

# How Will We Ever Resolve the Library Digital Content Problem?

by Alan S. Inouye

## ABSTRACT

Library access to digital content is characterized by a big dose of exasperation. Although digital content provides some remarkable benefits, the shift of the access rubric from copyright to licenses provided many inferior provisions for libraries. This dilemma spans library type, and features the digital book issue with public libraries in the 2010s to the present. In the past decades, the library community has advocated for change via direct engagement with the industry, state legislation, federal policy and media campaigns. Overall, these efforts have been modestly effective at best. Fundamental reconsideration of the path forward is needed. The first step on that path is a thoughtful assessment of the needs and opportunities for digital content in libraries, and the resulting possible policy directions.

The dilemma of library access to digital content is decades old, and a satisfactory resolution isn't on the horizon. This article characterizes how and why this dilemma is so vexing, describes library initiatives to address it during the last few decades, and suggests directions for the future.

## HISTORICAL ANTECEDENTS

A number of early thinkers and innovators promoted supremely optimistic visions for the future of information access. Way back in 1945, Vannevar Bush proposed his Memex, “in which an individual stores all his books, records, and communications and which is mechanized so that it may be consulted with exceeding speed and flexibility” (Bush 1945: 106–107). This may have seemed like science fiction at the time, but fast forward to 2007, when the iPhone was announced, “combining three products—a revolutionary mobile phone, a widescreen iPod® with touch controls, and a breakthrough Internet communications device with desktop-class email, web browsing, searching and maps—into one small and lightweight handheld device” (Apple Computer 2007).

Many technological breakthroughs and deployments have indeed propelled digital innovation resulting in capabilities not unlike Bush's Memex. These advances have

enabled a panoply of information and services accessible from devices from a radically enlarged geography (i.e., nearly anywhere in the digitally connected world). The exponential rise in digital content accessible to the general public, coupled with the dramatic increase in network and mobile technology greatly reduced time- and location-based constraints in accessing content.

The nature of content and how it is provided and used in libraries have changed profoundly, but less optimistically. A prominent early library challenge emerged with scholarly journals and their

escalating prices, first for print, and later, for digital versions as well. Journal price increases often rose substantially faster than the inflation rate, and given the central role of publication in established journals for scholarly research and academic careers, university libraries were captive to these increases—though that predicament provided stimulus to the open-access movement. Universities pushed back, and for example in 2021, the University of California reached a landmark open-access agreement with Elsevier, the world's largest scientific publishing company. Even with this agreement that incorporates open access, “Elsevier's prices are still too high, and it makes outrageous profits” (Kell 2021).

Since the 2010s, the highest profile battle related to library digital content has focused on ebooks and digital audiobooks in public libraries, especially when it comes to bestselling trade books. Both pricing and availability are prime points of contention. A library, for example, may typically pay \$60 for a license that expires after two years (i.e., for a digital book copy that may be loaned to one person at a time, simulating a print book copy loan). Such a license necessitates an additional payment if the library wishes to make the book available for two more years (Readers First 2024). And under such a regime, archiving and preservation effectively become impossible. In contrast, for \$20 or so, after a typical discount that libraries

receive, a library could purchase a physical copy of that book, which could last for decades.

More pernicious is that, under current laws, a publisher or distributor could unilaterally decide not to allow to library access to their book under any pricing or terms. Such restrictions were put in place during the 2010s by some of the largest publishers, and some digital content continues to be restricted in this way (Noorda and Inman Berens 2023).

More pernicious is that...a publisher or distributor could unilaterally decide not to allow to library access to their book under any pricing or terms.

Physical books and other analog content are provided commercially under the rubric of the first-sale doctrine of copyright law (17 U.S.C. 109). Once legally obtained, a library (or an individual) owns its copy of a physical/printed book and has the right to lend that book to others and even make copies to the extent permitted by the limitations and exceptions of copyright law such as fair use. In contrast, digital content is typically provided via a license over an aggregator's platform that provides the user only the rights specified in the contract. The licensing business model fundamentally alters the balance of power in favor of the rights holder, as licensing contracts are generally written by the publisher or distributor, and only the largest library organizations have any possibility to push back or negotiate over adverse terms. Libraries simply must accept the licenses offered, or not—though the latter can be challenging when library users are demanding digital versions of books or if the only version available is the digital one.

#### LIBRARY DIGITAL CONTENT ACCESS ADVOCACY TO DATE

In the last decade, there have been numerous discussions between library practitioners and representatives and publisher leadership and staff, as well as with other members of the publishing ecosystem. I, myself, on behalf of American Library Association (ALA), and often with a few other ALA leaders, have made several dozen

trips to New York City to meet with publishing representatives. While this engagement has led to improved understanding of others' perspectives, improvements in library access have been fairly modest.

Since 2013, some library advocates have sought relief in state legislatures. Approaches considered have varied from pursuing legislation that would require publishers to provide libraries with digital content access comparable to the access the consumer market enjoys (e.g., same-time availability of ebooks), to legal requirements on contract terms, to requirements for library spending of public funds (e.g., libraries can procure digital books only if the terms are "reasonable"). A Maryland bill that mandated library access when a digital book became available in the consumer market was enacted, but subsequently was preempted by a federal court based on federal copyright law (Albanese 2022). A similar bill in New York passed the state legislature, but Governor Kathy Hochul vetoed the bill, based on the experience in Maryland (Albanese 2021). Thus, despite considerable efforts in over a dozen states over many years, no improvement in library digital content access has been realized via state legislation.

A few forays have taken place at the federal level. In October 2019, ALA was invited to submit comments (ALA 2019a) to the Judiciary Committee of the US House of Representatives for its investigation into competition in digital markets. Then, in early 2020, the chair of Judiciary's Subcommittee on Antitrust, Commercial, and Administrative Law, then-Rep. David Cicilline, participated in a roundtable on ebook pricing and terms hosted by the Rhode Island Library Association. Subsequently, there were congressional discussions, and an early bill, comparable to the Maryland bill, was drafted, but stalled because of industry lobbying.

Additionally, several broad-based communications and grassroots campaigns have been launched in the past decade in response to adverse developments in library ebook access. The most notable and visible was the #eBooksForAll campaign, stimulated by the proposal of Macmillan Publishers to "embargo" libraries—that is, newly released ebooks would only be available to libraries eight weeks after being made available in the consumer market. This proposal incensed librarians across the country and impelled an unprecedented communications campaign in multiple media (Albanese 2019), capped by the delivery of a petition to Macmillan Publishers' headquarters (ALA 2019b). With the onset of the COVID-19 pandemic and the perceived imperative for online access, Macmillan cancelled this new policy.

## THE COMPLEX INTERRELATIONSHIP BETWEEN LIBRARIES AND THE PUBLISHING ECOSYSTEM

While library advocates have focused on the issue of digital access for libraries, the relationship between libraries and the publishing ecosystem is multifaceted. There are, of course, the continuing purchases of print books and materials. Beyond that, collaborative engagement between libraries and publishers and distributors includes exhibition at conferences, sponsoring author talks at library conferences and libraries, advertising, sponsoring awards and convenings, and advocacy on other matters (notably on book banning and broader intellectual freedom issues). Thus, while library advocates come at the library digital access issue narrowly focused on licensing, ALA, as the leading and comprehensive national library association, necessarily must address all dimensions of the publisher-library relationship.

## LOOKING TO THE FUTURE OF LIBRARIES AND DIGITAL CONTENT ACCESS

What the library community has done thus far has been modestly successful at best. Therefore, I conclude that the path ahead should not be a straightforward continuation of the efforts of the past years—given their limited efficacy.

To plan strategically for the years ahead, we need to go back to the basics and do our best to articulate what libraries will need in the future. This is certainly easier said than done, but planning for the long term is central to public policy advocacy in general. Change, whether in the legislative, judicial, executive, or corporate arenas usually takes a long time to achieve. Thus, library advocacy for digital content access should focus on what libraries will need for years or decades to come, not only on today's needs. We must therefore assess the foundational requirements—basic and ideal—for digital content across library types under various scenarios.

It will be important to consider how digital content will increasingly interact with library services, in addition to the direct provision of information. When print books ruled the day, libraries had a considerable competitive advantage over other information services providers when it came to providing access. Libraries enjoyed geographic proximity (often in walking distance) and few content

alternatives were available to most people before widespread access to the internet, much less for no fee. By contrast, the provision of digital content via digital networks occurs in an environment of robust competition in the marketplace and society. There has been a radical increase in competition for people's attention, and there are ever-increasing alternatives to libraries for content and services of all types—many of which are inexpensive or without direct fee (i.e., paid via advertisement).

Thus, library *collections* will continue to evolve as a concept. In society in general there has been tremendous growth in short-form and real-time content, thereby likely reducing the relative share of longer-form content such as books, movies, television programming, magazines, and newspapers. Books aren't going away, but they will exist in an increasingly broad and diverse ecosystem of digital content, library services, and hybrid delivery and engagement. And we are likely to see the continuing rise of digital books in the next decade, especially digital audiobooks.

In this context, we need to consider, what advantages do libraries possess and how should they best use them to serve communities? Again, libraries once had the com-

Books aren't going away, but they will exist in an increasingly ... diverse ecosystem of digital content, library services, and hybrid delivery and engagement.

manding advantage of providing access to print materials and other analog materials, an advantage that has deteriorated considerably. Libraries continue to have many strategic advantages that include a physical footprint, infrastructure, expert staffing, strong community support and reputation, and appreciation as key institutions for community connectedness, combatting loneliness, and ameliorating political polarization.

Given the importance of the information and technology industries in the information access space (which was once largely library territory), the library community needs greater outward focus on developments in these sectors. Will we see continuing consolidation in the

information industries—and if so, what would that entail for consumer and library pricing? One such change is the rise of the billionaire owner model in industries, such as newspapers (e.g., the *Washington Post*) and magazines (e.g., the *Atlantic*). And what are the implications of this trend for libraries? Could libraries see, for example, more direct competition if such owners turn out to be more public interest-oriented than profit-oriented? Meanwhile, the unbridled advance of technology, most recently artificial intelligence, will continue to influence library services.

It is time to seriously consider a new policy framework for content access. The last major piece of enacted legislation was the Copyright Act of 1976, predating the digital revolution. The library community is far from having developed ideas for what a new policy framework could look like, much less approaching anything of a consensus. A successful policy framework for digital content access will need to be balanced—enabling libraries to do their work for communities and society while also enabling businesses in the publishing ecosystem to operate viably. It will need to be unified across library types, as the idea of differing federal laws being enacted for varying library types is inconceivable. It will also need to be at the national level, as a patchwork of state policies would be unworkable.

Of the policy ideas in play, the one I find with the most possibility is contract pre-emption. Quite simply, it means that there are sufficiently compelling public policy priorities that may override certain provisions in contracts. Indeed, ALA was a cosponsor of a law symposium on the subject in May 2023 at American University. Even so, we need to take a hard look at possible public policy directions. I view a number of the ideas, such as digital first sale, as unattractive both substantively and politically.

Thus, continued library engagement with influential stakeholders in business and government is needed. As our thinking and plans advance, the library community will need business and political allies to develop and then implement a future-looking policy framework for digital content access that will enable libraries to continue to support their communities. That framework needs to be adaptable and to balance what libraries do to provide content and other services and the challenges that enable individuals to directly access content without using libraries as intermediaries. As is often the case in public policy, it's likely that "nobody will be really happy" with a viable, successful framework that can actually come to fruition.

## AN UNSATISFYING BUT ESSENTIAL CONCLUSION

Some readers will no doubt find this commentary unsatisfying. But we're at a crossroads, looking back at an unsatisfying past and looking forward to a dynamic and uncertain future. Today, there is no obvious effective path forward when it comes to libraries and content access in the digital age.

Most importantly, we must get beyond facile and simplistic slogans such as "we want lower prices." Indeed, we do, but narrowly focusing on price is not a viable strategy. We must avoid knee-jerk reactions, and we must not expect easy wins, since there are no such things. First, we must focus on what libraries will need and want to serve their communities. Then we must consider, what is obtainable in the political and business realms. There is no easy answer or shortcut.

The first question to address is what are the needs for libraries' digital content access? Let's look—from Maine to Hawaii, from university research to K–12 schools, from rural and remote communities to the densest urban areas, from archival to popular titles. Identifying and defining these library needs and opportunities are the foundation for possible new copyright, licensing, and market regimes. We need to know what the public needs and wants from libraries of all types before deciding on the desired public policy direction. We've been focused on firefighting in the 2010s then the COVID-19 pandemic hit, so this foundational work just hasn't taken place—yet.

The library community has much remedial work to do.

## REFERENCES

- Albanese, Andrew. 2019. "As Boycotts Mount, Macmillan CEO Defends Library E-book Embargo." *Publishers Weekly*, November 6. <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/81666-as-boycotts-mount-macmillan-ceo-defends-library-e-book-embargo.html>.
- Albanese, Andrew. 2021. "Hochul Vetoes New York's Library E-book Bill." *Publishers Weekly*, December 30. <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88205-hochul-vetoes-new-york-s-library-e-book-bill.html>.
- Albanese, Andrew. 2022. "In Final Order, Court Declares Maryland's Library E-book Law Unconstitutional." *Publishers Weekly*, June 14. <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/89598-in-final-order-court-declares-maryland-s-library-e-book-law-unconstitutional.html>.
- American Library Association. 2019a. "Competition in Digital Markets. Before the U.S. House of Representatives Committee on the Judiciary." October 15. <https://www.ala.org/sites/default/files/news/content/mediapresscenter/CompetitionDigitalMarkets.pdf>.

- American Library Association. 2019b. "ALA Delivers #eBooksForAll Petition, with 160,000+ Signatures, to Macmillan Publishers." News release, October 30. <https://www.ala.org/news/press-releases/2019/10/ala-delivers-ebooksforall-petition-160000-signatures-macmillan-publishers>.
- Apple Computer. 2007. "Apple Reinvents the Phone with the iPhone." Press release, January 9. <https://www.apple.com/newsroom/2007/01/09Apple-Reinvents-the-Phone-with-iPhone/>.
- Bush, Vannevar. 1945. "As We May Think." *The Atlantic*, July. <https://www.theatlantic.com/magazine/archive/1945/07/as-we-may-think/303881/>
- Kell, Gretchen. 2021. "UC's Deal with Elsevier: What It Took, What It Means, Why It Matters." University of California news release, March 18. <https://www.universityofcalifornia.edu/news/ucs-deal-elsevier-what-it-took-what-it-means-why-it-matters>.
- Noorda, Rachel, and Kathi Inman Berens. 2023. *Digital Public Library Ecosystem 2023*. American Library Association. <https://americanlibrariesmagazine.org/latest-links/new-ala-report-maps-digital-public-library-ecosystem/>.
- ReadersFirst. 2024. "Price Increases from Three of the Big 5." *ReadersFirst*, August 23. <https://www.readersfirst.org/news/2024/8/23/price-increases-from-three-of-the-big-five>.

**Alan S. Inouye** is senior director, public policy and government relations, for the American Library Association. In that role, he is the lead staffer for copyright and licensing policy and digital book advocacy and future directions for libraries and public policy. Previously, he was a coordinator of the President's Council of Advisors on Science and Technology, Executive Office of the President, and a study director at the National Academy of Sciences.