

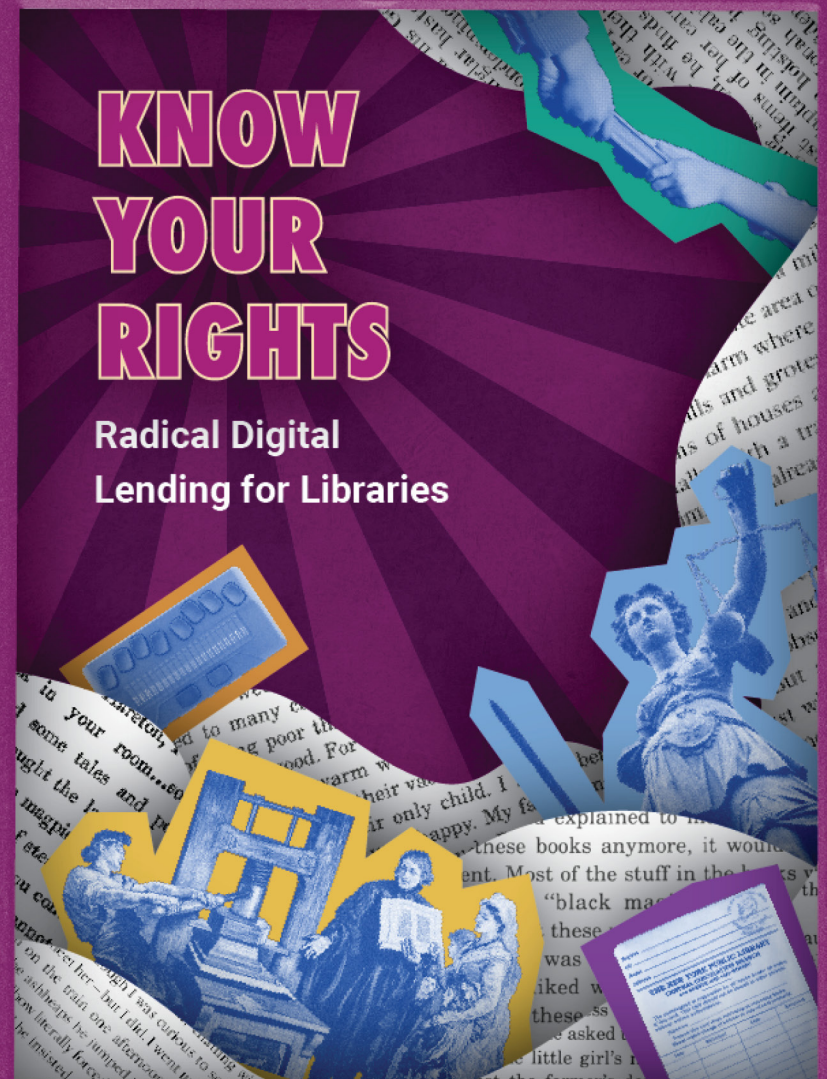
Interested in learning more about digitized lending? Great! The digitized version of this zine, which you can find at the QR code, includes links that provide more information on many of the topics we discussed. For even more information and insight into how libraries can navigate these issues, check out: www.libraryfutures.net.



Disclaimer: This zine talks about the law, but it does not provide legal advice. If this zine raises legal questions about the ideas presented here, please speak with your friendly neighborhood library lawyer or contact Library Futures for more information.



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What Can Libraries Do?

Half of the 50 largest libraries in the country are part of state universities and may qualify for sovereign immunity. Since the novel solutions presented in this zine are untested, the **11th Amendment** could shield state university libraries from the substantial financial consequences if these solutions don't work in practice. With that in mind, state university libraries may hopefully become more confident in pursuing these radical solutions and advocating for equitable and affordable digital lending on behalf of all libraries!



Library Futures is the vanguard nonprofit organization uncovering and confronting the fundamental policy issues that threaten libraries in the digital age. This zine explores novel legal theories to assist librarians and their allies in combating exploitative ebook practices. If you are a librarian, you may already be aware of the many issues surrounding digital ebook lending such as fair use restrictions, surveillance, and accessibility. This zine presents new theories for addressing these issues, and making ebook lending equitable, ethical, and effective. These theories are presented as a progression from individual actions (negotiating contracts and utilizing 17 U.S.C. §108(e)) to broader constitutional activism.

The ideas presented here are untested and radical and outcomes are unpredictable. However, libraries must rethink their approach to digital lending in the modern library. Librarians should continue to work with their legal counsel, clinics, and politicians to see what methods make the most sense for their library and community. We hope this zine inspires you to fight for your right to digitize!

Immunity Can Declaw Copyright Lawsuits (For Now)

Sovereign immunity currently protects state entities from claims of copyright infringement. Congress tried to eliminate state immunity for copyright claims with the Copyright Remedy and Clarification Act of 1990, but the Supreme Court struck it down as unconstitutional.

However, sovereign immunity is not—and shouldn't become—a get-out-of-jail-free card:

- Sovereign immunity can be waived. Most states have waived immunity for contract claims under state law, leaving ebook licensing contracts still enforceable against state entities.
- While sovereign immunity bars monetary relief, the *Ex parte Young* exception allows the copyright holder to sue a state official for injunctive relief to stop anything they deem copyright infringement.
- In the future, systematic infringement of copyright by states and arms of the state could violate the Due Process Clause of the Fourteenth Amendment and enable Congress to get rid of state sovereign immunity for copyright infringement claims. If all state university libraries use sovereign immunity to protect themselves from copyright suits over their digital lending practices, Congress may be motivated and entitled to limit that immunity.

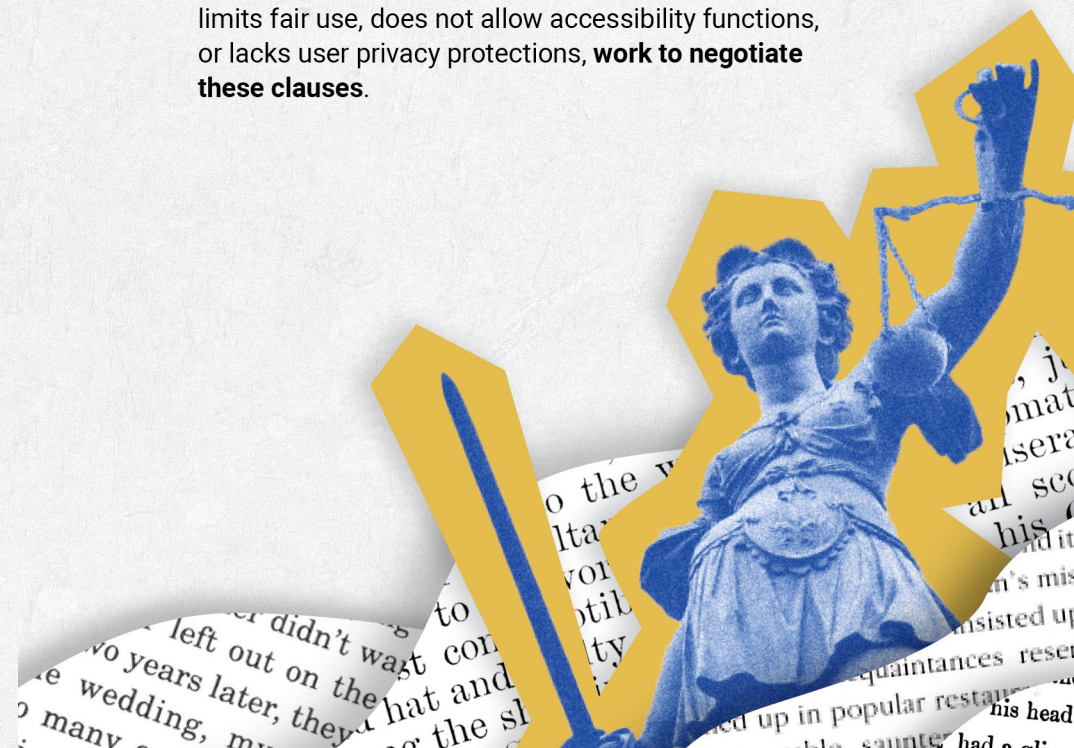
FOCUS ON THE FINE PRINT

Contracts between libraries and ebook providers are often confusing, cagey and calamitous for libraries. Contract language can be difficult to understand, and ebook vendors may discourage negotiation.

So, what can a library do when faced with such a situation?

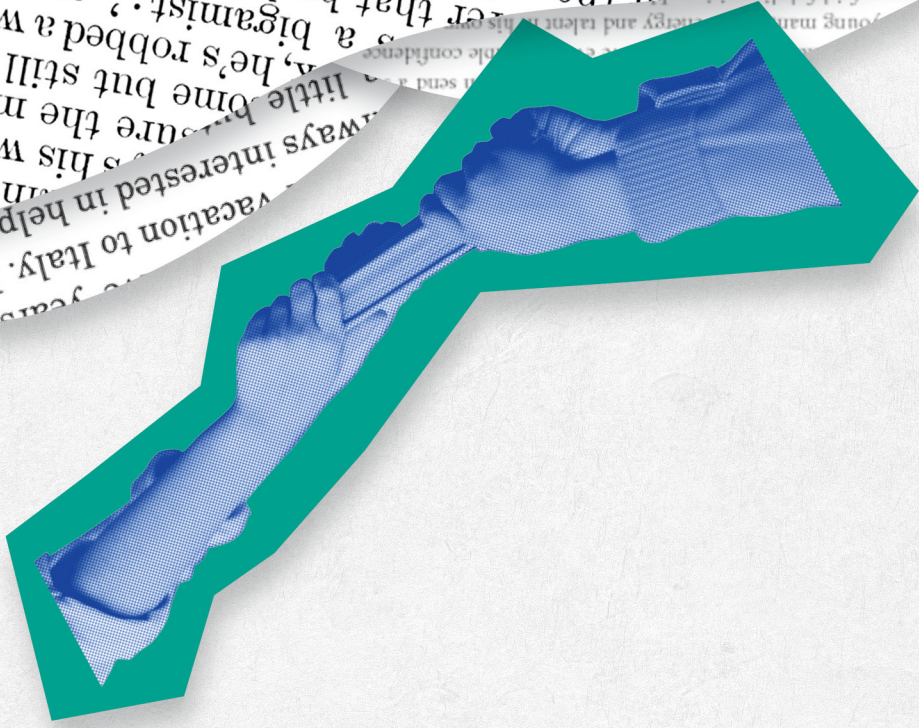
Negotiate Contracts into a Sword and Shield

Read your contract thoroughly, and if the language limits fair use, does not allow accessibility functions, or lacks user privacy protections, **work to negotiate these clauses.**



Using those factors, courts have generally held that **state universities and colleges** (and their employees acting in their official capacities) are covered by sovereign immunity. Whether local public libraries are entitled to immunity is a complex and fact-specific question. It is unlikely for a library to be covered by immunity if it is run by a political subdivision, such as a county or city, that is independent from the state government. Examining the governance rules for the entities running the library could help identify whether the state government has any control.

As tribal organizations, **libraries run by tribal governments** could also have immunity from copyright claims, unless voluntarily waived by the tribal government or expressly limited by Congress.



Some ebook publishers use contracts to override fair use, which is the built-in free speech safeguard in copyright law. If your library is entering into a new agreement and has some bargaining power, consider including a Fair Use Savings Clause in your contract, which protects uses such as criticism, commentary, news reporting, teaching, scholarship, and research by both the library and its patrons.

If your library is public or affiliated with the government, language that limits free speech through fair use override could affect the rights of your patrons! Drawing this explicit connection between fair use and free speech is relatively novel, some libraries may be able to leverage their duty to protect free speech as a tool in their push to include a Fair Use Savings Clause.

Sample Language:

Nothing in this Agreement shall in any way exclude, modify or affect anything the Licensee or an Authorized User is allowed to do in respect of any of the Licensed Digital Content consistent with the Fair Use Provisions of United States Copyright Law.

SAFETY NET: LEND WITH (SOME) IMMUNITY

Some libraries may be protected from lawsuits about their lending practices by sovereign immunity. **Sovereign immunity** is rooted in—but not limited by—the Eleventh Amendment and generally protects states and “arms of the state” from suits brought by citizens of other states, citizens of the state itself, and foreign states. Courts have also recognized common law sovereign immunity of tribal governments and tribal organizations, such as casinos, businesses, and schools.

Sovereignty Rules for State Schools

Are academic and/or public libraries considered “arms of the state”? Courts weigh many factors, including:

- (Most importantly) whether damages would be paid by state funds,
- Whether the entity performs central governmental functions, and
- How the entity is treated under state law.

Keep an eye out for—and negotiate—certain contract language regarding **digital rights management (DRM)**, which allows publishers and other rights holders to control what patrons do with their digital works. DRM has many uses, such as controlling access to only licensed users, preventing unauthorized copying, or enabling controlled digital lending. However, DRM can also prevent patrons from accessing books on a device that uses a different software, restrict accessibility tools, or track user behavior. If your contract includes this language around DRM, you may be able to negotiate the types of restrictions put on the ebooks, including those that require a specific e-reader format, disable accessibility functions, and encroach on reader privacy.

What Can Libraries Do?

Contact Library Futures if you think your contract may be unenforceable because it restricts free speech and fair use rights contrary to public policy. Don't let ebook providers rob you (or your patrons) of your voice!

KNOW YOUR RIGHTS

Fair Use and 17 U.S.C. § 108(e)

Lending digital books may already be legal without having to enter into exploitative ebook licensing agreements. 17 U.S.C. § 108(e) may allow a library to make a digital copy of an **entire** work in its collection for a patron if the library has determined after a "reasonable investigation" that a copy of the work "cannot be **obtained at a fair price**." Both phrases are ambiguous, especially because there is virtually no case law interpreting Section 108, so their meanings will likely rely on new case-by-case analyses.

Most ebooks, which often come with restrictive and expensive licensing terms, may not be able to be "obtained at a fair price" because "license" and "obtain" are distinct legal concepts. "Obtain" indicates a **permanent** transfer of possession. A license, on the other hand, only grants **temporary** access to an ebook. Even the U.S. Copyright Office has conceded that "obtain" probably doesn't include ebook licenses. Therefore, a court could find that, if ebooks are only available through a license and therefore cannot be obtained, no price can be deemed fair!

What Can Libraries Do?

Libraries may push back on publisher contracts that encroach upon lending accessible ebooks consistent with the ADA.

Libraries can also continue to invoke Section 121 to digitize and lend work for disabled patrons.

Remember Section 121?

Luckily, libraries can still turn to Section 121 to serve disabled patrons. Section 121 allows libraries to reproduce or to distribute copies of a previously published work in accessible formats exclusively for use by eligible persons. To achieve those abilities, libraries are free to digitize print works and digitally lend them to patrons with qualifying disabilities. And if publishers push back, it would serve to highlight their attempts to undermine libraries' mission to provide equal access to all.

Libraries Have Enhanced Rights to Copy

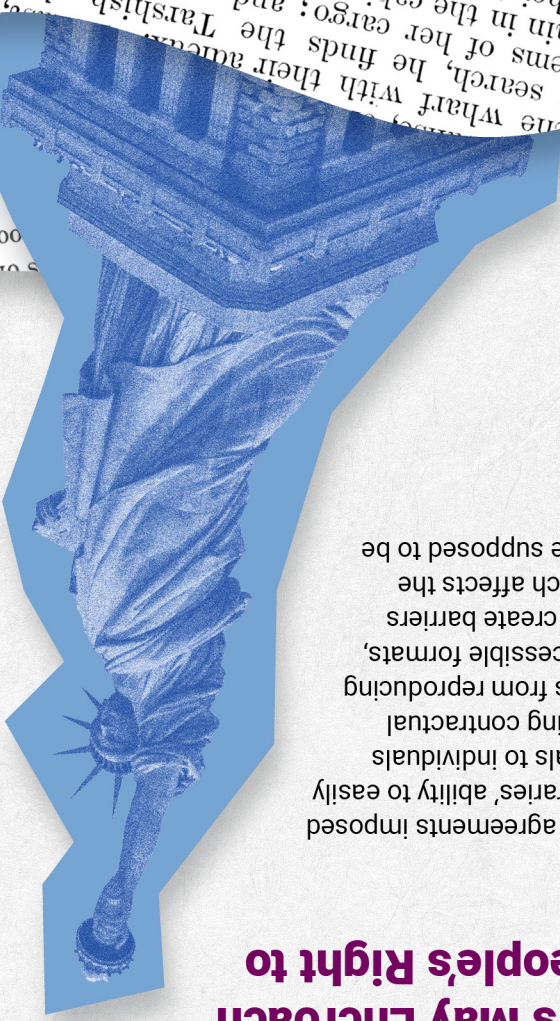
In order to embrace section 108(e) to its fullest extent, libraries can digitize physical books in their collections. Because Section 108 doesn't affect fair use rights under Section 107, libraries may be able to combine their rights under both sections. The fair use doctrine could enable libraries to make a "reserve" digital copy of every book in its collection. Once the library has its legal, fair-use digital copy, it might be able to create a new copy to deliver to patrons under Section 108(e).



By prohibiting discrimination in various areas, including employment, public accommodations, and education, the ADA seeks to ensure that disabled individuals have equal access to resources and opportunities that are fundamental to full participation in society. The ADA is part of a broader movement toward achieving equal citizenship for all, echoing the principles established in landmark cases that reinforced the rights of marginalized people throughout American history.

How Publishers May Encroach on Disabled People's Right to Equal Access

Overly restrictive licensing agreements imposed by publishers may limit libraries' ability to easily provide accessible materials to individuals with disabilities. By enforcing contractual terms that prevent libraries from reproducing or distributing works in accessible formats, publishers may effectively create barriers to information access, which affects the fundamental rights that are supposed to be afforded to all patrons.



Lend by the Book

Even if copies made under Section 108(e) satisfy the "obtained at a reasonable price" requirement, there are four other statutory requirements:

- The copy created from the fair use digital copy must become property of the patron.
- The library cannot have any notice that the copy will be used for purposes other than private study, scholarship, or research.
- The library must display a copyright warning prominently where orders are accepted.

- Libraries cannot engage in "systematic reproduction." This may apply only to copies made under Section 108(e), not reserve digital copies created under the fair use doctrine. No patrons or other libraries may receive copies in "such aggregate quantities as to substitute for a subscription to or purchase of such work." Consider having a system for tracking these copies to make sure no one is trying to game it.

What Can Libraries Do?

Don't let section 108(e) go to waste! In combination with fair use, it could empower libraries to lend digital versions of books already in their collections without needing additional permissions from publishers.



What Can Libraries Do?

Libraries may be able to act to protect disabled patrons' equal access to ebooks by investing in DRM-free content or negotiating for contract language that limits what DRM can be used for, as mentioned earlier. Because purchasing DRM-free content can be expensive for individual libraries, **collective action between libraries and communities** might be effective in pressuring publishers to provide less restrictive ebook licenses that align with Section 121 at a reasonable price.

Technological protection measures (TPM) and digital rights management (DRM) restrictions imposed by publishers may also prevent libraries from providing accessible formats. For instance, Amazon was pressured into removing their text-to-speech function on Kindle 2 by the Authors Guild and publishers. This established a standard in which publishers typically require aggregators to use DRM software that limits the reading application for ebooks, often preventing disabled readers from accessing essential assistive technologies like screen readers or text-to-speech tools. The Amazon move is just one more example of how publishers' policies may push against the libraries' abilities under Section 121.