At the intersection of public service and the market: Libraries and the future of lending

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Most library uses of books occur outside the purview of copyright and the market. Loans fall outside copyright's exclusive rights; libraries have exceptions for many activities that involve copying. Author remuneration for library uses via the public lending right is governed by distinctly non-market considerations. This changes when works take digital form: electronic lending involves copies and transmissions which copyright owners have a right to license. As a result, libraries' ability to engage in electronic lending is governed by private contract, which means market forces largely determine the terms on which libraries can provide access – and whether they may do so at all. This has potentially significant implications: libraries have traditionally played an important role in furthering the public's interest in access to content and other societal goals including the encouragement of Australian authorship. This article provides a doctrinal mapping of the regulation of physical and digital lending. It also identifies avenues of investigation which need to be explored to inform the practices of libraries and policymaking. What could we lose by a wholesale operation of market forces? And what could we gain?

INTRODUCTION

Public libraries play an important role in Australian cultural life. There are over 1,500 public library services in Australia, and during 2012-2013 they lent members of the public some 40 million different items (a total of almost 174 million individual loans).[1] Most of those items were physical books, in keeping with the traditional image of a library as shelves of books and quiet reading desks. But the historical roles that accompany that image, of libraries as cultural curators, preservationists, and stewards of knowledge and information, are being challenged and reshaped by the rise of digital technology and the internet. In the digital environment it is not self-evident that publicly funded libraries are the sole, or even the main, means by which people may get access to the written word. Library innovation and activity is occurring: libraries have sought to embrace the potential of new technology to better serve the public; to improve access for remote and disabled customers; to open up their collections for broader use; and to offer new services such as access to technology and spaces for creation.[2] Electronic books (ebooks) are becoming increasingly important, including in library lending, albeit from a relatively low base.[3] But at the same time technology providers such as Google and Amazon, commercial publishers, and even black market providers (including unauthorised

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[1] National and State Libraries Australasia, *Australian Public Libraries Statistical Report 2012-2013* (2014) p 3, http://www.nsla.org.au/sites/www.nsla.org.au/files/publications/NSLA.Aust_Pub_Lib_Stats_2012-13_0.pdf.

[2] With regard to the emerging role and use of Australian libraries as "makerspaces", see Slatter D and Howard Z, "A Place to Make, Hack, and Learn: Makerspaces in Australian Public Libraries" (2013) 64(4) *The Australian Library Journal* 272.

[3] Book Industry Collaborative Council, *Final Report 2013* (Australian Publishers Association, 2013) p 34, http://www.publishers.asn.au/documents/item/157: reports a statistic from significant elending supplier OverDrive reporting that OverDrive systems had been used to borrow 70 million titles from public and school libraries around the world in 2012, up from 15 million titles in 2010. The Australian Library and Information Association (ALIA) predicted that ebooks will make up 20-30% of all lending by 2020: Sansom M, *Public Libraries Fight to Keep Aussie Authors in Ebook Stores*,

file-sharing sites) are also experimenting with methods for delivery of digital book or "book-like" content.[4] In this state of flux, libraries, like public broadcasters and other such services, face the question: to what extent should they offer services or materials that compete with the market? If commercial providers can create digital libraries, providing subscription services with ready access to a range of titles, what role remains for the public library?[5] What is the relationship between the library and the market?

Ebooks provide a microcosm through which we can examine these questions. As demonstrated below, libraries' role when it comes to lending *physical* books stands resolutely outside the market. Most acts that libraries undertake in relation to physical books fall outside the copyright owner's rights, and, not being property, are not tradeable. Other acts have been explicitly carved out through exceptions. Perhaps even more importantly, *authors' remuneration* in the library context also operates significantly outside the market through Public Lending Rights (PLR). On the other hand, when works take digital form, the legal position changes significantly. Lending bits instead of books requires copying and (typically) transmitting the work. That puts the transaction squarely within the purview of the copyright owner and results in its contours being determined by private contract, supported by laws prohibiting the circumvention of technological access controls. In other words, to date, the forces of the market have ruled whether, and to what extent, libraries get to lend ebooks, with some ad hoc, poorly thought-through and very limited carve-outs. Since libraries have traditionally played an important role in furthering the public's interest in access to content in Australia, that reliance on the market in this new context has potentially significant implications for Australian society. With no equivalent to the PLR in place for ebooks, authors too are affected.

This article provides a doctrinal mapping of the regulation of physical and digital lending. It also identifies avenues of investigation which need to be explored to develop a deeper understanding of the consequences of current elending approaches. What could we lose when access to the written word depends on the vagaries of the market? And what could we gain?

REGULATION AND REMUNERATION SYSTEMS AROUND PHYSICAL LIBRARY ACQUISITIONS AND LOANS

Libraries (public, State, and educational) are key participants in Australia's book "ecosystem": the interrelated system around writing, publishing, reading, and cultural preservation and curation. Not only are libraries among the biggest purchasers of physical books,[6] but they provide a multitude of readers with far greater access to them than could possibly be attained on an individual scale; they are also a hub for reading and the encouragement of reading; discussion; research, and book-related and cultural events. As a matter of history and deliberate design, a large proportion of library activity occurs outside the purview of the market. The following section explains what that means by analysing the contours of the regulatory interface between libraries and other key members of the system: authors, readers and publishers.

Copyright framework

Copyright law provides a means by which intangible products are turned into legal objects which can be traded in the market. Activities that fall outside the copyright owners' exclusive rights – in this case, most library activities around physical books – are effectively excluded from market trading and market pricing.

http://www.governmentnews.com.au/2014/08/public-libraries-fight-keep-aussie-authors-e-book-stores.

[4] Bodó B, "Libraries in the Post-scarcity Era" in Porsdam H (ed), *Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property* (Ashgate, 2015).

[5] Sedgwick J, *Kindle Unlimited is the End of the Library as We Know It*, http://jamiesedgwick.blogspot.com.au/2014/07/kindle-unlimited-brave-new-world-or-end.html.

[6] According to one Australian Library fact sheet, Australian libraries (including both public and educational libraries) purchase approximately 12% of books purchased in Australia: Australian Library, *Marketing to Libraries: A Guide for Australian Small and Self Publishers*, http://www.auslib.com.au/pdfs/Marketing%20to%20libraries.pdf.

Australian copyright law grants no general exclusive right to lend or authorise the lending of copyright works. Although the owners of literary copyrights do have the exclusive right to publish their works,[7] and, read sufficiently broadly, this could have granted copyright owners wide-ranging control over secondhand sale and lending markets, the right has been interpreted as being limited to the supply of a work to the public *for the first time*.[8] That is, the publication right is effectively "exhausted" after the work is first publicly provided, with the effect that subsequent supply to the public will not infringe.[9]

Nor does the lending of physical copies of books, magazines, games, films, audiobooks or music trigger any of the other exclusive rights of the copyright owner: libraries can supply books to the public without reproducing, performing, adapting or communicating them to the public.[10] And non-remunerated library lending does not constitute "commercial rental", a right attached to sound recordings (including recordings of literary works, such as audiobooks) and computer programs.[11]

Some activities a library might undertake will involve making and communicating copies. The obvious examples are the making of copies for preservation purposes, and copying material for the purpose of document delivery (where a patron at one library requests a copy of a journal article or other material held at another library). Less obviously, copies of material (such as book covers, content descriptions, or artistic works etc) may be copied or photographed for administrative purposes (such as cataloguing). The approach to date has been for copyright law to provide carve-outs for these kinds of activities.[12]

Contract law

Rightholders might use contract law to attempt to gain additional control over post-acquisition uses of their literary works, for example by making sale conditional on the purchaser agreeing not to loan out the copy, or by restricting the number of loans or potential circle of borrowers. Because of the privity doctrine however, which prohibits rights and obligations from being conferred or imposed except on parties to the contract, any such contractual restrictions would only be valid (if at all) against the initial purchaser.[13] Subsequent purchasers will not be bound by those conditions unless they are expressly incorporated in their own contracts of purchase. Contract law is only ever an imperfect

[7] *Copyright Act 1968* (Cth), s 31(1)(a)(ii).

[8] *Copyright Act 1968* (Cth), s 29; *Avel Pty Ltd v Multicoin Amusements Pty Ltd* (1990) 171 CLR 88, [3], [19]-[20]. This is despite s 29 of the *Copyright Act 1968* (Cth) which defines publication as the supply of copies to the public. The High Court held in *Avel* that the definition was concerned only with the status of works as published or unpublished, and was not intended to define the contours of the right to publish.

[9] The equivalent in the US is the "first sale doctrine". US law grants rightholders a general right to distribute copies via sale, rental, lease, or lending: 17 USC, s 106(3). However, it then limits that right by entitling the owner of a particular lawfully made copy to sell or dispose of it without the copyright owner's permission: 17 USC, s 109.

[10] *Copyright Act 1968* (Cth), s 31(1)(a); "communicate" is defined as meaning make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise), s 10(1).

[11] *Copyright Act 1968* (Cth), ss 31(1)(c)-(d), 85.

[12] See *Copyright Act 1968* (Cth), s 49 (permitting libraries and archives to reproduce and communicate articles and published works in certain circumstances in response to user requests); s 50 (permitting reproduction and communication by libraries in certain circumstances including supply to users or inclusion in collection); ss 51(1), 110A (permitting libraries to reproduce and communicate certain older, unpublished materials for purposes of research or study); s 51(2) (permitting the reproduction of unpublished theses if required for purposes of research or study); s 52 (permitting works that would have fallen within s 51(1) to be incorporated into new published works in certain circumstances); ss 51A, 51B, 110B, 110BA (permitting reproduction of certain material in certain circumstances for various administrative, preservation and replacement purposes); s 200AB (permitting certain uses of works and other subject matter by cultural institutions and some other users). Note that the Australian Law Reform Commission has recommended significant reforms to these exceptions including the repeal of s 200AB and the adoption of a flexible "fair use" provision which includes "library and archive use" as a prescribed purpose. Australian Law Reform Commission, *Copyright and the Digital Economy Final Report* (2013) p 267, http://www.alrc.gov.au/sites/default/files/pdfs/publications/final_report_alrc_122_2nd_december_2013_.pdf. However, these recommendations have not yet been adopted by the legislature.

[13] Duke A, Robertson A and Paterson J, *Principles of Contract Law* (4th ed, Thomson Reuters, 2011) p 255.

means of trying to create tradeable objects,[14] and those limitations make it a particularly poor tool for reimposing market relations or restrictions on public libraries in the context of dealings with physical books.

Furthermore, as long as none of the copyright owner's exclusive rights are triggered by the dealing, any breach will only sound in contract, not in copyright. One record label has recently attracted controversy for warning that the unauthorised lending of their CDs constitutes infringement.[15] However, since the lending of a physical CD is not an exclusive right of the copyright owner under Australian law, unauthorised lending could be, at most, a breach of contract.[16]

As a result of this legal framework, attempts to limit the post-acquisition uses of physical works (or engage in price discrimination aimed at differentiating between specific groups of purchasers, such as consumers and libraries) are unlikely to enjoy success.

Public and educational lending rights

Another important way that the activities of libraries in their dealings with books are taken outside the ordinary operation of market principles – perhaps underappreciated in the legal literature – relates to the remuneration of authors. Ordinarily, making sure that authors get paid for their works is the job of copyright law:[17] the exclusivity created by copyright enables authors to bargain for money or other forms of remuneration in return for their creative labour. Since most library uses of physical works fall outside the copyright owner's exclusive rights that would suggest authors are not entitled to payment. However, authors and publishers are entitled to remuneration for library uses of physical books, independently of the copyright framework, via Australia's PLR.

The PLR has existed in Australia since 1974.[18] Under this scheme, qualifying creators (including authors, illustrators, translators, compilers and editors) and publishers are each paid a prescribed amount for each library holding of their works, as long as it exceeds 50 copies.[19] Only books fall within the scope of the PLR: for all other physical works held and lent by libraries, such as magazines and DVDs, the remuneration for authors and rightholders comes solely from the initial purchase price paid for the goods. PLR revenue is payable only to creators who are Australian citizens or residents, and publishers with some Australian connection.[20] The scheme has the dual objects of compensating Australian creators and publishers for the loss of income that may result from library lending of their books, and supporting the "enrichment of Australian culture" by encouraging the creation and publication of books in Australia.[21] This is only possible because the PLR system operates

[14] See discussion in Merrill TW and Smith HE, "Optimal Standardization in the Law of Property: The Numerous Clausus Principle" (2000) 110 *Yale Law Journal* 1; Merrill TW and Smith HE, "The Property/Contract Interface" (2001) 101(4) *Columbia Law Review* 773.

[15] Watercutter A, *Mumford & Sons Warn Against "Unauthorised Lending" of their CD*, http://www.wired.com/2012/12/mumford-sons-lending-copyright.

[16] In the case of the Mumford & Sons CDs there would not even be a breach of contract for a number of reasons, including that there is no contract between the party attempting to impose the condition and the consumer. In cases where the material lent is in digital form – for example, a CD or DVD – a copyright owner might argue that the recipient of the loan makes unauthorised temporary copies in the digital memory of the device used to play the copy (the CD or DVD player), and that the party loaning the material authorises those infringements: see *Australian Video Retailers Association Ltd v Warner Home Video Pty Ltd* (2001) FCA 1719. However, specific exceptions cover such temporary copies made from legitimately acquired material: *Copyright Act 1968* (Cth), ss 43B, 111B.

[17] This relationship is indirect in the employment context, where remuneration of a human author will generally come from the employer who is then designated the owner of copyright: *Copyright Act 1968* (Cth), s 35(6).

[18] The PLR operated initially as an administrative scheme. It was formalised through the *Public Lending Right Act 1985* (Cth).

[19] See *Public Lending Right Scheme 1997* (Cth) (made under s 5(1) of the *Public Lending Right Act 1985* (Cth)), s 3 (defining creators as Australian authors, illustrators, translators, compilers or editors of books, and others who contributed to their form or contents); s 17 (prohibiting payments where the estimated number of copies held is less than 50). Note that compensation is based on the number of copies *held* by libraries, not the number of loans. Stocks are calculated using a selective survey of a limited number of libraries.

[20] *Public Lending Right Act 1985* (Cth), s 5(4); *Public Lending Right Scheme 1997* (Cth), r 6.

[21] *Public Lending Right Act 1985* (Cth), s 2A; see discussion in Commonwealth, *Parliamentary Debates*, House of

independently of copyright. If a lending right were recognised within copyright itself, it would be subject to the principle of national treatment, obliging Australia as a matter of international law to extend those benefits equally to qualifying foreign nationals.[22]

Most interestingly, while remuneration schemes in copyright (such as the various statutory licensing schemes in Pts VA – VC of the *Copyright Act 1968* (Cth)) attempt to approximate a market result and distribute income according to copyright ownership (which frequently lies with publishers), remuneration under the PLR scheme works quite differently. Payments under the PLR are inalienable and payable according to a statutory formula which grants the lion's share of remuneration to authors (rather than copyright owners) according to a measure based more on access than popularity: ie remuneration is based on the number of copies of their work held in Australian libraries, not the rate of borrowing of those copies. In Australia, the money for the PLR comes from general revenue, not from patrons or library operating budgets. In 2013-2014 a total of $9.563 million was paid to 7,594 creators and 258 publishers.[23] Authors were paid $2 for each copy held by Australian public libraries; publishers received one quarter of that amount, ie 50c per copy.[24] Since there is no cap on the scheme, the payments can be substantial – in 2013-2014, one author was paid over $150,000; 34 authors received $20,000 or more; and a further 56 received between $10,000 and $19,999.[25] The remaining 7,504 authors each received less than $10,000.[26] To contextualise the breadth of the scheme, it is estimated that in 2009 there were around 7,600 practising professional writers in Australia (a figure which includes playwrights and scriptwriters as well as authors of books).[27]

A report by PricewaterhouseCoopers shows the importance of this revenue source, estimating that PLRs contributed some 11% to total author book-related income in 2010, with other major sources being publisher royalties (82%), distributions from the Copyright Agency (6%), and grants from the Literature Board (1%).[28] Anecdotally, authors seem to value the PLRs very highly as a source of ongoing, reliably paid (if often modest) income to supplement their copyright royalties. Author Libby Gleeson, a former chair of the Australian Society of Authors, describes the PLR as "one of the most important ways in which writers are rewarded for the work that they've done".[29]

In addition to its PLR, Australia has had an Educational Lending Right (ELR) since 2000. This operates as a separate administrative scheme which compensates creators and publishers of books held in educational institutional libraries. The aims and eligibility criteria for the ELR match those for the PLR,[30] though payments are assessed rather differently.[31] In 2013-2014, the ELR saw a further $11.334 million distributed to 9,616 creators and 366 publishers. Many of the most highly rewarded

Representatives, Hansard No 141 (1985), p 1920 (Staples J) http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansardr%2F1985-05-09%2F0008;query=Id%3A%22chamber%2Fhansardr%2F1985-05-09%2F0000%22.

[22] For the source of these international obligations see *Berne Convention*, Art 5(1); *TRIPS*, Art III; *WIPO Copyright Treaty*, Art 3; *WIPO Performances and Phonograms Treaty*, Art 4. See discussion in Goldstein P and Hugenholtz PB, *International Copyright: Principles, Law and Practice* (2nd ed, OUP, 2010) p 318.

[23] Public Lending Right Committee, Attorney-General's Department Ministry for the Arts, *Public Lending Right Committee Annual Report 2013-2014*, p 14 http://arts.gov.au/sites/default/files/about/PublicLendingRightCommitteeAnnualReort2013-14.pdf.

[24] *Public Lending Right Scheme 1997* (Cth), rr 14(2), 15(2), 17.

[25] Public Lending Right Committee, n 23, pp 30-31.

[26] Public Lending Right Committee, n 23, pp 28-29.

[27] Throsby D and Zednik A, *Do You Really Expect to be Paid? An Economic Study of Professional Artists in Australia*, p 17, http://www.australiacouncil.gov.au/workspace/uploads/files/research/do_you_really_expect_to_get_pa-54325a3748d81.pdf. Note however that not all authors remunerated under the PLR are necessarily professional writers.

[28] PwC Australia, *Cover to Cover: A Market Analysis of the Australian Book Industry*, p 20, http://www.industry.gov.au/industry/IndustrySectors/booksandprinting/BookIndustryStrategyGroup/Documents/ PwCCovertoCover.pdf.

[29] See video at Gleeson L, *PLR/ELR*, https://www.asauthors.org/plrelr.

[30] Educational Lending Right, *Policies and Procedure 2011*, http://arts.gov.au/sites/default/files/pdfs/elr-procedures-2011.pdf; also Public Lending Right Committee, n 23, p 16.

authors are the same in both schemes, including well-known children's authors Mem Fox, Robin Klein, Morris Gleitzman, Emily Rodda and Paul Jennings.[32]

International comparison

Australia's treatment of library activities as falling outside copyright owners' control is far from unusual. Countries have no obligation under the major international treaties (including Berne and TRIPS) to recognise library loan as one of the rights in the copyright bundle. Many parts of the world, including the US and the entirety of South America, Africa and Asia, neither recognise library lending as falling within the author's exclusive rights nor provide remuneration for library usage via a PLR.[33] In those jurisdictions, the only revenues paid by libraries to copyright owners are those derived from the initial purchase price. Exceptions entitling libraries to perform acts that would otherwise fall within the purview of the copyright owner are also common, with a recent WIPO study finding that, of the 188 member countries, 156 had at least one statutory exception.[34]

The EU position is somewhat anomalous, at least on paper: EU member states have been required to recognise non-commercial loan as within the copyright owner's exclusive rights since the *Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property* (the Rental Directive).[35] In its current form, the Rental Directive requires member states to grant copyright owners the right to authorise or prohibit the lending of copyright works and other subject matter.[36] "Lending" is defined as "making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public".[37] As a result, the initial sale of a work does not fully exhaust the owner's interests in its subsequent non-commercial loan.[38]

However, it would be wrong to take from this that the market is allowed to operate unhindered in the EU: in fact the Rental Directive permits states to derogate from the copyright owner's exclusive right as long as they at least ensure *authors* (notably not owners) obtain remuneration for public lending.[39] A number of EU members, including the UK, have taken advantage of that flexibility by giving effect to their obligations via the creation of sui generis schemes operating independently of copyright law rather than amending their copyright laws to recognise an exclusive right of library

[31] See Loukakis A, *Re: Modernisation of PLR and ELR Schemes – Discussion Paper*, p 4, https://www.asauthors.org/files/submissions/asa_submission_plr_modernisation_review.pdf (in which the ASA explains the reasons for the different funding formulae). See also the policy and operational guidelines relating to the Educational Lending Right, n 30.

[32] Public Lending Right Committee, n 23, pp 22-24, 36-37. Many of the same authors are rewarded in each scheme as a result of educational institutions holdings (schools, TAFEs, and universities) being weighted on professional advice.

[33] PLR International, *Frequently Asked Questions*, https://www.plrinternational.com/faqs/faqs.htm.

[34] Crews KD, World Intellectual Property Organisation, Standing Committee on Copyright and Related Rights *Study on Copyright Limitations and Exceptions for Libraries and Archives: Updated and Revised*, SCCR/30/3 (2015) p 6, http://www.wipo.int/edocs/mdocs/copyright/en/sccr_30/sccr_30_3.pdf.

[35] Directive 92/100/EEC on Rental and Lending, Art 15 (since superseded by Directive 2006/115/EC on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0115&from=EN). The introduction of the lending right was justified as being necessary to harmonisation. However, immediately prior to the EU's adoption of rental and lending rights, only four states – Denmark, the Netherlands, Germany and the UK – provided for remunerated public lending, and only Germany recognised the right within its copyright framework. Nonetheless, the German model was eventually adopted. Commission of the European Communities, *Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action* at [4.4.7]-[4.4.8], http://ec.europa.eu/green-papers/pdf/green_paper_copyright_and_chanllenge_of_thecnology_com_%2888%29_172_final.pdf.

[36] Directive 2006/115/EC, Art 1.

[37] Directive 2006/115/EC, Art 2(1)(b).

[38] Goldstein and Hugenholtz, n 22, p 318. Commercial rental of works are also dealt with in the EU Directive: see generally Directive 2006/115/EC.

[39] Directive 2006/115/EC, Art 6(1). Such remuneration may be determined with reference to their "cultural promotion objectives".

lending.[40] Like the Australian model, such systems effectively provide authors with a right of remuneration without giving copyright owners the right to control library uses of the physical containers in which cultural works reside. They are also able to limit eligibility for remuneration to works on criteria such as language and citizenship or residency of contributors.[41] It is yet to be seen how the European lending right will look once it has been fully implemented; a number of nations have dawdled in their implementation,[42] while others have incorporated broad exemptions (of doubtful legal validity) that result in no remuneration actually being paid.[43]

Some 33 countries worldwide have implemented PLR systems so far, motivated variously by national rights and social welfare rationales.[44] Australia is one of only four to do so outside of Europe (in company with Canada, Israel and New Zealand).[45] It is also one of a minority of global schemes to remunerate publishers as well as authors.[46]

The shakeout: Implications for publishers, libraries, authors and readers

When it comes to literary works embodied in physical containers (ie books),[47] Australia's existing regulatory framework gives publishers little control over libraries' acquisition and post-acquisition uses. The result is that most library activities sit firmly outside the realms of the market, bounded only by the contours of the Copyright Act and the lifespan of the physical object. They can engage in any act that falls outside the scope of the copyright owner's exclusive rights without fear of liability, including the loan of books to the public on any terms they wish; they can buy, repair, sell, give away or destroy books; they can lend them widely (including to patrons of other libraries). They can copy parts and deliver the copies to other libraries as part of a document delivery service; they can make certain reproductions for administrative and cataloguing purposes. They can also, importantly, *keep* books indefinitely; in other words, libraries' acquisition of physical works also provides them with continuity of access: if collection budgets are low one year, shelves still contain the works that have been purchased in previous years. They also retain works which have gone out of print or otherwise been withdrawn or discontinued from sale.

Clearly there is an interface with the market: libraries do have to buy books. But the system also gives libraries access to competitive prices. Publishers can and do rely on various methods to maximise the initial price paid for each copy. For example, they often "window" their releases, putting out higher priced hardbacks first, and releasing paperbacks for more price-sensitive purchasers later on. Publishers may also charge different prices in Australia than in other markets, since the knowing importation of books into Australia for commercial purposes, without the owner's licence, amounts to

[40] For a comprehensive list of the various PLR schemes operating around the world, see PLR International, *PLR Systems Around the World: Some Basic Facts*, https://www.plrinternational.com/plraroundtheworld.pdf.

[41] See PLR International, n 40, for a list of global PLR eligibility requirements.

[42] Re slowness of compliance see Commission of the European Communities, *Report from the Commission to the Council, the European Parliament and the Economic and Social Committee* (EUR-Lex), http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52002DC0502. In some cases the slow implementation may be attributable to libraries needing to fund the payments from existing resources.

[43] Article 6(3) of the Directive provides that "certain categories of establishments" may be exempted from the payment of remuneration, and some member states have relied on this to exempt all, or almost all, lending institutions. However, recent decisions of the ECJ have cast doubt on the validity of this practice. See C-36/05 *Commission of the European Communities v Kingdom of Spain* [2006] OJ C326/06, [7]-[8]); C-53/05 *Commission of the European Communities v Portuguese Republic* [2006] OJ C212/06, [7]; C-175/05 *Commission of the European Communities v Ireland* [2007] OJ C42/ 07, [4]; C-198/05 *Commission of the European Communities v Italian Republic* [2006] OJ C326/06, [11]. See also discussion in Goldstein and Hugenholtz, n 22, p 319.

[44] Goldstein and Hugenholtz, n 22, p 317.

[45] PLR International, n 40.

[46] For scope of the various global schemes, see PLR International, n 40.

[47] The analysis here is confined to books, although other products such as audiobooks recorded on CDs would also be "literary works embodied in physical containers".

infringement.[48] However, publishers have little ability to price discriminate between libraries and other purchasers. That's because, once the copyright owner has sold copies to wholesalers or retailers, they can in turn be sold to whomever they wish for any price they like.[49] Even if a publisher would prefer to charge consumers $15.99 and libraries $39.99 for the same book, libraries would simply be able to purchase copies originally sold to consumers for a more competitive price in the secondary market.[50] As matters now stand, libraries are able to purchase physical copies from wholesalers at significant discounts to the RRP. If rightsholders wish libraries to pay higher prices, they need to entice them to do so by offering something more in exchange. To that end, publishers sometimes produce "library editions", of books, which extend their shelf life by utilising heavier duty binding and/or higher quality paper.[51] The prices of those editions are effectively held in check by the availability of standard editions: a library confronted by a high priced library edition might settle for a cheaper consumer copy and rebind or repair it in-house. The impact of these limitations on local authors' income is ameliorated however by the existence of the PLR which, as noted, devotes the bulk of its payments in a most unmarket-like way to Australian authors.

WHAT CHANGES WHEN LIBRARIES LEND BITS INSTEAD OF BOOKS?

This section identifies how the legal situation changes when libraries deal with cultural materials that aren't embodied in lendable physical containers. In such cases the only relevant property is the intellectual property – the copyright in the underlying work. Short of buying that copyright altogether, libraries' only option for access is to license their desired uses. Current practice typically sees publishers license access to intermediaries known as distributors or aggregators, which then in turn make individual titles or complete catalogues available to libraries on their own technology platforms.[52] Aggregators commonly used by Australian libraries include OverDrive, Axis360, Wheelers and EBL; Australian libraries (and, more recently, many publishers) typically deal with multiple intermediary platforms.

Copyright

The owners of literary copyrights have three relevant exclusive rights: to publish, to reproduce in material form, and to communicate (electronically) to the public.[53] The scope of the publication right was discussed above. Since it is limited to the *initial* supply of a work to the public, it applies the same way to ebooks as to physical ones: it is exhausted once that first supply has taken place, and has no further application thereafter. However, application of the rules diverges when we come to the rights governing reproduction and electronic communication.

As noted above, acquiring or lending a physical book does not involve copying it, or communicating it electronically to the public. However, those acts *are* necessary to acquiring and lending their electronic equivalents. The acquisition of a purely digital version of Mem Fox's *Possum Magic* involves the making of at least one copy specifically for the acquirer. Loaning it to users via the internet or another network involves making additional copies, and triggers also the right to electronically communicate works to the public. It can be possible for libraries to lend ebooks without communicating them, by, for example, loading them onto a physical eReader device and then lending

[48] *Copyright Act 1968* (Cth), s 38. This contrasts with the position under US law, which provides that the first sale doctrine applies regardless of where the relevant copy was made. See *Kirksaeng v John Wiley & Sons Inc* 654 F 3d 2010.

[49] In the context of the US equivalent, see Reese RA, "The First Sale Doctrine in the Era of Digital Networks" (2003) 44(2) *Boston College Law Review* 577, 585.

[50] Again, even if the consumer was contractually bound not to resell their copy, that would only bind them, not future purchasers. And if they did breach any such condition, the act would result in little harm and be highly unlikely to be litigated.

[51] For more information about library editions and associated standards, see the website of the Library Binding Council, http://www.lbibinders.org.

[52] Book Industry Collaborative Council, n 3, p 183.

[53] See *Copyright Act 1968* (Cth), s 31(1)(a).

out that device.[54] However, even loaning an eReader requires making at the very least a copy on the loanable device. And loaning eReaders rather than allowing users to load ebooks on their own devices is an expensive option – eReaders cost considerably more than physical copies both to purchase and repair or replace if damaged, and require upkeep.

As a result of the intrinsic nature of digital files (which require copying and often transmission), the acquisition, loan and interlibrary supply of ebooks all fall within the scope of the copyright owner's rights. Every one of those acts can be controlled, and, potentially, priced.

Contract

The copyright-triggering acts essential to dealings with purely digital works give copyright owners far greater control over the post-acquisition uses of ebooks than physical ones. That's because, unless a purchaser manages to purchase the copyright in a work outright,[55] they are obliged to license the rights to engage in any copyright-triggering acts. Those licences are contracts which govern the terms on which the licensee may use the particular work.

Contracts can be drafted to impose different terms on different classes of purchaser, and may prevent assignment of rights and sale or transfer of copies. And, since every party who needs to make a copy or engage in any other copyright-triggering act must separately agree to the licence terms in order to do so, contractual terms can't simply be bypassed through lack of privity. It may not be open to a library to enter the contract necessary to purchase a "consumer" ebook edition (since any contractual offer from the publisher could exclude purchase for use other than purely personal use) and subsequent use by the library could fall outside the licence terms and hence breach copyright.

Licensing enables publishers to exercise far greater control over libraries' post-acquisition uses of cultural works, including lending. For example, HarperCollins announced in 2011 that it would impose a 26 loan cap on ebook circulations of its titles, after which a new licence would have to be purchased.[56] Publishers have no equivalent power to require libraries to remove physical books from their shelves after a certain amount of use. We address issues relating to the exercise of such post-acquisition control in more detail below.

In addition to the conditions set by publishers, the intermediary aggregators who sit between publishers and libraries may also affect the terms which libraries are offered. While aggregators obviously cannot grant libraries greater rights than they themselves obtained from rightsholders, they may grant fewer. For example, an aggregator might require library patrons to access books via a particular kind of software, or to limit access to streaming rather than download.[57] They can determine policies such as whether it is possible for a user to return an ebook early (in order to make it available for another loan) or prohibit that from occurring.

The need to license digital works also gives their owners the ability to decide whether or not to make the works available to prospective licensees at all, on what terms, and at what price. A report from the Book Industry Collaborative Council explains the range of deals that can result:

> While a single up-front payment for ebooks is common, some ebook suppliers have opted to charge libraries a fee each time a title is borrowed, or on the basis of access to the content for a defined service period. Even where libraries pay an upfront amount per title, it is common for continuing access to be contingent on libraries maintaining a relationship with the publisher/distributor who hosts the titles, and

[54] For example, the Glen Eira public library system in Victoria lends Kobo ebook readers with 25 books already loaded; patrons may then add loans from the available ebook catalogue. See Glen Eira Library and Learning Centres, *eBooks and eAudio*, http://library.gleneira.vic.gov.au/Information/eLibrary/eBooks_and_eAudio.

[55] This is highly unlikely to occur in the context of commercial books. It is, perhaps, more conceivable in the context of some educational materials, for example material which could be commissioned by government departments of education to fulfill standard curriculum requirements.

[56] Hadro J, *HarperCollins Puts 26 Loan Cap on EBook Circulations*, http://lj.libraryjournal.com/2011/02/technology/ebooks/harpercollins-puts-26-loan-cap-on-ebook-circulations/#.

[57] O'Brien DR, Gasser U and Palfrey J, *E-Books in Libraries: A Briefing Document Developed in Preparation for a Workshop on E-Lending in Libraries*, p 12, http://cyber.law.harvard.edu/sites/cyber.law.harvard.edu/files/E-Books%20in%20Libraries%20%28O%27Brien,%20Gasser,%20 Palfrey%29-1.pdf.

> on the continued operation of that publisher/distributor. Libraries are often charged substantially more than consumers for equivalent products, and in some cases libraries can access works only via bulk purchases (eg purchasing multiple "copies" of a title or purchasing access to a defined collection of titles).[58]

We explained above that publishers have little ability to engage in price discrimination in the case of physical books, which is why copies end up selling to libraries and consumers for around the same price.[59] The situation is very different for ebooks, because the need to license gives rightholders far more ability to differentiate between users and uses. Thus, in March 2014 the digital version of Donna Tartt's *The Goldfinch* was being sold to US consumers for US$7.50, and to US libraries for US$90.[60] In 2011, publishers in the Netherlands were reportedly charging up to 2000 for uncapped access to 2 year old titles.[61] In 2014, some Swedish publishers were demanding licence fees of 9-10 per loan for front list titles.[62] A number of publishers refuse to make works available to libraries on any terms at all.[63] Lack of availability is proving to be a particular problem in Australia, as demonstrated by a comparison carried out by librarian Gareth Dixon in June 2015. Examining 25 popular titles, each of which were available to US libraries to licence, Dixon discovered that 36% were not available to Australian libraries on any terms at all.[64] A further 12%, all published by Macmillan, were available only to libraries who were willing to purchase a bundle of at least another 499 titles into the bargain.[65]

Relationship between copyright and contract

The power of publishers to control post-acquisition uses potentially extends to those which would otherwise be permitted under the Copyright Act. Libraries are permitted to engage in certain reproductions and communications of copyrighted works for the purposes of facilitating particular kinds of access that the legislature has recognised as publicly desirable. They also have some carve-outs to enable them to fulfil their preservation missions. However, licensing agreements may contain terms prohibiting libraries from engaging in activities that would otherwise be permitted under that exception. They may also require libraries to impose specific terms upon their users.[66] These terms may restrict patrons' entitlements under the Copyright Act, by, for example, prohibiting fair reproductions for research or study.

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[58] Book Industry Collaborative Council, n 3, p 192. See also enormous range of models/terms on which content is being made available to Australian libraries at Book Industry Collaborative Council, n 3, p 201, Appendix B.

[59] Douglas County Libraries, *Douglas Counties Library Report: Pricing Comparisons as of March 3, 2014*, http://evoke.cvlsites.org/files/2014/04/DCL-Pricing-Comparison-3-3-14.pdf.

[60] Douglas County Libraries, n 59.

[61] Civic Agenda European Unit, *Review of Public Library E-Lending Models December 2014* p 40, http://www.lmba.lt/sites/default/files/Rapporten-Public-Library-e-Lending-Models.pdf.

[62] Civic Agenda European Unit, n 61, p 59.

[63] See the Civic Agenda European Unit Review, n 61, discussing the refusal of publishers to licence their works to public libraries in various countries: see pp 17, 19, 39, 45, 57. Major publishers such as Simon & Schuster and Macmillan long refused to licence their works for library lending in any market on any terms, but recently showed signs of changing that position, finally making their titles available to US libraries by 2014: see Enis M, *With All "Big Five" Ebooks Now Available, Ebook Vendors Assess the Road Ahead*, http://www.thedigitalshift.com/2014/08/ebooks/big-five-ebooks-now-available-ebook-vendors-assess-road-ahead.

[64] The included titles were *American Sniper* (paperback edition); *The Girl on the Train*; *Unbroken*; *Gone Girl*; *Fifty Shades of Grey*; *Burned*; *All the Light We Cannot See*; *Private Vegas*; *Wild*; *Still Alice*; *Big Little Lies*; *Dark Places*; *Zero Belly Diet*; *Insurgent*; *The Maze Runner; Saint Odd*; *Gray Mountain*; *American Sniper* (memorial edition); *The Escape*; *Diary of a Wimpy Kid*: *The Long Haul*; *The Boys in the Boat*; *Scorch Trials*; *Veronica Mars*: *Mr Kiss & Tell*; *Fifty Shades Darker*; *Fifty Shades Trilogy*. Dixon G, personal communication to the authors of this article, 18 June 2015.

[65] Platforms examined to determine availability included OverDrive, Axis360, Bolinda BorrowBox and Wheelers. Dixon, n 64. This data has not been published, but a copy is on file with the authors and available to view on request.

[66] For example, the State Library of Victoria's database page states that "Use of databases is governed by licence agreements between the publishers and the Library, and users are required to comply with the terms and conditions of the licences". State Library of Victoria, *Conditions of Access*, http://ezproxy.slv.vic.gov.au/login?url=http://slv.eblib.com.au/patron/login.aspx?t=guest&echo=1&userid=^u.

Australia's Copyright Law Review Committee exhaustively investigated the practice of contracting out in the early 2000s, finding that copyright owners commonly use licence terms to contract out of copyright exceptions.[67] That practice has continued. As of 2012, the National Library of Australia (NLA) reported that only 21% of its 121 subscription databases permitted document supply to Australian users via the interlibrary loan network and 57% prohibited use off the NLA's premises. Not a single database permitted copies to be provided to individuals at their request.[68] A separate study found a number of examples of rightholders attempting to "contract out" of copyright exceptions in their agreements with Australian libraries, including the express prohibition of reproductions or communications of material that would be permitted under the Copyright Act, and bans on inter-library loans of ebooks and other materials.[69] A survey conducted of Australian libraries in May 2014 found that 50% of respondents were not permitted to engage in interlibrary loans of ebooks under the terms of their licensing agreements, with a further 25% unable to engage in document delivery that would have been permissible under the copyright statute.[70] Although Australia's National and State Libraries have formed a consortium in an attempt to improve their bargaining position, it has reported only limited success in negotiating licences that permit the full range of copyright exceptions.[71] These results are not particularly surprising. As the Australian Law Reform Commission explains:

> Where copyright owners are in a strong bargaining position, they may overreach and circumvent the provisions of the Act, so that "private ordering" leads to a different balancing of parties' rights than is contemplated in the many complex and carefully structured statutory provisions of the Copyright Act.[72]

As Hargreaves puts it, contracts can "rewrite the limits the law has set on the extent of the right conferred by copyright".[73]

Uncertainty surrounds the extent to which contracting parties may bargain their way out of copyright exceptions under existing Australian law.[74] The practice raises questions regarding the extent to which laissez-faire attitudes of freedom of contract should prevail over the fundamental public policy considerations that give rise to specific limitations on copyright owners' rights in the first place. There is nothing in the Act suggesting that exceptions cannot be contractually pre-empted, and as Ricketson has noted, "at general law the waiver of rights and entitlements is readily accepted, in the absence of express legislative prohibition".[75] The only such express prohibition lies in s 47H of the Copyright Act, which relates to the contracting out of certain exceptions relating to computer programs.[76] Since the legislation is otherwise silent, that could itself be seen as further suggesting that, in all other cases, parties are free to contract out of the statutory exceptions to copyright.[77] On the other hand however, there are plausible alternative explanations for the drafting of s 47H that would

[67] See generally Copyright Law Review Committee, *Chapter 4: Copyright and Contract* (2002), http://www.austlii.edu.au/au/other/clrc/2.

[68] National Library of Australia, *Submission to the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy* p 36, http://www.alrc.gov.au/sites/default/files/subs/218._org__national_library_of_australia.rtf.

[69] Wright R, *Submission to the Australian Law Reform Commission Inquiry into Copyright and the Digital Economy* p 13, http://www.alrc.gov.au/sites/default/files/subs/167.rwright.rtf.

[70] Australian Library and Information Association, *The Need for Interlibrary Lending in an Ebook Environment* p 8, https://alia.org.au/sites/default/files/ALIA-Ebook-Interlibrary-Lending-Report.pdf.

[71] National Library of Australia, n 69, p 37.

[72] Australian Law Reform Commission, n 12, p 450.

[73] Hargreaves I, *Digital Opportunity: A Review of Intellectual Property and Growth*, p 51, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf.

[74] Australian Law Reform Commission, n 12, pp 435-445.

[75] Ricketson S and Creswell C, *The Law of Intellectual Property: Copyright, Designs and Confidential Information* (Thomson Reuters, 2014) at [11.640].

[76] *Copyright Act 1968* (Cth), s 47H; Australian Law Reform Commission, n 12, p 439.

[77] Ricketson and Creswell, n 76.

suggest it has no relevance to contracting out in other cases.[78] A variety of mechanisms within the laws governing consumer protection, competition and contract, as well as equitable doctrines relating to unconscionability and good faith, might also impact the enforceability of attempts to contract out.[79] Further, it has been strongly argued that some attempts to contract out of exceptions may be unenforceable on the grounds that "it is contrary to public policy for a contract to purport to oust the jurisdiction of the courts".[80] Carter, Peden and Stammer have made the case that it is only possible for parties to contract out of statutory rights where they are of a private rather than public nature.[81] Their analysis suggests that the case for unenforceability on public policy grounds is particularly strong in the case of libraries and archives, since the exceptions from which they benefit are enjoyed for public rather than private purposes.[82]

Acknowledging the uncertainty surrounding the enforceability of attempts to contract out under existing law, the Australian Law Reform Commission has recommended that Australia's copyright legislation be amended to make unenforceable a variety of contractual terms, including those which seek to restrict activities that would otherwise be permitted in accordance with the libraries and archives exceptions.[83] This recommendation was aimed at ensuring "that certain public interests protected by some copyright exceptions are not prejudiced by private arrangements, promoting fair access to content".[84] This is consistent with recommendations made after similar reviews in the UK and Ireland (and already acted upon in the UK).[85] However, it has not yet been acted upon in Australia.

A final point on the relationship between copyright and contract concerns the consequences of licence breach. As explained above, as long as none of the copyright owner's exclusive rights are triggered, any breach of licence terms will sound only in contract. By contrast, breaching a term of a licence in the ebook context may not just breach the contract, but could also result in copyright liability for infringing copies or transmissions. The difference is important: infringement of copyright carries a number of consequences that do not apply in the contractual context, including the risk of additional damages for "flagrant" infringement.[86]

Technological protection measures and anti-circumvention laws

A further layer of control in the ebook environment relates to technical measures applied to control use of works. Once works are stored in digital form, it is possible for copyright owners to attach technological protection measures (TPMs) or digital rights management (DRM) to limit their use. TPMs can be used to prevent or limit activities such as the making of copies or transmissions. It is common, for example, for technological limitations to be placed on ebooks to limit the amount of text

[78] Carter JW, Peden E and Stammer K, "Contractual Restrictions and Rights under Copyright Legislation" (2007) 23(1) *Journal of Contract Law* 32, 45.

[79] Australian Law Reform Commission, n 12, p 440.

[80] Carter, Peden and Stammer, n 79, p 41 (internal note omitted).

[81] Carter, Peden and Stammer, n 79, p 41, citing Carter JW, *Carter on Contract* (LexisNexis Butterworths).

[82] Carter, Peden and Stammer, n 79, p 47.

[83] The Australian Law Reform Commission did not recommend a general statutory limitation on contracting out of fair use, but did recommend some limitations on contracting out on the new fair dealing provisions if fair use is not enacted. Australian Law Reform Commission, n 12, p 436.

[84] Australian Law Reform Commission, n 12, p 436.

[85] In the UK context, see Hargreaves, n 74, p 51 (recommending that legislation be enacted to protect copyright exceptions from contractual override. This recommendation has since been implemented in respect of a number of exceptions. In the library context, see particularly the *Copyright, Designs & Patents Act 1988* (UK), ss 41(5), 42(7), 42A(6), Sch 2 (6D(4), 6E(6), 6F(6)). In the Irish context, see Copyright Review Committee, *Modernising Copyright: A Report* p 138, http://www.enterprise.gov.ie/en/Publications/CRC-Report.pdf (recommending that any contract term which unfairly purports to restrict an exception permitted by the Act should be void). The Irish recommendation has not yet been implemented at the time of writing.

[86] *Copyright Act 1968* (Cth), s 115(4). Subsections 115(5) and (6) also increase the potential for damages to be awarded for assumed, rather than proven, harm in the online context. In general, exemplary damages are not available for breach of contract.

that the reader can copy (including permitting no text to be copied at all).[87] By so doing, copyright owners limit the possibility of users engaging in copyright infringing uses, but also limit uses that are explicitly permitted under the Copyright Act, such as reproductions that amount to fair dealing for the purpose of research or study. TPMs may be used by copyright owners to bolster compliance with licence terms. Alternatively, they can be used as a substitute for such terms – a licence might not prohibit fair dealings with a work, for example, but a TPM may nonetheless make them impossible in practice. TPMs tend also to tie ebooks to particular technology platforms: for example, requiring users to read the ebook using particular technology, perhaps by downloading a specific application on their device.

TPMs are backed up by legislation which prohibits libraries and others from activities including circumventing access control TPMs and providing services that do so.[88] As their name suggests, access control TPMs are technologies applied by copyright owners to control access to copyrighted materials.[89] Some limited exceptions to the prohibition are found within the Act or prescribed by regulation.[90] Most relevantly to libraries, they currently permit:

- libraries to circumvent TPMs for the sole purpose of deciding whether to acquire material for their collections;[91]
- some institutions to reproduce and communicate works in order to assist people with print disabilities in certain circumstances;[92]
- libraries and archives to reproduce or communicate some kinds of works to other libraries, archives or users for the document delivery purposes set out in s 49 and s 50 of the Act;[93] and
- libraries and archives to reproduce or communicate works made under the s 51A preservation exception, or the s 110A and s 110B exceptions permitting certain dealings with sound recordings and films for preservation and research.[94]

There is however no general exemption permitting TPMs to be bypassed for non-infringing purposes. That means libraries are generally prohibited from bypassing TPMs for any reason other than those explicitly set out in the Act and Regulations. The exceptions within the Regulations have been under review by the Attorney-General's department since 2012,[95] and organisations such as the Australian Parliament's Department of Parliamentary Services and the Australian Digital Alliance and Australian Libraries Copyright Committee made submissions calling for exceptions to permit the bypassing of TPMs in order to enable a greater range of non-infringing library uses.[96] However, at the

[87] Librarian Karen Coyle explains the ways in which copying limitations are achieved in several common file formats. See Coyle K, *Digital Rights Management*, http://www.kcoyle.net/drm_basics2.html.

[88] *Copyright Act 1968* (Cth), ss 116AN, 116AP.

[89] *Copyright Act 1968* (Cth), s 10.

[90] See *Copyright Act 1968* (Cth), s 116AN(2)-(9); *Copyright Regulations 1969* (Cth), Sch 10A.

[91] *Copyright Act 1968* (Cth), s 116AN(8).

[92] *Copyright Regulations 1969* (Cth), Sch 10A(3.1).

[93] *Copyright Regulations 1969* (Cth), Sch 10A(4.1) and (4.2).

[94] *Copyright Regulations 1969* (Cth), Sch 10A(4.3.

[95] Australian Government, Attorney-General's Department, *Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968*, http://www.ag.gov.au/consultations/pages/ReviewofTechnologicalProtectionMeasureexceptionsmadeundertheCopyrightAct1968.aspx.

[96] See Heriot D, *Submission to the Review of Technological Protection Measure Exceptions Made Under the Copyright Act 1968*, http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Documents/DepartmentofParliamentaryServices-ParliamentaryLibrary.pdf; Australian Digital Alliance and Australian Libraries Copyright Committee, *Submission Regarding Exceptions for Technological Protection Measures in the Copyright Act 1968*, http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Documents/ALCCandADAsubmission.pdf.

time of writing some three years have passed since the final date for submissions, and there has been little communication from the department about whether and how it will respond.[97]

The current anti-circumvention regime enhances the power of rightsholders to eliminate copyright exceptions. Even if an attempt to contract out of those exceptions is void on public policy grounds, as flagged above, libraries may still be unable to engage in the permitted act if the work is locked by a TPM and no exception permits its circumvention.

Remuneration for authors

We explained that in the context of physical books, the PLR and ELR compensate creators and publishers for losses from library uses of their books, with creators getting the biggest share in a distribution scheme that does not seek to replicate a market result. The schemes do not currently apply to ebooks. Policymakers may hesitate to extend the scheme given that licensing terms may already provide for higher upfront payments than for physical books, or ongoing payments on a subscription or per loan basis – which undermines a key justification for the PLR scheme – that is, providing compensation for the multiple uses made of library copies which, in the physical context, are otherwise uncompensated.

As a result, authors' remuneration does not stand outside the market as in the analogue environment, but is determined entirely by their contracts with publishers and sales, without any supplement based on an author-favouring statutory formula. Whether this makes authors better or worse off overall is unable to be ascertained from currently available data, although there are early signs that the distribution of revenue from ebooks favours publishers over authors.[98] Notably too, in the absence of a PLR applicable to the loan of ebooks (or a compulsory remunerated Digital Lending Right or DLR), authors may gain little from ensuring that their titles are available in ebook form in libraries, especially if it detracts from sales. Concern has been expressed that in the absence of any DLR, works that see a high proportion of lending in digital form will not receive any share of the pool of funds available for compensation, and there could be an increase in lending activity without a corresponding increase in overall compensation (although this latter concern seems inconsistent with models of ebook provision to date which charge more for ebooks and require repurchase after a fixed number of loans).[99]

There are real challenges around determining an appropriate method for calculating payment under a prospective DLR,[100] not least because of practical differences in ownership and possession. The Lending Rights Expert Reference Group considered a number of proposals. Some look like the current analogue PLR in proposing to reward access: that is, payment would follow from library access to the ebook regardless of whether it is borrowed. However, unlike physical books, which are under libraries' physical control, ebooks are usually stored on remote servers (often not even in Australia), and can disappear from collections without libraries having any say. Premising payment of a DLR on the provision of access is therefore challenging in a practical sense. A further question is whether it is appropriate to include publishers in any DLR: to the extent that the PLR was intended to compensate publishers for the more extensive access to and use of a library copy, such compensation may already be built in to the higher prices charged by publishers to libraries, or per-loan or loan cap conditions. Assuming these issues can be resolved, setting the preconditions for distribution raises

[97] See Australian Government Attorney-General's Department, *Review of Technological Measure Exceptions*, http://www.ag.gov.au/RightsAndProtections/IntellectualProperty/CurrentIssuesReformsandReviews/Pages/ReviewofTechnologicalProtectionMeasureexceptions.aspx.

[98] Reference also to Copyright Agency, *Annual Report 2014*, p 27, http://www.copyright.com.au/assets/documents/Corporate/AnnualReports/2014-annual-report publishing figures on distribution of income from the various statutory licences administered by that organisation. Income is distributed at 12.4% to authors; 73% to publishers (although publishers may pass some of that income on to authors; data not available).

[99] Book Industry Collaborative Council, n 3, *Lending Rights Expert Reference Group Final Report* (ERG Report) p 191. The ERG Report also states a concern that there might be an increase in library *holdings* without an increase in compensation to publishers and authors – which seems simply inconsistent with the fact that libraries pay prices charged by rightsholders for access to ebooks.

[100] Models are discussed in the Book Industry Collaborative Council, n 3, pp 193-194.

further interesting questions. Setting a rate "per book" becomes more challenging in the digital context, where it is straightforward to manipulate the boundaries of an individual "book" or file (for example, to divide what is effectively one book into three instalments). If the rate is "per book", with the boundaries of the book set purely by authors, that would create an incentive to write shorter ebooks or distribute what would be one physical book in separate segments.[101] Further, not all models considered by the Lending Rights Expert Reference Group were premised on access. Other models would make a DLR more closely approximate to the market, in rewarding authors (and possibly publishers) according to rates of borrowing. Such a model has the potential to skew payments considerably towards more popular authors, further promoting the "winner takes all" distribution we already see in the market for books. This leads us to query whether this would merely further enrich those who can already support themselves with their writing, rather than serve the broader public goals of promoting Australian writing and publishing.

International comparison

The above analysis demonstrates that the Australian regulatory approach to ebooks and elending currently leaves it almost entirely to the market to decide the terms on which cultural works are acquired and used.[102] This is consistent with typical approaches to ebooks and elending elsewhere in the world. While the EU lending directive permits member states to bypass the grant of exclusive lending rights (so long as remuneration is provided for library uses), it does not permit remote loans of ebooks:[103] copying works and communicating them to the public (including making them available for members of the public to access from a time and place of their choosing) are exclusive rights of the copyright owner and governed instead by the InfoSoc Directive.[104] Dusollier has called for changes at the EU level to extend the PLR to remote loans of ebooks to facilitate digital library lending,[105] and an independent review commissioned by the UK Department of Culture, Media and Sport has similarly called for change.[106] Currently, however, the market-based approach overwhelmingly still applies in Europe.[107]

Recent and ongoing developments

Some attempts have recently been made to consider the implications of the shift to ebooks and elending in the Australian context. Those policy discussions to date have progressed largely through industry-focused consultations. For example, the Book Industry Strategy Group (BISG) was tasked with assessing the impacts of digital technologies on the production and delivery of books in Australia

[101] We note that Amazon has recently announced a new method for distributing royalties for its subscription book service in part as recognition of the fact that its previous method rewarded writers of short books equally with writers of much longer tomes: Reach K, *You Don't Get Paid Unless People Actually Read Your Book: The New Kindle Unlimited Royalties*, http://www.mhpbooks.com/you-dont-get-paid-unless-people-actually-read-your-book-the-new-kindle-unlimited-royalties.

[102] There is a derogation from this market-based approach in some circumstances, particularly where libraries are entitled to bypass TPMs and deal with materials for certain specified purposes.

[103] Dusollier S, "A Manifesto for an E-lending Limitation in Copyright" (2014) 5(3) *Journal of Intellectual Property, Information Technology and E-Commerce Law* 213.

[104] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Art 2, 3. Onsite library loans of ebooks may potentially be legally differentiable from remote loans. The InfoSoc Directive broadly permits exceptions to the reproduction right for library purposes (so long as they don't involve online delivery). See Directive 2001/29/EC, Recital 40. The right of making available does not extend to situations where recipients are present at the place where the act of making available originates: Directive 2001/29/EC, Recital 24. See also, Art 3. That combines to suggest different treatment may be possible for onsite loans of ebooks, and the UK has indeed recently extended its PLR to cover loans of ebooks downloaded to library premises. In practice however this development is unlikely to have any effect: no UK libraries have facilities for onsite loans, and there does not appear to be demand for them. Public Lending Right, *UK PLR Extended to Audio-books and Onsite Loans of Ebooks* pp 1-2, https://www.plr.uk.com/allaboutplr/news/UpdateAudioEbooks.pdf.

[105] Dusollier, n 104.

[106] See initial recommendation in Sieghart W, *Independent Library Report for England*, p 19, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/388989/ Independent_Library_Report-_18_December.pdf.

[107] The main exception is for "onsite" loans of ebooks in the UK. See Public Lending Right, n 105.

in 2010.[108] Composed predominantly of representatives from publishers, printers and booksellers,[109] the group proposed that Australian publishers work to develop a single consistent model for supply of ebooks to libraries, which could then be the basis for extending the PLR schemes to ebooks.[110] However, the Book Industry Collaborative Council (BICC),[111] convened to advise on and oversee the implementation of the BISG's proposed reforms, found that a single model would be impossible to achieve.[112] Instead, it put forward *Principles for Consistent Models for Supply of Ebooks to Libraries*, intended to inform the development by industry of more consistent models of ebook supply to libraries. The summary statements of the eight principles are as follows:[113]

(1) The Australian book industry should remain committed to enhancing readers' access to Australian books through libraries and encouraging reading, in all formats;

(2) Models for the supply of ebooks to libraries should be as consistent and transparent as possible, simplifying access to readers whilst providing measurable data for authors, publishers and libraries, and enough flexibility to be commercially sustainable for all parties;

(3) The industry aims to improve the availability of content, providing libraries with a variety of terms for acquisition and re-use, at a minimum consistent with the Australian Copyright Act. Finding viable and sustainable models that support concurrency of market release and the interests of publishers and libraries is a priority;

(4) The industry will undertake its best endeavours to provide access to purchased or licensed titles even if the distributor/publisher ceases business;

(5) Authors and publishers should receive fair remuneration, including a lending right through an extension of the Lending Rights schemes, for each ebook title licensed or sold to libraries;

(6) Libraries should expect to pay fair and reasonable prices for ebook titles and distribution services;

(7) All digital models should uphold Australian copyright law and strike a balance between ensuring adequate and proper rights protection for authors and publishers against illegal use of their work, and allowing libraries and their patrons to enjoy reasonable use of purchased titles;

(8) The industry should aim to give all library users access to ebooks on a range of devices from across all platforms, in such a way as to facilitate discovery and maximise choice.

While there has been no move to extend the PLRs to ebooks as yet, the BICC has recommended that the proposed new Book Council of Australia be tasked with moving forward in doing so;[114] a separate modernisation review into the PLR schemes is also currently underway.[115]

[108] Book Industry Strategy Group, *Consumer Attitudes Toward E-Book Reading* (2013) p vi.

[109] The group comprised four representatives from the publishing industry, two booksellers, three printers, two authors' representatives, and one representative each of the copyright and ICT fields. Libraries were not represented on the group, but representatives sometimes attended meetings as observers and "were invited to contribute to deliberations". Book Industry Strategy Group, *Final Report to Government September 2011* p 141, www.industry.gov.au/industry/IndustrySectors/booksandprinting/BookIndustryStrategyGroup/Documents/BISGFinalReport.rtf.

[110] Book Industry Strategy Group, n 109, p 69.

[111] The Book Industry Collaborative Council members "comprised representatives from peak book industry associations and experts in fields related to the book industry, including digital communications, research and copyright". Its terms of reference were to advise the minister on the book industry's "priority issues"; oversee implementation of the BISG's industry-led reforms (as responded to by the government); identify and communicate strategies for increasing industry capability and competitiveness; develop implementation plans for industry-led reforms; link industry and researchers, and identify options for establishing an independent industry body tasked with addressing issues of standards and competitive improvement. Book Industry Collaborative Council, n 3, pp 8-10.

[112] Book Industry Collaborative Council, n 3, p 33.

[113] Book Industry Collaborative Council, n 3, pp 187-190.

[114] Book Industry Collaborative Council, n 3, p 197. The formation of a Book Council of Australia, to be tasked with "promot[ing] Australian writing nationally and internationally and encourag[ing] and promot[ing] reading" was announced by Prime Minister Tony Abbott in December 2014, with members to be drawn "from a wide range of literary and industry organisations": Prime Minister of Australia (2014) *Prime Minister's Literary Awards and Formation of the Book Council of Australia*, (Press Release, 8 December), https://www.pm.gov.au/media/2014-12-08/prime-ministers-literary-awards-and-formation-book-council-australia.

[115] Public Lending Right Committee, n 23, p 1.

Although described by the BICC Expert Reference Group (ERG) as "an important step forward for the Australian industry",[116] the principles are notable for their conservatism: they seem to envisage that libraries, publishers and authors will play largely the same role they always have in the literary ecosystem. Also striking is their aspirational nature. Everything is stated in terms of "aims", or identified as something that "should" happen (or, even weaker, that they will be the subject of "best endeavours"). This latter point is particularly true of non-market goals, such as ensuring continuity or completeness of access.

It is perhaps not surprising that principles produced by working groups drawn from current players in the system for the creation, publication, distribution and consumption of books assume that those same players will continue to play their accustomed roles with changes only at the margin. It is unclear however how the various aspirational goals identified in these principles, particularly such non-market concerns as continuity and breadth of access, are to be achieved in circumstances where publishers see libraries as actual or potential competitors. These principles are not binding on any party, and given the range of competing interests at play, it seems unlikely that they will be broadly implemented by stakeholders.

WHAT DO WE LOSE AND GAIN BY ALLOWING THE MARKET TO DETERMINE THE TERMS OF ACCESS TO EBOOKS?

We have demonstrated that the law regulates the loan of physical and digital books very differently. The systems for lending physical books, and for rewarding local authors for the value of books held in libraries, stand mostly outside the market. By contrast, ebook lending, including the very question of whether it occurs at all, has so far been left largely to the market: to be determined via negotiations between libraries, publishers and intermediaries including aggregators such as OverDrive. A decade after the first wave of eReader devices hit the market, and five years after portable devices really took off with the introduction of Apple's iPad,[117] it is timely to review the success of this approach: to ask how it is working out for all the players in the book ecosystem, including authors, publishers, readers, libraries, and other new participants. This question, raised with increasing frequency in public policy circles as noted above,[118] must be answered if we are to put finite resources to their best uses in the future. What do we lose by this wholesale shift to the market, and what do we gain?

To begin, it should be acknowledged that a market-based approach is not self-evidently incorrect. In the digital environment, for all the reasons touched on above, "the line between book lending and book selling may be blurring".[119] The physical loan of books has built-in frictions that make borrowing an imperfect substitute for purchase: patrons generally have to visit a library within certain fixed hours to select, borrow and return books, they cannot borrow those which have already been taken by someone else, and, notwithstanding librarians' expert use of tape and glue, physical copies eventually wear out. By contrast, at least as a matter of technological capacity, ebooks may be borrowed simultaneously by many users, remotely, at any time, and they remain in pristine condition no matter how many times patrons drop them in the bath. Digital copies are also far cheaper to store (and occupy far less shelf space) than physical equivalents, suggesting that a far larger range of titles could be made available, and they could remain in collections indefinitely rather than being sent off for warehousing or disposed of. Each of these factors brings elending closer to being a perfect substitute for market provision of ebooks through sale or subscription, potentially transforming libraries into genuine competitors to publishers. As Ginsburg has noted, "were libraries to take full advantage of the capacities of digital media, the competition [with sales of ebooks] would be

[116] Book Industry Collaborative Council, n 3, p 182.

[117] The Sony Reader dates from 2006; Amazon's Kindle from 2007 and the Barnes and Noble Nook from 2009: Book Industry Collaborative Council, n 3, p 183. The first Apple iPad dates from 2010.

[118] As evidenced by the attention to this topic by both the Book Industry Strategy Group and the Book Industry Collaborative Council through its Expert Reference Group (ERG) on Lending.

[119] Ginsburg J, "From Hypatia to Victor Hugo to Larry and Sergey: 'All the World's Knowledge' and Universal Authors' Rights" (2013) 1 *Journal of the British Academy* 71, 87.

apparent".[120] Publishers and authors are therefore understandably concerned about the potential impact of library ebook lending on their ability to sell physical and digital copies.[121] As the US president of Macmillan Publishers once put it: "The fear is I get one library card and never have to buy a book again".[122]

But even if we accept that a wholly or partly market-based approach isn't necessarily a bad thing, and might even be desirable, history shows that the unregulated operation of the market can under-deliver on some important societal goals. For example, existing copyright systems do little to promote access to works directly, focusing instead on facilitating their initial creation. Copyright law and copyright theory have also tended to pay little attention to questions of preservation (as current problems around orphan works clearly attest) or distribution: we emphasise incentives for creation without asking, most of the time, whether the results and rewards of that creation will ultimately be widely distributed. As Shaver notes:

> The dominant account of copyright law emphasizes its virtues in providing market-based incentives for cultural production, implicitly presuming that a greater diversity of offerings is the primary end goal and that accessibility will be relatively unproblematic.[123]

By contrast, libraries see the facilitation of access as being at the heart of their mission. That is perhaps the inevitable culmination of what Gorman identifies as the eight guiding principles of librarianship: stewardship, service, intellectual freedom, privacy, rationalism (that is, the enlightenment tradition of rational thought), a commitment to literacy and learning, equity of access, and democracy (the principle that a well-informed electorate is essential to effective democracy).[124] In sum, libraries act as custodians of the broader public interest: that overall shared set of interests that, as a society, we recognise should sometimes take precedence over individual or group self-interest.[125] As a result, they have historically had an important role in fulfilling some of the social goals under-emphasised by copyright theory and under-served by copyright's market orientation, particularly with regard to access, distribution of benefits (including equality of access), and preservation.

The real questions of interest here are not whether libraries can obtain and offer access to ebooks on broadly the same conditions as they could in the analogue world, or even whether libraries are able to take full advantage of the capabilities of ebooks to better serve their readers. As Ginsburg notes: "[T]he future Alexandrian repository of digitised books … may take many forms, not all of them in line with the original public curator-custodian model".[126] The questions, rather, are what public policy goals do we aim to achieve, whether through libraries, the market, or other means, and what, if any, policy interventions might we need to achieve those goals? If we replace libraries' privileged access to material with an entirely market-based approach, will those broader public interest aims still be adequately fulfilled? Determining this might involve asking what roles libraries have played in the book ecosystem. Are those roles still important? Is the active involvement of libraries in the ebook system necessary to ensure those aims are achieved? What emerging new roles might be important? In the latter respect, it is perhaps worth considering whether the general societal role of libraries would suggest any new or different activities given the technological capabilities which arise with ebooks, as compared to their role in the analogue context. To what extent is the ability to provide access to a wide range of books a necessary support to those other, more inchoate roles that libraries play, in promoting literacy and engagement with culture, and in bringing together communities for all kinds of activities?

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[120] Ginsburg, n 120.

[121] Book Industry Collaborative Council, n 3, p 25.

[122] Annoyed Librarian, *Publishers Have Met the Enemy and It is Them*, http://lj.libraryjournal.com/blogs/annoyedlibrarian/2011/03/02/publishers-have-met-the-enemy-and-it-is-them.

[123] Shaver L, "Copyright and Inequality" (2015) 92(1) *Washington University Law Review* 117.

[124] Gorman M, *Our Enduring Values: Librarianship in the 21st Century* (American Library Association Editions, 2000).

[125] Giblin R and Weatherall K, "If We Could Redesign Copyright from Scratch, What Might it Look Like?" in Giblin R and Weatherall K (eds), *What if We Could Reimagine Copyright?* (forthcoming, 2016).

[126] Ginsburg, n 120.

To what extent should we fear a future in which some readers subscribe to the literary equivalent of Spotify or Netflix, and never get a library card again?

This article does not claim to answer those questions. However, the above analysis raises some red flags that justify looking more closely into the ability of an entirely market-based approach to satisfy the public interest aims that have traditionally been furthered by libraries.

The first flags arise from the ways in which publishers have been exercising their new held control. Globally, many have chosen simply not to permit libraries to access their ebooks on any terms at all, especially in relation to "trade" (ie commercial fiction) titles.[127] Ebooks supplied to libraries are often more expensive than consumer copies, and may require purchase of multiple copies or bundles of multiple titles to secure access at all. While publishers have been gradually making library elending more available, particularly in large markets such as the US,[128] Australia's public libraries remain dissatisfied with the state of elending. According to a 2014 survey, 97% of Australian libraries loaned ebooks, but more than half reported themselves "not satisfied" or "less than satisfied" with the selection available to them.[129] Further, as we have seen previously with various forms of content, access is unequal internationally.[130] Australian libraries are far less able to obtain access to popular books (on any terms) than their counterparts in the US.[131]

Where they *are* available, ebooks are generally being offered to libraries on a narrow range of terms,[132] with Australian libraries typically presented with "take-it-or-leave-it" standard term contracts.[133] HarperCollins' terms provide a particularly striking demonstration. The publisher justified its policy requiring a new licence to be purchased after 26 circulations as taking into account factors such as "the average lifespan of a print book, and wear and tear on circulating copies".[134] But although librarians demonstrated that their physical copies of HarperCollins titles were still in perfectly readable condition even after 120 loans, they were unable to prevail on the publisher to alter the deal.[135] A widespread US-led boycott eventually ended as librarians came to accept the impossibility of obtaining access for their readers unless they agreed to those terms.[136] As discussed above, publishers regularly also impose terms which eliminate the carve-outs permitted under the Copyright Act.

These practices are concerning insofar as they threaten the public interest in access to content, particularly with regard to completeness and continuity of collections. A lack of availability may not be the highest concern today, while the market for ebooks is still developing. If libraries choose not to agree to an ebook's offered terms, they can generally still provide access to the hard copy in

[127] Australian Public Library and Information Association, *EBooks and Elending Issues Paper*, http://alianet.alia.org.au/advocacy/Ebooks.and.Elending.Issues.Paper.v4.130107.pdf. See also discussion at n 62 and 63.

[128] See Enis, n 63.

[129] This lack of satisfaction related to the overall selection, the selection available from the bestseller lists, and the selection by popular and Australian authors. See Australian Public Library Alliance, *Comparison of Ebooks and Elending in Australian Public Libraries 2013 and 2014*, p 4, https://www.alia.org.au/sites/default/files/APLA-Ebooks-and-Elending-2013-vs-2014.pdf.

[130] Parliament of Australia, House Standing Committee on Infrastructure and Communications (2013) *At What Cost? IT Pricing and the Australia Tax*, http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=ic/itpricing/report.htm.

[131] See discussion at n 64. UK libraries have recently enjoyed greater access to ebooks as part of a trial emerging from the Sieghart Review. See Sieghart, n 107, p 13. At the time of writing however, the results of the trial were not yet available.

[132] See Book Industry Collaborative Council, n 3, Appendix B for a series of high level summary tables.

[133] National Library of Australia, n 69, p 37; Wright, n 70, p 12. Although it is possible that courts might be persuaded to rule attempts to contract out unenforceable, libraries tend to be risk averse institutions and may be deterred from testing that possibility by the uncertainty and high cost of litigation. Libraries might also hesitate to challenge restrictive licensing terms for fear of losing access to desired material altogether.

[134] Hadro, n 56.

[135] Pioneer Library System, *HarperCollins 26+ Checkouts*, https://www.youtube.com/watch?v=Je90XRRrruM.

[136] Bonfield B, *Ending a HarperCollins Boycott (February 27, 2011-August 7, 2013)*, http://www.inthelibrarywiththeleadpipe.org/2013/ending-a-harpercollins-boycott-february-27-2011-august-7-2013.

accordance with copyright's historical bargain. However, that safeguard will weaken in future as more popular content becomes available exclusively in digital forms. We have already seen bestsellers such as Hugh Howey's *Silo* series start as natively digital works,[137] and "digital-only" publishing imprints have begun to emerge.[138] Scholarly texts are increasingly available only in digital versions. Some emerging genres (such as children's educational books integrating sounds, images and interactivity) don't lend themselves well to physical distribution at all. What will it mean for libraries if there is no physical substitute for a work? If the current regulatory approach to ebooks continues, it seems inevitable that libraries will not always be able to obtain access to at least some of the kind of culturally valuable works that they acquired and lent as a matter of course in the physical context. As Dusollier observes:

> Excluding this new digital content altogether from the public mission of libraries to make cultural items available to the public in a non market-mediated transaction would deprive [library] users of a significant part of culture and creations.[139]

It is also significant that library acquisition of ebooks to date has rarely involved the transfer of permanent electronic copies. This gives rise to risks in the longer term around *continuity* of collections. Works can disappear from collections when libraries cease to subscribe, move to new aggregators, or if existing ones go out of business or themselves lose access to titles owned by particular publishers.[140] Previous editions of social or historic significance may become unavailable once new ones are published. Rightholders may also choose to selectively withhold works for periods of time to maximise sales.[141] In other cases works may become "orphaned", leaving libraries with nobody to obtain a licence from. Material can also sometimes be unilaterally removed from licensees' devices, as Amazon demonstrated in 2009 when it unilaterally deleted copies of George Orwell's *1984* and *Animal Farm* from purchasers' Kindle devices.[142]

The Australian book industry has shown promising signs of recognising and thinking about rectifying some of the problems we identify here, via, for example, the aspirational BICC recommendations. However, there is a need to be cautious about how much weight we give to existing industry interests in shaping the future role of books in Australian society. We have already described the crux of why libraries are so important to society – because they exist to fulfil the broader public interest in access to knowledge and culture, including by correcting distributional inequity and ministering to people the market would otherwise leave under-served. By contrast, members of the commercial book supply chain are rationally driven by private interests, particularly maximising their profits. That explains why some publishers demand enormous fees for access, and others refuse to license their books to libraries on any terms at all. This reality does not mean that market-based solutions will necessarily fail. But the clash of interests does mean we should not give weight only to industry preferences in considering the best ways of achieving public aims.

Other red flags emerge when the shift to elending is viewed from the perspective of authors. Without authors there are no books, and of course their interests are part of the broader public interest.[143] There are some early signs that, for many, the shift to a market-based approach isn't

[137] See Biggs J, *Hugh Howey, Author Of The "Silo Saga", Talks About Making It Big In Self-Publishing*, http://techcrunch.com/2014/05/19/hugh-howey-author-of-the-silo-saga-talks-about-making-it-big-in-self-publishing.

[138] Book Industry Collaborative Council, n 3, p 34.

[139] Dusollier, n 104, p 9.

[140] The limitations of physical storage and space means that physical books also disappear from the collections of libraries: physical books may be given away, sold, destroyed, or warehoused after a certain amount of time to make way for new books. The difference of course is that *libraries* choose which books to remove from collections; cf the electronic context.

[141] Film company Disney's use of the "Disney Vault" is perhaps the most famous example of this strategy; for the better part of a century, it has selectively released and withdrawn its works from sale in order to maximise profits. See The Disney Wiki, *Disney Vault*, http://disney.wikia.com/wiki/Disney_Vault.

[142] Stone B, *Amazon Erases Orwell Books From Kindle*, http://www.nytimes.com/2009/07/18/technology/companies/18amazon.html?_r=0.

[143] See Pallante M's comments on the United States Subcommittee on Courts, Intellectual Property and the Internet, *The Register's Call for Updates to US Copyright Law March 20, 2013*, United States House of Representatives (20 March 2013)

working in their favour. For example, the Australian Society of Authors has expressed concern that literary creators' incomes are presently being eroded by physical library holdings (which are subject to the PLRs) being replaced with digital ones (which are not).[144] This suggests that, notwithstanding publishers' ability to set the terms of access, any increased revenues resulting from exercise of that power are not necessarily flowing through to authors. Other commentators have expressed concerns that authors' positions may be eroded in the digital environment and that authors as a group are poorly situated to counter such erosion.[145] Just as with Spotify and musicians, there have been tensions between authors and Amazon over the remuneration of authors for books included in Amazon's subscription service.[146] Separately, there are concerns about availability of Australian content in ebook form: questions arise regarding how to promote Australian authors and keep e-book sales viable, especially when many key decisions are made by overseas publishers.[147] At the moment, hard data identifying changes in author income or clearly linking changes to any shift towards ebooks is not available. However, extensive literature has demonstrated that creators are often in weak bargaining positions in their dealings with intermediaries such as publishers, resulting in contractual arrangements that do not favour their interests.[148] In light of that, particular consideration needs to be given to determining what happens to authors' shares of revenues when the non-market PLR approach to compensating library uses is replaced entirely by a market approach.

Readers too have plenty of skin in the game. Uptake of ebooks through libraries in Australia is still relatively low, with ebooks still representing less than 5% of loans in most libraries that provide them.[149] We can anticipate that the shift to digital will eventually have a significant impact on reader preferences and behaviour, but have little data to help us understand what those changes might look like or how they might shape future library policy. Will people read more books if they have ready access to digital content? What kinds of books? What kinds of people? This latter question is particularly important. The void created by rightholders' refusals to licence libraries might partly be filled by their providing subscription access to literary material in the same way that services like Spotify and Netflix offer music and film. Amazon's "Kindle Unlimited" already offers US readers access to some 800,000 books and thousands more audio versions for $9.99 per month.[150] Some proportion of the public previously served by public libraries might well find such an offering attractive.

But that begs two important questions. First, what it might mean for libaries as social institutions (and society as a whole) if wealthier patrons who can afford commercial subscriptions cease to patronise libraries? Would it become more difficult to secure funding for the continued operation of public libraries? Secondly, what are the implications for those unable to afford that access? Libraries have historically reduced the deadweight loss copyrights impose on society – the benefits forsaken by

113th Congress, 1st Session, p 3, https://web.archive.org/web/20130418013229/http://judiciary.house.gov/hearings/113th/03202013/Pallante%20032013.pdf, stating that authors interests are "not a counterweight to the public interest but … at the very centre of the equation"; see also Ginsburg J, "Authors and Users in Copyright" (1997-1998) 45 *Journal of the Copyright Society of the USA* 1, 4; see discussion in Giblin and Weatherall, n 126.

[144] Loukakis, n 31, p 5, states: "The chief concern for authors in the current structuring of eBook sales to, and lending via, libraries is the negative impact on income."

[145] Cantatore F, "The Power Balance Revisited: Authors, Publishers and Copyright in the Digital Sphere" (2013) 6 *Creative Industries Journal* 89.

[146] See Streitfeld D, *Amazon Offers All-You-Can-Eat Books. Authors Turn Up Noses*, http://www.nytimes.com/2014/12/28/technology/amazon-offers-all-you-can-eat-books-authors-turn-up-noses.html.

[147] Sansom, n 3.

[148] See generally Towse R, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age* (Edward Elgar Publishing, 2001); Towse R, "Copyright and Cultural Policy for the Creative Industries", in Grandstrand O (ed) *Economics, Law and Intellectual Property: Seeking Strategies for Research and Teaching in a Developing Field* (Kluwer Academic Publishers, 2003); Kretschmer M, "Artists Earnings and Copyright: A Review of British and German Music Industry Data in the Context of Digital Technologies" (2005) 10(1-3) *First Monday* 1, http://firstmonday.org/article/view/1200/1120.

[149] Australian Public Library Alliance, n 128, p 3.

[150] Amazon, *Introducing Kindle Unlimited*, http://www.amazon.com/b?node=9578129011.

those who could have paid the marginal cost of the copy but are locked out by monopoly pricing[151] – by providing access to those who would not have been able to obtain it on commercial terms. That might include not only poorer citizens, but also rural and remote Australians with limited physical access to libraries, and the mobility or vision impaired. For the latter, ebooks, with their ability to increase font size or activate audio narration, can provide invaluable access to material that would otherwise be out of reach. Replacement with a market based approach might lead to books going unread; knowledge unlearned, and an overall increase in social inequality.

For each of these questions we also need to understand whether the particularities of Australia, particularly its social pluralism, vast distances and geographic isolation from the rest of the world, mean that the answers are different for Australian readers than for those in less geographically and linguistically dispersed countries. We simply don't yet have the data to answer these questions or determine how else digital access might impact readership, and those gaps make it difficult to determine the best library policy for the future. The rather narrow, industry-focused policy discussions to date have not provided answers to any of these broader questions.

CONCLUSIONS

It is no historical accident that libraries are able to acquire and lend physical copies of cultural works without negotiating with or directly remunerating copyright owners beyond the initial purchase price of the book. Copyright was never intended to reserve every valuable use to the owner: the bargain has always reserved some of the benefits of protectable creativity to the public at large. The shift to digital has resulted in a de facto reallocation of many of those benefits to rightholders. This article suggested that it may not necessarily or at least always be problematic, especially given all of the other changes wrought by digital technologies; there is new potential, for example, for rightholders to themselves reduce deadweight loss via their improved abilities to engage in price discrimination; and non-library providers, via market mechanisms, have new capabilities to provide the kinds of subscription-style, "all you can eat" access that only libraries could deliver in the past.

However, there is reason to be concerned that wholesale delegation to the market could result in neglect of some of those public interest aims that have traditionally been satisfied by libraries. The public interest comprehends a range of goals. Barbara Ringer, a former Register of the US Copyright Office, once defined the public interest as "the *aggregate* of the fundamental goals that the society seeks to achieve for *all* of its members – not for a majority of its members or for any large and powerful group, but for all of the people within the society".[152] That includes authors and publishers, printers and readers, sellers, teachers, students. The fundamental societal goals which have been commonly described as constituting the public interest in copyright include not only the support and encouragement of authorship, but also the promotion of learning and progress,[153] the widest possible creation, dissemination and access to works for all members of society (including those suffering socio-economic disadvantage),[154] space to "produce new works by building on the ideas and

[151] Of course, libraries are not limited to providing access to those who would not otherwise have purchased it. Some library users undoubtedly use access as a substitute for purchase. But the frictions of the physical lending process – attendance during opening hours to borrow materials, obligations to return them within a specified time, the need to wait for other patrons to finish with popular materials before they become available for loan – make library loans of physical artefacts an imperfect substitute for purchase.

[152] Ringer B, "Authors' Rights in the Electronic Age: Beyond the Copyright Act of 1976" (1981) 1 *Loyola Entertainment Law Journal* 1 (emphasis added).

[153] See Davies G, *Copyright and the Public Interest* (2nd ed, Thomson/Sweet & Maxwell, 2002) p 12; *WIPO Copyright Treaty*, opened for signature 20 December 1996, ATS 26 (entered into force on 6 March 2002), Preamble (emphasizing "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information"); Ricketson S, "The Copyright Term" (1992) 6 *International Review of Intellectual Property and Competition Law* 753, 755.

[154] See Davies, n 156, p 16; Great Britain Department of Trade and Industry, *White Paper on Intellectual Property and Innovation* (HMSO, 1986) p 35.

information contained in the works of others",[155] creativity,[156] freedom of expression,[157] the preservation of culture[158] and a robust public domain.[159] We do not yet have a full sense of which of these varied public interest goals can be served by market mechanisms as technologies and business models change, and which may require continued intervention through publicly funded services. Nor do we have a full sense of all the roles that libraries play nor the extent to which broader, inchoate benefits that arise from the existence of libraries as cultural institutions depend on libraries' continued role in the provision of access to books.

With the rise of ebooks, the way in which Australians access the written word is changing, as is the role of libraries and the interrelationship between libraries, publishers, authors, readers, and emerging new participants in the book ecosystem. The systems for writing, publishing, distributing, and even reading books are being seriously disrupted by technological change.[160] Disruption to the configuration and constellation of players who bring us literature and their respective roles is not by definition a bad thing if we ultimately remain able to achieve these broad goals for the production of, access to and preservation of culture. But the importance of these public interest goals does not go away simply because we switch from books to bits, and they're far too important to simply leave to chance. Given the potential significance of this shift in bargaining power for the book ecosystem as a whole, more investigation is needed to ascertain the extent to which relying on a market-based framework, qualified by some grace-and-favour concessions by rightsholders, is the best way of achieving our aims.

[155] *CCH Canadian v Law Society of Upper Canada* [2004] 1 SCR 339, [23].

[156] Netanel N, "Why has Copyright Expanded? Analysis and Critique" in Macmillan F (ed), *New Directions in Copyright Law, Volume 6* (Edward Elgar Publishing, 2008) p 4; Flynn SM, "The Washington Declaration on Intellectual Property and the Public Interest" (2013) 28(1) *American University International Law Review* 19, 21.

[157] *Ashdown v Telegraph Group* [2001] EWCA Civ 1142 (in which the UK Court of Appeal suggested that the UK's fair dealing exceptions "will normally afford the Court all the scope that it needs properly to reflect the public interest in freedom of expression and, in particular, the freedom of the press" at [66], and explaining how essential it is to remember that "considerations of public interest are paramount" and thus not to apply tests inflexibly at [71]. See also Flynn, n 159, p 21; Ricketson, n 156, p 755.

[158] See Australian Law Reform Commission, n 12, p 278; Gasaway LN, "America's Cultural Record: A Thing of the Past Considering Copyright: Institute for Intellectual Property & Information Law Symposium: Essay" (2003) 40(3) *Houston Law Review* 643, 643-671.

[159] Flynn, n 159, p 21.

[160] For an interesting discussion of the kinds of things that could be in store in terms of digital-only content, see Johnson S, "How the Ebook Will Change How We Read and Write", http://www.wsj.com/articles/SB123980920727621353.