

If we don't extend the protections of first sale to the digital realm, copyright may become all but irrelevant. As more and more of the intellectual property that we need and want to interact with is offered in digital form—and increasingly, only in digital form—I can see a situation in which copyright remains the de jure law of the land but is, de facto, all but meaningless to daily life as it is actually lived by the vast majority of Americans, because any IP they actually access is governed, not by copyright, but by contract and licensing law. And they don't really have any meaningful chance to influence the terms of those contracts, because they're not being negotiated between rights holders and some kind of users' collective bargaining unit; they're offered on a take-it-or-leave-it basis.

I think such a situation would be bad for a number of reasons.

First and most basic, it is not good for the government to have laws on the books that purport to, but don't actually, govern. It encourages people to think of government as outdated, irrelevant, and ineffectual. This does not do good things for their civic participation or their compliance, and discourages the best and brightest from choosing to enter government service.

Second, I still believe the balance of competing public and private goods inherent in our copyright compromise are important to preserve—indeed, I'd argue they're more important than ever.

Technology has permitted the creative conversation to evolve to include mashups, remixes, sampling, fan fiction, and other new twists on the transformative work (in addition to the well-established parody, pastiche, and collage). These all have a lot to say about the collective, evolutionary, and interdependent nature of the creative process, and about problematizing dominant mainstream narratives by adding marginalized viewpoints and alternative priorities.

As copyright terms grow longer while the culture changes faster, it is vital to make sure that the grassroots creative and communal response to culturally significant works of art can happen while those works are still relevant and impacting society. That won't happen if they're stifled by licensing terms which effectively make Fair Use not an applicable defense.

This is particularly true as enforcement is handed off to algorithms and automation at the major content hosting platforms which take down materials sometimes without any human being even at the rights holding company having seen the allegedly infringing content.

Beyond transformative works, the right to lend, sell, give away, or leave as a bequest the books, films, games, etc. that we've purchased is not a small one. Licenses which are effectively treated, and even referred to, as purchases and cost the same as purchases of the equivalent physical goods should not come with drastically reduced rights compared to their physical counterparts; it discourages the shift to digital which is better for the environment. It reduces the economic value of a good if one cannot recoup any portion of the investment; it also discourages consumers from trying new artists or authors, since they can't borrow a copy or recoup any portion of the cost of buying it if they don't like it. It also discourages the idea of investing in building a library which can be added to through the generations.

Meanwhile, purchasing used books, movies, music, etc. has been an important source of information, entertainment, and, in light of recent research on fiction and the development of empathy, emotional stimulation, to the young and the poor for generations; to drastically reduce their availability is not only harmful to the would-be seller but to the would-be buyer as well.

It is even a loss to scholarship: Scholars routinely study the personal libraries of famous figures to see not only their marginalia but what influenced them and when, but that data will be lost if it is only held on obsolete devices and the servers of companies which have no reason to keep it even if they don't themselves go out of business.

It also causes harm to schools, universities, libraries, charity shops, and other frequent beneficiaries of donated books, all of which can no longer receive either direct benefit of owning and lending the titles for the education of their users or indirect benefit of reselling them to raise funds which can be used for operating expenses, capital improvements, or to purchase other intellectual property which is more needed by their users.

Full disclosure, I am currently an editor at *Library Journal* -- though these comments represent only my personal opinion, not *LJ's* -- so I do receive some indirect benefit (in the form of job security) from the continued well-being of libraries.

That said, in addition to the financial loss from losing book donations, the lack of digital first sale --and the substitution of contract for copyright law in general when it comes to digital materials--also allows publishers to charge libraries many times more for the same content than they would consumers, as well as imposing expiration dates or number of loan restrictions. A library that buys a print book pays the same amount I do as a private individual, lends it as many times as they want and then resells it at the booksale; a library that buys a digital book pays three times as much, has restrictions on how many times or how long they can send it, and can't resell it at all. This puts libraries in the unfortunate position of either increasing the digital divide for their users by skimping on digital content in favor of print, or getting a lot less for the tax dollars with which they are entrusted.

That's if they can buy the digital content at all. It's pretty well known that some major publishers just won't sell ebooks to libraries at all, but at least those publishers still sell print versions of the same books and because of first sale, libraries can get those.

What is less well known is that the lack of a digital first sale doctrine also creates the troubling situation of content which is simply not available to libraries at any price or in any format. Kindle Singles is probably the single best known example, but there is a growing amount of content which is published digitally only, sold to consumers, and libraries are not allowed to buy it at all. That cuts off those who rely on libraries for their cultural and informational access from some of the most cutting edge content there is, and while that's not yet a large percentage of the whole, the situation is only going to get more acute as more publishing shifts to digital only.

Allowing sellers to choose who can purchase their content and for what price has other more troubling implications as well. What if publishers choose not to sell their works to citizens of countries whose form of government they do not condone? To those who they feel are too young to understand it? To those whose gender identity or politics they don't agree with? To fat people or poor people or anyone else who is not in a desirable demographic for their brand? Without digital first sale, born-digital materials can be restricted to any litmus test the publisher cares to apply. The robust debate in the public square which not only copyright, but a free press itself was created to ensure could become instead a series of private walled gardens at the very moment that mandates for open access to the results of federally funded research are pushing in the opposite direction. That does not serve the public interest, and it should be prevented.

Extending the first sale doctrine to the digital realm can ensure that the traditional rights of the consumer are not eroded and lost, and the institutions which depend on them to create and support a well-informed citizenry are not weakened.

Sincerely yours,

Meredith Schwartz