Library licenses for digital content undermine library rights and public policy

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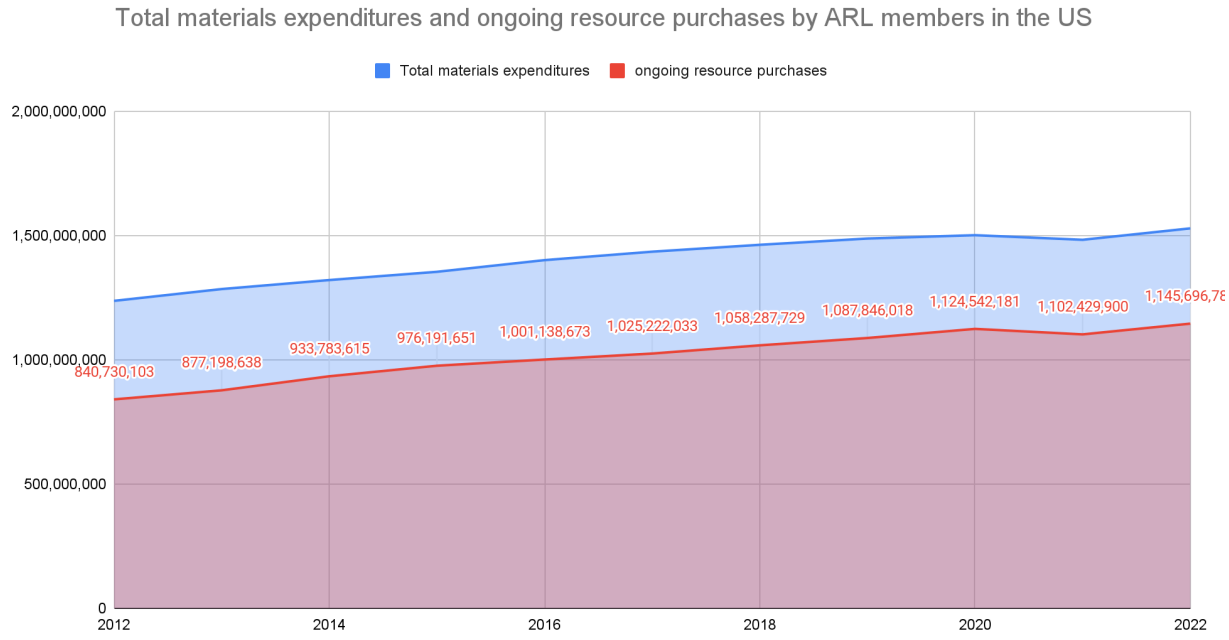
Libraries spend billions on lawfully acquiring digital resources

In 2022, research libraries in the US spent $1.5 billion on acquiring materials that support a rich, diverse, and interdisciplinary knowledge base for scholars and researchers. Annually, three quarters of that investment goes to licensing digital databases, journals, and other scholarly and cultural heritage works. In the past decade, research libraries' investments in licensed materials have increased by 36 percent. Public libraries' licensing is mostly weighted toward ebooks, although they also license databases, periodicals, and other media. Public libraries can spend tens of thousands of dollars licensing one ebook, or paying intermediaries like Overdrive to negotiate with publishers to license an ebook; despite the investment that libraries make in acquiring ebooks, ebook publishers often impose limits on the number of times a library can lend the work.



Licenses undermine library rights

Unfortunately, digital materials are subject to license agreements that often restrict libraries' ability to support research, preserve and provide access to scholarly works, and other mission-critical activities that are otherwise lawful under US copyright law. (KnowYourCopyrights.org). Licenses undermine the public policy objectives that Congress established through the exceptions and limitations in the US Copyright Act to benefit the public interest. And, some courts have found that such license terms are enforceable, even when they directly conflict with US copyright law. Sometimes, contracts are enforced without an in-depth analysis of whether or not they are in alignment with copyright law.

Scholarly sharing and text and data mining research

Some license agreements impose restrictions on scholarly sharing or other activities that constitute fair use, like text and data mining (TDM) research. Some publishers force libraries and researchers to negotiate for this lawful activity through license agreements, even for content that the library has already licensed. For instance, Springer Nature includes the following language on its website:

> "Subscribing academic and government institutions may include text and data mining rights in all new and renewed Journal and ebook subscription agreements under Springer Nature's standard TDM terms (Springer Nature's specialist Database products excluded). For such customers the rights to perform TDM is at no additional cost for content that their subscription license provides access to. Existing subscribers may also add TDM rights under these terms before their agreement is up for renewal."

The Springer Nature language is an example of publishers requiring libraries and other licensees to negotiate for rights that are already provided by the Copyright Act.

License agreements that restrict TDM, or require libraries or researchers to negotiate for lawful uses, present a barrier to research. In the example below, Elsevier limits researchers from conducting text and data mining research through their own API.

> 1.3 The Subscriber and its Authorized Users may not:
>
> - Use any robots, spiders, or other automated downloading programs, algorithms or devices, to search, screen-scrape, extract, or index any Elsevier web site or web application, other than the text and data mining service online via an API…

Preservation and accessibility

Research and public libraries rely on copyright exceptions to make preservation copies (17 U.S.C. §§ 107 and 108(b) and (c)), and accessible format copies (17 U.S.C. §§ 121 and 121A). Due to uncertainty about whether contract terms that restrict copyright exceptions are enforceable even when they conflict with copyright law, libraries might be reluctant to fully exercise these rights.

Libraries invest in materials, then invest in negotiating for the right to use those materials

Some libraries are able to retain their rights when negotiating with vendors for digital scholarly content. Academic libraries negotiate "researcher-friendly" licensing terms that preserve fair use and other rights, which are essential to ensuring that scholars can lawfully make use of the materials we have procured. This means that on top of the significant investment that libraries make in lawfully acquiring digital works, libraries are forced to invest significant time and effort to negotiate with private corporations to protect the rights that Congress already granted, or to pay significant sums each year to try to preserve fair use and other library rights. If libraries cannot fully exercise their rights, we will ultimately lose access to cultural heritage and scholarly works. In the case of research libraries, that situation would foreclose avenues for future scholarship and new knowledge.

Many libraries, especially public libraries but also smaller research libraries, lack the resources for negotiating with publishers. In the case of public libraries, any negotiation for access to books tends to be done by aggregators (e.g., Overdrive). And some publishers (e.g., Amazon) provide little if any access to libraries for their digital content--notwithstanding the ability of libraries to buy print and other [tangible] materials from them.

The Copyright Office can address this issue by supporting evidence gathering and best practices

In its 2001 DMCA Section 104 report, the Copyright Office suggested that there was no current evidence of the problem of license terms determining the landscape of library and user rights. In the same report, the Office acknowledged that library associations raised concerns about licenses or contracts for digital information displacing provisions of the Copyright Act. The report concluded, "although market forces may well prevent right holders from unreasonably limiting consumer privileges, it is possible that at some point in the future a case could be made for statutory change." Since then, publishers and content providers have shifted to licensing digital content with terms that restrict or

prohibit copying even for core library functions that are otherwise lawful, leaving libraries to comply with the terms or lose access completely–if they have access at all. Licensing models for digital content still benefit those who set the terms and increasingly erode the rights of libraries and other users of copyrighted works.

1) *Host roundtables on to collect updated evidence on how licenses determine the landscape of library and user rights*

A Copyright Office roundtable series would update the understanding of the current market-based barriers that libraries face to accessing and preserving works, and making them available to the public. Following the model used in its Artificial Intelligence initiative, the Office could convene libraries and rightsholders to discuss the extent to which licenses for digital content undermine libraries' missions of providing equitable access to information.

2) *Initiate a study to assess whether legislative or regulatory steps are warranted*

The Copyright Office could issue a Notice of Inquiry (NOI) to invite comments on whether new legislation or regulatory action is needed to address contract terms that conflict with US Copyright Law. Commentors could explain how other countries address these issues in their copyright laws, and highlight possible areas of convergence and divergence. Such a study could examine whether new legislation is needed in the US, and explore any specific proposals or legislative text.

3) *Convene library and publisher stakeholders to develop voluntary best practices*

The 2016 Department of Commerce White Paper on Remixes, First Sale, and Statutory Damages suggests: "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"). Libraries have had success developing codes of best practices, and would be happy to work with the Copyright Office and other stakeholders.