VARA) 17 U.S.C. §106A. In other countries, however, moral rights may include

rights such as attribution and integrity, including rights against the mutilation of the work, and may last indefinitely (Rigamonti 2006, 357). Finally, the No Copyright—United States designation would be an appropriate license for US public domain materials, such as those published in the US prior to 1923. Public domain terms can vary by country and by one country's treatment of foreign works under its own law, such as the restoration of foreign copyrights under US law, and the statement has been vetted for the US public domain term only (Rightsstatements.org 2018, 29).

The Other category is akin to providing catchall provisions and is further divided into three subcategories:

- Copyright Not Evaluated
- Copyright Undetermined, and
- No Known Copyright.

Copyright Not Evaluated is a provision that lets the user know that the copyright has yet to be evaluated by the hosting institution in any way, for instance, with the mass digitization of works. Although the digitizing institution may believe that the materials it is digitizing belong in the public domain, it has not done an individualized assessment of each piece in the collection. The Copyright Undetermined designation is intended for use when the institution has reviewed the item and has "made the item available, but the organization was unable to make a conclusive determination as to the copyright status of the item". A library may wish to use this designation if it has done a copyright review, but been unable to determine the status of the item because the author's date of death is unknown and it is necessary to calculate copyright length. Finally, No Known Copyright is an appropriate designation for a work made between 1925 and 1968 where a reasonably diligent online search has been conducted and no copyright can be located. It indicates that the instance is not a simple case, like a work published in the United States prior to 1925, and that a copyright search has been made, but that the organization cannot warrant the accuracy of the information to an infallible degree.

Note that all of the rights statements include a disclaimer that there is no warranty as to the accuracy of the rights statement and that the user of the work is ultimately responsible for his or her own use. The following table indicates the details provided in each rights statement.

Table 8.1: Rights Statements Inclusions

Short name of RS	Name of Rights Statement (linked to statement text on test server)
URL of Rights Statement	
One sentence description of the Rights Statement. This will not be displayed as part of the Rights Statement. Intended for use in documents or on websites describing the Rights Statements.	
Text of the Rights Statement **Notices:** – **One or more notices related to the Rights Statement** **Disclaimer regarding this being a Rights Statement and not a legally operative License summary.**	
Generic selection criteria for the Rights Statement. Short text that describes when this Rights Statement should be used, aimed primarily at data providers. This text will not be displayed as parts of the Rights Statement.	
Extra metadata	For some statements it is possible to provide additional metadata that triggers the display of optional information at the text of the Rights Statement (and above the notices). If this is the case this will be noted here. Specific behavior is indicated by keywords in bold as described by RFC 2119 (Bradner 1997)

Traditional Knowledge Labels

For countries that have protection for moral rights or a *sui generis* law protecting the right to traditional cultural expression, or for anyone wishing to recognize community rights that are not generally protected under US copyright law, Traditional Knowledge Labels (TK Labels) are available. Local Contexts was founded in 2010 to enhance and legitimize locally based decision-making and Indigenous governance frameworks for determining ownership, access, and culturally appropriate conditions for sharing historical, contemporary and future collections of cultural heritage and Indigenous data. Digital strategies for Indigenous communities, cultural institutions and researchers are provided through the TK (Traditional Knowledge) and BC (Biocultural) Labels and Notices as "an extra-legal educative metadata intervention" and the "goal was to develop a new and complementary set of licenses that addressed the diversity of Indigenous needs in relation to intellec-

tual property" (Local Contexts n.d.). The TK Labels are digital markers that define attribution, access, and use rights for Indigenous cultural heritage. Twenty TK Labels have been developed through direct community partnership and collaboration. Each TK Label can be adapted and customized to reflect ongoing relationships and authority including proper use, guidelines for action, or responsible stewardship and re-use (Local Contexts n.d.; Christen 2015). Another chapter in this book addresses indigenous intellectual property issues in more detail.

Conclusion

Although it may be time-consuming and difficult to correct errant online digital rights statements, it is important that libraries make the effort to do so. Otherwise, as noted above, there is a risk of copyfraud. Thankfully, the standardized rights statements documentation provides librarians with guidance on the appropriate inclusion of rights metadata for the materials in their online collections. Librarians no longer need to invent home-grown systems for copyright metadata. However, using correct terms for metadata is only half of the copyright battle. The more challenging part is to develop systematic approaches for copyright review. Luckily, the HathiTrust, the University of Miami Libraries, and Pennsylvania State University Libraries have taken the lead in providing road maps for such decisions. The many examples and case studies listed, along with the copyright flowcharts from Hirtle, Hudson and Kenyon's *Copyright and Cultural Institutions* book (2009), provide librarians with guidance on how to appropriately chart copyright decisions to determine which rights statements should apply to works housed in a digital collection. Hopefully, many more libraries will follow this lead and standardized rights statements metadata will become the norm and not the exception to the rule for digital collections.

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Part III: **International Developments: the Case for Library Engagement**

The framework of global copyright debates and the why and the how of taking part

Sara Klein and Jess Whyte

9 International Copyright Issues in Digital Preservation

Abstract: The goal of this chapter is to review various legal concepts of copyright as they relate to digital preservation. Three topics in digital preservation have been chosen for comparison and analysis: reproductions and their use, technological protection measures (TPMs), and orphan works or abandonware. The chapter focuses on three national and regional legal frameworks in Canada, the US, and the European Union (EU) and examines how each respectively handles the issues for each of the chosen topics. Similarities and differences are identified and areas where legal opinion may be vastly different are highlighted and explored.

Keywords: Technological protection measures**;** Copying; Library materials – Reproduction; Digital preservation; Orphan works (Copyright]; Copyright – Canada; Copyright – European Union; Copyright – United States

Introduction

Preservation of collections is a central function of many libraries and digital content presents unique challenges within that mandate, including copyright complexities. The goal of this chapter is not to discourage digital preservation work, it is to enable it. A copyright concern is just that, a concern, and one that can often be resolved or mitigated.

The percentage of digital content held or managed by libraries is increasing in volume, both through ease of production and reproducibility. In addition, there is a diversity of digital formats and platforms available, with each presenting its own risks of obsolescence. Regarding copyright, there are diverse and high numbers of associated rightsholders, license holders, and creators including some who may be anonymous. Licenses relate to various means of access including online or streaming and might involve purchase or user licenses with conditions which vary considerably and change frequently. Other issues include changing platforms and providers. Content itself is changing with new forms like mashups which combine various digital information resources. Digital preservation, much like traditional preservation, seeks to mitigate some of these risks.

Before continuing, the distinction between digital preservation and digitization in the context of this chapter needs to be clarified. Digitization is the process

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of migrating content from a non-digital format to a digital one, for example, scanning a printed photograph and making a JPEG version. Digitization is a form of reproduction that comes with its own copyright and access concerns. Digital preservation, however, is the ongoing management of digital objects in a steward's care and is the focus of this chapter.

This chapter also makes a distinction between preservation and access functions. This distinction prevents the copyright assessment of one function from affecting the library's ability to perform the other. Preservation is the maintenance of an object over time. Access is the location and use of an object, digital or otherwise. Preservation and access will always be linked, and the goal of preservation may be enduring access, but the activities undertaken in preserving content may be distinct from the activities undertaken in ensuring access. For example, a conservator may restore a painting so that it can be enjoyed by gallery visitors, but the skills, tools, and actions to do that restoration are separate from those needed to display that same painting in a public gallery. Practitioners may even preserve or restore an object they cannot yet provide access to, in anticipation of being able to do so in the future.

Some actions required to preserve a digital object might be considered copyright infringements unless they are sanctioned by specific exceptions or limitations in the legislative framework governing any particular library's contractual obligations in relation to purchase or access to information resources. For example, digital preservation practices often include:

- Making and storing multiple copies of an object to reduce the risk of hardware or system failure
- Migrating an object from one file structure to another to reduce the risk of obsolescence as in moving content from a proprietary database to a text-only format for preservation purposes and the maintenance of access
- Emulating or adapting a software environment varying from that used with original hardware in order to access content no longer accessible, including accessing ebooks designed for out-of-date hardware
- Changing software to access information resources in the case of obsolescence, current and potentially in the future, and
- Running or providing access to software or digital content that does not have an identifiable owner, apparent maintenance or support, frequently known as abandonware.

There are aspects of copyright law that seek to restrain these preservation activities; any activity beyond individual or original use of a work is usually restrained.

Librarians, library associations, users, and members of the digital preservation community have flagged copyright concerns related to digital preservation

and lobbied to secure change. Three major topics have emerged at the intersection of digital preservation and copyright law:

- Reproductions or copies for preservation purposes
- TPMs, sometimes referred to as, or may include, Digital Rights Management (DRM), and
- Orphan works.

This chapter provides an overview of each topic, followed by an explanation of how different copyright regimes in the US, Canada, and the European Union (EU) approach the issues related to each topic including the impact on digital preservation work.

Reproductions

Replication, reproduction, or copying relies on keeping copies of digital objects, ideally with backups stored in different physical locations, possibly in different formats. For example, images may be reproduced in various formats like JPEG or TIFF. While copying or reproducing a work for preservation purposes by a library is typically protected or included as an exception under modern copyright regimes, grey areas emerge in relation to any modification such as changing the file format or copying a work unnecessarily. Some digital resources, due to copyright law, may have requirements to track the number of copies accessed or used. For example, a library cannot create multiple copies for distribution or access under the guise of a preservation exception; a third party or automated software, as part of its preservation or access processes, might be making copies or derivatives without the library's direct knowledge. In this instance, it might not be possible to determine what arrangements have been made for preservation behind the scenes. Backup mechanisms and procedures are somewhat opaque. It is not clear what legal requirements would be in place in the situation just outlined. While actions taken to preserve digital content are likely to be protected under fair dealing or fair use, given the purpose of the copy, the nature of the materials, and the market impact, they may not be explicitly protected. That said, lack of legal certainty should not prevent libraries from fulfilling their mandates and taking steps to preserve digital information.

Another complexity is the use of shared networks or resources. Many libraries operate as part of consortia for agreed upon or shared purchasing of library collections. Others collaborate with regional or like groupings of libraries with shared storage arrangements or distributed digital preservation plans. Libraries

benefit from these consortia because of the distribution of the work and lowered costs. Collaborative library operations bring additional layers of intricacy and detail. There are shared contractual obligations and unilaterally owned items on shared servers. Examples of shared digital preservation include:

- Chronopolis digital preservation network, a program for the preservation of digital collections in three locations across the US
- CLOCKSS network (Controlled Lots of Copies Keep Stuff Safe), a dark archive run by its community members that preserves content at twelve international nodes with over 34,000 serials titles and 360,000 book title at the time of writing which are to be used only in the case of a trigger event such as a natural disaster
- Belgium-based SAFE PLN network, an international distributed preservation network based on the LOCKSS technology which creates multiple preservation copies of born-digital, open-access collections and is currently hosted by seven different institutions, and
- WestVault, which is part of the Council of Prairie and Pacific University Libraries (COPPUL) in Canada and uses OwnCloud and the LOCKSS software to ingest digital content into a distributed digital preservation storage network.

Libraries participating in these digital preservation arrangements will hold either a full copy of the digital collection or a partial copy. If anything happens to one copy, it can be repaired or replaced by a version held at another member institution. Some distributed storage networks require each depositing and holding member to own its own copy of the works ingested, but most do not. The networks serve as dark archive services, which are inaccessible to the public and where content can be retrieved by the depositor only. They do not operate as open access or distribution points. Much of their value is in the ability to access geographically distributed, affordable, and secure digital storage that relies on partner memory institutions and not on a costly and privately-owned service like Amazon Web Services (Trehub et al. 2019).

Differences in how copyright regimes handle reproductions for preservation purposes can confuse and hamper the creation of collaborative preservation networks, particularly cross-border ones because conflicting laws might govern behaviour differently for the various organizations involved, leading to confusion or inoperability. Because of different copyright laws in different jurisdictions, it may be overly complicated, or in some cases impossible, to complete projects across borders in a way that adheres to both sets of laws. Many networks deal with these issues by keeping the networks dark and/or controlled, separating preservation and access with access available as a failsafe mechanism to be used

only in the case of a disaster, or deferring copyright responsibility to the institutions depositing content.

Technological Protection Measures (TPMs)

Technological protection measures (TPMs), sometimes referred to as digital locks, are a means of controlling access to and use of digital content by technological means through hardware or software or a combination of both. They are used to prevent or restrict copying. For example, TPMs affecting libraries might be encrypting an ebook or DVD; applying a geographical restriction to use; blocking the download of streaming content; setting time limits for use; including watermarks or labels on a PDF document; determining the number of simultaneous users of information resources; or embedding passwords or keys on software.

TPMs are a challenge because they can render materials impossible to access, let alone preserve. TPMs themselves have a limited life and change frequently. They are notoriously susceptible to changing standards, business practices, and trends. Because of changing TPMs, a movie or ebook accessible ten years ago may no longer be available if the company that owns the format no longer makes or supports the software or keys needed to read it. With digital works encumbered by TPMs, and a general context of constantly changing technology resulting in obsolescence, file formats may not be able to be easily changed; passwords can be lost; printing or copying can be blocked; and purchased digital content can be withheld from owners seeking to access, download, copy, or preserve purchased content. While TPMs are intended to protect digital works from copyright infringement, they can also impede use and prevent legitimate copying under fair use or fair dealing, or some other legitimate copyright exception, and affect materials which might be in the public domain.

TPMs cannot always differentiate between legitimate and infringing uses of content. A library might rightfully, for example, migrate a work to another format for preservation. The act of preservation might be legal within the relevant copyright regime, but a legal act could still be technically impeded by overzealous TPMs which conflict with the exceptions afforded within the legislation to libraries, heritage institutions, or individual consumers. Depending on the copyright regime, circumvention of the TPMs might be specifically prohibited.

Orphan Works

As described in greater detail elsewhere in this book, orphan works are works "for which copyright owners cannot be identified or contacted to obtain permission for use" (Borgman 2007, 108). Abandonware refers to software that is no longer maintained and is ignored by its creators. The copyright complexities created by orphan works are not unique to digital preservation and there are existing strategies for mitigating risks, which focus on when a work is published or access to it is provided. These strategies include the use of takedown notices, applications for exemptions, or documenting failed attempts to locate copyright holders. In a library preservation context, copyright infringements of orphan works are unlikely to become a significant issue due to a lack of profit motivation. Preservation-specific actions on orphan works are unlikely to trigger a copyright case for libraries.

One digital preservation strategy that may lead to issues with orphan works is emulation. Emulation is a common tactic when dealing with orphan works or abandonware because these works or software are often older and no longer maintained. Emulation is when you use one computer system to imitate or pretend to be another computer system. Emulation is sometimes used to preserve older or obsolete content. For example, emulation may be used to provide access to an older file format when a modern method is not available. Emulation as a preservation strategy is most prevalent in interactive works, such as video games, software, or interactive art, when the goal is to preserve the experience alongside the content (Corrado and Sandy 2017, 222–224), or to enable performance of a work so that it may be recorded for posterity. Emulation might be used with donations of personal papers to view content for appraisal where author's manuscripts or archives are in obsolete formats, or research data management where scientific software might be needed to reproduce results. Libraries and stewards responsible for the ongoing management of content try to preserve the look and feel of the context in which the work was created, its functioning, or any digital marginalia included. As a strategy, emulation can be labor-intensive, sometimes requiring a bespoke solution that can be difficult to maintain over the long term.

The issues emulation raises within digital preservation are layered. One must find and use not only the object itself, but the software needed to perform or view it on-screen. Software may be a single application, or it may include other software needed to run the application, like an operating system. Software codes can be copyrighted and may have been distributed with licenses, and the content within the software may also be licensed, for example music, videos, or fonts. Each of these discrete areas can be taken up under copyright. Curation-ready soft-

ware, according to the Software Preservation Network, has known terms under which the software can and should be made available (Rios et al. 2017).

Digital Preservation and Copyright Legislation

The following sections provide an overview of the relevant copyright law relating to digital preservation in Canada, the United States, and the European Union, and an analysis of its impact on library activities and digital preservation work in each of the regimes examined. There are similarities across the regimes and some key differences. The area is in a constant state of flux. Laws are changed and interpreted all the time, and legal review and treaty negotiations with respect to copyright regimes are ongoing. There is frequently a gap between stated policy goals and the implementation of legal changes. Within each jurisdiction, the three topics of reproductions, technological protection measures, and orphan works are examined.

Canadian Legislation

The Canadian *Copyright Act*, as in most countries, grants copyright owners the sole and exclusive right to reproduce, perform, or publish a work, and to control the ability to benefit from that work, monetarily and otherwise. The rights are subject to limitations and exceptions, and particularly of interest are the exceptions granted to libraries, archives, museums, and educational institutions (Harris 2014). Canada, in a prescient move, overhauled all copyright legislation in 2012, in the middle of the digital explosion. As of this writing, the last statutory review of the Copyright Act was in June 2019, but its recommendations have yet to be enacted (Canada. Parliament. House of Commons 2019). The approach of the Canadian act in relation to the three areas identified is outlined below.

Reproductions

The Canadian *Copyright Act* (Canada. Justice Laws Website. 2020), identifies exceptions to infringement for libraries, archives, educational institutions, and museums in Section 30. Libraries may copy published and unpublished works protected by copyright so that they may maintain and preserve their collections:

Management and maintenance of collection

30.1 (1) It is not an infringement of copyright for a library, archive or museum or a person acting under the authority of a library, archive or museum to make, for the maintenance or management of its permanent collection or the permanent collection of another library, archive or museum, a copy of a work or other subject-matter, whether published or unpublished, in its permanent collection

(a) if the original is rare or unpublished and is
    (i) deteriorating, damaged or lost, or
    (ii) at risk of deterioration or becoming damaged or lost;
(b) for the purposes of on-site consultation if the original cannot be viewed, handled or listened to because of its condition or because of the atmospheric conditions in which it must be kept;
(c) in an alternative format if the library, archive or museum or a person acting under the authority of the library, archive or museum considers that the original is currently in a format that is obsolete or is becoming obsolete, or that the technology required to use the original is unavailable or is becoming unavailable;
(d) for the purposes of internal record-keeping and cataloguing;
(e) for insurance purposes or police investigations; or
(f) if necessary for restoration.

There is a caveat. The exceptions do not apply if an appropriate copy is commercially available:

Limitation

(2) Paragraphs (1)(a) to (c) do not apply where an appropriate copy is commercially available in a medium and of a quality that is appropriate for the purposes of subsection (1).

Issues arise with computer storage where backup copies and automated redundancies are part of the preservation process early on. A robust digital preservation strategy for libraries relies on multiple copies, even when a commercial copy is readily available. The best protection is to separate preservation functions from access. The preservation of digital content and the creation of backup copies in a dark storage inaccessible to most is unlikely to trigger a copyright case, whereas proliferating and/or distributing those copies online might. The separation of preservation and access permits libraries to address the copyright complexities of each separately without jeopardizing either mandate.

Technological Protection Measures

Section 41 of the Canadian *Copyright Act* specifically addresses TPMs and Rights Management Information and prohibits circumvention by various means:

> 41.1 (1) No person shall
> (a) circumvent a technological protection measure within the meaning of paragraph (a) of the definition *technological protection measure* in section 41;
> (b) offer services to the public or provide services if
> (i) the services are offered or provided primarily for the purposes of circumventing a technological protection measure,
> (ii) the uses or purposes of those services are not commercially significant other than when they are offered or provided for the purposes of circumventing a technological protection measure, or
> (iii) the person markets those services as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market those services as being for those purposes; or
> (c) manufacture, import, distribute, offer for sale or rental or provide — including by selling or renting — any technology, device or component if
> (i) the technology, device or component is designed or produced primarily for the purposes of circumventing a technological protection measure,
> (ii) the uses or purposes of the technology, device or component are not commercially significant other than when it is used for the purposes of circumventing a technological protection measure, or
> (iii) the person markets the technology, device or component as being for the purposes of circumventing a technological protection measure or acts in concert with another person in order to market the technology, device or component as being for those purposes.

For example, an individual may copy a non-infringing reproduction of a song from a laptop to a smartphone for personal use but cannot do so if the action involves circumventing technological measures preventing such an occurrence. Despite the 2012 overhauls in the *Copyright Act* generally, no explicit exceptions exist for the circumvention of TPMs by libraries, archives, or museums. Canadian digital preservationists cannot circumvent TPMs to preserve digital works for the future. The lack of legal specificity affects the preservation of ebooks and software.

In 2018, the Canadian Federation of Library Associations /Fédération canadienne des associations de bibliothèques (CFLA-FCAB) submitted a brief to the statutory copyright review process including five recommendations for changes to the *Copyright Act*. On the issue of TPMs, the CFLA-FCAB recommended "that Parliament amend the *Copyright Act* to make it clear that the Act is technologically neutral and that circumvention of TPMs is permitted for non-infringing,

digital and analog uses, in sections 29; 30.1–30.5; and 80 (1)" (CFLA-FCAB 2018). Similar calls were submitted in briefs from the Canadian Association of Research Libraries/Association des bibliothèques de recherche du Canada, Canadian Council of Archives/Conseil canadien des archives, the Canadian Museums Association/ Association des musées canadiens, Creative Commons, Education International, MacEwan University, the Ontario Council of University Libraries' Digital Curation Community, the Organization for Transformative Works, the Union des écrivaines et des écrivains québécois, and the University of Guelph. According to Pascale Chapdelaine at the University of Windsor, the introduction of TPMs to digital objects has significantly curtailed the application of exceptions in the *Copyright Act* (Chapdelaine 2018, 9).

The Canadian Parliamentary Standing Committee on Industry, Science, and Technology's (INDU) review of the *Copyright Act*, taking the representations received from various groups into consideration, made 36 recommendations for change. Recommendation 19 speaks directly to TPMs:

> that the Government of Canada examine measures to modernize copyright policy with digital technologies affecting Canadians and Canadian institutions, including the relevance of technological protection measures within copyright law, notably to facilitate the maintenance, repair or adaptation of a lawfully-acquired device for non-infringing purposes (Canada. Parliament. House of Commons 2019).

The outcomes of the report are yet to be taken up. Currently, no specific exception for the circumvention of TPMs for the purposes of preservation exists in Canadian law. In addition to the fact that there is no stated digital preservation exception, the definition of TPMs itself has been interpreted broadly in Canada with the consequences that acts regarded as legitimate within the law currently could be interpreted differently by the courts. Although the federal case *Nintendo of America Inc. v. King & Go Cyber Shopping (2005) Ltd, 2017 FC 246*[1] does not deal with preservation, its outcome has a wide-ranging effect on future conduct. Taking up the issue of TPMs for the first time, the Court found in this case that the Act's definition of TPMs is broad, and wrongdoing could be found even if no actual infringement occurred (Crowne 2017). The potential for infringement of the *Copyright Act* and the absence of appropriate exceptions for educational institutions, libraries, archives, and museums present strong disincentives and barriers to digital preservation and contribute to a lack of sustainability for works ensconced in TPMs. As a minimum, bit-level preservation may be possible but long-term accessibility and availability might be unlikely.

1 Nintendo of America Inc. v. King, 2017 FC 246 (CanLII), [2018] 1 FCR 509.

Orphan Works

When dealing with orphan works or abandonware, Section 77 of the Canadian *Copyright Act* assigns the Copyright Board of Canada/Commission du droit d'auteur du Canada the power to issue non-exclusive licenses for the use of works or other copyright subject-matters when the owner of the copyright cannot be located. Applications are reviewed on a case-by-case basis. In order to approve a request, the Board must be shown evidence that the applicant has made a reasonable effort to locate the rightsholder and that the rightsholder could not be located through that effort. The Copyright Board may then approve a request and issue a conditional nonexclusive license. The Board can also limit the types of uses permitted by the licenses, such as limits on reproduction, publication, performance, and distribution. The Copyright Board may issue licenses permitting certain uses including reproduction, publication, performance, and distribution (US Copyright Office 2015, 30–31). There are some situations which comply with exceptions under the Act and do not require an application, for example educational use. Preservation, even within an educational context, though, is not explicitly dealt with as a reason for exemption. As of this writing, an average of between 5–20 licenses have been awarded every year since 1990 (Canada. Copyright Board of Canada n.d). For digital preservation work in Canada related to orphan works, a Board-issued license is unlikely to be required unless access is being provided to the work, as in publishing it online or providing access to abandonware software in an online emulator outside of educational use.

United States Legislation

US copyright law protects copyright owners' rights, but also the public's rights. The purpose of most copyright laws is to encourage the creation of new works, but there are limits on the protections provided within the law so that people may refer to or invoke or, in the case of libraries, archives, and museums, collect or preserve works and contribute to the growth of knowledge. A major legislative event after the passing of the US *Copyright Act* of 1976 was the passage of the *Digital Millennium Copyright Act* of 1998 (DMCA) which implemented two World Intellectual Property Organization (WIPO) treaties. The passage of the DMCA enacted revisions to the 1976 Act by introducing rules to deal with the foreseen potential explosion of reproduction and distribution that was arriving with growing use of the internet and online services (US Copyright Office 1998).

Reproductions

Under Title 17 of the US Code, which contains the copyright laws, §108 addresses reproductions by libraries and archives specifically:

> 108. Limitations on exclusive rights: Reproduction by libraries and archives
> (a) Except as otherwise provided in this title and notwithstanding the provisions of §106, it is not an infringement of copyright for a library or archives, or any of its employees acting within the scope of their employment, to reproduce no more than one copy or phonorecord of a work, except as provided in subsections (b) and (c), or to distribute such copy or phonorecord, under the conditions specified by this section…(US Copyright.gov n.d.)

Libraries and archives have a limited exception to the protected reproduction and distribution rights when necessary to maintain or preserve their collections (LaFrance 2017, 241). Exceptions must fall within the allowances of fair use and within a scope so as not to infringe. As noted, §108 (a) for published works in particular allows libraries and archives or any of their employees to reproduce and distribute works under the following conditions:

> 1) the reproduction or distribution is made without any purpose of direct or indirect commercial advantage;
> (2) the collections of the library or archives are (i) open to the public, or (ii) available not only to researchers affiliated with the library or archives or with the institution of which it is a part, but also to other persons doing research in a specialized field; and
> (3) the reproduction or distribution of the work includes a notice of copyright that appears on the copy or phonorecord that is reproduced under the provisions of this section, or includes a legend stating that the work may be protected by copyright if no such notice can be found on the copy or phonorecord that is reproduced under the provisions of this section.

If a work is being reproduced "solely for the purposes of preservation and security or for deposit for research use in another library" (Subsection (b)), the law allows for "three copies or phonorecords of an unpublished work duplicated solely for purposes of preservation and security or for deposit for research use in another library or archives…" Similar conditions apply: first, the work to be reproduced is currently in the institution's collection; and second, any reproduction that is copied in a digital format cannot be distributed or made available in that format outside the premises of the library or archive. A point of contention is how one defines "the premises." Must a server be located on the premises of an archive for example, or can it be located remotely for use?

Subsection (c) addresses reproduction for the purposes of replacing damaged, deteriorating, lost, or stolen items, or reproduction in the case of a work where the

existing format in which it is stored has become obsolete. Reproductions in these cases are also subject to restrictions. First, the library or archive must determine, with reasonable effort, that an "unused replacement cannot be obtained at a fair price"; and second, any digital reproduction made cannot be made available to the public in its digital format outside the premises of the library or archive in which it is stored leading to similar questions about what constitutes the library's premises.

The subsection also discusses obsolete formats, defining obsolete as: "the machine or device necessary to render perceptible a work stored in that format is no longer manufactured or is no longer reasonably available in the commercial marketplace." Similar issues with the limited reproduction model in the digital realm discussed in relation to Canada arise in the US. If robust digital preservation systems rely on multiple, geographically distributed copies of files and automated digital asset management systems (DAMS), copy-tracking becomes onerous and impractical. The requirement that any digital reproduction remains on the premises of the library or archive should also be interpreted as within the control of the library or archive. With many libraries and archives moving to third-party digital storage providers or distributed digital storage, a traditional geographic concept of premises is difficult to define. Libraries may also rely upon their fair use rights (as described in §107) to preserve the content they steward.

> 107. Limitations on exclusive rights: Fair use
> …the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

There are no precise boundaries for reproduction activities (for the purposes of preservation) permitted by fair use, but this also means the law is flexible and context sensitive. The social and cultural benefits of preservation work can likely be argued to outweigh the cost imposed on the copyright owner.

Technological Protection Measures

Title 17, Chapter 12 of the US Code containing the Copyright Law of the US addresses copyright protection and management systems. Specific to TPMs, 17 U.S.C. §1201 prohibits circumvention: "(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title." There are statutory exemptions relevant to libraries:

> §1201 (a) (C) provides various conditions for non-infringement, including:
> (i) the availability for use of copyrighted works;
> (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
> (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
> (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works…

There are generalized exemptions for nonprofit libraries, archives, and educational institutions which are applicable throughout (LaFrance 2017, 430) although they are explicitly addressed in various subsections. For example, 17 U.S.C. § 1201(d) provides a specific exemption creation process for nonprofit libraries, archives, and educational institutions. The pathway by which these exemptions are generated is through a process of regulation promulgation involving the Librarian of Congress who plays a particular role in the US Copyright Law implementation. Section 1201(a)(1)(C) of the United States Code requires the regulation process to occur every three years to identify classes of copyrighted works whose non-infringing uses should be allowed to circumvent TPMs. For example, a regulation relevant to digital preservation was promulgated by the Librarian of Congress in 2015 with 37 CFR §201.40.: an explicit exemption was created for non-infringing circumvention of TPMs in lawfully acquired online video games to eliminate the need for a remote authentication server after the original server is shut down. Typically, this happens where the game is no longer supported by its developer but is allowed only for personal gameplay and, in the case of museums, libraries, and archives, to restore access to the game on a personal computer or game consoles to allow preservation of the game in a playable form, in which case circumvention of software used to operate the console is also permitted.

Similar to the case law interpretations of the Canadian statutes, TPMs law in the US has been interpreted to mean no actual infringement has to occur to be in violation if a situation is non-exempt (Chapdelaine 2018, 137; *Universal City Studios, Inc. v. Eric Corley 273 F.3d 429 (2d Cir. 2001).*[2] "No actual infringement" means that no copyright has to be violated, but that the creation of circumventions in and of itself, whether they are used or not, is a violation. The "no actual infringement" avenue was subsequently reinterpreted in *Chamberlain Group, Inc. v. Skylink Technologies, Inc.,381 F.3d 1178 (Fed. Cir. 2004)*[3] which concerned the anti-trafficking provision of the DMCA, 17 U.S.C. §1201 (a) (2), in the context of two

2 Universal City Studios, Inc. v. Eric Corley 273 F.3d 429 (2d Cir. 2001).
3 Chamberlain Group, Inc. v. Skylink Technologies, Inc.,381 F.3d 1178 (Fed. Cir. 2004).

competing universal garage door opener companies. The case led to a requirement for a reasonable relationship between "[t]he circumvention and copyright infringement, and enablement of copyright infringement or prohibited circumvention for attracting liability under the trafficking prohibitions but has not been consistently applied in subsequent judgments" despite the denouncement of the literal interpretation of the non-infringement angle (Chapdelaine 2018, 139).

A blanket exemption for memory institutions to preserve content for future use and study would be much simpler and in keeping with the spirit of US law. It may also be worth considering whether TPMs laws are constitutionally sound. Pascale Chapdelaine (2018) has identified four central questions which deserve exploration:

- Laws regarding TPMs may be considered unconstitutional if they are unrelated to the purpose for which copyright was created and exceed legislative power
- They might effectively fall outside the jurisdiction that gave them statutory authority in the first place and be deemed unconstitutional because they spill over powers regarding property rights, contracts, or consumer protections which fall under various state or federal powers
- They might violate free speech or freedom of expression, and
- Associated legislative and regulatory regimes might violate due process by being too broad.

So far, courts in the US have generally left the constitutionality of TPMs law unexamined, for example, in the case of *321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004)*[4] involving circumvention software where its use was not found to be unconstitutional (Chapdelaine 2018, 144).

Orphan Works

A major review of the state of orphan works under US copyright law was conducted by the US Copyright Office in 2015. The uncertainty about the fate of orphan works was deemed to be "a frustration, a liability risk, and a major cause of gridlock in the digital marketplace" (US Copyright Office 2015, 35). The review produced an extensive and wide-ranging report: *Orphan Works and Mass Digitization: A Report of the Register of Copyrights* (US Copyright Office 2015).

The reason behind the initial uncertainties is that, despite all best efforts to locate a copyright owner, an archive or library may not be able to seek permission

4 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp. 2d 1085 (N.D. Cal. 2004).

or negotiate licensing terms: "anyone using an orphan work does so under a legal cloud, as there is always the possibility that the copyright owner could emerge after the use has commenced and seek substantial infringement damages, an injunction, and/or attorneys' fees" (US Copyright Office 2015, 2). The report recommended legislation requiring that good faith and a diligent search for the copyright owner would be sufficient to limit liability. The report did not recommend that the US adopt fair use for orphan works, suggesting that this approach "does little to encourage users to search diligently for copyright owners" (US Copyright Office 2015, 3). The recommendations also rejected other models such as orphan works exceptions or creating a government-run licensing program, deciding that the limited liability model, on the whole, "provides the most comprehensive and well-calibrated approach for the United States" (US Copyright Office 2015, 3). The report recommended that a diligent search be defined as, "at a minimum, searching Copyright Office records; searching sources of copyright authorship, ownership, and licensing; using technology tools; and using databases, all as reasonable and appropriate under the circumstances" (US Copyright Office 2015, 3). Libraries would also be responsible for proving such diligent searches were undertaken before using any orphan works in ways that would normally violate copyright.

While the concern in this chapter is with digital preservation and not access issues, when it comes to preserving orphan works, the cases dealing with the issues have blurred the demarcation slightly. For example, the *Google Books* case is one that deals almost entirely with access. However, the 2nd Circuit ruling, Authors Guild v. Google, Inc. 804 F.3d 202 (2d Cir. 2015)[5] determined that simply scanning the books fell under fair use, touching on a digital preservation issue, even though access was the focus of the analysis. Do those who have the ability and resources to digitize and produce access to orphan works need to be concerned about seeking de facto ownership? Google Books, in describing its library project, notes their observance of copyright laws but risks remain in making preservation copies for works where owners cannot be located.

As in Canada, copyright issues with orphan works are unlikely to impede preservation-specific work in the US. The US has seen considerable advocacy on the part of its library community for the application of fair use within preservation. Fair use and fair dealing tend to be applied to performance, access, distribution, or use, not preservation, but there are some relevant applications in the sector. The Center for Media and Social Impact's *Statement of Best Practices in Fair Use of Collections Containing Orphan Works for Libraries, Archives, and other Memory Institutions* asserts fair use can apply to memory institutions' use

5 Authors Guild v. Google, Inc. 804 F.3d 202 (2d Cir. 2015).

of orphan works, and that "fair use supports the digital preservation of materials in archival and special collections, without regard to their status as orphan works" (Aufderheide et al. 2014, 26). The *Code of Best Practices in Fair Use for Software Preservation*, coordinated by the Association of Research Libraries, the Center for Media and Social Impact, and the Program on Information Justice and Intellectual Property, and endorsed by other organizations including the American Library Association, takes a similar approach with its position that "fair use applies equally to works where the owner is known and unknown" and that software preservation work should take the same approaches whether or not the copyright owners are findable (Aufderheide et al. 2019, 5).

European Union (EU)

Following the trend, the EU has also been engaged in updating its copyright laws and regulations in the last 5 years. The modernization has three goals: "more cross-border access to content online, wider and easier use of copyrighted material in education, research, and by cultural heritage institutions, and improved functioning of the copyright marketplace" (Panezi 2018, 596).

In the intervening years, various directives have been passed by the European Parliament and Council. Legislatively, the EU is still looking for harmonization of Member State copyright laws (Panezi 2018, 602). The EU governing bodies released Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC 2019 [hereinafter DSM Directive] (Directive (EU)2019/790) indicating the copyright initiatives and setting up a timetable for Member States to adopt modernization in their laws by April 2021, which, as of this writing, has yet to occur. European directives provide end-state goals for legislation purposes for Member States for achieving results; they do not implement or suggest the means to perform those results. Directives leave leeway for Member States to achieve the goals, but specifics in laws are not outlined. To date, eight Member States have put in some measures to implement the copyright modernization directive as noted in the EU National Transposition website with separate reportings for each directive, including the DSM Directive.

Reproductions

Article 6 of the DSM Directive applies to both TPMs and reproductions:

> Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make copies of any works or other subject matter that are permanently in their collections, in any format or medium, for purposes of preservation of such works or other subject matter and to the extent necessary for such preservation (Directive (EU) 2019/790).

The DSM Directive also recognizes the need for cross-border distributed digital storage networks and for cultural heritage institutions to rely on third parties "acting on their behalf and under their responsibility, including those that are based in other Member States, for the making of copies" (Paragraph 28). Again, though, work at the national level is still required. The Directive also notes that:

> An act of preservation of a work or other subject matter in the collection of a cultural heritage institution might require a reproduction and consequently require the authorisation of the relevant rightsholders. Digital technologies offer new ways of preserving the heritage contained in those collections, but they also create new challenges. In view of those new challenges, it is necessary to adapt the existing legal framework by providing for a mandatory exception to the right of reproduction in order to allow such acts of preservation by such institutions (Paragraph 25).

The DSM Directive states a preservation goal (Paragraph 27) for Member States:

> Member States should, therefore, be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports or to insure such works and other subject matter. Such an exception should allow the making of copies by the appropriate preservation tool, means or technology, in any format or medium, in the required number, at any point in the life of a work or other subject matter and to the extent required for preservation purposes. Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject matter in their permanent collections should remain subject to the authorisation of rightsholders, unless permitted by other exceptions or limitations provided for in Union law.

Member states can specifically address issues such as obsolescence and degradation or provide insurance or backup to existing items to maintain preservation. This broad recommendation contrasts with the more restrictive US regulations, but again, the Directive is not word for word implemented in Member States and

more restrictive laws may be in place in various nations of the EU as long as they are in line with the Directive generally. It remains that the legislation of Member States differs on reproductions.

Technological Protection Measures

As already noted, Article 6 of the DSM Directive provides an explicit exception for cultural heritage institutions to make copies of any works in their collections for purposes of preservation. Previous iterations of Directives prevented circumvention of TPMs. Articles 6 and 7 of the DSM Directive provides for more freedom for circumvention of TPMs to be used appropriately. The new provisions can be viewed as more than a mere defense to possible infringement. They can be regarded as rights in the positive sense (White 2020).

Orphan Works

The EU has adopted the statutory exception model when it comes to orphan works. In October 2012, the European Council released the Directive on Certain Permitted Uses of Orphan Works 2012/28/EU [hereinafter Orphan Works Directive], requiring:

> 1. Member States shall provide for an exception or limitation to the right of reproduction and the right of making available to the public … to ensure that the organisations … are permitted to use orphan works contained in their collections in the following ways:
>
> a) by making the orphan work available to the public…,
>
> b) by acts of reproduction…for the purposes of digitisation, making available, indexing, cataloguing, preservation or restoration.
>
> 2. The organisations … shall use an orphan work …only in order to achieve aims related to their public-interest missions, in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection. The organisations may generate revenues in the course of such uses, for the exclusive purpose of covering their costs of digitising orphan works and making them available to the public (Directive 2012/28/EU).

Uniquely, the European model allows for a public service organization to partner with a private organization to generate revenue in relation to orphan works they are using, as long as that use is "consistent with the public service organization's mission. The private sector partner, however, is not permitted to use the works directly" (US Copyright Office 2015, 21). The Directive in relation to orphan works has had widespread implementation as reported on the EU National Transposi-

tion website. As already noted, national transposition data is maintained for each directive and is available for the Orphan Works Directive.

As in Canada and the US, the Orphan Works Directive requires instituting a diligent search requirement to determine the owner, if any, of copyright material in Member State law. Once a work is judged to be orphan in one Member State, it is considered to be orphan in all Member States. Works can be used and accessed throughout the EU. The Directive calls for a single registry to maintain data on all works deemed orphan. A rightsholder who later resurfaces may reclaim ownership of a work once deemed orphan and claim fair compensation for the use of the work as provided by individual Member States' laws (US Copyright Office 2015, 21–22). The International Federation of Library Associations and Institutions (IFLA) Committee on Copyright and Other Legal Matters (CLM), in its response to a survey on the directive on orphan works, emphasized the burdensome nature for libraries of the process of conducting a diligent search for owners of works, and the resulting database's failure to facilitate the consideration of works for cross-border use. Despite libraries encountering a significant number of orphan works, only a limited number have been recognized as orphaned. IFLA also pointed out discrepancies between the Orphan Works Directive and the DSM Directive's out-of-commerce works provisions which creates complexities as to what exceptions beneficiaries are eligible for and when (IFLA Committee on Copyright and other Legal Matters 2020).

By separating access and preservation functions, libraries can continue preservation-specific work on orphan works. The DSM Directive provides an exception for making available out-of-commerce works, unless collective management organizations offer licenses, in which case, memory institutions may be granted licenses.

Conclusion

Various nations and international bodies have adopted differing regimes when it comes to copyright and preservation. It is clear that quickly changing technologies have resulted in, hopefully temporary, complex legal responses. Due to the differing nature of legislative systems and frameworks in different parts of the world, a unified approach might not emerge in the near future, but the library and other professional and educational communities should continue to lobby for simplified copyright laws and clear, ideally inclusive, exceptions for memory institutions. Examples of advocacy work include the efforts by international organizations like IFLA and its CLM, with representation and advocacy with WIPO, the

Library Copyright Alliance, or national initiatives like the Canadian Federation of Library Associations /Fédération canadienne des associations de bibliothèques (CFLA-FCAB) work to change laws around TPMs in Canada. Despite the complexities, lack of legal certainty should not prevent libraries from fulfilling their mandates and preserving digital information. Most copyright law regimes, even those that differ starkly, have significant protections and exceptions for cultural heritage institutions, libraries, educational institutions, archives, and museums. Acting in good faith and making considered, documented decisions will go a long way to adhering to regimes in place while campaigning for their replacement and more progressive, simplified legal frameworks.

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Stephen Wyber

10 WIPO, Copyright and Libraries

Abstract: The World Intellectual Property Organization (WIPO), based in Geneva, represents the primary forum for intellectual property (IP) governance at the global level. WIPO is the custodian of key international treaties focused on different aspects of IP, provides a forum for intergovernmental discussion and exchange, and constitutes a source of guidance and support for members. It plays a significant role in copyright law and practice. WIPO's Standing Committee on Copyright and Related Rights (SCCR) was set up in 1998–9 to examine matters of substantive law or harmonisation in the field of copyright and related rights. Libraries have been officially on the agenda of WIPO for some years, particularly as part of broader discussions about limitations and exceptions to copyright. This chapter seeks to provide the reader with an overview of WIPO and the engagement of libraries at there alongside partner stakeholders in favour of reform. The chapter presents background on WIPO, including its organisation and roles; addresses the history of its work around limitations and exceptions to copyright for the benefit of libraries and their users; examines the positions taken by different stakeholders; and reviews alternatives for pursuing more effective copyright laws for libraries.

Keywords: Copyright; Intellectual property (International law); Fair use (Copyright)

Introduction

The World Intellectual Property Organization (WIPO) was established in Geneva in 1970 following the WIPO Convention of 1967 to ensure cooperation between the different Unions of Member States who had signed the 1883 Paris Convention for the Protection of Industrial Property, the 1886 Berne Convention for the Protection of Literary and Artistic Works and the 1891 Madrid Agreement Concerning the International Registration of Marks (WIPO n.d.a). In 1974, WIPO became an agency of the United Nations (UN) and currently has 193 Member States.

WIPO is a venue for developing and securing agreement on international treaties on aspects of Intellectual Property (IP) and monitoring their implementation. It plays a key role in determining parameters and minimum standards for national laws and practices and provides an important space for discussion and exchange between national governments and agencies, helping to spread ideas and norms around the world and providing a focus for lobbying. WIPO is a source of guidance and support for its members, both in crafting national laws, and in

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developing infrastructure. It offers practical services for registering some forms of IP, such as patents and trademarks and has an important place in any consideration both of the copyright laws and practices that affect libraries' ability to carry out their missions today and any improvement strategies.

This chapter discusses WIPO's role and focuses on the work of the Standing Committee on Copyright and Related Rights (SCCR). It begins with an exploration of the arguments around legal action at the international level in general, and at WIPO in particular, before turning to discussions on limitations and exceptions to copyright (L&Es). It closes with reflection on the work with WIPO in the context of efforts to develop copyright frameworks appropriate for the effective operation of libraries.

Libraries have been officially on the agenda of SCCR for fifteen years, as part of broader discussions about limitations and exceptions. Libraries have argued that there is a need for reform to support education, research and access to culture in a digital age; and that an international WIPO legal instrument is necessary to achieve appropriate reform. Through working at WIPO, libraries have engaged directly with governments, raising awareness of the needs and interests of libraries and their users when it comes to making copyright policy. The potential to influence government is a valuable outcome in itself, complementing the work of library advocates nationally.

International Copyright Reform: Whether and How to Act?

Uniform Minimum Rights, Uneven Exceptions

An international dimension is present both in the copyright laws with which libraries work currently, and in efforts to achieve change in the future. International guidelines and legislation can create both floors with minimum protections, and ceilings with upper limitations on how far copyright can go in limiting people's ability to carry out activities without needing to seek permission or pay remuneration (Australia. Productivity Commission 2017). A key concern for libraries, along with other representatives of users and the institutions that serve them, is that floors tend to be harder than ceilings. If international law focuses on setting out the minimum rights that rightsholders should enjoy rather than on exceptions or limitations which place safeguards around exclusive rights, it might lead to situations where libraries and others are unable to fulfil their public interest missions.

The Berne Convention, for example, mandates an exception only for quotations, but leaves exceptions for other uses, such as for teaching, or reporting the news of the day, to the discretion of national legislation. Arguably, provisions for exceptions have grown weaker over time, with the original Convention providing broader possibilities than subsequent ones (Berne Convention 1886; WIPO 1886; WIPO 1979). There are situations in which the obligations of national governments concerning rights are relatively clear, but those related to L&Es are not. Governments may be tempted, or pressured, to offer less generous provisions for libraries, archives, educators, researchers and wider use than they would otherwise, for fear of facing legal action or criticism, as has been the case in South Africa recently (IFLA 2019a).

The result is that significant differences in L&Es exist in law from one country to the next. The International Federation of Library Associations and Institutions' (IFLA) analysis of the limitations and exceptions to copyright for libraries and archives covered in Professor Kenneth Crews' 2017 study for WIPO (Crews 2017) found that while 72% of countries have a preservation exception, barely 30% have one that is adapted for digitisation (IFLA 2019b). The situation is worse for internal library uses. Only 30% of countries have any exception at all, and only 20% allow for digital uses (IFLA 2019b, 2).

There are strong disparities in L&Es between regions, with richer areas tending to have more developed systems (IFLA 2019b). In practical terms, libraries and their users in one country may have greater possibilities to draw on L&Es to fulfil their missions than libraries and their users elsewhere. The inconsistency creates a risk of deepening divisions; key activities that enhance growth potential, such as education and research, are legally permitted and simpler to carry out in wealthier countries than in poorer ones (IFLA 2019b). A key argument for working at the international level is to bring about minimum standards for L&Es everywhere, to ensure that all libraries and their users enjoy a core set of options under copyright law to fulfil their missions without needing to seek permission, or pay remuneration.

The Case for Acting Internationally

Many suggest that appropriate outcomes could be achieved without international action, given the option open for national governments to introduce L&Es (EIFL 2019; George 2019, to give just two examples). However, advocates for copyright reform note the slow pace of national change, and point to the evidence of the Marrakesh Treaty which proved that an international instrument can provide a powerful incentive for reform (IFLA 2020). Furthermore, international action is

essential in the effort to ensure that libraries, archives, museums, educators and researchers, and other beneficiaries of L&Es can make use of them across borders. Without a guarantee of the ability to work easily with colleagues elsewhere, and faced with inconsistencies between national provisions, library and information professionals often encounter blockages and uncertainty, for example in preservation networks which bring together institutions from different countries to share digitisation equipment and expertise, something that is especially important for countries facing the risk of climate change-related damage, or for cross-border document supply, or for the development and sharing of materials for distance education. The collected statements of library representatives at WIPO meetings identify further issues (EIFL 2016a).

Beyond the impulsion that the Marrakesh Treaty has provided for national reform, the Treaty offers an important reference point for reflecting on the shape of potential international actions in general. The reasons behind the bid for change are familiar. Prior to the Treaty's agreement, exceptions permitting the making and sharing of copies of works for persons with print disabilities, perceived both as a human right and a public good, had been far from universal; potential beneficiaries were forced to rely on seeking permissions or market responses to their needs. The market failed to meet the demand, leading to the book famine (World Blind Union, 2021). Similar challenges are evident in relation to the ability of libraries to deliver on other public interest goals, such as preservation, and supporting research and education.

In addition, the Treaty has created a precedent for recognising the unique nature and character of libraries; they are clearly targeted by inclusion in the concept of authorised entities with a public interest mission, and are assigned the ability to make and share copies. Libraries are acknowledged as having a key role in responding to needs and delivering on rights to information, education and culture, in situations like preservation where the market is unlikely to provide solutions, or where the charging of fees could lead to the exclusion of many users. Finally, the Treaty explicitly addresses the question of how to enable the use of L&Es across borders, facilitates international cooperation and thereby enhances the ability of libraries to carry out their missions more effectively.

Positions Taken by Libraries and Others

Libraries, represented by IFLA, Electronic Information for Libraries (EIFL), and engaged national library associations, such as the Canadian and German library associations, have worked alongside counterparts from the archives and museums sectors, including the International Council on Archives (ICA)

and the International Council of Museums (ICOM) along with teachers' unions, academics and think tanks engaged in promoting rights for education and research, such as Education International, Communia, the American University Washington College of Law, Wikimedia Deutschland, Knowledge Exchange Institute (KEI), the Centre for Internet and Society, Corporación Innovarte, and the Karisma Foundation.

The long-term goal for reform is to ensure that libraries and their users everywhere benefit from a basic set of L&Es to copyright, and are able to work with colleagues across borders. Change in international law is seen as the optimal way to provide an impetus for national reform, and a positive alternative to the patchwork of national laws and bilateral and plurilateral trade agreements. Currently, librarians working across borders deal with intense complexity in establishing what they can and cannot do. An appropriate legal instrument would provide a basis for international preservation networks to share in-copyright works between countries, drawing on specialised equipment and skills, as well as maintaining copies in different places to minimise the risk of loss. It would provide a solid basis for providing access to items in library collections for the benefit of researchers and learners who are unable to travel.

Library, archive and museum organisations are calling for an instrument focusing on preservation and access to preserved content with particular action being taken by IFLA. The approach takes a narrower focus than previous proposals, but responds to an identified priority by Member States in the face of climate change, and would support education and research activities. Organisations working on education and research meanwhile argue that rights to use works for such purposes should not be limited to particular institutions, but apply also to the uses themselves, regardless of the context, reflecting that much learning and research takes place outside formal settings. A proposed Treaty on Education and Research Activities sets out long-term goals, with efforts to extend education rights into the digital sphere, and to enable cross-border uses as immediate priorities (Infojustice n.d.). The emphasis is that such changes would not and should not lead to unjustified harm to the legitimate interests of rightsholders.

The goals of reform are not shared universally. There is consistent opposition from organisations representing rightsholders and from some governments to any form of binding international action, as well as wider warnings about the expansion of unremunerated L&Es, for example as voiced at the thirteenth session of the WIPO Standing Committee on Copyright and Related Rights (WIPO SCCR 2005a, 12 para 32). Arguments opposing action on L&Es have focused on concern about their perceived over-extension and a claimed impact on commercial exploitation of works. For authors, publishers and collecting societies alike, any use of a work which is unremunerated may appear to be seen as a lost

sale or licensing fee. Such views might be considered reductive and misguided and do not take into account the role of libraries as drivers of future sales; the broader social value that comes from activities taking place under L&Es, including the fulfilment of human rights; or the fact that many users simply cannot afford to pay fees. It may well be that perceptions of the extent of L&Es sought by user groups and the potential impact on markets are inaccurate, with rightsholder organisations fearing something far more dramatic than would occur in reality (Flynn 2019).

The argument is frequently made at WIPO that licensing schemes can be established to enable uses that would otherwise be too complicated if it were necessary to seek authorisation from individual rightsholders each time. The claim extends to cross-border uses, with suggestions that cooperation between collecting societies can facilitate the receipt of all necessary authorisations. There are significant questions with this approach, given both the under-development of the infrastructure for collective management, even in developed regions (IFLA 2018a), and the fact that many works, in particular those which are orphan, or were never produced for commercial purposes, are unsuited for licensing (IFLA 2018b). Similarly, it can be argued that some activities are essential for delivering on human rights and public interest goals, and should not be left to the market.

Beyond the discussion about whether L&Es should be remunerated or not, a major concern with an international legal instrument for some is the perceived likelihood that any move would create instability, opening up copyright laws in many countries around the world. Such instability is a particular worry for industries that rely on copyright, although there are differing views as to the extent of the costs of L&Es to rightsholders. The concern may have its roots in the broader issue about the future evolution of copyright industries in the face of technological change, and in particular the potential for rightsholders to recoup investments. Some WIPO Member States aware of the complexity of changing domestic law would prefer to avoid any outcome that could oblige them to do so. At least at WIPO's SCCR, there are no proposals on the table that justify the concerns. Before examining how discussions are playing out at WIPO, WIPO and its operations are discussed.

At the Heart of it All: What is WIPO, and How Does It Work?

WIPO's Role and Functions

The role of WIPO today, as set out in its Convention, agreed in 1967 and updated in 1979, is to promote the protection of intellectual property through cooperation among Member States. Further functions set out in the WIPO Convention include promoting the development of measures designed to facilitate the efficient protection of intellectual property, harmonise national legislation in the field, encourage the conclusion of new international agreements, provide legal and technical assistance to members, carry out studies, and provide IP services, including registration. The Organization proclaims on its website: "By striking the right balance between the interests of innovators and the wider public interest, the IP system aims to foster an environment in which creativity and innovation can flourish".

In terms of WIPO's day-to-day operations, a significant component of work effort goes toward providing IP services, and in particular patent and trademark registrations. A general set of treaties, the Global Protection System, allows for the recognition of different types of intellectual property at the international level, avoiding the need for IP owners to register in each jurisdiction (WIPO n.d.b). The most prominent example is the Patent Cooperation Treaty; but other instruments focus on trademarks, industrial designs, and appellations of origin. The treaties facilitate the recognition and protection of intellectual property rights internationally, in exchange for a fee. Given that the lack of any registration obligation represents a key tenet of international copyright law, there is no scheme for registering or revenue receipt included in relation to copyright. A further general group of four treaties on Classification sets out rules on what to include in published information about registrations, in order to allow for improved cooperation across jurisdictions.

A key area of focus for WIPO is capacity building. Member States may ask for advice on IP reforms as well as on how to run IP systems. WIPO produces tools and support for the administration of intellectual property offices, as well as the development of collective management organisations to manage copyright licensing. A key focus of capacity building work is the implementation of WIPO's existing Treaties. A first key step, as with any Treaty, is that Member States need formally to ratify or accede to the Treaty, although in the case of EU Members, ratification of Treaties takes place as a bloc.

Furthermore, unless international law is directly applicable, it is important for governments to adapt national legislation to the requirements of a Treaty, to give certainty to individuals and organisations. WIPO's support often therefore focuses on the design of legislative reforms. Much of the capacity building work is confidential, shaped around the demands of the countries receiving support, and it can be difficult to understand what is being promoted. Occasionally, insights appear, for example, when WIPO makes comments or recommendations on draft laws (Band 2020a). Historically, a draft model law on L&Es was developed with the WIPO Draft Law on Copyright and Related Rights, providing greater transparency about was being promoted, but the draft has since disappeared from the internet (EIFL 2016b, 8).

WIPO is also a producer of research and reflection on issues associated with IP and generates statistics and indexes on particular topics like innovation. It has a growing emphasis on understanding the economics of IP, developing texts and other resources that may be used as references. It produces guides and explanatory documents commissioned from experts, for example on managing intellectual property for museums (Pantalony 2013). Finally, and most significantly for this chapter, there is WIPO's normative work, most publicly focused on supporting discussions around potential future international treaties. In addition to work on L&Es, other areas of focus include potential instruments on design including a Design Law Treaty (WIPO SCT 2016), new rights for broadcasters, and genetic resources; traditional knowledge; and traditional cultural expression.

Work on developing new treaties is complicated by the fact that the treaties need to be passed unanimously. Any Member State has a potential veto although in reality it tends to be only the larger Member States or blocs who feel able to oppose the will of all others. To maintain momentum and facilitate reform in the absence of international agreements, one response has been to take an alternative approach through the development of model laws or similar instruments which might potentially serve as substitutes for formal agreements. WIPO has also sought to promote initiatives that aim to provide voluntary solutions to lessen the impact of identified challenges. For example, the Accessible Books Consortium was launched ahead of the agreement of the Marrakesh Treaty (*WIPO Magazine* 2015), although it is questionable whether such initiatives can substitute for legal action.

While WIPO can pass treaties, it does not have a means of enforcing them along the lines of the World Trade Organization (WTO) dispute settlement mechanism, or the Court of Justice of the EU. However, WIPO Treaties are often incorporated into trade deals, or used as reference points in wider efforts to influence legislation. Depending on provisions within countries, international law may be

cited in litigation within countries, for example to hold a government accountable for not implementing the terms of WIPO Treaties.

Key Actors and Fora within WIPO

The key formal decision-making bodies in WIPO are its assemblies with the General Assembly bringing together the Member States, along with the Assemblies of the members of the different Unions, with for example, the Berne Union (International Union for the Protection of Literary and Artistic Works) bringing together the signatories of the Berne Convention. The General Assembly takes decisions on the Organization's programme of work and budget, appoints its Director General, and gives direction to its committees. The programme of work and the budget set out areas where the Secretariat will be active, including research and capacity building activities. Throughout the year, WIPO's Coordination Committee prepares key decisions and can approve some, such as the appointment of senior staff. The composition of the Coordination Committee is determined every two years with an emphasis on geographical balance and incorporates Member States from other bodies including the Executive Committees of the Paris and Berne Unions along with others. It currently comprises 83 countries.

The most prominent part of WIPO for libraries is its Standing Committee on Copyright and Related rights (SCCR), which is one of four standing committees addressing specific questions, including the creation of new international agreements. The SCCR was set up in 1998 to examine matters of substantive law or harmonisation in the field of copyright and related rights. Apart from the SCCR, other standing committees focus on patents, trademarks, including industrial designs and geographical indications, and standards. In general, Standing Committees work to support coordination and provide guidance, and can, if Member States agree, focus on normative work, as is the case with SCCR, which has both a draft treaty on broadcasting, and work towards an instrument of some sort on limitations and exceptions on the agenda.

In addition to the Standing Committees, the General Assembly and other governing bodies can establish permanent committees to address issues on an ongoing basis, such as WIPO's Program and Budget Committee (PBC), its Committee on Development and Intellectual Property (CDIP), the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and the Advisory Committee on Enforcement (ACE). Each Committee is chaired by a representative of a Member State, with the WIPO Secretariat providing support. The CDIP has a mandate to implement WIPO's Development Agenda, which seeks to ensure that development concerns are central to

the Organization's work. It focuses on projects requested by Member States, as well as some thematic discussions, but arguably has not led to a new focus on development issues in SCCR or elsewhere. The IGC is currently discussing draft texts on legal instruments around the protection of genetic resources, traditional knowledge and folklore. The work of SCCR is explored further below.

All WIPO Member States have the right to attend committee meetings, along with organisations recognised as observers, with observer status requiring the approval of Member States. In reality, not all Member States will attend every meeting; many countries send generalist staff from their Permanent Missions to the United Nations in Geneva, meaning that attendees at WIPO meetings might not have specialist knowledge on topics being discussed, although they do have a stronger sense of the broader political landscape across the UN system. Guidance for positions and views might emerge from a variety of sources, such as national IP offices, ministries of economy, justice, culture or foreign affairs, or even from within Geneva teams themselves. This can have an impact on the positions eventually taken.

Work on copyright at WIPO might involve a mixture of delegates from home country national governments with more subject expertise, and those based in Geneva who have a stronger vision of work across the board and diplomatic connections. Better resourced countries may send different people for different parts of the agenda, reflecting individual areas of expertise; more often, a single delegate will attend throughout. Where delegates are sent from home nations, WIPO meetings offer a useful opportunity to network and hold bilateral meetings.

Member States organise themselves into regions to facilitate participation in meetings:

- Africa
- Group of Latin American and Caribbean countries (GRULAC)
- Asia-Pacific
- Group B, comprising, in broad terms, developed countries, named after the room in which they meet in WIPO's building: UK US, Australia, Canada, Japan and the EU
- Central Europe and Baltic States Group
- Central Asia, Caucasus and Eastern Europe (CACEEC), and
- China.

Each group has a rotating coordinator position, with coordinators playing a key role in liaising with the Secretariat, and coordinating positions. The EU also speaks as a group, with the Commission or the rotating presidency taking the floor. In some situations, only group coordinators will take the floor, although all Member States have the right to speak. Observers, such as NGOs, will be invited to

speak only if the Chair approves, and often are given less time to speak. Committees themselves can agree on different types of action, including research, information gathering, or the development of tools. The outcomes sit alongside work carried out directly by the Secretariat as part of the Program of Work and Budget.

WIPO's Secretariat is based in Geneva, with regional offices around the world. WIPO has a projected income of CHF 951.8 million (just over USD 1 billion) over the two years 2022–23, and an expenditure of CHF 793.8 million (just over USD 859.2 million) (WIPO 2021, 4). Over 95% of the income comes from fees for services such as patent registrations, with the remainder from assessed contributions from Member States. The organisation has a degree of independence compared to other UN entities which are more reliant on government membership contributions.

Within WIPO's central organisational structure, the branch most engaged on issues related to copyright for libraries is the Copyright and Creative Industries Sector. The Sector comprises a Copyright Law Division which acts as a secretariat to SCCR and supports the implementation of Treaties, a Copyright Management Division focused on capacity building in support of collective management, and a Copyright Development Division which works on capacity building and other programmes with developing countries. The Sector also includes the Information and Digital Outreach Division taking the lead on communications for WIPO as a whole, and WIPO Awards.

Discussions on Exceptions and Limitations at WIPO

Historically, while L&Es have been part of copyright discussions since the Berne Convention, countries have been left to develop their own provisions. At the international level, there has been some evolution, notably with the introduction of the three-step test during the Stockholm Revision of the Berne Convention (Love 2012), but the optional character of exceptions in general, excluding quotation, has remained constant.

As already noted, it became clear over time that leaving decision-making about exceptions to the national level had disadvantages. Governments seeking only to comply with international law risked neglecting exceptions and core provisions for libraries and others were unevenly taken up around the world. Librarians, teachers, researchers and others enjoyed broader provisions in some jurisdictions than in others. An early focus responding to the situation was the exploration of the effects of exclusive rights on the ability of people with disabilities to access in-copyright works. In 1981, UNESCO and WIPO set up a Working

Group on Access by the Visually and Auditory Handicapped to Material Reproducing Works Protected by Copyright, addressing the issue of L&Es allowing the making and sharing of accessible format copies internationally (Berne Union 1982).

Despite some steps towards reform, there remained little focus internationally on L&Es, with the WIPO Copyright Treaty of 1996 notably simply permitting the extension of existing provisions into the digital environment:

> Agreed statement concerning Article 10: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment (WIPO 1996).

Similarly, when SCCR was set up in 1998, it focused purely on performers' and broadcasters' rights, leading to the 2012 Beijing Treaty on Audiovisual Performances and the unfinished Broadcasting Treaty (WIPO SCCR 1998). It was only at its ninth meeting, in 2003, that SCCR discussed a paper about limitations and exceptions in the digital age, prepared by Professor Sam Ricketson (Ricketson 2003). It raised questions about the application of existing laws to different digital uses, including by libraries and educators. Between 2004 and 2006, momentum grew for the topic of L&Es to be added to the agenda as a standard item at SCCR (Crews 2008; Garnett 2006; Sullivan 2007; WIPO SCCR 2009), with Chile in particular leading the efforts (WIPO SCCR 2004; 2005b). Chilean delegates called for an approach made up of three elements:

- Identification, from the national intellectual property systems of Member States, of national models and practices concerning exceptions and limitations
- Analysis of the exceptions and limitations needed to promote creation and innovation and the dissemination of developments stemming therefrom, and
- Establishment of agreement on exceptions and limitations for purposes of public interest that must be envisaged as a minimum in all national legislations for the benefit of the community; especially to give access to the most vulnerable or socially prioritized sectors (WIPO 2004, 1).

By the sixteenth session of SCCR in March 2008, it was accepted that exceptions and limitations should have their own standalone agenda item. Chile was joined by Brazil, Nicaragua and Uruguay in setting out plans to work on L&Es for educational activities, people with disabilities, libraries and archives, and the promotion of technological innovation, with the first three becoming increasingly

clearly defined as categories on which work would be carried out (WIPO SCCR 2008).

In the following years, the SCCR followed a pattern of commissioning studies into different aspects of the situation around L&Es in different countries, the first pillar of the proposal. The studies included reports prepared by Professor Kenneth Crews into limitations and exceptions for libraries (Crews 2008; 2015; 2017; 2019), as well as similar efforts for persons with print disabilities (Sullivan 2007); education (Fometeu 2009; Xalabarder 2009; Monroy Rodríguez 2009; Nabhan 2009; Seng 2016; Seng 2017); and museums (Canat, Guibault, and Logeais 2015). The studies have been descriptive, focusing on making sense of the laws currently in place from one country to the next, rather than judging how appropriate one approach or the other might be.

The other two pillars of Chile's original proposals, namely the exploration of the L&Es needed to promote innovation and creativity, and concrete proposals for minimum L&Es needed globally, have proved more contentious. The question of the form that any resulting instrument or output should take has overlapped with, and coloured, the wider discussion about substance.

The African Group took the lead in proposing a draft Treaty on Persons with Disabilities, Educational and Research Institutions, Libraries and Archives (WIPO SCCR 2010a; 2011a), while Brazil, Ecuador and Uruguay provided text in 2011 as a basis for a Treaty. The documents focused on a minimum set of L&Es to be adopted by all governments, with the African Group proposal highlighting in particular the need for the possibility of importing and exporting works to fulfil the proposed Treaty's goals (WIPO SCCR 2011b; 2012a). The 2012 Brazilian, Ecuadorean and Uruguayan education proposals simply took the language from the Agreed Statement of the WIPO Copyright Treaty which allows Member States to extend analogue exceptions to the digital world, and make such digital exceptions mandatory for educational purposes. The proposals for libraries and archives however highlighted the need for exceptions for lending, reproduction and distribution, as well as provisions on circumventing technological protection measures, and limiting liability for mistakes made in good faith.

In the meanwhile, others, notably the US and the EU argued both broadly in favour of maintaining rights, and particularly against moves towards a Treaty or any form of law that could compel changes. For example, the proposal for the EU included a recommendation rather than anything more binding on L&Es for people with print disabilities (WIPO SCCR 2010b), and the US document focused on objectives and principles (WIPO SCCR 2011c; 2014). In 2012, the Secretariat brought suggestions made to that date together into a single document, containing all submitted textual suggestions on the subject of libraries and archives (WIPO SCCR 2012b).

Together the various documents helped clarify the different positions broadly taken on the subject of L&Es. On the one hand, a shifting coalition of developing countries called for an international instrument which would both mandate a basic set of exceptions in every country and allow for their use across borders; and on the other hand, developed countries argued that there was no need for change to international law, with soft law, principles or simply guidelines being sufficient. It is worth emphasising that by this time strong progress was being made on the specific issue of L&Es for persons with print disabilities. Much work focused on the area, with efforts on other parts of the L&Es agenda voluntarily delayed to optimise the chances for successful outcomes related to print disabilities. The work was capped by the diplomatic conference at which the Marrakesh Treaty was signed in 2013.

With the Marrakesh Treaty in sight, Member States nonetheless recognised that work remained on the L&Es agenda. The General Assembly endorsed the recommendation "that the SCCR continue discussion to work towards an appropriate international legal instrument or instruments (whether model law, joint recommendation, treaty and/or other forms), with the target to submit recommendations on L&Es for libraries and archives to the General Assembly by the 28th session of the SCCR". A similar recommendation was made regarding educational and research institutions and persons with other disabilities although the target date for completion was the 30th session of the SCCR (WIPO General Assembly 2012, 4).

Despite the commitment to arrive at proposals in time for the 28th session held in 2014, the SCCR instead returned to the previous deadlock, with blocs of countries arguing both for and against the merits of binding international action. Following a restatement of existing positions (WIPO SCCR 2013a; 2013b), and with little sign of a way to resolve disagreements, but a proclaimed desire on all sides to see work on L&Es advance, the focus turned to exploring ways in which the substantive issues on the table could be explored without raising opposition.

Across a series of meetings, the SCCR discussed concrete provisions in eleven different areas for libraries and archives: preservation, lending, reproduction, legal deposit, parallel importation, cross-border uses, orphan works, limitations on liability, technological protection measures, contract override, and translation, based on a set of topics proposed by the African Group, Brazil, Ecuador, India and Uruguay. In 2017, the Chair of the SCCR, Martin Moscoso of Peru, proposed a Chair's chart for libraries and archives, and for educational and research establishments (Moscoso 2017a and 2017b).

The charts attempted to find a middle way between the proposals made by the different sides. Views expressed in the charts included both relatively strong assertions about the need for exceptions in certain areas, notably preservation

and lending, but also a focus on ensuring that any change to existing rights would not cause unjustified prejudice to rightsholders including cross-border uses. The charts take a strong position in favour of introducing limitations on liability for libraries and archives, and of enabling circumvention of technological protection measures when they prevent enjoyment of L&Es.

Even after this work, Member States remained unable to agree on a way forward. An Argentinian proposal for the structure of a possible instrument relating to L&Es, which would combine a minimum set of exceptions at the national level, and provisions allowing for works to be used across borders through a country of origin principle, also saw little take-up by delegations (WIPO SCCR 2016).

In 2015–16 the International Council of Museums joined the coalition already formed by libraries and archives, aligning itself with the agenda being pursued by library and archive organisations.

The next effort to find a way forward, under the guidance of the incoming Chair, Daren Tang of Singapore (who subsequently became Director General in 2020), and the Secretariat, was to develop action plans which could find a way around the continued deadlock on the question of the form of any end-product of reform discussions. The plans included both the development of typologies, aimed at providing a way of defining the different choices that lawmakers could make in elaborating L&Es which were presented at the 38th meeting of SCCR in 2019, with, for example, a typology of libraries prepared by Kenneth Crews (Crews 2019). A series of workshops was held in Singapore in April, Nairobi in June, and the Dominican Republic in July of 2019. The workshops concluded with an International Conference on Copyright Limitations and Exceptions for Libraries, Archives, Museums and Educational & Research Institutions in October 2019 (IFLA 2019c).

The various discussions and sessions, as well as the typologies, focused strongly on the state of the laws in place in 2019. As such, they offered primarily an opportunity to highlight the disparities in the provisions, and to engage Member State representatives in reflection on the legal situation for libraries, archives, museums, education and research, although some participants called for stronger action to promote exceptions, while others advocated for licensing as a solution to challenges encountered.

The results of the three workshops were summarised in the international conference. Member States heard summaries of the discussions held at the workshops, and started to broach the subject of next steps. The particular importance of action to bring about preservation exceptions globally and to enable digital and cross-border uses was highlighted, although with a strong presence of repre-

sentatives from collective management organisations on each panel, there were also voices in favour of promoting licensing as the sole necessary solution.

A report of the workshops and the international conference included a list of suggestions for future work and reflected the summing up by the Deputy Director General of WIPO at the close of the international conference (WIPO SCCR 2020a, 72–74). The suggestions included a continued need to focus on protecting rights and a collective approach to facilitate cross-border access. The report recognised the potential value of legal instruments at the international level, but placed a primary focus on providing information and technical support for reforms nationally, through a buffet of options for reform.

Looking Ahead – the Future SCCR Agenda

Progress towards concrete reforms at WIPO is slow, although not necessarily slower on L&Es than in any other area. Speeches by WIPO's previous Director General indicated a degree of frustration with the pace, but also pointed to failures to reach agreement at a global level in other areas as evidence of a wider problem with finding consensus (WIPO 2020). Different negotiations are often interconnected politically, if not in terms of substance, and progress on one question might be dependent on progress, or a lack of it, in a completely different area.

Nonetheless, the work undertaken has led to a greater awareness of the situation of libraries, archives, museums, educators and researchers than might have been the case otherwise, with vocal support from many Member States for action. It has opened up possibilities for library advocates to engage directly with governments in ways that might not otherwise have been possible, in meetings both in Geneva, and in national capitals throughout the world.

Since 2019, the COVID-19 pandemic has had a major impact on committee work in WIPO, with Member States taking a particularly hard line against continuing discussions in virtual form, even as other UN agencies have advanced their work in person. The report of the regional workshops and international conference was published in 2020, but not extensively discussed at the one meeting of SCCR that took place that year, or at the meeting held in June–July 2021. At the time of writing, the dates of the next meeting of the SCCR are not known, but it has been agreed that the meeting will include a half-day discussion about the impacts of the pandemic on the cultural, creative and educational ecosystem, including copyright, related rights, and L&Es.

The topic of L&Es for libraries and archives and, implicitly, museums, as well as for educational and research institutions and persons with other disabilities,

will be on the agenda. However, how substantive discussions will be, and how much they can advance, will depend on the willingness of those who are more favourable to action to make concrete proposals for work, as well as the readiness of those who have tended to be more reticent in the past to be more open and not block ideas.

A proposal for a new action plan may emerge, drawing on the suggestions made in the report of the 2019 regional workshops and the international conference. Some Member States may seek to promote international instruments; others may focus on soft law approaches; and others may wish merely to continue information exchange and evidence gathering. A practical step may be to focus on guidance and options for national reforms which could, at least, lead to some changes and clariy the need for complementary international reforms.

A further factor will be the progress of other items on the agenda at SCCR. Debates on a Broadcasting Treaty continue, with a proposal due from an informal grouping of Member States. On this topic, libraries, along with like-minded parties, have questioned the need for a Treaty, and highlighted the risks of creating additional rights without appropriate exceptions (KEI 2019).

The list of Other Items to be addressed at the end of the SCCR agenda has grown. While topics such as rights for theatre directors, resale rights and distribution of copyright incomes in a digital environment are only tangentially relevant for libraries, work on them takes time which then cannot be spent on advancing work on L&Es. More relevant for libraries is the proposal by Sierra Leone, Malawi and Panama in 2020 to carry out a study on Public Lending Right (WIPO SCCR 2020b). While any decision has been delayed so far due to COVID-19, the proposal is arguably one-sided, focusing only on the benefits of Public Lending Right, rather than its disadvantages, and instead of waiting for the results of an evaluation, prematurely seeks recommendations on the implementation of such schemes in developing countries. At its next meeting, SCCR is likely to decide what to do about the proposal.

The impact of COVID-19 will be felt, not just in the logistics around the meeting, but also in the substance of the discussions. The half-day session planned for the next SCCR meeting is likely to provide an opportunity to underline that the pandemic has supported the need to ensure that libraries, archives, museums, educators and researchers can continue to rely on L&Es in a digital environment. Yet it will also provide an opening for questions about the revenues of creators, in particular from major internet platforms. Other emerging issues will no doubt be the discussions taking place elsewhere about how to deal with platforms, and in particular the value gap (De Cock 2017) rhetoric seen elsewhere. Finally, there is the ongoing question of what will happen with the persons with other disabilities pillar of the wider work programme on L&Es. There remains

support from some Member States for action, yet it is unclear what the action might be. One option is a protocol or other text extending the application of the Marrakesh Treaty to all people with other disabilities, and the individuals and institutions that support them.

Conclusion

The World Intellectual Property Organization and the Treaties it oversees are a key part of the copyright landscape. They set broad parameters for national laws, both in terms of minimum protections to be offered to creators, create options, and in the case of the Marrakesh Treaty, obligations, to develop exceptions or other provisions to ensure user rights. The content of WIPO Treaties often filters into trade deals and other laws, or Treaty implementation is made part of such texts, making them more directly enforceable. WIPO through its capacity building work, as well as other activities, has a prominent role in shaping national copyright laws and administration. Influencing the work of WIPO therefore carries the potential to shape the laws that libraries face when working with copyright materials.

International negotiations are inevitably slow; results are not quick or easy. There is the need to reckon with opposition to anything that may require domestic reform, as well as a more fundamental sensitivity to the concept of exceptions to exclusive rights in the first place. WIPO is a logical focus for organisations and interests focused on promoting stronger intellectual property rights and enforcement, rather than the flexibilities created by L&Es, and it can certainly feel to reformers that efforts concentrating on the interests of users face strong headwinds.

The coming years are likely to continue to see discussion about both the substance of reform on L&Es, that is the activities to be included, as well as the form any change might take, through international law or other means. The impact of COVID-19 on the ability of libraries, schools and other institutions to fulfil their missions will be part of the picture, and may help underline the case for ensuring that L&Es apply to both digital and analogue uses. Concerns among rightsholders of losing out to internet platforms in the distribution of revenues may also come to take a more explicit role in the debate. In practical terms, it seems that a new round of evidence gathering and meetings is likely, potentially with the development of tools that focus primarily on supporting national decision-making which could contain the seed of future international action, rather than enabling cross-border cooperation directly.

For all the difficulty faced in ensuring progress through WIPO, no other forum offers the same potential for the development of treaties or other instruments which can both drive national reform and enable international cooperation. UNESCO has a strong emphasis on the work of libraries, as well as that of archives, museums, educators and researchers. The UNESCO Recommendation Concerning the Preservation of, and Access to, Documentary Heritage Including in Digital Form and accompanying implementation guidelines have been noteworthy achievements. However, UNESCO has tended to focus less strongly on copyright in recent years, and relies on persuasion rather than enforcement of the rules it oversees.

Trade negotiations, and in particular the World Trade Organization, have stronger enforcement mechanisms. However, at least at the global level, the WTO has faced similar challenges in terms of difficulties in securing agreement. Trade organisations are less focused on intellectual property, which can be seen as a bargaining chip alongside other issues, and they are considerably less open to civil society participation. Bilateral and plurilateral trade deals can deliver changes which strengthen the case for L&Es (Band 2020b), but are often carried out with little civil society contribution or oversight. Other fora have only a narrow focus, for example the World Health Organization which concentrates on intellectual property associated with medicines.

Notwithstanding the slow pace of work at WIPO, it continues to offer a relatively open space for civil society organisations to engage directly with governments on the topic of L&Es to copyright for libraries, as well as the provision of further research, tools and even international law that would help bring about adequate copyright frameworks. Engagement in WIPO, is a key part of any comprehensive effort by the library field to influence the shape of copyright laws and practices globally, complementing efforts at national and regional levels.

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Justus Dreyling and Teresa Hackett

11 Success for People with Print Disabilities: The Marrakesh Treaty

Abstract: On June 27, 2013, Member States of the World Intellectual Property Organization (WIPO) adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled. It is the first WIPO treaty to focus on user rights, and the first copyright treaty to include a clear human rights perspective. Its overarching objective is to increase the availability of reading material to over 300 million people around the world with print disabilities, and in terms of take-up by Member States, it is WIPO's fastest moving and most popular treaty. It constitutes a major success for libraries that played a leading role in treaty negotiations at WIPO, and are key to its successful implementation at national level. The treaty provides an opportunity for libraries of all types to boost services to people with print disabilities, helping libraries to better fulfil their public service mission of making knowledge and information available to everyone on an equal and inclusive basis.

Keywords: Libraries and people with print disabilities; Libraries and blind people; People with visual disabilities

Introduction

Marrakesh Treaty Quick Facts

- The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled is administered by the World Intellectual Property Organization (WIPO) at its headquarters in Geneva.
- It is available in six official United Nations (UN) languages: Arabic, Chinese, English, French, Russian and Spanish, and in four formats including Braille and Digital Accessible Information System (DAISY).
- It was adopted by WIPO Member States on June 27 2013, and entered into force on September 30 2016, after Canada became the twentieth state to deposit its instrument of accession in June of that year.
- It is the first WIPO treaty to focus on user rights and the first copyright treaty to include a clear human rights perspective.

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- The Marrakesh Treaty is WIPO's fastest moving and most popular treaty in terms of take-up by Member States, reaching the milestone of 100 countries in October 2020.
- It constitutes a major success for the global library community that played a leading role in successful treaty negotiations at WIPO.

On June 27 2013, Member States of the World Intellectual Property Organization (WIPO) adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled [hereinafter Marrakesh Treaty] (WIPO 2013a). It is the first WIPO treaty to focus on user rights, and the first copyright treaty to include a clear human rights perspective. Its overarching objective is to increase the availability of reading material to over 300 million people around the world with print disabilities. Despite important technological advances, the overwhelming majority of copyright-protected works is still unavailable in formats that are accessible to readers with print disabilities. According to estimates by the World Blind Union (WBU), only around five percent of all printed material is available in accessible formats, with an even lower figure in low- and medium-income countries (Pescod 2009). The problem, known as the book famine, is partly due to obstacles created by copyright law. The Marrakesh Treaty seeks to remove these obstacles by introducing mandatory limitations and exceptions (L&Es) to copyright that permit the reproduction and distribution of accessible format copies, and that allow for cross-border sharing of accessible material.

The proposal for a treaty relating to L&Es for visually impaired persons was introduced at WIPO in 2009 by Brazil, Ecuador and Paraguay (WIPO SCCR 2009). It initially faced strong opposition from rightsholders and industrialised countries, including the US and the EU. A coalition of civil society organisations, led by the WBU and Knowledge Ecology International (KEI), mobilized to support the proponents of the treaty; libraries and their representative bodies, including the International Federation of Library Associations and Institutions (IFLA) and Electronic Information for Libraries (EIFL), played a key role in the coalition. After nearly five years of negotiations, the Marrakesh Treaty was successfully adopted by WIPO Member States in 2013.

The Marrakesh Treaty provides an opportunity for libraries of all types to boost services to people with print disabilities, helping them to better fulfil their public service mission of making knowledge and information available to everyone on an equal and inclusive basis. Libraries are key to positive national implementation of the Marrakesh Treaty. This chapter tells the story of how success was achieved. The need for an international treaty for the benefit of people with print disabilities is outlined with discussion of the challenges posed by the copyright

system for people with disabilities and libraries that serve them. An overview of the negotiations at WIPO that led to adoption of the Marrakesh Treaty is provided, including the role of the library community.

The next section presents the Marrakesh Treaty and its key provisions, paying special attention to practical provisions that facilitate the work of libraries, and how they apply in national law. Examples of practical implementation by libraries to inspire and encourage wide take-up of the treaty are highlighted. In the final section and conclusion, an outlook on other international copyright instruments that might be necessary to support the work of libraries is described along with how the Marrakesh Treaty advances the international copyright system towards achieving these goals.

Copyright and Access to Protected Works for People with Print Disabilities

Copyright law may impede the provision of books and other printed materials in accessible formats, such as braille, large print and audio and, as a result, create a barrier to access to knowledge for people with print disabilities. At the same time, access to culture and education are fundamental to the full societal participation of and enjoyment of human rights by persons with disabilities (Sunder 2012). This section describes why the commercial book market was unable to provide sufficient access to printed works for persons with disabilities, and why international copyright law reform was necessary to address the deficiency.

The term "print disability" refers to "a difficulty or inability to read printed material" (Vision Australia n.d.). In addition to blindness and visual disabilities, the concept encompasses cognitive, developmental, learning and perceptual disabilities that make it difficult to read standard print. It also extends to physical disabilities that prevent an individual from holding or manipulating printed material. Accessible formats include braille, audio, large print and digital accessible formats, such as DAISY which stands for Digital Accessible Information System and is the original digital talking book standard (DAISY Consortium n.d.). With only around five per cent of printed material available globally in accessible formats, the commercial book market was not serving the needs of people with print disabilities. Traditionally, production of accessible versions of printed material can entail significant extra costs. Further, a variety of different accessible formats might be needed by readers, depending on the nature of the disability. The market for accessible versions is usually small and therefore not profitable enough to justify the extra costs of production.

Digital technologies offer a promising solution as publishers are encouraged to produce born accessible digital publications through the adoption of standards, such as EPUB, the leading mainstream ebook standard with built-in accessibility standards. In the future, the ambition of same book, same day for newly published material in print and accessible formats might be realised, at latest.

But until this day arrives, the production of works in accessible formats is mainly organised outside the commercial marketplace by the non-profit sector including libraries, blind people's organisations and charitable groups. To provide services in an effective and resource-efficient manner, copyright exceptions are required. Otherwise, the entity, such as a library, must obtain a licence. If no licence is readily available, the library must ask each publisher for permission for each title. The process can take weeks or months, and sometimes it is not possible to obtain permission at all. When a blind person cannot read a book in the same way as their sighted peers, because it is not available to purchase or to borrow from the library, it raises fundamental issues of equality of access.

In addition to placing a heavy administrative burden on organisations that operate on tight budgets and are financed through public means or charitable donations, lack of exceptions prevents libraries and other organisations from sharing their accessible copies with other libraries, or directly with print-disabled people, in other countries. In practice, it means that specialist agencies in different countries that share a common language often have to transcribe the same book many times, creating needless duplication of effort. For example, according to the World Blind Union (2010), when *Harry Potter and the Chamber of Secrets*, Book 2, by J.K. Rowling, was published in 1999, organisations in different English-speaking countries produced five separate national braille master files and eight separate national DAISY audio masters. If the files could have been shared, duplication would have been avoided and savings in financial and production costs enabled a further four braille and seven DAISY audio titles to be created and shared with people in other countries. Even in high-income countries, resources for production are scarce. In developing countries, where the majority of people with print disabilities live and the need is greatest, the available resources are far fewer.

Copyright presents three main obstacles. First, the making of a copy in an accessible format, such as braille, could infringe the reproduction right. Second, the distribution of the accessible copy could infringe the distribution or making available to the public right. Third, the cross-border exchange of the accessible copy could infringe the importation or exportation right. Overcoming the copyright obstacle requires exceptions. In 2007, WIPO commissioned a *Study on Copyright Limitations and Exceptions for the Visually Impaired* (Sullivan 2007). The

library community contributed to the study that analysed exceptions in national copyright laws for visually impaired people and included case studies on libraries from Canada, Chile, Germany, Kenya, Lesotho, Mozambique, Netherlands, New Zealand, Russia and the US. It identified 57 countries with exceptions for the benefit of people with print disabilities. Over 130 countries, mostly in the developing world, in which the majority of print disabled people live, had no such exceptions. Further, in the 57 countries with provisions, the scope and application of the exceptions varied considerably. For example, there were different definitions of disability, and a wide range of conditions under which the exception might be used. The existing exceptions mostly did not explicitly permit the import or export of accessible format copies (Sullivan 2007).

To address copyright obstacles, an international solution was needed. The Marrakesh Treaty requires ratifying countries to adopt copyright exceptions that allow the making of accessible format copies, the domestic distribution of accessible format copies, the sending of accessible format copies to another country, export, and the receiving of accessible format copies from another country, import. This means, for example, that libraries can pool their accessible resources within a country, or with other Marrakesh countries in the region or around the world, saving time, money and considerable effort. The production of works can be coordinated to reduce duplication, especially among countries that share a common language or where there is a large diaspora of people who speak another language. It also frees up human and financial resources to create more accessible titles, benefiting people with print disabilities everywhere.

Access to culture and education are key to the societal inclusion of persons with disabilities. Ensuring inclusion is not just a copyright issue, but also a human rights issue. The Marrakesh Treaty builds on a number of prior international agreements, including the UN Convention on the Rights of Persons with Disabilities (CRPD) adopted in 2006 in which Article 30: Participation in Cultural Life, Recreation, Leisure and Sport, stipulates that "States Parties recognize the right of persons with disabilities to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that persons with disabilities," including "access to cultural materials in accessible formats" (UN Department of Economic and Social Affairs. n.d.). By introducing mandatory exceptions for the benefit of persons with print disabilities, and by enabling the cross-border transfer of accessible format copies, it helps to fulfil the goal of universal access to information, the right to education and the right to participate in cultural life on an equal basis with others.

Libraries and Marrakesh Treaty Negotiations

Taking into account the entire historical context, the story of the Marrakesh Treaty has been more than 35 years in the making. When the treaty was adopted by WIPO Member States on June 27 2013, to observers it was seen as nothing short of a miracle (Saez 2013b). This section provides an overview of the process from the beginning to the adoption of the Marrakesh Treaty, and the role of the international library community throughout the process. Dreyling (2020) provides a more detailed account of the negotiations.

In 1977, the World Council for the Welfare of the Blind with the support of Brazil, first raised the issue at WIPO and UNESCO that led to the convening of a joint Working Group to consider the use of exceptions in international copyright conventions. IFLA was represented on the Working Group that adopted model L&Es for the benefit of persons who are blind or visually disabled (WIPO 1982). However, the models turned out to have little or no practical effect on L&Es in national copyright laws.

During the 1990s, the global political environment in the area of intellectual property (IP) underwent significant changes. The adoption of the Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS] (World Trade Organization n.d.) in 1994, as part of the agreement establishing the World Trade Organization, made the adoption of strict levels of IP protection at national level a pre-condition for participation in the global trading system. The IP protections strongly benefited industrialised countries that were pursuing similar policies in other global fora, such as WIPO. In response, some developing countries started to speak out against what they saw as the negative impact of the global IP system on development, and to look at ways of curbing the ratcheting-up of global IP rules by developed countries.

As a consequence of the developments, a global civil society movement emerged on access to knowledge (A2K) that identified WIPO, in particular, as an important forum in need of change (Franz 2010). Library organisations played a prominent role in the A2K movement. In 2000, IFLA and the WBU met the WIPO Secretariat in Geneva to discuss the potential for widening access to accessible format material. At the IFLA World Library and Information Congress (WLIC) in 2001, IFLA and WBU called for an international treaty for persons who are blind and visually impaired, followed in 2004 by a joint policy statement (Policy Position Agreed by the World Blind Union (WBU), the DAISY Consortium and IFLA Libraries for the Blind Section 2004).

IFLA and EIFL were active in the global coalition that produced a draft Treaty on Access to Knowledge and Technology (CPTech 2005b) with provisions in favour of persons with disabilities, as well as libraries, education and other public inter-

est purposes. In 2004, the A2K coalition issued the Geneva Declaration on the Future of the World Intellectual Property Organization (CPTech 2005a). The declaration called on WIPO to take a more balanced view of the social costs and benefits of IP protection, and to abandon the one size fits all approach that embraced the highest levels of IP protection for every country regardless of their socio-economic circumstances.

The Geneva Declaration kickstarted a discussion among WIPO Member States, which eventually led to the adoption of a Development Agenda by WIPO in 2007 (WIPO n.d.). The Development Agenda seeks to ensure that the needs of developing countries for a balanced IP system form an integral part of WIPO's work. It contains 45 recommendations covering norm-setting, flexibilities, public policy and the public domain, among other issues. The Development Agenda opened the door for the introduction of the topic of L&Es in the Standing Committee on Copyright and Related Rights (SCCR). In 2008, L&Es were formally established on the agenda of SCCR (New 2008).

The Development Agenda facilitated a dialogue on copyright reform between the A2K movement and certain developing countries. While the initial idea of an international treaty for the benefit of visually disabled persons originated with WBU and other civil society organisations, it was taken forward at WIPO by countries from the Global South. A large number of developing countries including Brazil, Ecuador, India, and Nigeria played leading roles in the negotiations.

In May 2009, Brazil, Ecuador and Paraguay formally introduced a proposal at SCCR for a treaty relating to L&Es for persons who are blind and visually impaired, based on a text prepared by WBU (WIPO SCCR 2009). The proposal set out possible ways to facilitate and enhance access to protected works, and according to the proponents, would support an earlier proposal calling on the committee to engage in concrete work on L&Es (WIPO SCCR 2008). It would also contribute to the broader aims of the Development Agenda, particularly those related to norm-setting.

The treaty proposal gained strong support from a coalition of civil society organisations, led by the WBU and the KEI. Over 30 representatives from five library organisations, IFLA, EIFL, the Library Copyright Alliance (LCA), the Canadian Library Association (CLA), and the Deutscher Bibliotheksverband/German Library Association (DBV), participated in many formal and informal negotiation meetings over the next five years. Library representatives delivered dozens of oral and written statements, and actively engaged with government delegates to ensure that the voices of libraries were heard.

At the same time, there was strong opposition to the proposal from rightsholders. Opposition centred around two main issues. First, publishers argued that the right of beneficiaries to make accessible format works, without having

to ask permission, could conflict with the commercial exploitation of published works, and harm the emerging ebook market. Further, the digital works might leak into the general market leading to piracy and potential abuse. Publishers warned that mandatory exceptions could prevent the development of a market for accessible formats.

Second, rightsholders expressed the fear that an international instrument on limitations and exceptions was a slippery slope towards similar work in other areas, such as libraries and archives. According to this view, it would represent a weakening of the international IP system law as a whole. A treaty with a focus on user rights, even if narrowly construed, could serve as a dangerous precedent not only in copyright, but also in the area of patents. The argument was also advanced inter alia by the Motion Picture Association of America (Kind 2013). In 2013, the Intellectual Property Owners Association in a letter to the US Patent and Trademark Office warned that a treaty "could set a dangerous precedent for other areas of IP law, particularly patent law" (Love 2013). Rightsholders believed that the only instruments adopted at international level should focus on standards of copyright protection, and that the adoption of exceptions should be left to the national level.

The major industrialised countries, home to powerful rightsholder industries, also rejected the idea of a legally binding instrument for persons with print disabilities (Mara 2010). In 2010, the US (WIPO SCCR 2010a) and the EU (WIPO SCCR 2010b) submitted two counter proposals to the proposal sponsored by Brazil, Ecuador and Paraguay. The counter-proposals were based on voluntary licensing schemes, instead of mandatory exceptions and they supported the establishment of a WIPO Stakeholders' Platform to facilitate arrangements to secure access for disabled persons to protected works.

The Stakeholders' Platform comprised representatives of rightsholder organisations, the visually impaired sector and the WIPO Secretariat. WBU actively participated as part of a twin-track approach to improve collaboration and to support negotiation of a binding agreement at SCCR. In October 2010, the Stakeholders' Platform launched a new project, the Trusted Intermediary Global Accessible Resources (TIGAR) project, to enable publishers to make their titles more easily available to so-called trusted intermediaries (WIPO 2010b).

However, in February 2011, WBU decided to suspend its participation in TIGAR, pending agreement at SCCR on a proper binding legal framework. According to the WBU, the TIGAR project was being erroneously portrayed by some organisations as an alternative to the underpinning legal framework needed to guarantee equal access to information, and being called for at SCCR (Hammerstein 2011). In other words, publishers saw the Stakeholders' Platform as an alternative to, and not a stepping stone towards, a binding legal instrument. The deci-

sion by the WBU to move away from the Stakeholders' Platform was an important moment that focused attention firmly back to negotiations at SCCR (Saez 2011).

To help break the continued opposition by the US and the EU at the SCCR, treaty advocates turned to the domestic scene. In the US, groups highlighted the discrepancy between the US position at WIPO and US copyright law, in particular the 1996 Chafee Amendment 17 U.S.C. § 121 that allows the making of accessible format copies by certain organisations. They also lobbied the administration of President Obama, who had entered the White House in January 2009, to support work on this compelling issue. In December 2009, the US announced its commitment to a "more thoughtful, reflective and modulated IP policy that protects the interests of IP holders and creators while serving the interests of civil society" and greatly changed the dynamic of the discussions at WIPO in a positive way (Mara 2009).

In Europe, civil society groups focused their advocacy on the European Parliament to put pressure on the European Commission, which had the negotiating mandate at WIPO. The European Blind Union (EBU) worked closely with members of the European Parliament who summoned the then-Commissioner for Internal Market and Services, Michel Barnier, to Parliament for questioning about the position of the Commission at WIPO. After Barnier's appearance, the European Parliament adopted a resolution in support of an international treaty that influenced the Commission to relax its position (European Parliament 2012; New 2011).

With the EU and the US eventually on board for a treaty, SCCR got down to the business of text-based negotiations examining critical issues, formulating definitions, and determining the scope of the exceptions and conditions of cross-border exchange. Finally, in December 2012, the WIPO General Assembly agreed to convene a diplomatic conference in Marrakesh, Morocco from 17–28 June 2013 (WIPO General Assembly 2013). A diplomatic conference is a specially convened event to negotiate the final stages of a treaty.

Many important matters including definitions, cross-border exchange and technological protection measures, were still to be resolved at the start of the diplomatic conference in Marrakesh. Negotiators had to work long hours and late nights throughout the eleven days of the conference to reach final agreement on the text (Saez 2013a). After a marathon conference attended by over 400 government officials and around 50 NGOs, fifty-one countries signed the treaty in Marrakesh on 28 June 2013. It was the largest number of countries ever to sign a WIPO-administered treaty immediately upon adoption. By signing the treaty, Member States expressed a political intention to support the treaty.

Overall, the result met the key demands set by the WBU. It also gave libraries a key role in the successful implementation of a landmark treaty, and a new

opportunity to help end the book famine. And when music legend Stevie Wonder made good on a promise to travel to Marrakesh to play for government negotiators if the treaty was adopted, it became the first WIPO conference to feature dancing in the aisles! An American singer, songwriter and record producer, Stevie Wonder had become blind in early childhood and experienced first-hand the lack of availability of sheet music in accessible formats (Hanson 2016). Wonder had spoken out on numerous occasions in favour of a treaty for persons with print disabilities, including at the WIPO Assemblies in 2010 (WIPO 2010a). The lyrics to Stevie's hit record *Signed, Sealed, Delivered* had never seemed so apt as on that historic night in Marrakesh (Saez 2013c; WIPO 2013b).

A Provision-by-Provision Analysis of the Treaty Text

This section provides a brief summary of the Marrakesh Treaty as a whole, and an analysis of the key provisions that concern the work of libraries. A detailed analysis of the treaty is available in Helfer, Land, Okediji and Reichman (2017). The Marrakesh Treaty contains a preamble, 22 articles and 13 agreed statements. The Preamble defines, in general terms, the purpose and shared objectives of WIPO Member States in concluding the treaty. The Articles set out the substance of the agreement. Articles 1 – 7 contain definitions, L&Es regarding accessible format copies and cross-border exchange, and obligations concerning technological measures. Articles 8–12 deal with respect for privacy, cooperation to facilitate cross-border exchange, general principles on national implementation, and general obligations on L&Es. Articles 13–22 are administrative clauses, such as eligibility for becoming party to the treaty, entry into force, and deposit of the treaty at WIPO. The agreed statements set out an agreed, common understanding among Member States to provide clarity to particular articles in the treaty, especially points of contention during the negotiations.

Preamble

The preamble establishes the core principles that underpin the treaty. It is essential to understanding the context of the treaty, and to supporting interpretation of individual provisions. For example, the opening paragraph contains an express reference to two widely adopted human rights treaties, the UN Declaration of Human Rights and the UN Convention on the Rights of Persons with Disabilities, placing human rights objectives, non-discrimination and equal opportunities

at the centre of the treaty. The preamble also recognizes the need to maintain a balance between the protection of the rights of authors and the larger public interest, particularly education, research and access to information, and highlights that such a balance must facilitate effective and timely access to works for the benefit of persons with print disabilities.

Definitions

Articles 2 and 3 set out the definitions.

Authorized Entities

From a practical point of view, the most important provision of the treaty for libraries is the definition of "authorized entity" because it defines the organisation that makes and distributes the accessible format copies, and under what conditions. Article 2(c) defines an authorized entity as "an entity that is authorized or recognized by the government to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a government institution or a non-profit organisation that provides the same services to beneficiary persons as one of its primary activities or institutional obligations". Thus, both a specialized agency providing services to blind people, such as a talking books library, and a general service library, such as an academic or public library that provides the same services to all its users regardless of disability, would constitute an authorized entity.

In addition, the library or other authorized entity "establishes and follows its own practices" to ascertain that the recipients are *bona fide* beneficiary persons, to limit the distribution of accessible format copies to beneficiary persons or other authorized entities, to discourage the reproduction and distribution of unauthorized copies, and to maintain due care, and records of, the handling of accessible copies. Any library or institution that meets the broad criteria set out in Article 2(c) qualifies as an authorized entity. To ensure that the accessible copies are used for *bona fide* purposes, the treaty provides that the authorized entity can establish its own practices in this regard. Importantly, the treaty does not contemplate rules being established for it by the government, nor an approval process or registration requirement. Note that the definition of authorized entity also includes for-profit entities using public funds to provide services on a non-profit basis to people with print disabilities.

Beneficiary Person

The treaty includes a broad definition of "beneficiary person", the type of person the treaty is intended to benefit. There are three groups of beneficiaries:

- People who are blind
- People who have a visual impairment that prevents them from reading printed works, and people who have a perceptual impairment, such as dyslexia that makes it hard to learn to read, write and spell correctly, and
- People with a physical disability that prevents them from holding or turning the pages of a book.

Although the treaty is directed towards people with print disabilities, Article 12(2) confirms the important point that it does not prevent the adoption of copyright exceptions for the benefit of people with other disabilities.

Types of Works

The treaty applies to published literary and artistic works in the form of text, notation or illustrations, including in audio form, such as audio books. Significantly, audio-visual works such as films do not fall within the definition of works, although textual works embedded in audiovisual works, for example educational multimedia DVDs, would appear to be covered.

Accessible Format Copy

Article 2(b) describes an "accessible format copy" as a copy of a work in a form which gives a beneficiary person "access as feasibly and comfortably as a person without visual impairment or other print disability".

Limitations and Exceptions, Cross-border Exchange and Technological Measures

The substantive core of the treaty is contained in Articles 4 through 7.

Article 4 Mandatory Provisions – National Law Limitations and Exceptions

The following provisions concern the making of accessible format copies, and must be implemented by countries that join the Marrakesh Treaty. Article 4(1) requires countries to provide in their national law an exception to the right of reproduction, distribution, and making available to the public "to facilitate the availability of works in accessible format copies for beneficiary persons." The limitation or exception should permit the changes that are needed to make the work accessible in the alternative format. In addition, countries may provide for an exception to the right of public performance, such as for the public reading of a poem or a play.

Countries have significant flexibility in how they can meet the obligation in Article 4(1). An example of one way to comply is set out in Article 4(2) whereby an authorized entity would be permitted to make an accessible format copy, or to obtain an accessible format copy from another authorized entity, and to supply the copy directly to a beneficiary person by any means under the following conditions:

- The authorized entity has lawful access to the work
- The conversion does not introduce changes other than those needed to make the work accessible
- The copies are supplied for the exclusive use of beneficiary persons, and
- The activity is undertaken on a non-profit basis.

Additionally and importantly, the beneficiary person or someone acting on their behalf, such as a family member or a librarian, can also make an accessible format copy for the use of the beneficiary person. Alternatively, Article 4(3) sets out that a country can also fulfil Article 4(1) by providing other limitations or exceptions in national copyright law.

Article 4 Optional Provisions – Commercial Availability and Remuneration

Articles 4(4) and 4(5) are optional provisions that, if implemented into national law, would restrict the freedoms allowed to libraries under the treaty. The international library community strongly opposes the introduction of these optional provisions into national law. Article 4(4) allows a country to confine the exceptions to works that are not available on the commercial market under reasonable terms for beneficiary persons in that market, nor in the particular format required by the beneficiary. Therefore, before a library could make an accessible copy, it would have to conduct a search each time to check whether the requested

work is commercially available in the format required by that particular person. As it would be difficult to ascertain with certainty whether a work is available in the format needed and at a reasonable cost for beneficiary persons, especially in cross-border situations, the practical effect would be to render the exception almost unworkable. It would delay the making of the accessible copy, and many libraries do not have the staff or resources to undertake such checks on a case-by-case basis. The level of risk, an assessment of the likelihood of the institution being sued by the copyright owner in the event that an accessible format copy of a commercially available work is made, might also mean that the library declines to offer the service at all. Of course, if an accessible format copy is available on the commercial market, as a practical matter, a library can always in any case decide to purchase such a copy. Making an accessible copy costs money in terms of staffing, time and equipment and a library will choose the most cost-effective and efficient option available.

Article 4(5) provides the option to subject the exceptions to remuneration: the payment of a fee to the rightsholder. For published works in library collections, the rightsholder is usually the publisher. In other words, a country could adopt a statutory licence rather than an absolute exception. This provision, like Article 4(4) discussed above, would also have a chilling effect on the making of accessible copies, especially for libraries in low-income countries with limited book budgets. It is important to note: the work has already been purchased or otherwise lawfully obtained by the library; the accessible copy is made for the sole purpose of providing equal access to the work; the making of accessible copies incurs costs to the library; and the activity is undertaken on a non-profit basis. Significantly, Articles 4(4) and 4(5) cater to the small number of countries with such provisions already in their national laws. The international library community believes, however, that the provisions should not be used as a model in other countries as there would be a negative impact on the number of accessible titles available. Libraries should oppose the inclusion of the optional provisions in implementing national law.

Article 5 Cross-border Exchange of Accessible Format Copies: Export

Article 5(1) provides that a country must permit an authorized entity to send or export an accessible format copy made under an exception to an authorized entity in another country, or directly to a beneficiary person in another country. As with Article 4, Article 5 provides countries with flexibility on how to implement the obligation. An example of one way to comply with Article 5(1) is set out in Article 5(2), which stipulates that the domestic copyright law of the sending

country must allow an authorized entity to distribute the accessible format copy to a beneficiary person, and to an authorized entity in another country, under the condition that the authorized entity meets the test of good faith, whereby the authorized entity does not know or have reasonable grounds to know that the accessible format copy would be used by other than beneficiary persons. The authorized entity may decide whether "to apply further measures," in addition to those it employs in the domestic context, to confirm the beneficiary status of a person it is serving in another country.

Article 6 Cross-border Exchange of Accessible Format Copies: Import

Article 6 is the matching bookend to Article 5. Just as Article 5 obligates countries to permit authorized entities to send accessible format copies to authorized entities or beneficiary persons in other countries, Article 6 obligates countries to allow authorized entities or beneficiary persons to receive or import accessible format copies from other countries.

Importantly, Article 6 stipulates that the obligation to import applies only to the extent that the national law of a country would permit an authorized entity or a beneficiary person to make an accessible format copy. Accordingly, if a country's national law permits authorized entities, but not beneficiary persons, to make accessible format copies, that country would be required to permit only authorized entities to import accessible format copies. Therefore, to ensure that an authorized entity in one country can supply accessible copies directly to a beneficiary person in a second country, the copyright law in the second country should have an exception that allows beneficiary persons, and not just authorized entities, to make accessible format copies.

Article 7 Obligations Concerning Technological Measures

Article 7 provides that a technological protection measure, such as a copy or access control, cannot prevent a beneficiary person from enjoying the exceptions provided under the treaty, even when a country prohibits the circumvention of technological protection measures in its general copyright legislation. In such cases, the country must adopt a mechanism such as an exception to the circumvention prohibition to permit an authorized entity, for example, to make an accessible format copy. Other mechanisms, for example, requiring the rightsholder to provide the authorized entity with a key to open the digital lock, would appear to satisfy Article 7.

Respect for Privacy, Facilitating Cross-border Exchange, General Principles and Obligations on National Implementation

Article 8 Respect for Privacy

Article 8 provides that countries "shall endeavour to protect the privacy of beneficiary persons on an equal basis with others". Libraries believe strongly in protecting the privacy of all those who use their services, including the right to read anonymously. In many countries, libraries are subject to laws on data protection. Implementation of the treaty should not interfere with the privacy of beneficiary persons, for example, in distribution mechanisms for accessible formats.

Article 9 Cooperation to Facilitate Cross-Border Exchange

Article 9 contains provisions designed to facilitate cross-border exchanges, such as the voluntary sharing of information to assist authorized entities in identifying one another. Under Article 9(2), countries agree to assist their authorized entities in making information available concerning their practices relating to accessible format copies, but it is important to note that authorized entities are not required to disclose the information. Presumably assistance could take the form of a website hosted by a country or the provision of additional funding to authorized entities.

Article 10 General Principles on Implementation

Article 10 underscores the considerable flexibility countries have in how they implement the treaty within their own legal systems and practices. Countries may fulfil their rights and obligations under the treaty in a variety of ways through specific limitations or exceptions, fair practices, dealings or uses, or a combination thereof.

Article 11 General Obligations on Limitations and Exceptions

Article 11, on the other hand, stresses that the L&Es in the treaty must be interpreted within the confines of the so-called three-step test. The three-step test, as set out in several major intellectual property agreements, subjects L&Es to three conditions that the reproduction of the works applies in certain special cases, does not conflict with a normal exploitation of the work and does not unrea-

sonably prejudice the legitimate interests of the author. Therefore the minimum standards for exceptions created by the treaty should be understood as falling within the ambit of the three-step test. However, some developing countries are not bound by the three-step test because they are not members of certain international copyright treaties for example, the Berne Convention, TRIPS or the WIPO Copyright Treaty, or are classified by the UN as least developed countries (LDCs), and not subject to the TRIPS agreement provisions on copyright until 1 July 2034 at least (EIFL 2021). Developed countries wanted to ensure that in such a situation, an authorized entity does not redistribute imported works to other countries, without having to adhere to the framework of the three-step test. For this reason, Article 5(4) provides that a receiving country that does not have three-step test obligations will ensure that an imported work is used only within that country's jurisdiction, and may not be re-exported, unless the making of an accessible copy is made subject to the three-step test.

Article 12 Other Limitations and Exceptions

Article 12 affirms that countries may implement other exceptions in national law for the benefit of persons with print disabilities, taking into account a country's economic, social and cultural needs, in particular the special needs of least-developed countries. It also affirms that the treaty is without prejudice to L&Es for persons with other disabilities provided by national law.

Implementation of the Treaty into National Law

When a country formally joins the Marrakesh Treaty, by depositing its instrument of accession or ratification at WIPO, the treaty enters into force in that country after three months. The next important step is for the treaty to be incorporated into national law, usually by amending the domestic Copyright Act to comply with the treaty's provisions (Band and Cox 2020). In some countries, the act of ratifying an international treaty means that the treaty has direct effect without the need for implementing legislation. In such cases, libraries in principle might start using the treaty immediately. For public awareness, it might be useful in such situations for the treaty to be expressly referenced, or otherwise recognized in national law or regulations. Libraries are central to the success of the Marrakesh Treaty, and have a key role in its successful implementation. For this reason, the library community should engage with policymakers to ensure the best results when the treaty is domesticated.

To comply with the Marrakesh Treaty, two main obligations are required to be fulfilled at national level. The first obligation is to provide for an exception or limitation in copyright law to allow authorized entities and beneficiaries, as defined in the treaty, to make and distribute accessible format copies for persons with a print disability. The second obligation is to allow the exchange across borders of those accessible copies. In incorporating the obligations into national law, governments nevertheless have several policy choices to make in the treaty. The best policy choices are those that are consistent with the spirit of the treaty as set out in the preamble: to enhance the human rights of people with print disabilities by facilitating access to reading material in accessible formats. In practical terms, it means that national implementation should not impose new barriers or introduce unnecessary costs on libraries striving to provide accessible materials. The following recommendations are made for national implementation:

- No registration requirements or additional record-keeping for libraries using Marrakesh rights. Article 2(c) establishes that any non-profit library providing the same services to beneficiaries under its institutional obligations qualifies as an authorized entity, and that it may follow its own record-keeping practices.
  Example: Libraries in Australia, Japan and Uruguay are not subject to any such restrictions (IFLA 2020).
- Do not subject the making of an accessible format copy to a commercial availability test, or payment of remuneration. Articles 4(4) and 4(5) in the treaty are optional provisions, and if implemented into national law, would restrict the freedoms allowed under the treaty.
  Example: These restrictions do not apply in France, Spain and the US
- Do not allow the exceptions to be overridden by terms in e-resource licences. It is implicit in the treaty that countries have the freedom to regulate the relationship between exceptions and contracts. The right to read for persons with print disabilities should apply regardless of the format of the material.
  Example: The EU Marrakesh Treaty Directive (Directive (EU) 2017/1564 2017) ensures that the exception cannot be overridden by contract in its 27 Member States.
- Do not discriminate against people with other disabilities, such as deaf people. Article 12 permits the retention and expansion of exceptions protecting persons with disabilities other than those mandated by the treaty, who are also prevented from accessing works to substantially the same degree as a person without the disability.
  Example: The exceptions in Argentina, Australia and India apply to all disabilities.

Best Case Examples of Practical Implementation by Libraries

Arguably, the most important step is practical implementation of the Marrakesh Treaty, that is, when libraries make practical use of the treaty to increase access to reading material for readers with print disabilities. Since the treaty entered into force at a global level, libraries have actively engaged in initiatives to put the treaty into practice. For example, librarians are learning about their new rights and responsibilities under the treaty, undertaking surveys to identify user needs, agreeing on metadata standards for increased discoverability, creating federated catalogues and developing accessible digital library systems. As a result, a variety of practical approaches has been adopted. Some book exchanges operate on an informal basis between libraries in response to individual reader requests; some initiatives focus on regional cooperation serving common language needs; and other new services are global in ambition.

There are no right or wrong approaches. Every initiative is commendable, and each contributes towards the development of a sustainable global network providing top quality accessible resources to readers, collectively bringing the Marrakesh Treaty goal of ending the book famine closer. Below are some examples from various countries around the world to help inspire and inform the library community.

Accessible Books Consortium

The Accessible Books Consortium (ABC) is a public-private partnership led by WIPO. The ABC Global Book Service is an online catalogue that allows eligible participating libraries and organisations serving people who are print disabled to easily obtain the accessible content they need. Over 635,000 accessible, digital books in 80 languages can be transferred across borders by a secure, automated mechanism (Accessible Books Consortium n.d.).

Austria

In 2020, the Literaturservice für blinde und sehbeeinträchtigte Menschen/Literature Service for Blind and Visually Impaired People at the Universitätsbibliothek Wien/University of Vienna Library decided to make bibliographic data on its accessible collection visible to all in the online catalogue. Now eligible students

at other European institutions, as well as colleagues in other libraries in Austria, can quickly check if an accessible title is available in the University of Vienna Library, and the item can be requested. In addition, every book is undergoing a quality re-check by specialist librarians to ensure the best reading experience. While the number of titles in the catalogue is small, the number and usage is expected to increase as more titles become visible, and the initiative spreads to other libraries. The Marrakesh Treaty entered into force in Austria on January 1, 2019.

Canada and Kyrgyzstan

In April 2018, the first international book transfer took place between Canada and Kyrgyzstan. The library at the Американский университет в Центральной Азии/American University of Central Asia (АУЦА/AUCA) in Bishkek, Kyrgyz Republic requested a business studies title for an MBA student from the library at the University of Toronto Scarborough, whose librarians arranged for the printed book to be converted into an accessible digital format. The DAISY, Braille and epub files were delivered using Dropbox, an online file transfer service. The exchange was designed in cooperation with the DAISY Consortium to demonstrate how straightforward international exchange of accessible books can be, once a country has ratified and implemented the Marrakesh Treaty (EIFL 2018). As the 20th signatory, Canada's accession brought the Marrakesh Treaty into force on September 30, 2016. The Marrakesh Treaty entered into force in Kyrgyzstan on August 15, 2017.

India

Bookshare India is a global online library of accessible ebooks for people with print disabilities (Sugamya Pustakalaya n.d.). Since India joined the Marrakesh Treaty, Bookshare India was able to offer over 100,000 titles to Bookshare members in India under the global copyright exception, and has teamed up with the DAISY Forum of India to establish a joint catalogue. Over 675,000 titles are available to readers in 17 languages including Hindi, Marathi, and Tamil. The Marrakesh Treaty entered into force in India on September 30, 2016.

Japan

In November 2019, the 国立国会図書館, Kokuritsu Kokkai Toshokan/National Diet Library (NDL) in Japan launched an international service that offers accessible works in DAISY, Braille, and other text-based formats to persons with print disabilities and eligible institutions as stipulated by the Marrakesh Treaty (National Diet Library 2019a). Persons with print disabilities outside Japan (National Diet Library 2019b) can use the service that, in addition to works produced by NDL, contains works produced by other libraries and collected by the NDL. Information in English is available for the process for use outside Japan. In addition, NDL partners with the ABC Global Book Service that initially made available over 1,500 mainly academic titles, and that number is expected to increase over time. The service is also available for use by people within Japan (National Det Library 2019c). The Marrakesh Treaty entered into force in Japan on January 1, 2019.

Poland and Lithuania

In October 2019, the first cross-border exchange of accessible books took place between Poland and Lithuania. The Książnica Podlaska im. Łukasza Górnickieg/Łukasz Górnicki Podlasie Library in Białystok, the largest public library in northeast Poland, provided sixteen titles to the Lietuvos aklųjų biblioteka/Lithuanian Library for the Blind (LLB), which needed material in the Polish language. In 2020, LLB reciprocated by transferring two requested titles from Lithuanian authors, in the English language, to Poland. Metadata for cataloguing was agreed between the two libraries, and the transfers were made using WeTransfer, an online file transfer service. There are plans to exchange more titles in the future (EIFL 2019). The Marrakesh Treaty entered into force in Poland and Lithuania on January 1, 2019.

Spain

In October 2019, Organización Nacional de Ciegos Españoles/ONCE, the national organisation of blind people in Spain, launched a new digital library service granting access to its collection through its Bibliographic Service (SBO) and Digital Library (BDO) to authorized entities in Marrakesh-ready countries around the world. The first book to be sent to another library was *El amor en los tiempos del cólera/Love in the time of cholera* by Gabriel García Márquez. From ONCE's holdings of more than 60,000 audio-books, ready-to-print Braille files and music

scores, the world's largest quality collection of accessible books in Spanish, 325 titles have been distributed to nine countries in Asia, America, and Europe, according to ONCE (personal communication October 2020). In addition, ONCE now has access to 54 libraries in 42 countries with combined holdings of 643,000 titles in 76 languages. By April 2021, over 200 titles from 15 different authorized entities, including popular titles and classics in English and French, have been obtained from abroad by ONCE, while ONCE sent over 560 titles to 14 authorized entities. The Marrakesh Treaty entered into force in Spain on January 1, 2019.

Conclusion and Future Outlook

This chapter has provided an account of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, including its genesis, key provisions, and best practices in terms of implementation, with special reference to libraries. The Marrakesh Treaty addresses a real need and its adoption in 2013 by WIPO Member States constitutes a major success for the community of persons with print disabilities, as well as for libraries that provide information services to the community. The more countries that implement the Marrakesh Treaty into national law and the more libraries that start using the treaty, the more people with print disabilities around the globe will benefit.

Two policy recommendations are suggested for the future. First, while the Marrakesh Treaty goes a long way in improving societal participation of people with print disabilities, copyright barriers for persons with other disabilities, such as deaf people, remain. The issue remains on the agenda of the WIPO SCCR. However, as of 2021, the issue has not advanced. WIPO Member States should urgently take steps to address the needs of persons with other disabilities, and should adopt an international instrument for their benefit. The Marrakesh Treaty provides a useful template for how this could be done.

Second, the Marrakesh Treaty demonstrates that treaties focusing on user rights can be enormously successful. In 2018, WIPO's Director-General called it "the fastest moving of the WIPO treaties, not only in the past year, but most probably in the history of the Organization" (Gurry 2018). As Helfer, Land and Okediji (2020, 340) argue, "the broader and more transparent consultations involved in adopting exceptions for the print disabled [...] provide a potential roadmap for other treaty implementation efforts that better realise the welfare objectives that are intrinsic to both the intellectual property and human rights regimes". L&Es for the benefit of libraries, archives and museums, as well as for education

and research, continue to be discussed at WIPO SCCR. The negotiations should continue in good faith and on the basis of empirical evidence, in consultation with beneficiary organisations and other stakeholders. The Marrakesh Treaty has shown that a well-designed treaty focusing on user rights can successfully co-exist with authors' rights and a prosperous publishing industry for the benefit of all.

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Anubha Sinha

12 A New Form of Contract: International Free Trade Agreements

Abstract: This chapter focuses on copyright issues related to access to knowledge in international trade agreements, also known as free trade agreements (FTAs). It touches on how intellectual property and trade have become intertwined, and the subsequent proliferation of FTAs. The larger discussion expands on the copyright-maximalist trend of provisions in FTAs, and their impact on libraries and public's access to knowledge. The chapter highlights the politics of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the most comprehensive multilateral agreement on intellectual property developed by the World Trade Organization (WTO), free trade agreement negotiations, and the efforts of civil society and library stakeholders to counter developments which have a negative impact on knowledge development and creativity.

Keywords: Free trade; Intellectual property; Foreign trade regulations

Introduction

Domestic copyright laws across the world have had much in common for centuries, and it has been relatively easy to stitch together a set of international rules that could bind all countries. The landmark copyright treaty, the Berne Convention on Literary and Artistic Works (Berne Convention), dates to 1886. It continues to play an influential role in modern copyright law. International rules on copyright have since converged into the two largest multilateral instruments on copyright: the World Trade Organization (WTO) Agreement on Trade Related Aspects of Intellectual Property [hereinafter TRIPS] of 1995 (World Trade Organization n.d.) and the World Intellectual Property Organization (WIPO) Internet Treaties. The rules continue to evolve in free trade agreements.

Free trade agreements (FTAs) are international agreements between two or more countries that determine preferential market access to goods and services. FTAs often extend to intellectual property rights protection, e-commerce and digital trade rules, investor protection, customs cooperation, and standard-setting. Depending on the countries involved, FTAs might be multilateral, regional, or bilateral. They are, however, less multilateral than agreements concluded at forums such as WTO and WIPO. While US-led agreements are referred to as Free Trade Agreements, the European Union (EU) has preferred the term Economic

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Partnership Agreements (EPAs), while WTO uses the expression Regional Trade Agreements (RTAs). The Regional Comprehensive Economic Partnership (RCEP), recently concluded between the ten members of the Association of Southeast Asian Nations (ASEAN) and six other partners, is the largest trade agreement outside the US and EU blocs.

Countries are highly interested in negotiating FTAs. FTAs are seen as useful instruments to secure such areas as market access, influence domestic policy reform and regional security (Whalley 1998). As of 2021, there were 349 regional trade agreements in force. The US and EU have been the keenest to enter into FTAs. The US is party to fourteen trade agreements with twenty countries, while the EU's annual report on trade agreements for 2019 describes thirty-six of its largest trade agreements with sixty-five countries in four regions (European Commission 2020).

Principles and systems set in the Berne Convention, TRIPS, and WIPO Internet Treaties continue to influence countries' negotiations and resulting FTA agreements. The Berne Convention and WIPO Internet treaties do not relate to trade but influence and have set certain standards for copyright rules in the digital environment. Although human rights are woven into the treaties to varying degrees, economics and trade interests have predominantly shaped TRIPS and the FTAs.

TRIPS, enacted in 1995 under the WTO trading system, remains the largest multilateral IP agreement to date. It was the first agreement to link IP and trade, and harmonised minimum IP standards for all WTO members. The EU and US drove the idea of regulating IP through trade law at the pre-existing General Agreement on Tariffs and Trade (GATT) forum, to protect the export of their music, films, and software, finally culminating in a new agreement, the TRIPS Agreement. TRIPS set the bar for successive intellectual property rights (IPR) treaties and FTAs. In a way, the steady increase in global IP protection since can be attributed to developed countries' interest in securing their markets and industries and pressure on developing countries to prioritise the demands of IP protection and enforcement over domestic needs.

Rules in IP, e-commerce, and digital trade in FTAs impact libraries and their users. Copyright provisions in FTAs generally cover: rights of authors, publishers, broadcasters and performers; use and protection of digital rights management (DRM) measures; scope and application of limitations and exceptions; and ratification of other multilateral copyright treaties. The provisions have led to an overall expansion of publishers' rights and narrowing of public interest uses of copyrighted works. Since FTAs typically require countries to amend their domestic laws and policies, they carry implications for domestic institutions such as libraries, museums, archives, as well as researchers, students and educators.

The TRIPS Shadow

The TRIPS Agreement broke new ground in many ways. By covering seven types of IP, copyright, patents, trademarks, geographical indications, industrial designs, semiconductor protection and trade secrets, it was the broadest international treaty on IP. It impacted sectors that were critical for people's welfare such as education, agriculture, health, and culture. The copyright obligations affected access to knowledge, which in turn impacted libraries. The TRIPS Agreement not only validated the idea that concessions on IPRs could be exchanged for benefits in other areas of trade, but also created minimum standards for IP protection and enforcement.

TRIPS' legal standards were closer to those of developed countries and as a result, developing countries were required to make significant changes to their IPR legislations (Watal 2001). A transition period was provided to developing and less developed countries. Today TRIPS applies to all 164 WTO members. It is compulsory for Member States to ratify TRIPS upon joining the WTO.

Articles 7 and 8 of TRIPS emphasise the idea that IPR systems should operate in a manner conducive to people's welfare, and that countries may adopt special rules to promote public health and nutrition and check abuse of IPRs, provided such measures are consistent with the rest of TRIPS. But the provisions operate only as a limited check on increasing IP protection for rightsholders. A study by the South Centre, the intergovernmental organisation of developing countries that helps combine their efforts and expertise to promote common interests in the international arena, highlighted that FTAs often end up going beyond the TRIPS requiFrements when protections for rightsholders are expanded (Correa 2017). Since TRIPS, FTAs have either adopted the TRIPS level of protection or exceeded it. The expanded level of protection is referred to as the TRIPS-plus approach. For example, TRIPS requires countries to enact a copyright term of 50 years plus life of the author; however, the Korea-US FTA (KORUS FTA) requires a term of 70 years plus the life of the author, which is equivalent to TRIPS-plus.

Treaties and trade agreements also create a dispute resolution mechanism to provide remedies for violations. FTAs often allow countries the freedom to select a dispute resolution forum to settle disputes, which includes the WTO when the subject of the dispute is covered by TRIPS. For instance, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the RCEP require their adjudicating panels to consider WTO panel jurisprudence to decide disputes. Article 28.11 of the Trans-Pacific Partnership states: "With respect to any obligation of any WTO agreement that has been incorporated into this Agreement, the panel shall also consider relevant interpretations in reports of panels and the WTO Appellate Body adopted by the WTO Dispute Settlement Body".

Further, the TRIPS enforcement mechanism allows states to deploy cross-retaliation against non-compliance of the agreement, which is an enforcement measure unique to the WTO trading system. For example, the WTO Dispute Settlement Body authorised Ecuador's action to suspend IPR protection as a redress against injury caused to it the EU in a banana-imports trade dispute (ICC Commission 2012).

Negotiating Positions and Trends

FTAs have been steadfast in increasing the duration of copyright protection, promoting a narrow interpretation of permissible public interest uses, applying DRM measures to protect content, and maintaining the absence of limitations and exceptions for the digital environment. These approaches hinder the rights and abilities of libraries and their users to access and use information in many ways. The issues and trends are outlined.

Extension of the Copyright Term

The copyright term agreed to in KORUS FTA was 70 years plus the life of the author. Until the US withdrew from the CPTPP agreement, the CPTPP also had the same term. These are TRIPS-plus measures since the TRIPS requirement remains 50 years plus the life of the author.

When copyright terms are extended, maximum benefits go to the country whose IP exports are greater since that country can extract royalties for a longer period. In both KORUS FTA and the CPTPP, the US was the leader in content production, and it is not surprising that the extension of copyright duration was removed when the US exited the FTA, which subsequently became the CPTPP. Another factor to be noted is that the US copyright term is 70 years plus the life of the author. The introduction of this standard in FTAs can be attributed to the intention of the US to bring other countries on board with its own domestic policy, and that the US usually exerts its weight as a powerful country in negotiations. The EU also increased its copyright term to 70 years in 1993.

When copyright terms are extended, it may result in an increase in costs to libraries. A study showed that Indian libraries paid prices equal to or higher than the prices in the US or the UK for the same book, and despite this, most titles available were older editions only (Basheer et al 2012). A term extension hurts

the public domain and can delay digitisation and preservation efforts to conserve works, including orphan works.

Freedom to Enact Limitations and Exceptions

Public interest uses of copyrighted works are essential for creativity and societal welfare. These uses are embodied in the limitations and exceptions parts of copyright law, which are legal provisions that permit certain types of uses without requiring authorisation from copyright holders. Limitations and exceptions systems vary by country; however, they can broadly be divided into general exceptions embracing fair use or fair dealing and specific exceptions or limitations. Determining whether a use is fair use or fair dealing, or is permissible under a specific exception, hinges on the nature of the use and the type of material.

Libraries depend on fair use, fair dealing, and other specific exceptions to a huge extent. These provisions enable preservation or replacement of material; permit private study and research; permit use of copying and printing machines in the library; provide exemption for DRM circumvention; and limit the liability for infringement for good-faith use (Crews 2017). When FTAs deal with limitations and exceptions, these are the many rights at stake. FTAs also typically refer to a legal standard that all limitations and exceptions should meet, and this legal standard determines the latitude of the rights that can be enacted. The Berne three-step test is the dominant legal standard in FTAs.

Berne Three-step Test: An Evolving Constraint

The Berne Convention is one of the most important international copyright law treaties. In 1967, it created a restrictive legal standard for limitations and exceptions that related to the reproduction right, known as the Berne three-step test. The reproduction right is one of the many exclusive rights of the copyright owner that applies to making of copies.

Technically, the three-step test requires that it is mandatory for any limitation or exception to meet certain conditions or steps to permit reproduction "in certain special cases", "provided that such reproduction does not conflict with a normal exploitation of the work" and "does not unreasonably prejudice the legitimate interests of the author" (Article 9.2). However, seventy years later, there is still minimal consensus on how to interpret and apply the three conditions or steps, making the exercise of conforming to the test a confusing affair for countries. Since the test was created in relation to the reproduction right, it constrained the

exceptions that related to making of copies only and did not affect other exceptions. However, subsequently, TRIPS imported the Berne three-step test and applied it to all limitations and exceptions: "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder" (Article 13).

This version of the test in the TRIPS Agreement has been interpreted by an adjudicatory body, the WTO dispute resolution panel, only once, in the context of a US copyright exception that enabled restaurants and small bars to play music without paying licensing fees. Briefly, reacting to an EU complaint, the WTO Panel interpreted "certain special cases" as the requirement for a provision to be clearly defined and be narrow in its scope and reach. The second step: "no conflict with the normal exploitation of the work" was interpreted as the requirement that the provision should not enable actual or potential uses that may enter into economic competition with the ways that rightsholders normally extract economic value and thereby deprive them of significant or tangible commercial gains. And the third step: "do not unreasonably prejudice the legitimate interests of the right holder" was interpreted as a proportionality test that requires the prejudice to rightsholders not to be at an unreasonable level. An unreasonable level is one that "causes or has the potential to cause an unreasonable loss of income to the copyright owner" (Schonwetter 2006). Ultimately, the WTO panel ruled that the US provision did not conform to the three-step test. Critiquing the panel's decision is beyond the scope of this chapter, but it should be noted that the interpretation was met with criticism, and when applied by other courts has resulted in inconsistent outcomes (Sutton 2012).

Insertion of the Three-step Test in Treaties and FTAs

Since TRIPS, the wholesale approach to the application of the three-step test has been adopted by other treaties, for example Article 10 of the WIPO Copyright Treaty (WCT), and FTAs alike. As a result, any discussion on creating a new limitation or exception begins with its potential conformity to the three-step test. Such discussion has constrained the ability of countries to enact limitations and exceptions in their national laws. A group of experts came together in 2008 to formulate a declaration on the three-step test and said that while it functions as a "check on excessive application of limitations and exceptions, there is no complementary mechanism prohibiting an unduly narrow or prohibitive approach" (Hilty 2008, 708; Geiger 2010, 119). Alternative interpretations of the test have been proposed by academics. However, countries today mostly err on the side of

caution while enacting domestic limitations and exceptions, which has led to a narrowing overall of limitations and exceptions.

Digital Rights Management (DRM)

Digital rights management (DRM) or anti-circumvention measures consisting of technological protection measures (TPMs) and rights management information systems found international legal protection for the first time in the WIPO Copyright Treaty (WCT). DRM and TPMs have also been included in FTA negotiations between countries that may not have ratified WCT in the first place (Chaudhari 2013).

Copyright holders use DRM to exercise more control over digital works; and often, such anti-circumvention measures prevent libraries and users from making uses that might be permissible under limitations and exceptions. FTAs often contain a separate set of limitations and exceptions addressing use of anti-circumvention measures, and there is a dominating trend to treat bypassing of anti-circumvention measures in a strict liability fashion. Under strict liability, the intention, or the degree of fault in the bypassing of DRMs and TPMs becomes immaterial, and a person would be held legally responsible for the consequences regardless. Further, the provision is worded in a way that leaves it to the discretion of countries to add safeguards or simply does not permit it. Such provisions are a serious risk and present obstacles to the work of professionals serving the public, such as educators, librarians, and archivists who need to engage in removal of technological protections to perform their duties.

Inching Toward Balance

The notion of balance underpins the theoretical justification for intellectual property rights. A balanced copyright law is one that balances the exclusive rights of rightsholders and the public interest through limitations and exceptions. In the last decade, there have been some steps towards promoting balanced copyright in FTAs. The term balanced copyright was used in connection with fair use in the draft Trans-Pacific Partnership Agreement (TPP) and was carried over to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). The origins can be traced to a 2012 proposal put forward by the US in the middle of TPP negotiations. This was a momentous shift in the US negotiating position (Band 2015).

Soon after, South Korea pushed for similar language in the KORUS FTA. The RCEP also added balanced copyright, with unequivocal support for fair use. The introduction of the new language represents an important escalation in IP negotiations on the point of fair use, and a potentially useful pushback against the expansion of anti-circumvention measures. Recently, groups interested in protecting and promoting fair use rights in international copyright policy also took action and wrote to the US Trade Representative supporting a balanced approach (Program on Information Justice and Intellectual Property 2021).

Enabling Industries to Sue Foreign Governments

Another trend in FTAs has been to protect IP as an investment and to provide remedies to multinational corporations for uncompensated or improper expropriation of property or for unfair or inequitable treatment of foreign investors, enabling corporations to sue host governments. The system is known as investor-state dispute settlement (ISDS), and is increasingly being viewed as a risk to the sovereignty of countries. Australia, Canada and Ukraine have been sued by private corporations in relation to IP disputes, and while Australia and Canada had cases ruled in their favour, Ukraine eventually had to negotiate a private settlement with the US-based Gilead Sciences (Peterson and Williams 2017). Not only can countries be sued for millions of dollars, but the ISDS mechanism also empowers foreign corporations to influence a country's laws in their favour. India, Thailand, Brazil and many other countries have begun to terminate unilaterally several such bilateral investment treaties recently (Dymond, Lim, and Sim 2020).

Politics of FTA Negotiations

While the divide between developed and developing countries was definitive in shaping negotiations and creating conflicts at WTO-TRIPS, developing countries initially were strongly opposed to bringing IP into the trading system. Articles 7 and 8 of TRIPS were the result of this struggle, through which it was made clear that rules should be made in a manner conducive to social and economic welfare. The Doha Declaration on TRIPS and Public Health followed in 2001. Again, led by developing countries, it went a step further and promoted the balanced interpretation and implementation of TRIPS in a manner supportive of the rights of countries to protect public health and promote access to medicines for all. It is based on the consensual understanding that not only are countries entitled to

use TRIPS flexibilities including safeguards against protection and enforcement in ensuring access to affordable medicines in their domestic laws, but they also have a duty to do so (Kilic 2014). Despite the specialist inclusions, most FTAs today incorporate TRIPS-plus provisions on matters of public health.

The realpolitik underlying FTA negotiations is complicated. Countries do not solely assume positions relative to their developmental stages; factors such as domestic and external pressures and local demands often outweigh bloc-based solidarity. Even in an agreement such as the RCEP, which did not involve either the US or EU, interests of advanced countries such as South Korea and Japan jostled with interests of countries such as India and China (Chander and Sunder 2018). And since South Korea and Japan had already bilaterally agreed to strong protection standards with the US, they pushed for similar standards in the RCEP.

A deeper examination of the regional and bilateral FTA game shows that maximum IP royalty gains end up accruing to the EU and the US, who have been described as "accidental beneficiaries" (Chander and Sunder 2018). This is largely due to the application of two principles underpinning the WTO TRIPS system, namely, national treatment and most-favoured-nation:

> Article 3, National Treatment: Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.
>
> Article 4, Most-Favoured-Nation Treatment: Privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

The resulting accidental benefits can be understood by an example: if India and Pakistan who are both WTO members enter into a bilateral FTA, then under the most-favoured nation and national treatment principles, they will be obliged to extend the same protection to other foreign nationals operating in their territories. And since the US and the EU are the largest producers of inventions, cultural goods and knowledge, and own a significant amount of IP in these countries, they stand to benefit the maximum from any increase in protection (Chander and Sunder 2018). Unlike other WTO agreements, TRIPS requires all WTO members to compulsorily apply the principles in respect of intellectual property rights protection and enforcement provisions in FTAs.

Additionally, in the past decade, countries have resorted to conducting FTA negotiations in secret, without publicly sharing meaningful updates on either progress or direction, nor seeking inputs from all stakeholders (Jishnu 2020). However, industry is often privy to the negotiations. It has become challenging for civil society and academics to evaluate the potential impact of the provisions

and alignment with public interest in a timely manner. Such opacity muzzles public opinion and shuts out expertise (IFLA 2016b). The perceived secrecy has further weakened the voices and participation of marginalised stakeholders such as educators, librarians, archivists, students, researchers, and people with disabilities. National and international library organisations are taking action to support transparent international trading systems with joint statements like the Brussels Declaration on Trade and the Internet (IFLA 2016a).

Conclusion

It remains difficult to fully explain countries' positions in FTA negotiations through perspectives such as: developed vs. developing; global north vs. global south; and industry in global north vs. public policy in global south. Countries also try to balance potentially competing factors such as: maximizing domestic social welfare, domestic industry interests, reduction in legislative work to conform to new international rules, and the idiosyncrasies of individual negotiators (Chander and Sunder 2018).

Nonetheless, FTAs led by developed countries frequently influence intellectual property regimes of developing countries in ways that might be at odds with their educational and developmental needs (Yu 2015), turning the clock back on hard-fought battles for recognition and policy space, such as the Doha Declaration on TRIPS and Public Health, the WIPO Development Agenda, and the WIPO Marrakesh Treaty, to highlight a few. The WIPO Development Agenda in 2004 was an important achievement for developing countries and the knowledge community, including library stakeholders. The library community together with associated groups has continued to put forward proposals related to the WIPO Development Agenda, with statements by the International Federation of Library Associations and Institutions (IFLA), the Library Copyright Alliance, and Electronic Information for Libraries (EIFL) session. The 45 recommendations of the Development Agenda require WIPO to facilitate the creation of balanced IP regimes, taking into account the developmental needs of countries. The Marrakesh Treaty of 2013 is another landmark achievement that for the first time instituted a cross-border exception to access and use works for the benefit of people who are blind or visually impaired, and persons with print disabilities.

More recently at WIPO, a strong consensus has slowly emerged that libraries, museums, archives, research and education stakeholders urgently require cross-border limitations and exceptions to enable digital preservation and online uses (Flynn 2021). At the moment it appears that multilateral treaty forums which

are structured as consultative and transparent, and that allow meaningful policy space for development agendas, without the monopoly of developed countries, might be more conducive to addressing the needs of developing countries and communities left behind in FTAs.

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Chris Morrison and Jane Secker

13 Copyright Education and Information Literacy

Abstract: This chapter explores the relationship between copyright education and broader digital and information literacy initiatives. It traces the development of the term copyright literacy and explores the extent to which it has become recognised within the library and information profession and elsewhere. The authors run the website copyrightliteracy.org and share their insights into why copyright literacy matters and how it relates to other aspects of information and digital literacy. They highlight the relevance of copyright as part of digital education initiatives, particularly since the COVID-19 pandemic and rapid shift to online learning, and provide two case studies from their institutions which demonstrate how to approach copyright literacy from both practical and strategic perspectives.

Copyright laws were developed to encourage creation of cultural expressions and socially beneficial information such as scholarly communication. Copyright law attempts to do this by providing authors, artists and creators with exclusive rights that allow them or their representatives to decide how their work is copied and disseminated. However, the copyright space is highly contested with opposing voices from the creative and media industries, author/artist representative bodies, the technology sector and civil society groups taking quite different positions. At times it seems the stakeholder groups are locked in a perpetual battle. The greatest concern about copyright within the library, education and cultural heritage sectors is that it presents a barrier. This chapter therefore explores the value of critical copyright literacy as a way of addressing copyright in contested space and involves an analysis of the cultural, social and economic implications of the copyright system. Library users are likely to be both consumers and creators of copyright works and often draw on the experience of librarians to guide them. The chapter explores the role played by librarians in developing critical approaches, and the tensions encountered where colleagues and library users expect them to provide clear direction on how to access and use information. The final section reviews the practical application of the principles discussed through two case studies: the University of Kent Copyright Literacy Strategy and the City, University of London module in Digital Literacies and Open Practice.

Keywords: Copyright – Study and teaching; Information literacy; Digital literacy

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Introduction

This chapter traces the development of the term copyright literacy, explores the extent to which the concept has become recognised internationally (IFLA 2018; Secker, Morrison, and Nilsson 2019) and examines the relationship between copyright education and broader digital and information literacy initiatives. The authors run the website copyrightliteracy.org and have undertaken research and led a variety of projects and initiatives in the copyright education field (Morrison and Secker 2015; 2017). The chapter makes the case for copyright literacy as a useful concept in supporting copyright law's aim of stimulating creativity and enabling cultural participation across diverse communities. Theoretical and practical aspects of information and digital literacy are presented and emphasise that copyright is a fundamental yet relatively under-developed element of existing information and digital literacy programmes. Critical approaches to information and digital literacy are considered along with the impact of copyright on the role of librarians and the potential for copyright literacy to develop greater engagement with the challenges of copyright in a digital society. The relevance of critical copyright literacy is explored in relation to the shift to online education following the COVID-19 pandemic. Finally, two case studies demonstrate how to approach copyright literacy from both practical and strategic perspectives.

Copyright Education and Copyright Literacy

Copyright education is written about in subjects such as law, librarianship, media, communication and cultural studies. A search of the term "copyright education" undertaken in the City, University of London Library catalogue in May 2022 retrieved 597 citations in the published literature. A brief analysis of the literature found that it included:

- Studies of how to teach copyright in formal education settings to specific groups including school students, undergraduates, academic staff, researchers as well as to those training to be librarians or work in the cultural heritage sector, and
- Research into the value of using specific tools, technologies or approaches to teach about copyright in new or engaging ways.

Meanwhile the creative industries tend to use the term copyright education on their websites and in publications to describe both training to inform creators about how to protect and monetise their work, and public relations campaigns

designed to influence consumer behaviour, for example, Get it Right from a Genuine Site.

Governments and national agencies responsible for intellectual property (IP) also use the term copyright education, but their focus tends to be on increasing public awareness of copyright and intellectual property to support economic growth. For example, in Europe a study was commissioned on copyright and intellectual property education in school curricula primarily to tackle a perception that piracy and infringement were growing (EU. Office for Harmonization in the Internal Market 2015). Similarly in the UK, a government report was undertaken primarily to help launch a public copyright education awareness campaign aimed at "winning the 'hearts and minds' of consumers about the importance of protecting IP" (Weatherley 2014, 7). Hobbs suggests in an analysis of US copyright education campaigns that the key purpose of copyright education is to support the growth of and respect for the creative industries (2010).

The phrase "copyright literacy" is used less frequently, with 117 items found in a literature search using the City, University of London Library catalogue. It is primarily used by authors in the field of library and information science (LIS) and most studies have explored copyright literacy in relation to LIS professionals. McDermott used the term in 2012, although not extensively, and provided no definition (McDermott 2012). The term was used systematically in research undertaken in 2013 involving a survey into levels of copyright literacy amongst librarians and professionals in the cultural heritage sector in Bulgaria, Turkey, France and Croatia. The findings were presented at an information literacy conference (Todorova et al. 2014). Devising a common survey tool meant that comparisons could be made around the world to see how countries differed in terms of levels of copyright literacy. In 2017 a further comparison of copyright literacy levels of librarians in thirteen countries was published (Todorova et al. 2017).

Secker and Morrison provided a definition of the term copyright literacy, defining it as "Acquiring and demonstrating the appropriate knowledge, skills and behaviours to enable the ethical creation and use of copyright material" (2016, 211). The motivation for creating the definition was to move beyond the largely quantitative findings of the research and understand more about the ways that copyright was experienced by information professionals. Subsequently Morrison and Secker undertook further research and published findings from a phenomenographic study of librarians which identified a number of variations in experience (2017).

In 2017, the International Federation of Library Associations and Institutions (IFLA) held a one-day meeting to explore the relationship between copyright education and information literacy. It took place as part of the World Library and Information Congress (WLIC) in Wroclaw, Poland, and librarians and edu-

cators from around the world came together to share their practices. It also led to the publication of a special issue of the *Journal of Copyright in Education and Librarianship*, featuring papers from the conference in 2019 (Journal of Copyright in Education and Librarianship 2019). The WLIC event was an opportunity to share research findings from the multinational survey, present case studies of good practice from around the world, and discuss common concerns. Hinchliffe explains how more than fourteen countries attended and discussed issues including "pedagogy, instructional design, learning theory, author rights, copyright limitations and exceptions, applications of the law nationally, international copyright, open access, and education for library and information science practitioners" (2019, 1).

In August 2018, IFLA launched a formal statement on copyright education and copyright literacy (IFLA 2018) and defined copyright literacy as having "sufficient copyright knowledge to be able to take well informed decisions on how to use copyrighted materials". The statement included recommendations to governments, libraries, library associations and library educators. In early 2020 IFLA launched a survey of international library associations to collect data about copyright education around the world: findings are yet to be published. Importantly, the IFLA statement formally recognises not only the need for librarians to understand copyright, but also their role as copyright educators.

The term copyright literacy has continued to be used at conferences and events, including the European Conference of Information Literacy (ECIL), LILAC: The Information Literacy Conference in the UK, and the Canadian ABC Copyright Conference. In 2018, an international conference, the International Copyright Literacy Event with Playful Opportunities for Practitioners and Scholars (Icepops) was founded.[1] Meanwhile Secker (2020) has presented findings from research, noting copyright literacy is largely lacking amongst academic staff, and the University of Kent has published a Copyright Literacy Strategy (Morrison 2019; University of Kent 2020). Both initiatives are discussed in more detail in the case studies later in this chapter. Copyrightliteracy.org has continued to encourage copyright educators to share their work and resources on its website which hosts several copyright education resources such as the openly licensed games, Copyright the Card Game and the Publishing Trap.

1 Icepops has been held three times since 2018 attracting copyright educators from around the world, and from both within and outside the library community. Further details including the conference papers are available on the Icepops website: https://copyrightliteracy.org/upcoming-events/icepops-international-copyright-literacy-event-with-playful-opportunities-for-practitioners-and-scholars/.

Why Copyright Literacy Matters

An understanding of copyright has become increasingly relevant to society more generally because of the development and widespread adoption of networked digital technologies. Copyright protects original creative works regardless of their literary or artistic merit, without the need for formal registration. The omission of formal registration of copyright works for protection to subsist was a key component of the Berne Convention of 1886, the world's first international copyright treaty. Prior to the digital revolution, the informal approach provided a practical solution which gave professional authors and creators protection for their works without the need for engaging with costly administrative processes. However the widespread use of the Internet has led to an explosion in consumption and creation of new content, nearly all of which is automatically protected by copyright. As a result, the reasonable expectations of the public to access and share content across networks are often at odds with the way that copyright laws are drafted according to a pre-Internet 20th century paradigm.

The broader implications of the ways that copyright has developed are covered elsewhere in this book which explores the foundations and fundamentals of modern copyright. In addition, the book discusses in depth the limitations and exceptions which are a fundamental part of providing the balance required for copyright law to serve its function. This chapter focuses on aspects of copyright law which have a particularly important bearing on how copyright is experienced by the people that it affects.

The first is that copyright is a highly contested space with key stakeholders often taking extremely divergent positions on how copyright should work. Copyright wars are often characterised as battles between the those with an investment in the status quo and those who find advantage in establishing a new paradigm. Although there are many different perspectives, the protagonists with the loudest voices, and not coincidentally the biggest financial stakes in the clashes, are the creators of digital platforms, such as Google, Amazon and Facebook, and the more traditional legacy publishing and media companies. Legacy publishers typically claim they are the true representatives of authors' interests, maintaining the value of copyright works and providing meaningful remuneration to creators and producers. The digital platforms emphasise the democratisation of creative expression that their services provide, where anyone with an Internet connection can participate in cultural life and share work with others.

Developments in global copyright law in the 20th century largely reflected the interests of legacy media organisations in creating "longer and longer terms of protection, against more and more kinds of unauthorized uses, to more and more different kinds of so-called 'works'" (Woodmansee and Jaszi 1995, 773). However,

despite strong laws, the new technology companies have thrived due to the significant consumer demand for their services and the speed at which technological innovation has outpaced law making. As Baldwin describes, the 1998 *Digital Millennium Copyright Act* (DMCA) in the US provided strong protections for copyright works and prohibited circumvention of technological protections. However, the "safe-harbor exemption allowed even infringing content to be posted online until its owners protested. This opened a large loophole in rightsholders' hopes of controlling works on the web" (Baldwin 2014, 287). The most recent major reform to copyright law is the EU Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter DSM Directive) which at the time of writing is being enacted into the laws of the Member States of the European Union (EU). The DSM Directive includes provisions that require online platforms to ensure infringing content is not added to their platforms. It remains to be seen whether this latest set of legal reforms most benefits legacy media organisations or digital platform providers. However, although these groups have the largest financial stake, civil society organisations such as Communia and the Electronic Frontier Foundation have highlighted the need for copyright to provide people with greater freedoms to share culture.

The next consideration is that justifications for copyright often focus on the interests of the author. However, as Bently (2008) identified, although the concept of the romantic author has long influenced the copyright debate, it is no longer relevant to many domains of creative activity. For example, contemporary cultural works such as TV programmes, feature films and computer games are team efforts reflecting the creative input of large numbers of professionals such as illustrators, animators, coders, cinematographers, make-up artists and set designers. And even for areas where the romantic author ideal is relevant, it is clear that the current copyright framework often does not work in their interests. As stated in the recent posting on *Author's Interest* by Giblin on the *Untapped* study in Australia, contractual arrangements in the publishing industry provide authors with sufficient remuneration in only a minority of cases (Giblin 2020).

However, even if one accepts the concept of the author as a helpful proxy for ensuring that value derived from consumption finds its way back to the originators of creative works, the reality of today's networked environment is that the concepts of author and consumer, or creator and user, have become less distinct. It has been said that digital has led us all to become prosumers, producers/consumers. The prosumer phenomenon can be seen in the rise of remix culture where existing works are constantly sampled, reinterpreted and reinvented in a seemingly infinite number of ways. The new remix cultural expression encompasses everything from high art and political commentary through to the inane

and the obscene and everything in between. There is of course nothing new in this type of activity. Cultural and artistic practices have always involved engaging with existing works and reinterpreting them. However, the paradigm shift of the Internet age means that works are made available to others at a speed and scale unimaginable before the dawn of the 21st century.

The implications of the shift to networked forms of creativity have wider societal relevance than the types of activity associated with remix culture. Open science and open scholarship recognise that the only way to address the current scientific, political and social challenges is to leverage the power of digital technology to share information and collaborate across geographical and temporal boundaries. For example, scientists working on climate change and global health crises are consuming and creating vast quantities of information, but are hampered in their efforts by an environment in which access to information is restricted. And copyright does not just present a challenge for the hard sciences. Scholars in the arts, humanities and social sciences find that licensing practices, underpinned by copyright law, can present barriers when access to archival material is restricted by institutions and individuals charging fees for reproduction rights. These barriers are particularly problematic in light of decreasing funding for research. Despite the developments in open access publishing, the scholarly communication system is still heavily dominated by a powerful publishing industry which protects its interests using a copyright framework that rewards enforced scarcity. In summary, copyright's purpose as framed in the US Constitution to "promote the progress of science and useful arts" is being compromised by legacy practices that are more aligned with the pre-Internet world.

The final key challenge for copyright in the digital age is that it has a markedly increased bearing on anyone engaging with information in any form, regardless of role, highlighting the importance of both the public interest in copyright and the extent to which the general public are aware of how copyright works. Although the concept of the public interest has been described as "vacuous, deceptive and generally useless" (Held 1970, 1) legal commentators have noted that it is still a valuable term primarily perhaps because there does not appear to be any useful alternative. How can laws be formulated except in the public interest? For example, Giblin and Weatherall (2017) discuss the relevance of the public interest in thinking about how copyright laws could be reimagined. However, they warn against its use in a way that is synonymous with the interests of users or consumers, such that the public interest appears to be in opposition to the interests of authors and copyright owners. Giblin and Weatherall also clarify that the public interest should not be conflated with the concept of the general public. Rather, public interest is a concept that aggregates the needs of all in society so that one group's interests do not dominate another's.

It is important that there is public engagement with copyright law to inform people's choices about both creation and consumption of copyright works, and thereby ensure an effective democratic process when new laws are made. Edwards and Moss (2020) have recently explored the lack of the public voice in government consultations on copyright law and have identified interventions that could enable more meaningful engagement from underrepresented groups. They also discovered through empirical research with members of the public that, despite what many might assume, people are not motivated only by self-interest. Instead they understand the balance required between restriction and dissemination of cultural goods. In fact, when presented with clear information about copyright law, the public actively engages with the nuanced arguments and considerations that have occupied legal scholars for decades.

However, even though there is potential for the general public to engage with copyright, for the most part awareness is low. Despite copyright and licensing now governing significantly interactions with media content, few people read let alone comprehend, the licensing agreements that shape interactions with digital technologies on e-readers, smart phones and other digital devices. Arguably the lack of knowledge of agreements is unproblematic. Copying and sharing content haver long taken place according to community-based norms that operate in the shadow of the law. However, as Craig and Tarantino (2020) have argued, cultural participation increasingly takes place in a privately ordered digital system that operates according to its own rules, not according to the balance struck by the statutes. For example, copyright infringements on YouTube are dealt with by a notice and take down process which allows users little opportunity to object if the content they post is claimed by a rightsholder. One of the key challenges to copyright in a digital environment is the extent to which people are able to make use of copyright exceptions, that is the fundamentally important legal uses of copyright works without the permission of the copyright owner.

Having established that the public interest is central to a well-functioning copyright system, and having highlighted the importance of public awareness, it is worth considering the concept of the public domain. Those unfamiliar with copyright are often unaware of the specific meaning of public domain in the context of copyright law, assuming that it refers to any content that has been published or presented for public consumption. Its generally accepted meaning in copyright circles is a work to which no exclusive intellectual property rights apply because they have expired or been expressly waived by the rightsholder. However, Deazley (2006) argued that the public domain is poorly understood even by legal commentators. His analysis identifies the difference between the perceived public domain, which tends to focus on expired copyright works, and the much broader true public domain which incorporates many different ele-

ments of the intellectual commons that allow society to function. The elements include ideas, insubstantial parts of copyright works, public interest defences and exceptions to copyright. Deazley warns that the public domain is constantly under attack from those who seek to take advantage of the system by enclosing the commons to the detriment of society.

Clearly there are many challenges to a well-functioning copyright system, and given that this chapter is part of a book aimed at the information profession, now seems a good time to reflect on the role that libraries and librarians play in addressing copyright issues. Firstly, as discussed elsewhere, libraries rely extensively on copyright exceptions to undertake their missions. As a result organisations such as IFLA, LIBER, the European Bureau of Library, Information and Documentation Associations (EBLIDA), and Electronic Information for Libraries (EIFL) advocate nationally and internationally on behalf of libraries and their users to ensure that copyright does not become a barrier to learning, research and cultural participation. In addition, libraries must operationalise the provisions in national and international copyright law to take full advantage of hard-won legal provisions. Finally, librarians are responsible for communicating clearly with their users about how copyright law impacts on what they want to do.

The Role of Libraries, Librarians, and Copyright Specialists in the Information Profession

Copyright law and the licensing of copyright works underpin many services that libraries offer in the digital age. Many aspects of librarianship require a good understanding of copyright, including knowledge about digitising collections, tracing rights, identifying orphan works, supporting online learning and providing guidance on open access and open education. International research has found over 90% of librarians believed that copyright should form a vital part of their education and continuing professional development (Todorova et al. 2017). Around the world there has been a growing demand for copyright training for information professionals. Dr Kenneth Crews spearheaded work in the US when he established the first university-based copyright office at Indiana University in 1994. Innovative training programmes for librarians exist, such as the Copyright First Responders created by Kyle K. Courtney at Harvard University Library. Copyright is a popular topic for library conferences. For example in the UK, the CILIP Copyright Conference regularly attracts over 200 delegates. Canada's ABC Conference is similarly popular. In 2018 a report emanating from Columbia Uni-

versity Libraries in the US examined current practice in copyright education and provides a list of current and past education offerings (Kelly 2018, Appendix E).

Despite numerous professional development opportunities, the Columbia University Libraries report (Kelly 2018, 5) concluded copyright education for librarians and the wider cultural heritage sector in the USA was "ad hoc .... sporadic, inconsistent, unreliable, sometimes conflicting". In short, the study concluded copyright education needed to be improved. Todorova et al. (2017) found levels of confidence in copyright literacy amongst the wider library profession were relatively low in non-English speaking countries. In developing countries, much work on copyright education for librarians has been led by EIFL, who build the capacity of librarians in copyright, provide resources and advocate for both international and national copyright reform through specialist programmes.

One way of dealing with copyright in better-resourced countries and institutions has been the creation of roles for copyright specialists in libraries. Designated individuals have the time to develop their knowledge and focus on building copyright literacy within their communities. For example, in the UK, 64% of all libraries surveyed had a dedicated copyright officer and the figure was up to 74% in universities (Morrison and Secker 2015, 88). In comparison, only 7% of libraries in Bulgaria employed a copyright specialist (Todorova et al. 2017, 334). Hudson's longitudinal study of copyright in cultural organisations in Australia, the UK, Canada and the USA suggests knowledge of copyright has improved over time in these countries. She observed development of a less risk-averse mindset in relation to copyright and attributed it to greater resources being dedicated to copyright (Hudson 2020a, 292–3). In a study of copyright specialists in UK educational and cultural institutions, the most common activities undertaken by the specialists were found to be: providing advice and support to staff, students and visitors; producing written guidance; obtaining copyright permission; and delivering workshops and training for staff and students (Hatch, Morrison, and Secker 2017, 6).

Providing copyright support to others remains challenging to librarians for several reasons. The Columbia University Libraries study (Kelly 2018) noted: a lack of courses in copyright within LIS programmes; many copyright courses were pitched at a basic level; there was no requirement for continuing professional development; and tension was caused by librarians being viewed as enforcers of copyright rather than educators. Morrison and Secker observed in their study that librarians with responsibility for copyright rarely command the seniority in their organisations required to effectively influence policy changes or to take risks based on a more forward leaning interpretation of copyright exceptions (2017). Their research revealed that many librarians experience copyright as a problem and something they want to avoid. Additionally, outside the larger US

universities, librarians are unlikely to be qualified to give legal advice. All these factors can lead to overly risk-averse attitudes and problems when librarians are required to provide guidance to users on how to interpret copyright exceptions and the concepts of fair dealing and fair use. In the US, the Libraries, Archives and Museums (LAM) sector is attempting to improve copyright education through the creation of a Virtual Copyright Education Center for professionals working in LAM. Five courses have been developed since its launch in 2020, including a basic course which has been made freely available. However, elsewhere in the world copyright education challenges remain.

One possible solution is for more librarians to receive formal legal training. However, it is important to distinguish between the role of legal counsel, who are qualified to provide general legal advice, and that of the information professional. Copyright specialists may be better served by thinking about their roles, not just as legal experts, but also as educators in the wider context of information and digital literacy who put a greater focus on empowering library users to make their own decisions, moving librarians away from a primarily compliance-based approach to copyright. The next section provides an overview of information, digital and media literacies and considers the extent to which they currently address copyright.

Information, Digital and Media Literacies

Information, digital and media literacies are important and inter-related concepts relevant to copyright. Common across the literacies is that they are cultural and communicative practices; they are not just knowledge but also contextual practices comprising skills, behaviours and values. A brief overview of each field is provided together with how copyright is currently addressed within each.

Information Literacy and Copyright

The concept of information literacy, dates back well over 40 years and librarians both in formal and informal educational settings have an important role to play in developing the information skills of the communities they serve. Many librarians offer a variety of training, formal education and support to their user communities. The United Nations Educational Scientific and Cultural Organization (UNESCO) in the Alexandria Proclamation on Information Literacy in 2005 recognised the need for information literacy stating that it:

> ...empowers people in all walks of life to seek, evaluate, use and create information effectively to achieve their personal, social, occupational and educational goals. ... It is a basic human right in a digital world and promotes social inclusion in all nations (Garner 2006, 3)

There are numerous frameworks of information literacy, many developed by library associations around the world. In the US, the Association of College and Research Libraries (ACRL) created standards and more recently a framework of information literacy that informs the teaching of librarians in the US and around the world (ACRL 2015). In 2018 CILIP, the UK's professional library association, defined information literacy as:

> the ability to think critically and make balanced judgements about any information we find and use. It empowers us as citizens to develop informed views and to engage fully with society (CILIP 2018, 3)

Increasingly, as with other literacies, many librarians see information literacy as a process that is contextual and constantly evolving, rather than a competency framework. There are consequent implications for how literacies are taught, to whom and at what point in formal and informal education. In general, many librarians work with teachers and other educators to embed information literacy into the curriculum. But the reality is that there are still many sessions delivered in schools and universities as standalone library classes.

In the last fifteen years, starting in the US, there has been a growing interest in critical approaches to information literacy. Drawing on critical literacy theory, the approach seeks to highlight power structures and address issues of social justice and reflects the changing role of librarians from service providers to active educators (Elmborg 2006, 192). Tewell defined critical information literacy as "an approach to education in library settings that strives to recognize education's potential for social change and empower learners to identify and act upon oppressive power structures" (2018,11). Of the five topics that Tewell identified as being taught in critical information literacy approaches, understanding "academic conventions and access"(ibid., 15), which links to the ACRL frame "information has value", lends itself most closely to teaching about copyright. Tewell's research did not identify copyright as a particular focus for librarians teaching critical information literacy. Similarly a monograph on critical literacy for information professionals (McNicol 2016) contains numerous case studies but the subject of copyright is largely absent. While there are many global issues related to social justice and inequalities which warrant consideration, the role that copyright and licensing plays in governing access to information is an area that remains somewhat overlooked by those teaching critical information literacy.

Most information literacy frameworks address the ethical use of information and align understanding copyright with referencing, citation and avoiding plagiarism. As already noted, ACRL places understanding copyright under the frame of "Information has value" and states that learners should be able to "articulate the purpose and distinguishing characteristics of copyright, fair use, open access, and the public domain" (ACRL 2015). Meanwhile CILIP (2018) maintains that information literacy "...means working ethically, understanding the implications of data protection, intellectual property rights, such as copyright".

Copyright is sometimes discussed as part of wider intellectual property issues, such as applying for patents or trademarks. Librarians teaching intellectual property and copyright tend to draw on the more functional side of information literacy teaching, seeing it as a set of rules to be followed, rather than a regime to be critiqued. It is fair to say that copyright currently plays a small part in most information literacy frameworks, which consequently means few librarians teach dedicated sessions on copyright, although change is beginning amongst academic librarians in the field of scholarly communications. Copyright issues are referred to in the context of open access. Academics and researchers need to understand publishing contracts, licensing schemes such as Creative Commons and different routes to open access. More recently, developments in Europe from the major funders with guidelines on access to scholarly content such as Plan S mean that understanding copyright will become more important for researchers publishing the results of funded work.

Digital Literacy

Digital literacy was a term first used by Gilster (1997), who stressed it was not a new term for computer literacy but a cognitive act. While the term is now in common usage, it has a variety of meanings. Reedy and Parker explain how digital literacy "ranges from basic access to sophisticated 'maker' skills" (2018, xxi) and that it is underpinned by critical thinking about online information, tools and people. In the UK in universities the Jisc framework is widely cited, although it built on earlier work on what were first called "learning literacies" by Beetham, McGill, and Littlejohn (2009). Jisc undertook various projects related to digital literacy and digital capability, defining digital capability as "the capabilities which fit someone for living, learning and working in a digital society" (Killen, Beetham, and Knight). Jisc uses the term digital capability to describe the skills and attitudes that individuals and organisations need if they are to thrive in today's world. The framework is significant in the UK as it has been adapted and rolled

out by Health Education England (HEE), who provide education and continuing professional development to all UK health practitioners (UK.NHS 2018, 2).

The six elements of digital capabilities according to Jisc include "information, data and media literacies" and it is here that copyright sits. On closer examination the framework presents copyright as a series of rules that need to be followed. For example, the role profile developed for a university lecturer includes: "Know the rules of copyright and plagiarism and alternatives such as creative commons licensing; use appropriate referencing for digital materials and support learners to do the same" (Jisc 2018, 2). The HEE framework similarly presents a functional view of copyright, stating as part of the domain covering "Information, Data and Content" that health care practitioners will have "the ability to understand and adhere to digital copyright, intellectual property and privacy rules and regulations" (UK. NHS 2018, 7).

In other models of digital literacy there is a greater emphasis on the critical rather than functional role. For example, Hinrichsen and Coombs (2013) proposed five resources of critical digital literacy. Although they do not reference copyright specifically, two aspects of their framework, using and analysing, discuss the legal and ethical components of digital literacy. Meanwhile the Open University's Digital and Information Literacy framework suggests that copyright is a fundamental part of understanding how to manage and communicate information that all learners need. The Manage, Create and Communicate Information section from level 0 through to Master's level refers to copyright under the heading of Academic Integrity and Ethical Use of Information (Open University n.d.). Reedy and Parker's practitioner guide to digital literacy includes a chapter specifically addressing copyright and digital literacy (2018). It states how copyright, rather than being a "separate concept that can be considered in isolation… is woven through all the key aspects of digital literacies and capabilities" (Morrison 2018a, 97).

Media Literacy

Media literacy is a contested term, subject to differing interpretations and debate amongst media educators. The communications regulator in the UK defines media literacy as "the ability to use, understand and create media and communications in a variety of contexts" (UK Ofcom n.d.). However, media literacy is an important component of media and communication studies with a wide body of academic literature that is beyond the scope of this chapter. One of the key scholars in the field, Renee Hobbs, from the Media Education Lab at the University of Rhode Island, has written widely about the relationship of media literacy

and copyright. Her book *Copyright Clarity: How Fair Use Supports Digital Learning* (Hobbs 2010) focused on "dispelling copyright confusion" which she attributes to anti-piracy campaigns from the creative industries that led many teachers and students to avoid using copyright works in education. She worked with two legal scholars Aufderheide and Jaszi, to create the *Code of Best Practices in Fair Use for Media Literacy* in 2007, which sought to strengthen public understanding of copyright and fair use. Rather than presenting teachers with copyright rules, Hobbs suggested asking three questions to help educators determine if their use is fair: whether the use of copyright material transforms the material; if the material taken is appropriate in kind and amount; and if the use is likely to cause economic harm to the copyright owner. She likens media literacy to a critical process of inquiry (*Code of Best Practices in Fair Use for Media Literacy* n.d.). This code of fair use was one of the first to be drawn up by the education community in the US and over fifteen others now exist to support other communities in their interpretation of copyright law (American University. CMSI n.d.).

This brief analysis indicates that understanding copyright can be framed as a fundamental part of the growing number of literacies that everyone needs in today's digital environment. Jacobson and Mackey (2011) call the multiple literacies "metaliteracy" which is one attempt to reconcile the troublesome and competing terminology. The way copyright is addressed in each of the different types of literacy is different. Digital literacy tends towards the functional approach to copyright, often related to online learning. Meanwhile information literacy focuses not only on how publishing and knowledge creation works, but also on how to use, re-use and share content. Most of the work that focuses on the critical aspects of copyright sits within media literacy where students and teachers often use and adapt copyright works and to do this ethically and legally they need a wider understanding of copyright. Consequently copyright education remains a small and specialist part of wider literacy teaching.

Copyright Education, Information Literacy and Criticality

This section explores the opportunities to build on the relationship between copyright education and other literacies, and specifically how to incorporate critical approaches to copyright into information and digital literacy programmes. There are several considerations when incorporating discussions about copyright into information or digital literacy contexts.

The first challenge is the extent to which information literacy practitioners have sufficient understanding of copyright law. Much work has been done to build capacity in the library sector, but many librarians still lack confidence. What exactly is expected of the information professional who engages with copyright education? There is a conflicting range of roles for someone supporting others with copyright: legal adviser, gatekeeper, service provider or critical friend. A key challenge when teaching others about copyright is that because it is a body of law, people have a tendency to conflate concepts of lawful and unlawful with concepts of right and wrong. Many learners are on an ethical back foot with a perceived lack of knowledge compounded by a sense that they are doing something wrong. Simple binary concepts are not useful when navigating the nuanced and complex world of copyright in the digital environment.

It is helpful to refocus the discussion on literacies as cultural and communicative practices which are situated in specific information landscapes (Lloyd 2010). It is tempting to focus on the knowledge element of a literacy, rather than viewing it as a social practice in which community members must negotiate which information and activities have meaning. As Tuominin, Savolainen, and Talja describe, a literacy means "being able to enact in practice the rules of argumentation and reasoning that an affinity group in a specific knowledge domain considers good or eloquent" (2005, 337). The behaviours relating to copyright that are accepted by a community must be more than lawful; they must also be accepted by members of that community as meaningful. Discussions about copyright must not only be based on an accurate representation of the law, but also empower people and provide opportunities for critical reflection within a specific domain of activity.

For the reasons outlined, the concept of critical copyright literacy might be helpful. It was first proposed by Morrison and Secker following research into librarians' experiences of copyright. They argue:

> Critical approaches mean acknowledging the contradictions and tensions that exist (for example the growing use of sites such as Sci-Hub in academia) but also raising awareness of the flaws in copyright law, and potentially being a champion for copyright reform and social justice (Morrison and Secker 2017, 365).

The critical approach can be applied in any field of activity where copyright has a significant bearing on community activity. As previously discussed, it is already a part of some media literacy programmes and highly relevant to learners and practitioners in artistic and creative fields where community codes of practice have been developed (Aufderheide and Jaszi 2018). However, to realise the potential of librarians' responsibility for both copyright and providing information literacy sessions, a more critical approach to the copyright education of librarians is

needed as a priority. Educating librarians would acknowledge and address the tensions and complexities of copyright law, and empower them to support their communities. However, teaching in this way is often not a comfortable space and may be particularly challenging for librarians who sometimes struggle to view themselves as educators (Wheeler and McKinney 2015). Even in the US, where copyright education is well developed for librarians, research points to confusion and anxiety in the sector, because of a lack of reliable and dependable information on copyright (Kelly 2018, 14). In critical copyright literacy, educators need to become comfortable with uncertainty and recognise they need to draw on authoritative information, which rarely provides people with a set of hard and fast rules. Instead, through teaching communities to think critically about copyright, educators can empower others to make their own decisions.

To provide a solid grounding in copyright, Secker, Morrison, and Nilsson proposed a critical copyright literacy framework covering five key areas:

1. The history and philosophy of copyright including the underlying ideologies and narratives about why copyright exists and what its future purpose is
2. Boundaries and balance, which covers the subject matter of copyright, subsistence of protection, exclusive rights, exceptions, and the concept of the public domain, and considers how balance is achieved in the system as well as the power relationships that exist between various groups
3. Licensing, including the permissions models available to creators and users of copyright material as well as the practices that grow up around them, and open licences
4. Communication and sharing, which focuses on what individuals and organisations want to communicate and how they do it, including from the individual's perspective, making an ethical and meaningful contribution to online communities in a way that respects and encourages creativity
5. Consequences and risk, which covers the actions individuals and organisations might take to avoid unwanted consequences of copyright infringement claims and involves understanding the opportunities and risks associated with copyright (Secker, Morrison, and Nilsson 2019).

Although the framework was initially developed as a curriculum for a standalone course for librarians, relevant topics can be embedded in any educational intervention. In fact, embedding copyright in context is a key step in promoting a critical approach to copyright literacy given that many learners may not perceive standalone copyright courses as relevant. The development of a critical copyright literacy framework might provide information and digital literacy practitioners with a tool to expose power structures and help learners identify inequalities in the copyright regime. However, the framework also needs to include appropriate guidance on possible teaching methods, drawing on dialogic approaches used in critical pedagogies.

It is important to acknowledge that copyright is a technical area of law and that a balance needs to be struck between the level of legal detail provided and enabling meaningful critical reflection. It is important for copyright specialists to work with their information literacy colleagues to develop critical approaches to copyright sessions that reflect good practice in information literacy teaching and an accurate representation of the law. There are signs this is starting to happen amongst copyright educators in academic libraries, who recognise their work sits at the intersection of both scholarly communication and information literacy. Recent examples can be found in Benson's (2019) monograph which has chapters and case studies from across higher education exploring how to have copyright conversations with different audiences. Meanwhile Pyman and Sundsbø (2021) provide a case study on teaching copyright in an engaging session aimed at early career researchers. More examples of how to teach critical copyright literacy are being collected to support the development of the framework.

It is worth acknowledging that the discussion so far has largely considered information literacy programmes within universities. However, as previously stated, copyright impacts on the lives of many different communities regardless of whether they are in formal education settings or not. Unfortunately, as Edwards and Moss (2020) highlight, opportunities to engage critically with copyright are limited for many in society. In addition, many public education campaigns on copyright generally reflect the interests of the creative industries who exert significant power over public policy (Hobbs 2010). Arguably, a greater investment on resources that support a broader and more critical approach to copyright literacy such as copyrightuser.org, an independent online resource aimed at making UK copyright law accessible to creators, media professionals, entrepreneurs, students, and members of the public, would enable a better law-making process. Some in the field of media policy have reservations regarding the use of the term literacy. Klein, Moss, and Edwards (2015) see a focus on literacies as problematic from a democratic perspective if individuals are expected to make choices about acceptable behaviour as an alternative to having an inclusive policymaking process.

Broader questions about public perceptions of copyright, how laws are formulated and whose interests they serve are highly relevant to the information profession. The critical approaches being developed within the education and library sectors may also provide a template for wider public engagement with copyright. However, it is important to acknowledge the scale of the challenge, and focus finite resources on the areas which provide the greatest benefit.

The next section focuses on activity in the UK higher education sector in response to the COVID-19 pandemic and is followed by two case studies from UK universities which demonstrate critical approaches to copyright literacy. The authors acknowledge the importance of not just seeing these challenges from a

higher education perspective. However, the university sector is fertile ground for combining academic subject knowledge and pedagogic innovation with communities of learners to whom copyright is directly relevant.

Copyright Literacy and Online Learning

This section is a reflective account based on the authors' experiences of providing copyright support to the UK higher education community since the outbreak of the COVID-19 pandemic in March 2020. It considers the challenges faced by copyright specialists in UK universities and how the pandemic has led the academic community to become more critical about copyright. It also highlights how the value of copyright literacy is being recognised beyond the library community, to support online learning.

The past twenty years have seen a growth in the use of learning technologies in education and training with virtual learning environments (VLEs) used to support learning, teaching and assessment. Technology allows teachers to create and share content, communicate with their students, develop interactive learning packages, manage assessment and provide student feedback. Until March 2020 most UK universities were using learning technologies as a supplement to their face-to -face teaching. In the first few months the shift to online learning, referred to as the digital pivot, was an attempt to allow students to progress with their studies without access to physical locations on campus. Libraries responded by trying to increase the number of digital resources available to support students studying remotely. Additionally, many publishers temporarily made additional resources available for free (Publishers' Association. n.d.). As the situation continued into 2021, more sustained efforts were needed to plan for and deliver high quality online teaching. As budgets across education became stretched, educators and librarians urgently considered the balance between maintaining access to existing collections and finding more sustainable solutions. Shifting teaching online raises many technical and pedagogical challenges for institutions. Copyright became one area of concern which was reflected in the number of blog posts and articles published on the subject around the world. For example, in the US came the "Public Statement of Library Copyright Specialists: Fair Use & Emergency Remote Teaching & Research" created by US colleges and universities and in Ireland Eoin O'Dell produced "Coronavirus and Copyright – or, the Copyright Concerns of the Widespread Move to Online Instruction – Updated" (O'Dell. 2020).

Online learning gives rise to copyright challenges because teachers often need to upload and share copyright-protected content and resources with stu-

dents. Copyright tended to be viewed as a barrier to teaching online, which led staff to avoid it (Secker and Morrison 2016, xvi). At specialist online education institutions, resources are often devoted to clearing copyright and devising policies and procedures to manage the risks. The pandemic therefore left many institutions grappling with how to deal with copyright for the first time. Experience has suggested copyright rarely features in teacher training or staff development programmes although copyright support in universities is more developed. In UK universities copyright is traditionally regarded as a compliance issue. The pandemic provided an opportunity to deal with copyright more holistically and perhaps more critically by engaging people across education.

Prior to the pandemic, a key practitioner textbook (Secker and Morrison 2016) considered how UK copyright exceptions and licences could facilitate access to copyright protected content. Despite amendments made to UK copyright law in 2014 designed to make it "fit for the digital age" (UK 2014), many UK universities adopted a risk-averse approach. As a result many did not feel confident in relying on exceptions to share content on digital networks (Secker and Morrison 2016, 52). Morrison (2018b) explored the interpretation of the copyright exception "illustration for instruction" in UK universities and concluded that there was inconsistency partly related to a lack of case law since the law was updated in 2014. Morrison suggested there was latent flexibility in the law and that larger, well-funded institutions were able to put measures in place to make better use of copyright exceptions. This observation may be borne out in a comparison of the UK to the US, where universities are much more active in supporting fair use and typically employ legally qualified copyright experts whose roles involve responding to legal challenge. Hudson provides a recent in-depth analysis of approaches to copyright risk in cultural and educational institutions in English speaking countries (2020a). Being able to take advantage of flexibility in the law requires copyright literacy.

Since the pandemic, there have been several legal commentaries on key copyright issues associated with the shift to online learning. Hudson and Wragg (2020) argued for expanding the remit of copyright exceptions to encourage collective licensing solutions that better meet the needs of educators. They also suggested UK universities might embrace in-house, open access publishing more swiftly. Meanwhile in Canada, Craig and Tarantino (2020) proposed recalibrating the copyright system due to the damage done by a permission-first approach to the use of digital platforms. They also questioned the narrative that copyright encourages learning or the creation and dissemination of new copyright works.

The pandemic highlighted the need for improved copyright education and there have been numerous webinars and online events on copyright-related topics. Civic society organisations such as Creative Commons and Communia have undertaken research, written blog posts, and run online events to support

the community. For example, Communia launched a Copyright for Education campaign and have undertaken surveys on copyright and remote learning. The number of queries posted to the UK higher education sector's copyright discussion list LIS-Copyseek almost doubled during the period from March – December 2020 with 941 posts compared to the previous year's posts of 514. The response to the growing interest in the topic was initially to write a blog post "Copyright, Fair Dealing and Online Teaching at a Time of Crisis" in March 2020, which as of November 2021 has received over 6500 hits. Shortly after, a webinar on the topic was hosted by the Association for Learning Technology. Webinars continued throughout 2020 and 2021 and have covered a wide range of copyright issues related to online learning. The topics discussed have included:

- The challenges of sourcing readings for students resulting from the closure of academic libraries during country wide lockdowns
- Responses from collective management organisations such as the Copyright Licensing Agency to make amendments to their licence terms to help alleviate the problem, and
- Problems getting access to audiovisual content, particularly when it is needed by students based overseas.

In Spring 2020 the webinars reflected the need for staff in UK universities to make risk-based decisions for teaching to continue in disciplines such as film studies. For students and teachers relying on audiovisual content, alternative arrangements were needed because copyright laws permitted showing of films without a licence only within the physical classroom. Community discussions prompted a legal analysis by Hudson (2020b) which was then used to inform institutional practices, supported by the webinars. Further critical analysis was conducted through a series of workshops with film studies lecturers with a view to creating a community-developed Code of Fair Practice.[2]

The crisis has highlighted problems in the way in which ebooks are sold or licensed to academic libraries. The webinar discussions frequently referred to a campaign launched in the UK in summer 2020 to lobby the government to investigate the pricing of academic ebooks. Spearheaded by three academic librarians, the campaign attracted support from well over 2500 individuals and organisations and gained media attention. Copyright was one of the particular challenges cited in the letter sent to the UK government. The webinars featured updates on

2 This project is a collaboration with Bartolomeo Meletti, creator of copyrightuser.org. At the time of writing the code of fair practice is in draft and it is hoped a version will be ready during the academic year 2021/22.

the practice of Controlled Digital Lending (CDL) in the US which provides a legal justification for digitising and lending books on a loaned to owned ratio.

The webinars allowed discussion of wider intellectual property issues impacting on teaching staff, such as who owns the content that lecturers create. Many copyright specialists recognised the need to amend and update existing lecture recording policies during the pandemic with the growth in the use of virtual classroom tools and pre-recorded video lectures. Policy issues were further compounded by the reliance on third party technology platforms which provided their services under contracts with intellectual property clauses. The contracts generally pass liability for intellectual property infringement to institutions, whilst potentially increasing users actions to increased scrutiny from rights holders (Pascault et al. 2020).

Despite all the challenges, there has been a greater level of critical engagement with copyright since March 2020, including from academic colleagues. The UK copyright community developed as a more active "community of practice" (Lave and Wenger 1991), where copyright literacy is partly a social practice in which community members negotiate which information and activities have meaning. The digital pivot has highlighted inequalities with the current system of scholarly publishing and led commentators to question if copyright is serving its intended purpose. It has also highlighted the need for a greater level of copyright literacy amongst policy makers, administrators, teachers, lecturers and students.

Copyright Literacy Case Studies

In the final section the authors present a case study from each of their current institutions to highlight two contrasting approaches to developing copyright literacy, including a more strategic approach at the University of Kent complemented by a case study from City, University of London, where copyright literacy is a central aspect of a new module aimed at teaching staff and introduced into the MA Academic Practice in 2018.

Case Study from University of Kent

Introduction

The University of Kent responded to the challenges of copyright by developing a Copyright Literacy Strategy in 2020. The development, engagement with aca-

demic and professional services staff and students, and its impact on academic practice are outlined in this case study.

The Development of the Strategy

The strategy was led by Chris Morrison, Copyright, Licensing and Policy Manager, and work began in 2019 with the aim of identifying the ways in which copyright impacted on the University, and creating a long term vision for addressing the issues. The work undertaken was informed by Morrison's Master's research (Morrison 2018b) which noted the range of institutional approaches to copyright and identified opportunities for a more progressive approach.

A working group was convened which met at a series of workshops, first identifying types of activity where copying was an issue and then listing out the desired behaviours (Morrison 2019). The working group comprised a range of professional services and academic staff who were able to bring varying perspectives. The group was asked to consider the University's overarching 2025 strategy (University of Kent 2019) and to identify its elements relevant to copyright. The results inspired a series of draft statements which the group discussed and built on. The activity led to a series of further refinements which were given a high level of scrutiny by the working group and relevant management committees. A final round of peer review from a series of UK and international copyright advisors, specialists and academic experts produced a draft which was approved in May 2020 and published in July (University of Kent 2020).

The Strategy

The strategy is in four sections: a five year vision, a series of values, activities and success measures.

Vision

The vision is that:

> By 2025 people working and studying at the University of Kent will feel confident in making informed decisions about using copyright material and will understand the role copyright plays in innovation and creation of new knowledge.

The University's approach to copyright education will support its strategic objectives by informing policy and practice.

The vision makes statements about the two key areas of copyright: the need to navigate the use of third party material and the considerations of what to do when copyright works are created at the University. Whilst one of the motivating factors of the strategy was to support the use of copyright exceptions, the group considered it important that the strategy should make reference to all aspects of copyright as they often need to be considered in conjunction with each other. The working group included a representative from the team responsible for commercialisation of intellectual property which led to a discussion about the benefits and drawbacks of both open and proprietary approaches to licensing. Whilst the group had diverse views on what approach the University should take, consensus was reached on increasing awareness and understanding of the issues involved when making decisions.

Values

As with the main university strategy, the copyright literacy strategy identifies a number of values that will guide the vision. Three key values are outlined. The first states that "staff and students are expected to behave lawfully and responsibly, but should be able to question assumptions about copyright law". This value was expressed with a clear intention to apply a critical mindset to copyright issues, and not simply focus on compliance. The next key value states that "a balance is required between the concept of copyright as private property and the importance of communication and dissemination of knowledge". This value acknowledges that there are different perspectives on copyright which need to be taken into account when making decisions. The final key value states that "the use of fair dealing and statutory copyright exceptions is an essential aspect of academic activity and a vital supplement to the use of licensed resources". The statement was developed to provide support to staff and students who rely on copyright exceptions, and to normalise acceptance of the use of exceptions. It was intended to progress Kent's position from typical university statements about copyright which may describe exceptions, but often leave people without a clear idea of what type of action the institution regards as acceptable.

Activities

The activities section of the strategy is expressed at a relatively high level so that it can adapt to changes in the institution over the five years for which the strat-

egy runs. The decision to create a steering group was influenced by the finding in Morrison's master's research that all institutions who had created a consistent approach to copyright had created a high level decision making body. The statement that the university would "[r]eview its policies relating to copyright law to ensure they reflect the institution's strategic objectives..." and that "...[t]his process will highlight potential conflicts and suggest ways of addressing these where appropriate" was perhaps the most controversial element of the strategy. The working group debated the difference between a stated aim of becoming well-informed about policy matters, against a decision to undertake specific policy directions such as embracing open practice. The former ran the risk of creating a talking shop, and the latter could be seen as an unhelpful attempt to circumvent the process of developing policy according to the university's established governance structure. The compromise solution accepts that copyright is a sufficiently complex topic and that many different groups both within and outside the university have a different stake in how it should be managed. However, the stated activity crucially creates the space for issues to be considered and for recommendations to be made. The creation of a Copyright Steering Group provides a route for recommendations to be acted on.

The strategy states that the university will "develop a network of staff whose roles involve advising on aspects of copyright law to identify opportunities for education, training and communication". The activity was originally expressed as an intention to create an educational programme which would inform about copyright from a top down perspective. However, further discussion revealed that this approach to embedding copyright literacy was overly hierarchical and ran the risk of exposing the subject out of context in a way that was not meaningful to staff and students. This was particularly relevant because of the number of other compliance topics that people needed to be made aware of such as data protection and accessibility. As a result, a network approach was agreed and a statement added that it "recognises that copyright often has to be addressed in context and alongside other issues".

The final and related activity that is worth comment is the university's commitment to "[d]evelop its copyright guidance to support staff and students using user experience design principles". The copyright guidance web pages were updated to coincide with the launch of the strategy and followed the objective of being "concise, in plain English and easy to access". They incorporated insights gained from focus groups and card sorting exercises and reception of the approach has been extremely positive. The number of page views has increased four-fold and people are spending more time on the pages than before, with a lower bounce rate (people who look at a page but then take no further action). The university has licensed the guidance under a Creative Commons attribution

licence so that others in the sector may reuse it. Other institutions have contacted the university to say they intend to base their guidance on Kent's work and have described the pages as "very clear and concise" as well as "succinct and classy".

Measuring Success

The final section of the strategy considers how the university will determine whether the strategy has been a success. It acknowledges the difficulty in compiling quantitative data on behavioural change, and instead identifies a range of quantitative and qualitative ways of reflecting on progress with the strategy. It states that case studies are likely to be the most powerful way of determining its impact.

> In conclusion, the University of Kent's Copyright Literacy Strategy was created to apply the latest developments in copyright literacy research in a specific institutional setting. Early indications show that the strategy is starting to deliver the intended benefits. It was finalised and launched at a time of pandemic and enforced lockdown which posed some logistical challenges. However, its creation is particularly timely given the challenges that the much greater reliance on digital communication presents and the need for copyright issues to be considered holistically and strategically.

Case Study from City, University of London

Introduction

At City, University of London, a module called *Digital Literacies and Open Practice* was launched as part of the MA in Academic Practice in October 2018. The module is also an elective module offered to students on the MA/MSc in Library and Information Sciences. This case study discusses the module as an example of a critical approach to copyright literacy. It also draws on research into the attitudes of academic staff towards digital literacies and open practice specifically exploring the data about copyright. The findings suggest that in order to use technology in their teaching effectively, academic staff need to a combination of digital, information and copyright literacy (Secker 2020).

Background

The MA in Academic Practice programme provides staff with the knowledge and skills they need to develop and enhance their teaching practices. It is a part-time

programme, and staff can also gain an Introductory Certificate, a Postgraduate Certificate or a Postgraduate diploma. *EDM122: Digital Literacies and Open Practice* is an optional module also available to Library and Information Studies master's students.

Course Content and Teaching

The creation of the module was partly inspired by a course at the University of Manchester which is part of its Postgraduate Certificate in Higher Education. The module tutor also gained valuable experience teaching a module on copyright literacy and open practice at the Universidad de Republica in Montevideo, Uruguay in August 2018. These experiences shaped the content and approaches used in the new module. It was also an opportunity to design a module where copyright literacy was embedded throughout.

The module has a blend of face-to-face and online teaching. It includes a webinar series from expert guest speakers. One webinar focuses specifically on copyright literacy and its relationship to open practice and digital literacies. The webinars are all recorded and made available from the course blog. The module explores a range of topics including definitions and terminology associated with open practice and digital literacies, students as digital natives, definitions of open education and open access, Creative Commons licences and the role of copyright. It also explores the concept of digital scholarship, online identity, finding open educational resources and creating digital media. Finally, it considers how to embed digital literacies and open practice in the curriculum.

The cohort of participants also plays the educational game, the Publishing Trap, that was co-created by the authors of this chapter. It is an openly licensed role play game where players in teams follow four academics through their careers. They are asked to make choices about how they want to publish their research and share their expertise throughout their life. The game has a particular focus on copyright and open access.

Assessment

There are two assessments as part of the module including a video and short reflection and a 2000 word essay. Participants are free to choose an aspect of either digital literacies or open practice on which to focus.

Feedback and Evaluation

The module has received positive feedback, including evaluation scores of 4.5/5. The module has attracted interest from other universities after featuring as part of several conference presentations (Secker 2020). The webinar series is open to anyone not formally enrolled in the course and the recordings are made available publicly. Statistics show that the module has an impact beyond the institution.

The Research

Alongside the launch of the module, a small research project was undertaken in summer 2019. Six interviews with academic staff were undertaken to understand their attitudes towards digital literacies and open practice and the implications for their own teaching. All those interviewed had studied the module EDM122. The study took a phenomenographic approach to explore how staff experienced both digital literacy and open practice. It built upon the author's previous research which explored the experiences of librarians in relation to copyright (Morrison and Secker 2017).

The project revealed several interesting findings in relation to copyright literacy. For example, prior to undertaking the module, all staff felt they had a limited understanding of copyright and licensing issues. The interviews suggested copyright was one of several factors that impacted on their confidence when using educational technologies (Secker, 2020). The research explored what might motivate staff to be more open, what the barriers were and the role of training and support. There was a wide variety of experiences and levels of knowledge and some notable disciplinary differences. For example, one academic in health sciences explained how the module developed her understanding of open access and open science. She realised that clinicians in hospitals did not always have access to the journals available in the university. She had also realised that healthcare professionals in the global south were limited in the journals they could access. Meanwhile an academic working in arts and humanities, felt that sharing research openly at an early stage might hamper chances of being published, or lead to ideas being stolen by other researchers. The findings reveal different ways in which academic staff experience copyright. In the first example copyright was recognised as restricting access to published content; however in the second example copyright could be a valuable way of protecting one's own work.

Going Forward and Discovering More

The module was shifted online in October 2020 due to the pandemic. The author hopes to conduct further research to build on the findings, to see how the pandemic and experience of online teaching might have impacted on staff experiences. Teaching about copyright as part of a wider module to inform academic practice has a number of strengths, allowing a critical engagement with the subject. It also means copyright has become a central aspect of how to teach and do research in the digital age. Updates on the module are made available on the course blog.

Conclusion

This chapter has made the case that copyright literacy provides a helpful way of addressing the challenges of copyright in the digital age, particularly by considering copyright from a critical perspective rather than focusing on it only from a functional perspective. The chapter began by charting the use and development of the terms copyright education and copyright literacy. It then set out the key challenges of copyright in a digital environment: that copyright is a contested space; that traditional concepts of authorship are no longer dominant in many creative domains; that science and scholarship are being hampered by a pre-digital paradigm; and that copyright law does not reflect the public interest.

The chapter then discussed the relevance of copyright to librarianship and the opportunities librarians have to learn about copyright and apply it to their practice. In order to consider why a literacy approach to copyright was beneficial, the chapter then provided a brief overview of information, digital and media literacies, identified the extent to which copyright was discussed in these fields and established that copyright was relevant to all of them, but addressed inconsistently. The chapter concluded by highlighting the opportunities to combine copyright education with broader information and digital literacy programmes. It argued that a more critical approach to copyright literacy is needed to address inequalities in the current copyright system and suggested a framework for use. The impact of copyright as part of the shift to online learning was explored and two case studies provided evidence of how critical copyright literacy is being put into action.

It has been argued that the term copyright literacy is useful. Taking a literacy based approach to copyright which focuses on communities of practice and their behaviours, not just on knowledge about the law, is crucial to navigating copyright issues. Copyright is experienced in different ways by different communi-

ties who need to be informed, but must also make sense of information provided according to their own values and practice.

Librarians play an important role as both copyright educators and information literacy teachers. However, fusing the two areas of responsibility together may require different thinking about how librarians are educated and how they develop their skills. Addressing skills and knowledge development both nationally and internationally will help the information profession meet its mission of providing access to information and enabling cultural participation for the community.

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Denise Rosemary Nicholson

14 Copyright Reform in South Africa from a Librarian's Perspective: A Case Study Approach

Abstract: Copyright law in South Africa was modelled on British copyright law but updated and enacted by the apartheid regime in 1978. Limitations and exceptions for libraries, archives, education and research are scant and have never been updated. The legislation makes no provision for people with disabilities and in view of its age, does not address the digital environment. This chapter[1] provides a historical timeline of attempts since 1998 to amend the *Copyright Act* No. 98 of 1978. Advocates for fair and more balanced copyright laws have pursued a strong campaign for change within the framework of access to information as a human right. As a result of opposing perspectives and polarisation amongst stakeholders, the copyright reform process has been a long and contentious road, without a successful outcome to date. A progressive *Copyright Amendment Bill* was approved by the South African Parliament in March 2019. Legal action was taken by Blind SA; international pressure was applied by the US Trade Representative; representations came from the European Commission; and actions were taken by international and local rightsholder groups and collective management organisations. The President of South Africa referred the Bill back to Parliament in June 2020 for review of some sections on the grounds of constitutionality. Parliament made various recommendations in 2021 and called for more public comments and online public hearings, which were recorded during August 2021. A further call for comments on new amendments to the Bill was made in December 2021. The Bill was retagged as a Section 76 Bill for processing through the provincial legislatures, resulting in further delays. It is hoped the review will be expedited and produce a positive and efficient outcome for all stakeholders.

Keywords: Copyright – South Africa; Human rights; Intellectual property – South Africa; Libraries – South Africa

1 This chapter draws substantially from Chapter 4 of Nicholson's Master of Laws (LLM) dissertation: *Accommodating Persons with Sensory Disabilities in South African Copyright Law*, 2012,University of The Witwatersrand, Johannesburg, South Africa https://wiredspace.wits.ac.za/handle/10539/12525.

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An Intellectual Property Policy and Legislative Framework

Development of the copyright system should be driven as far as possible by strong doctrinal and empirical evidence (Berkman Center for Internet and Society 2012). "Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests. These concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights" (Hargreaves 2011, 8). Well-drafted policy drives investigation, implementation and application of fair, balanced and appropriate laws, particularly in the context of a developing country. It is therefore incumbent on any government and in particular the South African government to develop and frame its intellectual property policies within the context of international intellectual property agreements and its constitutional and human rights commitments, in the context of a digital world and a fourth industrial revolution (Schwab 2016).

Information Access is a Human Right

To contextualise the need for copyright reform in South Africa, it is important to examine copyright and access issues within the framework of human rights, as well as international and regional copyright trends and legal commitments. Access to information is critical to human existence, development and quality of life. It is fundamentally important, accepted as a basic human right internationally, and entrenched in the Universal Declaration of Human Rights, to which South Africa is committed as a signatory, with Article 19 stating "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". Considerable change has occurred in relation to human rights.

The history of the concept of "human rights" reveals its historical evolution and political and social use from the Second World War until the Universal Declaration of Human Rights (1948). Since then the international instruments protecting human rights have broadened and developed, including at the regional level. The universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms are universally accepted (Griffo and Ortali 2007, 15).

Access to information is the lifeline for everyone to be able to function, exercise and enjoy human rights and dignity, and to participate fully in an equal and democratic society. "Human rights protection ... is not just linked to respect for individual freedoms but also to the social and cultural construction of inclusive societies, in which prejudices and barriers are eliminated and all can live without social, legal or practical stigma" (Griffo and Ortali 2007, 51). The community needs open and direct access to information to operate effectively within society.

Need for Balance in Copyright Law

Rightsowners strive for more protection and control of their works, whilst users of information endeavour to exercise the access to information rights afforded to them by constitutional and other national legislation. Ayoubi claimed that "the main clash of human rights and intellectual property in general and copyright in particular manifest itself in the inconsistencies between the moral and material interests of the author being the owner of the copyright and the benefits of members of public as they claim their rights in enjoying the results of cultural literary and scientific progress of the society as a whole" (2011, 9). Polarisation of stakeholders is inevitable and copyright reform is a highly contested process in most countries with rightsholders seeking to enhance protection and users pursuing wider access. South Africa has seen strong evidence of such conflict amongst stakeholders, especially since the current *Copyright Act* No. 98 of 1978 (hereinafter the *Copyright Act*) lacks balance.

The Berne Convention recognises the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and information access. Other international declarations, treaties and research reports, including the previously mentioned Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise the significance of both sides of the equation. The emphasis on balance is also entrenched in the preambles of the World Intellectual Property Organization's (WIPO) Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT) which deals with the rights of performers and producers. There are other directives, reports, statements and proposals which recognise the need to maintain a balance between the rights of authors and the larger public interest, particularly for education, research and access to information. They include:

- Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (Directive 2001/29 2001)

- Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market Directive (Directive 2019/790 2019)
- UK Commission on Intellectual Property Rights (CIPR) final report *Integrating Intellectual Property Rights and Development Policy* (UK CIPR 2002)
- World Summit on the Information *Society Declaration of Principles: Building the Information Society: A Global Challenge in the New Millennium* (WSIS 2003)
- Adelphi Charter on Creativity, Innovation and Intellectual Property, a project commissioned by the Royal Society for the Encouragement of Arts, Manufactures & Commerce, London (RSA 2006)
- Copy/South Dossier which documents issues in the economics, politics, and ideology of copyright in the Global South (Story, Darch, and Halbert 2006)
- Gowers Review of Intellectual Property, an independent review of intellectual property in the UK (Gowers Review of Intellectual Property 2006)
- Development Agenda for WIPO 2007
- African Copyright and Access to Knowledge Project (ACA2K) which operated from 2007–2010 and examined the relationship between national copyright environments and access to learning materials in African countries (Armstrong et al 2010; ACA2K Output repository n.d.)
- Proposal by Brazil, Ecuador and Paraguay, Relating to Limitations and Exceptions: Treaty Proposed by the World Blind Union (WBU) put forward by the WIPO Standing Committee on Copyright and Related Rights (SCCR)(WIPO SCCR 2009), and
- An independent review by Ian Hargreaves in the UK*: Digital Opportunity: A Review of Intellectual Property and Growth* (Hargreaves 2011).

The legitimate interests of users are primarily safeguarded by mechanisms known as copyright limitations and exceptions (L&Es) to the exclusive rights of authors and creators which help to ensure a balance between the rights of authors and creators and the just demands of information users.

Most experts in intellectual property advocate a balance in copyright, yet the constant pressure from rightsholders to strengthen copyright protection with additional measures such as restrictive licensing and digital rights management systems (DRMs) with technological protection measures (TPMs) in the digital environment makes the hope of true balance in the copyright system ever unattainable. It is important that balance be restored and maintained. Sirinelli acknowledges the importance of balance:

> To speak of the information society does not mean considering works of the mind as common merchandise and only envisaging copyright and related rights in the future in the light of consumers' interests alone. Intellectual property rights have always and everywhere provided a balance among conflicting interests: authors, creation auxiliaries, investors or disseminators, the public, enriching mankind's heritage .... This balance must be maintained (1999, 40).

Sirinelli claims that the historical, sociological and philosophical traditions of each country have influenced the way balance in copyright has been sought. He suggests there is a need for a new structure within the WIPO framework that will endeavour to find common solutions or attenuate the differences to achieve an acceptable balance. By inference, an international instrument may be a solution, but he, unfortunately, provides no suggestions or directions on how it could be achieved. Hugenholtz and Okediji note that:

> Both in national and international forums copyright is traditionally conceived as a property right, as are its structure and its discourse. Exclusive rights are the rule, while freedoms are framed as "exceptions" that must be narrowly construed, especially in the authors' rights tradition that dominates large parts of the world. Due to copyright law's systemic pro right-holder bias, as reflected in the property model, achieving a proper balance between protecting the interests of copyright holders and the interests of users will always be an uphill struggle for user groups (2012, 28).

Boyle suggests that:

> As intellectual property protection has expanded exponentially in breadth, scope and term over the last 30 years, the fundamental principle of balance between the public domain and the realm of property seems to have been lost. The potential costs of this loss of balance are just as worrisome as the costs of piracy that so dominate discussion in international policy making. Where the traditional idea of intellectual property wound a thin layer of rights around a carefully preserved public domain, the contemporary attitude seems to be that the public domain should be eliminated wherever possible (2004, 2).

The importance of L&Es to ensure users of information have equal statutory rights to authors cannot be over-emphasised. Limitations and exceptions are the catalysts which bring about balance and practical resolution to protect access to information for the public good. Over and above the general L&Es required by users of information, additional and specific L&Es are required to provide equal access to persons with disabilities.

In furthering the public interest, there is frequently tension between those that control copyright of the works and those who want to use the works for research, educational, recreational and other purposes. It is only by consciously

and appropriately finding the correct balance that "a copyright regime will maximise both the creation and communication of new knowledge and ideas" (IFLA 2004, 2). Pilch stresses that the balancing mechanisms in copyright are L&Es:

> Limitations and exceptions benefit all members of society. If they did not exist, copyright holders would have a monopoly over all uses except reading. In the case of visually impaired persons, even the act of reading is compromised if there are not sufficient exceptions in national copyright laws to support the creation and distribution of accessible and affordable versions of works (2009, 5)

Okediji posits that:

> Without the appropriate balance between protection and access, the international copyright system not only impoverishes the global public but, ultimately, it undermines its own ability to sustain and reward the creative enterprise for the long-term future (2006, xii).

Pistorius is of the opinion that implementation of the WCT and anti-circumvention provisions in developed countries has disturbed the copyright balance. She raises issues about technological protection measures which have the potential to lock up information indefinitely and cautions that:

> Content owners have gained the right to control both access to and use of copyright works in digital form through technological means. Encryption and the use of various digital locks effectively protect copyright owners against the piracy of their digital works. However, technology is blind and cannot distinguish between fair use for the purpose of research or private study and unfair use for commercial gain: all forms of unauthorised uses are barred. This has upset the delicate equilibrium between private and public rights (2006, 18/27).

Copyright Reform in South Africa

The Current Copyright Act

Copyright law in South Africa had its genesis in the British copyright model (University of The Witwatersrand 2021a; Nicholson 2015). The current *Copyright Act* No. 98 of 1978 (as amended) was drafted during the apartheid era. It is outdated and inadequate in the digital environment. The exceptions for education, research, libraries and archives have not been changed since 1978. The Act has no provisions for libraries and archives, galleries and museums, people with disabilities, or any digital uses. It has limited provisions for education and research

through fair dealing in Section 12. In Section 13 Regulations, there are limited exceptions solely for copying for classroom use and for preservation and inter-library loans for libraries and archives. Since the *Copyright Act* pre-dates digital copying, the type of copying permitted in the Act applies to photocopies only.

The process of copyright reform in South Africa has been a long and difficult road. Although the Act has been amended several times over its history for other purposes, it has not been updated in forty-three years to address the needs of library and information services, research and education, and people with disabilities. It provides strict protection of copyright owners' rights but little consideration for users' rights.

Reform Commences

In August 1998, the Department of Trade and Industry (DTI)[2] embarked on a process to amend the 1978 *Copyright Act*. Proposals drafted by the Publishers' Association of South Africa (PASA) were submitted to the DTI for consideration in early 1998. PASA positions on copyright have been clearly stated on their archived website for 2000. On 7 August 1998, draft regulations to amend Section 13 of the *Copyright Act* were published for public comment by DTI in the South African Government Gazette No. 19112. In addition to endorsement from PASA, the proposals were supported by the Dramatic, Artistic and Literary Rights Organisation (DALRO), and international bodies such as the International Publishers' Association (IPA) and the International Federation of Reprographic Rights Organisations (IFRRO), which has continued to take action on copyright issues in South Africa.

The proposals were more restrictive than the existing *Copyright Act*, had negative implications for education, research, libraries and archives, and contained inadequate exceptions for persons with disabilities. There were undesirable implications for information users. Strong objections were raised by the library and educational sectors who had been excluded from the legislative process. A Copyright Task Team was mandated by the South African Vice-Chancellors' Association (SAUVCA) and the Committee of Technikon Principals (CTP), representing all publicly-financed universities and technikons, to challenge the proposed amendments. SAUVCA and CTP later merged to become Higher Education South Africa (HESA) now known as Universities South Africa (USAf). Nicholson was appointed as convenor of the Task Team. After a strong campaign against the proposed amendments by the educational and library sectors, the Minister of Trade

2 The Department of Trade and Industry merged with the Economic Development Department in 2019 to become the Department of Trade, Industry and Competition.

and Industry, Alex Erwin at the time, acknowledged that the drafting process had lacked transparency and broader consultation. He agreed to recommence the process and include all stakeholders, confirming the intention with a DTI multi-stakeholder workshop in Pretoria in March 1999. Stakeholders were invited to present brief position papers at the workshop. Nicholson presented on behalf of the library and educational sectors, as well as for people with disabilities.

With pro bono legal assistance for about eighteen months from a well-respected firm of intellectual property lawyers, John & Kernick, now part of Adams and Adams, the largest law firm in the southern hemisphere, the SAUVCA/CTP Task Team formally challenged the proposed amendments. Via a detailed questionnaire, the Task Team gathered comments from libraries, educational institutions, non-governmental organisations, and government departments in South Africa, and presented a consolidated submission to the DTI in May 1999. The Task Team sought support from the opposition political party, the Democratic Party at the time to help stop the amendments being passed. As a result of the interventions, the DTI withdrew the draft regulations, despite strong opposition from PASA, DALRO and their international partners who attempted unsuccessfully to have them reinstated.

Proposed Amendments 2000 and 2002

On May 10, 2000, a second round of proposals to amend the *Copyright Act* and other IP laws was published for public consultation in the South African Government Gazette Notice 1805, No. 21156. This time, SAUVCA and the CTP mandated the establishment of an Electronic Copyright Task Team led by Nicholson to challenge the proposed amendments. The new proposals were once again restrictive towards education and research, libraries and archives, contained inadequate provisions for people with disabilities, and failed to address the digital environment. They also failed to provide the necessary balance between rightsholders and the public to enable and ensure the free flow of information for the good of society. As a result of a successful campaign by the educational and library sectors, this time engaging the Minister of Education, Dr Kadar Asmal, the DTI withdrew all the restrictive proposals except for the proposed amendments to Section 9 of the *Copyright Act*. Section 9 relates to sound recordings and changes suggested reintroduced needle time royalties for musicians. The proposed amendments were included in the *Copyright Amendment Act* No. 9 of 2002

In October 2001, in response to the various actions and to apply pressure to the DTI, IFRRO, PASA and DALRO presented the following resolution at the IFRRO Annual General Meeting:

1. *Urges* the South African Government to pass proposed amendments in the South African Copyright Act that were published for comment in the Government Gazette of 10 May 2000
2. *Encourages* the South African Government to prepare legislation to enable ratification of the WCT and WPPT by the South African Parliament (IFRRO 2001).

Legislative Impasse

As a result of the unsuccessful attempt to prevent the withdrawal of the proposals, with the exception of Section 9, from the Bill, rightsholder groups and collective management organisations also known as collecting societies in South Africa reacted by directing angry communications to the convenor of the SAUVCA/CTP Electronic Copyright Task Team. Both SAUVCA and the CTP decided to set up intellectual property committees in 2001 to formalise copyright advocacy activities. Committee members communicated in writing and met personally with PASA in Cape Town to try to find a compromise regarding L&Es for the educational and library sectors. Because of different and opposing perspectives, views and needs, discussions were not successful. Polarisation between supporters and opponents of more balanced copyright laws was clearly entrenched in South Africa and resulted in an impasse in the legislative process which lasted a decade.

Related Legislative Endeavours

While progress on copyright reform slowed to a halt, other legislative initiatives continued, including the *Electronic Communications and Transactions Act*, Collecting Society Regulations, and the development of a Free Trade Agreement with the US.

Electronic Communications and Transactions (ECT) Act, 2002

Although South Africa is a signatory to the WCT, it has not yet ratified it and treaty provisions have not been incorporated into the *Copyright Act*. To address the problem of cybercrime, and to ensure compliance with certain clauses of the WCT, the *Electronic Communications and Transaction Act* No. 25 (hereinafter the *ECT Act*) was promulgated in 2002 (Michalsons 2008). The Act includes strict provisions for technological protection measures and prohibition of circumvention

measures, without any exceptions for legitimate library or educational purposes, or for persons with disabilities. The *ECT Act*, particularly Article 86 on anti-circumvention protection measures, has no L&Es for fair use of digital works. It overrides existing legitimate uses of copyright works, for example, fair dealing, and exacerbates the access issues experienced by people with disabilities. It also prevents browsing electronic resources for library purposes, accessing ebooks via text-to-speech software by blind persons, and accessing public domain material when locked up with copyright works. Visser raised the issue about inflexibility and lack of exceptions in the *ECT Act* as follows:

> In South Africa, the prohibition on the circumvention of TPMs that control access to copyright works is complete – not only the circumvention of access control is proscribed, but also trafficking in devices that are 'designed primarily' for circumventing access control. And the prohibition is absolute – there are no exceptions; no technical exception (such as for reverse engineering, encryption research, and security testing); nor an exception in favour of research or education. It is incomprehensible that South Africa, a developing country, should opt for a system of protecting TPMs that is far more destructive of research and education than the systems adopted in the United States and Europe (2006, 62).

Visser also expressed concern about:

> The fact that possession of the physical object that contains the copyright work (e.g. a CD-ROM) no longer guarantees access to the work can have serious implications for the possessor of such object. Even a lawful possessor will not be able to access a copyright work shielded behind a TPM without an access key, or without circumventing the copyright work (2006, 60–61).

Once the copyright term has expired, works fall into the public domain. Visser pointed out that:

> Works in the public domain protected by technological protection measures are rendered inaccessible, as any circumvention (even circumvention of technological protection applied to works in the public domain) will result in a contravention of the prohibition. This can, of course, result in a digital lock-up of works in the public domain (2006, 62).

Visser stressed that "where developing countries do adopt protection of TPMs against circumvention, appropriate L&Es in favour of research and education should be enacted at the same time" (2006, 61). Conroy in her attempt to provide solutions to problems with the *Copyright Act*, recommended:

> … that the prohibition should strike only at the act of circumvention but should not concern itself with the devices used to perform such circumvention. Not only would this be in line with traditional copyright law, but it obviates the problem of legitimate uses being unable

> to use the circumvention devices they require to exercise their privileges under a copyright exception (2006, 273).

Intellectual property experts cautioned that it was highly likely that the *ECT Act* could override the L&Es in the *Copyright Act*. Schönwetter, Ncube and Chetty assert that:

> The ECT Act arguably prohibits the circumvention of technological protection measures, even to enable uses of copyright-protected materials that are expressly permitted under the Copyright Act (e.g. fair dealing, or accessing works in the public domain). It is recommended that this conflict between the Copyright Act and the ECT Act is addressed, for instance, by declaring the copyright exceptions and limitations contained in the Copyright Act as valid defences to any claims based upon the ECT Act (2009, 8).

Despite recommendations made to the government by various stakeholders and researchers for review of the *ECT Act*, the legislation remains unchanged and problematic.

Collecting Society Regulations

In 2006, the DTI introduced and enacted the Collecting Society Regulations which set out the conditions under which a collecting society may be established and operate under the *Copyright Act*, as provided for in Section 39 read together with section 9A of the *Copyright Act*, and with Section 5(3) of the *Performers' Protection Act*, 1967 (Act I1 of 1967) (SAMRO n.d.).

Proposed United States/Southern African Customs Union Free Trade Agreement

South Africa is a signatory to the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) which came into effect on 1 January 1995. To date, TRIPS is the most comprehensive multilateral agreement in intellectual property. Its key features for Member States are setting minimum standards, enforcement of intellectual property rights (IPRs) and dispute prevention and settlement (TRIPS Agreement 2019). TRIPS affords least developed countries (LDCs) an extended transition period to protect intellectual property domestically in view of their economic, financial and administrative constraints, and the need for flexibility and the creation of a viable technological base.

From 2003 until 2006, the US Trade Representative (USTR) was involved in negotiations with the Southern African Customs Union (SACU) countries, regarding a Free Trade Agreement (FTA) with a TRIPS-Plus IP Chapter. SACU is the world's oldest customs union and includes Botswana, Lesotho, Namibia, South Africa and Swaziland (renamed Eswatini in 2018). The FTA document was secret, and its contents were not made known to the public.

Four of the five SACU countries are developing countries, and the fifth, Eswatini, is a least developed country. The TRIPS-Plus IP Chapter in the US-SACU FTA required signatories to expand their obligations beyond TRIPS, and to adopt a stricter intellectual property regime including an extended 20-year copyright term in line with that of the US. Nicholson recommended that African countries, including South Africa, should "strongly resist pressure to adopt TRIPs-Plus or other proposals that strike at the very heart of their economic and development policies" (2006, 321).

Much has been written about the impact of TRIPS-Plus clauses (for example, Reid 2015). The potential negative impact of the Australia-United States Free Trade Agreement (AUSFTA) on education and research had been well-documented by intellectual property experts and researchers in Australia (for example McBurnie and Ziguras 2004; Rimmer 2006). Nicholson wrote to Xavier Carim, the Chief Negotiator of the South African Foreign Trade Office at the time, alerting him to the relevant documents. The UK Department for International Development (later replaced by the Foreign, Commonwealth & Development Office) and USAID heard about developments and contacted Nicholson, offering to place the concerns on their trade agenda with the SA DTI. Nicholson was invited to meet with Mr. Carim to discuss the TRIPs-Plus Chapter in the US FTAs. Key concerns and relevant documents were provided and the negative implications for research, education, library, and information services, and for persons with disabilities, in South Africa and other SACU countries highlighted. In particular, the extension of the copyright term for a further twenty years was considered not to be in the best interests of South Africa or other SACU countries that were all net importers of intellectual property.

Apart from the TRIPS-Plus IP Chapter in the US-SACU FTA, there were other controversial clauses which were not acceptable to the SACU countries. In late 2006, the SACU countries declined to sign the FTA and negotiations with the US Trade Representative were suspended. The outcome was positive. The provisions of TRIPS-Plus would have exacerbated the existing information access and copyright problems experienced by the library and educational sectors, and people with disabilities.

Issues Concerning Copyright and Disabilities

South Africa is a member of the African Group at WIPO and was a strong supporter of the World Blind Union (WBU) Treaty {Proposals for Blind, Visually Impaired and Other Reading Disabled Persons (TVI), as well as the Draft WIPO Treaty on Exceptions and Limitations for the Persons with Disabilities, Educational and Research Institutions, Libraries and Archives – Proposal by the African Group, presented at the Standing Committee on Copyright and Related Rights Twenty-Second Session, Geneva, June 15 to 24, 2011 (WIPO SCCR 2011). The DTI and the SA Department of Arts and Culture (DAC) co-hosted stakeholder seminars in Cape Town in 2004, Port Elizabeth in 2005 and Pretoria in 2010 and 2011, in an attempt to address access and related issues affecting people with visual impairment. Despite the consultative efforts, the DTI made no attempt at that stage to update the *Copyright Act*.

As a result of the ongoing access problems experienced by its members and failure by the DTI to remedy the situation, the South African National Council for the Blind (SANCB) established a Copyright Coalition in 2009. The coalition included Council members, the South African Library for the Blind, Tape Aids for the Blind, Pioneer Printers, Blind SA , the South African Disability Alliance (SADA), African Copyright and Access to Knowledge Alliance, representatives from the Universities of The Witwatersrand, Cape Town, Johannesburg and Kwazulu-Natal, and several other institutions and intellectual property academics. Nicholson was an active member of the Coalition. The Coalition arranged various workshops and meetings with the DTI to sensitise the Government and other stakeholders about the urgency of addressing the access needs of blind and visually impaired communities.

A Copyright Treaty Consultative Workshop to formulate the South Africa position on the WBU's TVI was organised by the DTI on September 13, 2010. The result of the workshop was a stakeholders' memorandum *The South African Position Regarding Copyright Limitations and Exceptions*, which supported a two–phased treaty at WIPO, namely, Phase One being the TVI as proposed by Brazil, Ecuador and Paraguay at WIPO (WIPO SCCR 2009), and Phase Two, which included the African Group's proposal already mentioned. The Summary of the position document reads as follows:

> Although some countries have provision for conversions into alternative formats, their copyright laws are territorial and do not address the broader international situation of cross-border exchange of information. Phase 1 of the Two-phased Treaty would address these issues. The main beneficiaries of Phase 1 will be blind, visually impaired and reading disabled persons living in developing countries, as they will have far greater access to works currently only available in high-income countries.

> However, even developed countries will benefit enormously from the liberalisation of access to foreign collections of accessible works and from the expansion of rights for blind, visually impaired and reading-disabled persons, e.g. in areas where access has been restricted by technological protection measures or restrictive licensing or contracts. Moreover, given the importance of economies of scale, everyone will benefit from the larger global market for accessible works. This will also create new markets for publishers and job opportunities for business persons interested in commercially producing works in in alternative formats (South African National Council for the Blind 2011).

For years, the South African government has ignored the trends in many other countries to address the needs of persons with disabilities in copyright law, or to ratify the 2013 Marrakesh Treaty for the Visually Impaired. The current *Copyright Act* is arguably in conflict with the South African Constitution and obligations in terms of various international human rights conventions, including the Convention and Protocol of the UN Convention on the Rights of Persons with Disabilities (CRPD) ratified in 2007 by South Africa especially with regard to Articles 9, 21 and 24. The *Copyright Act* perpetuates contradictions with other domestic laws that promote and protect access to information and education, as well as the right to equality, and freedom of participation and expression. It is also in conflict with laws that govern library and information services. The *South African National Library for the Blind Act* 91 of 1998 and the *National Library of South Africa Act* 92 of 1998 mandate libraries to provide optimal access to information for their users. Yet, the lack of appropriate copyright L&Es effectively renders the mandates ineffectual, particularly in the digital environment, and restricts services to persons with disabilities.

Breaking the Impasse on Copyright Reform

The legislative impasse seemed never-ending. Copyright reform was long overdue. Stakeholders were getting impatient. Musicians, in particular, started making demands for urgent reform. The government realised it had to initiate copyright amendments without further delay. Finally, in 2009, DTI embarked on a new process of copyright reform to bring it in line with the progressive laws of many developed countries and to meet the needs of the 21st century. The genesis of the Copyright Amendment Bill emerged from a number of influential copyright reviews.

DTI commissioned the University of Pretoria (UP) to develop studies and positions on copyright law, including fair use. At the same time, the African Copyright and Access to Knowledge Project (ACA2K), was probing the relationship between

national copyright environments and access to learning materials in eight African countries, including South Africa. The ACA2K research showed that the customary practices, processes and behaviour that prevail in a copyright environment are often even more important and revealing than the laws themselves. It seems the stricter the law, the more people tend to infringe copyright to ensure information access, albeit unlawful. The ACA2K researchers "found that copyright laws are, at best, unreliable access-enablers, regardless of the fact that copyright law is founded on the notion of the need to balance the economic interests of rights-holders with the access rights of users" (Armstrong et al. 2020, 36). The ACA2K work demonstrated that appropriate and adequate copyright flexibilities are fundamental for access to knowledge, and thus for human and social development (ACA2K Output Repository n.d.).

In 2010, the South African Open Copyright Review produced research findings and recommendations for fair use and appropriate L&Es for the library and educational sectors (Rens et al. 2010). From 2010 to 2014, the DTI embarked on an anti-piracy multimedia campaign where events were organised in various provinces to raise awareness about copyright issues. In 2011, the DTI established a Copyright Review Commission which was led by Judge Ian Farlam. Its mandate was to address artists' concerns that royalties were not being properly distributed to the rightful owners of copyright by collecting societies (South Africa Copyright Review Commission 2011). The DTI also commissioned a WIPO study: *The Economic Contribution of Copyright-Based Industries in South Africa* (Pouris and Inglesi-Lotz 2011). The study makes reference to Google's statement: "The existence of a general fair use exception that can adapt to new technical environments may explain why the search engines first developed in the USA, where users were able to rely on flexible copyright exceptions, and not in the UK, where such uses would have been considered infringement" (Gowers Review of Intellectual Property 2006, 62). Pouris and Inglesi-Lotz concluded:

> The South African copyright regime does not include exceptions and limitations for the visually impaired or for the benefit of people with any other disability (e.g. dyslexics) as well as for technological protection measures (such as encryption of the protected material) and electronic rights management information (such as digital identifiers). Furthermore, despite the existence of exceptions for purposes of illustration, for teaching and research, the legal uncertainty surrounding the use of works has led to the conclusion of agreements between the collecting societies and educational establishments to the financial detriment of the latter. As exceptions have the potentials to create value (Gowers Review, 2006), we suggest that DTI should review the Copyright Act to introduce limitations in accordance with the Berne Convention three steps test (article 9(2)) and with the fair use provision and to clarify clauses as necessary (2011, 53).

In 2011, at a multi-stakeholder conference, DTI informed stakeholders that it was preparing an intellectual property policy framework document which would be circulated for public comment later that year and provide the basis for updating the current intellectual property laws.

At the request of DTI, the SANCB Coalition submitted recommendations to amend the Copyright Act to the DTI Standing Advisory Committee on IP Rights. The recommendations included L&Es for people with disabilities, and introduction of new exceptions for, among other things:

- Transformative works
- Educational purposes including distance learning and elearning
- Translation into local languages
- Re-engineering of software
- Open licensing, open standards, and open formats
- Digital archiving
- Orphan works
- Parallel importation
- Backup copies for digital consumer products and most importantly,
- Fair use.

Also sought was explicit protection of the public domain and standard terms of copyright protection.[3]

As noted at the beginning of this chapter, copyright reform must be framed within the ambit of international obligations and national policies and legislation. Many of the treaties, proposals, conventions, and other sources have already been mentioned, ranging from the Berne Convention to the South African Constitution. They provided guidance, information, content and the framework for proposals to amend the *Copyright Act* and included WIPO studies on L&Es for libraries, archives and educational establishments (Crews 2017); the Beijing Treaty on Audiovisual Performances; IFLA's Treaty Proposal on Limitations and Exceptions for Libraries and Archives (IFLA 2013); South Africa's National Development Plan 2030; IFLA's Cape Town Declaration (IFLA 2015). Relevant goals from the United Nations Sustainable Development Goals were examined along with EIFL's Draft Law on Copyright (EIFL 2016) and appropriate clauses from progressive copyright regimes, particularly the US and other countries with fair use and related exceptions. DTI prepared a draft national intellectual property policy in 2013 and sought input and comment (South Africa Department of Trade and Industry 2013) as well as a regulatory impact statement (Pistorius, Bryer, Morar, and Jackson 2014).

3 Personal communication with the author.

After nine years of policy development, two different draft policies and various rounds of public consultation, Cabinet, the highest decision-making body of government, approved the new Intellectual Property Policy (Phase 1) in May 2018. There was high level input into the IP policy, with contributions from the United Nations Conference on Trade and Development (UNCTAD) and the UN Development Program (UNDP), as well as the UN Office of the High Commissioner for Human Rights (OHCHR) (Daniels 2018).

The Saga Continues

Unfortunately, the delays in the introduction of the reforms were not over. Things begin to sour. In 2013, the President assented to the *Intellectual Property Laws Amendment Act*, to incorporate Indigenous knowledge works as an extra category of protected works in the current *Copyright Act* and other intellectual property legislation, for example, trademarks, patents and designs, but the Act has not yet been promulgated. The legislation was controversial, and there was consensus amongst the stakeholders that protection of indigenous works should not be included in copyright legislation but addressed in separate *sui generis* legislation. As a result, a *sui generis* Bill was submitted to Parliament in 2015 by the Department of Science and Technology (DST). Originally called the Indigenous Knowledge Systems (IKS) Bill, it was amended and changed to the Protection, Promotion, Development and Management of Indigenous Knowledge Systems Bill in 2016 and passed as Act 6 of 2019. This legislation is more appropriately drafted to deal with Indigenous knowledge issues, but due to conflicting provisions with the Intellectual Property Laws Amendment Act, the future of both pieces of legislation is unclear. The latter Act has not yet been implemented as Regulations still need to be drafted.

In his 2014 budget speech, the DTI Minister, Rob Davies, announced proposed legislative changes, including the *Copyright Act*.

> Copyright Act: The existing intellectual property law regime requires a shift in order to take into account the trends, and developments, in the copyright environment, and address key challenges that have been raised by artists. The Copyright Review Commission which was headed by Judge Ian Farlam made important recommendations, which will improve access to education, regulate collecting societies effectively, and facilitate fair and speedy payment of royalties to rightful owners. We will propose amendments to the Copyright Act to bring an end to the plight of artists who continue to die as paupers. In this Bill, we will also propose measures to regulate fair use, and fair contract terms, given the challenges with contract negotiations within this industry (Davies 2014).

Library representatives wrote to the Minister's office respectfully requesting that L&Es for libraries and archives, education and research and for people with disabilities be included in the planned amendments. They stressed the urgency for such exceptions in view of the lengthy legislative impasse and existing copyright barriers affecting information access, education, research, and library and information services, and preventing conversion of copyright works into accessible formats for people with disabilities. In response to the request, the DTI's copyright and legal team met with the representatives in August 2014 to discuss the way forward.

The Copyright Amendment Bill

In 2015, DTI held public consultations and published a Draft Copyright Amendment Bill for public comment with a multi-stakeholder conference in Boksburg, Gauteng, after which, the deadline for submissions was extended to September 2015. Many stakeholders made submissions, some supporting the Bill and others strongly opposing it. Various stakeholder workshops were organised in some provinces for further discussion and debate and the Bill was revised during 2016, with DTI engaging in socioeconomic impact assessments with regard to the Bill. The revised Copyright Amendment Bill 2017 and the Performers' Protection Amendment Bill 2016, which are intrinsically-linked, were introduced into Parliament through the Portfolio Committee on Trade and Industry (Nicholson 2019).

The Portfolio Committee deliberated on the Bill at regular meetings and stakeholders were given many opportunities to submit comments on revised versions, and sometimes, on specific new or amended clauses. During early August 2017, public hearings were held in Parliament with international and local stakeholders presenting their views on the Bill. Nicholson presented on behalf of the library and educational sectors on August 4, 2017. The Chairperson of the Committee invited presenters to submit more information. A small technical team of IP academics from the University of Cape Town was appointed by the Committee to assist with the redrafting of the Bill, based on submissions received. Although there was no parliamentary requirement, the Bill was sent to the National House of Traditional Leaders for further consultation.

In October 2017, the African National Congress Legal Research Group convened a multi-stakeholder meeting in Johannesburg, which was live-streamed for the public's benefit and provided another opportunity to debate the contents of the Bill. In February 2018, the Portfolio Committee appointed a small technical team of IP experts, representing rightsholders and collecting societies, to help align the Bill with the Constitution and relevant policies, and Michele Woods, Director of the WIPO Copyright Law Division was consulted. In May 2018, the Committee

proposed to split the Bill into two phases, namely, Phase 1 to address the needs of musicians only, as recommended by the Farlam Commission in 2011, and Phase 2 at a later stage, to consider exceptions for the library and educational sectors and people with disabilities. Since Phase 2 would undoubtedly cause another long delay in the reform process, the library and educational sectors objected to the splitting of the Bill. Their representatives wrote to the Chairperson of the Portfolio Committee and met with the DTI's Deputy Director General and legal team expressing concern and stressing the urgency of the long-awaited L&Es for the library and education sectors and requesting that the Bill be reformed holistically and not in two phases. After deliberation, the Portfolio Committee agreed not to split the Bill and to continue working with the original consolidated Bill that was tabled for discussion and approval.

Approval of the Copyright Amendment Bill

The Portfolio Committee approved the Bill (version 5) on 15 November 2018 and the National Assembly approved it on 5 December 2018. It was referred to the Select Committee of the National Council of Provinces (NCOP) for discussion on 13 February 2019. This Committee called for final submissions from stakeholders by 22 February, 2019 and met again on 27 February and 6 March to address the submissions. On 20 March 2019, the Select Committee approved the Bill. On 28 March 2019, members of the full NCOP voted and finally passed the Bill.

The Bill was forwarded to the President of South Africa to act in terms of Section 79 of the Constitution. Section 79(1) reads as follows: "The President must either assent to and sign a Bill passed in terms of this Chapter or, if the President has reservations about the constitutionality of the Bill, refer it back to the National Assembly for reconsideration".

Sidebar – South Africa Commits to WIPO Treaties

It was noted earlier in this chapter that South Africa had not acceded to various WIPO treaties. By signing a treaty, a Member State of WIPO expresses the intention to comply with a treaty, but an expression of intent is not binding. It is only when a State accedes or ratifies a treaty that it becomes officially binding. Section 231 (2) of the South African Constitution determines the process for approval of international agreements. DTI made a presentation on March 26, 2019, to the Select Committee on Trade and International Relations and stated that accession to three international treaties, the Beijing Treaty on Audiovisual Performances,

the WIPO Performances and Phonographs Treaty and the WIPO Copyright Treaty, would ensure:

- keeping pace with technological developments
- protection for rightsholders in the digital environment
- new technological methods of exploiting copyright works
- strengthening of the position of performers; producers and authors in local and other markets, and
- access to copyright works specifically by those most vulnerable (South Africa. Department of Trade and Industry and Competition 2019).

Agreement was reached on acceding to the treaties.

Polarisation and Strong Opposition to the Copyright Amendment Bill

The Copyright Amendment Bill is progressive, forward-looking, and goes a long way to redress omissions and imbalances in the current *Copyright Act* for the benefit of all stakeholders. It aligns with progressive copyright laws in developed countries. Despite this, there has been a concerted effort by certain stakeholders to derail the Bill. In early 2018, rightsholder groups and collective management organisations (known as collecting societies in South Africa) formed the Coalition for Effective Copyright, now called the Copyright Coalition of South Africa, specifically to oppose the Bill. They have received support from international publishing and entertainment conglomerates who wish to maintain the status quo in South Africa, a developing country and net importer of intellectual property. The Coalition and its intellectual property legal advisors adopted an ongoing strategy to discredit the Bill through newspaper and blog articles, radio and television interviews, petitions and workshops to encourage stakeholders to oppose the Bill (Copyright Coalition 2019; Dean 2021a; Dean 2021b; Gilbert 2015; Karjiker 2015).

To counter opposition and to inform the public about the benefits of the Bill, a diverse group of creators, artists, musicians and other stakeholders established ReCreate SA on May 8, 2018. ReCreate SA's mission is to help creators by expanding their ability to earn from, own and create copyright-protected works and has made information available on the Bill.

During 2019, the President was put under immense pressure from the US Trade Representative (USTR), which threatened to review its preferential trade agreements with South Africa if the Bill were passed. South Africa's Generalized System of Preferences (GSP) eligibility could be withdrawn, causing dire economic consequences. The USTR called for submissions and held public hearings

in Washington DC on January 31, 2020, to persuade President Ramaphosa to refer the Bill back to Parliament for review. The University of The Witwatersrand LibGuide on Copyright includes a section: *Copyright and Related Issues: USTR GSP Trade Threats re: Bill* (University of The Witwatersrand 2021b).

The European Commission became involved in opposition to the Bill. Questions regarding the involvement were raised about the intervention in South African copyright reform on behalf of international rightsholders in the European Parliament. The response from the European Parliament included the following:

> The Commission fully supports the commendable efforts undertaken by the South African Government to revise its current copyright regime with a view to modernising it and bringing it in line with the international copyright conventions, including the Marrakesh Treaty, the WIPO [World Intellectual Property Organization] Copyright Treaty and the WIPO Performances and Phonograms Treaty. The Commission hopes that this reform will give a boost to the South African creative community and cultural industries, enhancing access to knowledge, culture and research for the society as the whole.
>
> Since 2015, Commission services have participated in the public consultations on the Draft Copyright Amendment Bill, by submitting their comments on the proposed amendments, drawing also on and in full consistency with the EU Directive on copyright in the digital single market [Directive (EU) 2019/790 of 17.4.2019, OJ L 130, 17.5.2019, p.92]. ...
>
> the EU Ambassador to the Republic of South Africa to the Director-General in the Office of the South African President reiterated some of the points expressed in the course of the public consultations ....
>
> The Commission also heard the views of various stakeholders and experts on the Draft Bill ...including organisations representing audiovisual producers, collecting societies of authors and composers book publishers as well authors' and publishers' reproduction rights organisations. (European Parliament 2020)

The European Commission process was secretive, involved only stakeholders representing rightsholders and failed to consult with organisations representing libraries, archives, museums and galleries, education or research, people with disabilities, or others who strongly supported the Copyright Amendment Bill.

The Next Stage – Copyright Amendment Bill Returned for Parliamentary Review

More than one year passed and the President had not assented to the Bill, nor had he sent it back to Parliament. Blind SA instituted legal proceedings in the Constitutional Court against President Ramaphosa in May 2020 to force the issue (Blind

SA 2020). The President reacted by referring the Bill back to Parliament for review on the grounds of constitutional concerns (South African Government 2020). Surprisingly, all the L&Es for education and research, and libraries and archives, museums and galleries, were referred back for review, despite their inclusion in the copyright laws of many countries around the world. The President's referral states along with other reservations that the Bill is "likely to be declared unconstitutional in terms of Section 25(1) of the Constitution and the Three-Step test binding South Africa under international law" (Ramaphosa 2020, 10). Inappropriate tagging or classification of the Bill was also cited along with a need for the Bill to be approved by provincial legislatures. In July 2020, letters of concern about the situation were sent to the South African Parliament by IFLA, the International Council of Archives, the African Library and Information Association, the Library and Information Association of South Africa, the Committee of Higher Education Libraries of South Africa, and BlindSA. Other organisations in support of the Bill undertook to raise their concerns during the Parliamentary review process. IFLA issued a press release with a statement by Gerald Leitner, the General Secretary:

> It is disappointing to see that learners, researchers and creators in South Africa will need to wait even longer for an already long-overdue reform, and particularly so given that the issues raised in the President's statement have already been extensively discussed. ... I hope that the South African Parliament will now stay true to its desire to support education, innovation, creation and development, and move rapidly to pass a law that will provide a model for the continent and the world (IFLA 2020).

In October 2020, the National Council for Library and Information Services (NCLIS), a statutory advisory body to the Minister of Sports, Arts and Culture, Nathi Mthethwa, communicated its grave concern to the Minister about the turn of events. NCLIS reminded the Minister that until the Copyright Amendment Bill is enacted, ratification of the Marrakesh Treaty for Visually Impaired people will continue to be delayed, subjecting people with disabilities to an ongoing book famine. In addition, some of Phase 2 amendments of the Third Cultural Amendments Bill of 2008, including the *National Library of South Africa Act*, the *Legal Deposit Act* and eight other legislative pieces related to cultural matters administered by the Department of Sports, Arts and Culture are impacted.

The Portfolio Committee on Trade and Industry in Parliament met three times to discuss the way forward and agreed that the Bill would be retagged or reclassified for provincial approval as sought by the President despite advice to the contrary from Chambers, Sandton provided to Recreate. It was also agreed that the fair use provisions would be opened for more public consultations. During November 2021, the Portfolio Committee on Trade and Industry met several times to deliberate on the Bill. In July 2021, stakeholders were invited to comment on the specific clauses

under review and to state whether the Bill complied or not with international treaties. On 11 and 12 August 2021, online public hearings were held by Parliament for stakeholders who had made written submissions. In November and December 2021, the Portfolio Committee on Trade and Industry discussed the written submissions and public hearings and made some decisions concerning deletions removing duplication in the Bill and including additional amendments which would need authorisation from the House of Assembly to be advertised for public comments. Subsequently, a call was made in early December 2021 for public submissions on new amendments to the Bill with a deadline of January 28, 2022, for comments.

Parliament received more than fifty submissions from stakeholders. The educational, research, library and other sectors, which supported the approved 2017 version of the Bill, strongly opposed the new amendments in their submissions in January 2022. The proposed amendments are overly restrictive and even prohibitive and arguably unconstitutional in some sections. It is unfortunate that the 2017 version of the Bill, which was fair and balanced, and provided for fair use and very helpful exceptions for education and academic activities, libraries, archives, museums and galleries and persons with disabilities, has essentially been overridden by impractical, unfair, and regressive proposals. If the Copyright Amendment Bill (version December 2021) is adopted in its current form, it will risk failing in a key policy objective: "to ensure access to information for research, education, libraries and archives and developmental goals" (EIFL 2022).

In May 2022, Parliament and the Department of Trade and Industry reviewed the submissions made by stakeholders in January 2022 and have recommended that some of the problematic proposals be removed or amended. It is now up to the Portfolio Committee on Trade and Industry through the National Assembly to approve or reject these recommendations before the Bill proceeds to the National Council of Provinces.

Once approved by the Portfolio Committee on Trade and Industry, the Bill will proceed to the National Council of Provinces (NCoP) for deliberation and will then be forwarded to the nine Provincial Legislatures for further deliberation and voting. A further call for public comments could arise during its passage through the Provincial legislatures.

South Africa's hopes for an updated and progressive *Copyright Act* have once again been delayed. When the Bill is finally approved and passed by Parliament, it will return to the President for assent. Thereafter, draft regulations will be published by DTI for public comment to enable the amended Act to be implemented. Although regulations follow a shorter process than a Bill, the copyright reform process will still take a long time before it is completed. Barriers to information access, education and research, particularly for people with disabilities, will continue.

Copyright Law and COVID-19

The COVID-19 pandemic in 2020 not only harmed the economy, education, health, lives and livelihoods of millions of South Africans, but also highlighted the omissions, inadequacies and restrictions in the current legislation that negatively affect or prevent access to information and educational resources, and hamper knowledge-sharing and the provision of relevant teaching and research materials, particularly in the digital environment.

Like other counties in the world, South Africa went under strict lockdown conditions due to the pandemic in March 2020. With level five restrictions, all libraries, archives and museums, educational institutions and businesses were closed at short notice. Print materials, multimedia and other works in library and related collections became inaccessible. Educational institutions at primary, secondary and tertiary level had no way of providing courses or teaching material unless they moved to online platforms immediately. Students were forced to leave their textbooks when they were swiftly evacuated from university residences. Educators and librarians provided course and other study materials, where they could, via password-protected elearning platforms, resulting in unforeseen expenditure on technology and equipment, data, training, software, and other related necessities, as well as unplanned-for copyright fees and countless difficulties for educators, librarians and users. Materials were unavailable digitally (EIFL 2020).

The current *Copyright Act* does not address the digital environment and its inadequacies became even more apparent in the COVID-19 lockdown. Educators and librarians have done their best to provide study materials under exceedingly difficult circumstances. Inadequate copyright L&Es and restrictive licences, especially relating to databases and ebooks, have prevented or limited what can and cannot be used, shared, converted, or uploaded to elearning platforms. Even institutions with blanket copyright licences with collective management organisations had to find additional funding for separate transactional licences to use additional or extra portions from copyright materials, as print copies were inaccessible due to library closures. Public libraries that, as a matter of course, promote authors' works by reading books to school children were forced to apply for permission and/or pay copyright fees to read books on online platforms, or to use alternative works for this important library function. A handful of South African publishers and some international publishers made concessions for the duration of the lockdown to open content usually locked behind paywalls. Unfortunately, in many instances the concessions were discipline-specific or country-specific, and not as helpful to South African educational institutions or libraries as originally expected (Nicholson 2020).

Conclusion

The ongoing delays in copyright reform in South Africa are seriously affecting information access, the provision of relevant and up-to-date materials for education, research and innovation, and the conversion of material into accessible formats for people with disabilities. It is crucial that Parliament address the constitutional concerns raised by the President expeditiously, astutely and transparently, so that the Bill can finally be assented to and enacted for the benefit of all South Africans. Failure to resolve the matter is hampering the work of libraries, archives and other information services that need an up-to-date and appropriate *Copyright Act* to enable them to conduct their statutory-mandated functions. Without amendments to the *Copyright Act*, South Africa will find it difficult to engage and compete in the digital space, especially as the demands of online teaching and learning, as well as research, publishing and innovation evolve within the ever-changing framework of the Fourth Industrial Revolution. Had the Bill been signed by the President in 2019 and enacted promptly, its L&Es would have been exceptionally helpful for educators, librarians, students, researchers, authors and creators, and people with disabilities during the COVID-19 lockdown. Although the pandemic protocols have eased, the challenges experienced in the digital space by educational institutions and libraries will persist until the *Copyright Act* is finally amended. Access delayed is access denied.

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Part IV: **Emerging Issues in Copyright**

An indepth look at some of the hot topics in copyright today

Rebecca Giblin and Kimberlee Weatherall

15 Taking Control of the Future: Towards Workable Elending

Abstract: Elending in public libraries has been both controversial and mainstream for at least a decade, with few signs of reaching any kind of sustainable equilibrium. One of the problems has been the gaps in knowledge: little is known about the availability of ebooks, borrowing patterns, or the interaction between elending and the ebook market. This chapter summarises the results of a first-of-its-kind, large-scale research project on the availability of ebooks to public libraries, and the terms on which they are licensed across English-speaking markets, as well as survey research conducted with libraries. It shows how books may be more available than previously thought, but that licensing practices contain flaws that indicate key failures in the market. The chapter considers possible copyright reforms for elending, such as exceptions for controlled digital lending or legislation targeting licensing practice. Finally, it urges creative solutions for taking more control of elending to ensure improvements for libraries, publishers, and authors, and to fill critical knowledge gaps.

Keywords: Library circulation and loans; Electronic books; Licence agreements

Introduction

Ebooks and elending continue to be the subject of profound disagreement, dissatisfaction and controversy within libraries and publishing houses. A core underlying challenge lies in the fact that multiple goals are being pursued simultaneously. Public libraries are critically important cultural and social institutions, but they are also part of the literary ecosystem and the market for books. Libraries seek to be responsive to their communities, and they are largely driven by demand. "Remaining relevant means that we are a slave to demand driven purchasing. (Don't tell the publisher)" (Kennedy et al. 2020, 9). Like other readers, library readers are most interested in new books: precisely the same titles publishers and booksellers are trying to sell in maximum number of copies in the small window of opportunity before a wave of even newer books knocks them off bookstore shelves (Kennedy et al. 2020, 15).

In most countries, booksellers are excluded from the library elending market altogether. Publishers share in revenues but worry that licensing to libraries might be cannibalising sales, leaving publishers worse off overall (Albanese

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2019d). Fears have been fanned by Amazon which, despite the absence of any evidence that library elending leads to lower sales, has told publishers that library elending is bad for their business (Albanese 2019e). In a world where sales are flat, Amazon and other big retailers are squeezing their margins, and with rising costs, it is easy to imagine publishers and booksellers lying awake at night, wondering what their futures hold.

The tension between libraries, publishers and booksellers has always been there, but in most countries, libraries are free to buy and lend out physical books without requiring publishers' permission. With ebooks it is different. Since buying and lending ebooks involves making copies and transmissions, copyright is involved, which means publishers must grant a licence or the ebook cannot be held by the library and cannot be accessed by the public. There was no deliberate decision to treat ebooks differently to physical books. It transpired through the happenstance of technological accident and the way pre-digital copyright laws were drafted. Back in 2015, the present authors noted that the consequence of differential treatment would leave the future of library elending entirely to the market (Giblin and Weatherall 2015).

Since 2015, the *elending project*, undertaken by a research team comprising researchers from law, data science and social science, funded by the Australian Research Council and working with partners from the library sector conducted comprehensive investigations into how ebooks are being priced and licensed around the English-language world (Giblin et al. 2019a; Giblin et al. 2019b); what motivates library decision-making about which ebooks to license (Kennedy et al. 2020); and how the system works for, and fails, libraries, publishers and aggregators (Giblin et al. 2019a). Over the years, tensions have grown, industry practice has shifted, and regulators have begun intervening. Thanks to the COVID-19 pandemic, members of the community have all gained first-hand experience of how exogenous shocks can threaten access to knowledge and culture, and the world has moved even further towards climate emergency on a scale that threatens the high-waste physical publishing paradigm. It is time to evaluate afresh how the market-based approach to elending is working out. What has been learned, and how do the learnings help libraries and publishers move forward?

At the outset, two short points should be noted. First, this chapter is largely limited to research and developments in the English-language world. Covering the whole globe would need a book of its own. It also focuses on elending in public libraries, as distinct from educational or professional libraries. For readers based in other regions or working with different kinds of libraries, the chapter hopefully provides a useful counterpoint to their professional experiences, and the discoveries described below might feed into future thinking. Second, the reader may notice that two important constituents in the world of elending have

not yet been mentioned. The first is the authors. Because authors usually do not control the rights over their commercially published ebooks and are not customarily involved in the decisions discussed below, they figure rarely, but they are important in the ecosystem and their interests will be brought into the equation in the last section. The other omission is the elending aggregators like Overdrive, who sit between libraries and publishers, providing infrastructure for elending. They too will figure more prominently later. But when it comes to the terms on which elending occurs, it is the publishers who determine the terms, and libraries that feel the impact. The focus is primarily on these two groups.

What Has Been Discovered?

As part of the *elending project*, four quantitative studies were conducted into the availability of ebooks for library lending, based on data collected in mid-2017. One study focused on Australia and examined the availability of 546 ebooks across five aggregators in this single market, as well as the availability of the ebooks in physical form. Another study was internationally focused and examined the availability of the same 546 titles across a single aggregator in five English-language markets: Australia, the US, Canada, the UK, and New Zealand. The third study was an international and large-scale study which investigated the relative availability of almost 100,000 titles across the same five English-language markets. The final study measured the time it took for bestselling titles to become available for elending in Australia. A database was separately constructed of over 7 million ebook checkouts covering five Australian regions plus Vancouver in Canada and Auckland in New Zealand. A nationwide survey was also conducted of Australian libraries in late 2018, and interviews held with library experts, elending aggregators and publishers. The following sums up some of the central discoveries under four headings:

- Ebook availability is patchy
- Even if ebooks are available, they are not necessarily affordable
- Libraries are driven by demand, which increases their vulnerability, and
- A lack of transparency is affecting all players.

Ebook Availability is Patchy

The *elending project* quantitative studies found that publishers were investing in making both front and backlists available to libraries for elending to a greater

degree than library partners had predicted. In the Australia-focused study, 6% of the 546 titles were unavailable in physical form, but half of those were available for elending. Thus, library ebooks are already contributing to continuing cultural availability. Older books were regularly available, and libraries could continue fulfilling their mission of making available backlist titles no longer sold in bookstores. But it was not all good news. In the small-scale Australian study, just 76% of sampled titles were available as ebooks from at least one platform, which was considerably worse than their availability in physical form, with 94% of the titles able to be purchased as books in Australia. Only 51% of sampled titles were available from all five platforms, which meant libraries needed to subscribe to multiple platforms and pay the associated platform fees to obtain access to the largest range of titles. Two-thirds of the libraries surveyed offered more than one platform and complained about providing the extra resources required to manage them, as well as having to pay multiple platform fees (Kennedy et al. 2020, 7).

In the small- and large-scale international studies, availability of the titles across the countries surveyed was extremely variable, with North American countries, the US and Canada, having access to the most complete range. Part of the gap is explained by the variable practices of Hachette, one of the Big 5 publishers. The Big 5 were considered to be: Penguin/Random House, Hachette Book Group, Harper Collins, Simon and Schuster and Macmillan, although it will soon be the Big 4 if the proposed acquisition of Simon & Schuster by Penguin Random House is permitted to proceed. The purchase by Penguin Random House of Simon and Schuster renders it a group of 4 (Schaub 2020). The executives in charge of Hachette's North American office permit titles to be licensed to libraries, albeit at a steep cost. At least at the time of the research, however, Hachette's UK office mandated that ebooks not be licensed to libraries in the UK, Australia, or New Zealand at any price. That meant those libraries were not able to provide Hachette titles to their ereading populations, including those with vision or mobility impairments, people living regionally and remotely, shift workers, and, of course, patrons affected by pandemic-related lockdowns.

In the bestseller time lag study, it was found that most books became quickly available as ebooks. In the sample of 81 titles, 49% became available on their publication date, a further 25% within 16 days, and the final 26% before they were published (Giblin et al. 2019a). This suggests publishers were not particularly concerned about cannibalisation of their frontlist titles as of mid-2017. As discussed below, the situation changed dramatically soon after.

Even If Ebooks Are Available, They Are Not Necessarily Affordable

Ebooks are licensed on any number of different terms (Riaza and Celaya 2015). At the time of the *elending project* quantitative research, the main standard-form licences in English-language markets were one copy/one user (OC/OU) which permit a title to remain in the collection indefinitely, with one user at a time able to borrow it; loan-limited licences, permitting the book to be borrowed by one user at a time for a set number of loans, usually 26; and time-limited licences, permitting one user at a time to borrow the title until the licence expires, usually after 2 years. Time-limited licences sometimes have an additional loan limit, for example, "36 loans or 2 years, whichever comes first". The practices differ across markets, with some countries, like the Netherlands, permitting multiple users to access titles simultaneously.

Time-limited licences carry the highest risk for libraries because titles will be deleted once the time limit is reached, regardless of whether or how much the books have ever actually been borrowed. For that reason, one might expect that publishers would use them only for the most valuable, highest-demand titles, which are almost always the newest ones. However, that is not the case. The large-scale international study found that time-limited licences were widely used, and that older and newer books were given expiring licences at similar rates (Giblin et al. 2019b). The greater risk was not compensated by lower prices. The data show that when it comes to ebook licences, old and new titles are similarly priced (Giblin et al. 2019b).

Such licensing makes certain titles unattractive. In the survey, libraries reported that time-limited licences made them less likely to purchase older titles, as well as titles from debut authors, especially if the authors were published outside the Big 5 group of publishers. The risk of such books failing to circulate before the licence expires is too high. These fears appear to be well-founded. Macmillan makes its titles available on a "52 loans or 2 years, whichever comes first" licence, and leading aggregator OverDrive has reported that 79% of titles expire before the loan limit is reached (Potash 2019).

Consistent with previous library interviews, the nationwide survey found Australian libraries strongly preferred that ebooks be offered with a choice of licences and price points to enable them to select the one that best fits the needs of their readers and budgets (Kennedy et al. 2020, 11–12). However, books are only rarely made available with a choice of licence. In the large-scale international study of almost 100,000 titles across five different countries, with a total of 388,045 instances, 97% were available on a single licence only (Giblin et al. 2019b). Preliminary interviews with publishers suggest they adopt the one size

fits all approach because they lack resources to devote to elending, which is, after all, a relatively small part of their business, and because they are unsure about the alternatives available and how they might affect their bottom line. However, the one size fits all approach might be costing publishers sales. 36% of responding libraries reported that licence type is a very or extremely important factor influencing their purchasing decisions, suggesting that, subject to strong patron demand, libraries will not buy books that are licensed on inappropriately disadvantageous terms (Kennedy et al. 2020, 8).

Libraries Are Driven by Demand, Which Increases Vulnerability

Price is not everything. Seventy-nine percent of libraries reported that known or anticipated demand was **the** most important factor in deciding whether to license ebooks. As a result, 38% of surveyed libraries reported that they would purchase high-demand titles regardless of unattractive pricing, and a further 47% said they may do so after considering factors like available budget and whether the title could be accessed elsewhere more cheaply (Kennedy et al. 2020, 9). Most books cannot be substituted with alternative titles, and libraries are keenly motivated to make their readers happy. The desire to meet user demand makes libraries vulnerable to above-market pricing or unfavourable terms in a way commercial businesses would not be.

A Lack of Transparency is Hurting All Players

Libraries, aggregators, and platforms all say the lack of transparency around elending is a problem for them.

Libraries want better data. The Australian survey found that few libraries tracked the price per loan, with a full 30% expressing a desire to do so but reporting they lacked the necessary resources or skills (Kennedy et al. 2020, 10). In the absence of loan data and analytics capacity, there was widespread concern from libraries about the impact that new licence styles such as per-loan licensing would have on budgets and workflows. The lack of overall information also stands in the way of attempts to modernise public lending rights (PLR) in Australia (more information on PLR is published elsewhere in this volume). Aggregators could build better tracking and reporting functionality into their offerings, but if they gave libraries a better window into the number of titles that expire without being borrowed, there is a risk that it would lead libraries to purchase fewer ebooks and harm the aggregators' own bottom line. Quite rationally, the providers of ebooks

focus their efforts on aspects that help them build revenue, such as making it easy for libraries to track holds and buy new licences to fulfil demand.

Aggregators also suffer from a lack of information. When aggregators were approached for permission to collect data for the small-scale Australian study, they said there was no point: that the same prices and the same licences would be found on each platform. But this was not the case. Forty-one percent of titles had different lending models across platforms, of which 22% were major differences, such as OC/OU on one platform, and time-limited on another. After further investigation it became evident that, although publishers often intend to give the same terms to all aggregators, they are not necessarily very good at giving effect to their intentions (Giblin 2019a).

Publishers are also harmed by incomplete and/or unavailable information. While aggregators report the number of licences sold, publishers related in interviews that they cannot access data about how often or where their ebooks actually circulate. In the case of OC/OU titles in particular, this leaves publishers to imagine their books are circulating thousands of times in exchange for a single fee. It is no wonder that some might accept unsubstantiated claims of Amazon that library elending cannibalises publishers' sales, despite Amazon's obvious interests in weakening libraries to further bolster self-interest (Albanese 2019e). However, these fears are likely to be unfounded. The analysis of almost 3.5 million ebook checkouts found that ebook titles are lent by Australian libraries a median of just thirteen times (Giblin et al. 2019b). In interviews, independent publishers in Australia expressed surprise at the extent to which libraries are concerned about licence terms, and they demonstrated a potential willingness to discuss alternatives that could work better for libraries while still addressing publishers' concerns.

In summary, it is likely that the absence of functioning information exchange and analytics, in addition to a lack of resources to tackle licensing issues on all sides, stands in the way of licensing options that could better allocate risk (of unread books) and reward (for popular books) among libraries, publishers, and authors. But perhaps the most important insight to emerge in this space is that actors within the ecosystem, particularly publishers and libraries, are largely unaware of the constraints and concerns facing others.

Recent Developments

The elending landscape has not settled into any particular pattern of licensing terms or availability. On the contrary, it has shifted substantially since the studies were undertaken. In particular, after the data collection phase of the *elending*

project, four of the Big 5 rolled out major changes to their licensing terms. Penguin Random House switched its titles from OC/OU to time-metered licences, and Hachette quickly followed suit, at least in those markets where it was willing to license them at all (Albanese 2019a). Simon & Schuster already had time-metering in place but shifted from one to two-year licences and raised its prices to match (Albanese 2019b). In a more welcome move, it also began experimenting with per-loan licences in the US market: a step towards the licence choice libraries have been seeking for years. Platforms like the Digital Public Library of America (DPLA) have also been working towards licence choice. As of 2020, for example, for books published by various independent presses, libraries have a choice on the DPLA platform between: the traditional OC/OU licence; one that offers a maximum of 40 loans with no time limit, up to 10 concurrently; and another that allows 5 loans, up to all concurrently, for a quarter of the price of the other two options (Kimpton 2020). The recent collaborative arrangement with Amazon also provides for licence choice (DPLA 2021).

The most controversial change was Macmillan's proposed reintroduction of embargoes on new titles (Sargent 2019). Embargoes had been a feature of the early elending landscape but had disappeared as publishers grew more comfortable with elending. In 2017, when data collection took place, even bestselling titles were widely available on or even before their publication dates, and the issue did not seem to be on anyone's radar. That changed after Amazon's anti-elending campaign began. Macmillan's new model, announced mid-2019, permitted libraries to purchase just one OC/OU licence for each new release, at a special discount price, usually US$30. After the eight-week embargo window passed, libraries would be able to buy additional copies on metered access terms, 52 loans or two years, whichever comes first, for about US$60. The policy specifically sought to introduce more "friction" into elending to prevent it from cannibalising sales (Sargent 2019). However, Macmillan provided no evidence in support of its claim that elending by libraries was damaging their sales overall, and the CEO of leading aggregator OverDrive, Steve Potash, citing its own data, decried it as a "work of fiction" (Potash 2019). It was denounced by the American Library Association (ALA), with ALA President Wanda Brown pointing out that "when a library serving many thousands has only a single copy of a new title in ebook format, it's the library – not the publisher – that feels the heat. It's the local library that's perceived as being unresponsive to community needs" (ALA 2019b). Macmillan faced down public criticism and a library purchase boycott, but eventually dropped the policy in the early days of the COVID-19 pandemic (Marshall 2020). Perhaps, with libraries shutting their doors and digital loans often the only way to connect library books to library readers, it became untenable to continue the fight.

Impact of Covid-19 Pandemic

The COVID-19 pandemic has been perhaps the most significant event to affect elending since it began gaining traction in the early 2000s. In March 2020, countless libraries around the world closed their doors as global lockdowns came into force. At the same time, legions of people were forced out of work, making commercial purchases less affordable. International supply chains were disrupted, making it more difficult for physical books to reach stores. Elending assumed an importance it had never previously had. The change was reflected in circulation figures, with libraries throughout the world reporting enormous surges in numbers. In the US, OverDrive reported an increase of 52% in ebook circulations (Dybis 2020) and in the UK, Bolinda reported a mammoth 110% increase after libraries shut down (Wales 2020).

This new public awareness of, and the need for, elending has, perhaps temporarily, put libraries on stronger ground. The sudden closing of library doors posed major challenges for libraries, especially in relation to material needed by students and researchers. Not only did the pandemic influence Macmillan's decision to abandon its controversial new terms, but it caused other publishers to offer concessions: Penguin Random House, for example, offered specific discounts for public and school libraries (Penguin Random House 2020). Aggregators and publishers worked together to offer simultaneous access licences, a shift that had previously been very slow to come (IFLA 2020).

The pandemic may have influenced a change of tune from Amazon. An increasingly important publisher of ebooks (ALA 2019a), Amazon has long refused to license them to libraries on any terms at all, creating "a particularly pernicious new form of the digital divide" (Albanese 2019c). However, in mid-2021 Amazon finally struck a deal to license about 10,000 of its ebooks and audiobooks to US libraries via the platform of the Digital Public Library of America (DPLA) (Klar 2021). Amazon's apparent new willingness to negotiate seems to have been influenced by interventions in the market by US state legislators (Klar 2021). Both Maryland and New York State recently passed legislation requiring publishers to license their ebooks to libraries on reasonable terms (Albanese 2019f). The new laws are discussed below under the heading: Is Legislation the Answer?

The shift to digital reliance was not without conflict. Some organisations went further in providing access to ebooks without publisher permission. The HathiTrust established an Emergency Temporary Access Service, which provided digital copies of titles to member libraries which owned the original print edition (HathiTrust Digital Library n.d.). For a member library like that of Columbia University, the service meant that 40% of Columbia's collection became temporarily digitally available during the COVID crisis (Columbia University Libraries 2020).

The Internet Archive went further, creating what it called the National Emergency Library (Internet Archive n.d.) providing expanded access and simultaneous loan of digital copies of titles previously made available in a more limited way, via the Controlled Digital Lending (CDL) model discussed in the next section. This move by the Internet Archive led to litigation; the National Emergency Library ceased operations earlier than originally planned. Educational libraries also relied on a range of exceptions to make and host electronic copies of books and book extracts that publishers had not made available and affordable for elending (Infojustice 2020).

Is Legislation the Answer? Options for Reform

The current situation is clearly unsatisfactory. Books are unavailable to libraries even when they commit to wasteful duplication of platform fees and administration. Terms keep changing. Actions like Macmillan's embargo impose inequality of access on those who depend on libraries for access to books. Data to track what is going on is unavailable. And despite all the research conducted over recent years, nobody seems to really understand the relationship between library elending and book sales. What options are open to policymakers seeking to put public library elending on a more sustainable footing, without upending the publishing and bookselling industries?

Reforming Copyright to Recreate Old Compromises

The first path is perhaps the most obvious: reform copyright, with a view to recreating, in a digital environment, the models under which libraries operated in the physical world. Since the altered application of copyright in the ebook environment compared to the physical world has created a dysfunctional market, copyright reform might seem the obvious solution. Why recreate the compromise which operated with print and physical materiality? Because it worked; people know it, and, more importantly, because the conservative international legal structure of copyright makes it easier to recreate the past, than to reimagine the system for the future. The transposition of exceptions applicable in the analogue environment to the digital context is a well-accepted method for seeking to preserve public interest balances in the digital environment.

Controlled Digital Lending (CDL)

One attempt to transpose physical models to the digital environment is known as controlled digital lending (CDL) (Bailey et al. 2018; Wu 2011; 2017). Under CDL, a library which has purchased one or more copies of a book makes a digital copy and can then circulate the physical or digital copies up to the number of legitimately purchased copies held. CDL seeks to maintain a close relation to past library practice and reduce the impact on copyright owners by limiting simultaneous loans. Thus, according to one definition offered by Hansen and Courtney (2018):

> CDL enables a library to circulate a digitized title in place of a physical one in a controlled manner. Under this approach, a library may only loan simultaneously the number of copies that it has legitimately acquired, usually through purchase or donation. For example, if a library owns three copies of a title and digitizes one copy, it may use CDL to circulate one digital copy and two print, or three digital copies, or two digital copies and one print; in all cases, it could only circulate the same number of copies that it owned before digitization. Essentially, CDL must maintain an "owned to loaned" ratio. Circulation in any format is controlled so that only one user can use any given copy at a time, for a limited time. Further, CDL systems generally employ appropriate technical measures to prevent users from retaining a permanent copy or distributing additional copies.

Under the CDL model, just as in the physical world, once a library has purchased a legitimate licensed copy of a book, details on how the book is lent thereafter are a matter for the library only, without rightsholder input, provided that the owned to loaned ratio remains the same, and digital rights management (DRM) is used to prevent copying and redistribution.

Hansen and Courtney (2018) argue that CDL is already allowed under US law, on two different bases. The first is that the first sale doctrine applies in the digital environment. The argument here is that copyright is exhausted once an object is sold. The concept of exhaustion is uncontroversial in the physical context where it entitles people to sell their physical books and DVDs on the second-hand market without copyright liability, but much more controversial in the digital environment where each electronic reproduction and communication involves a separate exercise of copyright. Subsequent to most of this literature, both the Second Circuit Court of Appeals in the US in *Capitol Records, LLC v. ReDigi Inc.*[1] and the Court of Justice of the European Union in *Nederlands Uitgeversverbond v.*

1 Capitol Records, LLC v. ReDigi Inc. 910 F.3d 649 (2d Cir. 2018).

Tom Kabinet[2] have rejected the concept of digital exhaustion or digital first sale. *Tom Kabinet* specifically dealt with ebooks and relied heavily on international copyright law and the World Intellectual Property Organization (WIPO) Copyright Treaty (1996) to rule against the argument.

The second argument is that CDL is, or should be, enabled via a copyright exception. US proponents argue that "fair use … permits libraries to do online what they have always done with physical collections under the first sale doctrine: lend books". The detailed argument is set out by Hansen and Courtney (2018). As noted below there is uncertainty about this argument, which has not yet, but could soon, be tested in court in a case brought by publishers against the Internet Archive in 2020, *Hachette & ors. v. Internet Archive & ors*.[3]

Europe does not have fair use, but it does have an exception in Article 6(1) of the *Directive on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property* [hereinafter Rental and Lending Rights Directive](Directive 2006/115/EC 2006) that allows non-commercial lending as long as authors, not copyright owners, are remunerated. A public lending exception exists in the Rental and Lending Rights Directive because under Article 2 of that same Directive, European law holds to the anomalous position of granting a general rental right in copyright that extends to non-commercial lending. The conditions of the exception could perhaps be met by a system such as a public lending right, although detailed consideration would need to be given to the question of how this would interact with questions of national treatment that arise in the context of the public lending right. Such questions are beyond the scope of this chapter.

The non-commercial lending exception in the Rental and Lending Rights Directive was considered in the Court of Justice of the European Union (CJEU) decision in *Vereniging Openbare Bibliotheken v. Stichting Leenrecht*[4] (*VOB*), which established that it covers elending. However, the decision has significant limitations: it covers only lending that has "essentially similar characteristics to the lending of printed works" (CJEU 2016). For example, the lending must be on an OC/OU or similar basis and more importantly, the ebook must have been legitimately acquired. The CJEU did not explain how an ebook might be legitimately acquired without being subject to licence conditions, or what would happen if

2 Nederlands Uitgeversverbond v. Tom Kabinet Internet BV. (C-263/18), 19 December 2019, European Court Reports [2019].

3 Hachette Book Group, Inc. v. Internet Archive (1:20-cv-04160) District Court, S.D. New York (Complaint).

4 Vereniging Openbare Bibliotheken v. Stichting Leenrecht, EUECJ C-174/15, 10 November 2016.

those licence conditions clashed with the conditions set out in *VOB*. As a result, the CJEU decision has not proved particularly useful to libraries.

Most countries do not have an exception that would even arguably allow CDL. They could seek to draft one, **if** they can ensure it is consistent with the three-step test in Article 9 (2) of the Berne Convention. Countries would need to argue that some version of CDL is (1) a "special case" that (2) "does not conflict with normal exploitation of the work" and (3) "does not unreasonably prejudice the legitimate interests of the author" or the "right holder", as stipulated in Article 9(2) of Berne, and Article 13 of the Agreement on Trade-Related Aspects of Intellectual Property Rights [hereinafter TRIPS] (World Trade Organization n.d.). Whether the argument can be sustained would depend significantly on how any exception is framed and applied; the more limited and tailored any exception is to address gaps in the elending market, the more likely it is to be consistent with the test.

A special case must be justified on some public policy basis and narrowly drawn to meet that purpose; it must also not fully cover or remove an exclusive copyright right. At least some elending by public libraries could be an arguable special case. CDL as a temporary and emergency measure in the context of the pandemic, for example, especially for books otherwise unavailable as ebooks, would be an especially strong case for an exception, as was argued in a number of library statements issued in 2020 (Infojustice 2020; Missingham 2020). The argument is further supported by figures from the Internet Archive suggesting that during the crisis, a majority of titles were looked at for less than 30 minutes, suggesting that such viewings are not substituting for sales (Kahle 2020).

Beyond this obvious special case, exceptions to support elending where publishers have failed to make books genuinely available may be justified by the critical societal roles that libraries play in promoting equal access to knowledge and culture, curating history, supporting research, and promoting reading. Those roles are supported by the longstanding history of lending and its attendant compromises between the interests of publishers and libraries. Frankly, publishers should not get to choose whether books are available to library readers. The inaccessibility of books for elending is not costless. It has a cultural price for readers seeking books that are not available physically, and for readers who cannot rely on physical lending due to disability, distance, or shift work making access during business hours impossible. Inaccessibility of books for elending has costs, too, for authors, who have no say over licensing terms and little hope, under present approaches, of receiving ongoing royalties, and are likely to see their titles simply disappear from electronic catalogues. It could be that some older books, at least past prize-winners and blockbusters, would find a reading public if available for elending, even if not a large one. This possibility contributed to the motivation behind the Untapped project, discussed below.

The more challenging legal question is whether CDL conflicts with normal exploitation of the copyright in books and/or unreasonably prejudices the interests of rightsholders and/or authors, which would put CDL in conflict with Article 9(2) of Berne and Article 13 of TRIPS. Both these questions have been held in World Trade Organization (WTO) dispute settlement proceedings to depend fundamentally on the impact of any exception on existing or prospective copyright markets for licensing or sale.[5] The reality, amply demonstrated by the *elending project*, is that there is a significant market for licensing specifically for non-commercial elending by libraries, which could be undercut by CDL, depending on when and how it is applied. There could also be an argument that any over-broad exception for elending would impact on normal exploitation through the market for commercial licensing of ebooks for purchase by readers, or for licensing of commercial subscription services, **if** there were evidence that library loans impact sales negatively.

The details matter a great deal in determining the consistency of any exception with international copyright law. There is evidence from the studies reported here that one significant Big 5 publisher, Hachette, has systematically failed to make its titles available for elending outside North America. Amazon, an increasingly powerful publisher, has failed to make titles available for elending by libraries anywhere in the world until the recent announcement with DPLA (DPLA 2021). The research further provides evidence that, although an elending licensing market exists, it is failing in relation to older books past their initial flush of popularity. The commercial life of physical books is short; most are available in bookstores for mere months, if not weeks. After that, demand is generally not high enough to justify keeping them on bookstore shelves, although external factors such as movie versions, literary festivals or awards might revive a book's popularity. One would expect to see licensing terms change to reflect that drop in demand, but the evidence from the *elending project* shows that does not happen. Older books are commonly licensed on time and/or loan-limited terms with books "exploding" and disappearing (Kennedy et al 2020, 4), and at prices similar to those applying to much newer titles. The data is insufficient to determine whether libraries refuse to purchase expensive older titles for elending. Checkout data from libraries was collected, along with data regarding which titles were available for libraries to purchase via the various aggregator platforms, but not data on what titles were in fact purchased by libraries; from an aggregator perspec-

5 *US—Section 110(5) of the US Copyright Act, Report of the Panel*, 15 June 2000, WT/DS160/R. Legitimate interests is a concept broader than the impact on economic interests; broader interests, such as those in moral rights, are not relevant to the scenario under consideration: and the focus in this chapter is on the market impact of any exception.

tive, information on sales would have been much more commercially sensitive. As already mentioned, there was a separate checkouts database showing how many times titles had been borrowed. The evidence cited above from the surveys suggests that purchases of older material were less likely: libraries reported being more likely to allocate their limited elending budgets to in-demand titles that have less risk of failing to circulate before the licence expires (Kennedy et al 2020, 8–9, 11–12).

If the market were to fix the problems identified, it would be most welcome. However, as the market has failed to fix these problems for more than a decade, it would be naïve to expect it to do so now without intervention. The constant shifting of publisher approaches to licensing and availability, and the recent turmoil, including the conflict over embargoes, are evidence of a market struggling to reach any kind of sustainable equilibrium. And there are real barriers to the market being able to remedy the issues. One is the absence of information. Quality information about pricing, licensing, and use of titles for elending is scarce and not well-circulated. And beyond information problems for libraries that the *elending project* findings highlighted, publishers, who receive no information about loans, electronic or otherwise, of their titles, have no way of knowing whether there is continuing interest in a title beyond its life in the bookstores.

Another practical barrier to more nuanced licensing strategies is the resources and time required to reach optimal, or even acceptable, licensing arrangements. Preliminary discussions with publishers suggest they have limited staff time allocated to managing ebook licensing, let alone licensing for elending. It would not be at all surprising that the result is the use of standard terms, rather than market-sensitive approaches. Notably, there is less variety in licence terms cross-jurisdictionally from the more resource-strapped publishers outside the Big 5 (as they were at the time of data collection). One would expect that the bulk of a publisher's time and effort on licensing for elending would be devoted to newer books. In the elending context, there is no cost to simply letting old titles sit at the same price; there is no pressure, for example, from competing second-hand sales; and given the expectation that sales would not be high in any event, it may simply not be worth a publisher's time to try to find a licensing solution that works for libraries. In short, the evidence suggests that not only is there a current market failure, especially in relation to older titles, but there is reason to believe that this is not a mere temporary problem that the market can solve. This makes enacting a copyright exception more readily justifiable.

Questions, of course, remain. From a legal perspective, there may be an open question whether any exception would need to be confined to unavailable titles only, to comply with the three-step test: or whether it is sufficient that the pricing or licence terms are unreasonable, having regard to the age of the title. And there

are further questions regarding what other limits might be needed for consistency with international law. For example, would it be necessary to confine access to ebooks geographically, so that public libraries are only serving local populations within visiting distance of the library? There has been very little interpretation of the three-step test, and without more information about the interrelationship between library elending and book sales, it is difficult to predict where the line between acceptable limitation and unacceptable incursion lies. As a result, exceptions might end up being shaped conservatively, and of little practical use to libraries.

The case for CDL would be strengthened if it involved remuneration for publishers and/or authors: what is called in copyright a compulsory licence, rather than an outright unremunerated exception. The explicit goals of a compulsory licence would be to promote curation, including continued attention to, and availability of older works of value**,** the preservation of digital access to older titles, the longevity of authors' work, and perhaps ensuring ongoing income. However, even remunerated exceptions must comply with the three-step test. They also raise still more questions because the terms of the licence must be determined. Could such a licence stipulate that some fixed proportion of remuneration go to authors, and thus build author interests into the system rather than relying on publishers to distribute income? Such a stipulation might be justifiable on the basis that publishers have failed to exploit the market effectively and as argued by Giblin (2017), that the extended duration of copyright ought to reward authors, rather than allow publishers extended periods for the collection of royalties. How would compulsory licences be framed to achieve the goal of reflecting the low and slow demand for older books? Ought compulsory licences provide for limited loans but unlimited duration, to match the slow demand for older titles while ensuring that authors whose books enjoy a resurgence of demand retain some ability to re-license the title on commercial terms? Should compulsory licences specifically allow for low and widely distributed demand for a title via consortium-based, state-based, or national library licensing of older books?

This discussion raises more questions than answers. But that itself is telling. A path to copyright reform via a CDL model exists and could be pursued if market problems continue. But it is complex and uncertain, and there may be better alternatives.

Ban Unreasonable Practice?

An alternative approach to copyright reform is to enact specific legislation prohibiting publisher licensing practices that are contrary to the public interest. As

of 2021 such laws have already been enacted with unanimous bipartisan approval in two states in the US: in Maryland[6] and New York State.[7] Both laws require publishers who license ebooks to consumers to offer them also to libraries on reasonable terms (Albanese 2021a; 2021b). The laws specifically ban embargoes by stating that limiting the number of elending licences available on release of the book is not a reasonable term, but provide that terms such as limitations on the number of simultaneous readers, loan lengths and the use of technological protection mechanisms would be.[8] Neither law specifically mentions price, although price gouging could presumably fall foul of the obligation to provide books on reasonable terms. Publishers' failure to comply will violate existing trade practices protections.[9]

Such provisions are welcome, but no panacea. They deliberately leave much to be determined, including terms the *elending project* research suggests are problematic particularly for older books, such as high prices and time-limited licensing (Giblin et al. 2019b). Such a law is also challenging to propose and implement, as it represents a specific intervention into commercial practices which to some extent seeks to dictate, or at least limit, the commercial freedom of market actors. However, even quite significant intervention is not unprecedented in copyright markets, especially where a small number of actors holds rights in a large chunk of a cultural form: regulations governing the behaviour and licensing practices of collecting societies, for example, are commonplace globally. Rules prohibiting or limiting unfair contractual provisions are common too. An attractive feature of this option is that it directly targets the behaviour of concern, that is, unreasonable terms that hamper libraries' abilities to fulfil their public interest missions. Beneficially, it is also able to keep up with evolving practice because what is considered reasonable can change over time as more is learnt about how elending affects markets. Drafting the legislation in terms of a reasonableness standard encourages stakeholders to generate quality evidence about the relationship between elending and book sales that is currently sorely absent. Litigation is expensive and uncertain, and in jurisdictions where provisions of this type are enacted, it is doubtful that anybody would be rushing to court straight away.

6 *An Act Concerning Public Libraries – Electronic Literary Product Licenses – Access*, House HB518; Senate SB432 (Maryland General Assembly 2021).

7 *An Act to Amend the General Business Law, in Relation to Requiring Publishers to Offer Licenses for Electronic Books to Libraries Under Reasonable Terms*, New York Assembly A5837-B.2021-22; New York Senate S2890-B (New York State, 2021).

8 See HB518/SB432 §§ 23-702(A)-(C) (Maryland); A5837-B/S2890-B §§ 399-nn (3) (New York State).

9 See HB518/SB432 §§ 23-702(D) (Maryland); A5837-B/S2890-B, §§ 399-nn (4) (New York State).

However, its very existence could get publishers and libraries to think more carefully about each other's needs and thus nudge behaviour in the right direction.

Is the Effort Worth the Outcome?

Copyright reform or other regulatory interventions as discussed above could in theory address current problems in the elending marketplace. However, such moves would face many challenges both in making the case for the exception or regulation against opposition from other stakeholders, and in appropriately framing its content given the lack of information about the relationship between library elending and book sales. It is unlikely that achievable copyright reform will address the period when ebook titles are new, nor is it likely to address any attempt by publishers to reintroduce embargoes, although specific non-copyright legislation along the lines of the Maryland and New York State laws might do so.

Publishers have signalled strong opposition to CDL. The complaint filed by Hachette, Penguin Random House, John Wiley & Sons and HarperCollins on June 1 2020 against the Internet Archive, *Hachette & ors. v. Internet Archive & ors*,[10] prompted by the Internet Archive's National Emergency Library initiative, but alleging all implementation of CDL by the Archive breaches copyright law, has already been mentioned. The complaint rejects any claim for fair use, pointing to the scale of the programme with more than one million titles available for loan globally, and the fact that the collection includes recent, commercially successful titles. The complaint also argues that the Internet Archive is not, in fact, a library, pointing to alleged behaviour which exceeds legitimate library services: it states that unlike traditional public libraries, which generally purchase new copies of books for physical loan and hence contribute to publisher bottom lines, the Internet Archive often acquires second hand copies and, without making them available for physical loan, simply stores them to justify digital loans. Assuming these alleged facts, if the matter goes to trial and the US Federal Court for the Southern District of New York rejects fair use, it would not necessarily mean all CDL is unjustifiable under either existing national copyright exceptions or international copyright law. But the filing of the case certainly suggests that proposals around CDL would be controversial.

So, the difficulty of achieving legislative reform, particularly to copyright law, and the time it would take should not be underestimated. Copyright reform is a blunt and extraordinarily slow instrument for making progress on the social and cultural goals of libraries. A 2017 WIPO Standing Committee on Copyright

10 Hachette Book Group, Inc. v. Internet Archive (1:20-cv-04160) District Court, S.D. New York.

and Related Rights study on library exceptions found that only 102 Member States, approximately 53% of WIPO Members, had a statutory provision explicitly addressing preservation of works in library collections (Crews 2017). Disputes still continue over whether users should have access to preservation copies digitally. The same 2017 study found that only 55% of WIPO Member States had a statutory provision explicitly permitting the reproduction of works by a library to provide individual copies of short works or excerpts for a user's private study; a few Member States had specific provisions to cover interlibrary loans while many others did not. The 2017 study's findings, showing that even these well-accepted library exceptions are less common globally than we might expect, suggest that new copyright exceptions which might address the even more controversial questions around elending are likely to be enacted only slowly, and spread globally at glacial pace.

More importantly, the kinds of copyright reforms that are likely to be feasible tend to hew closely to the past. International copyright law is remarkably conservative. It seeks to prohibit interference with settled expectations by focusing attention on "normal exploitation" and the "legitimate interests" of the author or the right holder (Berne Convention Article 9(2); TRIPS Article 13). Exceptions for the digital environment have generally been built on analogies with the existing practice, exceptions, and conventions.

But this conservatism means that copyright reform proposals fail to take advantage of the potential benefits of digital technology. Limiting the number of simultaneous borrowers and similar restrictions on elending erode its potential and create barriers and blockages to reading that are not dictated by the medium. There is no technical reason why a digital copy cannot be simultaneously lent to more than one reader: there are markets like the Netherlands where the practice is well-established. CDL involves the inefficiency of libraries making digital copies and setting up appropriate technical systems to limit use of those digital copies. CDL could be harnessing the potential of digital technology to collect data and information on elending use to the benefit of all stakeholders in the literary ecosystem, while ensuring that privacy is appropriately protected (Board and Stutzman 2020). Digital lending could generate information and insights about reading interests for publishers, booksellers, and authors: such as information that a particular title, or author, or of an identifiable genre, is of significant interest to readers associated with a particular library. That intelligence could be useful to publishers and to authors planning events such as book launches and promotions. There is the potential to do better.

Moving Forward: Filling the Gap

There is a huge obstacle in the way of a remunerated compulsory exception, or a meaningful prohibition on unreasonable terms: the fact that so little is known about the relationship between library lending and book sales. Because of this knowledge gap, the risk of error in regulatory intervention is high; and intervention is more difficult. The lack of data makes it hard to prove that facilitating elending will not conflict with normal exploitation or unreasonably prejudice the legitimate interests of authors, publishers, and booksellers. For the same reason, it would be difficult to demonstrate that licence terms are unreasonable and contravene a Maryland- or New York State-style provision. This data gap also explains why Amazon's whisper campaign has been effective. Publishers simply do not know how their books are circulating in libraries, or whether library use hurts sales. Given the industry's increasingly fragile economics, elending's potential cannibalisation of sales is a valid concern that should not be lightly dismissed.

But strong libraries are important too. They are essential to the community, and to the book and publishing ecosystem. If libraries are weakened by being unable to license the ebooks their readers want on sustainable terms, Amazon and other commercial aggregators will be able to wield even more power over publishers and readers. Libraries are essential public literary infrastructure.

The public evidence to date suggests that library use has a neutral or positive effect on sales. But the persuasiveness of the evidence is limited because of reliance on surveys and self-reporting (Price 2012; Booknet Canada 2019; Miller 2019). Other data is not available: while sellers of physical books report sales data to organisations like NPD BookScan, Amazon and others refuse to make ebook sales data available in the same way. As a result, publishers can only find out about sales of their own books, and researchers are unable to examine the overall market. Library checkout data is similarly siloed and held by individual libraries. While libraries are sometimes willing to share data confidentially with researchers, as they did in the *elending project*, it is of limited use unless it can be matched with corresponding sales data.

Despite these challenges, the data gap needs to be filled. If Amazon is right, and library practice is unknowingly decimating local book industries, that is something libraries, publishers and policymakers need to know, and something that should be informing debates about what kinds of licence terms are appropriate. If library uses are not harming sales, clear and persuasive evidence of that fact will be needed to counter the assertions made by those campaigning against library elending. Better data should also inform debates about the existence, shape, and funding of public lending rights. Of the five countries studied in the *elending project*, only Canada and the UK have extended PLR to ebooks (Schro-

eder 2019, 57). Australia and New Zealand are currently considering options, but the US has no scheme to compensate authors or publishers for library uses.

A research team has embarked on a new collaboration with Australian libraries and is seeking creatively to fill the gap. *Untapped: the Australian Literary Heritage Project* has digitised over 160 culturally significant out-of-print titles whose rights have reverted to their authors, or heirs. The rightsholders are participating in the project because they are eager to have the books available and read again, and because even a modest new income stream is welcome in these difficult financial times. In partnership with a local small press, *Untapped* will make the books available for sale and library loan. Library partners will license and promote the books and make their lending data available; the press will provide the data on sales. The research team, which includes leading cultural economists, will use the data, together with sales data from press titles that were available for sale before the initiative began, to better understand the relationship between library lending and sales and the economic value of library promotional efforts. Whatever the results of the project, it will generate informative new data.

"Libraries are key engines of book culture, and willing collaborators in the process of finding a path to access" (Miller 2019). Although libraries have long existed as public infrastructure, elending infrastructure is, for the most part, privately owned and controlled. Another way of targeting the data gap is for libraries to take control of their own elending infrastructure. Initiatives to do just that are already well underway. For example, DPLA's Exchange service, now known as the Palace Marketplace, is a library-run equivalent to commercial aggregation services like OverDrive, with the mission of giving libraries greater control over acquisition and delivery of digital content. It links to the SimplyE open source elending app provided by the New York Public Library and the Library Simplified content management service developed to give libraries greater control than they would obtain from third-party technologies by a collaborative group of libraries in the US, of which the New York Public Library is one. The impact of DPLA's recently announced collaboration with Amazon is still to be determined (DPLA 2021) with the new arrangements in play by the end of 2021. Amazon's 10,000 books are to be made available through SimplyE and four licensing approaches.

In Australia, the State Library of New South Wales has similarly developed the Indyreads content management ebook and eaudio platform for public libraries, based on the Odilo platform, with the aim of ensuring that libraries can access local material, with fees lower than commercial providers. Such platforms could facilitate library access to out-of-print books via partnerships with authors, similar to the *Untapped* project.

Library-controlled elending platforms enable libraries to share the costs of negotiating licences and building and maintaining infrastructure with the fea-

tures useful to libraries rather than service providers. Putting the public interest ahead of private profits makes it possible to do things differently and collect data which can be used by all. If libraries designed and controlled their own elending infrastructure, one would expect to see much better reporting, for example, about rates at which metered licences time out rather than loan out, and how books circulate over time. Such infrastructure would enable libraries to provide information to publishers, like the location of hot spots indicating demand for titles, as well as more granular reporting about how often their books are being lent. In exchange, publishers might be willing to participate confidentially in information-sharing to enable independent researchers to further study the relationship between lending and sales. By filling publishers' data gaps and making promotional efforts conditional on compliance with minimum terms, such value-adds could potentially do more, faster, to remedy the market failures identified, than formal legal reforms.

Library-controlled elending infrastructure could also address another problem: that, with so little money available in publishing, so much of it ends up in the pockets of intermediaries. Some ebook aggregators retain up to 50% of each licence fee, on top of hefty platform fees paid by libraries. Sales platforms like Amazon typically retain 30% of the price, already arguably an usurious amount for hosting and delivering files. Part of the cost is necessary to cover the costs of negotiating and implementing complex licensing deals and improving the applications, but the potential profits are huge. OverDrive was acquired by Rakuten in 2015 for US$410 million and sold in 2019 at a profit of over US$365 million (Owens 2019) to private equity firm KKR & Co. No doubt the new owner believes it can squeeze out even more profit. If libraries were to combine their resources to eliminate, or at least provide competition to, such intermediaries, the savings could be reallocated towards more books and public services, potentially benefiting readers, authors, and publishers.

Conclusion

As the *elending project* research has shown, the problems with elending are real. One way forward is legislative change compliant with international copyright law. But the path to law reform would not be simple. This is in part because the multi-million-dollar question about the relationship between library lending and book sales remains unanswered. This knowledge gap is the sticking point which makes it difficult to establish with confidence the scope of the exception or compulsory license which would comply with the three-step test, and what

terms would fail it. For this reason, a conclusion of the *elending project* and of this chapter is that formulating an exception may be premature. To the extent legislative reform would help, a Maryland- or New York-style approach is preferable. Prohibiting unreasonable terms would provide a backstop to prevent unreasonable embargoes and refusals to license books in particular jurisdictions. Such a rule could also encourage disputing parties to generate the data needed to determine what is reasonable or unreasonable, and to think more carefully about what each needs for the elending ecosystem to thrive.

But libraries do not need to settle for such a minimum; a backstop only. Collectively, libraries have real power. If they continue finding ways of working together to build public elending infrastructure, they can ultimately reshape the market to serve their own interests and give readers, publishers, and authors more of what they need. This might eventually prove to be the fastest and most effective way towards a workable elending market.

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16 Creative Commons and Open Access in an Academic Library: Implementation, Tools, Policy and Education

Abstract: An important task for libraries today is to support scholars in the creation, sharing, and preservation of knowledge. Libraries and librarians ensure the application of appropriate practices in copyright in their institutions and help faculty, students and researchers to navigate the research lifecycle, providing education and outreach to diverse university audiences, including faculty, students, post-doctoral students, visiting researchers, and staff, answering questions about copyright, offering information about open access publishing options, developing and maintaining open access repositories and policies, and providing information on grant requirements that may govern how published research is disseminated. The focus of this chapter is Creative Commons (CC) and open access (OA) to research in the context of the academic library. The knowledge required by librarians in their roles as guides and supporters of scholarly authors is described. The chapter outlines details of the publishing process, the importance of sharing knowledge, the significance of rights retention for researchers, and shows how CC works alongside limitations and exceptions to copyright. Various aspects of CC licensing, including the types available, and categories of OA are explored. Aspects of the operation of CC in relation to flourishing research practices such as text and data mining are discussed and contemporary challenges of using CC-licensed databases of images in facial recognition research highlighted. The chapter describes how CC licenses and tools are leveraged within the academic library. While the chapter emphasizes the roles of academic librarians and provides examples within academic libraries, the knowledge presented, and approaches given can be applied in other types of libraries.

Keywords: Open access publishing; Academic libraries; Science publishing; Library copyright policies

Introduction

An important task of academic librarians is to support scholarly authors on their paths to create, share, and preserve knowledge. Academic librarians engage in this work in a variety of ways: helping faculty navigate the research lifecycle;

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answering questions about copyright; offering information about open access publishing options; developing and maintaining open access repositories and policies; and providing information on grant requirements that may govern how published research is disseminated. Academic librarians provide education and outreach to diverse university audiences, including faculty, students, post-doctoral students, visiting researchers, and library and professional staff.

The focus of this chapter is Creative Commons (CC) and open access (OA) as they impact on research in an academic context. How do librarians provide effective support to their clients to ensure they optimize use of CC and OA in their research? What knowledge is required by librarians and what are the key competencies required to guide and support scholarly authors? How do Creative Commons licenses work alongside limitations and exceptions to copyright? How CC licensing operates in relation to flourishing research practices such as text and data mining is explored. It is vital that researchers retain their rights during the publishing process to be able to share their work. The primary paths for making scholarship open access, green and gold, are discussed, along with the opportunities and challenges encountered leveraging CC within both the research activity and publishing. The use of CC licenses and tools in relation to collections metadata, repositories, preprint servers, and open access journals is outlined. Institutional, public, and philanthropic open access policies are described and the importance of the role of the academic librarian in providing guidance, education, and support in relation to OA policy compliance highlighted. Details of appropriate educational resources, communities of interest, and training for academic librarians are provided.

Key Knowledge Areas

Academic librarians helping researchers publish their research results and scholarship require knowledge of core issues related to Creative Commons and open access. Substantive areas include understanding how CC licenses operate, the publishing lifecycle, the importance of retaining rights, and how researchers may use CC-licensed works within their own scholarship, along with the applications in libraries of CC, particularly in areas of collection management within a framework of effective institutional policies supporting good practice. There is a significant body of knowledge on copyright law for librarians (for example Crews 2020; Russell 2004; Benson 2019). This chapter draws on existing work and writing but constrains its scope to the intersection of CC and OA in the academic library and its audiences.

Open Access

Open access is a much larger topic than Creative Commons (Suber 2012). This chapter contextualizes open access through the lens of Creative Commons tools, policy, and education efforts within the academic library and institutions of higher education, as opposed to public libraries, special libraries, and other institutions in the galleries, libraries, archives, and museums (GLAM) sector, although approaches may well be applicable elsewhere.

Within OA is the growing global movement encouraging the use of Open Educational Resources (OERs) (Smith and Casserly 2006). OERs are "teaching, learning or research materials that are in the public domain or released with intellectual property licenses that facilitate the free use, adaptation and distribution of resources". OERs include "full courses, course materials, modules, textbooks, streaming videos, tests, software, and any other tools, materials, or techniques used to support access to knowledge". But OERs are not the focus of this chapter, even though an increasing number of librarians are supporting instructors and students in creating and adapting OERs, including openly licensed textbooks for use in the university setting. This chapter concentrates on CC and OA in sharing research outputs and scholarly journal articles.

How Creative Commons Works

Creative Commons is a broad topic with a history reaching back two decades (Bollier 2008) and the duties of a librarian include many areas intersecting with CC. CC licenses apply to works within the framework of copyright laws around the world. In general, copyright law grants a bundle of exclusive rights to the copyright holder. In most cases, the original author of a work is the initial copyright holder, since copyright law grants automatic protection to creative works the moment they are captured in a tangible medium of expression. The author may later transfer or assign the copyright to another entity, such as a publisher. For example, in the US, copyright law grants to copyright holders the exclusive rights of reproduction, the preparation of derivative works, distribution, public performance, and public display (US Copyright Office 2021).

Some creators, including academic authors, do not wish to exercise all their exclusive rights under copyright, and instead prefer to share their creativity under more open conditions. Creative Commons is a non-profit organization whose mission is to "help overcome legal obstacles to the sharing of knowledge and creativity to address the world's pressing challenges". Creative Commons was founded in 2001 and hosts a suite of copyright licenses that permit creators

to share their creativity on more generous terms with the public than does copyright whereby default all rights are reserved. CC licenses and various legal tools provide a standardized way for creators to grant particular permissions to use of works while at the same time ensuring that credit for work is appropriately acknowledged.

The rightsholder is the only person who may attach a Creative Commons license to a work. A particular benefit of Creative Commons is that, in contrast to traditional types of licenses, once an author has marked a work with a CC license, there is no need to negotiate any rights with a potential user. The work is simply offered under the terms of the license, and anyone who views the work may use the work under those terms.

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All the CC licenses share common features, such as:

- Sharing: the licensee may copy and redistribute the licensed material in any medium or format, at least for noncommercial purposes
- Attribution: acknowledgment must be provided to the author when a work is shared
- Non-exclusivity: the licensor may enter into different licensing arrangements at any time, and
- Irrevocability: once a licensee receives a work under a CC license, the licensee always has the right to use it under those terms.

Creative Commons licenses last for the duration of copyright and are presented as three layers. They include: the Legal Code, which is the license text that has been vetted by a group of international intellectual property experts and lawyers; the Commons Deed or human-readable version of the legal code which presents the key permissions and conditions of the license in an easy to understand summary; and a machine-readable code, which makes it possible for software applications and web searchers to find CC-licensed materials shared under a particular license (Abelson, Adida, Linksvayer, and Yergler 2008), for example a Google search for images.

Authors can pick the CC license relevant to their needs by visiting the CC license chooser website (https://creativecommons.org/choose/; https://chooser-beta.creativecommons.org/). Alternatively, some content sharing websites, including open access scholarly journals and repositories, integrate CC licensing into their platforms, allowing creators to choose the appropriate license at the time they are uploading their work to the site. CC licenses are used to share a variety of materials such as photography, music, video, educational resources, scientific research, and other creative works.

In 2019, there were nearly two billion CC-licensed works shared online (Creative Commons 2019, 6). Creative Commons licensing has become the most used open content license suite, with significant adoption of the licenses by projects including Wikipedia and Flickr. The licenses have been used by intergovernmental organizations such as UNESCO, the group of research funding agencies cOAlition S with its Plan S, and OA publishers such as eLife. While earlier iterations of the CC license suite were matched to an individual country's copyright law with separate license texts drafted to correspond to variations in a country's copyright rules, the most recent version, version 4.0, has been released as a single international version applicable across all jurisdictions. CC 4.0 licenses available in English have been translated into 26 non-English languages.

Limitations and Exceptions to Copyright

Limitations and exceptions are crucial checks to the authors' otherwise exclusive rights under copyright, and it is important that librarians and scholarly authors understand how the limits intersect with CC licensing. Limitations and exceptions are implemented differently globally. In some countries, a statute may provide specific use of copyrighted works without infringing the rights of the copyright holder. For example, a jurisdiction may include a statutory provision in its copyright law that permits a library to make a copy of a copyrighted work for the purpose of preservation under certain conditions, without first getting permission from the copyright holder. Other copyright laws include a more general limitation or exception, such as the US Copyright Law's Section 107 fair use provision which states: "...the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright" (US Copyright Office 2021, 19). Fair use is a powerful and flexible exception to copyright often exercised in the educational context. For example, a researcher wishing to incorporate copyrighted content into a scholarly article can review the potential use against the four factors of fair use and make a determination whether, on balance, the use is fair. The four factors include:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
2. the nature of the copyrighted work
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
4. the effect of the use upon the potential market for, or value of, the copyrighted work (US Copyright Office 2021, 20).

CC licenses do not constrain a user's ability to leverage the rights under a limitation or exception to copyright. The CC FAQ states, "if your use of CC-licensed material would otherwise be allowed because of an applicable exception or limitation, you do not need to rely on the CC license or comply with its terms and conditions". This means that if a user is incorporating part of a CC-BY-NC-ND-licensed article into a work and is doing so under a limitation or exception, such as fair use, there is no requirement to adhere to the terms of the license. Essentially, the CC license never trumps the underlying rights of a user to leverage limitations and exceptions to copyright.

There may be situations where an author wishes to include third party works used under a limitation or exception to copyright but wants to apply a CC license

to the work as a whole, openly licensing personal contributions. A practical way to address the issue is to include a disclaimer at the beginning of the work that identifies any third-party copyrights not covered by the CC license.

Publishing Lifecycle

Both limitations and exceptions to copyright and CC licenses might come into play at different times during the research and publication lifecycle. A scholarly author might leverage fair use when drafting a scientific paper by including acceptable portions of the scholarly works of others and release the article under a CC license by publishing the completed manuscript in an open access journal.

In their role as guides for scholarly authors, librarians are already familiar with the research and publication lifecycle. The cycle continues to evolve with new research and publication practices, but the standard workflow as described in the Association of College and Research Libraries (ACRL) scholarly communication toolkit contains common features: creation, evaluation, publication, description, dissemination and access, preservation and reuse. Academic authors read the works of others and develop their own lines of inquiry. They conduct research and synthesize findings into a written article. Depending on the discipline and type of research, findings might be presented at a conference, issued as a preprint, or produced in a blog. Fully-fledged articles are submitted to a relevant journal or publisher, who typically coordinates the peer review process. Following peer review and revision, the article is published either in open access or for subscription with access frequently available through library subscriptions to individual titles, aggregated collections, publisher, or subject groupings. Many academic writers place a version of work undertaken in an institutional repository. Finally, content is digitally preserved, ensuring that users downstream can access and use the works to create new scholarship. Content previously available in print versions stored in libraries in digital formats is available remotely. The cycle begins again.

Scholarly authors do not generally create copyrighted works for direct financial remuneration, but write to be read, create impact, advance careers, and support knowledge growth and scientific endeavor in their particular fields of study. Peter Suber explains:

> ...authors of research articles are not paid. When money is even part of an author's incentive, copyright fortifies the incentive by giving authors a temporary monopoly on their work and the revenue stream arising from it. Without copyright, unauthorized copies might kill the market for authorized copies and reduce sales. But all this is irrelevant to authors who

> write for impact, not for money, and who voluntarily forgo royalties... scholars have always had independent incentives to write journal articles, such as knowledge sharing, reputation building, and creating a portfolio for promotion and tenure (Suber 2019).

If scholarly authors are writing for impact, they can consider making research publications OA which is defined as "digital, online, free of charge, and free of most copyright and licensing restrictions". Open access can be implemented in various ways, with two primary designations. The self-archiving of a version of a research article under specific conditions into a repository is called green, while immediate publication under open licenses in journals for free access is called gold. With the green open access route, scholarly authors publish through the typical subscription journal publishing channels. Sometimes an author is required to transfer the copyright or grant an exclusive right to the journal. Green OA usually permits scholarly authors to deposit a version of the article in an institutional or subject-specific repository, sometimes after an embargo. Green OA is strengthened through institutional open access policies, funding agency requirements or by individual authors retaining some rights under copyright to deposit research articles into repositories.

Through the gold OA route, authors publish in OA journals. The research is made immediately available, typically under a CC license. Sometimes an upfront publication fee is paid by the author or the author's institution or funder. The fee is known as an article processing charge, or APC. One study estimates that 27.9% of the scholarly literature is in OA, representing 18.6 million articles (Piwowar et al 2018). By 2025, it is predicted that 44% of all journal articles will be available as OA (Piwowar, Priem and Orr 2019).

Rights Retention

Many subscription-based journal publishers require that authors transfer or assign copyright to the publisher. If an author transfers copyright, the author will often give the publisher full exclusive rights of reproduction, adaptation, distribution, public display, and public performance. Essentially, an author who transfers copyright without retaining rights is put in a position where permission must be sought from the publisher for the author to use personally created work, unless the use falls under a limitation or exception to copyright, such as fair use. Another consequence of transferring the copyright to the publisher is the loss of the ability to share the work under a CC license. The copyright holder is the only person who can attach a CC license to a work.

Librarians can explain to authors the implications of transferring copyright and provide advice on rights retention options. Authors can retain rights through various mechanisms. They can negotiate the details of the publishing contract. The Scholarly Publishing and Academic Resources Coalition (SPARC) is a global advocacy organization working to make research and education open and equitable for everyone. Together with the Science Commons, a CC project that operated from 2005–2009 with the aim: "to identify unnecessary barriers to research, craft policy guidelines and legal agreements to lower those barriers, and develop technology to make research data and materials easier to find and use", SPARC created an author addendum to effectively manage rights and ensure broad access. Most academic libraries provide guidance to their students, faculty, and researchers on how authors can negotiate with publishers to retain the rights required for OA. The Office of Scholarly Communication Services at the University of California Berkeley Library is an example of a library providing such services. Rights retention is important not only for authors submitting research papers to scholarly journals, but also for authors for which the monograph is the primary vehicle for publication. Authors Alliance is one of many non-profit organizations providing support and advice to authors who wish to share their creativity broadly to support the public good, and has published a guide to negotiating book contracts, including rights issues and CC options (Schofield et al 2018).

Authors in institutions of higher education can sometimes rely on open access policies adopted by their universities. The policies typically reserve rights for sharing articles authored by faculty or other university affiliates by retaining nonexclusive rights to posting a version of scholarly articles to an institutional repository. Many librarians assist faculty in understanding and complying with university open access policies. Some funding agencies who require open access to the outputs of their research grants provide information and assistance to potential grantees on retaining rights and complying with grant requirements. The previously mentioned cOAlition S initiative involving many research funding agencies provides advice on rights retention. Institutional and funder OA policies are discussed in greater detail later in the chapter.

Authors in some jurisdictions can reacquire rights through statute. For example, US copyright law provides for a mechanism called termination of transfer, which permits authors to recapture previously transferred copyrights 35 years after publication (US Copyright Office 2021, 167). The Authors Alliance published a guidebook to help authors reclaim rights if a publisher is no longer supporting the dissemination of their works (Cabrera, Ostroff and Schofield 2015). Creative Commons and the Authors Alliance together developed a termination of transfer or rights reversion tool that can assist authors in reacquiring rights.

Using CC-Licensed Works in Research

Because CC licenses grant copyright permissions in advance, authors can use CC works in their own research without contacting the copyright owner. Attribution may be satisfied "in any reasonable manner based on the medium, means, and context" (Section 3a.1.A.i). Creative Commons provides guidance on attribution practices across a variety of media. As discussed above, the legal construction of the CC licenses does not hinder an author from using a licensed work under a relevant limitation or exception to copyright. For example, part of a CC BY licensed image can be incorporated into research under a limitation or exception even where this action would not comply with the terms of the license. However, even if the researcher is not required via the license to provide attribution to the author of the image, the work should be cited appropriately in accordance with academic norms.

Text and Data Mining

Authors may consult with librarians about incorporating new research methods and outputs into their work. One area of increasing interest is text and data mining (TDM), "the discovery by computer of new, previously unknown information, by automatically extracting information from different written resources" (Hearst 2003). TDM methods are being used to analyze large swathes of the scholarly record and enable connections across disparate fields of inquiry that otherwise would be impossible to discover by a single reader.

Researchers who wish to perform TDM can face a variety of legal hurdles, including copyright. While there are many types of TDM, one approach involves the downloading of large sets of text on which to perform TDM. A researcher implicates copyright because, as discussed earlier in the chapter, the right of reproduction is one of the exclusive rights granted to the copyright holder. The researcher would be required to obtain permission from the copyright holder to engage in TDM or would need to rely on limitations and exceptions to copyright. Overall, the use of copyright-protected texts can be an impediment to some researchers who wish to conduct TDM (Green et al 2016). Text and data mining has been found to be fair use under US copyright law in a case involving the Authors Guild and HathiTrust.[1] The laws of various countries permit TDM under specific statutory limitations and exceptions to copyright. For example, the copy-

1 Authors Guild v. HathiTrust, 755 F.3d 87 (2d Cir. 2014), Authors Guild v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

right law of the United Kingdom permits text and data mining, but only for noncommercial purposes (UK Intellectual Property Office 2014). The European Union Directive on Copyright in the Digital Single Market came into force in 2019. Article 3 provides for rules to adapt certain exceptions and limitations to copyright and once implemented in Member State copyright legislation, will permit research organizations and cultural heritage institutions to conduct TDM for purposes of scientific research. And Article 4 permits those outside specific research organizations to engage in TDM, but the scope of the provision is narrower.

Researchers who wish to conduct TDM within jurisdictions without a copyright exception that expressly permits it could look at using bodies of texts with few rights issues, for example public domain or openly licensed works. However, researchers should realize there are drawbacks to limiting themselves to TDM material only in the public domain, or available under an open license. If a researcher were to conduct TDM on works only in the public domain, which mostly consists of older works whose copyright has expired, the research could produce skewed results. And even though there are millions of texts available under CC licenses, they present only a fraction of the scholarship published each year. Restricting TDM input to works unencumbered by legal restrictions could "risk bias in the scholarly record" (Courtney, Samberg, and Vollmer 2020). Levendowski shows how race, gender, and other biases found in openly available texts have contributed to and exacerbated bias in developing artificial intelligence tools (2018).

Researchers may conduct TDM on CC-licensed works, but they should be aware of the requirements in doing so. Librarians can help researchers understand that if there is a limitation or exception that permits TDM in the jurisdiction in which they are conducting their research, then the researcher can rely on it for TDM activity. If there is no copyright exception, then the researcher could consider CC-licensed works, but would need to answer additional questions based on the type of license applied to the target corpus, and the type and purpose of activity being conducted. If the researcher is undertaking the TDM primarily for commercial purposes, material licensed under a CC license which contains the NonCommercial condition, including BY-NC, BY-NC-SA, and BY-NC-ND, is excluded. If the TDM activity is being undertaken for noncommercial purposes, then a researcher can freely mine under any of the CC licenses.

Two of the CC licenses contain a NoDerivatives clause, which means that a user cannot share derivative works created using the content offered under those licenses. Any TDM adaptations made can be shared only if the license permits it. Licenses permitting adaptations are BY, BY-SA, BY-NC, and BY-NC-SA. If the researcher is not making any adaptations based on the underlying materials, TDM outputs can be shared, regardless of which CC license is attached.

Even if a researcher is able to leverage fair use rights to conduct TDM on copyrighted works, the law, at least in the US, does not necessarily permit the researcher to share or republish the full corpus of underlying works, or adaptations created during the TDM conduct. The researcher may be able to share annotations or snippets of the underlying work if doing so would be considered transformative, thus supporting their fair use evaluation. Researchers may want to be able to share small portions of the underlying content to show their work, thus enabling downstream researchers to be able to verify or replicate research results.

Facial Recognition Research

Researchers might be interested in using CC-licensed works in artificial intelligence algorithm training. CC-licensed content is relatively unencumbered by rights issues, at least from a copyright perspective. But there are other legal, policy, and ethical considerations that CC licenses are not able to address. Users of the licenses, as well as the librarians that teach the legal literacies of copyright and open access, should be aware of the limitations.

For example, CC licenses do not purport to license publicity, personality, or privacy rights of third parties. Photographs depicting people are particularly relevant in privacy regulations. Scholars who wish to include CC-licensed images and photographs of persons should know that while the license grants copyright permissions to use the works, it does not simultaneously give permission to use the image of a person depicted in a photograph.

The issue of privacy of persons appearing in CC-licensed works has recently come to the fore in the case of research on facial recognition. In 2019, NBC News published a story about how IBM was using up to one million CC-licensed photographs from the photo-sharing website Flickr to train data sets to improve facial recognition algorithms (Solon 2019). The images at issue contained depictions of people, and the photographers who had taken the photos and published them on Flickr under CC licenses found them in the IBM dataset. IBM claimed that the purpose of collecting and conducting research on the CC-licensed Flickr photos was to "create AI systems that are more fair and accurate", especially considering how poorly many facial recognition systems operate today (Smith 2019). While IBM's use of the CC-licensed photographs technically would be permitted from a copyright perspective, some photographers objected to their works being included in the dataset without their permission because they did not want their photography to potentially be used to power facial recognition algorithms that could be used for surveillance. Creative Commons responded that while the IBM approach might have been legal from a copyright perspective, the research should

also have taken privacy issues into consideration, which are not addressed by CC licenses. And the CC response pointed to the larger issue. Community and authors must grapple with how they feel about unexpected and potentially nefarious uses of creativity that is created and shared in good faith (Merkley 2019). While in theory the entirety of the CC-licensed Flickr corpus could be viewed as a gigantic open data set, there are non-copyright law and policy concerns, and ethical conundrums, that require researchers to navigate the issues with care.

Tools and Platforms

Librarians should be aware of the various ways that CC licenses and other legal tools are integrated within library practices, collections, institutional repositories, preprint servers, and open access journals. The knowledge of applications and uses will help librarians support scholarly researchers and others on campus interested in open access publishing and assist in knowledge growth.

Collection Management

Academic libraries collect mostly by purchase physical copies of monographs and license electronic access to ebooks and ejournals but do not hold the copyright and cannot apply CC licenses to their collections. Academic libraries continue to develop legal and policy workflows to manage their collections and help audiences understand copyright and other relevant considerations concerning use of library materials, including compliance with contracts and donor agreements, respect for the privacy of subjects of the materials, and ethical concerns with sensitive collections where digitizing and sharing them could put a particular community at risk. The GLAM sector in the US is developing guidelines in relation to open access in digital collections management with guidelines on contracts and copyright (Wallace 2020).

CC licenses and legal tools are useful for sharing data about library collections. There is a growing practice to share metadata about collections as open data, for example through Wikidata. Wikidata is a free, collaborative, multilingual and open secondary knowledge base that can be read and edited by both humans and machines. Wikidata is the central storage for the structured data of its Wikimedia related projects including Wikipedia, Wikivoyage, Wiktionary, Wikisource, and others. It is free for use by anyone. Contributions are published in the public domain using the CC0 Public Domain Dedication. Some academic

libraries are participating in the Wikidata project to improve the discoverability and accessibility of their collections outside traditional discoverability platforms, while others are exploring the sharing of bibliographic information related to the research created by scholarly authors (Association of Research Libraries 2019).

Rights Statements

Libraries hosting digitized special collections frequently provide rights information on how digitized materials can be used. Various types of rights can be adopted by cultural heritage institutions. Rightsstatements.org is one approach to standardizing rights statements. It is an international member-based consortium supported by public funding with members including the Digital Public Library of America and Europeana as well as national libraries of various countries. It offers "12 different rights statements that can be used by cultural heritage institutions to communicate the copyright and re-use status of digital objects to the public". The rights statements are offered in machine-readable fashion, like the Creative Commons licenses. The link to the desired rights statement must be associated with the digital object. The GLAM sector has conducted conversations about rights statements (scann 2020).

For works available under a CC license, the stable URL to the specific license under which the material is available could be inserted into the appropriate bibliographic record field within the library catalogue or other resource repository. Likewise, the URI of rights statements can be inserted in a metadata element, including dc:rights or edm:rights or property associated with the cultural heritage object to which the rights statement applies. Not only is it useful for searchers to comprehend whether a work is under copyright, or whether there are contractual restrictions that limit use, but they could also filter a search of the entire collection to return only works marked with a particular statement.

Repositories

Scholars rely on general, institutional, or subject repositories to share and preserve their scholarship. Deposit of scientific and scholarly articles into a repository is one of the primary ways authors engage in green open access publishing. Most repositories permit the attachment of a CC license at the time of deposit. Authors choose a license at the time of upload, attach it to their work and thereby make the terms available for search and discovery. Open source publishing platforms such as Open Journal Systems (OJS) provide the ability for local implemen-

tations to integrate CC licensing in their publishing workflow. Initiatives like the Public Knowledge Project provide hosting and support services for OJS installations.

General purpose repositories such as Zenodo permit the free upload of publications, presentations, images, and other types of resources, although users are limited in the types of CC licenses offered. Zenodo is operated by CERN and OpenAIRE to ensure Open Science and uploads are assigned Digital Object Identifiers (DOIs), to make them citable and trackable. Subject-specific repositories such as Humanities Commons, an online humanities network supported by various scholarly societies and institutions, permits members to upload and share research articles and other scholarship under a CC license. As already noted, authors must retain the copyright in their works to upload material under a Creative Commons license. If authors transfer their rights to journal publishers, they might be unable to share their scholarship on general purpose and subject-specific repositories.

Many scholars deposit versions of published research articles in institutional repositories associated with universities or university systems. For example, the University of California's repository, eScholarship, permits university audiences, including faculty and students, to share a variety of scholarly outputs, including author accepted manuscripts, working papers, conference proceedings, electronic theses and dissertations, and educational resources. Another type of repository is the funder repository. For example, articles arising from funding from the National Institutes of Health (NIH) must be deposited into PubMedCentral. The NIH public access policy requires submission of final peer-reviewed journal manuscripts "immediately upon acceptance for publication and be made publicly available on PMC no later than 12 months after the official date of publication".

Preprint Servers

CC licensing is also used for preprints. A preprint is "a version of a scholarly or scientific paper that precedes formal peer review and publication in a peer-reviewed scholarly or scientific journal". Some scholars place early versions of their research on preprint websites or servers, to share initial findings of research, invite comments from the academic community, and even connect with other researchers for future collaborations. The practice of releasing preprints is not new. The well-known site arXiv.org has expanded from its original sharing of preprints in the fields of mathematics and physics since 1991. There has been an explosion of new preprint servers in the last decade, with over 60 platforms representing a wide variety of disciplines (Chiarelli et al).

A preprint is an early version of a scholarly work, and the author still retains the copyright and can share content under a CC license. Most preprint servers permit authors to attach a CC license at the time of upload, permitting readers to use the work under the terms of the CC license. Preprint platforms do not require copyright transfer for a work to be shared on a server and usually stipulate that the author grant a perpetual, non-exclusive license for hosting and distributing the preprint, (either under a CC, or other open license). Like other repositories, the purpose of the non-exclusive grant of rights is to ensure guaranteed availability of content.

ASAPbio (Accelerating Science and Publication in Biology), a "scientist-driven nonprofit working to address this problem by promoting innovation and transparency in life sciences," has developed preprint licensing FAQs to help researchers understand copyright and open licensing in the context of preprints, and explain the implications of choosing a particular license for their preprint. A concern of some scholarly authors is whether a journal in which they intend to publish will object that a pre-peer-reviewed version has been already shared under a Creative Commons license on a preprint server. Some authors fear that sharing a preprint of an article will result in a publisher rejecting a submission, regarding the preprint as a previously published work. However, as ASAPbio notes, "most paywalled/subscription journals in the basic life sciences are willing to consider submissions that have previously circulated as preprints, and policies that refuse to consider submissions based upon the license of the preprint are extremely rare" While ASAPbio's guidance has been developed in the context of life science preprints, and some publishers have specific policies, the copyright and licensing information is generally applicable to preprints in other disciplines.

Open Access Journals

Green open access is made possible by individual authors self-archiving a version of their scholarly publications in an institutional, disciplinary, funder-based, or general-purpose repository. As noted earlier in this chapter, authors publishing via the gold open access route make research available immediately in an open access journal, and usually under an open license, such as a CC license. Bollier notes, "Creative Commons licenses have been critical tools in the evolution of OA publishing because they enable scientists and scholars to authorize in advance the sharing, copying, and reuse of their work" (Bollier 2008, 243). Sometimes the publication in a gold open access journal requires the payment of an article processing charge (APC). The Directory of Open Access Journals (DOAJ), a frequently

updated list of OA journals, shows that as of 2021, approximately 71% of the open access journals indexed on its site do not charge APCs (11,878 of 16,659).

Publication in an open access journal typically does not require the transfer of copyright. The author retains copyright and is presented with CC license options. Some permit only one CC license option. For example, open access publisher Public Library of Science (PLoS) requires that authors publish their research articles under a Creative Commons Attribution (CC BY) license. Others, such as Elsevier's Current Research in Microbial Sciences, permit authors to choose between publishing under CC BY and CC-BY-NC-ND.

Researchers can learn about gold open access journals through a variety of means. Sherpa Romeo maintained by JISC in the UK is an "online resource that aggregates and analyses publisher open access policies from around the world and provides summaries of publisher copyright and open access archiving policies on a journal-by-journal basis". Another way to discover open access journal publishers and find content is through the previously mentioned Directory of Open Access Journals (DOAJ). Open access journals indexed in DOAJ must grant usage rights to others using an open license, CC or equivalent, allowing for immediate free access to the work and permitting any user to read, download, copy, distribute, print, search, or link to the full texts of articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose.

Finally, the Open Access Scholarly Publishing Association (OASPA) tracks open access publishing from member organizations and publishers. OASPA reports that its members published nearly 2.1 million open access articles from 2000–2019, with 425,000, approximately 20% of the total, published in 2019, which represents a growth of around 17% over the previous year (Pollock 2020). Librarians help provide information to authors on article processing charges and help navigate publication agreements and workflows of open access publishers. APCs vary considerably from under $100 to over $5000, and even sometimes as high as €9500 for *Nature*. As discussed above, some OA journal publishers have decided on offering a subset of the Creative Commons licenses, such as CC BY or CC-BY-NC-ND, and charge different amounts based on how open the terms of the specific license. For example, the Proceedings of the National Academy of the Sciences offers a work to be made open access under the CC-BY-NC-ND license for $2,000, discounted from $2,500 if the institution has a site license, but charges an APC of $2,200 an article to be published under CC BY.

Research Output Policies

Open access policies in place at universities, government agencies, and philanthropic funders aim to increase the reach and impact of scholarly research. Some universities are adopting open access criteria to guide library collection development, or renegotiate access, purchasing and publishing agreements with major journal publishers. The Registry of Open Access Repository Mandates and Policies (ROARMAP) is an international registry of OA policies adopted by universities, research institutions, and research funders. Users can filter the database based on geographic location, policy type, open licensing conditions, and other parameters. Sometimes CC licensing is a central feature to a particular policy, while at other times it remains at the periphery. Regardless, it is important for librarians to understand the policy landscape so they can help authors comply with relevant requirements.

Institutional Policies

University open access policies aim to improve access to the research published by audiences on its campus. The world's first institutional OA policy was endorsed at QUT in Brisbane, Australia in 2003. Pioneering work was undertaken in the US at Harvard University's Faculty of Arts and Science in 2008. The OA policy grants Harvard a nonexclusive, irrevocable right to distribute scholarly articles published by faculty for non-commercial purposes. ROARMAP lists over 800 open access policies adopted by universities or research institutions.

University OA policies contain common features. First, most successful institutional repositories are initiated by faculty instead of administration (Crawford 2011, 44–5). Second, the policy typically contains a section that reserves copyright to the author but provides a grant to the institution of a nonexclusive, irrevocable, royalty-free, worldwide license. Third, the policy is usually constrained to cover work produced by the faculty after the approval of the policy and is forward-looking and not retroactive. Fourth, the policy normally contains instructions for how and when a copy of the work will be made available in an institutional repository. And finally, most times the policy names which unit on campus is responsible for maintaining the policy and answering questions (Folds 2016). The Berkman Klein Center for Internet & Society at Harvard University maintains an extensive guide which covers good practices in drafting, adoption, implementation, communications, and other tips and examples of open access policy formation at universities (Suber and Schieber 2021).

University open access policies are generally considered green policies because they permit scholarly authors to publish wherever they like, but require a deposit of some version of the published article, typically the author accepted manuscript (AAM), in the university's institutional repository. The AAM is the completed version of the article that has already gone through peer review but is not yet formatted with the journal publisher's layout and design.

Many university open access policies are silent on CC licensing. If university OA policies permit authors to publish in subscription journals where usually they are obligated to transfer the copyright to the publisher, it means that the author might not be in the position to share the published version in the institutional repository under a CC license. Bosman and Kramer (2020) looked at the policies of 36 large publishers and found that while there are about 2,800 journals that permit immediate deposit under green open access policies, "all disallow or do not explicitly allow CC-BY." The details of an author's publication contract will specify whether an author is able to deposit published scholarship in an institutional repository under a CC license.

Some publishers supply conflicting guidance. For example, while Elsevier requires that author accepted manuscripts are shared under the CC-BY-NC-ND license, it also claims that authors cannot deposit a copy of their AAM into an institutional repository until after an embargo. However, Bolick (2018) points out a workaround to subvert Elsevier's requested embargo. An author posts the publisher-blessed CC-licensed version on a personal website. Since this version is available under a CC license, which grants permission to copyright and redistribute the work, then it would permit the author's host institution to deposit it in an institutional repository "not through the license granted in the publication agreement, but through the CC license on the author's version, which the sharing policy mandates" (Bolick 2018).

Authors publishing via gold open access journals are not usually required to transfer copyright to the journal, and typically choose a CC license for published work. Authors subject to an institutional open access policy who publish in gold open access journals should be able to indicate in the repository metadata the license under which it is being shared. And since open access journals publish their articles under CC licenses, authors should be permitted to deposit the final journal formatted version, not simply the AAM.

Government and Philanthropic Policies

Librarians should be aware of governmental and philanthropic open access policies that require open licensing to the research outputs created through public

and charitable grant funding. The policies vary globally but are relevant to many higher education and academic library audiences because research projects and faculty apply for and receive research grants through grant-issuing institutions, such as the National Science Foundation, the European Research Council, the Ford Foundation, and others.

In the United States, the National Institutes of Health (NIH) Public Access Policy was the precursor to many funders' open access policies. As noted above, the NIH Public Access Policy requires that research created with NIH funding must be made available for free access by the public within a year of publication in a scholarly journal. Authors are required to deposit a copy of funded research articles in PubMed Central, NIH's public access repository.

The spirit of the NIH Public Access Policy was extended more broadly to other US Federal government research funding agencies. In 2013, a memorandum from the White House's Office of Science and Technology Policy (OSTP) mandated that recipients of grants from federal agencies who distribute more than $100 million in research and development funds must make the research articles that arise from that federal funding available to the public within one year of it being published. In 2020 OSTP issued a request for information to better understand the implications of removing the 12-month access embargo. Neither the NIH Public Access Policy nor OSTP's 2013 directive requires CC licenses for the research funded through these grant funds, although if researchers publish in gold open access journals, they would be able to share the CC-licensed versions of research when making works available on PubMed Central or another public access repository.

Private philanthropies that fund scientific and scholarly research have adopted open access policies for the outputs of their grants. Foundations, including the William & Flora Hewlett Foundation, Bill & Melinda Gates Foundation, Wellcome Trust, and others require permissive open licensing policies on their grant outputs (Kramer 2014; Bill & Melinda Gates Foundation n.d.; Wellcome n.d..; Creative Commons n.d.) The purpose of requiring open licensing such as Creative Commons Attribution (CC BY) is that materials created through philanthropic investments can be freely accessed, reused, remixed, and repurposed broadly by other researchers, and the public.

In Europe, a growing coalition of national and charitable funders organized under cOAlition S are supporting Plan S, an open access policy beginning in 2021 that will require "all scholarly publications on the results from research funded by public or private grants provided by national, regional and international research councils and funding bodies, must be published in Open Access Journals, on Open Access Platforms, or made immediately available through Open Access Repositories without embargo." Plan S offers a variety of ways for schol-

arly articles arising from funders to comply with the policy. First, authors may publish in an open access journal, with CC BY as the default license, including the use of the CC BY-SA 4.0, CC0 Public Domain Dedication. It also permits the use of CC BY-ND, "provided that this is explicitly requested and justified by the grantee". Second, authors may publish in a subscription journal, but they must make either the version of record or the author's accepted manuscript available immediately in a repository. Third, authors may publish open access in a subscription journal if doing so is included under a transformative agreement. cOAlition S offers strategies for funders to educate their audiences around rights retention.

Librarians can work with scholarly authors to understand the requirements of government and philanthropic open access policies, especially in relation to how they intersect with university policies.

Converting Subscriptions and Licenses to Transformative Agreements

Another area where considerations of CC and OA come into play relates to how academic libraries renegotiate access and publishing agreements with scholarly publishers. Many universities have found the subscription costs to commercial journals unsustainable (Cooper and Riger 2021), resulting in cancellations or renegotiations of big deal agreements with large publishers. For example, in 2019 the University of California system cancelled its subscription with Elsevier. The University of California had been proposing a so-called transformative agreement with Elsevier, which would have provided both access to Elsevier journal content, and a mechanism for articles authored by UC community members to be published OA. This type of agreement combines the costs of access and publishing into a single fee. Transformative publishing agreements are "contracts negotiated between institutions (libraries, national and regional consortia) and publishers that transform the business model underlying scholarly journal publishing, moving from one based on toll access (subscription) to one in which publishers are remunerated a fair price for their open access publishing services." The University of California in March 2021 negotiated satisfactory arrangements with Elsevier and has entered into transformative agreements with other publishers, including Cambridge University Press, Association for Computing Machinery, PLoS, and Springer Nature.

Even though most universities adopt green OA policies, some institutions provide financial assistance to faculty who wish to publish in gold open access journals. For example, at the University of California, Berkeley Library's Berke-

ley Research Impact Initiative (BRII) provides funds for faculty, researchers, students, and staff for the article processing fees of publishing in a fully open access journal when authors do not have grant funds to cover the costs. University-supported gold OA publishing funds are rare. In a survey, while 28% of respondents from doctoral universities said their institution maintains an APC fund, only 4% of respondents from institutions with masters programs said they had such a fund (Rosen and Grogg 2020).

A crucial component to negotiating new agreements with commercial publishers is ensuring that university authors can publish their work on open access terms, and retain other rights normally transferred to publishers as a part of the publication process. The University of California's Committee on Library and Scholarly Communication developed a set of 18 principles as a Declaration of Rights and Principles to Transform Scholarly Communication. Passed in 2018, it was a roadmap for the UC's negotiations with publishers on transformative agreements. Several of the committee's principles are immediately relevant to expanding open access through open licensing. The first principle states:

> No copyright transfers. Our authors shall be allowed to retain copyright in their work and grant a Creative Commons Attribution license of their choosing.

Several other principles support scholarly authors in sharing their work in open access, including:

> No delays to sharing. Publishers shall make work by our authors immediately available for harvest or via automatic deposit into our Institutional OA repository or another public archive.
> No impediments to rights reversion. Publishers shall provide a simple process for our authors to regain copyright in their previously published work.
> No curtailment of copyright exceptions. Licenses shall not restrict, and should instead expressly protect, the rights of authors, institutions, and the public to reuse excerpts of published work consistent with legal exceptions and limitations on copyright such as fair use.

Other principles for renegotiating agreements with publishers have been developed and include LIBER's Five Principles for libraries to use when conducting Open Access negotiations with publishers and the African Principles for Open Access in Scholarly Communication. These and other guiding frameworks set the stage for a fairer relationship with traditional commercial publishers and aim to improve the ability for scholarly authors to publish their work as open access under CC licenses.

CC licensing also comes into play when academic libraries are determining the types of scholarly content and collections in which to invest. The University of California's Scholarly Transformation Advice and Review (STAR) Team imple-

ments review criteria when reviewing potential system-wide acquisitions. One of the criteria is whether the vendor allows for the sharing of the materials under a Creative Commons license.

Education and Training

Dusty Folds argues that academic librarians should support scholars in understanding and participating in open access, including providing information on OA publications, drafting university open access policies, and training faculty on how to deposit in an institutional repository (Folds 2016). Academic librarians can draw from a variety of educational resources, training programs, and communities to educate themselves about the issues discussed within this chapter and can use the information to provide improved service to their university audiences interested in Creative Commons and open access publishing and policies.

Online Courses and Learning Resources

Online training programs such as CopyrightX: Libraries and Copyright for Educators & Librarians provide an introduction to US copyright and case law, and discuss practical considerations for librarians whose job responsibilities include providing information about copyright. The Creative Commons Certificate for Educators, Academic Librarians and GLAM is an 8-week interactive online course created by Creative Commons with specific chapters on Creative Commons as it relates to open access to research. The courses can equip librarians with knowledge and resources to teach their audiences about copyright and Creative Commons, and the openly licensed curricula can be used and remixed by anyone. Another way that librarians provide information about Creative Commons and open access is by developing and publishing website content such as LibGuides. An example is one prepared by the University of Colorado. Many academic libraries are sharing educational resources and content under CC licenses for reuse and customization by other libraries and educational institutions (Fortney, Hennesy and Murphy 2014).

Workshops and Communities of Practice

Education about Creative Commons is also accomplished through online and in-person workshops which might be provided during International Open Access Week, Open Education Week, and in one-off events that libraries host to educate audiences that include aspects of open licensing and Creative Commons, and related projects such as Wikipedia Edit-a-Thons. Some universities have established ongoing working groups of librarians, faculty, and staff to answer copyright questions from the university community. For example, Harvard Library's Copyright First Responders helps advance teaching, learning, and scholarship through community engagement with copyright.

Librarians can share information and advice through library or university email lists specifically set up to ask questions and promote discussion around topics such as copyright, scholarly publishing, and open access. These communities of practice can extend beyond the borders of a single university. A group of copyright and information policy professionals in academic and research libraries in the US and Canada established the University Information Policy Officers (UIPO), a community to share information about questions and issues that arise on campuses related to intellectual property and information policy, such as fair use in teaching, copyright legislation, and litigation that affect academic libraries and universities. The group uses an email list and Slack to communicate and hosts an annual member conference to discuss current issues and build community.

National level professional organizations provide venues for librarians to discuss matters of copyright, open licensing, and open access to research. Professional association committees such as the American Library Association's Copyright Legislation, Education, and Advocacy Network (CLEAN) advises ALA leadership on copyright policy and legislation, and offers copyright education to librarians. Related groups at the international level include the International Federation of Library Associations and Institutions (IFLA) Advisory Committee on Copyright and other Legal Matters and the Electronic Information for Libraries' (EIFL) Copyright and Libraries Programme. These member-driven groups provide education and advocacy on topics relevant to open access and copyright within academic libraries.

Conclusion

Academic librarians have long supported university faculty and researchers with information and guidance about scholarly communication and publishing. Increasingly, librarians are expanding their toolkit to provide expertise on copy-

right, open licensing, and open access publishing. Creative Commons licensing is one important piece of the contemporary open access publishing ecosystem. It is important for academic librarians, and the diverse audiences they serve, to understand the nuances, opportunities, and challenges with CC licenses, as well as institutional and funder policies. Luckily, there is a growing body of adaptable educational resources and communities of interest that can help academic libraries fulfil their goals and support OA publishing for the advancement of knowledge.

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Zoi Krokida

17 Use of Filters by Online Intermediaries and the Rights of Users: Developments in the European Union, Mexico, India and China

Abstract: Digitisation of content has facilitated dissemination of information. Most content today is accessed through online intermediaries who facilitate the uploading, discovery, sharing, delivery and receipt of information. The web, or the participative web as it is commonly known, is considered a place for exchanging content as well as a mechanism enabling creators to reach greater audiences for their works. Despite the advantages of disseminating digital content, online intermediaries have been the hearth of copyright infringements. Public consultation on the modernization of the enforcement of intellectual property rights in 2016 in the European Union drew attention to concerns with the emergence of new online intermediaries while the report of the European Union Intellectual Property Office examining consumption of copyright-infringing content between 2017–2020, of TV programmes, music and film in the 28 EU Member States highlighted numerous issues. Policymakers responded and introduced new legislative frameworks and forced online intermediaries to deploy technological tools to terminate or curb the circulation of unauthorised content. The response was reflected in various jurisdictions including the European Union, Mexico, China and India. Developments in relation to copyright in the Digital Single Market Directive are described. The adoption of filters by online intermediaries to block or filter the content of websites and networks to prevent or stop infringements by users is described and the subsequent concerns identified. Restrictive measures taken have been subject to criticism due to the high margin of error. Filter technology mechanisms are not always able to identify lawful content related to copyright exceptions, sometimes removing content unnecessarily which leads to censorship of content available to users. Technological measures might pose obstacles to users' fundamental rights, namely the right to free speech and the freedom of arts and sciences. An array of measures dealing with the issues is presented.

Keywords: Copyright – Computer network resources; Information filtering systems

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Introduction

Digitisation has given rise to high numbers of copyright-protected works being circulated through online intermediaries, enabling users to exchange content and creators to reach larger audiences for their work. Online intermediaries is used as an umbrella term to describe organisations that bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content created by others on the Internet, and provide Internet-based products and services. They include Internet access and service providers (ISPs), search engines and portals, cache internet service providers, web hosting providers, e-commerce services, online content sharing service providers, social media and providers of hosting services. In this chapter, when referring to specific national legislative tools for online intermediaries, the terminology adopted in them is used.

However, it appears that copyright violations are taking place within the networks of online intermediaries. For instance, the European Union (EU) Public Consultation on the modernisation of the enforcement of intellectual property (IP) rights outlines that the emergence of new online intermediaries has led to an increase in online piracy (European Commission 2016c, 8), while a report from the European Intellectual Property Office finds that the average user consumed copyright infringing content 5.9 times per month during 2020 (European Union Intellectual Property Office 2021, 11). As a result, policymakers have introduced new legislative frameworks and require online intermediaries to prevent illicit activities within their networks. Online intermediaries are therefore ascribed a duty of care and must exercise greater responsibility regarding their operations. Appropriate measures might involve the use of technological tools with the aim to terminate, or at least to curb to a greater extent, the circulation of unauthorised content. Otherwise, online intermediaries will be subject to liability for the copyright violations that are committed by their users.

The current trend of using filters is evident in several jurisdictions where governments require, implicitly or explicitly, online intermediaries to deploy technological tools. At the European level, the Copyright in the Digital Single Market Directive of 2019, Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC [hereinafter DSM Directive] (Directive 2010/790 2019) and the Proposal for a Digital Services Act Regulation in December 2020 (European Commission 2020a) require online intermediaries to prevent the re-emergence of infringing content. Proactive measures suggested for online intermediaries, as many commentators argue, might involve the adoption of filtering-based technology. Similar approaches have already been adopted in Mexico with the *Ley Federal de Derechos de Autor*/Federal Law of the

Authors' Rights, in India with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 and in China with the Provisions on the Governance of the Online Information Content Ecosystem that came into force on the 1st of March 2020 (WILMap 2020).

Filtering obligations, however, have been subject to criticism due to the high margins of error that can occur. A study conducted by Jacques, Garstka, Hviid, and Street showed that some videos which were parodies of songs had been removed under the reasoning of copyright infringement (Jacques et al. 2017). Filtering technology might not be able to determine lawful content that falls within the meaning of copyright exceptions, such as parodies or works that belong in the public domain, and content might be taken down unnecessarily. Users' content might be censored, and fundamental user rights placed in jeopardy. More specifically, the technological measures adopted might pose an obstacle to the right of freedom of expression and the right to receive information, as per Article 11 of the EU Charter of Fundamental Rights and Article 10 of the European Convention of Human Rights, as well as limit the right to creative expression, as per Article 13 of the EU Charter of Fundamental Rights and Article 19(2) of the International Covenant on Civil and Political Rights.

This chapter argues that the imposition of filtering-based technology might violate internet users' fundamental rights. It discusses the normative role of online intermediaries as a place for the exchange of content and promotion of the freedom of expression and creativity of internet users and considers the existing legal framework at the European level, namely the DSM Directive and the Proposal for a Regulation on Single Market for Digital Services, the Mexican Copyright legislation, the Indian regulatory framework for online intermediaries and the Chinese legislative provisions on online intermediaries. Drawing on the analysis, it provides an overview of different types of filtering technology to enable the reader to gain an understanding of the peculiarities of filtering tools. Finally, the chapter critically evaluates the implications of the current legislative regimes on online intermediary liability as they impact users' fundamental rights and proposes an array of measures by which any negative implications could be overcome.

Role of Online Intermediaries as Facilitators of the Exchange of Content

Nowadays, online intermediaries facilitate the dissemination of content amongst internet users. They offer the appropriate space for users to search, discover, impart and receive content as well as express their creativity. Such a role for

online intermediaries has been reinforced at theoretical, legislative, judicial, and policy level.

Online Intermediaries Facilitate Free Speech

The role of online intermediaries as facilitators of free speech has clearly been outlined at policy level. Consider, for instance, the EU Commission's Communication on Online Platforms which outlines that online intermediaries "enhance citizens' participation in society and democracy, as they facilitate access to information" (European Commission 2016a). Likewise, the European Commission's Proposal for a Digital Services Act Regulation notes that online intermediaries contribute "…in facilitating public debate, economic transactions and the dissemination of information, opinions and ideas" (European Commission 2020a, 6). Such a stance is also contained in the report on the economic and social roles of information intermediaries prepared by the OECD which states that one of the main functions of online platforms is to enable information exchange (Perset 2010, 6). Finally, the stakeholders in the EU Public Consultation on online platforms seem to agree that one of the most common assets of online intermediaries is to make the information accessible to internet users (European Commission 2016b; European Commission 2016d).

Current legislative provisions on online intermediary liability aim to maintain a public space for internet users to exchange information. Indeed, Advocate General Poiares Maduro, in joined cases C-236/08, C-237/08 and C-238/08 of *Google France/Inc. v. Louis Vuitton Malletier; Google France v. Viaticum Luteciel; Google France v. CNRRH, Pierre-Alexis Thonet, Bruno Raboin, Tiger, a franchisee of Unicis*[1] pointed out in para. 142 that "To my mind, the aim of Directive 2000/31 is to create a free and open public domain on the internet." Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [hereinafter Electronic Commerce Directive] (Directive 2000/31 2000) addresses e-commerce activities.

The role of online intermediaries as public forums where internet users can exchange views has been illustrated by academic scholarship. For instance, like the Αρχαία Αγορά/ Ancient Agora where Athenians debated and exchanged views, online intermediaries enable internet users to express and share views on political or social issues. Papacharissi (2002, 243) argues that internet infrastructure

1 Google France v Louis Vuitton and ors Joined Cases C-236/08, C-237/08 and C-238/08 [2010] ECLI:EU:C:2010:159..

offers public space to internet users. Citing YouTube as a representative example, she argues that internet users can engage with current democratic practices, such as the uploading or viewing of political satires, viewing political speeches, being informed of major political decisions and agreements, and expressing their views via video. Laidlaw (2012, 18) interprets online intermediaries as a form of deliberative democracy where internet users can share their opinions on daily matters. Likewise, Belli and Zingales (2018, 190) suggest that online intermediaries shall be treated as public spaces if they deploy a public role. Finally, the Rapporteur of the UN on freedom of expression states that the internet "contributes to the discovery of the truth and progress of society as a whole" (La Rue 2011, 7). Internet users can access and disseminate information about political actors and promote democratic values for society.

The need to preserve the internet as a free space for the exchange of views has been supported by a cluster of cases at European level. For example, the judgment of *Delfi AS v. Estonia*[2], application no. 64569/09, where the European Court of Human Rights found that the use of automatic filtering to remove offensive comments did not violate Article 10 of the European Convention of Human Rights. In this case, the Strasbourg Judges in the dissenting Opinion pointed out in para. 22 that the Internet "...is a sphere of robust public discourse with novel opportunities for enhanced democracy. Comments are a crucial part of this new enhanced exchange of ideas among citizens".

The recently issued ruling of *Vladimir Kharitonov v. Russia* (application no. 10795/14) confirms the need for caution in filtering[3]. The European Court of Human Rights concluded that blocking a website scheme runs the risk of creating collateral censorship, terminating access to lawful websites, and violating Article 10 of the European Convention of Human Rights. In support of its reasoning, the Court reiterated the need to view the internet as a space for exchanging views and restated the need for open access to be safeguarded. It noted in para. 33 that "the Internet provides essential tools for participation in activities and discussions concerning political issues and issues of general interest, it enhances the public's access to news and facilitates the dissemination of information in general." Online intermediaries shall be seen as guardians of the right of Internet users to receive and impart information from a wide range of sources, and players in the enhancement of democratic values. Rights in the online public domain must not be undermined and Article 11 of the European Charter of Fundamental Rights and Article 10 of the European Convention of Human Rights must be upheld.

2 Delfi AS v. Estonia (2015) no. 64569/09, ECHR 2015. Dissenting views on Delfi AS v Estonia (16 June 2015) Application no. 6456.

3 *Vladimir Kharitonov v. Russia*. 10795/14 (23 June 2020) [2020] ECHR 462.

Online Intermediaries Boost Creativity

Online intermediaries are spaces for creative expression amongst Internet users. Users can exchange content such as songs, videos, or photos. For instance, the DSM Strategy of the European Commission acknowledged that 56% of citizens across the EU Member States used the Internet for cultural purposes and that spending on the digital media industry in the next five years was expected to see double growth (European Commission 2015a, Para. 2.4), while at the same time the Communication: *Towards a Modern, More European Copyright Framework* noted that 49% of EU Internet users accessed music, videos, and games online, quoting figures from the Eurostat community survey on ICT usage in households and by individuals conducted in 2014 (European Community 2015b, Para.1). Statista publishes regular updates on monthly Facebook usage with 2.89 billion in the second quarter of 2021 (Statista, 2021). David Sayce's blog in 2020 noted that there were around 6,000 tweets per second, 500 million tweets per day and around 200 billion tweets per year. Meanwhile, "the majority of music video parodists on YouTube (77%) copied the original sound recording in their work; however, some 50% of the sample added new original lyrics to the parody, while 86% of creators added a new original video recording" (Erickson, Kretschmer and Mendis 2013, 11).

The role played by online intermediaries in boosting the creativity of online users is described in academic scholarship. For instance, Frosio outlines the existence of creativity in the online world in the following way, "Digital creativity, including user-generated content (UGC), results from participatory culture spreading through community interactions and promoting identity and diversity" (Frosio 2019, 34-35). Likewise, Gauntlett (2013, 1) discusses how the Internet facilitates creativity and innovation amongst users and compares it with the creativity in the offline world by noting that "The difference that high-speed internet connections make is not just a boost in convenience of communication but represents a significant transformation in how those human beings who are online can share, interact and collaborate." In addition, Literat and Glaveanu (2018, 897) aptly point out that online intermediaries are enhancing the relationship between creativity and fanfiction groups. Finally, Doctorow critically suggests new ways of enforcing IP rights online and notes that online intermediaries boost the creative sector since creators can reach larger audiences for their works (Doctorow 2015, 69).

The significance of online intermediaries in enhancing cultural growth has also been accentuated at judicial level. A representative example is to be found in the Advocate General's opinion on *Peterson/YouTube* (C-682/18).[4] The Advocate General discussed the dispute between a copyright owner and YouTube for

4 *Peterson v. YouTube and Elsevier v Cyando AG* C-682/18 and C-683/18 of 2021) ECLI:EU:C:2021:503.

not removing a video from a song, alleging copyright infringement. He argued in para. 43 of his Opinion that:

> The platform gives its users (who number more than 1.9 billion, if Google is to be believed) the opportunity to share their content and, in particular, their creations online. A multitude of videos is uploaded there every day, including cultural and entertainment content, such as musical compositions published by emerging artists looking for a wide audience, informative content on topics as diverse as politics, sport and religion, as well as 'tutorials' the purpose of which is to allow anyone to learn to cook, play the guitar, repair a bicycle, etc.

The Advocate General suggests that the use of technological tools would restrict freedom of expression online which would subordinate online creativity. The right to culture as per Article 27 of the Universal Declaration of Human Rights and the right to freedom of the arts and sciences as per Article 13 of the EU Charter of Fundamental Rights would be jeopardized.

Overall, it seems that at policy, judicial, and scholarship levels, online intermediaries are perceived to facilitate users as they seek to freely impart and receive information and enhance creativity. The right to freedom of expression and the right to artistic freedom as set forth in European Conventions, national legislation and International Conventions are safeguarded by online digital access.

Yet, the role of online intermediaries as facilitators of content exchange and cultural activities might be restricted in light of the adoption of filtering-based tools by online intermediaries. Policymakers ascribe a duty of care to online intermediaries to exercise greater responsibility regarding the operation of their platforms. In this light, online intermediaries are required to use advanced technological tools to perform their role.

Trends in Legislation Relating to Filter-based Technology

A bedrock of emerging legislative frameworks worldwide appears to require online intermediaries to terminate or prevent the reappearance of infringing content online, and to adopt filter-based tools. The following discusses filtering obligations with reference to relevant legislation and provisions from the EU, Mexico, India and China. The choice of these jurisdictions is because they are all in the process of reforming the liability of online intermediaries in adjusting to the enforcement of copyright laws in the digital age.

Developments in the European Union

Copyright in the Digital Single Market Directive

Following an intense debate and lobbying in the EU Parliament and Council, the controversial DSM Directive was passed on March 26 2019 in the European Parliament, and ratified by the European Council on April 17 2019. The controversial provisions of the Directive have been subject to severe criticism by human rights associations, Internet activists, and academic scholars while its compliance with fundamental rights has also been examined by the European Court of Justice following an application for annulment by Poland which argues that the Directive encroaches upon fundamental rights as enshrined in the Polish Constitution (Centrum Cyfrowe Foundation 2019; Mileszyk 2019). In that case, however, the Advocate General, Saugmandsgaard Øe[5], in his Opinion declared that the use of filtering tools are compatible with freedom of expression as set forth at the EU Charter of Fundamental Rights but admitted that filtering tools might be a possible solution due to the high volume of content that cannot be reviewed by human moderators. Likewise, the CJEU held that Article 17 is valid but observed with regard to filtering tools that, "neither the defendant institutions nor the interveners were able, at the hearing before the Court, to designate possible alternatives to such tools." (Case C-401/19, para. 54).

Amidst the controversial provisions of the Directive, Article 17 para.4 enables online content sharing service providers to avoid liability under three conditions. They must demonstrate their best efforts to obtain authorisation, demonstrate their best efforts to ensure unavailability or disable or remove content in the case of copyright infringements following industry practices or act expeditiously. The provisions have been subject to heated debate since it could be interpreted that online content sharing service providers must deploy filter-based technologies to prevent the reappearance of any works violating copyright.

One might argue that the filter-based obligations cannot be implied because in para.8 of Article 17 in the same Directive the prohibition of general monitoring obligations is included. It states that "the application of this Article shall not lead to any general monitoring obligation". European policymakers want online intermediaries to be compliant with the EU *acquis* and in particular with Article 15 (1) of the Electronic Commerce Directive (Directive 2000/31/EC) which prohibits general monitoring. Article 15 (1) is considered one of the cornerstones of e-commerce since it does not impose any obligation on online intermediaries to develop fil-

5 Opinion of Advocate General Saugmandsgaard ØE in case C-401/19, Republic of *Poland v European Parliament, Council of the European Union*, para. 220.

ter-based tools to identify copyright infringing works within their networks. Consequently, online intermediaries can continue their business operations without investing resources for content identification technologies.

Yet it seems impossible to satisfy the requirement of best efforts described in Article 17(4) of the DSM Directive to terminate the circulation of infringing content or prevent the reappearance of infringing content within the online intermediaries' networks without deploying monitoring obligations. This understanding has been reiterated in the words of European and national policymakers. After the final vote on the DSM Directive in Strasbourg in March 2019, the French Minister stated that French authorities need to collaborate to promote the use of content identification systems (Masnik 2019a). Likewise, the former Commissioner for Digital Affairs reinforced that Article 17 of the DSM Directive opens the door for the adoption of filtering obligations to online intermediaries by noting, "[a]s things stand, upload filters cannot be completely avoided" (Masnik 2019b). These statements illustrate the rationale of the DSM Directive and underline the suggestion that the use of filtering technologies would constitute an important part of the new copyright framework in the digital world.

The risks in the use of filters is evident in the Guidance on Article 17 of the Copyright in the Digital Single Market Directive issued by the European Commission on June 4 2021. In particular, the Guidance notes that rightsholders may decide to provide information to online content sharing service providers about copyright works whose infringement could cause significant economic harm (European Commission 2021, V.2). If online content sharing service providers do not consider the information provided by rightsholders, they would be unable to demonstrate that they had made best efforts to prevent the dissemination of copyright infringing content within their networks and would be subject to liability. To exonerate liability, online content sharing service providers would need to resort to filtering-based tools or hire human moderators to examine the work or parts of the work that have been uploaded within the networks but have been earmarked as infringing content by the rightsholders (Reda and Keller 2021a; 2021b).

Crucially, the risk of imposing filtering-based technology is not only expressed by national policymakers. It seems to have been adopted in the implementation of the DSM Directive within the EU Member States. The following section provides examples.

Implementation in Member States

The German Parliament passed on May 20 2021 the *Urheberrechts-Diensteanbieter-Gesetz (UrhDaG)*/Act on Copyright Liability of Online Content Sharing Service

Providers, which transposes Article 17 of the DSM Directive. Germany enacted Article 17 into its own legislative piece and separated it from other provisions of the German Copyright Act (Reda 2020; Nordemann and Waiblinger 2020). Like the provisions of the DSM Directive, the German Act on Copyright Liability transposes the conditions for primary liability of online content sharing service providers once they communicate unauthorised works within their networks. To escape from liability, Section 4 of the Act states: "Service providers are obliged to undertake their best efforts to acquire the contractual rights of use for the communication to the public of copyright-protected works…"

In order to protect copyright exceptions, the German Act inserts a new provision under the term of presumably authorised uses. More specifically, the Section 9 states that user-generated content must remain online if it: "1. contains less than half of a work or several works by third parties, 2. combines the part or parts of a work referred to in no. 1 with other content, and 3. uses the works of third parties only to a minor extent (section 10) or is flagged as legally authorised (section 11)". Content can be removed only after the conclusion of the complaints procedure provided by the online content sharing service provider. In practice, online content sharing service providers cannot take down a work that falls within the notion of presumably unauthorised use even if the work matches with a file that is archived in the database of the filtering software. As per Section 9 para. 3, it is the responsibility of the online content sharing service provider to contact and inform the rightsholder about the right to file a complaint. While the matter is being processed, the content is still available on the platform and can only be removed following human moderation.

Yet, the Act remains silent on the moderation of content that does not fall within the above-mentioned categories, for instance, if the uploaded work cites the whole work of the creator or belongs in the public domain or in the case of false claims for copyright violations (Reda and Selinger 2021; Nobre 2021).

A similar stance has been adopted by the Netherlands in transposing the provisions of the DSM Directive. The Dutch draft bill was adopted by Parliament on May 15, 2020. Instead of introducing a separate legislative piece, the Draft bill added the relevant provisions of the DSM Directive and made amendments to the current *Autorswet*/Dutch Copyright Act (Chavannes 2020). The Dutch draft bill followed verbatim Article 17 of the Copyright in the DSM Directive and the Act states in Article 29 (d) 2. (2) that the online content sharing service provider must "upon receipt of a sufficiently substantiated notification from the author or his successor in title, promptly remove the reported works from his website or make access to them impossible and make every effort to prevent the reported works in the future will be offered again". This means that online content sharing service providers are required to take down or prevent the re-emergence of unau-

thorised works. Crucially, this outcome could be achieved either through the use of human reviewers or the installation of automated technological tools within the networks.

The interpretation appears to echo the Explanatory Memorandum which had accompanied the Dutch Draft Bill when it was debated in the Dutch Parliament, as well as when the draft was subject to open consultation. In particular, the Explanatory Memorandum offers, in many instances, the term filtering, or filtering technology, as an example that could be used by online content sharing service providers (Chavannes 2020). Observation of the mass protests and reactions from human rights associations and Internet activists during the legislative process of the DSM Directive in Brussels led to open-ended political discussions about the meaning of upload filters. The final Bill did not make use of the term to avoid criticism.

France has implemented the DSM Directive into its national legal system and has transposed verbatim Article 17 of the DSM Directive in Article L. 137-1 and Article L. 137-2 of the existing Code of Intellectual Property Law. Article L. 137-1 addresses the scope of online content sharing service providers and Article L. 137-2 is about the liability of online content sharing service providers for copyright infringements within their networks. Online content sharing service providers must demonstrate they have made their best efforts to obtain authorisation for the use of the work or show that they made the best efforts to terminate or prevent the reappearance of the infringing content, and the use of filtering tools is not excluded. The implementation of Article 17 does not entail any relevant procedural provisions that would safeguard users' fundamental rights. The French perspective on this matter was contained in the response of the French Government to the Commission's stakeholder consultation for the implementation of Article 17 of the Copyright in the Digital Single Market Directive which noted that the existing provision took into consideration the fundamental rights of users and in particular Article 11 of the EU Charter of Fundamental Rights.

Finally, Finland's implementation is ongoing. A public hearing of the government's proposal for the transposition of the DSM Directive was made on December 21 2020. At first glance, the Government's proposal seems to refrain from obliging online content sharing service providers to use content moderation technologies within their networks although the situation might change. The draft proposal follows Article 17 (8) of the DSM Directive, and states that general monitoring obligations for online content sharing service providers are prohibited, but it incorporates a blocking procedure that online content sharing service providers must follow to avoid direct liability for copyright violations within their networks (Keller 2020). Blocking requires online content sharing service providers to deploy technological tools for content moderation before the

content is uploaded to the platform. Once the automated technology identifies an unauthorised video, it notifies the copyright holder of the infringing content. It is then up to the copyright holder to decide whether the video represents an infringement or not. In the case of an infringement, the rightsholder requests the video be blocked and a notification is sent to the user, with appropriate justification, and information is provided about available counter-claim procedures and the option to challenge the outcome in court. Interestingly, the same approach seems to be followed in the second draft of the Bill in Section 55 h which refers to the complaints and redress mechanism. Yet, it is unclear whether this process will be followed since amendments are expected during the legislative drafting in the Finnish Parliament (Melart 2022). It appears that despite the prohibition of general monitoring, online content sharing service providers are required to follow a notice and action approach with the support of content identification mechanisms to curb the dissemination of unauthorised content online. Whilst the DSM Directive prohibits general monitoring obligations, there is still the risk of adopting filter-based tools. This understanding appears to be followed by the current reform for online intermediary liability at the European level.

Proposal for Regulation on a Single Market for Digital Services

The Proposal for a Digital Services Act Regulation published on December 15 2020 seems to adopt the same pattern as the DSM Directive and requires online intermediaries to prevent illicit online activities (European Commission 2020a). Such prevention might be achieved with the implementation of filtering technology in the battle against illegal content. Following the outcomes of the impact assessment of the EU Commission (European Commission 2020b), the Commission published a new Proposal for regulating illegal content online:

> which aims to offer the best conditions for innovation in the Digital Single Market as well as ensure the protection of fundamental rights online (European Commission 2020a).

The proposed Regulation would apply as *lex specialis*[6] for the cases that are not covered by the existing legislation. This means that it would apply in cases that are not entailed in the DSM Directive or the Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 Amending Directive 2010/13/EU on the Coordination of Certain Provisions Laid Down by Law, Regulation or

6 A law governing a specific subject matter, *lex specialis*, overrides a law governing only general matters *lex generalis*.

Administrative Action in Member States Concerning the Provision of Audiovisual Media Services [hereinafter the Audiovisual Media Services Directive] (Directive (EU) 2018/1808) (Angelopoulos 2020). The proposed Regulation notes:

> Building on the key principles set out in the e-Commerce Directive, which remain valid today, this proposal seeks to ensure the best conditions for the provision of innovative digital services in the internal market, to contribute to online safety and the protection of fundamental rights, and to set a robust and durable governance structure for the effective supervision of providers of intermediary services.

In addition, it states that it "calls for an ambitious reform of the existing EU e-commerce legal framework while maintaining the core principles of its liability regime" and Recital 16 of the proposed Regulation notes:

> The legal certainty provided by the horizontal framework of conditional exemptions from liability for providers of intermediary services, laid down in Directive 2000/31/EC, has allowed many novel services to emerge and scale-up across the internal market. That framework should therefore be preserved. However, in view of the divergences when transposing and applying the relevant rules at national level, and for reasons of clarity and coherence, that framework should be incorporated in this Regulation. It is also necessary to clarify certain elements of that framework, having regard to case law of the Court of Justice of the European Union.

The provisions of the proposed Regulation reinforce the provisions of the Electronic Commerce Directive. More specifically, Article 3 of the proposed Regulation reinforces Article 12 of the Electronic Commerce Directive and refers to the liability of mere conduit Internet service providers; Article 4 of the proposed Regulation incorporates Article 13 of the Electronic Commerce Directive and addresses the liability of caching Internet service providers; Article 5 reinstates the liability of hosting Internet service providers, as set forth in Article 14 of the Electronic Commerce Directive.

The proposed Regulation follows the rationale of Article 15 (1) of the Electronic Commerce Directive and reinstates that providers of hosting services are not require to monitor their networks. More specifically, Article 7 repeats Article 15 of the Electronic Commerce Directive and notes that "[n]o general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers". This means that online intermediaries would not need to license expensive filtering technology or develop their technology to monitor their networks (Frosio and Geiger 2021, 30–31).

As always, the devil is in the detail. The prohibition of general monitoring obligations appears to be nullified because the filter-based technological tools seem to be allowed as per Recital 58 of the proposed Regulation:

> Very large online platforms should deploy the necessary means to diligently mitigate the systemic risks identified in the risk assessment. Very large online platforms should under such mitigating measures consider, for example, enhancing or otherwise adapting the design and functioning of their content moderation, algorithmic recommender systems and online interfaces, so that they discourage and limit the dissemination of illegal content, adapting their decision-making processes, or adapting their terms and conditions.

Consequently, certain types of online intermediaries would be required to deploy content moderation tools or algorithm-based software. Such tools would amount to automated content removal and are already applied by certain online intermediaries on a voluntary basis. Representative examples can be found in Content ID of YouTube, or the Photo DNA software of Microsoft. Content ID is a fingerprint-based software that automatically removes unauthorised videos once they are uploaded by users and there is an indication that they match with files that already exist in the database of the software. At the time of writing this chapter, the proposed Digital Services Regulation's trilogues negotations have been completed (22 April 2022). While the final draft has not been made available, it appears that mandatory appeal mechanisms and compensatory claims have been included in order to safeguard users' fundamental rights.

The proposed Regulation on a Single Market for Digital Services reflects the trend of using filter-based tools for content moderation to curb the dissemination of illegal content. Use of filters by online intermediaries for this purpose has spread beyond European borders. The following section addresses the proliferation of filtering obligations in non-EU jurisdictions, Mexico, India and China.

Filter Obligations in Non-EU Jurisdictions

Mexico

Before July 2020, Mexico did not have statutory provisions for online intermediary liability. More specifically, the *Ley Federal Del Derecho De Autor*/Federal Copyright Act of 2013 did not entail specific procedures for online intermediaries about the removal of infringing content for their networks upon being notified. Likewise, the *Ley de Telecomunicaciones y Radiodifusión*/Broadcasting and Telecommunications Act of 2014, which is still active, does not include relevant provisions for the regulation of the liability of online intermediaries. It focuses on the procedures for blocking access or suspending communications through judicial orders (WILMap 2014b). To seek redress for copyright infringements online, rightsholders could resort to the provisions of the Código Civil Federal/Mexican civil code that provides compensatory, but not injunctive, relief. As per Article 1913:

> When a person operates machines, any instrument or substance that is inherently dangerous . . . such person is obliged to repair the damage caused by such instruments, even if the person does not act in an unlawful manner, unless that person proves that the damage was a consequence of the inexcusable fault or gross negligence of the injured party.

A person providing a machine through which the rights of third parties have been infringed shall be liable for damages for any infringement. Neither lack of fault nor negligence shield the person from liability. Transposing this interpretation to online intermediaries, it could be held that online intermediaries whose platforms violate the rights of copyright holders would be subject to claims for damages. Yet, to date, the provision does not seem to have been used by rightsholders to protect their rights.

The new *Ley Federal del Derecho de Autor*/Federal Copyright Act, which has been in force since July 2020, offers statutory provisions about the regulatory framework of online intermediaries and has come under severe criticism from human rights and Internet activist bodies due to the rush in the legislative process and its incompatibility with the Mexican Constitution (Doctorow 2020a, 4; Doctorow 2020b; Betancourt et al 2020). It has been introduced in light of the USCMA Agreement between the United States, Mexico, and Canada which aims to facilitate free trade between the countries involved. Amidst the provisions of the USCMA, the Agreement entails new provisions for Digital Trade (Krishnamurthy et al 2020; Laidlaw 2019, 45).

The Mexican Government has added the new provisions to the existing Copyright Act under the heading "Technological Protection Measures, Information on Rights Management and Internet Service Providers" to transpose the digital trade provisions of the Agreement. One of the key issues of digital trade lies in Article 19.17 of the USMCA Agreement which sets forth the legal framework for online intermediaries that host content online. The legislative framework offers statutory provisions that shield online intermediaries from liability for third party content that is uploaded within their networks. As per Article 114 Octies, online intermediaries are not liable for material hosted within their networks if they expeditiously remove any allegedly infringing content when learning about it, either through a notification from the copyright owner or an order for removal from the appropriate authority. Otherwise, online intermediaries would be subject to liability for illegal acts committed by their users.

However, apart from the conditions that enable online intermediaries to escape liability, the new Federal Copyright Act includes the use of filtering mechanisms to curb the dissemination of infringing content online. Article 114 Octies II sets forth the use of technological tools regarding copyright infringements without explicitly stating the use of filtering mechanisms. More specifically, it states that,

"in both cases, reasonable measures must be taken to prevent the same content that is claimed to be infringing from being uploaded to the system or network controlled and operated by the Internet Service Provider after the removal notice or the resolution issued by the competent authority" (Doctorow 2020a, 36). Online intermediaries must undertake measures to prevent the dissemination of infringing content and are not required simply to deploy filter-based measures to terminate the circulation of unauthorised content within their networks. They are forced to do so. Such methods might vary from algorithmic decision-making procedures to automated content identification technologies.

The idea of filtering obligations is not new in Mexico. In 2010 the Mexican Congress introduced a draft law proposal the aim of which was to amend the Federal Copyright Act by adding provisions based on the three strikes system about copyright infringements in the digital ecosystem (WILMap 2010). More specifically, according to the three strikes system, rightsholders could ask the Mexican Institute for Industrial Property to require online intermediaries to send two warning notices to users who were committing copyright infringements. If the allegedly infringing users do not comply with the two warnings, they would be subject to injunctions with a third warning notice. To warn users, online intermediaries had been requested to deploy filtering obligations and monitor their networks with the aim of identifying the allegedly repeated infringers. However, similar to *Hadopi Loi* in France (Datoo 2013), which was also a draft law proposal for the adoption of a three strikes system against online copyright infringements, the Mexican draft law proposal came under severe scrutiny and its implementation was abandoned (Haggart 2014, 312).

India

In India, the legal framework for online intermediaries is to be found in Section 79 of the *Information Technology Act 2000* which shall be read in conjunction with the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 [hereinafter Information Technology Rules 2021]. According to Section 79 (2) of the *Information Technology Act 2000*, online intermediaries are exempt from liability for third party copyright violations within their networks under specific circumstances, namely they must not initiate, modify or select the receiver of the transmission while they must exercise due diligence in the operation of their business model. However, as per Section 79 (3) the provision for liability exemption is not applicable in cases where the online intermediary has conspired or abetted or aided or induced the infringing act or failed to remove the infringing content upon receiving actual knowledge of the illicit activity.

The Information Technology Rules 2021 were rapidly processed in February 2021 without any consultation and replaced the Information Technology (Intermediaries Guidelines) Rules 2011. They describe a stricter legal framework for online intermediaries and require online intermediaries to take down infringing content after being notified by the court within 36 hours. In addition, as per Rule 3 para. j online intermediaries must provide within 72 hours to a governmental body's request any information about the verification of the identity of a user for crime or cybercrime prevention purposes.

The new Rules introduced two types of online intermediaries, namely social media intermediaries and significant social media intermediaries. The latter are those intermediaries that have above five million registered users and are subject to additional obligations such as transparency reports and the use of filtering technology with the aim to terminate or prevent the emergence of infringing content. As per Rule 4 para. 4:

> A significant social media intermediary shall endeavour to deploy technology-based measures, including automated tools or other mechanisms to proactively identify information that depicts any act or simulation in any form depicting rape, child sexual abuse or conduct, whether explicit or implicit, or any information which is exactly identical in content to information that has previously been removed or access to which has been disabled on the computer resource of such intermediary under clause (d) of sub-rule (1) of rule 3, and shall display a notice to any user attempting to access such information stating that such information has been identified by the intermediary under the categories referred to in this sub-rule:...

Online intermediaries are required to deploy technological tools to determine the illegality of content disseminated online. Ex-ante filtering obligations are assigned to online intermediaries with the aim of curbing online piracy.

The Information Technology Rules 2021 have triggered a high level of criticism (Rodriguez, Mathew and Schmon 2021; Khan, Voule, and Cannataci 2021), primarily because the use of proactive measures are thought to come into conflict with the Indian Constitution, and in particular with Article 19(2) of the Constitution of India that safeguards the right to free speech and dictates that:

> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of 6 [the sovereignty and integrity of India,] the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

What is more, the new legislation seems to be against the landmark decision of *Shreya Singhal v. Union of India (Writ Petition No. 167 of 2012)*.[7] The case concerned the arrest of two young ladies by the police for posting offensive comments about Mumbai's shutdown for the death of an important politician. Amidst the important findings of the ruling, the Supreme Court of India stated that online intermediaries cannot remove infringing content by themselves. Rather, it is only after a judicial order is issued that online intermediaries can block illicit information online. In the Court's words in para. 119:

> Section 79 is valid subject to Section 79(3)(b) being read down to mean that an intermediary upon receiving actual knowledge from a court order or on being notified by the appropriate government or its agency that unlawful acts relatable to Article 19(2) are going to be committed then fails to expeditiously remove or disable access to such material.

Finally, news websites have negatively reacted to the introduction of the new provisions. More specifically, two digital news websites have filed petitions in front of Kerala High Court and Delhi High Court respectively arguing that the new provisions might have a detrimental effect on free speech online and might lead to censorship. Both High Courts have accepted the petitions and the cases are ongoing. (Chaturvedi, 2021). It appears that the Information Technology Rules 2021 are opening the door for the use of automated technology to filter and block allegedly infringing content but at the same time such use might conflict with the constitutional protection of free speech.

China

In China, the Regulation on the Protection of the Right to Network Dissemination of Information Networks 2006 (hereinafter Regulation 2006) regulates online intermediaries' liability for online infringements with Order of the State Council of the People's Republic of China no. 634. Articles 14–17 of Regulation 2006 provide a notice and takedown procedure according to which online intermediaries must immediately remove the infringing content upon receiving written notification from the rights holder and notify the user-subscriber about the allegedly infringing content. Article 22 of Regulation 2006 enables online intermediaries to escape from liability if, for instance, the online intermediaries are not aware of the infringing nature of the content, they delete the content upon receiving a

7 *Shreya Singhal v. Union of India*. AIR 2015 SC 1523; Writ Petition (Criminal) No. 167 OF 2012.

notice from the rights holder, or they do not receive any direct economic benefit from the infringing content (Wang 2018, 52).

Online intermediaries are required to undertake necessary measures to terminate infringing activities within their networks. As per Article 36(2) Tort Liability Law 2009, online intermediaries must deploy appropriate measures to terminate or delete the infringing content either after being notified by the rightsholder, or once they become aware of such content (Friedmann 2020).

The Chinese legislative framework is supported by a cluster of case law that ascribes an obligation to online intermediaries regarding the termination of infringing content. Consider, for instance, the case of *Beijing Higher People's Court, Zhong Qin Wen v. Baidu, Gao Min Zhong Zi No. 2045 (2014)*.[8] Zhong Qin Wen, a copyright holder, brought legal proceedings against Baidu, an online content exchange platform, alleging copyright infringement. To the Court's reasoning, online intermediaries are ascribed a duty to monitor popular works on their networks (WILMap 2014a). However, as Wang points out, the Court refrained from clarifying the concept of popular works, and thus passed this difficult issue onto the online intermediaries (Wang 2016, 137). Online intermediaries must decide the threshold for likes or downloads which make a work popular.

The Beijing High People's Court shed light on the legal uncertainty and released the Guidelines on the Trial of IP Cases involving Networks 2016 which aimed to provide consistent guidance with regard to the current provisions of the online intermediary regulatory framework and were binding in the courts within the Beijing municipality. To determine whether the online intermediary has knowledge of the infringing content, the Courts must examine whether the rightsholder notified the online intermediary of the infringing content, if the online intermediary interfered in making available the infringing content within its platform, if the infringement has repeatedly taken place and the online intermediaries have not acted to stop it, if the online intermediary knew about the allegedly infringing content with the use of filtering-based technology, and if the online intermediary deploys a mechanism for the notice and takedown procedure (Friedmann 2020). What is more, the obligation for online intermediaries to prevent online infringements has been reinforced in the Provisions on the Governance of the Online Information Content Ecosystem that came into force on March 1st, 2020 and aim to safeguard the network ecosystem and protect the rights of individuals, as well as public interest, from cyberattacks. Amidst the provisions, Article 7 explicitly states that online intermediaries must take appro-

8 *Zhong Qin Wen v. Baidu* [中青文v.百度] *Gao Min Zhong Zi* No. 2045, Beijing Higher People's Court [北京市高级人民法院](2014）高民终字第2045号], 2014.

priate measures and prevent or terminate the dissemination of illegal contents that "adversely affect network ecology" (WILMap 2020).

Overall, it appears that a cluster of jurisdictions at international level require online intermediaries to deploy filter-based technology with the aim of preventing or stopping the circulation of infringing content online, while other jurisdictions are initiating copyright reforms to meet the demands of the digital age. Either implicitly or explicitly, jurisdictions require online intermediaries to deploy filtering obligations as part of their business models to fight infringements within their networks. Before venturing into the implications of filter-based technology for the fundamental rights of internet users, it is worth discussing the types of filters in use to gain a better understanding of the different technological tools involved and how their interaction with the activities of users.

Types of Filter-based Technology and Their Impact on Use

Due to the exponential growth of artificial intelligence (AI) and rapid innovation in recent years, many types of filter-based technology are available to online intermediaries. Filters can be applied ex-ante or post-ante; each has its own characteristics; and they can locate infringements based on audio, video, text, or images (Sartor and Loreggia 2020, 39). The types of filters in use are described and their impact on users fundamental rights examined.

Filter-based Technologies

Metadata is the simplest form of filtering technology (Moreno 2020, 158) and is the information that goes with the work. It helps to determine infringements based on audio, video, text, or images. Some examples of metadata are a song's title, the publisher of a book, or the duration of a video. Metadata filtering technology scans the metadata of the work against a database of files to identify unauthorized works (Sartor and Loreggia 2020, 40) without downloading the file.

Another type of filtering technology that identifies infringements based on audio, video or images is hashing. A hash constitutes a unique digital signature for each file. If the hash of one file matches the hash of of another file, a copyright infringement is identified. (Frosio and Husovec 2020, 621). An example is the PhotoDNA software developed by Microsoft. It is a digital fingerprint-based software which detects images that relate to terroristic or child abuse content. Microsoft donated its advanced and sophisticated PhotoDNA software to the US National Center for Missing & Exploited Children (NCMEC) for use as well as to

law enforcement agencies to assist in rescuing children from the risks of child pornography and exploitation (Sartor and Loreggia 2020, 40). Another example is LTU Tech which provides image recognition technologies which can be used either for detecting child pornography or abuse cases, or counterfeit goods (Gann and Abacassis 2018, 6; Angelopoulos 2009, 2–3).

Watermarking, which places a hidden barcode in the work, is commonly used by the film industry to locate who is accessing works without authorisation (Moreno 2020, 158). Before the Oscar Awards, copies of new films are watermarked before being sent to the voting members of the Academy so that it is easier to identify if a member leaks the movie to third parties (Milano 2012, 3). Finally, fingerprint-based technology identifies infringements by examining a specific piece of content to identify its inherent characteristics and then matches it against a database of files (Gann and Abecassis 2018, 6). Representative examples can be found in deep packet inspection, Cleanfeed software, the Content ID system, and Audible Magic technology.

Content ID is a rights management system based on digital fingerprinting technology developed by Google. It is deployed by YouTube with estimated development costs varying but reportedly exceeding US$100 million (Doctorow 2020a, 8; Spoerri 2019, 173; Engstrom and Feamster 2017, 23). Content ID contains a database of 50 million works amounting to a period of 600 years of audio and visual material (Jacques et al. 2018, 218). The filtering technology is highly sophisticated. It has been reported that between September and December 2020, Content ID was used by YouTube to terminate the dissemination of unauthorised works online and took down fourteen times more videos than the human content moderators did (Sartor and Loreggia 2020, 49).

Audible Magic uses fingerprint technology and matches video and audio content against a Global Content Registry which is a database of fingerprints of copyrighted works (Gann and Abacassis 2018, 6). Dailymotion works with Audible Magic and INA to use fingerprinting technology to detect unauthorised videos by checking their fingerprints against a database (Gann and Abecassis 2018, 6). Echoprint is an open-source fingerprint-based software for audio that is deployed by Spotify. It generates a code for a song and scans the code against a database of codes already submitted by copyright holders and collecting societies (Engstrom and Feamster 2017, 15).

Finally, another type of filtering technology identifies textual infringements. Two representative examples are Natural language processing and Blacklisting. Natural language processing identifies potential infringements by conducting a semantic and syntactical analysis. Semantic analysis examines the meaning of words and categorises them as well as identifying names and the positive or negative sentiment of the text. With syntactical analysis, natural language pro-

cessing identifies the names, adjectives, verbs, and nouns used in the text along with its structure by dividing it into main sentences and clauses. Blacklisting matches content against a database of files with copyright infringing content. To identify copyright infringing content, blacklisting scans the text against the database. Should the text match with an unauthorised work in the database, software removes it (Sartor and Loreggia 2020, 41–42). Additionally, in the online world, it is common for images to be accompanied by text. For instance, images in memes, street directions, or menus are posted by users to online intermediaries every day. To detect infringing text in images, Facebook has initiated the development of Rosetta, a machine-learning software which extracts text that appears in images from a billion of images made available through Facebook and performs a syntactical and contextual analysis (Sartor and Loreggia 2020, 43; Borisyuk, Gordo, and Sivakumar 2018).

It appears that the rapid advancement of technology enables the development of different kinds of filtering tools, and it has been argued that the use of filtering technology might have corrosive effects on Internet users' activities online. The following section critically evaluates the implications of the use of filtering tools in relation to user rights.

Impact of Use of Filters on User Rights

The attribution of a duty of care to online intermediaries has led to the proliferation of filter-based obligations on a global basis. The tools are applied either on their own or accompanied by human moderators. Article 17 (9) of the DSM Directive states that any complaints related to decisions about disabling access or removing uploaded content shall be subject to human review.

The extensive use of filtering technology has given rise to considerable criticism from scholars, internet activists, and prominent public figures since it poses serious threats to users' fundamental rights, such as the right to freedom of expression and the right to creative expression. Filters "involve risks of both over-blocking and under-blocking content and as such amount to a violation of the right to freedom of expression" (Article 19 2016, 1), while the European Digital Rights (EDRi) notes that "these practices deeply affect human rights such as freedom of expression and access to information, culture and education" (EDRi 2018). Likewise, Article 3b of the UN Joint Declaration on Freedom of Expression and the Internet outlines that filters constitute "a form of prior censorship and are not justifiable as a restriction on freedom of expression". Meanwhile, an open letter signed by prominent internet advocates, including the founder of the world wide web Sir Tim Berners-Lee, states that the DSM Directive copyright reforms

should not turn "the Internet from an open platform for sharing and innovation into a tool for the automated surveillance and control of its users" (O'Brien and Malcolm 2018).

The negative impact of filtering mechanisms on free speech and creativity is seen in the lack of accuracy. It has been argued that the adoption of filtering mechanisms does not guarantee the removal of copyright infringing content. Several cases have been reported where filtering technology could not differentiate between legitimate and infringing content. One example can be found in a video showing students protesting to free Tibet which was removed from YouTube for the stated reason that it violated the International Olympic Committee's copyright, even though it did not (Marsoof 2015, 19).

The difficulty that online intermediaries face distinguishing between legitimate and illegitimate content is evidenced by the high number of counter-notifications for content removed from their networks. A representative example can be found in YouTube's counter-claim procedure. During the Covid-19 pandemic, it has been reported that while 11 million videos had been taken down during April and June 2020, 320,000 of the removals were appealed, and half were placed back because they have been erroneously removed (Vincent 2020). The issues with accuracy stem from the specifications of each type of filtering technology. For instance, machine learning technology requires a considerable amount of training data for each field. Lack of training data might result in the erroneous removal of lawful content (Sartor and Loreggia 2020, 57).

Automated content identification technologies are subject to high margins of error. For example, metadata is not uniquely attached to a work since two works, a film and a book for example, might have the same metadata (Engstrom & Feamster 2017, 11–12). The technology can be circumvented by users and prove inaccurate (Gann and Abecassis 2018, 5). Hash-based identification technology, such as the PhotoDNA software or Shazam, is subject to users' circumvention with small changes made to a copy so that it differs from the original file (Sartor and Loreggia 2020, 51). Likewise, content filters such as Cleanfeed software, or the Content ID system, can be circumvented if modifications to the sound or speed of song files or to the level of brightness and darkness of video files takes place (Sartor and Loreggia 2020, 40) while watermarking is mainly applied to newly copyright-protected work and fails to detect content that is already available to the online world (Moreno 2020, 158; Japiot 2017, 17).

Difficulties in identifying copyrighted works arise from the nature of copyright infringements which are described as contextual infringements. To establish a copyright violation, several parameters must be taken into consideration, including societal conditions, information about the date of an author's death, whether the work is licensed, and information about the submission of the work

to various databases (Husovec 2016, 36). Any failure in the watermarking and matching process might lead to removal of works in the public domain which should be freely accessible to everyone. A study by Ahlert, Marsden, and Yung (2014) described a case where researchers submitted a complaint about lack of availability of legitimate content to a UK and a US Internet service provider who offered Internet access. The work that had been removed was part of a book by John Stuart Mill which was published in 1869 and thus belonged in the public domain. In response to the complaint, the UK Internet service provider expeditiously removed the legitimate material without any further investigation of the claim; however, the US Internet service provider requested further information about the copyright ownership.

The different approaches by the providers are due to the different copyright exceptions in various countries, and judicial interpretations of those exceptions. What constitutes fair use and what proportion of an original work may be used is highly debated in the courts and is left for the courts to decide. Sag (2012, 51) points out that fair use is "doctrinally incoherent and unpredictable in application", and a "lottery argument". Works covered by copyright exceptions run the risk of being removed. Another example can be found in the study by Jacques, Garstka, Hviid, and Street (2017, 58–60) on the impact of YouTube on cultural diversity. Their study indicates that the Content ID software used by YouTube failed in many instances to recognise song parodies that entailed new lyrics but used the original sound recording.

The Advocate General's Opinion on *Peterson v. YouTube* (C-682/18) focused on the potential restrictions on creativity and stated in para. 243 that the use of filtering technology "would introduce a risk of undermining online creativity, which would be contrary to Article 13 of the Charter. The danger in that regard is that maximum protection of certain forms of intellectual creativity is to the detriment of other forms of creativity which are also positive for society".

Finally, filtering technology appears to face difficulties in applying the interpretations adopted by the courts. For instance, the Court of Justice of the European Union in Luxembourg set out in the *Eva Glawischnig-Piesczek v Facebook* (C-18/18)[9] case that the host Internet service provider must terminate or prevent the re-emergence of identical and equivalent content. Para. 53 states that equivalency shall be understood as "information conveying a message the content of which remains essentially unchanged and therefore diverges very little from the content which gave rise to the finding of illegality." Para. 46 states that online intermediaries must prevent the re-emergence of identical and equivalent content without being required to "carry out an independent assessment".

9 *Eva Glawischnig-Piesczek v Facebook* C-18/18 [2019] ECLI:EU:C:2019:821 .

One might wonder how filtering technology can identify equivalent infringements without conducting an additional examination in, for example, instances where infringing content is reposted by a user who criticises or comments on the content thereof, or where infringing content is reposted by a user in the context of news reporting (Krokida 2021, 315). Lack of further investigation might lead to the removal of lawful content and restrict users' fundamental rights, namely the right to free speech and the freedom to the arts and sciences.

The difficulty in distinguishing between legitimate and infringing copyright content is not the only reason why the right to freedom of expression and the right to creativity may be in jeopardy. Online intermediaries might turn to over-blocking of content to evade liability. As stated earlier, being subject to liability rules, hosting Internet service providers might act as "overzealous police officers" (Rowland, Kohl, and Charlesworth 2017, 86) and potentially over-enforce their rights online or block websites without further examination of the allegedly illicit activities that take place within their networks. Several studies demonstrate the threat of over-removal of content by online intermediaries. Urban, Karaganis, and Schofield (2017, 11) found that one out of twenty-five automatic removals is erroneous. Similarly, another study under the auspices of the French Ministry of Culture concluded that "Just over half of those who received a blocking message when sharing audio or video content (56%) disputed it, or about 2% of Internet users." (Mochon et al. 2020, 93).

Overall, one can conclude that technological filtering tools might have a corrosive effect on users' fundamental rights and on the right to freedom of expression and creativity. Filtering technology cannot easily distinguish between legitimate and copyright infringing content use due to the peculiarities of each filtering software and inaccuracies in identifying the context and the circumstances within which the content has been posted. Online intermediaries have the capacity to deploy filtering systems excessively to avoid liability for violations with potentially unnecessary removal of content and collateral censorship where lawful content has been removed from networks.

Recommendations

Filtering obligations have the capacity to transform the digital ecosystem and pose serious threats for users who receive and send online content. A user-based approach should be adopted in implementing filtering technology. It is proposed that transparency be adopted in the use of any filters. Filter-based software uses algorithms that extract codes, fingerprints, hashes, or metadata and scan them

against a database of audios, videos, images, and texts to determine any infringement. Such algorithms are often described as black boxes because users do not understand them. Many online intermediaries publish transparency reports on a voluntary basis. To name a few, Facebook, Google, and Twitter publish transparency reports of removal requests with justifications and counter-notifications. A statutory obligation for transparency would result in consistency within the online intermediaries and promote legal certainty for users and rightsholders. As Ursula von der Leyen, the President of the European Commission, said in her State of the Union speech, "Algorithms must not be a black box and there must be clear rules if something goes wrong" (Von der Leyen 2020).

Secondly, there is a growing need for adoption of a hybrid model for online content moderation. Human moderators need to be involved in reviewing content deemed unauthorised by filtering systems. In Germany where the *Network Enforcement Act*/*Netzwerkdurchsetzungsgesetz* addresses hate speech content online, Facebook hired 1200 human moderators who, in parallel with algorithmic review, review hate speech related content and take it down (Article 19 2018, 61; Oltermann 2018). Errors or inaccuracies can be limited when human moderators examine complex copyright infringements to determine whether they are within the meaning of fair use or not. A recent Ofcom report highlights the hybrid model of human review and technology and states that "This combination allows vast quantities of content to be automatically filtered, whilst enabling the more complex content to be reviewed by a team of human moderators who better understand the nuances of online content" (Ofcom 2019, 36). The risks of removing lawful content and censorship can be avoided.

Thirdly, it is recommended that oversight bodies be created to supervise the appropriate implementation of filtering obligations. This recommendation echoes the European level Article 17 (9) of the DSM Directive which states:

> Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies.

Such authorities exist in some countries, such as Greece and Italy, and could serve to safeguard users' fundamental rights online (Krokida 2022).

Conclusion

This chapter has examined the emerging legislative frameworks requiring online intermediaries to deploy filtering to prevent the re-emergence of infringing content within their networks. The use of filtering algorithms seems to have spread on a global basis and a handful of jurisdictions has incorporated such activities into their legal regimes for online intermediaries while others have initiated copyright reforms in the digital age. At the European level, the DSM Directive requires online intermediaries to make best efforts to prevent the reappearance of infringing content to escape liability. Many EU Member States, such as Germany, France and the Netherlands have transposed the Directive into their local contexts and required online intermediaries to adopt the necessary measures to curb or stop the infringements within their networks. In similar fashion, in Mexico there is a new Federal Copyright Law that requires online intermediaries to prevent the emergence of unauthorised content online. Unless online intermediaries undertake their obligations, they are subject to liability. In India, the Information Technology Rules 2021 impose an obligation for online intermediaries to deploy technology-based tools to detect infringing content, while in China the Provisions on the Governance of the Online Information Content Ecosystem that came into force on March 1 2020 require online intermediaries to adopt proactive measures to safeguard network ecology.

The imposition of filtering obligations has the potential to erode the fundamental rights of users, namely the right to freedom of expression and the right to artistic expression. Online intermediaries are not always able to determine the difference between lawful and infringing copyright content, leading potentially to censorship. Filtering algorithms are inaccurate; and studies highlight the increasing number of counter-notifications and high percentages of reinstatement of content. At the same time, filtering obligations can lead to over-blocking, thus triggering the risk for censorship.

Going forward, a user-based approach has been suggested to limit the detrimental effect of filtering technology on users' fundamental rights. The approach should include transparency, the establishment of authority to supervise the implementation of filtering obligations, and a hybrid model of filtering technology including human moderators. Otherwise, the rationale for the Internet as a space of free speech and exchange of ideas and information set forth by the inventor of the World Wide Web, Sir Tim Berners Lee (2008), will belong to the past.

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Kirsten Thorpe and Lauren Booker

18 Navigating Respectful Practice to Support Indigenous Cultural and Intellectual Property Rights in Australian Libraries

Abstract: Concerns for the appropriate protection and management of Indigenous people's heritage materials held in Australian cultural institutions is increasing. Across the galleries, libraries, archives and museums (GLAM) sector, many institutions are beginning to examine ways to redress and reconcile tensions that have resulted from the long histories of imperial and colonial expansion across the world. Libraries are reflecting on their roles in the dislocation and dispersal of cultural heritage materials from Indigenous peoples and communities. Indigenous peoples worldwide face an inability to control their cultural heritage materials held in collecting institutions, and the existing legal frameworks do not support Indigenous people's aspirations and self-determination. The inadequacy of existing legal frameworks relates to ownership, moral rights and copyright. This chapter discusses the protection of Indigenous Cultural and Intellectual Property (ICIP) rights in relation to libraries, focusing on Australia's current approaches to ICIP in the library sector. It outlines key literature concerning the protection of Indigenous people's rights to culture and heritage and provides a broad context to the challenges of working with cultural heritage materials and past collecting practices which lacked an ethical basis and informed consent. The gaps concerning the application of ICIP in the library sector are identified along with the need for further research. The chapter presents examples of good practice in building support for the use of appropriate ICIP rights in Australia and provides instances of how information professionals have navigated the protection of ICIP rights across the wide range of collecting institutions in Australia, including public, academic and special libraries, and galleries, archives and museums. Principles for navigating respectful practice in ICIP rights in Australian libraries are provided for use by information professionals. Four case studies on projects in the galleries, libraries, archives and museums sector are provided to demonstrate what can be achieved.

Keywords: Indigenous peoples – Material culture; Cultural property – Protection – Law and legislation; Aboriginal Australians – Material culture; Torres Strait Islanders – Material culture; Cultural appropriation – Indigenous Australians; Indigenous Archives

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Introduction

Ongoing misappropriation of Aboriginal and Torres Strait Islander people's culture in Australia has significant and wide-reaching impacts on Aboriginal and Torres Strait Islander peoples. In a library context, concerns relate to the appropriation of Indigenous knowledges, languages, arts and cultural expressions without informed consent. In the landmark report *Our Culture, Our Future*, leading international authority on Indigenous Cultural and Intellectual Property (ICIP) Dr Terri Janke, a Wuthathi/Meriam woman, investigated the gaps in the protection of Indigenous knowledges and cultural heritage materials held in collecting institutions including galleries, libraries, archives and museums (Janke 1998). She notes, "Since impact with Europeans, Indigenous Australian cultural heritage material was seen as free for all, as part of the deserving bounty of the colonisers" (Janke 1998, 1). Significant documentary materials held in collecting institutions, both published and unpublished, hold important ICIP that may or may not have been documented and preserved with free, prior and informed consent. Janke's early research on ICIP highlighted Indigenous peoples' concerns that the use of materials was occurring without the permission of Indigenous communities and that in some cases, the use was not only inappropriate but also culturally offensive and derogatory because of knowledge being used out of context (Janke 1998, 19).

Twenty years later, in a report for IP Australia, Janke argued that the appropriation of Indigenous arts and knowledge continued to lack protection through Australian intellectual property laws and suggested that the recognition of ICIP rights might assist Indigenous people in achieving greater control over knowledges (Janke and Santini 2018). Janke's work has continued to draw attention to the numerous issues and concerns (Janke 2021). Indigenous people are pushing for changes to gain better control of their cultural heritage materials held in collecting institutions. Any change comes while recognising that the existing legal frameworks are inadequate in supporting Indigenous people's aspirations and self-determination as is clearly the case regarding Indigenous people's ownership and moral rights with copyright.

The significant gap in the literature on ICIP rights and library practice is a developing area of concern. The literature examined for this chapter has ranged across published scholarly journals and articles, submissions and reports, and institutional websites. The focus in examining ICIP and Indigenous knowledges is broad and the concerns of Indigenous people in Australia concerning ICIP are identified. A broad reach of major collecting institutions is examined. ICIP in and of itself is not bound by collecting institution boundaries. Instead, ICIP exists across the management of Indigenous knowledges and cultural heritage mate-

rials in a variety of settings. Engaging with examples of ICIP rights within allied museums and archives sectors helps fill the gaps of library-specific literature and provides examples for libraries to follow.

The chapter explores how libraries as part of the galleries, libraries, archives and museums sector (GLAM) are vital agents in promoting respect for Indigenous people's rights to manage their cultural heritage according to the principles stated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) (United Nations 2008). Steps being taken by many Australian libraries and collecting institutions in attempting to redress and reconcile tensions that were brought to bear from the colonialisation of Australia are outlined. Libraries are not neutral in their role of supporting the dislocation and dispersal of cultural heritage materials that document Indigenous peoples and communities. The implications and concerns of current practice aligned to cultural heritage protection under Australian law are identified.

The focus is on Australia and four case studies are presented. Australia is the location of the authors and provides the parameters for their most relevant insights. Australia has been working for some years on improvement strategies. Much of the transformative work around ICIP happens in a place of praxis and many Indigenous library and information workers are leading the struggle. Their achievements are acknowledged, and wherever possible, highlighted and made visible. Emerging practices relating to adopting the protection of ICIP into institutional settings are described and provide some suggested pathways for future action. The chapter provides insights to practitioners on how they can navigate respectful practice to support ICIP rights in libraries and other cultural institutional settings. The past two decades have seen increased dialogue about the importance of developing institutional frameworks and methods, including articulating and implementing protocols and enabling Indigenous people's participation in decision-making processes.

Library and information workers are working in a period of considerable change, and there is a great demand for institutions to articulate policies, protocols and procedures for Indigenous engagement. Future work in libraries will need frameworks and guidance to focus on the intersecting nature of institutional policies and international mandates such as UNDRIP that support Indigenous ICIP rights. For instance, in developing dialogue around the provenance of collections to assess implementation of ICIP rights where materials have been collected without the informed consent of communities. Library and information workers will need to examine their collections with respect and understanding and be willing to challenge past collecting practices that dispossessed Indigenous peoples of agency and self-determination. ICIP rights, as outlined in the work of Terri Janke and many others, provide a framework to address Indigenous

people's rights, including "free, prior informed consent, integrity, attribution and benefit sharing" (Janke 2019, v), that address the need for more adequate and culturally relevant support for ICIP in the Australian library sector.

Introducing the Authors

Before discussing the topic of navigating respectful practice to support Indigenous ICIP rights in Australian libraries, it is important to introduce the authors: first, to situate them by engaging with Indigenous women's standpoint theory (Moreton-Robinson 2013) to ensure that readers understand the standpoint and perspective; and second, to situate the research undertaken in the context of ICIP rights in Australian libraries.

The authors are both academic researchers within the Jumbunna Institute for Indigenous Education and Research at the University of Technology Sydney (UTS) and work with a small team within the Indigenous Archives and Data Stewardship Hub to advocate for Indigenous rights in archives and data more broadly. The Hub develops research and engagement concerning refiguring libraries and archives to support the culturally appropriate ownership, management and ongoing preservation of Indigenous knowledges. The interests and focus broadly relate to Indigenous people's self-determination related to the management of Indigenous cultural heritage materials held across libraries, archives and museums. Much of the content appearing in this chapter applies across the whole cultural heritage domain. The authors both come from Indigenous families in New South Wales and have worked with libraries and archives institutions on the development of protocols, policies and services for Aboriginal and Torres Strait Islander people and with communities seeking access to their cultural heritage and on related research projects.

What Is Indigenous Cultural Intellectual Property (ICIP)?

ICIP is a term that encompasses a wide range of Indigenous cultural and intellectual property, including both tangible and intangible Indigenous cultural heritage. The Terri Janke Company website defines ICIP as including:

- Artistic, literary and performance works (copyright)
- Indigenous Languages

- Different types of knowledge (e.g., plant and spiritual knowledge)
- Tangible and intangible cultural property
- Indigenous ancestral remains and genetic materials
- Cultural and environmental resources
- Sites of Indigenous significance, and
- Documentation of Indigenous heritage and histories.

The discussion paper *Indigenous Knowledge: Issues for Protection and Management* (Janke and Sentina 2018) explains that "the scope of ICIP is constantly evolving", suggesting that it is a term widely used in Australia to include "intangible and tangible aspects of cultural heritage from cultural property, cultural sites to languages, human remains and documentation of Indigenous peoples" (Janke and Sentina 2018, 13). The World Intellectual Property Organization (WIPO) acknowledges the ever-changing and complex nature of Indigenous knowledges and the terminology used in the description. WIPO states: "No single definition would do justice fully to the diverse forms of knowledge and expressions that are held and created by Indigenous peoples and local communities throughout the world. Their living nature also means that they are not easy to define" (WIPO 2020).

WIPO notes that as there is no formal consensus across terminology used to describe "diverse forms of knowledge and expressions", and uses working descriptions of multiple terms for ICIP, including "Indigenous Knowledges", "Traditional Knowledge" and "Traditional Cultural Expression" (WIPO 2020). Another definition of Indigenous knowledge is provided by UNESCO as part of its Local and Indigenous Knowledge Systems (LINKS) programme:

> Local and indigenous knowledge refers to the understandings, skills and philosophies developed by societies with long histories of interaction with their natural surroundings. For rural and Indigenous peoples, local knowledge informs decision-making about fundamental aspects of day-to-day life. This knowledge is integral to a cultural complex that also encompasses language, systems of classification, resource use practices, social interactions, ritual and spirituality (UNESCO n.d.).

The UN provides further understanding of the diversity and significance of Indigenous knowledges in UNDRIP. Specifically, in Articles 11 and 31, UNDRIP mandates for Indigenous people's self-determination over the maintenance, control, protection and development of their cultural and intellectual property, described in text as "cultural heritage, traditional knowledge and traditional cultural expressions". The mandate includes ICIP collected previously and taken without free, prior and informed consent. Article 11 states:

1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 31 states:

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Indigenous Cultural and Intellectual Property (ICIP) Rights

> Ownership of information is one of the issues [...] It's a general thought out in the community now about different value systems and where people do own, or have responsibilities for their Ancestors and also protecting the knowledge of their language group or ... it's a difficult space that we reside in at this time and we're fighting all the time to maintain our cultural identity and cultural values. Maxine Briggs, State Library of Victoria (De Souza et al 2016, 19).

Broadly, ICIP rights enable self-determination for Indigenous peoples over culture, heritage and knowledge. Recognition and implementation of Indigenous people's self-determination is the key to the United Nations Declaration on the Rights of Indigenous People (UNDRIP). Attention has already been drawn to Articles 11 and 31. Article 3 states:

> Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In Australia, legislated conceptualisations of intellectual property and the corresponding protection, which do not recognise Indigenous ways of knowing, being and doing can do irreversible damage to both the intergenerational knowledge transfer of Aboriginal and Torres Strait Islander ICIP and damage the cultural flows of information within Indigenous community contexts. Jane Anderson argues that on the most basic level, Indigenous people have no legal rights over their cultural heritage materials which means that "they must constantly negotiate with the copyright owner for future use, reproduction, and in some extreme instances, access" (Anderson 2005b, 348). In addition, there is a lack of timely responsiveness to the complexities involved in cross-cultural legal discourse, when Indigenous peoples point out issues, but minimal is done to appropriately and actively address gaps identified.

In recognition of unresolved gaps in legislation, Terri Janke formulated True Tracks protocols to assist Aboriginal and Torres Strait Islander peoples in protecting and sustaining their cultural heritage and knowledge. The work of Janke has been highly significant in the Australian GLAM sector, and resources and training continue to be developed to support change and the recognition of ICIP in institutional contexts and can be found on the website: https://www.terrijanke.com.au/. The ten True Tracks principles for protection of ICIP and for when working with Indigenous peoples were identified in Janke's doctoral thesis (2019):

1. Respect
2. Self-Determination
3. Consent and Consultation
4. Interpretation
5. Cultural Integrity
6. Secrecy and Privacy
7. Attribution
8. Benefit Sharing
9. Maintaining Indigenous Culture
10. Recognition and Protection (Janke 2019, 330).

The principles provide a roadmap for guidance around respectful engagement with Indigenous cultural heritage and knowledges. At a various level, they stop the erasure of Indigenous people's voices, allow people to be involved in deci-

sion-making about their materials, and offer pathways for people to provide advice and consent. The Australian arts sector has responded to calls for action by developing approaches to ensure that artists and creative practitioners build respect and recognition for ICIP rights. The Australia Council for Arts publication *Protocols for using First Nations Cultural and Intellectual Property in the Arts*, for example, provide guidelines and discussion on the importance of art practices maintaining "cultural integrity and authenticity" through ICIP protection, including obtaining resources and historical materials held in libraries and archives to support living cultural representations (Australia Council for the Arts 2019, 134).

It is unclear the extent to which Indigenous cultural knowledge has been, and continues to be, extracted from libraries and collecting institutions without appropriate Indigenous consultation and protection. The recognition of ICIP rights provides opportunities for implementing approaches that support the culturally appropriate management of Indigenous tangible and intangible knowledges, resources and materials that may be held within libraries and collecting institutions. Currently, approaches in Australian libraries to protect ICIP rights are ad hoc, and they are primarily dependent on the current strategic agendas of the government or library leadership. There exist, however, significant imperatives for libraries to modify practices to support ICIP rights. As Janke asserts,

> The challenge is that Indigenous arts, songs, designs, stories and knowledge have been and continue to be exploited outside Indigenous peoples' communities by people not entitled to do so. Such exploitation occurs without recognition of any Indigenous control or consultation and without benefits accruing back to Indigenous people. Even more critical, this important collective heritage is displaced, distorted and debased (Janke 2019, 1–2).

Notwithstanding the ad hoc approaches to recognising ICIP rights, the case studies provided in this chapter demonstrate that there has been movement in the Australian libraries and collecting institutions sector to recognise the importance of collections and to develop approaches which respect and protect ICIP.

However, as previously highlighted, there exists a significant gap in the literature on this important topic. Some articles, including that of Alana Garwood-Houng, discuss how many Indigenous people in Australia are unaware of material being held in collecting institutions because of the way it was created and collected "without consent or through deception" (Garwood-Houng 2005, 127). There has been limited research on ICIP and few reflections on the impacts of modifying current practices, particularly to support Indigenous community needs for self-determination. Rare insights include Bow and Hepworth's exploration of the tensions of ICIP and copyright law in relation to managing collections of language materials in the *Living Archive of Aboriginal Languages* project in an academic library context (2019). Their research provides unique reflections into

how the project, funded through an Australian Research Council grant, enabled dialogue on tensions of ownership and recognition of Indigenous cultural heritage. Bow and Hepworth discuss an area of concern previously identified by Nakata et al (2005, 168) highlighting the need for libraries to retrospectively seek consent from communities before engaging in digitisation of materials to make content available online. Bow and Hepworth reflected on the approaches to navigating two systems, ICIP and Copyright, that were "largely incommensurable systems" (2019, 7). They argue,

> While infringement of copyright, including moral rights, poses legal risk to the project, failure to respect ICIP, although not legally enforceable, is potentially more serious, indicating a lack of trust and a breakdown in working relationships with Indigenous communities (Bow and Hepworth 2019, 10).

In response to the tensions, the Australian library and information sector utilised the ATSILIRN (Aboriginal and Torres Strait Islander Library, Information and Resource Network) Protocols (ATSILIRN 2012) as a tool for dialogue and action. According to Garwood-Houng and Blackburn the ATSILIRN Protocols "enable library staff to manage appropriately any issues regarding, for example, secret sacred or sensitive materials and intellectual property, separately from Western issues of copyright and reproduction permissions" (Garwood-Houng and Blackburn 2014, 8). The ATSILIRN Protocols were published at a time when Indigenous concerns about access to information were being discussed by Indigenous people, the government and the information professions. Protocol 3, Intellectual Property, states: "The interests of the authors and publishers of records, books and other documentary material are protected by copyright law but the interests of those whose culture is described are not. The primary rights of the owners of a culture must be recognised" (ATSILIRN 2012). Despite their promise, the ATSILIRN Protocols require the support of appropriate institutional policies, a congruous organisational culture and cultural competencies to make them effective (Thorpe 2019a).

The digitisation of collections offers libraries and cultural institutions opportunities to enter into discussions with Aboriginal and Torres Strait Islander peoples about ICIP rights in the management and use of their cultural heritage collections. Unfortunately, because of the lack of protection of ICIP in Australian law, many institutions use copyright as the guideline for opening up and curating collections online. This approach has the potential risk that libraries and collecting institutions continue to operate on colonial paradigms that cause harm to Indigenous people and further dislocate communities from their cultural stories and resources. Library and information systems fail to meet Indigenous

peoples' communities' requirements in managing ICIP concerns at a granular level. The *Mukurtu Content Management System* described in the Case Studies shows that purpose-built systems offer potential tools to transform and dismantle past failures (Shepard 2014). Resourcing is a significant issue for cultural institutions and communities during the conduct of negotiations of ICIP concerns when building new collections and addressing past practices that lacked the informed consent of communities.

The Protection of Indigenous Cultural Heritage in Australia

UNDRIP makes clear the importance of ownership and self-determination for Indigenous peoples over ICIP and the protection of cultural heritage, both tangible and intangible. However, as Wiradjuri woman, Robynne Quiggin has argued:

> The current legislative and policy matrix is generally disjointed and uncoordinated and provides minimal protection for the places of significance and cultural material, including objects, ancestral remains and knowledge that has belonged to this country and its people for thousands of years (Quiggin 2019, 184) .

Quiggin asserts that there is an urgent need for innovation, legislation and policy to protect Indigenous cultural heritage, including materials in libraries and archives, as "Years of inaction and tinkering around the edges of cultural heritage laws has allowed much Aboriginal and Torres Strait Islander cultural heritage to be harmed and destroyed" (Quiggin 2019, 211). As it currently stands, UNDRIP is a not legally mandated in Australia. Australia was one of four settler colonial countries to vote against UNDRIP in 2007 and did not formally endorse it until 2009.

Ongoing inaction and lack of support in praxis for UNDRIP has broad impacts on Indigenous people and how communities can be involved in decision-making and priority setting to support the preservation and maintenance of cultural heritage. The importance of Australia ratifying UNDRIP in domestic law remains a priority for its Indigenous peoples. For example, in early 2021, media company IndigenousX began a campaign calling for the ratification of UNDRIP into Australian law. The campaign implored the Australian Government to discuss, reset and promote the 46 articles of UNDRIP and to move beyond good faith so that UNDRIP would be ratified and set into Australian law with full effect (IndigenousX 2021).

It is vital to understand the Australian landscape and context both in terms of library obligations in Australian law and international mandates such as UNDRIP. The support for UNDRIP and the associated protection of ICIP rest on the goodwill of decision makers in cultural institutions, including libraries, which are in themselves government bodies. The sector operates in the paradigm of good faith rather than within appropriate Australian legislative and policy frameworks. Without proper foundations in place and the visible "sustained will of legislators", Quiggin points out that "Indigenous scholars, practitioners and bureaucrats have designed legal and non-legal mechanisms to address the inadequacies of the current system" (Quiggin 2019, 184).

Developing Approaches for Ethical Practice to Support Indigenous Cultural and Intellectual Property (ICIP) in Australian Libraries

In the absence of commitment to a broad framework, institutions in the GLAM sector in Australia have developed specific policy and protocol documents to directly address how they should engage with Aboriginal and Torres Strait Islander communities, collections and ICIP. Despite the lack of protection for Indigenous cultural heritage and ICIP in Australian law, libraries have responded to the leadership of Indigenous scholars, practitioners and government workers to build more appropriate and respectful engagement with their collections. Key documents include the previously mentioned ATSILIRN Protocols which were first published in 1995 by the Australian Library and Information Association (ALIA) and endorsed by the Aboriginal and Torres Strait Islander Library, Information and Resource Network (ATSILIRN), with the latest version available in 2012. Garwood-Young has written an overview of the development of the protocols (2014).

The peak body for state and national libraries in Australia and New Zealand, the National and State Libraries of Australasia (NSLA) provides various statements and policy documents and refers to international agreements, including UNDRIP, with a *Position Statement: Aboriginal and Torres Strait Islander Library Services and Collections* (NSLA 2014 revised 2021)) and a *Position Statement: Indigenous Cultural and Intellectual Property (ICIP)* (NSLA 2021). Also relevant is the ten-year roadmap for Australian Museums and Galleries Association Incorporated (AMaGA). *First Peoples: A Roadmap for Enhancing Indigenous Engagement*

in Museums and Galleries (Janke 2018) which includes a significant focus on the recognition and protection of ICIP.

Libraries and collecting institutions engage in research with communities and collections. Consequently, the research protocols and guidelines developed by the National Health and Medical Research Council (NHMRC) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) are critical documents for engagement. The NHMRC and AIATSIS documents directly refer to UNDRIP as the baseline from which the principles and guidelines are written and therefore implement UNDRIP at a sector level. The NHMRC publication *Ethical conduct in research with Aboriginal and Torres Strait Islander Peoples and communities: Guidelines for researchers and stakeholders* (2018a) outlines ethical research conduct by aligning with six core values: spirit and integrity, cultural continuity, equity, reciprocity, respect, and responsibility (NHMRC 2018a, 3). The NHMRC Guidelines align with UNDRIP by affirming the Declaration as the "minimum standards for the survival, dignity, security and wellbeing of Indigenous people world-wide" (NHMRC 2018a, 15). A companion volume provides further details (NHMRC 2018b).

In 2020, AIATSIS published its *Code of Ethics for Aboriginal and Torres Strait Islander Research* (AIATSIS 2020a) along with a guide to its application (AIATSIS 2020b) to supersede the previously published *Guidelines for Ethical Research in Australian Indigenous Studies* (GERAIS). AIATSIS states that the Code is to be read in conjunction with UNDRIP as the Code's principles "are informed by the recognition of and respect for the rights of Indigenous peoples as articulated in the United Nations Declaration on the Rights of Indigenous Peoples" (AIATSIS 2020a, 3). Significantly, all three documents, UNDRIP, NHMRC and AIATSIS, refer directly to ICIP rights, identifying the space in which ICIP rights relate to the care, protection and maintenance of Indigenous cultural heritage.

In summary, there are problems with the lack of recognition of ICIP by Australian Law although there are some guidelines and statements developed at a national and international level to promote ethical practice in supporting the protection of Indigenous cultural heritage. Key library, museum and research guidelines mandate the protection of ICIP but there is a clear need for further work to be carried out in the library sector to support ICIP concerns. The next section of the chapter explores the question of the protection of ICIP against the backdrop of colonialism, briefly discussing the role of public libraries during the colonial period of Indigenous dispossession.

Colonialism and Libraries in Australia

The role of public archives and libraries in establishing and supporting the damaging effects of colonisation on Aboriginal and Torres Strait Islander peoples is often overlooked or underestimated. As institutions with an identity predicated on notions of public education, libraries are seen as neutral and generally as benign places and services (Anderson 2005b, 87). The sentimentality and wonder these institutions inspire have long overshadowed the historical complicity of the library sector in settler-colonial regimes dispossessing Indigenous peoples of their cultural materials and knowledge. Colonial collecting institutions were tasked with amassing collections representative of the nation state, and as such, they supported government operations, building national identity and civic education. The collecting approaches privileged certain groups of people over others and excluded many. Australia's colonial public libraries:

> became richly symbolic of various types of proto-national cultural self-assertion, as well as providing an institutional framework for a range of intersecting ideological disputes, from debates about self-governance and citizenship, to racial hierarchies and the acculturation of Indigenous peoples, to questions of taste and cultural capital (Atkin et al 2019, 1–2).

In Australia, state public libraries are repositories of colonial and assimilation period records and ephemera from each state and territory. Manuscripts were created by colonisers, missionaries, travellers, and other government officials involved in documenting Indigenous people's lives and cultures (Thorpe and Galassi 2018, 182). In the continuing service of collecting, preserving and sharing national, state and local narratives, state public libraries can make critical decisions around ICIP and, in some collections, representations of Indigenous people's cultural and personal information. Due to the oppressive histories of Australia's colonisation, many library collections of ICIP and representations of Indigenous peoples are without clear attribution or rights attached, and much of the material has been appropriated and used without consent or knowledge. "Despite their advocacy of free universal access, the cultural and social politics of colonial public libraries therefore contributed to, and even consolidated, the structures of colonial racism…" (Atkin et al 2019, 67).

ICIP rights are increasingly becoming an area of concern for libraries, archives and museums to address as they grapple with past institutional roles played in the damaging period of colonialism. Many Australian public collecting institutions are built upon the collection and appropriation of Indigenous cultural knowledges now held in their collections. The increasing recognition of the inadequate support and protection provided by Australian intellectual property legis-

lation and conceptualisation, such as the individualistic nature of creation and ownership, presents the imperative for action needed to support ICIP protection, both with collections created today and with access to and use of historical collections (Janke 2019). To progress work with ICIP rights, the history of colonialism and its ongoing impacts must first be acknowledged. As Nakata and others have argued, positioning libraries as neutral or resorting to "the oftused argument that equality in services means the same services for all" denies recognition of libraries as capable of agenda and bias, as well as the impact of colonisation on the lives of Indigenous peoples in Australia. They note:

> Despite the goodwill in the Australian LIS sector and the professions' desire to do the right thing with respect to Indigenous knowledge and peoples, there is still in some places a perceptible undercurrent of apprehension that Indigenous concepts of knowledge management and intellectual property protection are restrictive in a way that is sometimes contradictory to or incompatible with liberal and democratic notions of free and universal access to information and knowledge (Nakata et al 2005, 19).

A major question is how the guidelines for ethical practice such as UNDRIP, the NHMRC and AIATSIS can be aligned to support ICIP rights against the backdrop of colonialism. A first step is for libraries to challenge the assumptions of library neutrality and seek to redress relationships with Indigenous peoples in Australia. While some institutions recognise the importance of their collections for language and cultural revitalisation (Thorpe and Galassi 2014; Nicholls et al 2016) there is still limited research and dialogue relating to truth-telling and the need for libraries to recognise their roles in supporting colonialism. In the case study section of the paper, examples of work undertaken in Australian libraries to support the incorporation of Indigenous languages and worldviews are provided. The examples highlight how libraries are beginning to modify practice to support reclassification processes that acknowledge ICIP rights.

Despite the progress, it is argued that there is a lack of explicit recognition from libraries and collecting institutions about their role in colonisation. Consequently, library systems and processes continue to perpetuate colonial collecting paradigms that position Indigenous peoples and cultures as the other. There are evident tensions apparent in libraries and collecting institutions in progressing support for ICIP without acknowledging historical institutional complicity in denying Indigenous people their sovereignty with ICIP. It is asserted that the recovery of Indigenous knowledges from major collecting institutions across libraries, archives and museums is part of a process of decolonisation and healing for Indigenous peoples with the engagement offering institutions with opportunities to reflect on present day relevance, values and ethics.

Case Studies – Indigenous Cultural and Intellectual Property (ICIP) In Action

Four case studies provide examples of projects that have addressed the proactive support of ICIP rights broadly across libraries and collecting institutions. The data from the case studies are drawn from publicly accessible websites and provide examples of where a library, archive or museum has a fully articulated ICIP protocol or principles in place, as well as examples where the practice itself demonstrates respect for ICIP rights.

Case Study 1. NSW Australian Mukurtu Hub

In late 2019, the Jumbunna Institute for Indigenous Education and Research at the University of Technology Sydney led the development of the NSW Australian Mukurtu Hub (The Hub) as a place of support for Aboriginal peoples and communities to manage, preserve and share their cultural heritage and knowledge (Thorpe 2019b). The Hub collaborates with the Center for Digital Scholarship and Curation, Washington State University, the State Library of NSW and the University of Technology Sydney (UTS). The NSW Australian Mukurtu Hub has connected through a digital network and content management system to develop dialogue and a community of practice to support work related to the digital return, repatriation and circulation of cultural heritage materials (Christen, Merrill, and Wynne 2017).

ICIP considerations are embedded in the design of the Mukurtu Content Management System (CMS). Mukurtu (MOOK-oo-too), is a free, mobile, open-source platform built with Indigenous communities worldwide to manage and share digital cultural heritage. The open-source software's grassroots development included community requirements such as "customizable templates, adaptable user-access levels, and clear intellectual property management tools to make informed decisions about the circulation of their own materials" (Christen, Merrill, and Wynne 2017).

The Hub, along with that of the wider Mukurtu project, aims to support the disruption of colonial collecting paradigms where collections were extracted and separated from Aboriginal and Torres Strait Islander communities, and contribute to the further development and care of living archives (McKemmish, Chandler and Faulkhead 2019). In support of living archives, the Hub seeks to facilitate both the return of data from libraries and collecting institutions and assist communities with proactive collecting and documentation locally. In this way,

the Mukurtu approach to archiving is based on relationship building and active participation from all parties involved. The Mukurtu CMS and the relationships in the Hubs and Spokes model around which Mukurtu is built focusses on developing proactive collecting that is responsive and relevant to local community information and recordkeeping needs.

Specifically, the NSW Australian Mukurtu Hub was established to build partnerships with NSW Aboriginal communities to support digital curation and archiving training, while establishing community informed guidelines for returning and maintaining Indigenous collections locally and within collecting institutions. Key to this work is respect for ICIP rights in the care and management of digital cultural heritage materials. The Hub is working with a number of community Spokes to work through the development of protocols and principles for local archiving activity. In 2020, the Hub worked with Tranby Aboriginal College, the Wonnarua Nation Aboriginal Corporation and the Brewarrina Aboriginal Cultural Museum, to develop uses of the Mukurtu CMS to support local digital curation and collecting. The development is guided by Christen and Anderson's (2019) concept of slow archives where "Slowing down creates a necessary space for emphasizing how knowledge is produced, circulated, contextualized, and exchanged through a series of relationships. Slowing down is about focusing differently, listening carefully, and acting ethically" (Christen and Anderson 2019, 87).

For the NSW Australian Mukurtu Hub, ICIP rights are foundational in forming the relationships between Hub and Spokes to ensure information and cultural heritage materials are documented and managed through appropriate attribution and acknowledgment and informed consent. A related component of the Mukurtu CMS are the Traditional Knowledge Labels and Licences (TK Labels) developed by the project Local Contexts. The TK Labels provide a space for negotiating rights, including tensions around Indigenous knowledges held in copyright and public domain materials, and to respect Indigenous ways of knowing, being and doing. Importantly, however:

> These TK Licenses and Labels offer a set of new options for addressing issues of ownership, access, and control of traditional cultural expressions documented and recorded by non-Indigenous peoples and researchers that now reside in numerous cultural institutions worldwide. This is a key point: the Licenses and Labels are only designed for knowledge that has either already been made into a tangible form through recording and documenting, or that will be recorded and documented in the future. This initiative does not intend to create a legal framework for knowledges that are unrecorded or not ever to be documented (Anderson and Christen 2013, 112).

In 2019, the Mukurtu project in the US worked with the Passamaquoddy community to update metadata and contextual information from wax recordings held at

the Library of Congress which were transcribed. In a significant shift in practice, the TK Labels now attribute the Native American knowledge holders and the community for the recordings. In doing so, the library rightfully returned the ownership, authority and intellectual property to the community rather than it belonging to and remaining with the individual who created the recording (Kim 2019).

Case Study 2. National Film and Sound Archive of Australia (NFSA)

> ICIP, or Indigenous Cultural Intellectual Property protocols .... is the ownership over our song, our dance, our language. But it goes beyond that. Working in cultural institutions, collecting institutions, the way ICIP is managed is something that I feel still needs a lot of development. It's about connecting the rightful cultural knowledge holders with ... Indigenous collections in the archives, in the libraries, in the museums and galleries to ... have the appropriate cultural management of this material. Because, for Aboriginal and Torres Islander people, the collection items aren't just tapes and video, these are the keepsakes and the extensions of our ancestors, of our song and our dance and our culture and our language.

These are the words of Tasha James, Manager Indigenous Connections, National Film and Sound Archive of Australia (NFSA), a Wiradjuri woman, as spoken in an Australian Society of Archivists, Indigenous Recordkeeping and Archiving Module in 2020 (Australian Society of Archivists 2020). The National Film and Sound Archive of Australia (NFSA) has the responsibility for collecting, preserving and making available the nation's film, television, sound and audiovisual heritage. It addresses ICIP concerns across several areas, including explicit statements regarding ICIP protection, collection ownership, copyright, the return of Indigenous cultural materials to communities, and conditions of use. Actions taken are guided by the NFSA's *Indigenous Cultural and Intellectual Property Guidelines* (NFSA n.d.), which relate to the use of Aboriginal and Torres Strait Islander Material from the NFSA collection, including the Film Australia Collection.

The Guidelines require that relevant Indigenous cultural authorities support use of the archive through a process of researchers gaining permissions for access and use. They also require that the user ensure that any footage used is not inadvertently and inaccurately associated with another Indigenous community in its reuse. A cultural warning and label must also be used to advise people of the existence of culturally sensitive materials, including the use of deceased people's images and voices, in any broadcasted or exhibited reproduction of materials.

A review of the NFSA website highlights ways in which the implementation of the ICIP policy is being incorporated into the collecting institution's policies and strategies to ensure, for example, that staff awareness is raised and competency built around engaging in dialogue on ICIP rights. The Strategic Vision, Mission and Priorities provide a high-level framework for the NFSA's activities. They are informed by a number of planning and policy documents, including the Corporate Plan (2021–22) and Indigenous Strategy (2020–2023).

The NFSA's Indigenous Strategy, *Keeping the Pathways to Ancestors Alive,* uses *The First Peoples: A Roadmap for Enhancing Indigenous Engagement in Museums and Galleries (the Indigenous Roadmap)* as a tool to structure key strategic priorities. Areas of focus include: Embedding Indigenous Values, Knowledges and Perspectives through a programme to embed ICIP protocols. Key outcomes are:

- ICIP Working Group established
- ICIP resources developed and training delivered for NFSA staff to apply ICIP
- NFSA Guidelines implemented, and
- NFSA Culturally Restricted Material Management Strategy implemented.

The NFSA approach emphasises the importance of ICIP, and the need for attention to policy development, organisational change and awareness building. It may appear straightforward to suggest that ICIP protocols be followed. However, there is a requirement that staff also build skills around negotiation, cross-cultural communication, and cultural competence to be effective in this space. The NFSA's current Corporate Plan, includes in its NFSA Strategic Risk Profile 2021–22 to 2024–25 a list of strategic priorities, identified risks, and key mitigation strategies. Through the theme *Engage and Celebrate*, the NFSA has identified a risk of Inadvertent or inappropriate sharing of collection material. The key strategy to mitigate this risk is to implement Indigenous Cultural and Intellectual Property Protocols.

The NFSA example of implementing ICIP protocols demonstrates the need for a holistic view around ICIP approaches. Similar approaches could be taken in library settings to promote a culture of respect for historical collections that document Indigenous peoples beyond merely looking at copyright considerations. The guidelines require that any people who may wish to access and use historical collections take responsibility for using materials ethically. This means that Indigenous people are actively involved in decisions about information and collections relating to their ancestors. As noted in Tasha James' comments, the materials are not considered mere "tapes and videos"; they represent "the extensions of our ancestors". The ICIP guidelines open up a space for recognising people's spiritual and emotional connections to collections. The awareness raising around

ICIP protocols at the NFSA has seen greater recognition of Indigenous people as the creators of materials.

As was the case with the Passamaquoddy wax cylinder recordings held at the Library of Congress in the United States (Kim 2019), the NFSA in 2017 ensured that the recordings of Fanny Cochrane Smith were inscribed into the UNESCO Australian Memory of the World Register. The inscription recognised the vital role played by the recordings that "contain the only spoken records of any one of the original Tasmanian Aboriginal languages…" and "…are songs of survival and represent their ongoing struggle for rights and recognition" (UNESCO. National Committee of Australia 2020). This work highlighted the importance of the NFSA connecting with descendants of Fanny Cochrane Smith and acknowledged Indigenous culture as a living, dynamic culture, not merely one represented by the past.

Case Study 3. Galiwin'ku Community Library Classification System

The Galiwin'ku Community Library serves the Galiwin'ku community on Elcho Island, which is off the coast of East Arnhem Land in Northern Australia. In 2017, the Northern Territory Library partnered with the East Arnhem Regional Council to run a collaborative pilot project with Galiwin'ku Aboriginal Library Officers, local elders and community members to replace the Dewey Decimal Classification (Dewey) in the Galiwin'ku library with a Galiwin'ku classification system (NSLA n.d.). The Galiwin'ku specific classification system put in place uses the relevant community language Yolŋu Matha and is categorised using six Yolŋu cultural concepts (Masterson 2019).

The new programme is believed to be the first of its kind in Australia. The books have been organised according to key cultural aspects of Yolngu life and are categorised in language. Loosely translated, one category encompasses art, language, culture and customs. Another covers the natural environment. One is for true stories, and a final category gives a home to everything else. Sections for youth and adult fiction have also been given new titles in Yolngu language (Thompson and Trevaskis 2018).

NSLA includes the Galiwin'ku Community Library classification system as a case study in their online resources. In the NSLA case study, the Galiwin'ku classification system is connected to the ATSILIRN Protocols 2. Content and perspectives, 4. Accessibility and use and 5. Description and classification. The definition of ICIP is inclusive of Indigenous languages and different types of knowledge and ICIP rights support the ability of Indigenous communities to self-determine,

control and benefit from ICIP. The removal of Dewey and the re-classification of Galiwin'ku Community Library not only implement the Yolŋu Matha language in library services, it is also led by the Galiwin'ku community. "Aboriginal Australians in remote Aboriginal community libraries should not be required to jump over the hurdle of navigating a Western, linear, hierarchical, compartmentalised classification system in order to access a library item" (Masterson et al 2019, 285).

Dominant library classification systems, like Dewey, have been criticised as inappropriate, misrepresentative and harmful for Indigenous knowledges by many communities, scholars and library professionals internationally (Duarte and Belarde-Lewis 2015; Masterson et al 2019; Thorpe 2019a). the Galiwin'ku Community Library recognised the inappropriateness of Dewey as a *balanda*/European system and created a culturally appropriate, relevant and empowering library space for the community of Galiwin'ku (Masterson et al 2019). As the new classification system is formulated on the basis of Yolŋu language, concepts and mathematics, the project, as already noted, addresses ATSILIRN Protocol 3: Intellectual Property. NSLA discuss Protocol 3 in a library context as the "right of Aboriginal and Torres Strait Islander peoples to determine the use and access provisions for collection materials that reflect their own history, culture, language and traditions". The project involving the Galiwin'ku Community Library is a strong example of supporting ICIP, self-determination and listening to the specific needs of community library stakeholders. Indigenous ways of knowing, being, and doing concern not only the collections, but are embedded in library services and systems. As Galiwin'ku Community Library Officer Amanda Gumbala says: "There is always a balanda way to do things, but this is our way" (NSLA n.d.).

Case Study 4. Museum of Applied Arts and Sciences

The Museum of Applied Arts and Sciences (MAAS), also known as the Powerhouse, is a major collecting institution in New South Wales for documenting national, state and local material arts and science heritage. The major museum branch of MAAS, also known as the Powerhouse Museum, focuses on material arts, science and technology exhibits, often aimed at school-aged children. MAAS has over 500,000 collection items, whose acquisitions span multiple institutional name changes since the Museum was established in 1879.

MAAS holds a substantial and growing collection of Aboriginal and Torres Strait Islander cultural material. In 2016, MAAS engaged Terri Janke and Company to establish the MAAS ICIP Protocol, specifically for the Museum. The Protocol that was developed follows the ten Principles outlined in Janke's True Tracks, with each principle addressing the specificities of MAAS and its collections.

The purpose of the MAAS Australian Indigenous Cultural and Intellectual Property Protocol is to:

- Recognise and respect Indigenous peoples' rights to access, maintain, control and benefit their cultural heritage (also known as ICIP)
- Detail the principles that guide how MAAS meaningfully engages with Indigenous peoples in relation to their cultural heritage and ICIP, including through appropriate interpretation of Indigenous cultural heritage within MAAS and the Indigenous Cultural Material, and
- Publicly acknowledge MAAS support for and encourage the wider recognition of the value of ICIP and ICIP rights (MAAS 2016, 2).

Key to the MAAS ICIP protocol is its focus on self-determination and free, prior and informed consent across all elements of museum processes when engaging with Aboriginal and Torres Strait Islander cultural heritage material which is in MAAS custody and care (MAAS 2016, 5).

Significantly, the MAAS ICIP Protocol is not limited in its assertion to the protocol document only; it can be found asserted on the MAAS website in information on Rights and Permissions, which is linked within the digitised Powerhouse collection. Through this assertion, the MAAS ICIP protocol must be understood as applicable for all Aboriginal and Torres Islander cultural heritage held in the MAAS collection or at MAAS on loan. There are visible assertions of the MAAS ICIP Protocol; the Museum holds itself transparently accountable to the Protocol's purpose and function. Significantly, the Protocol is more than aspirational, and has begun to be woven into the framework of institutional processes and discussed in combination with copyright. "In guarding the integrity and authentic representation of Australia's first people, MAAS recognises its obligation to respectfully deal with Indigenous Cultural Material" (MAAS 2016, 2).

The MAAS ICIP protocol is discussed as an obligation of the Museum and is in line with Article 31 of UNDRIP. The connection elevates the MAAS ICIP Protocol to an international Indigenous rights obligation and provides an avenue for localised implementation of UNDRIP. Over time, the experience of MAAS has the capacity to provide significant insight into the practice of negotiating ICIP rights and copyright legislation and combining of ICIP rights protocols with existing institutional policies for the rest of the GLAM sector in Australia. Collaboration and transparency of processes, ensuring appropriate community privacy, would be very beneficial.

Conclusion

This chapter explored how libraries can navigate respectful practice in support of ICIP rights. It discussed the current incompatibility between western understandings of intellectual property and ownership and Indigenous ways of knowing, being and doing related to the management of cultural heritage held in libraries. Australian libraries and collecting institutions have played a role in supporting processes of colonialism that sought to dispossess Aboriginal and Torres Strait Islander people of their land and culture. The Australian library sector must recognise the role it has played and engage in dialogue to negotiate the tensions of western IP and ICIP.

The principles articulated in the statements produced through UNDRIP, the NHMRC, AIATSIS and others provide guidelines for ethical practice to support ICIP rights which can be adopted by libraries to support respectful practice. However, there is minimal scholarship regarding ICIP in the Australian libraries sector and gaps in the field. The case studies were drawn broadly from allied sectors across the GLAM sector to demonstrate the ways that institutions have taken up approaches to address the concerns of Indigenous people about access and control over their cultural heritage materials. The case studies provide a snapshot of the work being done with ICIP in Australia across libraries and collecting institutions.

There is an opportunity for the library sector, in Australia and beyond, to engage in further research and practice improvements. There is an opportunity for institutions and organisations engaging with ICIP to collaborate and share experiences to encourage further discourse and literature to communicate not only aspirations but also the experiences, problems and tensions in the process of ICIP rights implementation. Work is not as visible as it could be to inform the implementation of ICIP rights frameworks in praxis, specifically in the library and information sector. Further conversation and collaboration across the sector would provide significant insight into the practice of negotiating ICIP rights and copyright legislation and enhance the recognition of ICIP rights protocols within existing institutional policies.

Given the challenges in the sector's reliance on policies and processes which hinge on Western conceptualisations and frameworks, including ways of knowing, being and doing, and a destructive background of colonialism with its dispossession of Indigenous culture and knowledge, there is a critical need for further research and dialogue. Finally, it is asserted that the recovery of Indigenous knowledges from major collecting institutions across the GLAM sector is part of a process of recognising and implementing UNDRIP, and importantly, healing for Indigenous peoples internationally. Libraries and collecting

institutions progressing their support for ICIP rights must also acknowledge historical institutional complicity in denying Indigenous people their sovereignty regarding their cultural and intellectual property.

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Amalia Toledo and Sydney Mai-Yen Sheridan

19 User-Generated Content: Tensions Between Freedom of Expression and Copyright

Abstract: Rapid online growth of social media, wikis, blogs, and targeted websites has provided a diverse playing field for content creation. Today the means of production and distribution of information are not in the hands of a few. Anyone can create content for an array of purposes including news, entertainment, education, and research. However, content users and creators face a long-standing tension in the application of copyright laws and the exercise of free speech. This chapter explores the notion of user-generated content (UGC) to understand what it is, what its boundaries are, and how it can be classified. The chapter also explores the cultural and political relevance of user-generated content and its contribution to the development of democratic societies and examines legal concerns. Among the concerns is the constant discord between the rights to freedom of expression and copyright, and how existing legal solutions might contribute, or not, to the clash of rights. The chapter examines the role of online platforms in copyright law enforcement and the exercise of free speech. The chapter seeks to contribute to the understanding of what it means to protect the right of users and creators to free speech while at the same time protecting copyright.

Keywords: User-generated content; Freedom of expression; Copyright

Introduction

Digital technologies, especially the Internet, have had a profound impact on the ways content is created, disseminated, accessed, and consumed. Human creativity has found new spaces where it can express itself, which, in general, are within the reach of almost every person with an Internet-enabled device and connectivity. Today, the playing field has increasingly levelled. The means of production and dissemination are no longer only under the control of a few. In fact, although most of the online platforms where user-generated content (UGC) is available are privately owned, the business models in place are dependent on the creative activity of the users themselves who make their activity available to the public for consumption and sharing by other users. The Internet is a tool that has generated new and creative forms of expression from home videos showcasing the abilities

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of one's pets, to the myriad memes that flood social media and digital communications, through to an illustration that pays tribute to a beloved public figure.

The impact that digital technology has had on freedom of expression is unparalleled. User-generated content frequently involves amateurs who have become empowered through interactive media tools to change the relationship between author and audience. Some of the new creators generate unique content; others mix existing content available producing video games, fan fiction, parodies, and citizen science, uploading, tagging, commenting, and curating. Some see digital creators as the groundswell of participatory culture; others use the term prosumers to describe those who both produce and consume content; and a few have referred to the new content as "loser-generated content" (Erickson 2014, citing others).

The infinite possibilities of expressing human creativity conflict with copyright regimes that, in the interest of protecting the legitimate interest of authors, creators and rightsholders, limit freedom of expression. Although copyright imposes what might be considered a reasonable limitation to the right to freedom of expression, the recent development of copyright norms and their enforcement in the digital realm can pose excessive restrictions to free expression.

This chapter explores the continuous tension between the freedom of expression of the users who create digital content, and copyright in the face of the exploding popularity of UGC. The first part describes in detail the characteristics of UGC highlighting its salient features including creative effort, non-professional status and public availability, the intention with which a person creates UGC, and the platforms on which it is hosted. The platforms discussed are primarily YouTube, Google, Facebook, and Twitter, but it is important to acknowledge the proliferation of online platforms for content distribution, social media, virtual worlds, and wikis.

The second part of the chapter analyses the global cultural and political relevance of UGC. While UGC is examined as a tool for the diffusion of culture and participation in democratic processes, the discussion also focuses on how UGC can be used as a tool to create counterfeit, misleading, and abusive content. The next section establishes the contours of freedom of expression and copyright in the digital age and how they clash with each other, and introduces international treaties to analyse the scope of copyright practices. The fourth part of the chapter provides an analysis of the role of platforms on which UGC is mounted in the tension between freedom of expression and copyright including platform moderation and copyright enforcement mechanisms in Canada, the United States, and Europe and analyses mechanisms for libraries to manage UGC in information retrieval and discovery systems. The final section provides a synthesis of observations on the topic.

User-Generated Content in the Digital Age

Definition of User-Generated Content

The creative activity of modern human society has found an unparalleled opportunity for distribution on the Internet. Anyone with an imaginative idea and a minimum of digital technology and skill can share creations in a matter of minutes with the whole world without any intermediary other than web access and a service provider. Thanks to technological advances, creative activity today is much more active and collaborative than ever. One example is Wikipedia which invited users to share their knowledge on specific topics. Another example is the emergence of open educational resources generated within the educational community which, connected by Internet-enabled technologies, share, adapt and enhance content created by others and made available on online platforms. UNESCO's International Centre for Technical and Vocational Education lists platforms for sharing of online resources in technical and vocational education. OER platforms include Curriki, LibreText and Khan Academy listing everything from textbooks, curricula and instructional materials to learning exercises available for educational communities to mix and remix.

The manifestation of creative output on the Internet is commonly known as user-generated content (UGC), which refers to any type of content created by Internet users. The UGC discussed throughout this chapter pertains primarily to non-commercial UGC that is used for pleasure, knowledge-sharing, and cultural and political causes. There is no agreed single definition of UGC. There are many definitions representing different perspectives. One simple definition is: "User-generated content is content published on an online platform by users" (Wyrwoll 2014, 15). Wikipedia provides:

> User-generated content (UGC), alternatively known as user-created content (UCC), is any form of content, such as images, videos, text, and audio, that has been posted by users on online platforms such as social media and wikis. It is a product consumers create to disseminate information about online products or the firms that market them. User-generated content is used for a wide range of applications, including problem processing, news, entertainment, customer engagement, advertising, gossip, research and many more. It is an example of the democratization of content production and the flattening of traditional media hierarchies.

Another definition is:

> UGC refers to all publicly available media content that is produced by end-users. UGC can refer to all media technologies, from digital photos and videos to blogs, podcasts and mobile

> phone content and is published by both traditional media sources (largely broadcasters) and non-traditional media sources (such as eBay, YouTube, and Facebook) (Stribbling and Scott 2008, 6)

UGC is a powerful tool for expression made possible by the digital age. What in the past was a letter to the editor with a restricted audience has been transformed into a supposedly journalistic analysis and critical podcast available to many, for example, the *Presunto Podcast* where a group of independent communicators analyze the work of the media in Colombia. The project is an initiative that began among a group of friends interested in scrutinizing with humor how the national mass media covers the news. Today it is supported by donations, but they have taken advantage of podcast platforms including GooglePodcasts, Apple, and Soundcloud, to create and distribute the content.

Much UGC is not of professional quality and rarely perfect but makes a connection with an audience due to its spontaneity and apparent authenticity. For the creators, the process can be a rewarding experience not only for the pleasure of producing something, but also for the satisfaction of seeing the work recognized by other users, companies and even by the platforms that were used to disseminate it. For consumers, UGC serves as a means of information or entertainment. But UGC can also be created and shared for deliberately harmful, hateful, or misleading purposes. This chapter introduces some salient mechanisms for flagging, moderating, and removing abusive or illegal UGC and identifies the challenges such mechanisms pose for users' freedom of expression.

User-Generated Content: Some Salient Features

While it might be difficult to agree on a single definition of UGC, various descriptions have been presented (Krumm, Davies, and Narayanaswami 2007; Östman 2012; Ruz 2011; Wunsch-Vincent and Vickery 2007) and the following characteristics have been highlighted:

- Creative effort: content creators use their inventiveness to produce an original work or adapt an existing work to craft a new one, for example, when an amateur musician publishes a video performing an original song, or when a user transforms the interview of a politician into a video parody of the politician, for example Donald Trump interviewing himself in confusion (Brown 2020). With transformation, the creator adds a personal creative value to the work. The value might have a collaborative element as in the case of users who collaborate in the creation of entries in Wikipedia or in building another resource such as OpenStreetMap, a map of the world created by users. The

pandemic has seen a significant rise in the availability of UGC containing immensely creative and innovative content on topics related to the pandemic and/or generated as distractions from the pandemic.
- Non-professional: the creative activity of users usually occurs outside their everyday professional fields and does not represent their source of economic livelihood. Even if initially, they do not expect to receive any benefit or remuneration, it may be that the lack of intention of monetizing begins to blur. UGC placed in an initial phase of non-commercial activity on an advertising-based platform inevitably becomes monetized given the very business model of the platform itself which seeks to sell products. On the other hand, there are professionals who generate content in their free time as ordinary users. For example, a father who is a wedding photographer created a blog with photo-shopped pictures of his daughters in unusual situations as a fun way for their grandmother, diagnosed with cancer, to safely know what was going on with her granddaughters (Tom 2012). Blog postings and other UGC created by non-professionals demonstrate some of the ambiguity behind UGC. Non-professional users who are creators can generate highly sophisticated UGC, resulting in scenarios where the creators may generate profit. In many cases it is difficult to determine a person's intention, monetary or otherwise, for creating content. The line is becoming increasingly difficult to draw, but most UGC seeks to separate user-created content for leisure or non-commercial purposes, from content created by entities, professionals, or others for clearly commercial purposes.
- Publicly available**:** the work created by users is available on an online platform to be consumed or shared with any person through a public social media account or a closed group of people on a social media platform.

The features mentioned are useful for establishing the contours of user-generated content, as opposed to professionally created content, from which a certain technical quality of the product is usually expected. User-generated content has become an important marketing tool with users posting recommendations, likes and dislikes for products or services.

Typology of User-Generated Content

UGC can be classified according to the type, format or platform used for distribution (Wunsch-Vincent and Vickery 2007). UGC can take various forms including a poem or opinion piece; audio such as a remake or cover song or a podcast; graphic such as photos or illustrations; video such as a home video or a short

film; or a combination of these elements. The platforms used for UGC distribution are varied. There are:

- Blogs created by individuals, groups or associations
- Websites like Reddit, a social news aggregator, or TripAdvisor providing travel services and ratings, which contain shared user-created entries and recommendations
- Wikis or text-based platforms such as Wikipedia, a not-for-profit multilingual online encyclopedia, which are written and maintained by a community of volunteers through a model of open collaboration, using a wiki-based editing system, with an educational emphasis
- Sites that allow feedback, commentary and creative input like FanFiction, where writers and readers can share their passions, or Fictionaut where writers can share their ideas, gain recognition and connect with audiences
- Platforms for podcast distribution such as Apple Podcasts where people can voice their opinions or SoundCloud, a music sharing website which allows users to create, promote and share content, and connect with audiences
- Social media sites such as Facebook or Snapchat connecting family or friends, Instagram, a photo and video social networking service, or Pinterest, an image sharing and social media service enabling saving and discovery of information in the form of pinboards
- Image-sharing services like Flickr, home to tens of billions of photographs and two million groups, TikTok, a site for sharing videos, or YouTube, sharing video content on one of the world's most heavily used internet platforms, and
- Internet sites for the virtual world such as ActiveWorlds, providing opportunities in a three-dimensional world (Wunsch-Vincent and Vickery 2007; Wikipedia 2021).

Many of the platforms have a recommendation and rating system that leads to the extent of content consumption and to the popularity, recognition, and notoriety of the creator.

Another approach to the classification of UGC is to examine a person's motivation for content generation. Some creators contribute content as a form of self-expression. Individuals or groups document occurrences in their lives, express opinions, share analysis, comment on other content or report on situations. Some seek social and communicative interaction with like-minded people; others entertain themselves or pass the time; some wish to inform or engage in citizen journalism; others seek to persuade people to certain perspectives; some seek to advertise products or services; some creators engage in activity for the purpose of professional progress; and some seek to educate (George and Scerri 2007).

In examining UGC, original content can be generated by a user independently, for example, creating a blog to document travel. Alternatively, content might be composed in which a user integrates a piece of creative content into an existing work without transforming it, for example, including a copyrighted photo by another author into a travel blog entry. Further transformation can occur with a user changing a pre-existing work, for example, by using a frame from a movie to create a meme that is included in the blog post. UGC can have varying layers of content with different copyright issues associated with each layer (Ruz 2011; Erickson 2014) and with the platform used.

The Cultural and Political Relevance of User-Generated Content

UGC is part of a digital age, where creative activity and cultural production are no longer in the hands of a few, with prescribed methods of production and distribution. For the most part, users who are creators seek to share and not compete for the content they have generated. The experience is "based on expressiveness, performance and collaboration" (Östman 2012, 1005) and involves knowledge, activity, and behaviour with cultural and political relevance.

UGC and users who are creators disrupt traditional media and content suppliers (Senftleben 2008). Yet some of the most significant platforms used for UGC production and distribution are dominant and even monopolistic players in the content-sharing industry, a crucial component of the digital economy. The concentration of power that rests in the hands of a few platform players is a growing concern across multiple fields such as antitrust. For example, the Antitrust Division of the United States Department of Justice filed a lawsuit to prevent Google's anticompetitive and exclusionary behaviour, and to promote the innovative activities of other companies so that they could compete and thrive in the digital market (US Department of Justice 2020). The case, *United States v. Google LLC*[1] illustrates the struggle amidst the dominant players and between platforms to host UGC.

The dominance of a few platforms also presents concerns about privacy and data collection. The overwhelming dissemination of, and engagement with, UGC on large platforms facilitates these platforms' widespread collection of user data and information. Arguably most importantly, the dominance of a few key platforms such as Google, Facebook, and YouTube, and the concentrated ownership

1 United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. October 10, 2020).

of such platforms by a small number, Alphabet and Meta, pose substantial issues for the democratization of content-sharing. Significant power over hosting UGC continues to rest in the hands of a few monopoly platforms, thereby undermining the democratization of content-sharing and expansion of user autonomy that UGC so aptly advances by its nature.

Cultural Relevance

The Internet has served as a vehicle for the diffusion of culture. The ease of access to technology to produce and broadcast content has paid off in the generation of creative activity, knowledge, and information. While recognizing the large digital divide between states, societies and individuals, anyone with a smartphone can produce cultural content that reflects personal creative interests or expresses and captures community culture. For example, the science fiction short films produced by a group of eight young Nigerians, The Critics Company, with scarce resources, slow internet, continuous power cuts, everyday objects, and low and mid-range smartphones, have gone viral on social media (Africanews 2019). Without a doubt, the contents are the result of the ingenuity and determination of their producers, who took advantage of technologies and other user content, in this case, tutorials available on YouTube explaining how to produce films with special effects, to find a means of expression and tell their science fiction stories.

The young Nigerian group harnessed the power of UGC, becoming innovators and contributing to the cultural richness of their community. The work of The Critics Company is an example of how UGC is relevant in fostering creation and cultural enrichment. As a result, there is greater autonomy, participation, and diversity. "Technological change empowers individuals to 'tell their stories', to produce cultural goods such as music and to transform the information and media content environment surrounding them... Users may derive a higher value ... as the content may be more personalised... users have a greater control" (Wunsch-Vincent and Vickery 2007, 35). Users transform the information and communication ecosystem to make it more relevant to their interests and contexts. UGC is also relevant to creating a sense of identity within a group, community, or society. UGC serves as a mechanism that harnesses collective intelligence to provide information and knowledge, with the potential to improve the quality and scope of access to culture and the right to education.

Cultural relevance is made possible by the proliferation of content in different languages. Although English continues to be the most widely used language on the Internet with 2020 figures at 25.9% followed by Chinese at 19.4% (Johnson 2021), the reality is that UGC is produced in any language, which in turn

allows for the enrichment of cultural heritage and the strengthening of different languages. For example, there are many efforts by cultural entities, collectives, and individuals to make visible the Guarani language, the official language in Paraguay spoken by just under 90% of its population (Galeano Olivera 2016, 15). The promotion of UGC in Guarani has used collective collaboration to translate Wikipedia, Firefox, and Facebook, and promoted use of the language, allowing it to progress, be visible and relevant to all the people who speak it. Perhaps UGC in Guarani or any other minority language may not have the same scope as content in English but is important in proclaiming local culture and contributing to keeping languages alive.

Much UGC is derivative in whole or in part, and many creators rely on copyrighted content. The Critics Company may rely on copyright music to create the soundtrack of its film productions, ignoring or disregarding copyright restrictions. Likewise, collective efforts to translate digital content into Guarani are transformative processes that may be infringing copyright. To the extent that creators do not have the authorization of the rightsholders to use content, or are using free licensed content, they are operating under copyright restrictions that can inhibit creative production that contributes to cultural diversity. Some content creators have gone under the radar, perhaps because they do not infringe copyright or perhaps because they have had the good fortune of not running head-on into issues associated with copyright. As copyright regimes become more restrictive, the potential for UGC to promote cultural creation and diversity is at risk.

Political Relevance

UGC plays an equally critical role in democratic participation, activism, and social and political mobilization. Producing and disseminating content in minority languages is both a cultural and political act: it challenges the dominance of hegemonic knowledge production and visibility and fosters and fights to keep alive the world view connected to the society speaking the language. As Östman (2012) argues, UGC is indivisibly involved in political participation and in the acquisition of political attitudes, knowledge, and behaviour.

UGC has been used for critical, political, and social justice purposes. Perhaps the best example of the latter is the role of citizen journalism where individuals take an active role in making and disseminating news content (Bowman and Willis 2003). Citizen journalists often become the only source of information within war zones, as was the case with the war in Syria, where citizens took the risk of documenting the conflict, filling an important void in understanding what had been happening in the country since the 2011 uprising. Many of the UGC

products of citizen journalists in Syria today are stored and verified in the Syrian Archive, a digital memory project that preserves UGC and collects human rights violations, so that content can be retained for the future to support accountability and contribute to post-conflict reconstruction and stability (Syrian Archive n.d.).

One of the great appeals of UGC is its honesty, which allows for greater involvement and identification with the message of the content, hence its political relevance. The fact that a group of people can be identified or reflected in the content generated by others can give them enough confidence to express ideas and political views, leading to active civic participation (Östman 2012, 1008). For example, in 2015, the Canadian initiative Project 60 used UGC strategically to encourage First Nation youth to create and share short videos explaining the voting process. The project sought to politically engage a crucial segment of the population, while the content creators educated and empowered their youth peers about the impact and importance of elections for their community (Indigenous Social Media and User-Generated Content n.d.).

Although UGC is a crucial source of cultural and political participation that allows individuals and groups to disseminate knowledge about causes, UGC is, as noted earlier, a tool that has also been used for ill-intentioned and malicious purposes. UGC has been weaponized by people seeking to misinform or influence democratic processes through the creation and dissemination of fake news, abusive content, and deepfakes, a form of synthetic media that uses an image or video to create a fake scenario. One deepfake video created by the Flemish socialist party Vooruit in 2018 which circulated on Twitter and Facebook portrayed Donald Trump teasing and insulting Belgium for remaining in the Paris Agreement. The party's deepfake was intended to raise awareness and generate public discussion about the climate crisis and the video contained several indications that it was fake (Velicer 2021). Yet this instance demonstrates the significant role UGC can play in threatening an informed citizenry and contributing to "epistemological anarchy" (Galston 2020).

UGC, therefore, can be seen as a vehicle in the digital age for freedom of expression. However, as this chapter continues to explore, UGC not only faces issues of user and creator misuse, but also various legal and technological barriers, which are often emanating from the powerful agents of the copyright industry.

The Clash between Freedom of Expression and Copyright

Freedom of Expression

Article 1 of the Universal Declaration of Human Rights states that: "All human beings are born free and equal in dignity and rights".

> Human rights are universal and inalienable; indivisible; interdependent and interrelated. They are universal because everyone is born with and possesses the same rights, regardless of where they live, their gender or race, or their religious, cultural or ethnic background. Inalienable because people's rights can never be taken away. Indivisible and interdependent because all rights – political, civil, social, cultural and economic – are equal in importance and none can be fully enjoyed without the others. They apply to all equally, and all have the right to participate in decisions that affect their lives. They are upheld by the rule of law and strengthened through legitimate claims for duty-bearers to be accountable to international standards (UNFPA 2005).

Freedom of expression is a basic human right and constitutes the right of people to express their ideas and opinions, and to issue, access, seek and receive information of all kinds. The right of freedom of expression also protects the ability of individuals to disseminate information and ideas by any means, regardless of borders.

Freedom of expression is recognized as a cornerstone of any free, democratic, and participatory society and is fundamental to the realization of the human being. It protects the most basic of human freedoms, namely the right to think and share opinions with others. It is also fundamental to democracy and the exercise of other rights (UN. Human Rights Committee 2011). For democracy to function, the full and effective participation of citizens is essential, which occurs, in large part, through the realization of freedom of expression. In addition, it also allows for the exercise of other rights such as the right to participate in cultural life, and to enjoy the benefits of scientific progress and its applications. Institutions including libraries often safeguard the right to freedom of expression and participation in cultural and innovative life.

Although, in principle, all expressions are protected by freedom of expression, it is not an absolute right, and it can be limited. For a limitation on freedom of expression to be permissible, according to international human rights standards, the following principles must be met:

- Legality: a law formulated with sufficient precision and accessible to all persons has provided for the limitation

- Legitimacy: the limitation pursues a legitimate aim, that is, the respect for rights, for example, intellectual property, or reputation of others, or the protection of national security, public order, public health, or morals, and
- Necessity and proportionality: the limitation is necessary and proportionate; that is, the interference must adopt the least restrictive means necessary to achieve the intended aim (UN Human Rights Committee 2011).

It is worth noting that, according to international human rights standards, any measure restricting freedom of expression on the internet "must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application" (La Rue 2011, 8). However, regarding the application of copyright on platforms carrying UGC, as will be addressed later in this chapter, the implemented measures tend to use the platforms as a proxy for restricting freedom of expression, in breach of the aforementioned obligation.

The Human Rights Council has stated that human rights offline must be equally protected and guaranteed online. "Freedom of expression applies to the Internet, as it does to all means of communication" (La Rue et al. 2011). At its 20th session the Human Rights Council adopted a resolution that unanimously stated: "the same rights that people have offline must also be protected online, in particular freedom of expression" (UN Human Rights Council 2012, 2). The Internet has undoubtedly provided people with greater access to all kinds of information, but it has also given them unusual opportunities to be active subjects in the creation and dissemination of knowledge and information as seen in relation to UGC. The catalytic power that technology has given people to exercise their rights to freedom of expression has created tension between governments and the powerful, including economic agents of the copyright industry. Technologies that enhance the exercise of freedom of expression confront the legitimate interest of protecting copyright.

Copyright

Intellectual property has two traditional legal domains: copyright and industrial property, that is, patents and trademarks. Copyright deals with the rights of intellectual creators. Its object of protection covers original works in the literary, scientific, and artistic fields, whatever the mode or form of expression. Copyright grants authors the right to authorize or prohibit, for a specific limited time, particular uses of their works. In other words, limited monopolies are granted

to creators in relation to their creations. Moreover, copyright regimes protect the activity of expression rather than the ideas, concepts, processes, or procedures themselves. Therefore, copyright protections in themselves do not pose limits on the sharing of ideas. Copyright protection is justified as an important means of encouraging authors and artists to create, thus promoting, enriching, and disseminating a nation's cultural heritage, creative activity, and innovation.

Copyright protects two types of rights: moral and economic. "Economic rights allow right owners to derive financial reward from the use of their works by others. Moral rights allow authors and creators to take certain actions to preserve and protect their link with their work" (WIPO 2016, 9–10). Moral rights allow authors to preserve and protect their connections to their work. Usually, the moral right cannot be transferred to third parties. However, the application of moral rights varies under different national laws. Authors, on the other hand, can grant their economic rights to others known as rightsholders, so they can obtain monetary compensation for certain uses such as reproduction, distribution, public performance, broadcasting or communication, translation, or other adaptations.

Copyright is not an absolute right; it can be limited with the aim of protecting the public interest. Copyright regimes include a list of exceptions and limitations that, according to the Berne Convention, are understood not to conflict with the normal exploitation of the work and not to unreasonably prejudice the legitimate interest of the authors. In general, the list of exceptions and limitations ensures that copyright does not interfere with the exercise of other rights.

Existing copyright regimes can have important implications for the protection and promotion of human rights, particularly freedom of expression. As the increasingly powerful economic agents of the copyright industry are pressing to claim creative works and forms of knowledge, human rights are being infringed (Chapman 2001). Creators are progressively losing control of their works with the result that society faces increasingly insurmountable barriers to the free exchange of information.

Industrialized countries have pushed for increased global copyright protection. The World Intellectual Property Organization (WIPO) reinforces this maximalist copyright view, in which there is little room for discussion, consideration and effective protection of the public interest and human rights. Governments use copyright laws to enhance a country's competitive economic advantage. Policies developed often favour major economic interests, particularly large multinational corporations, to the detriment of protecting access and promoting development in local societies.

The conflict between copyright and human rights has attracted the attention of United Nations (UN) human rights bodies and continues to do so. In 2000, the UN Sub-Commission on the Promotion and Protection of Human Rights,

later known as the Advisory Committee of the Human Rights Council, adopted as part of its deliberations a Resolution on Intellectual Property Rights and Human Rights, affirming that the right to the protection of the moral and material interests resulting from one's scientific, literary or artistic productions is a human right, subject to limitations in the public interest with primacy over trade law. The resolution:

> Affirms that the right to protection of the moral and material interests resulting from any scientific, literary or artistic production of which one is the author is, in accordance with article 27, paragraph 2, of the Universal Declaration of Human Rights and article 15, paragraph 1 (c), of the International Covenant on Economic, Social and Cultural Rights, a human right, subject to limitations in the public interest.
> Declares, however, that since the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights…there are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other.
> Reminds all Governments of the primacy of human rights obligations over economic policies and agreements… (UN Sub-Commission on the Promotion and Protection of Human Rights 2000, 28–9).

Five years later, the UN Committee on Economic, Social and Cultural Rights, in its General Comment No. 17, distinguished between the human rights recognized in Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, and the rights recognized in the intellectual property regimes:

> Whereas the human right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions safeguards the personal link between authors and their creations and between peoples, communities, or other groups and their collective cultural heritage, as well as their basic material interests which are necessary to enable authors to enjoy an adequate standard of living, intellectual property regimes primarily protect business and corporate interests and investments.

The Committee went on to note that: "The right to benefit from the protection of the moral and material interests resulting from one's scientific, literary and artistic productions seeks to encourage the active contribution of creators to the arts and sciences and to the progress of society as a whole…[and] is intrinsically linked to the other rights recognized in article 15 of the Covenant…" (UN Committee on Economic, Social and Cultural Rights 2006, 2). The other rights, which are mutually reinforced and limitative, are: the right to take part in cultural life, the right to enjoy the benefits of scientific progress and its applications, and the freedom for scientific research and creative activity. Thus, the rights of authors and creators must facilitate, rather than limit, cultural participation and broad access to the benefits of scientific progress.

As for the rights recognized in copyright regimes, the Committee indicated that they should not be equated with human rights. "Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity" (ibid, Para. 2). Nor can the rights associated with copyright be considered human rights as they protect the commercial and business interests and investments of legal entities, whose rights are not protected at the level of human rights. Additionally, copyright, unlike human rights, "are generally of a temporary nature, and can be revoked, licensed or assigned to someone else" (ibid).

To give substance to Article 15(1)(c) of the Covenant and to distinguish its measures from copyright as understood in intellectual property regimes, the Committee outlined further details of the elements and wording contained in Article 15:

- "Authors" are recognized as "natural persons", as opposed to the recognition in copyright regimes for "legal entities"
- "Any scientific, literary or artistic production" refers to creations of the "human mind" including "'scientific productions', such as scientific publications and innovations, including knowledge, innovations and practices of indigenous and local communities, and 'literary and artistic productions', such as, inter alia, poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions"
- "Benefit of protection", does not establish modalities according to the Committee, but it should not be understood at the same level and means of copyright protection. States can establish higher protections, if they do not unreasonably limit other human rights such as freedom of expression
- "Moral interests" refer to the authors' interests in their creations and their rights to object to any distortion, modification, prejudicial action or other derogatory action and noted creations as an expression of personality. The Committee further noted that most national copyright regimes protected moral rights, and
- "Material interests" relate to property rights, the rights of workers to receive adequate remuneration and an adequate standard of living (Articles 7 and 11 of the Covenant). The Committee further stated that an adequate standard of living "can also be achieved through one-time payments or by vesting an author, for a limited period of time, with the exclusive right to exploit his [sic] scientific, literary or artistic production" (ibid, 5).

To be consistent with all the provisions of Article 15 of the International Covenant on Economic, Social and Cultural Rights, the type and level of protection

afforded under any copyright regime must facilitate and promote cultural participation and intellectual progress and do so in a manner that is broadly beneficial to members of society both individually and collectively. These considerations go far beyond the economic calculation that guides copyright. Copyright could be reformed to be more respective to human rights regimes and current tensions with the right to freedom of expression would be reduced.

Online Platforms and Copyright Management

User-generated content would not exist if there were no platforms for publication and broadcast. Types of UGC were presented earlier in the chapter and they can be distinguished by different types of platforms used. The term online platform is used variously to include search engines, social media, creative outlets, communications services, and collaborative services. Some are interactive. Platforms might be non-profit or commercial. The growth of UGC and online platforms has been stimulated by the expanding use of mobile devices along with the increasing sophistication of personal computing capacity.

"An online platform is a digital service that facilitates interactions between two or more distinct but interdependent sets of users (whether firms or individuals) who interact with the service via the internet" (OECD 2019, 20). Platforms or internet intermediaries themselves can be classified in various ways: by types of users, the kinds of data and content mounted, the actions taken in relation to data collected, or sources of revenue. (ibid). Wyrwoll described platforms on which UGC is mounted as blogs, forums, location sharing and annotation platforms, media sharing platforms, microblogs, question and answer platforms, rating and review platforms, and social networks (2014, 20). UGC includes messages, product recommendations, instructions, learning materials, news, comments, advice, articles, blogs, profiles, reviews or creative content ranging from poetry, stories, ideas, to videos posted on forums like Twitter or Reddit; social media like Facebook, TikTok or WeChat; encyclopaedias like Wikipedia; creative outlets like LiveJournal; commercial services like Amazon; shared video sites like YouTube or Vimeo; musical recording sites like Spotify or SoundCloud; and podcasts on Spotify for Podcasters.

The platforms allow people to contribute, evaluate and consume content online. The business models of many platforms are based on third party production of content; the platform providers create the systems to maintain attention and interest, the most common of which is the evaluation and feedback of users and suggestions for similar content.

Management of User-Generated Content by Digital Platforms

Each platform regulates in its terms and conditions the legal aspects related to the dissemination of content by third parties including the intellectual property rights of creators and others that might be affected, rules for behaviour, and any applicable legislation and jurisdiction. Terms and conditions vary across platforms.

The policies are adopted to give users information about the rules that operate in them, but they also translate legal obligations. One legal obligation in the US is the *Digital Millennium Copyright Act* (hereinafter the DMCA), which requires US-based platforms to takedown content that allegedly infringes copyright. The terms and conditions provide certainty and predictability about the digital behaviour that platforms expect from their users and the possible consequences. As a rule, all platforms recognize that the authorship of content remains with the person who creates it. However, for the platforms to function as they have been conceived, the terms and conditions include the transfer of rights to store, copy, share and disseminate the content produced by users. All platforms recognize the importance of copyright. The use of the platforms' services by users is subject to respect for copyright. The terms and conditions of some of the most popular platforms, particularly regarding the transfer of rights, are stated in the following.

Google

Google creates a licence for the use of UGC that is subject to intellectual property protection while the content remains on any platform owned by the company, including YouTube (Google 2020). Content created by users includes docs, sheets, and slides, blog posts uploaded through Blogger, reviews submitted through Maps, videos stored in Drive, emails sent and received through Gmail, pictures shared through Photos and travel itineraries shared with Google. The licence is global, non-exclusive, and royalty-free. In addition, it allows Google to save and allow public access to the content, as well as to transform it through changing its format or translation. The agreement includes sublicensing to other users so that they can, for example, share the content according to how their platform services work. In relation to the company's video-sharing service, YouTube, users have the option of granting permissions for use through Creative Commons licences.

Facebook

Facebook's terms and conditions include the creation of a "non-exclusive, transferable, sub-licensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content", consistent with the user's profile settings, that is, whether the profile is open or closed (Facebook 2020). The licence terminates with the removal of the content, unless third parties who keep their profiles active have shared the content (Facebook 2020).

Twitter

Terms are similar for Twitter. The company has a global, non-exclusive, royalty-free permission to use, copy, modify, publish, and distribute the content that a user shares on the social media platform. "By submitting, posting or displaying Content on or through the Services, you grant us a worldwide, non-exclusive, royalty-free license (with the right to sublicense) to use, copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods now known or later developed (for clarity, these rights include, for example, curating, transforming, and translating). (Twitter 2021).

Pinterest, TikTok and Soundcloud

Pinterest grants a licence with similar characteristics to terms and licences already outlined, stating "You grant Pinterest and our users a non-exclusive, royalty-free, transferable, sublicensable, worldwide licence to use, store, display, reproduce, save, modify, create derivative works, perform and distribute your User Content on Pinterest solely for the purposes of operating, developing, providing and using Pinterest" (Pinterest 2018). There is a separate section on Copyright. TikTok includes in its terms the same transfer of rights, but the license is considered irrevocable and perpetual (TikTok 2019). TikTok has a separate intellectual property policy.

SoundCloud's Terms of Use involve users granting the company a limited, worldwide, non-exclusive, royalty-free and fully paid licence to store, distribute and use the content uploaded to the platform (SoundCloud 2021). The transfer of rights is sub-licensable. However, the termination of the license applies only to the audio, text, and images that users have uploaded to their accounts, but not

to the comments or other contributions they have made. The license is perpetual and irrevocable for the latter.

Wikipedia

Wikipedia, unlike commercial platforms, is committed to supporting access to knowledge, free culture, and the promotion of common goods. To this end, it requires users who contribute to the project to "grant broad permissions to the general public to re-distribute and re-use their contributions freely" (Wikimedia Foundation 2020). Hence, the general rule at Wikipedia is the use of licences such as Creative Commons copyright licences which are free and easy-to-use, and provide a simple, standardized way to give permission to share and use creative work and the GNU General Public License, a series of free software licences that provide users with the freedom to run, study, share, and modify the software.

Rules of Behaviour and Copyright Enforcement

The use of platforms is subject to respect for the copyright of others. By accepting the terms and conditions, users agree not to upload any material that violates the copyrights of third parties. However, many users publish material belonging to other authors, either in its original version or in an adapted form, perhaps in ignorance of requirements to observe copyright, and with or without an intention to infringe on such a right.

Copyright infringement is further complicated when copyright law and policies are misaligned with the practices, cultures, and norms of online platforms. The issue is especially apparent on social media platforms such as Instagram and Twitter that foster redistribution and reposting across other platforms (Meese and Hagedorn 2019, 5). Platform users have a nuanced understanding of copyright. While some users are aware of copyright policies and legislation, copyright law is not always clear about how users can create, share, attribute and manage their content in a practical setting (ibid, 4). For instance, adequate attribution on social media platforms can be difficult for users who are unable to locate the original copy amidst countless other copies (ibid). While some users creating content are aware of copyright law, they may be uncertain how to implement attribution practices; others deliberately infringe copyright in the creation and dissemination of content, once again demonstrating the complexity in users' behaviour.

The platforms have created content moderation mechanisms to enforce copyright and, in the vast majority, respond to the DMCA's legal requirements.

In general, content moderation requires rightsholders to request a platform to remove content based on an alleged infraction of rights. The platform must act on any complaint. According to the DMCA, the action to be taken involves removing the content and then notifying users. If the removal of the content is erroneous or represents an abuse by rightsholders, users have the option of contesting the complaint with a counter-notification.

Some contend that the system is designed to encourage complaints from rightsholders and to discourage complaints from users (Cortés Castillo 2013). On the one hand, it is inexpensive for copyright owners to make complaints about alleged violations of their copyright, while on the other hand, the system provides a strong incentive for platforms to "en el puerto seguro de la ley/be in the safe harbour of the law"; that is, to take actions which will ensure legal immunity, and avoid being caught up in legal proceedings against them (Cortés Castillo 2013, 5). Moreover, the platforms have neither the mission nor the incentive to confirm the veracity of allegations or to defend their users against possible excesses by rightsholders. Applying the DMCA's notice, and takedown system guarantees that the platforms are not legally responsible for infringements caused by their users. Therefore, the platforms respond to rightsholders' claims, even when an exception to the copyright or a legitimate use might be involved. The DMCA and platform responses have led to numerous cases of unjustified and abusive content removal, often violating the users' rights to freedom of expression and due process (Cortés Castillo 2013).

Another copyright enforcement mechanism is the European one. Until very recently, Europe mirrored the US notice and takedown system, which recognizes that the platforms are not legally responsible for copyright infringing content but are required to remove it once flagged. With the adoption of the 2019 European Union Directive on Copyright in the Digital Single Market (hereinafter the DSM Directive), the scenario began to change. The controversial Article 17 of the said standard requires platforms to request the rightsholders' authorization, for example, by means of a licence, before copyright-protected works can be uploaded to the website. Without such authorization, the platform would be liable for the copyright infringement of its users. Paragraph 4 states: "If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have: (a) made best efforts to obtain an authorisation …" (Directive (EU) 2019/790 2019). In other words, the European safe harbour for platforms in copyright cases is the implementation of an upload filter, which will screen content before it is published. The system in practice creates a censor-

ship mechanism, in which users will have to obtain the approval of the platform before being able to publish and broadcast content (Heldt 2019).

In international human rights law, there is a strong presumption about the prevention of prior censorship and a focus on the ability to comment on public issues without censorship or restraint to inform public opinion (UN Human Rights Committee 2011; Lanza 2017). Given the importance of the right to freedom of expression for democracy, any sanction for expressions that may infringe on the rights of others should be imposed only subsequently to the publication of content and should never precede it. This ensures, for example, that unpopular ideas or opinions are circulated, and that public debate is not suppressed. Upload filters, as proposed by the DSM Directive are nothing more than a prior censorship mechanism.

Another approach to dealing with the issue can be found in the Canadian copyright regime with its notice and notice system. Rightsholders who believe that users are violating their copyright must send a notification of possible infringement to the platform. In turn, the platform must forward the notification to the users. The intent of this approach is to discourage online infringements (Stephens 2018). The Canadian system adopted an educational and awareness raising approach, rather than a retaliatory one. Rightsholders do not lose their right to sue, but only a court can determine whether there has been an infringement of copyright and what sanction or remedy might be deemed appropriate.

Libraries and User-Generated Content

There are various ways in which libraries engage with UGC. Library systems may use an information retrieval platform that includes UGC from other knowledge- and content-sharing platforms. Libraries with websites and social media pages will create and share their own UGC. Additionally, libraries' digital information retrieval and discovery systems can enable users to comment, review, and rate content on the library's platform. The latter practice permits users' contribution to the information retrieval process which can critically foster users' expression and knowledge-sharing about the library's materials.

For libraries that use information retrieval or discovery systems incorporating UGC, it is important that the "Libraries ... should adopt policies that define the time, place, and way the user contributes the content to the library's discovery system. Additionally, libraries should make it very evident which content is generated by the library and which content is generated by other users (American Library Association 2019). Management mechanisms are important as the way a library system

presents and incorporates UGC may influence the way users select books and materials, for instance, based on reviews and ratings other users' postings.

As previously stated, libraries that incorporate UGC in their systems may be supporting users' freedom of expression by providing a public digital space in which users can freely discuss, recommend, or even critically comment on a range of topics. Therefore, libraries should exercise caution when removing UGC, ensuring that it is removed under due process and because of exceptional situations.

Copyright Enforcement and Freedom of Expression

Online platforms have developed reactive content moderation mechanisms including applications of artificial intelligence (AI) to act against potential infringements to their rules and legal obligations (Llansó 2020). The mechanisms rely on another user flagging the content as abusive or illegitimate and potentially a copyright infringement. Pressured by governments, the copyright industry and civil society including non-governmental organizations, non-profit organizations, and users themselves, the platforms have been forced to design proactive mechanisms that allow them to quickly contend with the issues that arise from the dissemination of abusive or illegitimate content (Llansó 2020; Romero Moreno 2020).

Managing UGC on digital platforms also involves the task of addressing false, hateful, or inappropriate UGC with the growing quantities of so-called fake news and deepfakes. Detecting and removing malicious, erroneous abusive content while protecting the right to freedom of expression is a difficult debate in digital environments. Whether platforms should permit the circulation of UGC for leisure, creative innovation, cultural expression, and political causes only, or allow users to be exposed to a full range of UGC regardless of its accuracy, validity or appropriateness presents ongoing conflict and debate between platforms, civil society, and governments. Copyright law can be used to remove certain UGC based on safeguarding an author's copyright-protected work, assuming there is no involvement of fair use or other exceptions to copyright infringement under specific circumstances. Government bodies have increased their attention, taking actions such as the proposal to amend Section 230 of the US Communications Decency Act which protects online intermediaries from laws applied to publishers holding them legally accountable for the speech they host (Electronic Frontier Foundation n.d.). Mechanisms such as fact-checking and labelling concerning UGC as potentially misleading help reduce falsities and offer mechanisms respectful of protecting users' right to freedom of expression (Bazelon 2020).

Proactive systems can use manual or automated techniques. Manual approaches include human review before deciding what action to take, which may be to remove the content, warn the user who uploaded the content or allow the content to be uploaded. Automated techniques use algorithms to flag abusive or illegal content by measuring patterns, matching them to a database of works or any other criteria determined by the platform (Llansó, 2020; Romero Moreno 2020). YouTube, for example, developed a system called Content ID, which makes it easier for rightsholders to identify content uploaded to the platform without authorization (YouTube 2021). The system requires that rightsholders share with YouTube a database with the catalogue of works that belong to them. The automated system then matches the contents found on the platform with those in the database. The Content ID guide states it is available only to rightsholders who hold "exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube creator community." The video-sharing platform has other tools for reporting copyright infringement: an online claim form, a content verification program available to rightsholders to send content removal notifications for several videos at once, and a Copyright Match Tool which is available to any YouTube user who has submitted a valid copyright takedown request and can be used to identify automatically video matches.

Increasingly, platforms rely on AI for content moderation, either proactively to detect content that violates their rules or legal obligations, or to perform automated content evaluation (Llansó 2020). The automated content moderation mechanisms are less dependent on user flagging or enforcing the decision on whether a material violates the platform's content policy, or the law, by automatically removing or degrading the content.

Content moderation is used to identify potential copyright infringement, whether reactive or proactive, and does not examine the veracity of the complaint or whether copyright protections are being abused. In a state of law, it would also not be expected or desirable for a private agent to have the power to determine whether a copyright infringement is occurring. However, content moderation mechanisms are very often used arbitrarily or have the unwanted effect of suppressing freedom of expression (Cortés Castillo 2013, 6). They also ignore the very limitations and exceptions to copyright, thus weakening them.

The DMCA has been used as a tool to takedown and stifle what is considered fair use in some countries. The Ecuadorian government has reportedly invoked the DMCA takedown notice to censor online criticism (Nazer and Stoltz 2017). Content including videos, images, audio clips, text, and memes on Facebook, Twitter, and YouTube criticizing the president and the Ecuadorian government have been taken down from the sites on which they were posted through the DMCA's notice and takedown mechanisms on the grounds of copyright infringe-

ment (Vivanco 2014). While using copyright to silence political expression is an extreme step, complainants have exploited copyright to remove opinions, criticisms, poor reviews and to restrict the overall public domain of information resources available to users. Flagging and taking down UGC can serve a legitimate and important purpose especially when protecting democratic processes, the truth, and populations in vulnerable contexts; however, the practice should not jeopardize constitutional rights and freedoms established in specific countries (Heldt 2019).

If content moderation mechanisms are implemented prior to content uploading, as suggested in Article 17 of the DCM Directive, copyright enforcement is likely to become a prior censorship tool. Furthermore, it could be argued that it violates international human rights standards on freedom of expression in relation to the principle of legality; that is, that the limitation on the right is provided by law with sufficient clarity to enable individuals to regulate their conduct.

The usual ways in which content moderation mechanisms are implemented to enforce copyright leave users in the dark, not knowing or understanding why they are being notified or why the content has been removed. Users do not receive enough information to understand that their content has been flagged as copyright infringement because the uploaded material matched with a copyrighted work in a database. The lack of transparency about how content moderation mechanisms are implemented to enforce copyright and the high incentives that platforms have to respond to the powerful copyright industry leaves users defenceless, affecting their fundamental rights to express and inform themselves, to share their opinions and ideas, and even to engage in democratic life.

Conclusion

UGC is a creative form of digital expression that has exploded thanks to technological developments and the expansion of the Internet. The reasons for creating and sharing UGC are endless. It is undeniable that UGC plays an important role in the cultural and political participation of societies. UGC contributes to the generation of knowledge and information, offers an opportunity to tell stories from a non-hegemonic point of view, and connects people with common interests. UGC is a powerful communication tool.

Never before have there been so many possibilities for exercising freedom of expression. Advances in digital technologies, telecommunication, and the growth of the use of mobile devices have led to diverse and creative ways of expressing oneself and sharing ideas and opinions with others. Unhappily, there are nega-

tive aspects arising from the capacity for users to generate misinformation and disinformation. Copyright regimes have become barriers, sometimes significant ones, to the dissemination of a cultural, informational, and even political asset of contemporary history.

While the flagging or removal of content because of copyright infringement is a valid mechanism, this chapter has evidenced ways in which rightsholders can appeal to copyright enforcement mechanisms to serve ill-intended purposes and to stifle public expression. Some valid mechanisms for addressing copyright infringement today may have the potential to inform future policies for dealing with unlawful behaviour and content online. However, policies and practices in relation to online content creation must be developed holistically to carefully address the needs of all stakeholders including civil society, governments, Internet intermediaries, copyright regimes, users, creators, and original authors.

Copyright and its enforcement through various content moderation mechanisms on online platforms represent a threat to the exercise of freedom of expression. "Since 1999, the UN Special Rapporteur, together with [others] ..., has issued annually a Joint Declaration on Freedom of Expression, reaffirming its central role for human rights and fundamental freedoms" (UN Human Rights n.d.). The Joint Declarations by the Special Rapporteurs for Freedom of Expression of the international and regional human rights systems have since 2011 consistently expressed the view that content moderation mechanisms applied to online platforms represent a significant threat to the enjoyment of freedom of expression on the Internet.

To meet the challenges posed by technological developments to copyright protection, it is essential to balance the legitimate interests of authors and rightsholders with the general interests of individuals and the community in enjoying their rights to freedom of expression. Governments must not forget their obligations under international human rights law and should refrain from promoting disproportionate measures that are responsive to the lobbying of powerful economic forces in the copyright industry. The socio-economic development of a country, often the argument for creating more protectionist copyright regimes, depends on many factors external to the creative industry, including the existence of conditions for the enjoyment of freedom of expression, for collective intelligence and collaboration to find space to flourish.

Online platform owners must also recognise the threat to freedom of expression inherent in content moderation mechanisms and mitigate it. Certainly, the platforms must be more transparent and accountable about the technical mechanisms they develop to meet their legal obligations, how they implement them, and the impact they have on users' rights to freedom of expression. It is increasingly critical that future copyright regimes be developed which respect human

rights. Authors and rightsholders have legitimate interests in protecting their works and investment, but these interests should never outweigh societal significance in protecting human rights.

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20 Artificial Intelligence and Text and Data Mining: Future Rules for Libraries?

Abstract: Artificial Intelligence (AI) is not a general method but an umbrella that includes many digital tools that are changing the library environment. Chatbots, document classification, personalized services, text and data mining (TDM), intelligent education, and user discovery are some of the AI tools that offer new and broad possibilities for research, access, and use of vast amounts of data. But there is growing attention and discussion on how global and domestic copyright law should allow or impede access to the use of data. This chapter examines current AI trends for libraries, focuses on TDM, and presents relevant regional and domestic copyright legislative developments on the subject. The analysis indicates that norms passed to regulate TDM vary in content and objectives from country to country, yielding an ill-suited environment for libraries to work as a channel for international research based on AI tools. It concludes with a dialog centered on the evolving relationship between knowledge, AI, TDM, and the creation of new limitations and exceptions (L&Es) for copyright law. This chapter informs the reader of impacts of recent AI, TDM, and copyright developments on libraries and highlights policy developments that could bring a more uniform international legislative body of law in which libraries could operate and support researchers.

Keywords: Artificial intelligence; Text data mining; Copyright and electronic data processing; Fair use (Copyright); Electronic information resources – Fair use

Introduction

Artificial intelligence (AI) and machine learning (ML) have shown significant practical progress in recent years. AI and ML algorithms are creating a much-automated society, modifying many aspects of life. A recent survey of more than 2,200 leaders, managers, and contributors across a wide range of industries and geographies reveals how the drive to implement AI is reshaping organizational culture and processes and creating new mandates for Chief Information Officers and other technology leaders. Most organizations are still in the early stages of the process to implement AI or to experience benefits at scale. Just 5% are implementing AI widely across the organization; 18% have implemented it in a few processes; 19% are running pilot projects; 13% are planning AI adoption, while

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27% are still investigating it. But even if changes are not being currently implemented, the same survey showed that more than 63% of respondents expect AI to drive dramatic or significant organizational change (MIT SMR Connections 2020).

Some of the leading examples of private-sector growth today, like Amazon or Facebook, depend on the use of ML to optimize production methods, supply chains, marketing, and pricing. AI applications are growing across various sectors: transportation, health care, agriculture, finance, law, cybersecurity with autonomous detection and decision making to enhance reaction times to threats, and defense with autonomous and semi-autonomous weapons systems (Harris 2017; Metz 2015).

Libraries are not foreign to technological changes, as there are many tools to be implemented in the service of patrons, research, and education. An ExLibris Whitepaper reported that some critical transformational forces in libraries, such as AI, TDM, and ML, are not widely understood (ExLibris n.d.). Chatbots, document classification, personalized services, TDM, intelligent education, and user discovery are just some of the AI developments in libraries (Wheatley and Hervieux 2019; Cervone 2011; Pinfield, Cox and Rutter 2017).

TDM serves as a useful tool to navigate the insurmountable amount of data and information currently available while bringing new insights and understanding in many fields of knowledge. For example, TDM can be used in linguistics to analyze large bodies of text to extract syntactic or grammatical patterns; in medicine, TDM can find associations between a gene and a disease, or between a drug and an adverse event; in general, TDM is turning into the standard practice in pharmaceutical research, journalism, information retrieval, and consumer information.

Libraries often play a role in supporting TDM research because they:

- Steward vast quantities of materials that they can digitize and turn into collections for TDM researchers
- Help researchers find, locate, and use pre-existing collections or data, and
- License content under binding contractual terms that affect how TDM researchers can use content and data.

But there is an interesting problem as current regulations, or the lack thereof, affect how libraries can support TDM research through these three mechanisms. More often than not, there is no specific answer on how to address issues arising under contract law, laws prohibiting the circumvention of technological protection measures (TPMs), or cross-border copyright issues. What happens when a TDM research project is developed with catalogs of libraries in different countries? Can researchers develop TDM projects lacking legal access to the data or the information? Is it possible to engage in international projects and share the

results? Can librarians negotiate to eliminate or reduce contractual restrictions on researchers' rights to engage in TDM? As technology advances, more questions continue to grow on how to balance copyright laws with user access and innovation.

As a partial response to these questions, some developed nations have passed laws to regulate TDM practice. Still, the results show laws that are not compatible between those same countries. The TDM articles recently passed within the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (Text with EEA Relevance) [hereinafter DSM Directive] (IFLA 2021; Directive (EU) 2019/790 2019) will be incompatible in many parts with the 2018 Japanese TDM copyright reform (Japan 2020) or the recent *Google*[1] or *HathiTrust*[2] rulings of the United States Court of Appeals for the Second Circuit which are discussed later in this chapter. The diverse regulatory practices create an unstable, fragmented, and complex international environment for libraries and users of information protected by copyright laws. Most developing countries that have not initiated updates to their copyright laws provide librarians with limited chances to make available copyrighted works for TDM projects.

A recent study by the Program on Information Justice and Intellectual Property at the College of Law at the American University Washington explains that there is relatively widespread authorization in research, private reproduction, and in general exceptions for making reproductions of whole works needed to build non-public TDM research databases (Flynn et al 2020). If librarians or researchers decide on using flexible and open interpretations of the existing limitations and exceptions (L&Es) such as the right to research, digital reprography, or private or personal use, not having explicit rules on the matter could bring high levels of uncertainty given the rapidity of AI technological developments to explore and exploit information. Moreover, countries with a restrictive interpretation of L&Es, for example Argentina (Argentina 2011) will undoubtedly forbid librarians to allow any TDM on their printed or digital copies of the available works, except with an appropriate license. AI and TDM discussions are intensifying worldwide in diverse forums, including the Organization for Economic Co-operation and Development (OECD) and World Intellectual Property Organization (WIPO), but no consensus model has emerged (WIPO n.d.).

The existing literature is incomplete on how libraries will be affected by the current TDM legislative changes. There have been studies on how the TDM laws are being framed in the United Kingdom (UK), European Union (EU), and

1 Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015.
2 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

Japan, as well as studies on the previously mentioned TDM *Google* and *HathiTrust* cases in the US. Google was allowed to undertake unauthorized digitizing of copyright-protected works, create search functionality, and display snippets from works. The HathiTrust case allowed libraries in the HathiTrust project to digitize copyrighted works for the purpose of permitting full-text searches, allowing member libraries to provide patrons with certified print disabilities access to the full text works, and for the libraries to preserve the copyrighted books in digital form.

TDM studies in Europe include Geiger, Forsio and Bulayenko (2018) and Hugenholtz (2019), explaining how the new TDM articles of the DSM Directive put AI developers, journalists, commercial research labs, and other innovators at a competitive disadvantage in comparison with the United States, and other studies highlight concerns (Quintais 2020; Stephenson 2020; Hilty, Harhoff and Drexl 2016; Margoni and Dore 2016; and Caspers and Guibault 2016). Analysis of developments in the US can be found, for example, in Sag (2009), arguing that acts of copying that do not communicate the author's original expression to the public do not generally constitute copyright infringement; Carroll (2019), asserting that text and data mining is legal in the United States because fair use permits copying and archiving data to enable and validate TDM research; and Sag (2019) explaining why applying copyright's fundamental principles in the context of new technologies implies that copying expressive works for non-expressive purposes should not be counted as infringement. Worldwide research is available at, for example, Flynn et al (2020), stressing the need for international leadership on the diverse mechanisms that countries may use to authorize TDM research and the adoption of rules permitting cross-border TDM projects. Okediji (2019) and Litman (1994) provide general information on L&Es. Flynn and Palmedo provide a description of "openness" of copyright exceptions (2017).

But not much has been developed reviewing the current impact of AI changes on libraries compared to the current copyright legislative modifications. This chapter reviews how TDM practices and legislation, or the lack thereof, affect access to information by patrons at libraries.

This chapter adopts an interdisciplinary perspective. The first part addresses the concepts of AI, ML, and TDM based on the most recent government, scientific and technological research, while considering the social impacts of the technologies for libraries. The second part of the chapter reviews and analyzes the legal aspects by reference to regional and national contexts. Questions are raised on the capacity of the current L&Es in regional or domestic laws to advance access to data from the various perspectives of librarians, researchers, and users. The third part provides recommendations to facilitate dialog between copyright, AI and

TDM, and suggests possible solutions for future policy changes in law, research, and technology.

Artificial Intelligence and Text and Data Mining

In examining how libraries are involved in AI, AI must be explained, along with TDM, and the changes to access in the knowledge environment. This section anchors key concepts to build towards how libraries are involved in the technological changes by exploring the nature of AI and TDM, its history, and various international perspectives on its growth and development.

Nobody would have imagined that the 1950s question posed by Alan Turing, "Can machines think?" would be the current trend in technological development today (Turing 1950). This British mathematician is known to be one of the many who opened the way to decades of work on a machine's ability to show intelligent behavior. Following slow early development, more recently, AI and ML have shown significant practical progress. The unique confluence of vast amounts of data, including the internet, algorithms, and modern computing, is opening a new chapter for AI and ML development. There is an increased ability to train existing algorithms with vast quantities of data samples and with the use of modern computing, particularly Graphics Processing Units (GPUs) and storage capacity. AI has emerged in the past decade faster than in the first 70 years of artificial intelligence development (Shi 2011; Martinez et al 2019).

Brief History of Artificial Intelligence

Artificial intelligence (AI) is not a recent technology; the algorithms used today have been in existence for several decades (Stone et al 2016). Emerging from Turing's work (Turing 1950) came the Turing test where a machine and a human are compared to determine if a machine is indistinguishable from a human. Late in 1956, the field of AI was born with a workshop organized at the Dartmouth Summer Research Project on Artificial Intelligence (McCarthy et al 1955). John McCarthy, jointly with Nathaniel Rochester, Marvin Minsky, and Claude Shannon, organized a two-month ten-man study of AI. The objective was to proceed on the basis that every aspect of learning or any other feature of intelligence could in principle be so precisely described that a machine could be created to simulate it; the workshop also intended to find how to make machines use language, form abstractions and concepts, and "solve kinds of problems now reserved for humans, and

improve themselves" (McCarthy et al 1955, 2). The researchers defined AI as the problem of making a machine behave in ways that would be called intelligent if a human were so acting.

The two-month Dartmouth project fell short, but history shows a continued advancement in AI decade after decade. In the 1950s, AI research focused on game playing; in the 1960s on search algorithms and general problem solving (Minsky 1961; Shi 2011); and in the 1970s AI explored natural language understanding and knowledge representation (Feigenbaum 1984; Shi 2011, 4). The 1980s came with a slowdown in AI development called the "AI Winters" and a slowing down of research funding (Martinez et al 2019, 15–16). But in the 1990s and early 2000s, AI resurged with some successes.

To name a few, in 1997 there was a fundamental shift in AI capabilities when IBM's chess-playing expert system Deep Blue defeated reigning chess champion Gary Kasparov (Kasparov 2017); in 2005 Google's English translation tool for Chinese and Arabic texts topped an international exercise to find the best Chinese and Arabic translation technology (Kanellos 2005); in 2011 IBM Watson defeated Jeopardy former champions Brad Rutter and Ken Jennings (Markoff 2011); and in 2016 Google's DeepMind made an AI system to defeat Lee Sedol at the ancient board game Go (Cao 2019).

The AI accomplishments were made possible by a mix of integrated advances in AI algorithms, the availability of vast amounts of data samples, and high-performance computers. Estimates indicate that 90% of all data have been created in the past two years (Statspotting 2012). The increased ability to train existing algorithms using the data available combined with greater processing capacity and improved storage capacity has allowed AI in the past decade to achieve more than was possible during the first 50 years of development.

The mix of elements has brought dramatic AI advances in neural network or deep learning methods:

> In describing the course of AI development, the Defense Advanced Research Projects Agency (DARPA) has identified three "waves." The first wave focused on handcrafted knowledge that allowed for system-enabled reasoning in limited situations, though lacking the ability to learn or address uncertainty, as with many rule-based systems from the 1980s. The second wave, from approximately the 2000s to the present, has focused on advances in neural networks and machine learning (e.g., image recognition, language translation) using statistical models and big data sets. The third wave will focus on contextual adaptation—learning and reasoning as the system encounters new tasks—moving towards general AI (Harris 2017).

As a response to the advances in AI, several countries and regions around the world have already released reports on how to prepare for the upcoming chal-

lenges. On this race for being first in the technology, governments have released their forthcoming strategies; the White House Office of Science and Technology Policy (OSTP) with its National Artificial Intelligence Research Resource Task Force is preparing a response; the European Parliament's Committee on Legal Affairs has adopted three reports on artificial intelligence (Geneva Internet Platform 2020); the House of Commons' Science and Technology Committee in the UK commissioned a report on artificial intelligence (UK Parliament 2016); the Chinese State Council has produced a plan (China. State Council 2017; Webster et al 2017), and the Center for Security and Emerging Technology of the Russian Federation has developed a strategy (Konaev 2019). Expert committees have also produced reports and policy documents with the High-Level Expert Group on AI appointed by the European Commission, the expert group on AI (AIGO) of the Organization for Economic Co-operation and Development (OECD), and the Select Committee on AI of the UK House of Lords (UK. Parliament. House of Lords 2017). The private sector and the universities are also doing their share of research and development, with numerous studies and research documents published on the subject.

What is Artificial Intelligence?

A definition of AI is of utmost importance, especially when the subject is pending for legislation around the world. Ultimately a definition matters from a copyright perspective to provide the scope of the law. But this task poses a challenge as the technology is always in flux. Governments have given diverse definitions but overall, there is no commonly accepted definition of AI, in part because of the many diverse approaches to research in the field. This lack of agreement on a single definition will possibly bring issues in future legislative processes at the international, regional, and domestic level, but the lack of a precise, universally accepted definition of AI has also helped the field to grow and advance at an ever-accelerating pace.

For the US government there is no commonly accepted definition of AI although Section 238 (3) (f) and (g) of the FY2019 *National Defense Authorization Act* (NDAA) directs the Secretary of Defense to produce a definition of artificial intelligence and includes the following:

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.

3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task. (5) An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting. (US. Congress. House 2018, 62)

The closest approach to a definition is found in the White House 2019 National AI R&D Strategic Plan report by which AI "enables computers and other automated systems to perform tasks that have historically required human cognition and what we typically consider human decision-making abilities" (US National Science and Technology Council 2019, 1). The US strictly relates the future development of AI to the increase of computing power, the availability of large datasets and streaming data, and algorithmic advances in machine learning. In a recent presentation, an official of the Department of Defense called AI "the new oil, and the governments or the countries that get the best datasets will unquestionably develop the best AI" (Cronk 2020).

The UK agrees there is no single definition of AI but notes in a Select Committee report, citing others, that there is a tendency to describe "AI by contrasting it with human intelligence and stressing that AI does not appear 'in nature.' At present, the capacity of 'AI machines' is narrow and specific; they can complete what Margaret Boden, Professor of Cognitive Science at the University of Sussex, has described as 'specialised tricks'". The report concludes AI is "a set of statistical tools and algorithms that combine to form, in part, intelligent software that specializes in a single area or task. This type of software is an evolving assemblage of technologies that enable computers to simulate elements of human behavior such as learning, reasoning and classification" (UK Parliament. House of Commons. Select Committee on Artificial Intelligence 2019, Paragraph 4).

But a European report goes further, citing others as stating "The broadest definition of artificial intelligence (AI) characterises it as the attempt to build machines that 'perform functions that require intelligence when performed by people'" (Sartor and Lagioia 2020, 2). The High-Level Expert Group on AI (AI HLEG) of the European Union provides a definition:

> Artificial intelligence (AI) systems are software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their previous actions. As a

> scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization), and robotics (which includes control, perception, sensors, and actuators, as well as the integration of all other techniques into cyber-physical systems. (European Commission. Independent High-Level Expert Group on Artificial Intelligence 2019, 6)

China gives the broadest definition of all countries:

> The development of AI has entered a new stage. After sixty years of evolution, especially in mobile Internet, big data, supercomputing, sensor networks, brain science, and other new theories and new technologies, under the joint impetus of powerful demands of economic and social development, AI's development has accelerated, displaying deep learning, cross-domain integration, man-machine collaboration, the opening of swarm intelligence, autonomous control, and other new characteristics (China State Council 2017; Webster et al 2017, 2).

Some of the definitions are linked to a military approach with significant implications for national security. The US Department of Defense (DOD) and other nations are developing AI applications for a range of military functions. So far, applications of AI are found "in the fields of intelligence collection and analysis, logistics, cyber operations, information operations, command and control, and in a variety of semi-autonomous and autonomous vehicles" (US Congressional Research Service 2020).

Yet many AI systems perform only a fraction of the activities listed in any definition. Activities such as pattern recognition, language processing and practical suggestions, are activities done independently by every system. But there are other more sophisticated systems that may combine diverse capacities, as in the example of self-driving vehicles.

Machine Learning and Artificial Intelligence

Machine Learning (ML) is the name for a comprehensive family of techniques used for new forms of AI data analysis becoming essential tools for prediction and decision-making (Lehr and Ohm 2017). There is an increased ability to train existing algorithms with vast quantities of data samples.

As already noted, AI has applications across many sectors ranging from agriculture and cybersecurity, through defense and health care to transportation. Many commodities and services, including email spam filters, medical diagnoses, product marketing, and self-driving cars, are now dependent on ML algorithms (Coglianese and Lehr 2017). ML has entered the realm of national security and defense and is one of the main reasons governments are looking for advance-

ment on AI. The latest cyber operations use ML to enhance mission-critical tools and capabilities, with the newest learning models detecting distributional traffic shifts, anomalous network behavior patterns, and creative attacks as they originate (Guerra and Tamburello 2018). More precisely, ML can help identify malware, network anomalies, intrusion detection, rank aggregation of information, deep packet inspection, and detect cyber threats ranging from hacking into government or military networks to cyber-attacks on corporations and personal accounts. Most notable examples include: the Titan Rain incident in 2003, when US Department of Defense facilities, NASA laboratories, Lockheed Martin and other systems were hacked into and lost many terabytes of information; the cyber incidents directed against Estonia and Georgia, leading to severe disruption of media, government and banking systems; the US fight against the Islamic State of Iraq and Syria (ISIS); or the 2014 cyber-attack on Sony Pictures Entertainment by the group Guardians of Peace who stole data and disabled computer systems.

Three main approaches to ML are commonly found: supervised learning, reinforcement learning and unsupervised learning. In supervised learning the machine learns through supervision or teaching. More precisely the machine is given a training set that will allow it to find the correct answer. Under this system, the data scientist acts as a guide to teach the algorithm the right responses (Mokhtarian 2018). "Supervised learning requires that the algorithm's possible outputs are already known and that the data used to train the algorithm is already labeled with correct answers" (Castle 2017). This type of learning is found in systems designed to recognize objects, for example, face recognition, systems for automated translation, clinical decision support systems based on symptoms and diagnoses, systems for assessing loan applications, insurance and customer recommendation systems, and online purchases.

By way of an example, a binary algorithm was able to classify 1600 US judicial opinions on successor liability (Fagan 2015). Binary classification algorithms can learn to identify between two choices after being trained on a dataset of images or words that are properly labeled with the options and some identifying characteristics. In this case, the algorithm was able to examine the words of each opinion and determine the probability of it belonging to the relevant class with relevant meaning that the court applied any type of successor liability legal standard to the facts. Another example can be seen with the algorithm Correctional Offender Management Profiling for Alternative Sanctions (COMPAS), a risk assessment software used to forecast which criminals are most likely to reoffend. The Department of Corrections of Wisconsin State

> uses the Correctional Offender Management Profiling for Alternative Sanctions tool, commonly known as COMPAS, for criminogenic risk and needs assessments and unified

> case planning. This actuarial risk assessment contains offender information specifically designed to determine their risk and needs and inform dynamic case plans that will guide the offender throughout his or her lifecycle in the criminal justice system (Wisconsin. Department of Corrections n.d.).

Fairness in algorithms has been questioned with abundant literature questioning possible bias emanating from the use of automated decision-making systems (for example, Spielkamp 2017).

Reinforcement learning is close to supervised learning, as both systems require training through examples. But "reinforcement learning is a framework that shifts the focus of ML from pattern recognition to experience-driven sequential decision-making" (Stone et al 2016, 9). The ML approach typically involves creating training methodologies that enable a system to explore independently, perform multiple trials at tasks, and learn from the experiences. As explained in a 2016 US Senate hearing on the dawn of artificial intelligence in relation to "Learning physical actions in the open world: Research efforts have been underway on the challenges of enabling systems to do active exploration in simulated and real worlds that are aimed at endowing the systems with the ability to make predictions and to perform physical actions successfully" (US Congress. Senate. Committee on Commerce, Science and Transportation. Subcommittee on Space, Science, and Competitiveness 2016, 13). The machine learns through rewards or penalties that are linked to the outcomes of such actions. Examples include systems that learn to play games by rewards linked to victories and penalties to defeats; or investment systems where rewards are linked to financial gains and penalties to losses. When the system is working at its full potential, AI applications can take independent actions in the real world.

A third relevant ML system is unsupervised learning. Contrary to supervised or reinforcement learning, unsupervised learning works without receiving external instructions, learning without human-authored labels. Under this system, the machine works through clustering and dimensionality reduction while seeking to identify structure among unlabeled data (Hinton and Sejnowski 1999; Le 2012). Common examples of unsupervised learning algorithms are found in research of audience segmentation, customer investigation, pattern recognition, and anomaly detection or cyber-operations. Unsupervised learning is often characterized as supervised learning with an unknown output, as it is difficult in many circumstances to generate objective criteria to classify the results as either failed or successful (Hinton and Sejnowski 1999). The fact that a machine can independently identify and resolve processing problems makes this learning method closest to answering Turing's original question "Can machines think?" (1950) posed earlier in this chapter, although it has not yet arrived.

Library Applications of Artificial Intelligence

There are many ways in which libraries are getting involved with AI tools. TDM, document classification, chatbots, and user discovery, are some of the current AI tools being implemented (Asemi, Ko, and Nowkarizi 2021). Furthermore, some AI tools are becoming essential tools. This section examines the role of libraries in relation to aspects of AI. There has been some hesitancy in adopting the technology on an everyday basis (Wheatley and Hervieux 2019; Cervone 2011). Concerns raised about AI in libraries in the previously mentioned ExLibris whitepaper on AI included: "… human creativity and empathy would no longer be necessary due to the efficiency of AI …and valuable human characteristics are devalued and rare … AI would magnify injustices such as inequality, bias, and discrimination, and help propagate misinformation …AI might jeopardize data privacy" (ExLibris n.d., 13).

A 2017 report by the UK's Society of College, National and University Libraries (SCONUL) found that some key transformational forces, such as AI, TDM, and ML, were not widely understood: from the survey only 4% considered AI skills for libraries were critically important; 28% deemed them important; 32% not important and 35% did not know, yet intellectual property skills were viewed as critically important by 25% and important by 60% (Pinfield, Cox, and Rutter 2017, 43 Figure 7). The same survey found in terms of key trends and their impact in the future that 10% of libraries thought AI and ML would have a transformational impact, 21% significant, 32% small, 5% none, and 32% did not know (Pinfield, Cox, and Rutter 2017, 15).

Chatbots

Chatbots, also known as digital assistants or intelligent agents, are computer programs that can simulate an intelligent conversation through text or speech, and use speech or character recognition tools to provide information to users with examples such as Siri or Google Assistant. Chatbots with embodied representation are being used by libraries (Talley 2016). The University of Oklahoma incorporated a chatbot Bizzy to answer frequent questions from students, such as library schedules, or places to print (University of Oklahoma. University Libraries 2019). The chatbot also helps students with basic research, but more complex questions are addressed directly by the library staff. The Helsinki Central Library Oodi uses an app from the Finland-based technology company Headai, to create Obotti to help discover new books either by voice search, proximity and location of the books, or popular uses (Pun 2019).

Georgia Tech's Jill Watson, University of Murcia's Lola and Staffordshire University's Beacon are chatbots to answers students' most frequently asked questions (Young 2019; Staffordshire University 2019). Studies support the creation and use of chatbots as a big percentage of the questions asked face-to-face to librarians do not require librarian expertise (Talley 2016). In one study, two-thirds of the total questions asked of librarians by students related to library locations and their attributes, all of which staff with minimal training might easily answer; only 16% of transactions concerning subject-based questions required professional help (Bishop and Bartlett 2013).

Classification of Library Documents

Classification of library documents comes as another significant challenge. The increasing amounts of information produced each year require new methods to facilitate effective searching, retrieval, and organization. Although many current approaches to classification can rapidly identify the overall topic of a document, there is a need for systems that can efficiently organize documents into the correct subfields or areas of specialization (Kowsari et al 2017). Among diverse classification proposals, some research has examined techniques based on semantic document classification, contrary to the traditional keyword classification approach. For example, a recent research paper proposed that by using the "Wikipedia knowledge to analyze the semantic information behind document keywords, Wikipedia matching can overcome the semantic mismatch problem encountered in keyword matching" and improve the accuracy of document similarity computation and in turn the accuracy of document classification (Wu et al 2017).

New approaches have examined new ML and deep learning techniques for document classification as part of a subset of ML tools that deploy multilayered processes, account for billions of data points, and continuously adjust their classification rules. Some propose a mix of diverse approaches for document classification (Zenun, Imran, and Yayilgan 2019). Flannery from the University of Notre Dame was able to automatically generate summaries for a special library collection of more "than five thousand Catholic Pamphlets by implementing summarization techniques through Natural Language Processing (NLP)" (Wang 2020, 2).

Intelligent Education

Another potential AI development for libraries is intelligent education which offers AI personalized learning, automated counseling, assessment, platforms

for game-based teaching, and even education decision making. The American Federation of Teachers and the IBM Foundation have collaborated to build Teacher Advisor with Watson. The program uses artificial intelligence technology to answer inquiries from educators and help them develop personalized lesson plans (Harris 2016). "IBM and MIT have signed a 10-year, $240 million partnership agreement that establishes the MIT-IBM Watson AI Lab where IBM researchers and MIT students and faculty will work side by side to conduct advanced AI research" (MIT News Office 2017) to transform higher education and research centers. The American Library Association (ALA) has highlighted the importance of AI for libraries in the future (ALA 2019). Personalized learning promises that every student will experience an educational approach that is tailored to his or her individual abilities and needs, increasing students' motivation and reducing their likelihood of dropping out. But for AI-based learning systems to work correctly, big data on every student would be needed to train the system, and this could bring ethical issues; students might disagree on how their data might be shared and used by AI algorithms (Wachter and Mittelstadt 2019).

Information Discovery by Users

Another AI application in libraries that will grow exponentially is user discovery with its potential to help patrons with more accurate search results (Li, et al 2019). Traditionally, research and discovery methods use MARC formats as standards for representing and communicating bibliographic and related information in machine-readable form. But new methods are being developed by which "AI-based discovery services such as Yewno reach into the digital text to promote discovery via concepts generated from the full texts themselves" (Pun 2019). SCONUL also believes AI and ML are likely to be at the heart of "'datafied' scholarship – research increasingly underpinned by large datasets and digital artefacts, involving open, networked, algorithmically-driven systems" operating in a networked research environment with the potential to replace traditional methods of dissemination and discovery (Pinfield, Cox, and Rutter 2017, 4).

Text and Data Mining

In addition to the impact on search and discovery, TDM is becoming a growing practice and has already been outlined with its capacity for interpretation of large bodies of raw and processed data through the identification of patterns. Article

2 (2) of the DSM Directive defines TDM as "any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations" (Directive 2019/790 2019). As the scale of published information increases, TDM uses algorithms to analyze large bodies of content in search of patterns and information in much reduced periods of time compared to a human reader, while bringing new insights and understanding in many fields of knowledge (Sag 2019). Without connections being explicitly identified or mentioned in papers, for example, TDM can be used in linguistics to analyze large bodies of text to extract syntactic or grammatical patterns (Hugenholtz 2019); in medicine, TDM could find associations between a gene and a disease, or between a drug and an adverse event (Borghi n.d.); and in general, TDM is nowadays standard practice in pharmaceutical research, journalism, information retrieval, and consumer information (Eskevich and Van den Bosch 2016). In the next section, the legal approach taken by different countries is examined as TDM norms are becoming uneven, fragmented, and complex for libraries, researchers, and users of information (Caspers et al 2017).

The Copyright Landscape Affecting TDM Research

TDM can unlock new research capabilities in scientific and scholarly literature but to perform effectively, TDM needs full access to data from text materials and databases. There are currently two primary possibilities for lawful data access: one option is to obtain open access materials that are freely available for download and reuse; a second option is to use materials limited by copyright restrictions and typically subject to specific permission rules for access and manipulation. A third possibility is to use public domain texts in which copyright has expired or was never attached. Under the first option, contents are commonly made available for download under a Creative Commons or similar license that allows a more open redistribution and reuse than a traditional copyrighted work. Open access publications are on the rise with databases such as PubMed Central containing more than seven million full-text articles for text mining and other types of reuse. The second option is to access content from publishers' subscription-based journals, which restricts access to their publications under the applicable copyright legislation or negotiated purchasing contracts. Some cross-publisher collaborations provide access to subscription-based content but do not seem to provide researchers with comprehensive access to the published literature to conduct TDM research (Carroll 2019).

When copyright is the limitation for access to content, every country has a distinct set of rules to allow, limit, or possibly forbid TDM activities. Some countries have developed specific rules for TDM use such as Japan with Article 47 (Japan 2020), United Kingdom (UK Copyright Act 2020) with Section 29A, and Germany with § 60d on TDM (Germany. Urheberrechtsgesetz, UrhG/Act on Copyright and Related Rights 2017). The EU DSM Directive explicitly includes an exception for TDM research activities (Directive (EU) 2019/790 2019) whereas other countries like the US have allowed TDM specific activities through the existing fair use doctrine. Countries that have not addressed TDM through legislation or court rulings, may allow TDM research through copyright exceptions and limitations such as the right to research, reprography, private or personal use, digital storage, or low TPMs. There are other examples of countries where domestic copyright legislation has a restrictive interpretation blocking any possibility for TDM research (Flynn et al 2020).

Comprehensive legislation on TDM is an essential tool for libraries so they can assist their patrons and users to legally access materials and databases within their collections, make reproductions, store the information, and share the results without any copyright violations (IFLA 2020). Countries have diverse regulations on how TDM is allowed to be performed.

TDM Legislation

Regulations on TDM usually come as an exception within the current copyright regime, allowing users to mine copyright works to which they have lawful access. Such an exception enables researchers and other legitimate users to undertake data mining on substantial amounts of data, as TDM is a new vital tool for research and academic libraries. Support for TDM commonly includes access to legally accessed materials, not only on-site but remotely, and with the right to retain copies for storage and further study (IFLA 2020). Few countries have passed legislation to allow TDM activities, as many others are still updating their laws. In the following sections, the recently passed copyright exception and limitation provisions from the European Union (EU), United Kingdom (UK), Germany, and Japan are discussed.

European Union

The EU is modernizing its copyright rules in response to new consumer behaviors with the adoption of various directives regarding the new digital environment

(European Commission 2021). In 2017, for example, a regulation was passed on cross-border portability of online content services to allow consumers who buy or subscribe to films, sports broadcasts, music, ebooks, and games, to access the content as they travel within EU countries (European Commission 2018). Likewise, in 2017 a Directive and a Regulation implemented the Marrakesh Treaty in the EU to allow content access for the blind, visually impaired, or otherwise print disabled people [hereinafter the Marrakesh Directive] (Directive (EU) 2017/1564 2017; Regulation 2017/1563) and in 2019, the DSM Directive adopted new copyright L&Es focusing on the online availability of content across the EU, including exceptions in Articles 3 and 4 on TDM (Directive (EU) 2019/790; Geiger, Frosio and Bulalyenko 2018).

Articles 3 and 4 of the DSM Directive aim to provide a harmonized environment for researchers across Europe. First, the Directive creates mandatory L&Es for researchers carrying out TDM projects, which guarantees a more uniform implementation across Europe. Second, the L&Es cover both commercial and non-commercial uses making research available for legally accessed materials. And third, contractual provisions created by rightsholders cannot override the non-commercial usages while protecting TDM research from the contractual enclosure (Geiger, Frosio and Bulayenko 2018); but the two exceptions are not equally robust as the commercial use of Article 4 can be restricted by private agreements (Eskevich and Van den Bosch 2016), as outlined below.

DSM Directive Article 3

Article 3 creates a mandatory copyright exception for non-commercial scientific research performed with TDM. Any contractual provisions contrary to the TDM exception shall be unenforceable, and the TDM project can only be advanced by research organizations or cultural heritage institutions. The exception includes reproductions, extractions, and storage of works; but the user requires lawful access. To fully comprehend the scope of Article 3, it is necessary to review the beneficiaries of the exception, research organizations, and cultural heritage institutions; the conditions of use such as lawful access and TPMs; as well as the limitations that the DSM Directive TDM provision will encounter compared to other domestic legislation.

Beneficiaries of the Exception

Under the DSM Directive, the first group of beneficiaries of the exception, research organizations, is outlined in Recital 12 and includes a wide variety of entities whose primary goal is to conduct scientific research and/or educational services. It encompasses universities and their libraries, research institutes, or any other entity, such as hospitals, that carry out research. The Directive limits the research organization by requiring it to operate under a not-for-profit basis, reinvest all profits into its scientific research, or work under a public interest mission recognized by a European Member State. Recital 11 allows research organizations to benefit from the exception when their research activities are carried out in the framework of public-private partnerships, but organizations for which commercial enterprises have a decisive influence on the research project, such as shareholders or members that could obtain preferential access to the research results, are not considered research organizations for the DSM Directive. "Public broadcasting organizations and commercial research institutes, for example, are therefore excluded from the scope of Art. 3, but might still find solace in Art. 4" (Hugenholtz 2019).

The second group of beneficiaries of the TDM exceptions in Recital 13 and Article 2(3) is cultural heritage institutions. The DSM Directive defines them as any "publicly accessible library or museum, an archive or a film or audio heritage institution." The definition includes libraries and museums, notwithstanding the type of works they hold in their permanent collections and archives. It includes national libraries and archives, as well as any in educational establishments, research organizations, or public sector broadcasting organizations. Since the definition is so ample, some cultural heritage institutions could be included as research organizations. However, the exception does not apply to the general public and there is no overarching right to TDM for members of the public to engage in non-commercial research purposes. Unaffiliated individuals or researchers are clearly excluded from the DSM Directive, as contrasted with the UK situation which includes unaffiliated researchers within its TDM exception in § 29A (UK Copyright, Designs and Patents Act 1988 2020).

Lawful Access

Regarding the usage conditions, lawful access is a big player in the TDM process. Lawful access in Recital 14 of the DSM Directive covers content available under an open access policy, or through contractual arrangements between rightsholders

and the beneficiaries of the exception, research organizations or cultural heritage institutions.

Open access content refers "to scientific information that is free of charge to the user and that is reusable" (European Commission 2020). Programs and expert groups on open data include OpenAIRE and the European Open Science Cloud (EOSC). An example of institutional policies for open access in the US is provided by the University of California: "Each Faculty member grants to the University of California a nonexclusive, irrevocable, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles, in any medium, and to authorize others to do the same, for the purpose of making their articles widely and freely available in an open access repository" (University of California Academic Senate 2020).

Contractual arrangements for content cover subscriptions and content that is freely available online. Recital 14 states: "[I]n the case of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto and covered by those subscriptions should be deemed to have lawful access". Thus, the lawful access condition is divided between free and paid services. When lawful access for users is linked to institutional subscription services payments, the organization's budget capacity comes to play an essential role. "Only a few research organisations will be able to acquire licenses for all databases that are relevant for a TDM research project" (Geiger, Frosio, and Bulayenko 2020, 29) which in turn will limit the development of TDM for a relevant number of research organizations. If each institution's funding capacity determines the research results in TDM, lawful access conditions will grow the differences between institutions and might increase the scientific and innovation gap between developed and less developed European nations.

The limitations to lawful access for content attached to a paid subscription have been highlighted by examples of restrictions imposed on copyrighted content during the COVID 19 pandemic. Craig and Tarantino noted:

> Unfortunately, however, at the institutional level, there typically remains a great deal of uncertainty around what constitutes lawful fair dealing practices, and a reluctance to rely on the user rights of students and educators in the face of threats of litigation and liability. With increasing uncertainty around this question in Canada, we can expect to see educational institutions continue their cautious approach to educational copying, entering costly and restrictive commercial licenses, purchasing expensive paper and digital copies, and imposing onerous limits and responsibilities on instructors tasked with continuing to satisfy learning objectives under ongoing quarantine conditions. Here, as elsewhere, the COVID-19 crisis has only revealed and exacerbated long-standing problems in our copyright system and its operationalization (Craig and Tarantino 2020, 26).

Lawful access also presents an additional layer of control. Article 3 (3) of the DSM Directive allows rightsholders to apply TPMs "to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective". Dusollier notes:

> Despite the expressed intention of the European lawmaker to safeguard a balance between the rights of the copyright holders and the interests of the users and society at large, the anti–circumvention provisions give the rights owners preference: the protection is broad and surely extends beyond the boundaries of copyright; the exceptions are overridden, albeit the empty promise of the article 6(4) (2003, 462).

Recital 16 of the DSM Directive goes further to explain the reasoning behind the provision and frames the application of a potentially high number of access requests and downloads of works. Hence, rightsholders can use TPMs for cases where their systems or database security and integrity could be jeopardized. But the Directive also sets a recommended balance between TPMs and security risks, as they both should "not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception".

Questions have been raised regarding the reach of the Article 3 exception, as it puts the EU in a disadvantageous AI research position (Samuelson 2018; Drexl et al 2019). While the EU divides the TDM regime between non-commercial and commercial use, other countries such as the US and Japan have avoided that approach, allowing TDM without regard for the commercial purpose or the type of user. As already noted, the US court rulings of *Google* and *HathiTrust* have allowed commercial use of TDM research under fair use exceptions. And Japan, the first country to pass a TDM copyright provision, does not distinguish between commercial and non-commercial use, the information analysis does not necessarily have to be conducted for scientific research purposes, and TDM is open to all users. This approach follows Japan's objective to promote the development of AI and big data industries (European Alliance for Research Excellence 2018). Consequently, EU firms might ship offshore their TDM research to places with less restrictive TDM legislation, or non-EU firms may avoid investing in TDM research in the EU because of the DSM Directive restrictions (Samuelson 2018).

DSM Directive Article 4

Contrary to Article 3, Article 4 creates an exception that has no restriction on the type of user or the commercial purpose; however, the exception can be overridden

by contractual agreements or a unilateral declaration (Quintais 2020). It includes all kinds of users without regard to any affiliation: any organization, corporation, or individual researcher can make use of the TDM exception. In addition, Article 4 allows any reproduction and extraction of lawfully accessible works whether for commercial or non-commercial use. But the exception does give rightsholders an opt out option: it is applicable only on condition that the rightsholders have not expressly reserved the use of works.

This Article brings a separate legal regime for TDM practice, as the marked differences with Article 3 make it more of a business transaction. Article 4 is a provision that allows any person or organization to engage in TDM projects for any purpose, as long the rightsholder consents to the use. Article 4(3) and Recital 18 give the rightsholders the option to reserve their rights by "the use of machine-readable means, including metadata and terms and conditions of a website or a service". But they can also reserve their rights by other means, "such as contractual agreements or a unilateral declaration". In practice, a publisher is free to control access for commercial use, to license by contractual agreements, or to unilaterally block or prohibit any use of its works. The risk comes, as stated by Hugenholtz, if publishers "offer paid-for text and data mining as value-added services and will be reluctant to grant TDM licenses to third parties" (Hugenholtz 2019). As a result, Article 4 could effectively create and legitimize a derivative market for TDM activities through contracts, licenses, and even exclusivity over works and content.

Article 4 could also put the EU in a disadvantageous research position, as the opt out option in the DSM Directive does not match other jurisdictions' least restrictive TDM provisions. At the forefront of TDM open regulations, Japan allows any TDM use, including commercial research, without any rightsholder compensation. Japan's legislation also allows a TDM user to be free of a rightsholder's economic retribution when accessing data or information, making incidental electronic copies of the works, or during database research. Similarly, since the *Google* case in the US, corporations may engage in TDM projects without any rightsholder compensation if they meet the required fair use conditions Some countries that lack specific provisions to limit the use of TDM, like Belize (Belize 2000), Barbados (Barbados 1998), or Panamá (Panama 2012), may allow free exploitation under fair dealing or Article 9(2) of the Berne Convention. These alternative markets might encourage researchers, organizations, and corporations to explore nations with fewer limitations on TDM projects.

United Kingdom

> After several studies assessing costs and benefits of a copyright reform, the UK was the first Member State to adopt a TDM exception on 19 May 2014. The UK Copyright, Designs and Patents Act 1988 has provided for a text and data analysis exception for non-commercial research. According to UK law, the making of a copy of a work by a person who has lawful access to that work does not infringe copyright if it is made so that that person can carry out a computational analysis of anything included in that work for non-commercial research purposes. The exception does not cover reproduction of databases (Geiger, Frosio and Bulayenko 2020, 22).

The text of Article 29A of the UK's *Copyrights, Designs, and Patents Act* reads: "a person who has lawful access to the work may carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose". The scope of the exception was framed after Article 5.3(a) of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society [hereinafter InfoSoc Directive], a norm that requires a scientific research purpose with a non-commercial character (Directive 2001/29/EC 2001).

Article 5(3) is not a mandatory exception for EU members.

> With the exclusion of temporary copies (Article 5(1)), exceptions and limitations are *optional* for EU Member States to implement. All L&Es are subject to the three-step test contained in Article 5(5): they shall only be applied in certain exceptional cases, which do not conflict with a normal exploitation of the work or other subject matter, and do not unreasonably prejudice the legitimate interests of the rightholder (Rosati 2019, 128).

The UK government therefore made an active choice to introduce a TDM exception to UK law, stating: "This will enable key research without undermining publishers' control over IT systems or commercial exploitation" ("Modernising Copyright" 2012, 37). As stated by the UK Intellectual Property Office, the creation of the exception does not mean that "researchers or companies can now access material for free, as researchers or their institutions still have to buy access to content if that is the business model of the publisher" (UK Intellectual Property Office 2014, 5).

But non-commercial use is not the only relevant restriction to the UK exception. A second meaningful restriction requires the person undertaking the research to already have lawful access to the works to be used (Article 29A (1)). The UK Intellectual Property Office defines lawful access as being where "researchers have the legal right to access a copyright work to read it" (UK Intellectual Property

Office 2014, 7). Very similar to the limits of the DSM Directive, content that may be lawfully accessed includes journals and database subscriptions, and works published under open licenses including Creative Commons and Open Government licenses. But as seen above with the DSM Directive, the link to subscription services payments means the researcher's budget capacity comes to play an essential role and risks increasing the scientific and innovation gap for UK researchers.

The third significant limitation comes from Article 29A (2), as the exception applies only to reproduction but not communication of the work. Contrary to other TDM exceptions that allow reproduction and sharing of the work, Article 29A (2) does not allow the researcher "to share the TDM research information to any other person" except where the transfer is authorized by the copyright owner. The UK Intellectual Property Office is clear on this restriction, stating works "can't be shared, sold, or made publicly available in any way and anyone doing so could be sued for copyright infringement" (UK Intellectual Property Office 2014, 7). And even though article 5(3) of the InfoSoc Directive that inspired Article 29A, allows both reproduction and communication, the UK decided to preclude the communication option in its own law. In TDM research, sharing the results is an essential second part of the process. Sharing helps develop knowledge as it allows other researchers to collaborate, or even develop new research projects from the same information. Sharing data performs the same function as a book does when it is published, printed, distributed and makes the information contained available for discovery and use. Other countries' legislation allows sharing of TDM: Germany allows sharing within a close research circle, even for third parties to review results; Japan allows sharing without restrictions.

As a result, the UK TDM copyright exception might be ripe for review. Since the exception was framed before Brexit and partially inspired by Article 5(3) of the InfoSoc Directive, the UK may consider new rules for engaging TDM research that would align with the current international approaches, or even, with the DSM Directive. But even though the DSM Directive might be a starting point for reform, including a mandatory commercial use as in Japan or the US, it might also bring better competitive results for UK researchers. Framing exceptions on par with the most forward-looking countries could also bring international projects to the UK.

Germany

Germany and other European countries, for example, France, that had passed copyright exceptions on TDM before the DSM Directive will need to adjust their norms to reflect the new EU TDM exceptions. Contrary to some parts of Articles 3 and 4 of the DSM Directive, section 60d of the German Copyright and Related

Rights Law (Germany. Urheberrechtsgesetz, UrhG/Act on Copyright and Related Rights 2017) creates an exception for TDM limited to non-commercial purposes. The German exception allows researchers to reproduce the copyrighted material to create a corpus of data, but only allows the work to be available to a specifically limited circle or to third parties to monitor the quality of scientific research (Geiger, Frosio and Bulayenko 2020, 23). This restriction is not included in the DSM Directive. Furthermore, section 60d requires that, once the research work is finalized, the corpus and the source material's reproductions need to be deleted unless sent to libraries, archives, museums, or educational establishments for long-term storage (Articles 60e and 60f). Again, this disposition would be contrary to the DSM Directive.

Japan

Japan was the first country to amend its copyright law in 2009 to include a TDM exception (Japan. Copyright Act 1970), which was later modified by a 2018 amendment that broadened the exception scope (Japan. Copyright Act 2020). The 2009 TDM provision was introduced to allow computer information analysis, authorizing reproduction and adaptation of works used for TDM projects. The exception included a broad definition of informational analysis, had no commercial use restrictions, and the TDM projects did not need to be carried out exclusively for scientific research purposes (Caspers and Guibault 2016). But the exception also had some relevant limitations: all the TDM tasks were required to be performed exclusively using a computer, which brought questions regarding future applicability if new technologies came into play. Some commentators noted that while "The Japanese list of detailed exceptions has the merit of clarifying a number of potential legal uncertainties in the online environment, it has the disadvantage of being bound by state-of-the-art technologies. As soon as technology changes, the list might need to be updated" (Borghi and Karapapa 2013, 62).

The exception also suffered from a lack of clarity, and seemed to exclude raw data, as well as databases (Triaille, De Meeûs d'Argenteuil, and De Francquen 2014). Issues of uncertainty were raised by others.

Hence, the Japanese TDM exception appears to cover a broad range of TDM exceptions, both commercial and non-commercial, and both for research and other purposes. However, there are some concepts in the exception that are not entirely clear and may cause uncertainty, especially the last phrase of the provision (Caspers and Guibault 2016, 69).

The limitations and uncertainties in the law created the need for an amendment to the 2009 TDM copyright exception and the 2018 Amendment introduced

additional TDM provisions, while offering a broader scope for TDM and the technologies involved (Ueno 2021). Article 30–4 expanded the scope of works for TDM use, while introducing the types of exploitation that can be performed. The article allows the exploitation of any copyrighted work that is not intended for enjoying or causing another person to enjoy the ideas or emotions expressed in such work (Ueno 2019).

The definition of enjoying becomes a key element to set the reach of the limitation. Ueno notes that in Japan "copyright is a right protecting only an interest in the inherent exploitations aimed at 'enjoying' or causing another person to 'enjoy' a work". He refers to the Japanese Copyright Office (JCO) perspective:

> that the economic value of a work is normally realized when a person who views or listens to the work pays compensation for such work in order to enjoy the ideas or emotions expressed in a work and satisfies the person's intellectual or emotional desires (Ueno 2019, Slides 10–12).

Acts performed not for the purpose of enjoying the ideas or emotions expressed in a work would not prejudice the interests of the copyright holder. Examples of non-enjoyable uses are given in article 30–4(iii) with works used during computer data processing that do not involve perceiving the "expressions through the human sense".

Article 30–4(ii) gives an even broader reach to the TDM exception as it offers a comprehensive inclusive list of foreseeable steps in a TDM project. For the Japanese copyright law, it is permissible to exploit work, "in any way and to the extent considered necessary". This includes actions such as the "extraction, comparison, classification, or other statistical analysis of language, sound, or image data, or other elements of which a large number of works or a large volume of data is composed". The Article gives the right to extract all the required works, classify and compare them, run any TDM process, as well for processing statistical analysis of all types and sizes of works, thus eliminating any possibility of restricting AI data processing.

Japan copyright TDM exceptions show the most open legislation for TDM use. Contrary to the exceptions of the European DSM Directive, the UK, or Germany, Japan offers an exception flexible enough to offer an open environment for research and exploration of a broad spectrum of TDM projects, limited only if there is an enjoyment of the work that is being used.

Court-based TDM

United States

There are diverse cases that need to be considered to determine the legality of TDM in the United States, as the law is not specifically covered by statute. Cases such as *Williams & Wilkins Co. v. United States*[3], *Authors Guild, Inc. v. Google, Inc.*[4], and *Authors Guild, Inc. v. HathiTrust*[5], already mentioned, have built a solid legal precedent to allow TDM in the United States (Sag 2019). This section concentrates on explaining the fair use statute and naming the key cases for TDM in the United States.

The Law of Fair Use and TDM

Copyright fair use doctrine was initially developed by the Courts in the US to allow unauthorized copying of copyrighted works where it was beneficial to society. *Folsom v. March*[6] is regarded as the first case. Courts developed fair use to further the United States Constitution Art. I, § 8, cl. 8 purpose of promoting the "progress of science and useful arts". Latman (1958) outlines the history of fair use before codification. Samuelson (2017) discusses ten types of justifications for L&Es and considers the relative utilities of specific and open-ended L&Es. While authors are one of the intended beneficiaries of copyright "the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship" (*Authors Guild, Inc. v. Google, Inc* 2015, 13).

Courts have recognized that the ultimate goal of copyright is to "expand public knowledge and understanding" (*Authors Guild, Inc. v. Google, Inc* 2015, 12) while giving creators limited temporary monopoly over their works. Fair use also provided a First Amendment safety valve (Cunard, Keller, and Potenza 2021). Related case law includes *Eldred v. Ashcroft*[7], *Harper & Row Publishers, Inc. v.*

3 Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd by an equally divided Court, 420 U.S. 376 (1975).
4 Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).
5 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).
6 Folsom v. Marsh, 9. F.Cas. 342 (C.C.D. Mass. 1841).
7 Eldred v. Ashcroft, 537 U.S. 186, 219-20 (2003).

Nation Enterprises,[8] and *National Rifle Association of America v. Handgun Control Federation of Ohio*[9] and so,

> as the 20th century wore on, the uncodified fair use doctrine became the main common law limit on copyright's exclusive rights. Cases typically involved parodies and burlesques, scholarly, quotations, critical commentary, and news reporting, although not all of the defenses prevailed (Stephenson 2017, 19).

Fair use was codified with Section 107 of the 1976 Copyright Act (US Copyright Act 2021) which formalized fair use into a four-factor statute. The four factors used to determine if the use made of a work in any particular case is fair are:

1. The purpose and character of the use
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole, and
4. The effect of the use upon the potential market for or value of the copyrighted work.

The US Copyright Office (2021) provides guidelines to the four factors. Under the first factor, the Court considers the extent to which the new work is "transformative". As *Mattel, Inc. v. Walking Mountain Productions*[10] states, the work must add "something new, with a further purpose or different character, altering the first with new expression, meaning, or message". Under the second factor, the Court considers whether the copyrighted work is "of the creative or instructive type that the copyright laws value and seek to foster'' (Leval 1990, 1117; Patry 2021, § 4.1). This factor rarely plays a significant role in the determination of a fair use dispute. The third factor "asks whether the amount and substantiality of the portion used in relation to the copyrighted work as a whole, are reasonable in relation to the purpose of copying" as in *Dr. Seuss Enters, L.P. v. Penguin Books*.[11] Under the fourth factor, Courts must question "whether actual market harm resulted from the defendant's use... and whether 'unrestricted and widespread conduct of the sort engaged by the defendant ... would result in a substantially adverse impact on the potential market' for the original or its derivatives" as noted in *Campbell v. Acuff–Rose Music, Inc.*[12]

8 Harper & Row Publishers, Inc. v. Nation Enterprises 471 U.S. 539, 560 (1985).
9 Nat'l Rifle Ass'n of Am. v. Handgun Control Fed'n of Ohio, 15 F.3d 559, 562 (6th Cir. 1994).
10 Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 800 (9th Cir.2003).
11 Dr. Seuss Enters., L.P. v. Penguin Books, 109 F.3d 1394, 1399 (9th Cir.1997).
12 Campbell v. Acuff–Rose Music, Inc., 510 U.S. 569 (1994).

Each of the four factors is to be examined independently and then weighed against each other. In *Campbell* the court found that Section 107's four factors are not to "be treated in isolation… all are to be explored, and the results weighed together, in light of the purposes of copyright". *Authors Guild, Inc. v. Google, Inc.*[13] noted that each factor is part of the question of "how to define the boundary limit of the original author's exclusive rights in order to best serve the overall objectives of the copyright law to expand public learning while protecting the incentives of authors to create for the public good". The court noted:

> Notwithstanding fair use's long common-law history, not until the Campbell ruling in 1994 did courts undertake to explain the standards for finding fair use. The Campbell Court undertook a comprehensive analysis of fair use's requirements, discussing every segment of § 107… the Court made clear that they are 'illustrative and not limitative' and 'provide only general guidance about the sorts of copying that courts and Congress most commonly ha[ve] found to be fair uses'. … The statute 'calls for case-by-case analysis' and 'is not to be simplified with bright-line rules'.

Other relevant cases with similar findings include Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc.[14] and Cariou v. Prince.[15]

Aufderheide and Jaszi note that fair use has been an ever-evolving concept. From the 1960s to the 1990s, fair use had been understood as an exception that could be used only "if your activities did not invade the copyright holder's market in any way" (Aufderheide and Jaszi 2018, 88). However, in the 1990s, Leval questioned the way fair use has been understood, or intuitively managed by the courts:

> Judges do not share a consensus on the meaning of fair use…The opinions reflect widely differing notions … decisions are not governed by consistent principles but seem to result from intuitive reactions to individual fact patterns (Leval 1990, 1106–7).

Leval advocated for an interpretation more focused on the transformative purpose than on the effect of the use on the potential market or value of the copyrighted work supported this position, holding that a transformative purpose makes the first factor more likely to favor fair use. Since *Campbell*, the reading of fair use has expanded to give more weight to the transformative element. If the purpose is transformative, it should not matter if the use is commercial or not, and a fair use should be acknowledged.

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13 Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

14 Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 141–42 (2d Cir.1998).

15 Castle Rock Entertainment, Inc. v. Carol Publishing Group, Inc., 150 F.3d 132, 141–42 (2d Cir.1998); Cariou v. Prince, 714 F.3d 694, 708 (2d Cir.2013).

Fair Use Research and TDM Cases

The 1973 case of *Williams & Wilkins Co. v. United States*[16] was the first relevant case on institutional and systematic unauthorized copies for research purposes. In *Williams & Wilkins Co*., a publisher of medical journals sued a government medical research institute and its library for copyright infringement. The Department of Health, Education, and Welfare, through the National Institutes of Health (NIH) and the National Library of Medicine (NLM), made unauthorized photocopies of some articles from the publisher's scientific journals *Medicine*, *Journal of Immunology*, *Gastroenterology*, and *Pharmacological Reviews*. The medical researchers who asked for the copies were scientific researchers and practitioners who needed the articles for personal use in their scientific work, and there was no intention to duplicate them for sale or other general distribution. The institutions concerned restricted copying to a single copy of a single article with a limited extension of fifty pages.

Based on the type and context of use, the Court found no infringement as the challenged use was considered fair. The court used the fair use fourth factor to reach its decision. The plaintiff failed to prove its assumption of economic detriment, in the past or potentially for the future. As noted by the Court "[t]he record did not show a serious adverse impact, either on plaintiff or on medical publishers generally, from the photocopying practices of the type of NIH and NLM." Hence, the publisher did not show the hypothetical assumption of market loss as a proven fact. But the Court did find that an injury to medical and scientific research could be caused if photocopying of this kind would be held unlawful. The Court ruled in favor of the defendants. The case became relevant as libraries were authorized to make copies for research purposes.

Most recently, two court rulings must be examined to determine if they allowed institutional and systematic unauthorized copying for TDM in the US, the previously mentioned cases: *Authors Guild, Inc. v. Google*[17] and *Authors Guild, Inc. v. HathiTrust*.[18] In the *Google* case, the Court allowed Google to make unauthorized digital copies of copyright-protected works in order to enable search functionality, and display snippets from those works. In the *HathiTrust* case, the Court allowed the libraries of the HathiTrust project to digitize copyrighted works for the purpose of permitting full-text searches. It also allowed member libraries

16 Williams & Wilkins Co. v. United States, 487 F.2d 1345 (Ct. Cl. 1973), aff'd by an equally divided Court, 420 U.S. 376 (1975).

17 Authors Guild, Inc. v. Google, Inc., 804 F.3d 202 (2d Cir. 2015).

18 Authors Guild, Inc. v. HathiTrust, 755 F.3d 87 (2d Cir. 2014).

to provide patrons with certified print disabilities access to the full text works, and for the libraries to preserve the copyrighted books in digital form.

Both cases were decided on appeal by the Federal Court of Appeals of the Second Circuit and found to be sufficiently transformative to be covered by the copyright fair use exception. In the *HathiTrust* case the Court concluded that the creation of a full-text searchable database is a transformative use. When performing a word search the result is different in "purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn". Hence, there is little or no resemblance between the original work and the results of the HathiTrust Digital Library full-text search.

In the *Google* case, the Court found that Google's making of a digital copy of plaintiffs' books for search purposes was also transformative: "The purpose of enabling a search for identification of books containing a term of interest to the searcher involves a highly transformative purpose". Google's purpose was to make available significant information about the copied works, allowing searchers to find the works that contained a word of interest; also, the N-grams function allowed readers to learn the usage frequency in the aggregate corpus of published books for different historical periods. The two functions proved transformative enough to favor fair use.

It is important to note that the *HathiTrust* and *Google* cases show that both commercial and non-commercial use of TDM are allowed in the United States: HathiTrust is a nonprofit educational entity while Google is a profit-motivated commercial corporation. In each case TDM was allowed after fair use transformative requirements were met. If a new work adds something with a further purpose or different character thereby altering the source material with fresh expression, meaning, or message, it fulfils the transformative requirements of the first fair use factor. Once the requirements are met, as reflected in the *Campbell* finding, the "significance of other factors, like commercialism, that may weigh against a finding of fair use" are lessened. Other cases on systematic and institutional copying of images for transformative purposes when the copies served a different function from the original include: *Kelly v. Arriba Soft Corp*[19], *Perfect 10, Inc. v. Amazon.com, Inc*.[20] and *A.V. ex rel. Vanderhye v. iParadigms, LLC*.[21]

Although current cases appear to allow commercial and non-commercial use of TDM in the US, questions remain for several other problematic topics. There is no specific answer on how to address issues arising under contract law, laws pro-

19 Kelly v. Arriba Soft Corporation, 280 F.3d 934 (9th Cir. 2002) withdrawn, re-filed at 336 F.3d 811 (9th Cir. 2003).

20 Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007).

21 A.V. ex rel. Vanderhye v. iParadigms, L.L.C., 562 F.3d 630 (4th Cir. 2009).

hibiting the circumvention of TPMs, or cross-border copyright issues (Sag 2019). The possibility of libraries creating mineable datasets from procured content also raises questions. As noted earlier in this chapter, what happens when a TDM research project uses catalogs of libraries in different countries? Can researchers develop TDM projects without legal access to the data or the information? Would it still be legal to perform TDM if access is from an infringing source such as Sci-Hub (Carroll 2019, 893)? Is it possible to engage in international projects and share the results of the contents? Can librarians negotiate to eliminate or reduce contractual restrictions on researchers' rights to engage in TDM? As technology advances, more questions will emerge on how to harmonize copyright laws with user access and innovation.

Reforming the Copyright Landscape to Enable Libraries to Support TDM Researchers

Comprehensive legislation on TDM is an essential tool for libraries to enable them to provide support to users in legally accessing materials and databases, making reproductions, and storing information. Libraries can focus on licensing, digitizing or creating their own content in ways that maximize researchers' abilities to share (IFLA 2020). An adequately structured TDM exception would allow researchers to develop TDM projects with both open access materials and subscription-based content; facilitate TDM for commercial and non-commercial use; and build TDM analysis and projects not limited to scientific research purposes.

> TDM need not come at the expense of rights holders. These reproductions do not compromise the core interests of exclusive rights, which is to prohibit unauthorized reproductions that can substitute for the work of the author. It could even be argued that these incidental reproductions are outside of the scope of exclusive rights (Flynn et al 2020, 4).

An appropriate TDM exception similar to that in Japan would enable the use of lawfully accessed materials without the need to inform or seek permission from publishers, provide libraries the tools to disregard contractual provisions and licenses that conflict with TDM, and reduce restrictions on access to subscription-based content. An open TDM exception would allow storage of the corpus, or the copies generated with TDM, provide the option to share any TDM project results, and provide open access for all types of users, including but not limited to researchers, academics, non-profit or profit-based organizations, to engage in TDM.

But as seen in the previous sections, most of the regional or domestic laws on TDM lack many of the characteristics described as needed. For example, as already noted, TDM articles recently passed within the DSM Directive in Europe will be incompatible in parts with the 2018 Japanese TDM copyright reform or the recent Google or HathiTrust rulings of the United States Court of Appeals for the Second Circuit. While Europe and the UK distinguish commercial and non-commercial use, Japan and the US make no such distinction. And while Germany limits the sharing to a close group of researchers, Japan allows free sharing with no restrictions. While commercial use in Europe can be opted out by contracts, in the UK commercial use is not even permitted by the TDM exceptions.

Most developing countries have not yet initiated the process of updating their laws for existing TDM practices. Sean Flynn in his statement at the WIPO Conversation on IP and AI in July 2020 said:

> Many countries have rights to reproduce materials for research purposes that are broad enough to permit text and data mining to train AI and for other purposes. But many laws are inadequate because they are restricted to non-commercial uses, excerpts of works, or do not extend to the communications between researchers necessary to enable collaboration and validation (Flynn 2020).

An alternative option for domestic jurisdictions may be to adopt flexible interpretations of existing L&Es, such as the right to research, digital reprography, or private or personal use exceptions. However, not having explicit rules on the matter could bring high levels of uncertainty given the constant new AI technological developments to explore and exploit information. Countries with a restrictive interpretation of L&Es, such as Argentina, will foreseeably forbid librarians to allow any TDM on their available holdings.

As stated by Okediji in a paper arguing that development interests require different kinds of L&Es to the ones currently reflected in international copyright law, there are relevant benefits for the harmonization of basic copyright laws to allow the cross-border flow of information (Okediji 2019, 689, 709). TDM requires a comprehensive international environment of legal rights to grow as a worldwide source of knowledge. While reviewing possible copyright legal provisions involved in the ML process, the following considerations must be borne in mind.

Four Evaluation Points

First, lawful access as a requirement for TDM should be re-examined. Lawful access covers content based on open access, or through contractual arrangements between rightsholders and beneficiaries. But the limitations to lawful access do not come with open access, but with content attached to a paid subscription as demonstrated by examples of restrictions imposed on copyrighted content during the pandemic COVID 19. At the institutional level, there typically remains uncertainty around what constitutes lawful fair dealing practices, and if lawful access remains a requirement, budget capacity will mean that only a few research organizations will be able to acquire licenses for all databases relevant for a TDM research project which will limit the development of TDM for research organizations.

Second, the division between commercial and non-commercial use should be eliminated. The Japanese approach should be adopted which does not distinguish between the two types of use and promotes the development of AI and big data industries. Firms may avoid investing in TDM research in countries where commercial restrictions are in place, or ship offshore their TDM research to places with no such distinction.

Third, communication and distribution of TDM data, research, corpus, or results should be guaranteed. In a TDM project, sharing information comes as a second important part of the process, as it allows other researchers to collaborate, or even develop new research projects from the same information. Most legislation allows some sharing of TDM: the DSM Directive allows it, Germany allows sharing within a close research circle, even for third parties to review results, and Japan allows sharing without restriction.

Fourth and foremost, the use of works for non-expressive or enjoyable purposes should be allowed for TDM exploitation. As with the Japanese law, laws should allow exploitation of copyrighted work in any way that is not intended for enjoying or causing another person to enjoy the ideas or emotions expressed in such work. The approach would legalize TDM and other uses based on computer data processing that do not involve perceiving the expressions through the human sense. A similar approach has been expressed by rulings in the US when speaking about the idea/expression dichotomy common to all copyright law and expressed in Section 102(b) of the Copyright Act.

As noted by Sag:

> The Google Books and HathiTrust cases held, in effect, that copying expressive works for non-expressive purposes was justified as fair use… copyright law is concerned with the communication of an author's original expression to the public. TDM and other non-expressive uses do not communicate original expression to the public… As such, even though

these uses involve technical acts of copying, they do not conflict with the copyright owner's exclusive rights (Sag 2019).

Conclusion

The copyright panorama offers an uneven, divided, uncertain scenario for libraries around the world. Each library depends on its domestic or regional copyright laws. Access to materials remains restricted. TDM research in different fields of knowledge continues to depend on variable copyright restrictions. Inconsistent and conflicting copyright instruments put libraries and their users in unfavorable positions and the absence of uniform legislation has the potential to increase the scientific and innovation gap between developed and less developed nations.

Japan and the US stand as examples on how to legislate and allow space for TDM. To foster innovation and facilitate TDM research, countries must eliminate barriers including lawful access requirements, distinctions between commercial and non-commercial use, limitations on sharing the data, corpus, research, or results of TDM projects, as well as the cross-border limitations that library users might encounter while undertaking domestic and international research.

The library community is perfectly positioned to recognize the pressing need for a broad and harmonized exception to permit the lawful use of copyrighted protected works for the purposes of TDM activities, and to take action to promote appropriate legislative changes required.

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