

Examining the interconnections between copyright law and the mission of the library:
Focusing on digital first sale

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Libraries, long recognized as central cultural institutions in any civilized society, have historically been at the forefront of furthering the public interest in a democracy. To further the public interest, one of libraries' most fundamental tasks is to lend books, music, movies, and other cultural products. Through this fundamental role, libraries are helping promote the advancement of knowledge and culture.

As John Palfrey notes, "The knowledge that libraries offer and the help that librarians provide are the lifeblood of an informed and engaged republic."² Core values promoted by modern librarianship include access, intellectual freedom, preservation, and literacy, among others. Founded in 1876, the American Library Association has played a crucial role in furthering these values "to enhance learning and ensure access to information for all."³

Copyright law governs many of libraries' functions, which include lending books and other creative works, preserving them, acquiring content to meet the needs of their communities, and providing access for people with disabilities. In our increasingly digital world, copyright law has been blamed for becoming a roadblock to libraries' capacity to fulfill those missions. In particular, libraries are having an increasingly hard time making digital works available to the public.

Given that public access to information is a core library value, the copyright law's

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² JOHN PALFREY, *BIBLIOTECH: WHY LIBRARIES MATTER MORE THAN EVER IN THE AGE OF GOOGLE* 10 (2015).

³ See <http://www.ala.org/aboutala/missionhistory>

balance between the interests of users and the interests of copyright holders is of concern to the library community and the public. The ability of libraries to serve their patrons is closely linked to the future of copyright because copyright law governs the scope and boundary of the information and creative works people are able to access and engage with in their daily lives.

The U.S. Constitution states that the purpose of copyright law is to “promote the Progress of Science and useful Arts, by securing for limited Times to Authors...the exclusive Right to their respective Writings....”⁴ Over the past several decades, policymakers have upset the balance that the Constitution’s copyright clause was designed to achieve. They have elevated the means of the clause (the exclusive right to writing and discovery) over the end (the progress of science and the useful arts) by prioritizing the financial interests of copyright holders over the public’s ability to access and use knowledge and creative works. This trend has been supported by an “economic efficiency” framework that emphasizes maximizing monetary return to copyright owners for new creations.⁵

The current copyright law is based on the print culture in which copying takes non-trivial time and effort. When the Copyright Act of 1976 was enacted, lawmakers could have little anticipated today’s digital technologies that mediate all aspects of our daily lives. Indeed, quite unlike the artistic mediums of that time, digital artifacts have unique features that include easy and perfect copying, non-degradability, and ease of distribution, among others. These features have raised some concerns about how the current copyright regime may continue to provide a reasonable stream of revenue.

In particular, the ease of making and distributing digital copies with no quality degradation frames the debate about extending the first sale doctrine to digital media. The

⁴ United States Constitution, Article I, Section 8.

⁵ MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE 29 (2012).

first sale doctrine exhausts the copyright owner's exclusive right to control the subsequent distribution of a particular copy after its initial sale, as long as the work is a physical copy, such as a CD or a printed book. Section 109(a) of the Copyright Act states that the owner of a copy of a copyrighted work "is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy."⁶ Because of first sale, secondary markets for used books and music exist, and libraries are able to distribute content without fear of copyright liability.

For libraries, the first sale doctrine allows libraries not only to lend copyrighted books and physical materials to their patrons but also to sell or donate items from their collections. Other socially beneficial policy effects of first sale include preservation of works, protecting consumer privacy by allowing consumers to transfer ownership of copies without getting permission from the copyright holder, and product innovation through competition between original and secondary markets.⁷ Preservation of cultural works by libraries is important because it allows the public to access copyrighted works even when those copyrighted works may not be available from copyright holders due to the calculation of economic viability or other reasons such as copyright holders' changed views regarding their copyrighted works. In terms of ensuring access to creative works, protecting consumer privacy, and preserving cultural works, libraries have historically been at the forefront.

Individuals' expectations and behaviors regarding digital works typically reflect their experience with physical works.⁸ This is particularly true when it comes to ebooks. People tend to believe they "own" their ebooks in the same way they own print books. In other words, individuals' perceptions of what they can do with their possessions remain the same

⁶ 17 U.S.C. §109(a) (2012).

⁷ See Aaron Perzanowski & Jason Schultz, *Digital Exhaustion*, 58 UCLA L. REV. 889 (2011).

⁸ Yoonmo Sang, *Copyright and the Future of Digital Culture: Application of the First Sale Doctrine to Digital Copyrighted Works* (2015) (Unpublished doctoral dissertation, The University of Texas at Austin).

regardless of the distinction between digital and physical works. When consumers come to recognize that they do not actually own their purchased ebooks and cannot transfer those ebooks, they can feel deprived of their legitimate rights.⁹

Critical here is the fact that the first sale doctrine does *not* apply to digital content. Being free from the application of the first sale doctrine, copyright holders of digital content, instead, usually rely upon the licensing option, as commonly used with software applications, rather than follow the transfer of ownership of copies as occurs with printed books. Through the use of licensing agreements, copyright holders seek to maximize their revenues by controlling subsequent dispositions of their works. In the digital era, the transfer of ownership of a copy of a creative work in digital form does not function as the default for interaction with owners of purchased content. Rather, purchasers of digital content usually do not “own” what they have purchased. As a result, because purchasers of digital content do not have title to the works, they cannot resell, lend, or rent their content without the copyright holder’s permission.

In such a situation, libraries are mere licensees of their e-content, even though they duly purchased the content to lend to their patrons. Publishers often impose a range of restrictions on libraries’ usage of their leased content. For example, limits are placed on which particular ebooks libraries are allowed to lend and ways that library patrons can use those ebooks.¹⁰ Some publishers, such as HarperCollins, limit the number of times their ebooks can be loaned to library patrons thereby forcing libraries to repurchase access to content if they want to offer a robust collection of digital books over time.¹¹ These

⁹ *Id.*

¹⁰ See Adam Vaccaro, *Why It’s Difficult for Your Library to Lend Ebooks*, BOSTON.COM, June 27, 2014, <http://www.boston.com/business/technology/2014/06/27/why-difficult-for-your-library-stock-ebooks/rl464TPxDaYmDnJewOmzH/story.html>

¹¹ See Jeremy Greenfield, *Do You Borrow Your Ebooks from Your Library?* FORBES, April 25, 2014, <http://www.forbes.com/sites/jeremygreenfield/2014/04/25/do-you-borrow-ebooks-from-your-library/#29a8a2d93852>

restrictions mark a drastic change from the traditional mode of library operations in which printed books are purchased and loaned repeatedly without constraint. Once purchased, printed books belong to libraries in perpetuity and libraries determine their own lending and purchase policies, make copies for users, and replace and preserve books if the need arises.

Copyright holders argue that digital content must be licensed rather than purchased because it does not significantly degrade with time and usage and, thus, very rarely requires replacement. They argue that allowing digital content to be purchased encourages illegal and/or perfect copying that reduces new purchases over time. By directing attention to the lack of degradation of digital content, opponents of a digital version of first sale have succeeded at blocking the passage of any legislation.

Because some content is available only through end user licensing agreements (EULAs), libraries are further restricted from exercising exceptions and limitations established by copyright law to balance the interests of copyright holders and libraries. The terms and conditions embedded in the small print of EULAs raise additional concerns because EULAs may include restrictions on use that users cannot negotiate with “take it or leave it” contract terms. Additionally, EULAs are written for individual consumers rather than library institutions so library copyright exceptions are non-existent in the license terms. Although the library community is continually trying to improve the terms of user agreements with rights holders, libraries are sometimes required to pay much higher prices for ebook titles than individuals. These constraints often fall as a burden on libraries that already struggle with limited budgets and resources. Of particular concern, in the long term for libraries and society-at-large, is the concern that restrictions on digitized content may eventually negatively impact the ability of libraries to provide their patrons with access to knowledge and creative works.

As noted above, the dominant theoretical justification by rights holders for copyright

protection has been the law-and-economics paradigm that places a primary value on economic efficiency. According to that paradigm, the value of copyrighted material is measured by its monetary value, that is, how much consumers are willing and able to pay.¹² This paradigm gives priority to the monetary return to copyright holders and largely ignores other values. The values being overlooked include factors such as increasing individual autonomy, equitable access to knowledge and creative cultural works, and opportunities for individuals to actively participate in the process of cultural meaning-making.¹³

The value of copyright is not a simple function of the financial incentives it confers for creativity. Cultural values linked to equity of access, free speech, and democracy, among other such outcomes, deserve much greater attention in the context of copyright, regardless of whether those values can be translated into economic value for copyright owners.¹⁴

One alternative for understanding copyright legislation is to envision the copyright system as a tool for realizing democratic values that benefit society.¹⁵ An ecology where the creation and use of creative works is accomplished within a narrow and limited view based solely on economic justifications cannot assure the protection of democratic values. The narrow justification for copyright protection that is based on a framework of economic efficiency is increasingly incompatible with contemporary cultural practices, such as mashups, remixes, sampling, fan arts, and open source movements.¹⁶ Therefore those who put much value on copyright's democratic values have argued for the necessity of a broader framework. Rather than focusing solely on the paradigm of economic efficiency that seeks to maximize monetary return to copyright owners, they argue that copyright should serve goals

¹² See Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERK. TECH. L. J. 229 (2014).

¹³ *Id.*; Yoonmo Sang, *Toward Cultural Democracy: Digital First Sale Doctrine and Copyright*, 21 COMM. L. & POL'Y 221 (2016).

¹⁴ SIVA VAIDHYANATHAN, *COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY* (2001).

¹⁵ Bracha & Syed, *supra* note 12; Sang, *supra* note 13.

¹⁶ SUNDER, *supra* note 5, at 25.

that promote individuals' autonomy and further people's active participation in cultural meaning-making processes and equitable access to knowledge and creative works.

To further that perspective, one group of scholars recommends the adoption of alternative frameworks for copyright protection.¹⁷ Those alternative frameworks, rooted in democratic copyright theories, take into consideration the democratic values the copyright law intends to accomplish, such as advancing individuals' self-determination, decentralizing the cultural meaning-making processes, and helping libraries fulfill their mission to the public.¹⁸

While awareness precedes meaningful change to the status quo, awareness alone cannot bring about meaningful action for the benefit of society. Rather, concerted action is required to advance copyright reforms. Toward that end, various groups that make up the library community along with other public interest groups must work together to promote a balance of the copyright law, based on the shared assumption that the ultimate beneficiary of copyright legislation should be the public, not only the economic interests of copyright holders.

Historically, libraries have played a significant role in implementing the ideal of providing access to knowledge and cultural works, helping people become informed citizens, and advocating intellectual freedom of society and other democratic values. "Without access to knowledge and cultural works, meaningful participation in processes of cultural meaning-making cannot be guaranteed, not to mention the critical issue in a democratic society of supporting an informed citizenry."¹⁹ By setting up barriers to access of knowledge and the

¹⁷ See Bracha & Syed, *supra* note 12; ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION AND THE LAW* (1998); Niva Elkin-Koren, *Cyberlaw and Social Change: A Democratic Approach to Copyright Law in Cyberspace*, 14 *CARDOZO ARTS & ENT. L. J.* 215 (1996); Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 *YALE L. J.* 283 (1996); SUNDER, *supra* note 5.

¹⁸ See Bracha & Syed, *id.*; Sang, *supra* note 8.

¹⁹ Sang, *id.* at 152.

preservation of cultural works, the current copyright regime increasingly inhibits the ability of libraries to accomplish their missions in the digital era. Copyright reforms that support libraries' smooth transition from the analog model to the digital model are essential in order for libraries to continue to fulfill their mission of first and foremost serving the public in a democracy.²⁰ It should be noted that copyright reform efforts that attempt to further the public interest need to be undertaken in connection with updating Section 108 of the Copyright Act. Section 108 gives exemptions to libraries and archives that serve to limit the copyright holder's exclusive right and reflect public interest considerations to balance interests of publishers and those of libraries and archives. Over the past several decades, efforts to reform the provision for the digital era have so far been unsuccessful.²¹

Future meaningful efforts to balance the interests of copyright holders and those of copyright users, including library patrons, can become actualized when we envision copyright as a government-granted monopoly that functions to realize democratic values such as equitable access to knowledge and creative works by enhancing individuals' autonomy with regard to existing works and by promoting ordinary citizens' active participation in cultural meaning-making processes as opposed to merely granting economic incentives to creators.²² The core values that libraries seek to accomplish cannot be fully supported by economic efficiency. The primary mission of libraries should continue to prevail even in the digital age inasmuch as libraries, in particular public libraries, function as "core equalizing institutions" that further access, intellectual freedom, and preservation of culture.

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²⁰ PALFREY, *supra* note 2, at 181-202.

²¹ *See id.* at 201.

²² Sang, *supra* note 13.