1. Executive Summary

This white paper describes the formation, work processes, findings, and conclusions of the Licensing Principles Research Team (LPRT) of the Charlotte Initiative (CI) during 2016 and early 2017. The LPRT was co-led by Theresa Liedtka (Dean of the University of Tennessee, Chattanooga Library) and Steve Cohn (Director of the Duke University Press), and they are the primary authors of this report. But it had active participation from eleven other library members and two other publisher members, as well as CI consultant October Ivins and research assistant Kelly Denzer.

The tasks of the LPRT were fourfold:

1) Review applications of First Sale in the digital environment
2) Review current case law, white papers, and other literature as it relates to e-books and the Charlotte Principles
3) Collect current e-book licenses and examine the role of licenses to govern use of and access to e-books in light of existing copyright law
4) Investigate interlibrary loan (ILL) in relation to e-books.

On the First Sale Doctrine, after discussing initial viewpoints and reviewing the literature (in particular the Department of Commerce’s January 2016 report from the Internet Policy Task Force, “White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, and Innovation in the Digital Economy”), the LPRT decided to acknowledge that the First Sale Doctrine does not currently apply to e-books (other than potentially through license agreements), while keeping the door open for possible future applications.

The LPRT’s literature review task force found very little material relevant to the CI. They noted that the literature in this area becomes quickly dated, due to changing technology and practices. They were surprised at the scarcity of published studies on the intersection of e-books and licenses, and they found no definitive US court rulings that related to e-books. They did find two especially interesting and relevant legal cases:

- Redigi v. Capital Records involves a service that provided an individual the opportunity to resell owned digital music files. Redigi was found liable for unauthorized reproductions. Redigi has filed an appeal.
- The Tom Kabinet case in the Netherlands involved a platform for individual resale of e-books that was challenged by the Dutch Publishers Association, with Tom Kabinet found guilty as they could not prove to the Court’s satisfaction that the “seller’s declaration” was enough to demonstrate legal ownership.

The LPRT’s license review task force analyzed 31 publisher and aggregator e-book licenses, which seems to account for nearly all extant e-book licenses. They found a great deal of variation among these licenses, and they found the licenses in general to be complicated, confusing, and legalistic. The LPRT, which did in fact contain some experts on legal matters related to licensing, was unanimous in wishing that e-book terms could be agreed upon between publishers and libraries in far less time-consuming and far less legalistic ways.
The license reviewers looked at the licensing language and terms in four areas
- Provision of irrevocable perpetual access and archival rights
- Allowance for unlimited simultaneous users
- Freedom from any Digital Rights Management (DRM), including (but not limited to) use of proprietary formats, restricted access to content, or time-limited access terms
- Interlibrary loan.

Among the areas they examined, the reviewers found the least consistency in the area of perpetual access and archival rights. Almost every license addressed these issues, but those ways were all over the map, which raised serious questions about just what anyone means when they refer to “irrevocable perpetual access.”

Surprisingly few publisher licenses said anything explicit about DRM or no DRM, though nearly all of the aggregator licenses did include explicit DRM provisions, as did a few of the publishers. But there were a couple of particularly clear and useful “no DRM” publisher statements that the reviewers noted as possible models. The reviewers did not consider either restrictions to Authorized Users or anti-piracy provisions as DRM. They were aware of some publishers who had no DRM in fact but did not say that in their licenses, and they felt it would be useful for all “no DRM” publishers to be explicit about that in their licenses.

They found that most of the publishers do allow multiple simultaneous users, though a few had models, like most of the aggregators, where multiple simultaneous users was only allowed if the library paid an up-charge over a single-user model. Again, many licenses made no mention of this issue, even where the license analysts knew they did allow multiple simultaneous users; and again here they felt that publishers should state this explicitly. In both cases there was speculation that publishers felt by leaving it out of the licenses they might be leaving themselves room for changing their minds later on.

ILL was explicitly mentioned in most of the licenses, with clusters around no ILL allowed; ILL only for individual chapters; ILL as allowed by copyright law, or by CONTU guidelines; and ILL only in hard copy or via systems where the copy is soon deleted.

As for next steps, we were optimistic about the progress we made in coming to understand each other’s needs and desires, and about the potential to build on our work. Therefore the LPRT proposes the funding of an intense and focused set of further conversations between librarians and publishers, with a goal of more standard and less legalistic e-book licensing language, with well-defined terms.

We think our work has set the table for a more conclusive set of conversations that can set standards and expectations for everyone—if all parties are willing to let go of particular phrasings, and perhaps even long-held principles, that we have, each working separately, developed carefully and become attached to; and also let go of assumptions we are carrying forward from the world of print publication. We think the Charlotte Initiative, and the work of the Licensing Principles Research Team in particular, has taken us a long way towards that goal. We were in agreement that we would all hate to see that momentum dissipate.
2. Introduction

Formation

The Licensing Principles Research Team (LPRT) was envisioned from the first as an integral subset of the larger Working Group of the Charlotte Initiative (CI). But, because of changes in personnel on the CI Project Team, the LPRT was the last research team formed. The person initially proposed as the leader of this research team was unable to assume that role. So new leadership had to be chosen, and as a result the LPRT had approximately six months less work time, compared to the other research teams.

After the Kick-Off Meeting of the Charlotte Working Group in September 2015, the CI leadership decided, given the contentious nature of some of the issues around licensing, that it was best to recruit co-leaders for the Licensing Principles Research Team: one librarian and one publisher. Steve Cohn, Director of the Duke University Press, and Theresa Liedtka, Dean of the University of Tennessee, Chattanooga Library, were then asked to co-chair the LPRT.

Beginning with a core of members of the Working Group who had expressed particular interest in working on licensing principles, Theresa and Steve, with help from project consultant October Ivins, recruited the members of the LPRT: three other publishers and ten other librarians (sometimes as pairs of people from a single institution). In addition, the LPRT welcomed several volunteers, as word of the project spread. Most of those recruited onto the LPRT ended up being active in the work of the research team in some way or other, but some members put in a lot more work than others. Please see Appendix A for a list of the contributing LPRT members.

Charge

The broad charge provided to the LPRT was as follows:
Address the current licensing issues surrounding e-books, and explore the fundamental issues in e-book licensing that are keeping libraries from achieving a collection that meets the core principles of the grant; and then work to develop possible solutions.

The three Charlotte Principles are:
Provision of irrevocable perpetual access and archival rights
Allowance for unlimited simultaneous users
Freedom from any Digital Rights Management (DRM), including (but not limited to) use of proprietary formats, restricted access to content, or time-limited access terms.
The LPRT was asked to carry out a set of specific activities:

5) Collect current e-book licenses and examine the role of licenses to govern use of and access to e-books in light of existing copyright law
6) Review current case law, white papers, and other literature as it relates to e-books and the Charlotte Principles
7) Review applications of First Sale in the digital environment.

Interlibrary loan (ILL) was later added to the LPRT team’s charge for investigation. While this topic was not included in the three Charlotte Principles, it was front and center in many of the other library statements of principles about e-books that the CI leadership had located, and it was much discussed during the first Working Group meeting. So the LPRT leadership decided that the research team would also focus on the issues surrounding ILL and the ways ILL was referred to in publisher licensing.

Please see Appendix B for the full charge and high-level timeline for the LPRT.

Activity Overview

The LPRT worked together for approximately 18 months. Steve, Theresa, October, and Kelly Denzer, Project Research Assistant, had multiple planning meetings from October 2015 to February 2016. These calls created the processes that would ultimately guide the future activities of the LPRT, including the decision to use two subgroups to address the team’s charge.

The LPRT came together for the first time via conference call on 25 February 2016 to review the charge and to discuss how best to organize to achieve the stated objectives. The call included spirited conversation, the first of many, on the meaning and definitions of the Charlotte Principles. In a second call, on March 21, 2016, the LPRT worked out its split into two subgroups, one to focus on the literature review aspect of the charge, while the other would tackle the collection and review of licenses. Another key component of the call was lively, candid, and thoughtful discussion of the First Sale Doctrine in the digital environment, since a government white paper on that topic was an early discovery of the LPRT.

In summary, the activities of the LPRT began with a collective group discussion on the First Sale Doctrine as it applies to e-books, an agreement to include several aspects of ILL-related research in the team’s activities, and the formation of two subgroups to complete the research and analysis portions of the LPRT charge.
3. The First Sale Doctrine as It Applies to E-books

The first element of the charge addressed by the LPRT was the applicability of the First Sale Doctrine to e-books. This question was discussed by the entire membership of the LPRT. Publishers and librarians came to the discussion with diverse perspectives.

The First Sale Doctrine is codified in the United States Code, Copyright Law, Section 109 and provides that an individual who purchases a copy of a copyrighted work receives the right to sell, display, or otherwise dispose of that particular copy, notwithstanding the interests of the copyright owner. The First Sale Doctrine is the legal basis that allows libraries to lend books to patrons, allows owners to sell or lend a copy of a book, and allows a new owner to resell that same copy, usually at a discounted price.

Does First Sale apply in the digital environment? Many librarian members of the LPRT came to the exercise believing that the First Sale Doctrine is applicable to e-books. However, among the LPRT's librarian members there was a range and breadth of perspectives on the topic. The publisher members all approached the topic believing the First Sale Doctrine did not apply to e-books, and several questioned whether the topic should even remain in the charge.

A pivotal reading that informed the LPRT was the Department of Commerce's Report, by the Internet Policy Task Force, published in January 2016, “White Paper on Remixes, First Sale, and Statutory Damages: Copyright Policy, Creativity, and Innovation in the Digital Economy.” The Internet Policy Task was formed in 2010 and included a broad group of stakeholders that sought and received extensive public comment. In July 2013, the Internet Policy Task Force had issued a preliminary green paper, entitled: “Copyright Policy, Creativity, and Innovation in the Digital Economy.”

A key recommendation of the White Paper, related to the work of the LPRT, is found on page 4: “Amending the law to extend the first sale doctrine to digital transmissions of copyrighted works is not advisable at this time.” The report goes on to say, “Innovative business models and licensing terms provide some of the benefits traditionally provided by the first sale doctrine.” Concisely, the rationale for the White Paper recommendation is that the market is still evolving and that government intervention in these early years of the development of e-books model could “skew” the development of market-driven, mutually beneficial models.

LPRT members engaged in a spirited discussion on the First Sale Doctrine as it relates to e-books. From the publisher view, the aforementioned statement supported the collective view that the First Sale Doctrine does not apply to e-books, only print. From the librarian perspective, they noted that while the White Paper does not recommend a change in the law, it does speak to the legitimacy of the option in certain cases and it speaks specifically to the concerns of libraries, including this statement on page 5: “If over time it becomes apparent that libraries have been unable to appropriately serve their patrons due to overly restrictive terms imposed by publishers, further action may be advisable (such as
convening library and publisher stakeholders to develop voluntary best practices, or amending the Copyright Act).”

Also related to the work of the LPRT was the White Paper’s recommendation to create “a multi-stakeholder process to establish best practices to improve consumers’ understanding of license terms and restrictions in connection with online transactions involving creative works.” Ultimately, the findings of the LPRT support this initiative and share the concern that the lack of “common definitions” and a “common understanding of terms” is a root problem related to e-books and licensing.

The decision of the LPRT was to acknowledge that the First Sale Doctrine does not currently apply to e-books (other than potentially through license agreements), while keeping the door open for possible future applications. Several members noted that numerous groups continue to research and create dialogue around the topic. Additional conversation stressed the fact that this area of law is still unsettled and there are no definitive court rulings at this time. The group agreed to continue to monitor the issue and report any new developments that might occur during the course of its work.

4. Literature Review

Methodology

The Literature Task Force of the LPRT kicked off its work in April 2016. The ultimate goal of the Literature Task Force was the creation of an annotated bibliography of timely, relevant readings related to the Charlotte Initiative. The specific charge was to “read, comment, and synthesize the literature that makes up the bibliography.” The members of the Literature Task Force were a combination of publishers and librarians: Lindsay Barnett, Terry Ehling and Melanie Shaffner, Rachel Fleming, Jill Grogg, Chuck Hamaker, Rebecca Seger, and Theresa Liedtka (chair). Katie Zimmerman and Mihoko Hosoi joined the group in November 2016.

The compilation of the LPRT bibliography was multi-faceted. Kelly Denzer conducted multiple literature searches in relevant subject databases, and across the Internet as a whole, bringing an initial 15 articles, web sites, and blogs to the bibliography. Sharon Farb, a member of the Working Group, asked for recommended readings from ARL’s University Intellectual Property Officers listserv members. The result was 18 more recommended articles and books, which were added to the initial core of the bibliography. These 33 readings comprised Phase One of the literature review. Over time, an additional 24 readings were added to the bibliography, as references within the initial readings along with new findings and recommendations brought other material to light, bringing the total number of readings reviewed to 57.

The Literature Task Force used a shared Google document to compile, assign, and comment on readings. In Phase One each reader was assigned approximately five readings. In Phase Two an additional four readings were assigned to participating readers. Readings varied in
length from a single blog post to an entire book. Readings were assigned in a rotating fashion, based on the length, in an effort to try to share the reading load in an equitable fashion. Members wrote a summary of each reading, including the relevance to the Charlotte Initiative, and assigned as many keywords as appropriate.

The resulting bibliography is found in Appendix C – LPRT Annotated Bibliography. Please note that the bibliography is selective: many articles read by the Literature Task Force were not included, as they were deemed neither timely, nor relevant.

Outcomes

Perhaps unsurprisingly, the literature review conducted by the Literature Task Force did not yield any startling or previously unknown results related to the Charlotte Initiative principles and related topics.

Several trends were noted in the literature review:

- The literature in this area becomes quickly dated, due to the changing nature of technology, both formats and practices.
- There are some interesting experiments happening in the music industry, as played out in the ReDigi cases. ReDigi is a service that provided an individual the opportunity to resell owned digital music files. In order to resell a digital file, a user has to make another copy of it, even if the original copy disappears and even if two copies never coexist simultaneously. In *ReDigi v. Capital Records*, ReDigi lawyers invoked the First Sale Doctrine as its defense. They also argued that people copy files all the time within one computer. The purpose of any incidental copies created by the ReDigi system was to facilitate the first sale rights consumers are entitled to effectuate under § 109(a). Ultimately, ReDigi was found liable for unauthorized reproductions. Judge Sullivan ruled that (1) ReDigi knowingly aided and benefited from users’ acts of infringement, therefore it’s secondary as well as primary infringement; (2) users resold the new copy, not the original one, therefore it’s not protected under first sale; and (3) the “new” copies made in the ReDigi process don’t qualify as fair use because they are identical to the originals and thus aren’t “transformative,” and they are made for commercial purposes and undercut the originals and thus diminish the market for them. In February 2017, ReDigi filed an appeal to the findings.
- There are several interesting experiments with e-books happening in the European Union, specifically, the Netherlands. Tom Kabinet, a Dutch company, was sued by the Dutch Publishers Association for offering a platform for the individual resale of e-books. The ruling was a mixed bag for Tom Kabinet, which was found guilty as they could not prove to the Court’s satisfaction that the “seller’s declaration” was enough to demonstrate legal ownership; however, the platform or concept of selling legal e-books was not questioned.
• More studies are needed on the intersection of e-books and licenses. The Literature Task Force was surprised at the scarcity of published studies.
• There are no definitive court rulings in the United States that relate to e-books.

Like it or not, we live in interesting times when it comes to licensing issues.

5. Interlibrary Loan

In response to several library statements of e-book principles that were passed out to the Working Group before its initial meeting, all of which contained insistent statements about the importance of allowing interlibrary loan in an e-book environment, ILL surfaced as a publisher concern at the initial meeting of the Charlotte Initiative Working Group in September 2015. Specifically, publishers were concerned that allowing interlibrary loan for e-books would have a negative impact on sales. Most librarians at the meeting were surprised by this publisher concern. Librarians spoke to interlibrary loan standard practices, such as following CONTU guidelines and not borrowing titles from the current publication year. Other librarians cited common programs such as “buy not borrow” as reasons why publishers should not have concerns.

Publishers were not swayed by the librarians’ passionate statements, and they were quite emphatic that—with e-books as distinct from print books—interlibrary loan amounts to “cloning, not loaning”: copying is involved, and therefore the copying restrictions described in US copyright law should apply in an e-book environment, rather than the First Sale Doctrine. Librarians reiterated that ILL was a core library service. Publishers and librarians both acknowledged that little to no research exists on this topic and resolved to address this gap as much as the project would allow.

The results of these early conversations on interlibrary loan resulted in the following:

1. The Charlotte Initiative Working Group asked the LPRT to include the topic of interlibrary loan in its license analysis work. For the outcomes and results of this analysis, please see the following section on license analysis.

2. October Ivins held a conversation with Tony Melvyn, who works on interlibrary loan at OCLC, in an effort to gather data on the topic. She asked for OCLC to release its interlibrary loan borrowing and lending information to her. OCLC, with the permission of the libraries and publishers who were participating in the Charlotte Initiative, compiled and released five years of the following data points:

   a. 13 participating libraries:
      • Appalachian State University,
      • Carnegie Library of Pittsburgh,
      • Louisiana State University,
• Macalester College,
• Massachusetts Institute of Technology,
• Northeastern University,
• San Jose State University,
• UCLA,
• University of Michigan,
• UNC-Charlotte,
• University of Ottawa, and
• University of Tennessee, Chattanooga

b. 7 participating publishers:
• Duke University Press
• Johns Hopkins University Press (affiliated with Project MUSE)
• LSU Press
• Oxford University Press
• Purdue University Press
• University of Michigan Press
• University of North Carolina Press.

c. Interlibrary Loan data for the aforementioned libraries and publishers—specifically seven fields, including:
• Book information including: Title, Publisher, Imprint Year,
• Requests cancelled, filled, unfilled,
• Request dates- correlate to sales, reviews,
• OCLC symbol for library,
• Call number stem-trends by discipline,
• ISBN - for similar versions/editions,
• OCLC record number

The data provided was massive and messy. It is important to note that we recognized that this data would be predominantly for print books, as OCLC does not provide the means to borrow and lend e-books within its interlibrary loan systems. It is important also to note that data from other interlibrary consortia and systems is not included, such as RELAIS or RAPIDILL. Occam’s Reader was also discussed as it relates to interlibrary loan.

As of April 2017, publishers have not yet had a chance to explore the data provided. However, the group brainstormed several means to determine the possible impact of interlibrary loan on publisher sales, including:
- Providing publishers with the data to determine any potential impact on sales, for example create a list of top 20 books requested or lent from each publisher.
- Research how many libraries purchased books borrowed through interlibrary loan.
6. License Review

Methodology

Kelly Denzer, our research team’s wonderful research assistant, collected 31 e-book licenses, from every publisher we could collectively name as having an e-book license. (This was way easier said than done!) She downloaded what she could, and she created a link in the few cases where the license could not be downloaded. This created a set of academic e-book licenses as of 2016 that the Charlotte Initiative should be able to make available for anyone who wants to look at them.

A grand total of 31 licenses may seem surprisingly low. But that really was all that we could come up with, and we did in the end manage to get licenses from all but one of the publishers we contacted. One license came in too late for us to analyze. And there were several cases where a publisher that was named by a member of our group turned out not to have any e-book license at all (in some cases the journal license seemed to stand in for that). It helps to remember that, except for Duke, none of the American university presses have their own e-book license. They sell their books to libraries via the nonprofit aggregators, Project Muse or JSTOR or Oxford’s University Press Scholarship Online (UPSO), and/or via commercial aggregators, and those are the licenses they use.

So we think in our 31 licenses we have a pretty comprehensive set, including six aggregators and 25 individual publishers (we counted Oxford as an individual publisher license, since they do not amalgamate the publishers’ books within UPSO but rather sell individual publisher packages, all using the same license terms).

Then we set up three teams to analyze the licenses, with each team doing about ten licenses: reading the entire license, sometimes reading things like Terms of Use where they were referred to in the license, and noting their findings in a License Analysis Form. These forms were set up with areas for each of the three Charlotte Principles, plus one for interlibrary loan, plus an area for collecting miscellaneous other provisions that seemed noteworthy.

It looks like this:

<table>
<thead>
<tr>
<th>Irrevocable perpetual access?</th>
</tr>
</thead>
<tbody>
<tr>
<td>No DRM (including proprietary formats, time-limited access, restricted access)?</td>
</tr>
<tr>
<td>Unlimited simultaneous users OK?</td>
</tr>
<tr>
<td>ILL OK?</td>
</tr>
<tr>
<td>Other noteworthy/unusual provisions</td>
</tr>
</tbody>
</table>
There were columns for Yes and No, and also for It’s Unstated, It’s Unclear, It’s Complicated, with space for Notes and Explanations.

The licenses were analyzed by at least one person, and in many cases two—a primary analyst and a back-up analyst—depending on how the teams set themselves up. The forms also in some cases include comments from others—for example, on one form where the analyst said “Yes” on Irrevocable Perpetual Access but described a required annual fee set at the discretion of the publisher, one of the co-leaders wrote that this did not fit his idea of irrevocable perpetual access.

Five librarians did the heavy lifting on the analyses: Tony Horava from University of Ottawa; Angela Riggio from UCLA; Katie Gohn from University of Tennessee – Chattanooga; Katy Gabrio from Macalester; and Kate Dickson from UNC-Charlotte.

Once we had done all the individual license analyses, we collected our thoughts about them onto a License Analysis Summary Form, to which all Licensing Principles Research Team members were invited to contribute, and to which all the main analysts did contribute, plus Theresa Liedtka and Steve Cohn as the research team co-leaders, plus several other members of the LPRT: Terry Ehling from Project MUSE, Lindsay Barnett from College of Charleston, and Rebecca Seger from Oxford University Press. The points made below about what we found and what we thought about what we found are all derived from the collectively created License Analysis Summary.

In reviewing our findings, we will not give out any names of publishers when we mention particular licensing language or terms. Some participants in the Charlotte Initiative project had initially proposed using the license review to call out particular publishers whose license terms seemed to contradict the Charlotte Principles. But the research team, and in particular some of its publisher members, did not want to do that. We believed we should enter this process in the spirit that both publishers and librarians are trying to figure this out, in these early days of e-book licensing, as best they can. And we decided to assume that there are good reasons why various publishers have come down in various places with regard to their licensing language and its fit with the Charlotte Principles.

Overview of Findings

Our findings begin with our collective thoughts on what we saw and concluded from the set of analyzed licenses as a whole. Then they move to our collective thoughts about each of the individual areas on our license analysis form. Many of the comments use language contributed by one of our analysts or commenters, but most are not verbatim quotes—we have taken the liberty of combining two or more comments sometimes, or editing the comments to make them clearer.
**General thoughts**

Two parallel summary statements, both of which were followed by exclamation marks: “Librarians sure are left to interpret a lot of legalese!” and “I often say that I had no idea I needed a law degree to be a publisher!” Licensing can be very complicated, very confusing, very time-consuming, and, yes, very legalistic. Our research team, which did in fact contain some experts on legal matters related to licensing, was unanimous in wishing that e-book terms could be agreed upon between publishers and libraries in far less time-consuming and far less legalistic ways.

Because there is so much legal language in these licenses, it can be hard for those who are trying to negotiate the licenses, and who will have to work with the license’s terms—often librarians and publishers without legal backgrounds—to make progress or see eye to eye, because they are having to talk about terms that neither party fully understands. To some extent and in some cases, that might mean that neither party to the negotiation may fully understand just why some particular terminology or phrasing might be used in the licensing language. And to some extent and in other cases, it means that lawyers need to be brought in to do the negotiating, which tends to take it out of the hands of those who must actually work with the licenses.

The negotiation process becomes more complicated, and generally more oppositional, when the licensing terms are tangled up with terms of use that are not well understood on both sides, connected to publisher business models that are not well understood by librarians, and affected by library operational needs and expectations that are not well understood by publishers. Thus it seems that the complexity could be simplified through continued conversations between library and publishing colleagues, so that we better understand each other’s goals and concerns.

But there aren’t many occasions for such conversation, and generally those that have occurred in the past have not seemed to bring the two sides closer. To some of us it seemed surprising that we haven’t gotten farther on this sort of mutual understanding, twenty years in from the start of e-book licensing—especially with the terms of the license agreements from large publishers that have been dealing with librarians the entire time. The dialogue continues each time publishers and librarians discuss a new agreement, when they talk at conferences, etc. Nevertheless, the development of mutual understandings has not progressed very far.

The licensing process would certainly be a lot less complicated if there was some standardization among licenses: standard language, standard terms of use, etc. Presumably, the licenses can’t really all be exactly the same, since different business models, different goals, and different levels of risk acceptance are involved. But right now these licenses are so radically various that it is very hard to take what you’ve learned from analyzing one license and apply it to another, even across vendors supplying similar materials.
We agreed that, while the Charlotte Principles seem simple when stated, and seemed simple to us when we first saw them, they seemed much more complicated when we actually tried to apply them to individual licenses. And they seemed still more complicated when we tried to make generalizations across a large set of licenses.

We also found it surprising how little information relating directly to the Charlotte Principles was stated in the licenses. Maybe some of these really are negotiation points; or in some cases they may represent purchase options, so in order to get what you want you have to be willing to pay more. But it does seem like the Charlotte Principles involve basic matters that should be stated in a licensing agreement.

Maybe at least part of the reason that some of these seemingly basic matters are omitted from the license language is that publishers see various libraries wanting or even demanding quite different and sometimes even contradictory things. Since they don’t want barriers to purchasing their e-books, they have to leave those matters out of the licenses, in order to leave room for choices and for sometimes agreeing to something a library is insisting on, as a special case in order to make an important sale, even if it’s not what the publisher would want to do for everyone.

And maybe publishers don’t put language about some of these matters into their licenses because the legalistic license language is so hard to negotiate. Or maybe it’s because, once a license is in place, it becomes very hard to make changes to it; and the publishers want to have the flexibility to make changes, since it’s still early days in the e-book environment. For example, if a publisher commits to No DRM in its license, and then twenty years from now the publisher decides it really needs to impose some DRM, it’s going to be very hard to do that if the “no DRM” language is included in the license, because libraries will probably refuse to sign the new license, and/or lawyers might need to get involved. So it is much easier not to apply any DRM in practice, and make that known, and maybe say it in other places like terms of use or marketing materials, but not to say anything at all about it in the license. Publishers don’t want their successors, many years later, to curse them for having built into a license something that, at some future point, seems like giving away the farm.

The differences between purchasing a print copy of a book and what can happen when a book is available electronically are many and large, but they are not all well understood. One useful example was given by a publisher: When there is a legal challenge to a book—say it references someone by name in a way that is harmful (the victim of a crime, for example) and that victim reaches out to the publisher challenging the book—in a digital environment, publishers simply have to take that content down while they research the issue, and then maybe forever after. They can’t—ethically or legally—keep that content available on the platform. In the old world, the library would still have the printed book on the shelf, and because of the physical nature of that book, there wasn’t anything the publisher could do about it except maybe ask customers to remove the book. Now, because the publisher is hosting the digital content, they have an obligation to remove the offending part. So then they are not providing “irrevocable perpetual access” to that content. That’s just one example of the differences that have to be spelled out in these
complicated licenses, because otherwise people still seem to assume in many cases that whatever applied in the print world also applies, and should apply, or even must apply, in an electronic world.

**Perpetual Access and Archival Rights**

In this area there was by far the most variety (or, stated another way, the least consistency) of any of the issues we analyzed. This definitely raised the question: Just what do we mean by “irrevocable perpetual access”? One of our analysts asked, “Is there really any such thing, unless the licensee is allowed to create its own archival copy and then do whatever it wants with that copy by way of preservation?” (When the Working Group as a whole discussed this aspect, it gave rise to the Platforms and Preservation Research Team, which was not part of the original project design or grant application.)

Just about every license we looked at addressed this topic in some way—sometimes clear, sometimes vague. But those ways were all over the map. Here are some of them (stated in non-legalistic language):

- Either we will keep it supplied or a third party will (Portico is fairly often mentioned by name; we only saw LOCKSS/CLOCKSS mentioned once).
- We will create a fixed copy for use as an archive, if we need to. Sometimes, this is described specifically as a CD-ROM or a DVD.
- It’s a subscription; so access ends when the payment ends.
- It’s a hybrid: You get access forever to the content you bought; but you lose added free content as soon as you stop subscribing to the newly added content each year (in some cases, you can then choose to buy the formerly free content).
- You can only get continued access to the content you formerly “bought” or subscribed to if you pay an annual platform fee. (Some of our analysts considered this to be “irrevocable perpetual access”; others did not.)
- You can only get continued access to the content you formerly “bought” or subscribed to if you pay a one-time fee.
- You get perpetual access, but we reserve the right to remove content (with or without a rebate if some content is removed).
- After X years of annual payments you become vested; if you stop subscribing after that, you get perpetual access for the years you paid for; at less than X years, you can buy perpetual access to the years you subscribed to, for a flat fee.
- You get perpetual access under this agreement, but we reserve the right to terminate the agreement at any time. (None of our analysts would buy that one as “irrevocable perpetual access”!) You get perpetual access, but we reserve the right to terminate the agreement at any time if there is any breach of the agreement—in one case perpetual access is stated to be “a right, but a revocable right.” (It’s debatable—and we’ve had some good debates about it—as to whether this one constitutes irrevocable perpetual access.)
Our analysts and commenters on the Summary Analysis had more thoughts in this area than in any other. It was unclear to all of us just what exactly perpetual access is, and how we would actually implement it—that was a consensus view. We agreed that the use of the term “perpetual” was troublesome: We all use it, but we don’t really seem to have any idea what it means. For one thing, is perpetual really for ever and ever, to eternity (whenever that is!)? That’s a ridiculous thing for anyone to promise, isn’t it?

It’s not clear that publishers understand what perpetual access means. Additional annual fees; termination of an agreement whenever the publisher thinks it has been violated; ability to remove content—all of these fly in the face of true perpetual access. But how is a publisher going to know what the world will bring a hundred years from now, or a thousand years from now?

What do libraries want, when they ask for or insist on perpetual access? Perhaps they don’t really know. Do they want to be in the business of making their own copies of everything and then hosting those copies? Apparently not. Are they happy to have access via a third party like Portico? That’s not clear, and certainly not universal.

For a purchase with perpetual access, some of the librarians were okay with the fact that a little content might fall out; but others were adamant that this should never happen. Some were okay with small annual hosting fees for perpetual access, and some were adamant that for a purchased e-book—as opposed to a rented one paid for via an annual subscription for access—there should not be any additional fees.

Analysts asked what it means if you buy something—not rent, but buy—and then you don’t actually have it in your possession. With a printed book, it’s on your library’s shelves, and it’s up to you to preserve it. The publisher has delivered that copy. It’s the library’s problem now. But with electronic books, the library might not want to have any “thing” in the library’s possession and have it be the library’s problem what to do with it and how to preserve it. (This also speaks to the challenges of ensuring ongoing access in a cloud environment, where nothing is stored locally.)

Only a few licenses stated specifically how perpetual access content would be given to libraries in the event that the vendor could no longer provide web-based access. (Some examples were CD/DVD, PDF, Portico, and “mass storage medium”—whatever that means.) Even vendors who listed a format also usually had a statement saying something along the lines of “or another format the Licensor deems acceptable.” There are no guarantees here that the format these perpetual access materials are provided in will be usable by libraries or easily disseminated to library users.

The idea of delivery of the licensed content on a medium of the publisher’s choice—like a CD or a DVD—raised questions around what is an appropriate medium, who decides, what are the additional costs, and how the library can then make this material available to its patrons. What might be technically possible might also involve an inordinate amount of time and labor for the library purchaser of the perpetual access.
Our analysts agreed that there ought to be an opportunity for vendors and libraries to come to an agreement on the format: the format should not be just whatever the vendor decides it should be at some later time of publisher crisis. But it is not clear whether that decision should be made once and for all time at the point when the licensing agreement is made (which risks future changes in technology making that format obsolete, to the point where it is unusable or highly problematic) or whether it should be stipulated that a mutual agreement will be arrived at when the delivery of a format other than online delivery from the publisher’s platform needs to be invoked (which risks pushing the decision to a time when the publisher is in crisis).

Without some good and mutually agreeable terms for describing what happens at this point, it was not clear whether anything short of immediately delivering the content to the library for it to do its own preservation of the content could be considered to ensure “irrevocable perpetual access.” As one analyst said, “Well, maybe anything short of that is a guarantee of irrevocable perpetual access, but in a very undesirable form.”

Librarians said they frequently are willing to pay annual hosting fees for titles they are meant to have perpetual access to, because the idea of figuring out the best way to store, preserve, and provide access to that content locally is extremely overwhelming. But then they also wondered—and the publishers involved told them they were very right to wonder—whether those doing this hosting really know how to provide perpetual access, as librarians do (or, at least, think they do).

Some asked, “Isn’t requiring payment of an annual fee in exchange for ‘perpetual access’ just a different, albeit less expensive, type of subscription, rather than a purchase?” And this is especially true in a case where the publisher, for example, retains the right to change their “non-material” license terms at any time by posting the change to their website – and then in some cases the ongoing access terms are not listed as being material. So how can vendors call access perpetual if the library is paying an annual fee (which is really a subscription) for the content that it has supposedly already bought? What happens if the library cannot pay the fee one year, because of some financial crisis? Can the vendor then pull all access to that purchased and “perpetual” content? Can the library get the access back if it ever starts paying again?

Publishers pointed out that, with the introduction of digital platforms from aggregators and publishers, these platforms become the equivalent of the library’s shelves in the print world, except that rather than the library having to pay for space to put those shelves in it is now the publishers who need to pay for the shelves and for all the costs of maintaining them. The digital platforms do have real and significant costs, but also hopefully they have a lot of benefits beyond what a physical shelf could provide—so they can’t actually be thought of as the equivalent of shelves: they are complicated and useful systems for accessing, searching, annotating, etc.

So, while publishers may not completely understand what libraries want and believe they are buying with perpetual access, librarians may not understand well that there are costs for the digital platforms: to maintain it 24/7, to provide usage statistics, to adapt to
changing technologies, to deliver information and metadata to discovery services; and then when the platforms change, as they must over time, this has to be delivered all over again.

Publishers may see ongoing investment in purchasing new content each year as an adequate substitute for paying annual hosting fees for older purchased content. That makes it look like the older content is coming to the libraries for free in an arrangement of that sort. So then it is a shock to the librarians when they decide not to purchase the new content and discover that they are expected to pay something for the provision of older content that they may have purchased long ago but that still needs to be maintained and upgraded by the publisher.

In an electronic environment, the difference between purchasing and subscribing seems much less simple than in a print environment. The libraries are used to buying a printed book and having it, once and for all. So they want to act like they are buying the book once and for all, even when they are buying an e-book. They don’t want to subscribe to e-books; they want to buy them. But subscribing is what a lot of these e-book “purchase” arrangements act like.

There are also differences between static e-books and e-book products that have some type of updating that is beneficial to the end-user community but difficult to find the right way to price other than an annual update fee. So maybe we need to bracket those out and be clear that, when we are talking about perpetual access, we are just talking about static e-books. That might make sense now, mostly. But, considering the speed at which technology is moving, it seems likely that e-books will become less and less static, since the ability to change or add material seems likely to be irresistible in many cases. Then what will perpetual access mean?

We all agreed that the purchase of electronic access is not like the purchase of a physical book, where it is the libraries’ problem to preserve the book once it’s on their shelf. And we all agreed that publishers are not very good at thinking about preservation. Publishers say they have always seen preservation as the libraries’ job, and they still want to see it the same way in an e-books environment. But in an e-books environment libraries see preservation as the publisher’s job, since language about perpetual access is frequently included in licenses.

Publishers, however, are focused on the books that are selling actively now, and on the books they are acquiring and producing for future publication; not on the books they published ten years ago, much less the ones they published fifty years ago that aren’t even selling any more. They don’t want to put resources—time and effort and money—into those older books. So, even though they feel that they have to promise it in order to enable library e-book purchases, how can they realistically commit to giving “perpetual access” to those books, if libraries won’t take care of that?
Digital Rights Management

Very few of the licenses say anything explicit about DRM or no DRM. Even when there seems to be evidence from other places on the site (such as a Terms of Use document) or from people’s actual experience with the publisher's material that there is (at least by some definitions of the term) no DRM, this is not mentioned in most of the licenses. And it is the same when there is explicit DRM on the site—this is not usually mentioned in the license language.

Many of us believed that, in cases where there is no DRM, publishers should state this explicitly in the license agreement, as an assurance that DRM will never be added later without a clear revision of the license terms. This would give libraries a clear reassurance that no DRM would be added without a revision of the license. As it is now, it can be very hard to figure out whether there is some form of DRM or not, because that information is spread across multiple documents, such as the license, the terms of use, the order form, etc. It would be easier to have this information centralized in one place.

But, as we see it, this information needs to be accompanied by a clear definition of what would constitute DRM, since as we talked about DRM it became clear to us that we had various understandings of what constitutes DRM or No DRM, even though DRM is a term we all toss around as if it has a clear and consistent meaning.

As one of us said, “DRM seems to be another squishy construct.” So a simple statement of “No DRM”—which publishers sometimes say in their promotional material, or even in their terms of use—might not tell purchasers very much. And it would be open to objections from librarians, like the following (which is based on two concerns we heard but that the LPRT in general saw as not constituting DRM):

“What do you mean there’s no DRM? You’re delivering the material chapter by chapter, so I can’t just download the whole book.”

or

“What do you mean there’s no DRM? There are watermarks on each page.”

Could we create a clear and unambiguous definition of what we mean by DRM that both publishers and librarians would readily agree to?

The most common forms of explicit DRM (which we found in only a few of the publisher licenses but in nearly all of the aggregator licenses) seem to be

- Limits on number of pages to download or copy; and
- Limits on number of pages to print

We saw no mentions of time-limited access, which is a term specifically invoked by the Charlotte Principles language on No DRM.
The limitations on printing all seem aimed at normal individual use, as in “Print up to 20% every 30 days.” And sometimes the limitations on downloading are also aimed at normal individual use, as in “May download only one chapter at a time.”

But in other cases the limitations on downloading are clearly aimed at preventing piracy, as in “Neither Licensee nor any Authorized User may . . . either individually or collectively download Product at a rate which exceeds 500 PDFs per hour”—or access may be withdrawn. Generally, we agreed that this is not the sort of DRM that the Charlotte Principles were intending to prevent. This is about piracy, not about ordinary use. And we all agreed piracy does need to be prevented (even if perhaps not all librarians see it that way). As one librarian put it, “Piracy prevention is a fuzzy area where better communication is needed, but it’s not central to the Charlotte Principles.”

Here’s one “No DRM” statement that some of us liked:

In the event that Licensor utilizes any type of Digital Rights Management Technology to control the access or the usage of Licensed Materials, Licensor agrees to notify Licensee of any technical specifications. In no event may such Digital Rights Management Technology be used in such a way as to limit the usage rights of a Licensee or any Authorized User as specified in this License Agreement or under applicable law. Any Digital Rights Management Technology shall be applied in compliance with this License Agreement and applicable privacy and data protection laws.

And here’s another, modified slightly because in the original it refers to journal articles and “entries” (whatever that means) in addition to book chapters:

Authorized Users may download, search, retrieve, display and view, copy and save to hard disk or diskette and store or print out single copies of individual chapters in the Licensed Electronic Products for the Authorized User’s own personal use, scholarly, educational or scientific research or internal business use. Authorized Users may also transmit such material to a third-party colleague in hard copy or electronically, for personal use or scholarly, educational, or scientific research or professional use but in no case for re-sale, systematic redistribution, or for any other use.

But note that this one refers to individual chapters, not to entire e-books.

The license analyzers clearly did not understand a restriction to Authorized Users (or other such terms) as constituting “restricted access” in the Charlotte Principles meaning of the term, since most of the licenses do seem to have language to that effect. So we could not figure out what the statement about “no restricted access” in the Charlotte Principles would or should mean, beyond the limited downloading and printing that we saw mainly in the aggregator licenses.

As for the term “no proprietary formats” in the language of the Charlotte Principles, we puzzled over how to interpret that phrase too. If it means no downloading of material by
individual readers as a PDF, we saw limitations on the amount of that but no prohibitions of PDF downloading. If it means no downloading of the entire site into some sort of “local load,” we saw a substantial number of licenses that do prohibit downloading of the entire site. But we did not see that as DRM.

Unlimited Simultaneous Users

The large aggregators tend to have both multi-user and single-user models, at different prices, though some of the smaller aggregators do simply allow unlimited simultaneous users. Most of the publishers do simply allow unlimited simultaneous users, though a small number mention aggregator-like sets of terms that allow for restrictions of the number of users under certain models that have lower prices.

Many licenses—even in cases where unlimited simultaneous users was known by our analysts to be OK—do not mention it. But some do, using phrases like, “There is no limit on the number of Authorized Users who may access the product concurrently” or “Access is provided to the Licensee for an unlimited number of concurrent users.” In general, we felt that it would be to the publisher’s advantage to mention this in the license, if the publisher is committed to it.

For those publishers in our group who were committed to allowing unlimited simultaneous use in all cases—on the basis that restricting the number of users makes no sense for an e-book, even if it is what happened by the nature of the medium in the print world—the considerable librarian appreciation of the aggregators’ business model of having a variety of access models (e.g., unlimited simultaneous, up to 5 simultaneous users, and single-user-at-a-time), so libraries can decide what they are willing to pay for, was quite surprising, especially as it seems to fly in the face of the Charlotte Principles. Many librarians appreciated the price flexibility offered by multiple options. More consistency and more transparency in these pricing models was wished for, but our librarian members in general liked having the choices from the aggregators that they are not getting from a publisher who offers only an unlimited simultaneous users model.

One analyst said, “Sometimes, one user at a time is sufficient. It is upsetting to see limitations to a one-user model on textbook purchases, but it goes without saying that textbooks are bread and butter for some publishers.”

Another said, “Since we all have varying needs and budgets, it’s great to have multiple purchasing options available. However, while I don’t expect vendors to create unique licenses for each purchasing model, I wonder if it would be possible to add an addendum to the standard license that explains what DRM is attached to the materials based on the model you choose. I feel like much of this information on limitations by purchase model is shared informally in conversations between librarians and vendors or aggregators (usually when libraries are considering a purchase or at the point of purchase), and I’d rather have this information recorded in an official document.”
And a third added, “I think the variety of purchase models is useful and needed, but more transparency as to the basis of the pricing for those models would be nice. I think flexibility would be possible, even with transparency.”

A publisher noted that the economics of book publishing are very different for publishers of monographs versus trade books versus course adoptions, and librarians need to recognize those differences. For monographs, libraries are the primary market. But for course adoption or trade books, libraries are a small piece of the pie. And the availability of such a book on a library platform could have a drastic impact on the publisher’s sales. For example, an inexpensive paperback book that sells thousands of copies each year for courses would be very difficult—in fact, probably impossible—to price appropriately for a library to provide unlimited access to its users, because a library would never be willing to pay as much as its individual users would pay when those payments are all added together.

On the other hand—with the growing prevalence of used books, pirated editions, etc.—publishers can no longer count on receiving payments from all users of course books. So an assured payment (or, perhaps even better, a per-student payment) from the institution via its library might become increasingly attractive to publishers.

We all agreed that these types of conversations are vital to have between publishers and libraries, and that they have more to do with business models and pricing than they do with licensing. Thus it made sense for the Charlotte Initiative to set up a separate research team to look at course use; and thus it might not in fact make sense for the Charlotte Principles to demand that “unlimited simultaneous users” should always be allowed for one set price, or even that this has to be available as an option in all cases.

**Interlibrary Loan**

Most of the licenses (though by no means all) do mention interlibrary loan or ILL. The specific language varies a lot, but there are some obvious clusters:

- Many publishers do allow ILL of individual chapters but do not allow ILL for whole books.
- Some publishers explicitly disallow all ILL.
- A few allow ILL but only within the same country, presumably because copyright law varies by country.
- A number of the licenses refer to allowing whatever is allowed by copyright law or CONTU guidelines. Sometimes this goes along with mention of single chapters.
- A number of the licenses refer to allowing transmission in hard copy but not in digital form, or to allowing transmission only via systems whereby the copy is deleted after a certain time.

Here is some of the language for strong restrictions:

- Cannot make available to anyone other than an Authorized User.
Here is some language for single chapter (sometimes stated as “single items” or “small portions”) restrictions:

- Up to five per year; following CONTU guidelines or similar fair use restrictions.
- ILL of whole books and multiple chapters requires explicit permission.

And here is some language about transmitting in digital form:

- May not transmit in digital form; must be hard copy sent by fax, mail, or electronic transmission using Ariel or its equivalent.
- Must be a secure transmission whereby the file is deleted.

Some of our analysts commented that the huge variation in ILL language—including many licenses that leave it to the library to interpret what is meant by “fair use” or “in compliance with copyright law” or other phrases of that sort—is a big problem for them in terms of working with the licensing staff in their libraries, since it is very challenging to communicate and interpret these terms to their ILL staff, who generally do not have much legal expertise.

One said that the librarian making the interpretation, especially if it is going to be written down in a set of guidelines for ILL staff to use, should probably have a conversation with the Office of University Counsel, or at least with the head of the library, about how far the institution is willing to interpret terms like “fair use” or “reasonable amount” where vague language of this sort is used in the license.

The Occam’s Reader initiative was identified by one analyst as an attempt to resolve ILL issues. But none of the publishers involved had anything good to say about it, and one said she had been approached but had made a clear decision not to try it.

Another analyst mentioned learning that even in a case where her library did have the right to lend an entire e-book via ILL, they still had to do it at a chapter level, which was burdensome, because of how the files were broken up in the e-book system they were using.

One publisher said, “ILL for e-books: I just wish it would go away. We allow ILL on a per-chapter basis. But if a library wants the all-singing, all-dancing version, then it really needs to buy the book.”

Others added that ILL in the digital world is not at all replicating what happened with ILL in the print world. And it is not at all like ILL for a journal article, which is just one small piece of a journal and would never affect whether anyone would subscribe to the journal. That difference between journals (where people almost always just want a small part, and they understand that this is all they can copy or send to someone else) and books (where
they almost always want to copy or send the whole thing) has to be recognized and acknowledged.

When you “lend” an e-book, these publishers said, it’s not really lending; it’s giving a second copy to the borrower. It’s a clone, not a loan; so then the copying and fair use laws need to apply. And while the copyright statute does allow the copying of individual journal articles or of small parts of books, it does not treat the copying of an entire book as fair use, except in the exceptional case where that book is unavailable otherwise at a “fair price” (whatever that means).

ILL for e-books does seem to be the area where publishers and librarians have the strongest disagreements—which is why we included it in our analyses, along with the three Charlotte Principles.

7. Next Steps / Recommendations

Libraries and publishers share many mutual concerns related to e-books and e-book licensing, such as

- Preserving e-books in accurate versions, to document and preserve our long-term heritage and culture.
- Ensuring that technologies aid, not limit, the availability and accessibility of e-books.
- Making licensing discussions and the signing of licenses clear and quick, rather than oppositional and labor-intensive.

In the long history of publishing and libraries, e-books are infants. Our group of license analysts and commenters were in general optimistic about the progress we made in coming to understand each other’s needs and desires, and the potential for further progress if we have good opportunities to build on the work we have done. We would welcome the opportunity to continue this dialogue in earnest.

Therefore the LPRT proposes that the Mellon Foundation consider funding an intense and focused set of further conversations between librarians and publishers. This dialogue would be a follow-up to the Charlotte Initiative, with a goal of leading to more standard and less legalistic e-book licensing language, with well-defined terms. We think our work has set the table for a more conclusive set of conversations that can set standards and expectations for everyone.

In working through terms, both publishers and librarians will need to let go of particular phrasings, and perhaps even long-held principles, that we have, each working separately, developed carefully and become attached to. In the publisher community, these phrasings and principles show up in many of the existing publisher license templates we looked at; and while many of those phrasings and principles seemed objectionable to our set of librarians in the LPRT, they also were able to identify language in some of the publisher licenses we looked at that they believe can serve as a model of clear and acceptable language.
In the librarian community, these phrasings and principles show up in model licenses created by libraries, such as those recently released by the University of California and the Canadian Research Library Network. Chuck Hamaker, who spearheaded the Charlotte Initiative proposal, early in the conversation suggested that definitions were needed but that the group should not put its energy into analyzing model licenses; so the LPRT did not look seriously at those library model licenses. But there too we would certainly find a combination of some phrasings and some principles that are unacceptable to publishers, and other phrasings and principles that could indeed serve as a model acceptable to all parties.

We will also all need to let go of assumptions from the world of print publication, recognizing that terms like ownership or interlibrary loan may not mean the same things in an electronic world. Time and time again in the LPRT we found ourselves saying some version of, “It worked that way in the print environment, but that does not carry over into the electronic environment in the same way.” This is a fundamental reality that all stakeholders have to come to terms with.

In addition to librarians and publishers, the conversation would benefit greatly from the inclusion of one or more sympathetic and knowledgeable lawyers who understand the viewpoints of both librarians and publishers. We believe they would be able to tell us where we can use “plain English,” where the use of certain legal terms is absolutely essential, and how we can accompany those legal terms with enough explanation in plain English that lawyers will not need to be called in at every turn in a licensing negotiation. It is definitely a mutual interest for librarians and publishers to make licensing language readily understandable for non-lawyers. But, perhaps paradoxically, we probably need legal help to achieve it.

We may still have a long road to travel before we get to a place where we can all agree on what an e-book license that works well for all parties should look like. But we don’t see any insurmountable obstacles on that road. We believe that we can get to the end of that road, if we can get follow-up funding to go the next mile.

That funding would need to enable key stakeholders, appointed and empowered by their respective communities, to meet in person several times, with an understanding that we all need to be both patient and persistent, and above all that we need to practice putting ourselves into the other party’s shoes, and seeing what the world looks like from the other party’s point of view. We think the Charlotte Initiative, and the work of the Licensing Principles Research Team in particular, has taken us a long way towards that goal. We were in agreement that we would all hate to see that momentum dissipate.
Appendix A
Licensing Principles Research Team
Active Membership

*Research team co-leaders*
Steve Cohn, Duke University Press
Theresa Liedtka, UT Chattanooga

*Publisher members*
Terry Ehling and Melanie Schaffner, Project Muse
Rebecca Seger, Oxford University Press

*Librarian members*
Lindsey Barnett, College of Charleston
Kate Dickson, UNC Charlotte
Sharon Farb, UCLA
Rachel Fleming, UT, Chattanooga
Katy Gabrio, Macalester College
Katie Gohn, UT Chattanooga
Jill Grogg, LYRASIS
Tony Horava, University of Ottawa
Mihoko Hosoi, California Digital Library
Angela Riggio, UCLA
Katie Zimmerman, MIT
Appendix B
Licensing Principles Research Team
Charge and Timeline

To address the current licensing issues surrounding e-books, the Licensing Principles Research Team (LPRT) will first explore the fundamental issues in e-book licensing that are keeping libraries from achieving a collection that meets the core principles of the grant; then it will develop possible solutions.

The three basic principles are:

- Provision of irrevocable perpetual access and archival rights.
- Allowance for unlimited simultaneous users.
- Freedom from any Digital Rights Management (DRM), including (but not limited to) use of proprietary formats, restricted access to content, or time-limited access terms.

The issue of licensing is at the heart of this project because at present license terms control every use of electronic content purchased. For example, in a sustainable archival model, libraries could take possession of a copy of the digital file and decide how best to provide archiving and business continuity guarantees to the campus. This would satisfy the first of the three licensing principles, and it would open up the possibility for further transformative uses of the material—potentially including cross-platform full-text indexing, shared annotations and comments, or the implementation of external linking within an electronic text—if publishers would agree not to restrict such uses.

To explore the fundamental issues in e-book licensing that are keeping libraries from achieving a collection that meets the core principles of the grant, the LPRT will:

1. Collect representative examples of current and proposed/model licensing language.
2. Examine the role of licenses to govern access to and uses of e-books, in light of existing copyright laws and protections:
   - Conduct a literature review* to analyze current case law, white papers, and other literature.
   - Review the applications of the doctrine of First Sale in the digital environment.
3. Compare these legal findings to the current practices in licensing content for purchase and use:
   - Where are licenses needed to govern access to and uses of electronic materials, in light of existing copyright laws and protections, if they are needed at all?

Then the LPRT will consider which of the terms in the gathered licenses work with and against the basic principles, and will engage libraries and publishers interested in developing a sustainable ecosystem for electronic academic publishing to collaborate in the
creation of ways to increase access to e-books, whether through licensing or other mechanisms, while employing the three basic principles.

---

*A literature review of licensing literature will also be part of the Environmental Scan that will be accessible to team members.

Licensing Principles Research Team
Timeline

September 2015  First Meeting of the Charlotte Initiative Working Group, UNC-Charlotte

October 2015  Steve Cohn and Theresa Liedtka appointed co-chairs of the Licensing Principles Research Team

February 2016  First Conference Call of the Licensing Principles Research Team

April 2016  Formation of License Analysis Task Force and Literature Review Task Force, as subgroups of the LPRT.

June 2016  Gather preliminary findings for interim report to the Mellon Foundation

September 2016  Gather findings that are more comprehensive and solicit feedback at the Working Group meeting in Charlotte

October 2016  Second Meeting of the Charlotte Initiative Working Group, UNC-Charlotte

February 2017  Gather and prepare findings for presentation at Charlotte Initiative Open Conference, UNC-Charlotte

March 2017  Charlotte Initiative Open Conference, UNC-Charlotte

April 2017  Draft white paper documenting process, outcomes, and recommendations from the LPRT.
Appendix C
Licensing Principles Research Team
Annotated Bibliography


This article discusses whether first sale rights extend to goods manufactured overseas. The Owner's Rights Initiative (ORI), consisting of libraries and internet retailers like eBay, contend that once you purchase something, you should then be able to rent, re-sell, lend or donate legally. In 2011, Wiley successfully sued a student for reselling in the U.S foreign editions of Wiley books exclusively for sale abroad, stating that first sale only extends to U.S. made goods. If upheld, the ruling could limit libraries' ability to lend books made or even just printed overseas. The case was going to the Supreme Court in 2012.


An interview with Brandon Butler that discusses the state at the time of publication of the various fair use challenges and recently decided cases, specifically Hathi Trust, SOPA, GSU, and more. Includes opinions about legislation and reform of the Copyright laws.


This is a report on a House IP Subcommittee hearing on the first sale doctrine held in NYC in 2014. The author of the article, Jonathan Band, testified at the hearing on behalf of the Owner’s Rights Initiative, and reported on other testimony at the hearing. Three primary topics were addressed: Kirtsaeng v. Wiley, digital first sale, and complications in physical first sale when licensed software is included. Stephen Smith (CEO of Wiley), Band (ORI), and Greg Cram (NYPL) testified about Kirtsaeng. Smith testified that Wiley was seeking legislation to overturn Kirtsaeng. Band testified that copyright law was an inappropriate means to control international markets. Cram testified that overturning Kirtsaeng would complicate libraries' ability to circulate foreign-printed books. Testimony about digital first sale was delivered by Siy Sherwin (Public Knowledge), John Ossenmacher (ReDigi), Stephen Smith (Wiley), Ed Shems (illustrator), Matthew Glotzer (movie consultant), and
Emery Simon (Business Software Alliance). Questions from the subcommittee on digital first sale focused on facilitating infringement, affecting the primary market for digital goods, and what consumers expect when they purchase digital goods. The author’s testimony and focus were on inclusion of licensed software with physical goods.


This article characterizes and describes two models of ebook sales in the US - the Google model and the Amazon/Apple model. The Google model utilizes fair use, but consolidates a large corpus of works under one distributor, leaving room for Google to act as a monopoly. The model followed by Amazon and Apple used proprietary formats and devices, and price capping between the two retailers lead to an antitrust case against them in 2012. The article argues that in both cases the market tends toward monopolistic control by only a few large players.


Blockchain technology, the main technological innovation of Bitcoin as it stands as proof of all the transactions on a network, may “offer new possibilities for owners to sell digital copies of ‘pre-owned’ content on secondary markets.” However, companies that have tried to use blockchain technology in order to create secondary markets have encountered the problem of what to do with all the existing copies of the content. Even though the record of the transaction exists due to blockchain, the original copy also still exists on the seller’s computer, which “runs smack up against the ‘first sale’ doctrine of the US copyright laws.” The article describes Redigi efforts to fix the problem. The author concludes that while blockchain technology may provide possibilities, it does not solve the problem of the first sale doctrine under current law.


The most valuable element of this website is the Liblicense link; other resources are for members and do not include much detail for the purpose of this bibliography. The Liblicense site includes licensing vocabulary, terms and descriptions, which include sample terms and commentary. Site also includes numerous links to other sites, which offer guides and other information on licensing.

Cram, Greg. 2014. “Hearing on First Sale under Title 17: Hearings before the U. S. House of Representatives Committee on the Judiciary Subcommittee on Courts, Intellectual Property, and the Internet”. (Testimony of Greg Cram, Associate Director, Copyright and Information
This is a transcript of the testimony of Greg Cram, Associate Director, Copyright and Information Policy at the New York Public Library from 2014. The testimony is organized into three major points and a conclusion: Importance of First Sale to libraries, why the Supreme Court’s Kirtsaeng decision should stand, and digital first sale. Cram provides a history of lending libraries in the U.S., noting they have spurred progress by increasing access to knowledge and a significant record of use. The author suggests that Congress monitor the quickly evolving digital marketplace to ensure that public access to scholarship is not significantly limited.


This article is broken down into four sections: the history of first sale, whether a digital first sale doctrine can exist, should first sale apply to digital files, and benefits of relying on a characteristics based test when considering a first sale doctrine for digital goods. The goal of this paper is to evaluate the characteristics of physical items that fall under the first sale doctrine and determine if those characteristics are present in digital copies.


The Report addresses the effects of rapid technological advance on existing copyright law and offers general recommendations for future law and policy. The report notes that over the past two decades, the rights and exceptions in copyright law have been repeatedly amended to respond to developments in digital technology, that many are in the process of being interpreted by the courts, and they should be left to evolve unless and until there is a need for legislative correction. Government actions like Operation in Our Sites, and private enforcement through litigation and DMCA remedies provide effective avenues to combat many types of infringement. Current tools have a number of gaps and shortcomings, making them ineffective in some contexts. It is important to find workable fixes for these gaps and shortcomings. The goal is to create a multi-faceted plan, involving legal tools, technology, private sector cooperation, and public outreach and education, along with the continued development of appealing legal offerings to curb infringement sufficiently to support robust legitimate markets for copyrighted content. There has been tremendous growth in the online copyright marketplace, with many services launched across copyright sectors, providing consumers with unprecedented access
in many formats. Some obstacles remain, however, particularly in the complex area of music licensing, which must take into account the complexity of different works, different licensing mechanisms, and different administrators of different rights.


Please note: This review focuses on section IV. First Sale Doctrine and Digital Transmissions (pp. 35-69) of the Report.

• Stakeholders (those commenting on the Green Paper issued by the Department of Commerce, July 2013) defined the benefits of the first sale doctrine as the ability to (1) resell or give away an owned copy of a work w/o having to obtain the permission of the copyright owner; (2) lend an owned work to another person; (3) preserve works that might otherwise be lost to posterity; and (4) protect privacy by making it difficult to track identities of those who have obtained copies of particular works.

• Commenters expressed concern that consumers’ ability to engage in acts traditionally within the scope of the first sale doctrine is increasingly controlled by licenses.
  + Copyright owners/publishers do permit the sharing of ebooks between multiple devices and among friends, at least for a selection of their catalogues.
  + Copyright owners also noted that consumers now have multiple access points for acquiring content (e.g. textbooks, music, and software) and at price points that are often lower than for the analog equivalent.
  + Rights holders generally prefer a licensing model (v. ownership); they argue that the strict application of the first sale doctrine to digital works would have a profound impact on pricing of those goods (prices would increase, perhaps significantly).

• Stakeholders described a marketplace that is evolving away from a distribution services model to one where consumers are offered multiple access and consumption options and price points (monthly subscriptions, freemium, pay-per-view, short-term loan, &c.). These models do not trigger application of the first sale doctrine because not copies are sold.

• Commenters did identify two primary respects in which the online marketplace fails to provide the benefits traditionally offered by the first sale doctrine: (1) a reliance on licensing terms is not a full substitute for statutory guarantees, especially as these terms can be modified; and (2) the licensing model does not replicate the ability of consumers to resell their copies, which enables and promotes a secondary market downstream.

• A number of stakeholders, including libraries, publishers, and authors, remarked on the limitations on what libraries may do with digital materials, including ebooks. Libraries expressed concern about the shift from owning physical copies to ebook
licensing models that did not allow for inter-library loaning and access models that were ‘print-centric’ and restrictive (e.g. single-user v. multi-user). However, publishers counter that ebook lending can have a greater impact on the marketplace than traditional library lending (of print) and can have a deleterious impact on revenue and margins. They argue that trading partners should not “awkwardly and impractically attempt to graft a doctrine crafted for the physical environment onto the online environment.”

- Library associations assert that publishers “frequently include terms in their [license agreements] that restrict libraries’ ability to exercise their rights under Section 107 (Fair Use) and Section 108 (library exemptions, supplementing Section 107) of the Copyright Act. Of especial concern was provision, or lack thereof, for preservation of ebooks. On a related note, libraries, patrons, and authors, citing “the right to read anonymously,” noted that the first sale doctrine protects privacy by “making it impossible for rights-holders to track the identities of all consumers who have obtained copies of their works.” The Green Paper states, however, that preservation and privacy are not central to the first sale doctrine’s core purpose: to permit the alienation of tangible personal property.

- The Center for Democracy and Technology identified a “policy conundrum” in that “[a]llowing first-sale principles to go completely extinct in digital markets is undesirable. But so is forcing digital content to be distributed via ‘ownership’ models in order to permit resale, when the market is embracing subscription and service-based distribution models.”

- The paper concludes that the licensing agreements between ebook publishers and libraries are new and evolving, and that early government intervention in the ebook market could skew the development of innovative and mutually beneficial arrangements.


This article studies the use of technological protection measure (TPM), which prevents use of electronic resources, and the more common “soft restrictions” that do not prevent, but significantly inhibit use. The study focuses on typical scholarly use of licensed resources, which includes printing, saving, accessing multiple resources, accessing a resource for an extended time, group sharing, and downloading. The study was performed at a Carnegie 1 library with a focus on engineering, health, and history/art history resources. Purposeful and random sampling of a range of resource types in the collection was performed, as well as interviews with librarians. The study identified six types of soft restrictions, which are extent of use, frustration, obfuscation, interface omission, decomposition, and warning. Two types of hard restrictions were discussed, which are disallowing copy/paste and use of a secure container technological protection measure. Regarding the use of TPM in scholarly publishing, the study shows that hard restrictions have not thrived in this area, and in some cases have been recalled. However, soft restrictions are common, and warrant more focus.

This article describes and explains the shift in the database industry's treatment of downloading. Downloading began as an unwanted by-product of new technology and became a product feature. The authors explain this shift in terms of changes to market practices, legal rules, user expectations, and technology-based tools that shape the use of intellectual and cultural property. In the early 1980s, citation database users did not have the right to "download," or save, citations from bibliographic databases, but by the early 1990s, citation database publishers had partnered with bibliographic citation software developers (e.g. ProCite) to make easy downloading of citations a product feature. The author presents a theoretical framework that is useful for analyzing changes in use rights for a variety of types of intellectual and cultural goods. Finally, the authors compare lessons from this historical case study to contemporary use rights debates in the intellectual and cultural property literature.


The author considers and proposes various measures for salvaging a "shrinking aftermarket in copyrighted works." The article starts with a thorough overview of the first sale doctrine’s history, including several important cases and section 109, followed by sections on ownership versus licensing, automated copyright management systems and anti-circumvention laws. The last two sections describe the author’s proposed amendments to section 109 and 1201. It is interesting that many of the processes and arguments remain the same today as 14 years ago, with the exception of changing technologies. The author draws analogy to cable and satellite television industries and describes the battle over VCRs.

The core question is can contract override copyright. The author examines laws in France, Germany, Netherlands, and the U.S. Traditional copyright law strikes a balance between an author’s control of original material and society’s interest in the free flow of ideas, information, and commerce. In today’s digitally networked environment, this balance has shifted dramatically to one side, as powerful rights holders contractually impose terms and conditions of use far beyond the bounds set by copyright law.


The fair use doctrine in US copyright law is critical for libraries to fulfill their missions. This paper details how flexible limitations and exceptions might similarly benefit libraries outside the US. US libraries primarily rely on five of the 16 different limitations and exceptions in copyright law. They rely on three purpose-specific exemptions: 1) Section 108 for preservation; 2) Section 110 for performance or display in face-to-face teaching; and 3) Section 121 for the accessible format copying for users with print disabilities. The other two exceptions on which libraries primarily rely are the first sale doctrine, which allows core lending capabilities, and the flexible fair use standard. Flexible limitations, such as fair use, accommodate broader uses than purpose-specific exceptions because, in part, purpose-specific exceptions do not allow for unforeseen advances in technology and other areas. Courts determine Fair Use on a case-by-case basis and based on four nonexclusive factors. Courts have often weighted the first factor (character and use) against the third and fourth (amount of copyrighted work and market effect).


This 2014 law review article proposes five long-term principles to reform §108 and explores librarian and policy-maker approaches to §108. The five principles of revision are: 1. Preserve library access to and the development of other limitations such as fair use, 2. Address issues unique to libraries, archives, and other memory institutions, 3. Favor simplicity and consistency, 4. Reformulate limitations as technology neutral, 5. Embrace flexibility.

This case study describes the development of a systematic process to find alternatives when an electronic resource is discontinued. The process took place from July to October 2014 at the University of Illinois at Chicago (UIC) Library of the Health Sciences (LHS). The goal was to make sure that all the e-book titles from the discontinued database were available in the library collection so that users would have perpetual access without any interruption.


This is a report of a two-year study by JISC on etextbooks usage and business models between 2009-2011. The first phase is to look at the current landscape and make recommendations for potential business models, and the second phase is a hands-on trial of four e-textbook business models with ten UK HE institutions, eight textbook publishers and three aggregators over a period of a year. Case studies from the perspective of the libraries involved are available. General findings were that, at the time, students were reluctant to rely exclusively on digital content, there were challenges in the movement of students between courses, and that the economics of libraries purchasing on behalf of students make that an unlikely to be a viable model. The general consensus was that student purchase was likely to be the dominant model for several more years.


This website includes the following types of model licenses: archives sublicense (used for digital archives); journal licenses and sublicenses for Ejournals; database licenses and sublicenses; and a sublicense for the SHEDL consortium. Key benefits of model licenses include flexible terms and conditions; consistent license terms; statement of quality (i.e., quality assured resources that are vetted through stringent criteria); time and money savers; and continued enforcement of a licensing benchmark.


This article examines the impact of increasing reliance on e-collections with access and use restrictions on future scholarship. It begins with a summary of library support of scholarship by maintaining an accessible scholarly record, and describes the shift in focus from "just in case" collections to "just in time" collections. It describes history of ILL as a case study in library copying technology and adoption of the 1976 Copyright Act as a legislative response. Then, the article describes rise of digital works, shift of access models, and libraries’ loss of control over the use of digital works through licensing agreements. It also discusses rising costs, bundling of e-content, and argues that pay-per-view models essentially impose a tax to read. The author argues that the short-term benefit of publisher-mediated access is not
outweighed by long-term consequences for preservation and access to the scholarly record, and discusses ways to address these problems. This article notes that adding digital works to the first sale doctrine under 109(a) does not address the problem if works are licensed rather than sold. It also notes the problem of orphan works. The article discusses managing the contractual limitations on library rights through license negotiation. Collaborative agreements, particularly shared e-book collections, are discussed as a potential solution, as is open access.


A brief article focused on statutory damages, one aspect of The Department of Commerce, Internet Policy Task Force’s White Paper on Remixes, First Sale, and Statutory Damages. There is one sentence that summarizes the rest, “the white paper found no need to recommend changes in the area of remixing and the first sale doctrine.”


Compiled by Liblicense, a bibliography of articles, chapters, reports, books, and principals of licensing issued by a variety of library organizations. Primarily it includes links to articles from the 1990s through the latter part of the first decade of the 2000's, and provides good historical reference for the current state of ebook purchasing. Included are references to papers on how to negotiate licenses, how consortia can work together to acquire content, and negotiation strategies.


This article summarizes the findings from a Mellon-funded research project, facilitated by the TRLN Consortia in 2011. It culminated with a 2-day meeting between a group of librarians from the TRLN Consortia, representatives from 10 consortia, ebook aggregators and publishers, looking at the future of consortial ebook purchasing and resource sharing.


This article is written from the viewpoint that the first sale doctrine should apply to retail purchased ebooks, and that providers are imposing DRM restrictions to avoid the piracy, which so severely affected the music industry. It discusses the use of "licensing" instead of purchasing of ebooks. It encourages providers to find ways to allow for first sale to apply though does not provide specifics. It does not touch on academic works, but rather seems geared more towards trade publishing.


Intellectual property rights policy has been historically driven by rights-holder interests, but with the advent of easily-shareable digital content, the very notion of a digital file as “commodity” that can be “owned” has shifted and requires new examination and definition. It is the classic struggle between individual ownership rights and collective community interest. Through an examination of recent Canadian copyright policy issues and changes, the author finds that such changes do not exclusively favor rights-holders.


This article describes a legal battle underway in the Netherlands regarding e-books.


The European Union’s highest court (Court Justice of the European Union, CJEU) affirmed in 2016 that public libraries could lend electronic books. In a case brought by Dutch public libraries against an author’s rights collecting foundation, the public libraries argued that the same rights should apply for digital lending as for traditional books.

The Owner's Right Initiative (ORI) aims to promote the free flow of trademarked goods around the world. They want to create a provision in the Transatlantic Trade and Investment Partnership between the US and the EU to allow copyrighted goods to be traded. This group takes a particular interest in physical goods with essential software. For example, a consumer may buy a computer, but manufacturers claim they are only licensing, not selling, the software needed to make that computer function, and the purchaser has no rights related to that software. They also acknowledge that more discussion needs to take place on how the first sale doctrine applies to digital goods. Includes a website detailing various major legal cases concerning copyright from 1908-2012. The ORI blog looks to be updated about once a month, and provides information on any legislation, publications, or major events taking place that address copyright issues and first sale doctrine. The FAQ primarily provides information on who the ORI is, but also explains what owner's rights are and why they are important. The issues section of this website discusses how ownership is critical to commerce. Businesses, retailers, libraries, museums, and others rely on the first sale doctrine. It describes the Kirtsaeng v. Wiley case, and talks about the "doctrine of worldwide exhaustion," meaning that owners can trade in imported goods knowing their rights are secure.


The first sale doctrine is not just a limit on distribution rights but rather a broader principle of copyright exhaustion (the idea that once a work protected by intellectual property rights is passed from the right's holder to the consumer/user, the right's holder power is diminished). Prior to the digital environment, section 109 sufficiently dealt with the first sale doctrine. With digital works, many have called for the expansion of 109 to recapture the balance between copyright holders and copy owners. This article, however, calls on the courts for a reinvigoration and enforcement of the judicial doctrine of copyright exhaustion, similar to how the courts have handled technological developments regarding patent exhaustion. The first sale doctrine is no longer sufficient to deal with the complexities of the digital copyright economy, but another longstanding concept of the Copyright Act, copyright exhaustion, can be applied through common law, which gives the courts the necessary flexibility to adapt to new technologies.


The Court of Justice of the European Union (CJEU) in the Netherlands, ruling on Vereniging Openbare Bibliotheken ("VOB") v Stichting Leenrecht, indicated that the lending of an e-book may, under certain conditions, be treated in the same way as
the lending of a traditional book. The finding supports the view of VOB, an association to which every public library in the Netherlands belongs. VOB’s action against Stichting Leenrecht, a foundation that collects the remuneration (or royalties) owed to authors, concerned lending under the ‘one copy, one user’ model. The Federation of European Publishers (FEP) indicated that the CJEU’s decision runs counter to the letter and spirit of the Public Lending Right Directive and the Infosoc Directive, both of which prescribe the need to treat physical and electronic goods and services differently.


The article’s focus is on digital rights management technology and the many problems the author has with it, including: the rhetoric of piracy, long-term preservation issues, accessibility, its harm to fair use, one source devices or platforms, and more. It covers the Digital Millennium Copyright Act and its implications, and tells librarians we should not let it happen or work with vendors using it.


This article discusses the history of the first-sale doctrine, including expansion and contraction of the doctrine, and discusses how such a digital first-sale doctrine might be established through legislation, the courts, or the marketplace. The authors also describe how digital content is different from analog content, focusing on digital content’s reproducibility. As seen in Capitol Records v. Redigi, U.S. courts are unlikely to adopt a digital first-sale doctrine without congressional policy-weighing deliberations. Section 109 could be amended, but Congress is unlikely to intervene while consumers’ appetite for digital content remains strong. Lastly, this article posits that content licenses and subscription services may render any establishment of a digital first-sale doctrine unnecessary. The rise of licensing and subscription models may make the concept of “owning” a copyrighted work obsolete.


The author argues that the First Sale Doctrine is too rigid in the face of evolving modern technology, and suggests a functionalist approach to the Doctrine and a more flexible rule to address technological advances, which were unforeseen when the Doctrine was first introduced. Part II provides the background, and discusses the history of the Copyright Act and First Sale Doctrine, as well as legal distinctions between print and digital media. Part III examines two cases interpreting the
Doctrine. In Kirtsaeng v. John Wiley & Sons, the Supreme Court held in favor of Kirtsaeng who resold imported foreign-produced textbooks for profit in the United States. In Capitol Records v. ReDigi, the U.S. District Court for the Southern District of New York ruled that ReDigi was liable for copyright infringement when it allowed people to upload and resell songs they had bought from Apple's iTunes. Part IV analyzes court decisions and explores the potential effects on the used or secondhand market, black market, and pirated goods. Part V discusses the considerations and challenges that must be addressed when crafting a new rule. Finally, Part VI suggests a more flexible Doctrine, using a functionalist approach, considering intent and effect, and balancing the needs of consumers and copyright holders to resolve some of the problems with the current Doctrine that have arisen as technology advances.


This article proposes "DRM Lite" as an alternative to traditional DRM, in the form of a visible watermark containing the consumer's personal information. The article first argues that traditional DRM is ineffective as it does not deter malevolent actors, but does impede legitimate purchasers. Robinson argues that all that is required of DRM is that it satisfy DMCA requirements in order to allow enforcement against ebook resale stores. Robinson suggests a solution composed of a watermark including the user's information and prohibiting redistribution and click-wrap terms and conditions.


This post reports on a White Paper on Remixes, First Sale, and Statutory damages released by the USPTO. The White Paper concludes that no legislative change is warranted, and the post reports on the USPTO's findings and process. The PTO report argues that the development of market solutions such as Netflix' streaming video subscriptions with "friend and family" options and cloud storage have made digital first sale unnecessary as a matter of legislative change. There is also discussion of "forward-and-delete" technology to facilitate digital first sale. The post also notes that the major content retailers (Amazon, Apple, Netflix) did not provide testimony for the white paper. Regarding libraries and digital first sale, the author of the post advocates updating section 108 to enable library lending of ebooks comparable to print lending, and notes that the PTO White Paper is more open to legislative reform for 108 than other issues.

A brief summary of the Department of Commerce’s Internet Policy Task Force White Paper on Remixes, First Sale, and Statutory Damages from American Libraries. Recommendations regarding First Sale (that "[digital first sale] is not warranted because of potential market harm") are characterized as "unsurprising," and noted the recommendation that "libraries and publishers work together to find common ground."


This article discusses the concept of cultural democracy and how it can be used to expand the current narrow and economically focused view of copyright law. Cultural democracy is a multi-disciplinary concept, which focuses on individual’s autonomy, self-determination, diversity of expression, and the ability to be active participants in the creation of culture rather than passive receivers. It also centers on the individual’s right to be provided with equitable access to culture that allow them to make life choices, which reflect their individual tastes. There are three major ways in which cultural democracy supports the values of a democratic culture: advancing individual’s self-determination, decentralizing the cultural meaning making process, and supporting public libraries as cultural institutions that preserve knowledge and support intellectual freedom. Libraries promote the public good by preserving culture and creating access to information. Current copyright law places more importance on the copyright holder and providing monetary incentives to keep creating, while cultural democracy weighs individual autonomy and self-determination more heavily. The digital age has created new opportunities for access to information and in offering individuals the means to create and build upon cultural materials, but the current copyright restrictions do not support the tenets of cultural democracy and restrict the development of a participatory culture. The author recommends that Congress prevent copyright holders from forcing non-negotiable licensing terms on libraries, and should consider a digital first sale doctrine.


Can there be a secondary market for digital files? This article discusses two landmark cases from 2013, Kirtsaeng v. John Wiley & Sons, Inc. and Capitol Records v. ReDigi. Kirtsaeng v. Wiley, in essence, protected consumer rights (but worried libraries). In Capitol versus Redigi, the court found against ReDigi and rejected its first sale defense. Technology does not stand still and ReDigi 2.0 may change the landscape, but at present, it does not fundamentally address the court’s primary
concern: the copy being distributed was not lawful. Other issues discussed in the chapter include streaming of television content (i.e., public performance rights) and computer software protection.


The article discusses digital first sale, focusing on the court case of Capitol Records, LLC v. ReDigi Inc. ReDigi, a service allowing the resale of "used" music files through digital transfer, was deemed guilty of infringing copyright by the court. ReDigi, billing itself as the "world's first pre-owned digital marketplace," allows users to resell legally acquired music files. It only traffics in files purchases from iTunes, which does not employ a click-wrap license (users must accept terms of agreement before download is possible), prohibiting resale. The sale takes place in the form of file transfer. Capitol Records sued ReDigi, citing copyright infringement. Capitol Records claimed that ReDigi created temporary copies of music files upon upload and download, which violated copyright. ReDigi was found guilty of vicarious and contributory infringement of Capitol’s rights. Though ReDigi claimed that new technology allowed music files to be transferred bit by bit rather than copied, the court determined that the new files constituted a "new material object", distinct from the original, resulting in unlawful reproduction. ReDigi’s fair use claim was rejected, largely because of the fact that they were facilitating commercial sales. The author contends that copyright holders such as Capitol Records should support efforts to establish a digital first sale, as the alternative is turning users to piracy.


This article reviews and analyzes the White Paper on fixes to copyright law released by the U.S. Department of Commerce.


Peter Jaszi, a member of DFC, gives testimony as part of a Congressional directive to the U.S. Copyright Office to explore and study the idea of a digital first sale doctrine in the wake of the Digital Millennium Copyright Act (DMCA) of 1998. The Digital Future Coalition (DFC) is particularly interested in first sale and its application to the digital environment. DFC supports an amendment to the law that allows for digital first sale, specifically a model where resell can take place as a digital transfer.
where the original copy is destroyed in the process. Jaszi recommends that the current study be supplemented with additional information about commercial distribution practices that may impede traditional first sale. The DFC is also concerned with click-through licenses that eliminate rights granted to the purchaser under the Copyright Act, and feels more research should be done in this area.


Web-based applications of major library ebook vendors, such as ebrary and ProQuest, has forced libraries to remain technologically behind the times as the rest of the web moves to mobile-friendly delivery. Studies in other industries such as music have shown that relaxing DRM increases music sales overall. No similar studies have been performed in the library environment. More research should be done to determine user awareness of DRM on scholarly resources, and if this impacts overall view of ebooks. The prominence of more flexible ebook acquisitions models such as PDA and non-linear lending shows that ebook vendors may be willing to explore changes in the current, heavily restricted ebook market. Previous studies show that users more readily adopt e-resources when they are perceived as being more convenient, relevant, and timesaving.


This is a 2010 Study of 7 UK libraries exploring selection criteria for ebooks. The study confirms previous findings that business model and license terms are key factors in consideration of ebook purchases. License factors specifically noted are simultaneous user limits and restrictive DRM as deterrents to purchase. Respondents indicate the wide variance in both licenses and business models is an issue for librarians trying to negotiate the ebook market.


This article describes changes made by Overdrive in 2014 in switching to MP3 for its audio files. It includes discussion of DRM, backwards compatibility, and a changing role for libraries guiding users through the maze-like landscape of differing DRM.