Toward a New Access Paradigm:
Digital Ownership for Libraries and the Public

Executive Summary

In the past several years, we have seen a dramatic digital shift by book publishers and ebook platforms away from traditional sales toward licensing content, particularly to the public sector.[1] The shift away from ownership and toward licensing opened the door to the substitution of statutory property rights with unilateral contract terms. With the availability of digital content, libraries and consumers should have more rights and access, but in fact, they have fewer. Licensing has resulted in a deeply broken system around ebook lending, impeding libraries from serving the needs of their communities while also creating critical access issues. Licensing often makes significant collections, archives, and repositories of digital content now inaccessible, unaffordable, or subject to exploitative terms that make it difficult for libraries to purchase materials to lend and preserve. A small group of large publishers and distributors dominate the ebook market, and charge high costs for digital resources, forcing libraries to license rather than own works as they have traditionally with print resources.

In response, Library Futures recommends policymakers adopt an approach of digital ownership that extends the current paradigm for print works and allow libraries to both maintain the benefits of print collections and innovate even further toward providing new methods of access, preservation, and education by creating new lending models, equitizing access for underserved communities, and contributing to a more democratic balance. The remedy for these issues is situated in three different realms: legal reform (judicial, legislative, and regulatory), collective action, and library-owned infrastructure—these are not mutually exclusive, but rather overlap and build upon each other.

[1] The public sector includes libraries, schools, universities, and other publicly-funded institutions.

This paper will outline some approaches to solving this issue through structural, community-based, and technical means. It will give a brief, non-exhaustive overview of the legal landscape and governmental avenues for reform and focus more comprehensively on collective action and infrastructure. This paper is also not intended to be a prescriptive directive, but rather a starting point for further discussion. The intent is to structure the conversation by contextualizing options for the library and policy community on moving toward a more sustainable information ecosystem. It is important to note that there is no one solution for all occasions and all institutions, but what we hope to highlight is the importance for libraries to be able to choose the ownership or access model that best suits the needs of their communities.

We encourage readers to explore the expansive current and upcoming literature available regarding high-level legal reform; however, the intent of this paper is to build on Library Futures' advocacy work within the library community.

I. The Problem

When a consumer buys a physical item, such as a book, they own the book—which allows them to freely distribute or lend that copy. When a user "buys" an ebook, they do not own the ebook they buy; they merely rent it—in other words, they cannot transfer, modify, or make other uses of the ebook beyond those authorized by the license agreement.

This shift from ownership toward licensing opened the door to the substitution of statutory property rights (such as the right to acquire, use, and dispose of property), replacing them with unilateral contract terms. As a result of this shift, publishers and platforms now routinely attempt to assert control over almost all library activities related to ebooks, including how, where, when, and to whom they can be shared.

Merely because an ebook is a digital file does not make it software. Software is typically governed by licensing. However, unlike software, an ebook's value lies in the content it contains, not in what it can do. Ebooks *are* books. And ebooks should be considered books under the law, without necessarily being subject to the licensing regulations of a software product.[2]

The practical consequences of licensing are far-reaching and impact both libraries and consumers. The licensing regime gives rightsholders greater control not only over the pricing and availability of their work, but also over the ways consumers can use their property. That control limits consumers on a number of levels: it prevents them from acquiring or reselling works via secondary markets; it impinges on their privacy and limits their opportunities for innovation;[3]

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[2] *See, e.g.,* "Buch Ist Buch" campaign. Barbara Schleihagen, "A Book is a Book: The Long Road to Legal Regulations for E-books in Libraries" [translated from German], *Forum Bibliothek and Information* (April 8, 2022).
[3] *See* Sarah Lamdan, *Data Cartels* (2022)

and it threatens market efficiency and competition by increasing costs and the potential of consumer lock-in. Unlike with print media, a student cannot legally share a digital textbook with another student; a reader cannot legally loan an ebook they love to a friend; an artist's music can disappear without warning from a streaming platform. Despite clicking a ''buy now'' button, users are in reality agreeing to conditional and impermanent access to digital content, effectively a rental under another name.[4]

Fundamentally, digital content licensing creates an imbalance of power in favor of the licensors. These contracts, which consumers are forced to sign for access and often do not even read,[5] leave very little—if any—room for libraries or consumers to negotiate, which serves to entrench unfavorable terms over time. To quote Jason Schultz and Aaron Perzanowski in *The End of Ownership,* the proliferation of licensing created a "market for lemons"[6] and a "mutant form of contract law"[7] that is perpetuated by the absence of genuine alternatives. Traditional mechanisms that make sure contracts reflect the mutual intent of the parties are broken,[8] and libraries and consumers are effectively powerless to negotiate the restrictive licensing terms that are offered to them. As a result, publishers have more information and control than libraries and consumers about the digital goods for sale, saddling libraries and consumers with unfair or restrictive terms that they do not have the negotiating power to change.

The imbalance of power is also evident in the context of consumer privacy.[9] Licensed media allows unprecedented surveillance of consumer behavior. While libraries have historically safeguarded patron records, vendors use licenses to skirt these protections. Because vendors are not bound by the same laws of confidentiality as libraries for keeping personal information private, publishers have widespread leverage to collect data about library users, implicating inviolable privacy interests that are core to libraries,[10] and allowing large, for-profit companies to skirt privacy laws that are intended to protect against for-profit and other inappropriate uses of personal information.As power, and thus data, consolidates in fewer hands, users are held

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[4] Kyle K. Courtney, "If publishers have their way, libraries' digital options will see major cuts," *The Hill* (May 24, 2022).

[5] According to a 2017 Deloitte survey, 91 percent of people consent to legal terms and services conditions without reading them. The survey found that, when faced with no choice, users are willing to accept potential consequences in exchange for access. A more recent 2020 survey found that 99 percent of consumers do not read the Terms and Conditions when they purchase an item or service. The experiment caught 99 percent of survey respondents surrendering things like the naming rights of their first-born child and browsing history access to their mothers. *See* Caroline Cakebread, "You're not alone, no one reads terms of service agreements," *Business Insider* (Nov. 15, 2017); *see also* Dr. Tim Sandle, "Report finds only 1 percent reads 'Terms & Conditions'," *Digital Journal* (January 29, 2022).

[6] A "market for lemons" is an economy where sellers have more information and control than buyers about the goods for sale. *See* Aaron Perzanowski and Jason Schultz, *The End of Ownership: Personal Property in the Digital Economy* 60 (2016).

[7] Ibid. at 66.

[8] Ibid. at 65.

[9] For a comprehensive discussion on privacy issues in this context, *see* Sarah Lamdan, *Data Cartels* (2022).

[10] "Privacy," *Am. Libr. Ass'n* (last modified Apr. 2017) (discussing importance of privacy with respect to library services).

hostage with no viable alternatives that better protect user privacy. In this way, competition problems are also privacy problems, resulting in more privacy violations due at least in part to a dwindling pool of consumer choice.[11]

A. *Digital Content in Libraries: A Rental Agreement with Little Regulation or Oversight*

The effects of the licensing paradigm are especially evident in the library context, where libraries are major consumers of digital materials.[12] Historically, libraries have had the right to own and lend physical materials. With physical materials, libraries maintain full control over their offerings, such as how long to allow books to be lent out, what records to keep about their usage, and how to preserve them for the long term. Digital content has contributed to conditions in which a few large companies have consolidated to control both the purchasing and acquisition as well as the distribution of that content. Ebooks are hosted on publishers' or distributors' servers, which means that libraries must follow their strict licensing conditions for how those books are acquired, lent, and preserved. When a library agrees to these licenses, *at best* they are merely renting or leasing temporary access to these works, even if the access promised is "perpetual." Even worse than a rental agreement, a library does not come into possession of the digital files at any point at all—as such they are not even renting them, but rather paying for a patron to access them outside of the library's premises.

As a result, publishers now have the ability to deny access to content, restrict use, charge exorbitantly inflated prices, and set terms that would be unacceptable in the physical context.[13] Currently, all ebook licenses offered to libraries by the "Big Five" publishers expire either after 24 months or 26 checkouts.[14] If the licensing model remains the only option for library digital content, libraries will struggle to perform their traditional functions, as well as meet the needs of their patrons in an increasingly unequal information landscape.

B. *Perpetual Access is not Ownership*

Some publishers offer a "perpetual access" licensing option, which means, in the context of ebooks and other digital content, paying a fee for the content and retaining permanent access.

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[11] As a recent example, Thomson Reuters left an open database with sensitive customer and corporate data, including third-party server passwords in plaintext format, accessible for anyone to look at. *See* Vilius Petkauskas, "Thomson Reuters collected and leaked at least 3TB of sensitive data," *CyberNews.com* (Nov. 3, 2022).
[12] A conservative estimate is that libraries account for nine percent of publishing revenues. *See* Jane Friedman, "What Do Authors Earn from Digital Lending at Libraries?" (Oct. 30, 2021). Additionally, according to Guy LeCharles Gonzalez, the true percentage of public libraries' estimated $1.5 billion materials budget that goes toward trade publishing's estimated $12 billion in projected revenue is a "knowable unknown." Guy LeCharles Gonzalez, "Why It's Time to Quantify the Library's Role in the Reading Marketplace," *Publishers Weekly* (Dec. 13, 2019).
[13] Gabrielle Emanuel, "Inside the E-Book 'War' Waging Between Libraries And Publishers," *GBH News* (January 6, 2020).
[14] "Publisher Price Watch," *ReadersFirst* (last visited July 8, 2022).

Typically when a library purchases a perpetual access license, the content remains on the publisher's or vendor's server. The "Big 5" publishers offered perpetual access in the past, but no longer do.[15]

Although perpetual access may seem to be enough, it is not the same as ownership. First, the access is "perpetual" only in the sense that a library continues to maintain a relationship with that vendor. The promise of "perpetual access" comes with potential strings attached—publishers still have the ability to pull back library resources at any time, for any reason. It is impossible to say whether the vendor will still be hosting the content in 20 years, or if it might go out of business or be sold to another company. In a system where copies reside on publisher or vendor servers, subject to restrictive license terms, the digital holdings of every library are at risk of vanishing.

Publishers have used licensing to control use and dissemination of materials and to deny ownership rights afforded to creators, users, and cultural institutions. By denying libraries the ability to own electronic materials, publishers subject libraries and their users to the whims of business decisions, sales figures, and other methods of corporate control.

C. *Amplifying Library and Consumer Choice*

Freedom of choice for libraries and consumers is crucial to any solution for the licensing problem. Libraries are not homogenous, and their relative communities often have differing needs—there are situations in which a licensing agreement could be beneficial to a library system, and individual library systems should have the freedom to decide how they acquire and maintain their collections.

For example, if a public library wants to lend hundreds of simultaneous copies of the latest bestseller and not permanently keep it on their shelves, licensed access—rather than ownership—may be more appropriate and efficient for that particular library and its community's needs. The library would not need to expend resources associated with ownership, such as storage, hosting, and maintenance of hundreds of copies of an ebook past the book's initial popularity.[16] In fact, digital books need constant maintenance—reprocessing, reformatting, re-invigorating—or they will not be readable.[17] In addition, public libraries may not want to continuously version econtent, maintain file formats, or provide long term digital preservation, as their objective centers more on access rather than preservation.

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[15] Michael Kozlowski, "Here are the big 5 publishers terms for libraries in 2021," *GoodEReader* (Feb. 16, 2021).
[16] Similarly, a consumer may not want to *own* a copy of every single film, music album, or ebook, and in some instances, streaming services may provide consumers with the convenience that they would rather have.
[17] Brewster Kahle, "Digital Books wear out faster than Physical Books," *Internet Archive Blog* (Nov. 15, 2022).

Ownership, and licensing with a possibility of ownership can also act as a hybrid option for libraries and potentially even consumers. For example, the use of "springing licenses," a legal mechanism for granting a license that automatically springs into ownership at a future date, could provide some middle ground for negotiation.[18] In this way, licensing can be a complementary service that libraries should have the *option* to choose. If implemented appropriately, flexible license agreements, like springing licenses, could potentially provide welcome diversity in options and pricing structures available to libraries. The key is meaningful choice.

The following sections outline some approaches to solving this issue through legal reform (judicial, legislative, and regulatory), collective action, and library-owned infrastructure. This includes a brief, non-exhaustive overview of the legal landscape and governmental avenues for reform and focus more comprehensively on collective action and infrastructure.

II. Copyright Reform

At the core of digital ownership is uncertainty over the digital equivalent of the first sale doctrine. First sale, as it applies to tangible goods, is codified in 17 U.S.C. § 109 and otherwise known as the "exhaustion principle." First sale is the notion that a rightsholder relinquishes some control over a product once it sells. The doctrine, first recognized by the Supreme Court in *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908), allows the owner of any lawful copy of a copyrighted work to resell, rent, lend, give away, or otherwise treat that copy in any way he or she desires without the copyright owner's permission, as long as the copyright owner's other exclusive copyright rights are not infringed. Legally and historically, library lending has hinged on the first sale doctrine, grounding the ability to loan works through the notion of property ownership. When a library buys a book, it "exhausts" the rightsholder's interest in that particular copy, and the library can subsequently lend the copy to patrons and other libraries because it owns that book.

By contrast, transactions in the digital ebook market involve complex and restrictive licenses that deprive consumers and libraries of ownership (and, therefore, exhaustion) rights. The shift to licensed digital content has resulted in a contractual override of these traditional rights and forced a permissions-based framework on libraries where permissions are not needed. Significant changes to copyright law would be required to address the rise of licensing as a replacement for ownership and the resulting inequity in digital access. Those changes could be achieved through legislation, the courts, or through regulatory intervention. Because each pathway to copyright reform presents its own set of challenges, a combination of action through each avenue would ideally be most effective to produce significant structural change.

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[18] *See* "Springing Licenses," *Creative Commons* (last visited Sept. 5, 2022).

A. *Judicial Remedies*

The courts are in a powerful position to counterbalance the expansion of licensing and allow libraries the option to once again own their collections. This can be done through a number of avenues, including, but not limited to:

Utilizing the doctrine of ***contract preemption:*** The doctrine of contract preemption holds that when a state law (such as a contract) conflicts with federal law (such as copyright), federal law takes precedence. In theory, courts could rule that ebook licenses that are inconsistent with copyright law—such as those that conflict with section 108 (Copyright Exceptions for Libraries and Archives), or even section 107 (Fair Use)—are unenforceable.[19]

Establishing a ***common law exhaustion doctrine*** adapted more closely to the modern digital landscape.[20] Courts have room to apply and continue to develop common law regarding a first sale doctrine in the digital marketplace, much like they have developed the common law around fair use. The first sale right is a judge-made doctrine that was codified in section 109(a), just as the fair use right is a judge-made doctrine which was codified in section 107.

Distinguishing library lending from for-profit enterprises such as ReDigi and unequivocally leave the door open for non-commercial educational access and library digital ownership. *Capitol Records v. ReDigi* is a case from the Federal District Court for the Southern District of New York about copyright infringement of digital music.[21] ReDigi was a for-profit company that created a novel system to sell used iTunes licensed MP3s. Capitol Records and other record labels sued ReDigi, claiming copyright infringement. The court in *ReDigi* sided with Capitol Records, finding that this used MP3 market of licensed music was not a fair use because the sale of these MP3s had a direct impact on the market for more licensed sales of MP3s. However, a library is not a for-profit entity and a viable argument can be made that libraries are not unreasonably encroaching on the commercial entitlements of rights holders by

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[19] As it stands, it is rare for courts to utilize contract preemption in the U.S. because courts mainly focus on whether the rights defined by a contract overlap with the rights of a federal copyright. They very rarely ask whether a contract interferes with the rights of the consumers of the copyrighted work. *See* Schultz & Perzanowski, at 176.

[20] Schultz & Perzanowski discuss in depth what a modern digital exhaustion doctrine could look like, which is outside the scope of this paper. *See* *The End of Ownership: Personal Property in the Digital Economy* (2016); "Digital Exhaustion," 58 UCLA L. Rev. 889 (2011); "Reconciling Intellectual and Personal Property," 90 Notre Dame L. Rev. 1211 (2015); and others.

[21] *Capitol Records, LLC v. ReDigi, Inc*. 910 F.3d 649 (2d Cir. 2018).

lending materials, as they have always done.[22] [23] The courts could clarify this distinction through future case law.[24]

B. *Congressional Intervention*

Federal lawmakers can enact various legislative remedies to address the issue, including, but not limited to:

Amending the Copyright Act to modernize it in line with digital ownership and prevent publishers from imposing restrictive licensing terms on lawful uses of digital content. (A discussion of possible amendments is outside the scope of this paper.)

Codifying the doctrine of contract preemption to protect copyright exceptions from override by contracts. An example of this type of legislation can be found in the United Kingdom. Following reforms in 2014,[25] contracts can no longer remove many of the rights users have in UK copyright law.[26] Because freedom of contract in UK law is an important legal principle (similar to the US), prior to 2014 libraries were faced with a situation where contracts overrode most copyright exceptions. The courts weighed in on these contracts on a case-by-case basis, providing essentially little, if no clarity for libraries or educational establishments. However, as a result of the 2014 reforms, many UK copyright exceptions can no longer be "trumped" by publisher contract provisions. Therefore, regardless of what a license, subscription agreement, or contract with a publisher provides, most UK educational and library institutions are empowered to "ignore" the contract and retain their copyright exceptions. US legislation

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[22] Notably, the Plaintiff publishers in *Hachette Book Group, Inc., et al. v. Internet Archive*, 1:20-cv-04160 (S.D.N.Y. 2020) disagree with this statement and argue that *ReDigi* precludes digital first sale for libraries. However, Library Futures, as well as numerous legal scholars, dispute Hachette's interpretation of the law. Regardless, at the time of this writing, the legal analysis is far from settled.

[23] For a more detailed analysis of the ReDigi decision as it applies to libraries, *see* Kyle K. Courtney, "Libraries Do Not Need Permission to Lend Books: Fair Use, First Sale, and the Fallacy of Licensing Culture," *Medium* (May 18, 2020); and Krista Cox, "The Implications of the ReDigi Decision for Libraries," *Ass'n of Research Libraries* (Dec. 21, 2018).

[24] It is important to note that *ReDigi* is merely *one case in one circuit*. There is enough reason to believe that one of the other eleven circuit courts in the U.S. could arrive at a conclusion different from that of the Second Circuit—especially if it were presented with more applicable facts than those in *ReDigi.* Libraries have not yet had a real opportunity to test a court-based pathway to digital ownership because the vast majority of born-digital content is licensed before the issue can even reach the courts. At the time of this writing, the *Hachette Book Group, Inc., et al. v. Internet Archive* lawsuit is pending in the Southern District of New York, and even so, is distinguishable because it primarily concerns digital scans of paper books rather than born-digital content like ebooks.

[25] UK law now states, "To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable." This provision is contained in the Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014; the Copyright and Rights in Performances (Disability) Regulations 2014; and the Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

[26] "Protection of copyright exceptions from override by contract," UK Libraries and Archives Copyright Alliance (Jan. 4, 2019).

similar to that in the UK has the potential to empower consumers and libraries with re-established statutory rights.

Other international jurisdictions have had success with enacting legislation that prevents private parties from using contracts to override copyright exceptions. For example, the European Union has included contract preemption clauses in its directives for the past several decades.[27] The EU's Copyright in the Digital Single Market Directive provides that: "Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable," referencing articles that govern text mining and data mining, digital cross-border teaching, and preservation by cultural heritage organizations, respectively.[28] Similarly, Singapore's Copyright Bill includes exemptions from copyright for certain functions, such as text and data mining, and prohibits contracts from excluding these functions.[29]

Legislative proposals are a clear way to take up the issue of digital ownership, but Congress is notorious for its slow-moving process, and any legislative intervention would likely take a significant amount of time to come into effect. Notably, any proposal would also result in forceful opposition from well-funded lobbying on behalf of the publishing industry.[30]

C. *Regulatory Reform*

A practical approach might be to compel a regulatory agency, such as the United States Federal Trade Commission (FTC) to promulgate rules concerning ownership of digital goods. The FTC has rulemaking authority to issue industry-wide regulations to address unfair or deceptive practices and unfair methods of competition. In the absence of new federal legislation, the FTC has stepped in and mitigated major consumer problems in the past.[31] For example, in July 2021, due in large part to the advocacy of right to repair organizations, the Biden Administration issued an executive order asking the FTC to draft regulations aimed at right-to-repair protections.[32] The order calls on the rulemaking authority of the FTC to prevent

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[27] Eleonora Rosati, "Towards Less Flexibility: EU Preemption," *Copyright and the Court of Justice of the European Union*, Oxford Academic (Apr. 17, 2019).
[28] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.
[29] Singapore Copyright Bill, 17/2021, *Part 5: Permitted Uses of Copyright Works and Protected Performances* (Jul. 6, 2021).
[30] *See* David Moore, "Publishing Giants Are Fighting Libraries on eBooks," *Sludge* (2022)
[31] For example, the 1977 Eyeglass Rule is a noteworthy FTC directive that required eye doctors to give consumers a copy of their prescription without an additional charge. The consumer was then free to take this prescription to a third-party retailer to buy glasses. The Eyeglass Rule enabled competition and gave consumers choice. *See* 16 CFR Part 456 (1977).
[32] The order also addressed a number of other consumer issues, from net neutrality to the high price of prescription drugs. "FACT SHEET: Executive Order on Promoting Competition in the American Economy," *The White House* (July 9, 2021).

manufacturers from stipulating that electronic devices can be repaired only by authorized personnel.

As another example of the FTC's regulatory power in this domain, in August 2022, the FTC launched its rulemaking process on data protection and privacy.[33] The FTC's Advance Notice of Proposed Rulemaking seeks public comment on the harms stemming from commercial surveillance and whether new rules are needed to protect people's privacy and information. According to FTC Commissioner Kelly Slaughter, "We can show that our understanding of what isn't fair has evolved in response to these prevailing market practices and give specific guidance to industry about requirements of the law."[34] The same rationale could be applicable to the current licensing paradigm and would be a logical extension of the FTC's recent interest in protecting privacy.[35]

Although federal legislation enacted by Congress is a stronger way to achieve digital ownership protections, FTC rulemaking is sometimes viewed as "a type of insurance" the agency could fall back on if Congress is unable to pass legislation.[36] Federal rules that establish clear expectations regarding digital ownership and provide the FTC the authority to seek potential financial penalties could form a sustainable model for library ownership of digital goods.

III. Collective Action

In our view, a solution to the digital ownership problem lies in community intervention in the form of developing practices that support collective action and that can extend over time. The library community has been a powerful force in acting collectively to stand against entities that are prohibiting libraries from exercising their rights.

A. *Boycotts and Grassroots Action*

When Macmillan enacted an embargo in July 2019, only allowing libraries to buy one perpetual access copy of new ebook titles during the first two months after release, hundreds of libraries ceased to purchase Macmillan ebooks in protest of the new sales policy.[37] Other libraries protested in letters, at conferences, and in social media campaigns. After less than five months, Macmillan dropped the embargo and it is widely believed that the company lost millions of

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[33] "FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices," *Federal Trade Commission* (Aug. 11, 2022).
[34] Joseph Duball, "FTC Officially Launches Privacy Rulemaking Endeavor," *IAPP* (Aug. 11, 2022).
[35] *See* "FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices," Federal Trade Commission (Aug. 11, 2022).
[36] Joseph Duball, "On the horizon: FTC's Slaughter maps data regulation's potential future," *IAPP* (Nov. 2, 2021).
[37] "Library boycott of Macmillan eBooks," *Whatcom County Library System* (last updated Mar. 17, 2020).

dollars. Then-CEO John Sargent told the American Library Association in January 2020 that he was seeing a "horrific drop in sales."[38]

Another recent example of community collective action is the pressure campaign against Wiley in 2022, when, at the start of the Fall 2022 school semester, Wiley abruptly withdrew 1,379 multidisciplinary titles from Proquest.[39] The decision was widely condemned by librarians, civil society organizations, and university libraries. #ebookSOS organized several efforts in protest and compiled the full list of titles pulled from ProQuest to make authors aware that their books are being restricted. Several weeks later, Wiley relented and announced it was temporarily restoring access (until June 2023) in the face of public pressure.[40]

B. *State Legislative Action*

Library associations in different states have been working with legislatures to introduce state legislation that attempts to equitize the ebook marketplace. During the 2023 legislative session, numerous state library associations are taking an approach, led by Library Futures, that frames the discussion in terms of how publisher contracts restrict libraries' abilities to perform their fundamental duties. The ebook bills are predicated on libraries as consumers, and situate publisher contracts within state consumer protection laws. We anticipate a groundswell of state-by-state laws that empower libraries to negotiate fairer contracts. Although these state bills are intended to *mitigate* the inequities in the ebook marketplace and do not directly address digital ownership issues, the broader takeaway is that this represents a powerful collective effort on the part of the library community to advocate for communities', taxpayers', and readers' rights.

This movement started in 2022, when Maryland lawmakers, with help from the non-profit organization Reader's First and the Maryland Library Association, unanimously passed a bill requiring that publishers "shall offer" licensed eBooks to Maryland public libraries "on reasonable terms."[41] The bill effectively stated that if a publisher offered any eBook to the public, then it must also offer libraries a license to that eBook at a "reasonable" price. New York followed suit and passed a similar bill that same year, and a handful of other states introduced versions of the legislation. The Maryland bill and its state facsimiles were ultimately unsuccessful; following a lawsuit by the publishers, a federal judge ruled in favor of the publishers, issuing an injunction and later finding the law unconstitutional due to federal

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[38] Andrew Albanese, "ALA Midwinter 2020: Macmillan CEO John Sargent, Librarians Spar Over E-book Embargo," *Publishers Weekly* (Jan. 26, 2020).
[39] Claire Woodcock, "Publishing Company Starts School Year by Removing Over 1,000 E-Textbooks," *Vice* (Oct. 5, 2022).
[40] "Statement on Wiley eBooks Featured in ProQuest Academic Complete Library," *Wiley* (Oct. 5, 2022).
[41] Matt Enis, "AAP Sues Maryland Over Law Requiring Publishers to License Ebooks to Libraries Under "Reasonable Terms," *Publishers Weekly* (Dec. 9, 2021).

copyright preemption issues.[42] Despite the setback, library stakeholders and legislators shifted the strategy and continue to move forward with bills that would, in the shorter term, improve protections for libraries.

Taking part in such actions may invoke fears and concerns—upsetting the status quo, "rocking the boat," misunderstandings about copyright, and general risk aversion—but these fears are not reasons for inaction. Fear cannot hold back progress in this space. There are numerous ways of advocating, and advocacy is a critically important way of upholding library missions and values.[43]

C. *Publisher and Vendor Accountability and Incentives*

Publishers and vendors typically operate with a profit incentive and do not necessarily share motivations for equitable access, lending, preservation, and patron privacy, and they build their platforms and develop their practices accordingly. As such, strategies to collectively promote publisher and vendor accountability are key to changing the licensing paradigm.

The "scorecard" method can be an effective tool for promoting vendor accountability. "Scorecards" are reports on industry best practices that provide objective measurements for analyzing the policies and positions of publishers and vendors as they relate to providing digital content to libraries. A scorecard would spotlight publisher and vendor policies that either advance or hinder a library's (and indeed everyone's) right to own, preserve, donate, and lend legally acquired materials, and highlight forward-thinking vendors and publishers who innovate with rights-friendly technologies or policies.

An example of a successful scorecard is "Who Has Your Back," an annual report released by the Electronic Frontier Foundation (EFF) that evaluates a set of select technology companies' policies with regard to how they treat user data when the government demands access. The report seeks to promote competition by creating a "race to the top" amongst companies who stand up for their users' privacy in the legislature and in the courts whenever it is possible to do so. EFF sent the report and a call-to-action to 13 major tech companies, asking them to join the fight for user privacy. Apple and Dropbox agreed, and pledged that they would require search warrants from government officials before handing over users' private files and data.[44] Similarly, the Library Freedom Project created a vendor privacy scorecard that analyzed 12 vendor privacy policies, including those of ProQuest, Elsevier, EBSCO, OCLC, Ex Libris, and JSTOR. The policies were graded against a common rubric based on NISO-developed principles, and

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[42] *See* Andrew Albanese, "In Final Order, Court Declares Maryland's Library E-book Law Unconstitutional," *Publishers Weekly* (June 14, 2022).
[43] It is necessary to note that there are potential antitrust implications for certain kinds and extents of collective action, but a discussion of these is outside the scope of this paper.
[44] Sarah Jacobsson Purewal, "Apple and Dropbox Join EFF in Fight for User Privacy," *CSOOnline* (Sept. 23, 2011).

practices were denoted as being good privacy practices, areas of concern, or privacy practices that were incompatible with library privacy values.

One of the difficulties with accountability techniques such as the scorecard method is that many agreements between publishers and libraries are shielded from public scrutiny by language that prohibits the contract details from being disseminated. These restrictions, typically in the form of either a confidentiality clause or a non-disclosure agreement (NDA), allow the publisher to obscure unfavorable (or favorable) terms from other libraries. As part of a push towards greater transparency and accountability, libraries can consider strategies to push back against confidentiality clauses or NDAs in their contracts with publishers.[45]

IV. Infrastructure

Libraries can build their own infrastructure to ensure that it is oriented towards the needs of their users and provides libraries with the choice to own their digital content. From a practical and policy perspective, *who* administers the actual technology of digital ownership is crucial. Infrastructure can be built by vendors, publishers, or communities, and it can be open source or proprietary. Each infrastructure model presents challenges, but open source, community-owned and operated infrastructure provides control and some level of equity, though tradeoffs may need to be made.

When platforms are run according to rules negotiated between rightsholders and vendors, libraries and their users trade property rights for conditional access privileges. Without the ability to modify or contribute to software projects, most libraries have little control over the products they use, including in terms of copyright, privacy, and user experience. Community or consortia developed and maintained infrastructure can provide a welcome intervention from the proprietary software systems sold to libraries and the public sector, though not without tradeoffs. Community-owned infrastructure takes work, organizational commitment, and funding, and timelines can often be slower than vended solutions. Most crucially, libraries need abundant funding, staff, and resources in order to carry out these ideas.

Notwithstanding the many benefits of library-owned infrastructure, the practical difficulties and the resources required to effectuate it—both technical and personnel—are most challenging for public libraries and smaller institutions. It may be more realistic for academic libraries or large public institutions to independently devise and maintain their own ownership infrastructure, but given that many smaller institutions contend with budget cuts and limited resources to even keep basic operations running, they cannot reasonably maintain their own

[45] It is important to note that although many libraries do fight against NDAs, "most librarians honor the silencing contract clauses to avoid conflict with the companies they rely so heavily upon." *See* Sarah Lamdan, *Data Cartels* at 60 (2022).

servers or platforms. But resource disparity should not preclude smaller institutions from the option of owning their digital content. Therefore, functional, community-built and supported infrastructure, both technical and social, is key to enabling communities to engage in ownership of digital content.

Libraries have a shared history of pooling resources to solve collective infrastructure problems. The HathiTrust Digital Library represents a successful infrastructure coalition—through collective investment, HathiTrust members have created a common infrastructure for access and long term preservation of digital content. In addition, efforts such as the Digital Preservation Network (now defunct), MetaArchive, the Academic Preservation Trust, and LOCKSS[46] have worked to build federated "dark archives" that will keep redundant copies in case of the loss of originals.

There have been previous consortial attempts to build library ebook platforms. One such example is Amigos Library Services, a multistate consortia in the Southwest, which launched the Amigos eShelf Service (defunct as of 2017), an ebook marketplace that aimed to provide options to members, such as hosting and negotiations with publishers—including a purchase option.[47] Unlike shared collections, such as Califa's enki Project, Amigos intended to provide the infrastructure for libraries to build their own collections. This was a useful service for a consortium to offer, since it is not feasible for most libraries to build an ebook platform themselves. Unfortunately, Amigos ceased its eShelf Service because it "proved more challenging than anticipated,"[48] likely due to resource constraints. Amigos is a demonstrative example of the crucial need for library resources in order to build and sustain these tools. The Connecticut State Library has been rolling out a library statewide ebook platform, owned and funded by the state of Connecticut, called eGO CT to public libraries across Connecticut. The goal is for Connecticut library patrons to access the statewide collection, as well as content from their local library. eGO has the potential to facilitate library-owned digital content, but will require secure funding in order to advance its potential as a state-owned model for library digital ownership.

Another current endeavor is the Digital Public Library (DPLA)'s Palace Project, a nonprofit, library-centered digital content platform—its aims are similar to that of Amigos eShelf, but lack the ebook ownership aspect. The Palace Project works directly with publishers to license content on more flexible terms through its own exchange, the Palace Marketplace, which is currently the only nonprofit e-content marketplace.[49] The Palace Project currently offers only

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[46] Unlike the other projects listed here, LOCKSS is publisher-driven, demonstrating that publishers can cooperate in a way that benefits the broader publishing and preservation ecosystem.
[47] If at some point a library chose not to host with Amigos any longer, it could move its files to another hosting platform, as long as the protections on the files remained the same.
[48] "Amigos Library Services has ceased production of the eShelf℠ Service," *Amigos* (Feb. 9, 2017).
[49] "About," *Palace Project* (last visited Oct. 18, 2022).

perpetual licenses, which is not full ownership for the reasons described above. However, Library Futures and others could support DPLA to bring digital ownership into their product to better serve library mission and values.

A poignant example of the value of community collaboration is Project ReShare, formed by a group of libraries, consortia, information organizations, and developers, with both commercial and non-commercial interests, to build a user-centered, open-source, community-owned resource sharing platform for libraries. The ReShare Community is built with a mutual investment in "an open collaboration intended to break down the barriers and silos associated with commercial platforms and replace them with an inclusive, community-owned ecosystem."[50] For example, ReShare's Shared Inventory allows a group of libraries to contribute each member's bibliographic and holdings metadata to a central repository. ReShare could leverage a similar collaborative approach to digital ownership. As ReShare demonstrates, solving the licensing paradigm will take the community coming together to develop structural solutions that enable and empower libraries to opt for content ownership over licensing.

A. *Verification and Management of Downstream Uses*

One of the major concerns with widespread adoption of digital ownership is that it would lead to downstream infringement because digital works are easier to replicate—and it is easier to get away with—digital copying. In short, one of the challenges is how to verify ownership as well as prevent invalid transfers of digital works.

In the context of licensed ebooks, rightsholders rely on Digital Rights Management (DRM) to control the behavior of downstream users, and one proposal would be to apply the same DRM techniques to digital content that is owned instead of licensed. However, DRM is problematic for numerous reasons and should not be the default way forward.[51] There are alternatives to DRM that preserve the library's right to lawfully do what it would like with the content it legally owns.

First, rightsholders have already demonstrated that DRM is not strictly necessary for distributing ebooks. Some vendors and publishers already offer DRM-free ebooks and audiobooks. For example, EBSCO currently offers 288,000 DRM-free ebooks,[52] and in 2018, Google launched a DRM-free audiobook store with a range almost as comprehensive as

[50] "Welcome," *Project ReShare* (last visited Nov. 8. 2022)
[51] For a comprehensive discussion on the problems and pitfalls of DRM, *see*: Jason Schultz & Aaron Perzanowski, "The Secret War Inside Your Devices," *The End of Ownership*, pp. 121-138 (2016).
[52] "EBSCO eBooks DRM-Free Collections," *EBSCO* (last visited Nov. 19, 2022)

Audible's.[53] Many small, independent publishers are also foregoing DRM.[54] There is no evidence that either Google, EBSCO, or others who offer DRM-free content, have suffered widespread infringement as a result of foregoing DRM.

Blockchain technology could also offer some insight into creating a working system of digital asset verification.[55] At its core, the blockchain is a public record of transactions, keeping track of every global bitcoin transaction to provide a complete and trustworthy record of ownership. Although the blockchain is not a panacea,[56] its underlying technology is application-neutral and could provide a practical pathway for publicly verifying the legitimacy of digital assets, in contrast to closed-system DRM technology.

Regardless, in a bigger picture sense, monitoring every downstream use imposes time and costs on rightsholders that they and the courts would likely rather avoid. But there is nothing new about potential copyright infringement—most of us are familiar with burning a CD for our CD collection, making mixtapes for friends, or creating other variations of unauthorized copies in an older era. An individual would be more likely to face consequences for illegally downloading vast amounts, or selling unauthorized copies. Similarly, in the digital context, it is necessary to ask what kind of infringing behavior are we willing to draw the line at: merely creating or transferring a copy of an ebook? Multiple copies? Or posting or reselling? It is impossible to eradicate all digital infringement, and the amount of expenditure that it takes to try to reduce unauthorized copying down to zero is perhaps not worth the diminishing returns at a certain point. Moreover, according to a 2020 Immersive Media & Books study performed by the Panorama Project, other than in extreme cases, downstream use does not impact sales, and in fact augments it.[57]

V. The Role of Publishers

Libraries and publishers can work—and even *must*—work together to develop a pathway toward digital ownership because doing so would arguably benefit both. As of 2018, Amazon controlled approximately 89 percent of the ebook market.[58] If a publisher wants to sell its titles on Amazon—and for many publishers, there is little choice—it must agree to wrap them in DRM: digital locks that permanently bind those titles to Amazon's platform.[59] According to

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[53] Cory Doctorow, "Google Launches a DRM-Free Audiobook Store: Finally, a Writer- and Listener-Friendly Audible Alternative!," *Boing Boing* (July 20, 2018).
[54] Michael Kozlowski, "Audiobook publishers and retailers are trying to go DRM-Free," *GoodEReader* (Aug. 11, 2018).
[55] For a more thorough discussion on bitcoin and personal property, *see*: Joshua A.T. Fairfield, "Bitproperty," 88 So. Cal. L. Rev 805-874 (May 2015).
[56] James Grimmelmann & Arvind Narayanan, "The Blockchain Gang," *Slate* (Feb. 16, 2016).
[57] Panorama Project, *Immersive Media & Books 2020 Consumer Survey* (last visited Jan. 24, 2023).
[58] Matt Day and Jackie Gu, "The Numbers Behind Amazon's Market Reach," *Bloomberg* (Mar. 27, 2019).
[59] Cory Doctorow & Rebecca Giblin, "How Amazon Took Over Books," *Chokepoint Capitalism* (2022).

Rebecca Giblin and Cory Doctorow in *Chokepoint Capitalism*, through DRM, publishers "handed Amazon the keys to their castles," shackling every ebook to Amazon's platform and handing it a monopoly on their customers, thereby empowering a predatory monopsony.[60] This model is unsustainable for not just authors and libraries, but for publishers themselves.

Publisher-created platforms can promote the retention of rights and flexibility, opening up potential for collaboration with libraries. Some publishers, particularly small presses, are already making the choice to both sell ebooks to libraries and to work with them in a reciprocal relationship to preserve and lend their materials. For example, the Brick House Cooperative, a partner of Library Futures, is leading the charge of publisher innovation by selling permanent digital copies of works to libraries.[61] According to Sludge, a member of the co-op, "Brick House is a hopeful project that the internet can be more like Bandcamp and less like Spotify—less commercialized and centralized, more dedicated to supporting a diverse and sustainable ecosystem."[62] Smaller publishers, like Brick House, are able to undertake innovative projects like this in part because they are not locked in to Amazon's chokepoint. Over time and with support, they can provide new avenues for envisioning genuine alternatives and library-publisher collaboration.

The library community has the potential to call in publishers and other entities who share a commitment to ensuring a sustainable future for libraries in the modern digital environment. Library Futures encourages publishers to recognize their shared responsibility to perpetuate the distribution of culture and knowledge to readers, and the importance of libraries and archives in this goal. We want digital materials to be equitable, discoverable, usable, and high quality, and we hope to support publishers in order to build a healthy ecosystem for writers, publishers, libraries, and learners of all types.

Conclusion

An ideal system should allow libraries to own digital works with the same associated rights as print materials that further permit and encourage innovation in the digital context. This change would empower, not challenge, the library's mission to promote access to knowledge, culture, and literature. It would aim to ensure not only that libraries can continue to function as they have in the physical space, and be able to innovate beyond the rules set by licenses.

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[60] Ibid.
[61] Maria Bustillos, "Sell This Book!", *The Nation* (Aug. 3, 2021).
[62] David Moore, "Introducing Brick House, a Co-Op Against the Wolves That Killed Your Favorite Websites," *Sludge* (Aug. 25, 2020).

Reforming the licensing regime will necessarily require legal change, whether through legislation, the courts, regulatory action, or a combination of each. But often, legal change—particularly when it comes to intellectual property—is prompted by developing technologies. The library community can and should become actively engaged in building community-owned, community-run, and open-source infrastructure that supports digital ownership through innovative means of making digital material available to readers. By working together on alternative options, libraries can create more choice in the digital space currently dominated by for-profit platforms and players.

We know that libraries wield an immense amount of influence, but there needs to be coordination between the library community to see digital ownership move ahead. We need to think with a collective frame. Library Futures looks forward to the opportunity to work with libraries, publishers, and communities to develop systems and solutions that suit their needs in service of a balanced lending, learning, and publishing ecosystem.