

E-BOOKS IN LIBRARIES

A Briefing Document developed in preparation
for a Workshop on E-Lending in Libraries

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DOCUMENT BACKGROUND AND SCOPE

This briefing document was developed with helpful inputs from industry stakeholders and other practitioners in preparation for the “E-Books in Libraries” workshop, hosted on February 24, 2012, by the Berkman Center for Internet & Society with the generous support of the Charles H. Revson Foundation.

The “E-Books in Libraries” workshop was convened as part of a broader effort to explore current issues associated with digital publishing business models and access to digitally-published materials in libraries. Workshop attendees, including representatives from leading publishers, libraries, academia, and other industry experts, were invited to identify key challenges, share experiences, and prioritize areas for action. This document, which contains some updates reflecting new developments following the February workshop (up to June 2012), is intended to build on and continue that discussion with a broader audience, and encourage the development of next steps and concrete solutions.

Beginning with a brief overview of the history and the current state of the e-book publishing market, the document traces the structure of the licensing practices and business models used by distributors to make e-books available in libraries, and identifies select challenges facing libraries and publishers. Where possible, we have made an effort to incorporate stakeholder perspectives and real-world examples to connect analysis to the actual questions, issues, and challenges that arise in practice. The document concludes with a number of informative resources – including news articles, whitepapers, stakeholder and trade association reports, and other online sources – that might inform future conversations, investigations, pilot projects, and best practices in this space.

The topics presented in this briefing come at an important moment for the publishing industry, and in particular the e-book market, both of which have been rapidly evolving over the last several years. These changes are, in turn, affecting the models used by publishers’ horizontal and vertical business partners, such as libraries and distributors. While we have endeavored to provide accurate information within this document, the dynamic flux of the industry can make it difficult to accurately capture a comprehensive snapshot of its current state. For instance, during the course of our initial research we found that some information published as recently as September 2011 had already become outdated; other salient information is not made publicly available for competitive reasons. Please note that we consider this to be a working document, which we hope to develop further as information changes and the issues evolve.

In light of these limitations, we welcome feedback and suggestions.

THE E-BOOK MARKET

The way in which books are written, produced, and marketed has gradually evolved since the invention of the printing press, but the basic bounded-paper format remained largely unchanged over centuries. The recent transition from an analog to a digital information ecosystem, however, has led to a revolution of the book publishing industry with the emergence and proliferation of e-books as perhaps the most visible expression of this tectonic shift.

The origin of the "e-book" – defined for the purpose of this document as "a book-length publication, consisting of text (and sometimes, images) in digital form, formatted to be read on the electronic screens of user devices such as e-readers, computers and mobile phones"² – can be traced to Project Gutenberg, a volunteer effort launched in the 1970s aimed at digitizing cultural works to encourage the creation and dissemination of e-books.³ Until very recently, however, e-books were not the object of mass-market popularity; rather, they were only publicly available through a limited number of remotely-hosted databases on the Internet, like Project Gutenberg, and were viewable only on desktop or laptop computers.

In the last five years, the demand for e-books has increased significantly, resulting in a rapidly expanding market for e-books. The reasons for the rapid growth of the e-book industry are manifold and include technological, economic, social, and legal drivers and "enablers." The introduction of e-reader devices sparked the evolution of the e-book market, starting with the launch of the Sony Reader in 2006, the introduction of the Amazon Kindle in 2007, and the release of Barnes & Noble's Nook in 2009. Concurrently, tablet computing devices, such as the Apple iPad, which are also frequently used to read e-books, have also become very popular. In January 2012, the Pew Research Center's Internet and American Life Project reported that "the share of adults in the United States who own tablet computers nearly doubled from 10% to 19% between mid-December 2011 and early January 2012 and the same surge in growth also applied to e-book readers, which also jumped from 10% to 19% over the same period."⁴

The industry statistics reported over the last several years clearly illustrate the sharp rise in demand and the overall growth potential of the e-book market. The American Association of Publishers (AAP) reported that the U.S. publishing industry earned a total of \$27.9B in net sales revenue in 2010 from all hardcover, paperback, mass market, physical audiobooks, non-physical, and digital books.⁵ The market share of e-book and other digital format sales, when compared to the market for books in any format, increased from

² See "E-Book," *Oxford English Dictionary* (3d Ed., December 2011).

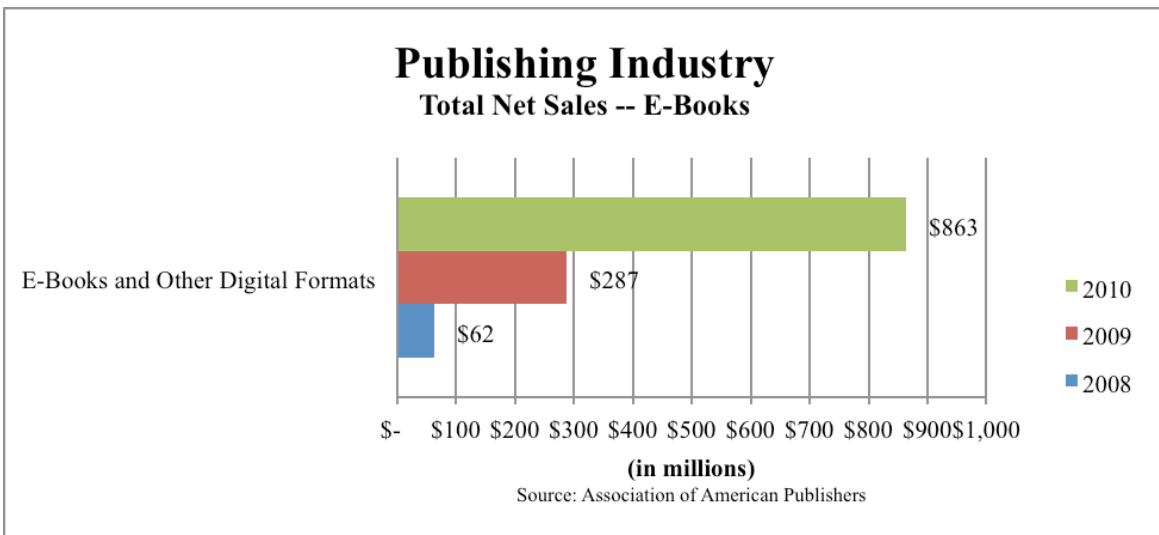
³ See Michael Hart, "The History and Philosophy of Project Gutenberg," August 1992, http://www.gutenberg.org/wiki/Gutenberg:The_History_and_Philosophy_of_Project_Gutenberg_by_Michael_Hart.

⁴ Pew Internet & American Life Project, "Tablet and E-book reader Ownership Nearly Double Over the Holiday Gift-Giving Period," January 23, 2012, <http://www.pewinternet.org/Reports/2012/E-readers-and-tablets.aspx>.

⁵ American Association of Publishers (AAP), <http://www.publishers.org/bookstats/highlights/>.

0.6% in 2008 to 6.4% in 2010, representing \$863M in total net revenue in 2010 from trade e-book sales.⁶ Along with these figures, the AAP noted that “the consistent, growing popularity of e-books and apps are a major success story in content formats, even in advance of 2011 [(for which the AAP had not yet released industry data at the time of this publication)], which is currently tracking high e-format sales.”⁷ Additionally, the Book Industry Study Group report on “Consumer Attitudes Towards E-Book Reading in 2011” noted, “almost 45% of survey respondents report that they are moving away from purchasing hardcover books, and 50.2% report having reduced their paperback purchases.”⁸

To highlight the staggering growth occurring in the trade e-book market, compare the \$863M in total net revenue reported in 2010 to the mere \$287M that was reported in 2009 and \$62M reported in 2008 – approximately triple the revenue earned in 2009, and thirteen times the revenue earned in 2008.



Perhaps even more telling about what can be expected in the AAP's 2011 revenue report, Amazon, the largest retailer of books in the U.S., announced in May 2011 that e-book sales now outnumber print-on-paper sales.⁹ Looking beyond this, data from the early months of 2012 already reveals tremendous growth in sales for youth and adult e-book titles alike. Specifically, the AAP's January 2012 "Monthly Statshot"¹⁰ reports that the monthly sales figure for children's and young adults e-book titles in January 2012 increased to 22.6 million from 3.9 million in January 2011 (an 80.5% increase). In this same period,

⁶ By contrast, trade hardcover sales account for 39.6% of all sales, with total net revenue for 2010 was \$5.26B (0.9% increase); trade soft cover sales account for 37.8% of all sales, with total net revenue of \$5.27B (1.2% increase); trade mass-market paperback sales account for 9.2% of all sales, with total net revenue of \$1.28B (-13.8% decrease). AAP and Book Industry Study Group (BISG), "Book Stats 2011: An Annual Comprehensive Study of the U.S. Publishing Industry," 2011, pp. 42-45, available for purchase at <http://www.bisg.org/publications/product.php?p=24&c=437> (on file with Berkman Center); AAP, "Formats," <http://publishers.org/bookstats/formats/>.

⁷ AAP, "Formats," <http://www.publishers.org/bookstats/formats/>.

⁸ AAP and BISG, "Book Stats 2011," *supra* note 6, p. 45.

⁹ Claire Cain Miller and Julie Bosman, "E-Books Outsell Print at Amazon," *New York Times*, May 19, 2011, <http://www.nytimes.com/2011/05/20/technology/20amazon.html>.

¹⁰ AAP, "Publishing Industry has Strong January Revenue Growth in Print Books and eBooks for All Audiences," <http://www.publishers.org/press/62/>.

monthly sales of adult titles also rose to 99.5 million sold in January 2012, compared to 66.6 million in January 2011, with “adult e-books . . . set to overtake adult paperbacks as the highest volume product for publishers in America.”¹¹ Indeed, in the first quarter of 2012, net sales revenues from e-books exceeded hardcover net sales revenues for the first time in the U.S.¹²

¹¹ See Jolie O'Dell, “E-books are the fastest-growing area of book sales, especially for youngsters,” *VentureBeat*, March 29, 2012, <http://venturebeat.com/2012/03/29/ebook-sales-growth/>.

¹² See Lauren Indvik, “Ebook Sales Surpass Hardcover for First Time in U.S.,” *Mashable Business*, June 17, 2012, <http://mashable.com/2012/06/17/ebook-hardcover-sales/>.

E-BOOKS IN LIBRARIES

Just as the publishing industry has been experiencing tectonic market shifts, libraries, too, have discovered that patrons have become increasingly eager to access content in digital formats that are compatible with popular e-reader devices.

Library Journal's 2011 survey of e-book usage in public libraries – “Ebooks the New Normal: EBook Penetration and Use in U.S. Public Libraries” (hereafter referenced as the “*Library Journal* E-Book Survey”) – found that “66% of respondents said they had experienced a ‘dramatic’ increase in request for e-books in the past year” while “28% said they experienced a ‘slight’ increase.”¹³ Libraries reported that the “top circulating categories of e-books” were primarily works of fiction, including “best sellers”, “mystery/suspense”, and “general fiction”. The demand for non-fiction works also jumped, with “biographies/memoirs”, “political/current events”, and “history” among the most popular categories.¹⁴

The publishing industry uses a series of business models that enable certain forms of e-lending in libraries (described in detail in subsequent sections). According to George Coe, a president at Baker & Taylor, the publisher-to-library market across all formats and all libraries (e.g., private, public, governmental, academic, research, etc.) is approximately \$1.9B; of this, the market for public libraries is approximately \$850M, which Coe likens to the market for independent, non-chain bookstores.¹⁵ In 2011, public libraries plan to spend approximately \$72M on e-book materials, representing on average 4% of libraries’ materials budget – on a per-library basis, public libraries will spend on average \$26,000 (median \$9,500) on e-books.¹⁶ Respondents to the *Library Journal* E-Book Survey anticipate that by 2016 e-books will account for 8.8% of libraries’ materials budgets.¹⁷ Notably, the editors of the report commented in the executive summary that they “suspect this five year spending projection is conservative” based on the “rapid gains over the past year, the enthusiastic adoption of e-books in the culture at large, and the deepening engagement in creating best practices for getting e-books into the hands of library patrons.”¹⁸

According to the 2011 *Library Journal* E-Book Survey, 82% of libraries currently offer access to e-books, which reflects an increase of 10 percentage points from 2010.¹⁹ Of the 18% of libraries that do not currently offer access to e-books, 49% reported that they “definitely plan to [offer access] in the next 12 months,” and 33% indicated that they may add e-books, “but it’s not a high priority.”²⁰ Libraries maintain an average of 4,350 e-book copies in a collection.²¹

¹³ “Ebooks the New Normal: EBook Penetration & Use in US Public Libraries,” *Library Journal*, 2011, p. 24, <http://www.thedigitalshift.com/research/ebook-penetration/>.

¹⁴ *Ibid.*, pp. 32-34.

¹⁵ See Andrew Albanese, “Digital Book World: E-Books in Libraries? No Problem, Panel Says,” *Publishers Weekly*, January 27, 2011, <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/45925-digital-book-world-e-books-and-libraries-no-problem-panel-says.html>; see also Carolyn Kellogg, “Digital Book World: Where do libraries and e-books meet?,” *Los Angeles Times*, January 26, 2011, <http://latimesblogs.latimes.com/jacketcopy/2011/01/digital-book-world-where-do-libraries-and-ebooks-meet.html>.

¹⁶ *Library Journal* E-Book Survey, *supra* note 13, p. 8.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, p. 20.

²⁰ *Ibid.*, pp. 4, 21.

²¹ *Ibid.*, p. 8.

While distribution models vary, e-books are most commonly made available to libraries through an intermediary distributor (sometimes referred to as an "aggregator"), which sells access to e-books titles and copies of e-books, often from multiple publishers. It is worth noting that some publishers do directly sell e-books to libraries, but the overall percentage is relatively small by comparison.

Based on the *Library Journal* E-Book Survey, the chart below notes the most commonly used distributors.

SELECTED E-BOOK VENDORS²²

| Vendor | % of Libraries Using Vendor ²³ | Primary Business Model(s) |
|---------------------------------|---|--|
| OverDrive | 92% | Perpetual access; lendable, downloadable files |
| NetLibrary | 22% | Perpetual access; lendable, downloadable files; subscription |
| Gale/Cengage | 21% | Subscription |
| EBSCOhost | 10% | Subscription |
| Safari Books Online | 5% | Subscription |
| Ingram/MyiLibrary | 5% | Perpetual access; lendable, downloadable files |
| Direct purchase from publishers | 3% | Perpetual access |

However, not every publisher makes its e-books available to distributors for library access. The sudden popularity of e-readers, coupled with the shift to digital formats and the ease with which patrons can browse and check out e-books from their local library's website, have caused publishing companies to abstain from – and in some cases rethink their approach to²⁴ – library e-book lending programs. For example, Josh Marwell, a vice president at HarperCollins, published the following remarks in March 2011 after HarperCollins announced its 26-circulation cap per e-book policy: "We have serious concerns that our previous e-book policy, selling e-books to libraries in perpetuity, if left unchanged, would undermine the emerging e-book eco-system, hurt the growing e-book channel, place additional pressure on physical bookstores, and in the end lead to a decrease in book sales and royalties paid to authors."²⁵ Many of

²² *Ibid.*, p. 90.

²³ *Ibid.*, p. 9.

²⁴ For example, see the very recent dispute between Penguin and Amazon, as well as the recent decision by HarperCollins to limit the total number of circulations available to a license. See Michael Kelley, "Penguin Restores Kindle Lending, but Still Not Providing Digital Editions of New Titles," *The Digital Shift*, November 23, 2011, <http://www.thedigitalshift.com/2011/11/ebooks/penguin-restores-kindle-lending-but-still-not-providing-digital-editions-of-new-titles/>; Julie Bosman, "A Limit on Lending E-Books," *New York Times*, February 27, 2011, <http://mediadecoder.blogs.nytimes.com/2011/02/27/a-limit-on-lending-e-books/>.

²⁵ Josh Marwell, "Open Letter to Librarians," HarperCollins, *Library Lovefest Blog*, March 1, 2011, http://harperlibrary.typepad.com/my_weblog/2011/03/open-letter-to-librarians.html.

the other major trade publishers have expressed similar reservations. Brian Napack, the U.S. president of Macmillan Publishers, succinctly summarizes his case for hesitation: "The fear is I get one library card and never have to buy a book again."²⁶

At present, a fraction of the 6 largest trade publishers permit e-book lending in libraries.²⁷ Among those that do license to libraries, many publishers use license terms to define the manner in which the e-books can be used.



AVAILABILITY OF E-BOOKS BY TRADE PUBLISHERS

| Publisher | E-Book Lending Status |
|------------------|---|
| Random House | Allows unrestricted e-book lending ²⁸ |
| Macmillan | Does not license any e-books ²⁹ |
| Simon & Schuster | Does not license any e-books |
| Penguin | Pilot program launched in June 2012 ³⁰ |
| Hachette | Allows limited licensing of "back list" ³¹ |
| HarperCollins | Allows lending, with 26-loan cap per license |

²⁶ See Annoyed Librarian (*pseud.*), "Publishers Have Met the Enemy and It is Them," *Library Journal*, March 2, 2011, <http://blog.libraryjournal.com/annoyedlibrarian/2011/03/02/publishers-have-met-the-enemy-and-it-is-them/>.

²⁷ Macmillan and Simon & Schuster do not license any e-books to public libraries. Random House is generally considered the only major trade publisher that licenses titles with few restrictions; HarperCollins limits each e-book license to 26 circulations before the license expires. Hachette only licenses their old back lists to libraries – no front list bestselling e-books. Penguin has recently launched a lending pilot program through the New York Public Library and Brooklyn Public Library.

²⁸ Although Random House has some of the least restrictive licensing practices among the "Big Six" publishers, it recently raised e-book prices by a considerable amount (as much as 300 percent, in some cases). According to Random House's statement on this price increase, "our new e-book pricing framework is to bring our titles in price-point symmetry with our Books on Tape audio book downloads for library lending. . . . We believe our new library e-pricing reflects the high value placed on perpetuity of lending and simultaneity of availability for our titles." See Michael Kelley, "Librarians Feel Sticker Shock as Price for Random House Ebooks Rises as Much as 300 Percent," *Library Journal*, March 2, 2012, <http://www.thedigitalshift.com/2012/03/ebooks/librarians-feel-sticker-shock-as-price-for-random-house-ebooks-rise-as-much-as-300-percent/>.

²⁹ See Robert Adrian Hillman, "Library Wars: Amazon and Publishers Vie for Control of E-book Rentals," *The Atlantic*, December 6, 2011, <http://www.theatlantic.com/technology/archive/2011/12/library-wars-amazon-and-publishers-vie-for-control-of-e-book-rentals/249544/>.

³⁰ Penguin reestablished its lending program in June 2012 by launching an experimental pilot with the New York Public Library and the Brooklyn Public Library. Prior to this development, Penguin terminated its previous lending program in November 2011. See "Penguin Launches E-book Library Lending Pilot Program," *Publishers Weekly*, June 21, 2012, <http://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/52645-penguin-launches-e-book-library-lending-pilot-program.html>; but see Michael Kelley, "Penguin Restores Kindle Lending, but Still not Providing Digital Editions of new Titles," *The Digital Shift*, November 23, 2011, <http://www.thedigitalshift.com/2011/11/ebooks/penguin-restores-kindle-lending-but-still-not-providing-digital-editions-of-new-titles/>.

³¹ The current status of Hachette's stance on library lending is a little unclear – we found several conflicting reports. However, according to *Library Journal*, Hachette has not permitted its front list titles to be lent since July 2010. Michael Kelley, "Hachette Taking a Close Look at Risks and Benefits of Library Ebook Lending," *Library Journal*, August 23, 2011, http://www.libraryjournal.com/lj/home/891756-264/hachette_taking_a_close_look.html.csp.

LICENSING AND LENDING PRACTICES

Overview

The early business models that gave libraries access to e-books were brought to market by NetLibrary in the late 1990s.³² These models closely resembled the commercial database models first used to make e-journals available to libraries. More than a decade later, the landscape has changed significantly and become increasingly competitive, with dozens of distributors competing for market share and product differentiation. The extensive range of e-book products and services being offered by distributors changes frequently.

Despite the proliferation of new competitors, the models used by publishers and distributors share a number of characteristics. First, most publishers (and by extension, distributors) only license, but do not sell, e-books to libraries. These licenses can contain a variety of restrictions on use, some of which are determined by the publisher and others by the distributor. Occasionally, the library can negotiate the terms that originate from the distributor.

The distributors commonly offer full-service packages to a library, which include the licensing rights to e-books and also services to host the e-book collection for the library. Following the purchase of an access license, the distributors work with the library to create a website portal that the patrons can access on the library's website, or on the website of the distributor, using library credentials (i.e., a library card number, and a PIN) to access the library's e-book collection. Some distributors, like OverDrive, NetLibrary, and Ebrary, permit patrons to download (or "check out") e-books for limited periods of time onto patron-owned hardware devices, including PCs, Macs, and e-reader devices like the Kindle, NOOK, and Reader. The "loan periods" are typically managed by the distributor's proprietary software platform, or occasionally third-party software like Adobe Digital Editions, which enables the e-book files to be protected by digital rights management ("DRM") technology. Together, the software and the DRM allows the library and distributor to set the parameters of how the file can be used, on which devices it can be accessed, the number of pages that can be viewed, whether any portions of the e-book can be printed on paper, and for how long the patron will have access to the file.

Many of the lending and licensing arrangements offered by e-book distributors fall into one of three broad categories (explored in more detail in the next section): perpetual access, subscription, and pay-per-view. Of these, the two most commonly used in practice are the "perpetual access" and "subscription" models. However, these models can share overlapping characteristics depending on the nature of the license granted to the library. For example, the license may restrict the number of simultaneous users who can access a copy or the total number of simultaneous users who can access a database; it can also set prohibitions on certain types of uses, like inter-library loans, or limits on simultaneous usage and specify expiration terms or triggering events (e.g., license valid for 1 year, license valid for 26 circulations).

³² The original NetLibrary e-book database was launched in 1999. This early platform allowed patrons to search and view the full text of e-books through Internet browsers, and add notes, bookmarks, and links to external resources outside the database. James Galbraith notes that "Reading from cover to cover was an option . . . but the emphasis was on research use, similar conceptually to the periodical database NetLibrary emulated." Sue Polanka, ed., *No Shelf Required* (American Library Association: Chicago, 2011), p. 10.

MODELS USED BY E-BOOK DISTRIBUTORS

| Model | % Used by Libraries | Notable Distributors | Method of Access | Lendable? |
|------------------|---------------------|---|---|---|
| Perpetual Access | 68% ³³ | OverDrive, NetLibrary, MyiLibrary | Perpetual access/license; Single patron per copy; downloadable files | Yes, depending on terms; DRM-protected files in EPUB, PDF, Kindle |
| Subscription | 27% ³⁴ | NetLibrary/EBSCOhost, MyiLibrary, Gale/Cengage, Safari Books Online | Remotely hosted database; access unlimited per copy, or multiple simultaneous users capped per copy (not unlimited) | Some subscription services allow downloadable files |
| Pay-Per-View | 1% ³⁵ | EBL | Remotely hosted database | Yes, for short-term loan periods |

Across these (and other) lending and licensing models, a number of new acquisition models have emerged. A prominent example is “patron-driven acquisition” (or “PDA”), whereby the library works closely with the distributor (often through the distributor’s platform and collection management software) to configure automatic purchasing “triggers” based on patron demand for copies. For example, distributors will allow the library to display an entire catalog of e-book titles as “available” in the library’s collection, and, if a pre-determined number of patrons request a certain e-book title, the library can configure the distributor’s platform to automatically acquire a copy. The benefit for libraries is that they can mitigate the risk of acquiring access to e-book titles that will not be used by patrons before the demand for such titles can be ascertained. This model is especially useful for libraries offering bestselling e-books that have a large number of “holds” (i.e., patrons waiting to check out an e-book). In those instances, upon reaching a certain number of holds – which for popular titles at metropolitan libraries can easily reach several hundred³⁶ – the library will automatically acquire additional copies of the e-book via the distributor. More radically, the Douglas County Libraries in Colorado has eliminated the role of a distributor altogether by implementing a model that executes agreements directly with publishers to self-host e-book lending servers and files without relying on a third-party hosting provider.³⁷

The Licensing Chain

Typically, publishers license the rights for distribution with e-book distributors, which in turn sublicense e-books to libraries, often with additional services (e.g., e-book hosting and platform software) that enable the patron to easily search for and check out e-books from the library’s collection. The flowchart below illustrates how licensing rights and data are often chained together.

³³ *Library Journal* E-Book Survey, *supra* note 13, p. 56.

³⁴ *Ibid.*, p. 50.

³⁵ *Ibid.*

³⁶ See e.g., Christian Davenport, “As demand for e-books soars, libraries struggle to stock their virtual shelves,” *Washington Post*, January 14, 2012, http://www.washingtonpost.com/local/as-demand-for-e-books-soars-libraries-struggle-to-stock-their-virtual-shelves/2012/01/13/gIQAklOXzP_story.html.

³⁷ See Michael Kelley, “Douglas County Libraries Strikes New Deals With Publishers to Own Ebooks,” *The Digital Shift*, October 27, 2011, <http://www.thedigitalshift.com/2011/10/ebooks/douglas-county-libraries-strikes-new-deals-with-publishers-to-own-ebooks>.

addition the price of the e-book specified by the publisher), and whether the e-book may be downloaded by patrons or viewed only through an Internet browser.

Library → Patron

Finally, it is also worth noting that as the patron accesses the e-books that the library has sublicensed, the patron may also be required to assent – sometimes implicitly merely by using a website, sometimes more explicitly through a “click through” agreement – to contractual terms. For instance, the patron will likely encounter a “terms of service” agreement on the library or distributor’s website, an “end user license agreement” that almost always accompanies software like Adobe Digital Editions, or a “terms of use agreement” which is often included with the patron’s e-reader device. While these contractual agreements may fall outside the “publisher → distributor → library” chain of contracts and licenses, they may still pose additional limitations and restrictions on access and use of software or e-books.

The following sections of this document focus on the specific business models that distributors use to make e-books available in libraries.

BUSINESS MODELS

This section highlights the business models most commonly used by distributors to make e-books available in libraries. In each instance, we have sought to provide an overview of the model, including lending methods and access provisions. We have also selected a number of illustrative use cases to explore how distributors have offered these models currently and in the past, and how they are used in practice. The final portion of each description makes note of hard questions and additional areas for research and discussion. As noted earlier, lending arrangements in practice may exhibit attributes from multiple models; consequently, the models described below should not be thought of as mutually exclusive categories, but rather as a conceptual framework for understanding the working aspects of particular lending arrangements.

"Perpetual Access" Model

Business Model Overview

In this model, distributors sell licenses to libraries for individual copies of e-book titles that, upon acquisition, become integrated into the library's collection through an e-book collection management software platform hosted by an e-book vendor or, in some limited cases, hosted by the library. Depending on the terms of the license, the e-book can be "loaned out" through the software platform to patrons for pre-determined periods of time set by the vendor, the publisher, or the library. In most cases, the lending of trade e-books is enabled by DRM technologies, which limit the manner in which the file can be accessed and shared. However, the most popular distributors have developed technologies that allow DRM files to be transferred to an increasing number of popular e-readers. For instance, in September 2011, OverDrive began offering the ability to load e-books onto Kindle devices.³⁹ And most recently, in late May 2012, the International Digital Publishing Forum (IDPF) issued a statement indicating an interest in developing a new "Lightweight DRM" that could potentially ameliorate critical interoperability issues associated with existing e-book collection management software and e-reader hardware.⁴⁰

Some aspects of this model are similar to those used in the sales of print-on-paper books, as access to each e-book copy is typically limited to one patron at a time. In limited instances, some distributors (or publishers) permit access by multiple patrons to a single e-book copy.⁴¹ According to the *Library Journal* E-Book Survey, 10% of librarian respondents reported purchasing "concurrent use/access" to e-books in 2011.⁴² However, this question permitted multiple responses and did not distinguish whether an affirmative response to "concurrent use/access" is mutually exclusive of perpetual-access or other types of purchases (i.e., an e-book could conceivably be purchased with "perpetual access" rights and be accessible to multiple concurrent users).

³⁹ OverDrive Press Release, "OverDrive and Kindle compatibility with Library eBooks," September 21, 2011, <http://www.overdrive.com/News/getarticle.aspx?newsArticleID=20110921>.

⁴⁰ Megan Geuss, "E-books may take a page out of digital music's book," *ArsTechnica*, May 20, 2012, <http://arstechnica.com/gadgets/2012/05/e-books-may-take-a-page-out-of-digital-musics-book/>.

⁴¹ See Polanka, *supra* note 32, pp. 108-109.

⁴² *Library Journal* E-Book Survey, *supra* note 13, p. 50.

Under this model, e-book titles are generally more expensive to license than the outright purchase of a print-on-paper book through a traditional library vendor. Increased costs can range from “20 to 100 percent higher than the cloth list price, depending on the vendor and type of access secured.”⁴³ In addition to the cost of licensing each copy, libraries may also have to pay annual “platform maintenance fees” to the vendor for the costs of hosting the library’s e-book collection.

Method of Access and Lending

When an e-book is “checked out” by a patron, a copy of the e-book is temporarily made inaccessible to other patrons through the library’s collection for the length of the loan period. The loan period is often equivalent to the loan periods that apply to a library’s print-on-paper books, on average ranging from 14 to 21 days.⁴⁴ Once this period expires, the e-book automatically reverts from the patron to the library, returning to the library’s collection without the need for intervention by the library or the patron.

Although distributors and libraries often speak of e-book “ownership,” the majority of e-books are licensed, not sold.⁴⁵ Consequently, the library can be said to have purchased *access* to the e-books, which is in turn subject to the rights and limitations set forth in the agreement between the distributor and library. Often, the license grants access to the e-book in perpetuity, so long as the library complies with any additional obligations specified in the license, or until an event that triggers expiration of the license – for instance, upon reaching “26 loan circulations.” In the event of license termination or expiration, the library must purchase new licenses to continue offering access to e-books.

Use Case: OverDrive and New York Public Library

OverDrive, Inc. is a privately held company that distributes e-content through a proprietary software platform from a wide variety of publishers to public libraries, schools, corporations, and retailers. According to the *Library Journal* E-Book Survey, more than 92% of public libraries that maintain an e-book collection use OverDrive (sometimes in addition to other vendors). OverDrive is widely popular among libraries because it offers access to more popular, recreational trade titles from major trade publishers like HarperCollins and Random House.⁴⁶

According to OverDrive’s website, the company is partnered with 18,000 libraries and 1,000 publishers worldwide, and offers a catalog of 300,000 e-book, audio book, and video titles. Using OverDrive’s library management software, known as “Digital Library Reserve,”⁴⁷ public libraries can purchase access to

⁴³ See Polanka, *supra* note 32, p. 100.

⁴⁴ *Library Journal* E-Book Survey, *supra* note 13, p. 61.

⁴⁵ A license is distinguishable from a sale. Section 109 under the Copyright Act limits a copyright owner’s exclusive right to distribution, and permits the *owner* of a copy of a copyright work to resell or otherwise dispose of that copy after the initial purchase. However, if a copy is instead *licensed*, the copyright owner retains ownership of the copy and merely permits the purchaser to make limited uses of the work. 17 U.S.C. § 109, text available at <http://www.law.cornell.edu/uscode/text/17/109>.

⁴⁶ See *e.g.*, Polanka, *supra* note 32; Kate Price and Virginia Havergal, eds., *E-Books in Libraries: A practical guide* (Facet Publishing: London, 2011).

⁴⁷ OverDrive, “Library Solutions,” <http://www.overdrive.com/Solutions/Libraries/>.

individual copies of e-book titles that are made available to patrons through a separate website portal, typically hosted on the library's website domain.⁴⁸ Through this web portal, a patron can view a particular library's OverDrive collection of e-book titles, the file format (e.g., EPUB, PDF, Kindle), and the number of copies available in the library's collection. If a patron desires to check out an e-book for use on a computer, e-reader, or mobile device (e.g., a PC, Mac, Kindle, NOOK, Android smart phone, iPhone or iPad), the patron must download OverDrive's "Media Console" software. This software enables the patron to download DRM-protected e-books from her library's collection to her computer or mobile device, and also allows her to transfer the file to an e-reader or another compatible device. Throughout the check out process and loan period, the OverDrive platform manages the interaction between the e-book file, e-reader, and the library's collection management system.

The New York Public Library (NYPL), which circulates the most print-on-paper and e-content materials among public libraries in the U.S., is an OverDrive customer and currently offers more than 75,000 copies of more than 35,000 e-book titles – the majority of which are available through OverDrive.⁴⁹ This represents a fraction of the 6 million items that are available for lending in the NYPL's collection.⁵⁰ As of 2011, the NYPL has approximately 1 million "active"⁵¹ patrons; of these, approximately 7,800 patrons are OverDrive users. The NYPL plans to spend \$1 million on e-book acquisitions this year.⁵²

Hard Questions/Additional Discussion Points

- High demand for popular, bestselling titles, especially in 18-month period following publication, may directly compete with retail e-book offerings – average holds to copies ratio at libraries is 6:1
- Not all publishers currently make titles available to libraries through publishers
- Overall lack of transparency of licensing terms between publisher and distributor, and between distributor and library
- How to balance e-books sales to consumers with the availability of e-books to libraries?
- License restrictions can impede libraries' ability to archive, preserve access, facilitate interlibrary loans, etc.
- Competition from the technology sector (e.g., Amazon, Google, among others)
- Although trade publisher participation is the highest for this model, only a limited number of the major trade publishers currently make titles available for e-lending

⁴⁸ See e.g., New York Public Library e-book collection, <http://ebooks.nypl.org>; Boston Public Library e-book collection, <http://overdrive.bpl.org>.

⁴⁹ Steve Kastenbaum, "eBook lending: Libraries go digital," *CNN*, October 26, 2011, <http://www.cnn.com/2011/10/26/living/digital-libraries/index.html>.

⁵⁰ *Ibid.*

⁵¹ Defined as a patron who has checked out material in the last 12 months.

⁵² See Roger Yu, "Libraries ramp up e-book lending," *USA TODAY*, November 14, 2011, <http://www.usatoday.com/tech/news/story/2011-11-13/elibrary-digital-book-lending/51201652/1>.

"Subscription" Model

Business Model Overview

In a subscription model, distributors offer access to a large database of e-book titles for a pre-determined period of time, usually on an annual basis. Unlike the perpetual access model in which libraries can retain access to e-books after the initial fee (depending on the terms), access in the subscription model terminates if the subscription is not renewed. Often, the distributors permit the library to access a particular catalog of titles, which, for example, can vary from 100 to 1,500 titles that share common subject areas.⁵³ These e-books can be accessed by an unlimited number of users simultaneously, or in some cases accessed by a limited number of users per copy.

According to the *Library Journal* E-Book Survey, approximately 27% of libraries that offer e-books do so through a subscription model, although the popularity of this model seems to be declining – by contrast, more than 49% of libraries reported using this model in 2010.⁵⁴ This model is commonly used in the e-reference market segment, by vendors like Gale, Credo Reference, Safari Books Online, and EBSCOhost's NetLibrary. Many libraries provide access to a subscription-based service in addition to purchasing individual titles under the perpetual access model, often to provide access to reference e-books and trade e-books.⁵⁵

While the overall cost of access to these titles is often lower than the perpetual access model, many vendors only provide access to "back list" titles, which for many libraries is less desirable because front list titles are the most popular with patrons. Costs per user (as opposed to costs per title) can also be deceptively high, as subscription model pricing is often based upon the population or active membership being served by the library.⁵⁶

Method of Access

Most subscription-based e-books are made available through vendor-hosted databases that are accessible over the Internet or through a library's website. Not all vendors allow subscription e-books to be downloaded, although some, like NetLibrary, allow chapters to be downloaded or, in some circumstances, entire books for full lending periods.⁵⁷ Typically, subscription downloads are made possible by vendor software or third-party software. Adobe Digital Editions, which supports lending period limitations through DRM, is often used to regulate the amount of time that a patron spends with a file.⁵⁸

Depending on the vendor, multiple patrons may be able to access a title in a library's subscription collection at a given time. For example, NetLibrary offers "single user," "three user" and "unlimited user"

⁵³ See Polanka, *supra* note 32, p. 71.

⁵⁴ *Library Journal* E-Book Survey, *supra* note 13, p. 50.

⁵⁵ See e.g., Boston Public Library, "Electronic Resources," <http://www.bpl.org/electronic/ebook.asp>.

⁵⁶ See Price and Havergal, *supra* note 46.

⁵⁷ See e.g., EBSCOhost, "Online vs. Offline Access," <http://www.coalition.org/sites/default/files/netlibrary.pdf>.

⁵⁸ See e.g., Adobe Digital Editions, <http://www.adobe.com/products/digitaleditions/>; Adobe, "Sample E-Book Library Features," <http://www.adobe.com/products/digitaleditions/library/>.

pricing models.⁵⁹ The e-book titles are accessible to the library for the length of the subscription term period. After this time, the library must renew the subscription.

*Use Case #1: O'Reilly **Safari Books Online***

Safari Books Online, Inc., a joint venture founded by O'Reilly Media and Pearson Education, markets an online database of 19,933 technology e-book titles produced by a variety of publishers, and is acknowledged as the "most widely adopted" subscription package of newer content available for public libraries.⁶⁰ Safari offers subscriptions to "individual subscribers, organizations, teams, government entities, and public and private libraries."⁶¹

Safari uses the ProQuest, Inc. platform to connect library patrons with its database. After authenticating through a public library's website, a patron can browse, search, access, and download the titles in the Safari Online Library.⁶² **However, the platform does not permit portable files to be downloaded by patrons; rather, patrons must access the Safari materials through an Internet browser on a desktop or laptop computer, iPad, or similar device.** Safari offers a number of different subscription packages, which range from unlimited usage of Safari's entire catalog to a capped number of users for a limited selection of their catalog.⁶³

Safari is widely available at a number of public libraries across the county, including the San Francisco Public Library, which includes in its collection over 4,000 Safari titles.⁶⁴

*Use Case #2: **NetLibrary/EBSCO***

NetLibrary was acquired by EBSCO in 2010. As of 2011, its services will be rebranded under the "EBSCOhost" suite of products. In its new form, NetLibrary offers, among other models, a subscription-based service plan for libraries that allows patrons to purchase access to selected collections of e-book titles within its catalog of 265,000 e-book and audiobook titles from many publishers.⁶⁵

Patrons access the NetLibrary database through an EBSCOhost webportal after being authenticated on a public library's website. All e-books can be viewed through the EBSCOhost web portal using a standard Internet browser. Some individual e-book titles, depending on the publisher of the e-book, can be downloaded using Adobe Digital Editions, which can place limits on the manner in which or the duration for which the patron can access the e-book.⁶⁶

⁵⁹ EBSCOhost, "Expanded Business Models – eBooks," <http://www.coalliance.org/sites/default/files/netlibrary.pdf>.

⁶⁰ See Polanka, *supra* note 32, p. 99.

⁶¹ Safari Books Online, "Subscriptions," <http://safaribooksonline.com/subscriptions>.

⁶² Safari Books Online, "A digital library that helps you stay on top of new and emerging technologies and trends," 2008, <http://www.proquest.com/assets/literature/products/databases/safari.pdf>.

⁶³ Tim O'Reilly, "Safari Books Online 6.0: A cloud library as an alternative model for ebooks," *O'Reilly Radar*, October 28, 2009, <http://radar.oreilly.com/2009/10/safari-books-online-60-a-cloud.html>; Tim Warner, "An Introduction to Safari Books Online," *Inform IT*, July 8, 2008, <http://www.informit.com/blogs/blog.aspx?uk=An-Introduction-to-Safari-Books-Online>.

⁶⁴ San Francisco Public Library, "eBook Resources," <http://sfpl.org/index.php?pg=2000005001>.

⁶⁵ EBSCOhost, "Collection Development and Acquisition Options," http://support.ebsco.com/uploads/kb/ebooks_brochure.pdf.

⁶⁶ EBSCOhost, "E-book User Guide," available at http://support.ebsco.com/uploads/kb/ebooks_user_guide.doc.

EBSCOhost makes its NetLibrary e-books available in a variety of different configurations, including unlimited simultaneous users, three users, and one-user-per-copy models. Libraries can also purchase access to "pre-packaged collections," which are organized by subject and provide access to an array of titles for a pre-determined price.⁶⁷

Hard Questions/Additional Discussion Points

- Larger publishers generally do not use this model, as it is much more difficult to monetize at a price point that is reasonable to both the publishers and libraries
- Limited access to "front-list titles"
- Libraries do not always have flexibility to choose which titles are included in a subscription package
- Subscriptions can be a challenge to sell because libraries frequently object to "ongoing expenditures" unless "the price per title is extremely low"⁶⁸
- Some have noted that at these low rates a "publisher would need to lease [a] title for at least ten years to see the same profit" as e-books sold under other models⁶⁹

"Pay-Per-View" Model

Business Model Overview

A smaller number of distributors use a "pay-per-view" model. The 2011 *Library Journal* E-Book Survey found that this model is used by less than 1% of public libraries.⁷⁰ In this model, as in the subscription model, libraries pay an ongoing fee in exchange for the ability to display a list of titles to patrons, but the library must "rent" individual copies from this database for an additional fee per copy. Unlike the subscription model, which provides access to many titles for a high annual fee – not all of which might be used by patrons – the ongoing fee is much lower than the subscription model, and additional fees are only charged when a patron wants access to an e-book. Depending on the licensing terms, once rented, the patron is permitted to access the e-book for a pre-determined period of time that corresponds to either the library's circulation period or to a period of time set by the publisher or the vendor. According to *No Shelf Required*, short-term loan fees average around 10% to 15% of the total cost of the book.⁷¹

This model can be attractive to some libraries because the overall costs are reduced and the library is only paying for e-content that its patrons consume. Consequently, copies of e-books that libraries acquire, but do not frequently circulate, will not generate "digital dust" in the same manner as e-books licensed under the perpetual access model. On the other hand, the library does not secure "perpetual access" to

⁶⁷ EBSCOhost, "Collection Development and Acquisition Options," http://support.ebsco.com/uploads/kb/ebooks_brochure.pdf.

⁶⁸ See Polanka, *supra* note 32, p. 99.

⁶⁹ *Ibid.*, pp. 99-100.

⁷⁰ *Library Journal* E-Book Survey, *supra* note 13, p. 50.

⁷¹ See Polanka, *supra* note 32, p. 11.

the e-books that are rented. Instead, when the rental period expires, the library patron no longer has access to the copy.

Method of Access

This model requires computer-based access to the database provided by the distributor and made accessible through a library's website with a patron authentication system using a library card and PIN. Library patrons select a title and a copy is "rented;" term periods are set by number of hours, days, or weeks. The e-book copy is generally only available to a single user during the rental period and upon expiration, reverts to the catalog and must be re-rented by future patrons. Some newer hybrid variations on this model (see EBL use case below) offer the ability to set an automated purchase based on patron demand. For example, a library might acquire a copy – meaning become an owner or licensee – of a copy of a given title experiencing high-rental demand at a set triggering event.

The software platforms used by the vendor and the library can provide fairly granular controls, and often allow the library to set specific parameters regarding the total number of rental periods that are to be made available to libraries.

Use Case: EBL and University of Texas at Austin

E-Book Library ("EBL") is a distributor of academic and professional e-books that offers a number of "flexible lending models" for libraries.⁷² EBL's catalog aggregates over 100,000 e-book titles from publishers.

Among the flexible models offered by EBL is a "pay-per-view" model. When a patron "previews" an e-book online for a pre-determined "browsing" period, the expiration of this period automatically triggers a short-term loan period. At this point the e-book is considered "on loan" with the patron until the short-term loan period expires, usually within 24 to 48 hours, or as negotiated in the license agreement.⁷³

EBL has also integrated a patron-demand driven purchase model into its pay-per-view model, whereby after a certain number of short-term loans (i.e., "rentals") are triggered for a given title, the library can automatically or manually purchase the title under a limited access license, which allows the library to access the work for up to 325 24-hour periods in any given year.⁷⁴ If the e-book is accessed more than 325 days, the library can purchase a second copy of the e-book, extend additional short-term loan periods (each triggering additional charges), or the library can wait until the 1-year anniversary of the acquisition, upon which the counter is reset without additional payment for the next 1-year period.

⁷² EBL, "About us," <http://www.ebllib.com/?p=about>.

⁷³ EBL, "Brochure" http://www.ebllib.com/pdfs/ebllib_brochure.pdf.

⁷⁴ EBL, "EBL's "Demand-Drive Acquisition," http://blog.ebllib.com/wp-content/uploads/2009/04/ebllib_demand_driven_acquisition_overview_uk.pdf.

In 2007, the University of Texas library launched a pilot program using EBL's pay-per-view e-book delivery model.⁷⁵ Using ten years worth of usage data metrics from their other subscription services, including NetLibrary, the Library determined that a relatively small percentage of e-books had been accessed more than four times.⁷⁶ Consequently, the library decided to set the auto-purchase trigger at the fourth use of an e-book in the EBL system. When a patron accesses a title in the EBL system, the patron is allowed to view it for an initial 5-minute period. Upon expiration, the patron is prompted with a message that indicates the browsing period has elapsed and she can continue by creating a loan or by returning to the catalog. If the patron elects to create a loan, the short-term loan period is triggered (in this case, for a \$50 or higher charge to the library) and the patron is granted access for a 24-hour period.⁷⁷

For the University of Texas, the cost of each short-term loan under the EBL model was approximately 5-10% of the purchase price of the e-book, and the library allocated \$300,000 to the first fiscal year in the program.⁷⁸ Following the first year of the pilot program, the library had spent \$286,849 of the funding allocation: \$190,043 on short-term rental periods and \$96,806 on purchase triggers.⁷⁹ Notably, the library did not reach the 325-day access limitation on any of the e-books purchased.⁸⁰

Hard Questions/Additional Discussion Points

- Without ownership, access is dependent on libraries' ability to pay rental fees
- Libraries' activities, like curating and archiving pay-per-view material, may be limited
- A significant benefit to libraries under this model is the ability to create and set predictable budgets
- It seems possible that under an ownership-trigger model, a library's collection can become dominated by titles chosen by only a few patrons
- New market entrants with competitive models are emerging; for example, see Bilbary⁸¹

⁷⁵ Susan Macicak and Lindsey E. Schnell, "Patron-driven, Librarian-approved: a pay-per-view model for e-books," *Serials*, vol. 23, no. 2 (November 2009), <http://uksq.metapress.com/content/h857558qvq02445k/fulltext.pdf>.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Bilbary, <https://bilbary.com/>.

SELECTED CHALLENGES FACING LIBRARIES AND PUBLISHERS

E-books offer many advantages over print-on-paper books and have tremendous potential to change the way we interact with media. These advantages, however, are accompanied by a number of overlapping challenges and uncertainties.

Reminiscent of the recent travails of the music industry, many publishers are working towards adapting business and licensing strategies in response to the disruptive effects of the Internet and e-reader technologies. Underlying challenges in the shifting paradigm include market uncertainties, new vertical and horizontal competition, and alternatives to publishing companies, not to mention considerable uncertainty about whether e-books will, in the long run, be a boon or a burden for publishers and libraries alike.

The digital transition has also encumbered the ability of libraries to collect, organize, maintain, and provide access to information and resources. Some public librarians have expressed frustration with the challenges associated with limited access to e-books that are in high demand, the difficult-to-negotiate licensing terms offered by e-book vendors, the technical issues associated with providing patrons with seamless access to e-book titles across multiple e-reader platforms, and the overall expense of procuring and maintaining an e-book collection.

This section highlights these concerns and some of the hard questions being raised by librarians and publishers in this rapidly changing sector.

Cannibalization of Consumer Sales

Cannibalization is a central factor for publishers. Publishers fear that e-books that are available in a public library at no extra cost to patrons will compete directly with e-books sold through retailers. According to one publisher, past experience illustrates that content in a digital format is less valuable than content in an analog format. This shift has encouraged publishers to take measures to minimize cannibalization between the digital and analog market segments, and protect the value of bestsellers by, for example, using some of the parameters discussed in previous sections or by forgoing participation in library e-lending programs altogether.

Additionally, many publishers believe that the online medium does not offer the same market segmentation between book consumers (i.e., people who purchase books from a retailer) and library patrons (i.e., people who check out books from a public library) that the physical medium affords. Specifically, the process of checking out a print-on-paper book, which requires an individual to physically travel to the library to check out and return a book, is not the same for an e-book. E-books in public libraries are often made searchable and downloadable through library websites. A patron can "check out" an e-book without entering the library, and an e-book copy automatically reverts to the library without patron intervention at the end of a loan period. Without the physical limitations that exist in a brick-and-mortar library system, some publishers argue that ease of access to e-book titles weakens the dichotomy of the consumer and

library patron segments; this outcome compromises revenue streams as more individuals turn to libraries for access to e-books rather than purchasing the content from retailers.

Front List E-Book Titles

Many of the e-book titles that are most sought after by libraries are those on the "front list" of the publishing catalog, which represents the most recent best-selling titles. Libraries experience the highest demand for a copy of a title within the 18-month period following publication. Recent empirical studies suggest that 80% of library borrowing is focused on 20% of the library's overall collection, and front list titles from the Big Six publishers comprise a significant percentage of this 20%.⁸² To address the issues like this, HarperCollins announced in February 2011 a change in licensing terms under which it now requires libraries to purchase a new license after an e-book has been circulated 26 times.⁸³ For a popular e-book available for 2-week loan periods, the license would have to be renewed after one year in constant circulation. This lending cap is intended to address the issues involved with front list titles by controlling the potential losses within the 18-month period.

Patron Demand

As consumer market demand has risen for e-books from publishers, so has patron demand for e-books from libraries. According to the *Library Journal* E-Book Survey, 80% of libraries "say they currently offer e-books to users,"⁸⁴ and 66% of respondents "said they had experienced a 'dramatic' increase in requests for e-books in the past year."⁸⁵

In an article published in January 2012, the *Washington Post* noted, "there are not enough digital versions of best-selling books at Washington area public libraries, leading to lengthy wait times for borrowers."⁸⁶ For example, for popular titles such as *The Girl With the Dragon Tattoo*, as many as 507 patrons were waiting for a chance to be loaned one of the Fairfax County library system's 126 copies. The *Library Journal* E-Book Survey corroborates such anecdotal evidence of patrons' high demand for digital versions of best-selling books from libraries, reporting that "the top two factors that influence a library's decision to purchase an e-book for its collection are 'projected usage/high demand titles' (selected by 94% of respondents, up from 77% last year) and 'user request' (up to 84% from 64% a year ago)."⁸⁷ Waitlists of comparable length for similarly high-demand titles have become common at major metropolitan libraries across the country.

⁸² See Eric Hellman, "The Pareto Principle and the True Cunning of HarperCollins," *Go to Hellman Blog*, March 11, 2011, <http://go-to-hellman.blogspot.com/2011/03/pareto-principle-and-true-cunning-of.html>; Julie Gammon and Edward T. O'Neill, "OhioLINK—OCLC Collection and Circulation Analysis Project 2011," OhioLINK Collection Building Task Force, September 2011, <http://www.oclc.org/research/publications/library/2011/2011-06.pdf>.

⁸³ Julie Bosman, "Publisher Limits shelf Life for Library E-Books," *New York Times*, March 14, 2011, <http://www.nytimes.com/2011/03/15/business/media/15libraries.html>.

⁸⁴ *Library Journal* E-Book Survey, *supra* note 13, p. 20.

⁸⁵ *Ibid.*, p. 4.

⁸⁶ Christian Davenport, "As demand for e-books soars, libraries struggle to stock their virtual shelves," *Washington Post*, January 14, 2012, http://www.washingtonpost.com/local/as-demand-for-e-books-soars-libraries-struggle-to-stock-their-virtual-shelves/2012/01/13/gIQAkIOXzP_story.html.

⁸⁷ *Library Journal* E-Book Survey, *supra* note 13, p. 7.

Data from June 2012 emphasizes the point, noting that many e-book borrowers have at times been unable to check out the title they sought at their local library. According to a Pew Internet and American Life Project study, “56% of e-book borrowers from libraries say that at one point or another they had tried to borrow a particular book and found that the library did not carry it,” and “52% of e-book borrowers say that at one point or another they discovered there was a waiting list to borrow the book.”⁸⁸ Additional data from Pew suggests that there is room for additional growth in patron demand. At present, Pew reports that only “12% of readers of e-books borrowed an e-book from the library in the past year,” and “58% of all library card holders say they do not know if their library provides e-book lending services.”⁸⁹ As more potential consumers learn about and take advantage of e-book lending options at their local libraries, existing challenges seem unlikely to disappear.

Friction in Lending Arrangements

Through licensing agreements, publishers and distributors often impose contractual restrictions on libraries and distributors.⁹⁰ This “friction” plays a key role in differentiating business models, delineating market segments (e.g., purchasers of books vs. public library patrons), and protecting publishers’ revenue streams from cannibalization.

Examples of friction in a contractual agreement include limits on:

- ownership (e.g., whether a e-book file is owned, licensed, or subscribed to)
- time (e.g., windows on distribution, delays between patron loan request and download, limitations on the permissible period for which a library can loan an e-book to patrons)
- age of e-book (e.g., distribution release windows based upon time from publication)
- variable price points (e.g., one-time fee, or fees based on use/access)
- place (e.g., the location where a patron can access/download an e-book – over the Internet or only on library premises)
- scarcity of copies (e.g., a cap on the number of copies accessible per user, per library, etc.)
- bundling of materials (e.g., package sales to databases or subject-specific collections, rather than individual titles)

⁸⁸ Pew Internet & American Life Project, “Libraries, patrons, and e-books,” June 22, 2012, <http://libraries.pewinternet.org/2012/06/22/libraries-patrons-and-e-books/>.

⁸⁹ *Ibid.*

⁹⁰ Macmillan and Simon & Schuster do not license any e-books to public libraries. Random House is the only major trade publisher which licenses titles with few restrictions; HarperCollins limits each e-book copy licensed to 26 circulations before the license expires. Hachette only licenses their older back lists to libraries – no front list bestselling e-books. And Penguin just recently announced the launch of a pilot program with the NYPL. See earlier discussion regarding e-book availability *supra* “Licensing and Lending Practices,” pp. 7-9.

The *Library Journal* E-Book Survey found that the overwhelmingly dominant model currently used by 68% of libraries is "the use of a single e-book copy by a single person at a time" – otherwise referred to as the "one-license-per-copy" access model. Frustrations for "public libraries continue to be limits on simultaneous usage of e-books and circulation caps," "wide selection of titles and formats," and "fair price."⁹¹ Licensing restrictions can also disrupt the core functions of public libraries by restricting their ability to make copies, preserve access to works for patrons, perform archiving tasks, and facilitate inter-library loans. The lack of ownership rights in the licensing scenario can significantly impede preservation and archival tasks, which triggers concerns from the libraries' perspective. Moreover, the right to possess a licensed e-book file is not absolute, which raises the possibility of sudden loss of access.

A recurring theme throughout our February workshop involved the proper level of "friction" – the restrictions imposed on access and use under the terms of the arrangement – and, more generally, the intersection of contract and copyright law. Even in light of the aforementioned frustrations, stakeholders from both sides of the debate noted that it would be difficult to imagine "frictionless" arrangements, given the cannibalization concerns that cause many publishers to choose not to offer access to e-book titles. However, the key may lie in understanding how to weigh the types of friction against one another or which types of friction should be considered key design features in lending arrangements.

Competition

New market entrants, like Bilbary,⁹² have emerged in recent months and promise competitive products that could compete with incumbent distributors. While these may not be "silver bullet" solutions to the underlying problem, the possibility of wider market disruptions can cause the current stakeholders to become more entrenched in their positions in the library e-book debate as they fight battles on other fronts. The Internet has also given rise to a new breed of "self-published e-book" authors, who have found success in alternative arrangements without using traditional publishers.

One of the more visible challengers to publishers and libraries is Amazon, which now provides a lending service for members of its \$79 per year "prime" membership program.⁹³ Under this program, prime members are permitted to read one book per month from Amazon's "Lending Library," which contains more than 66,000 titles, including "100 current and former *New York Times* Bestsellers."⁹⁴ This list is expected to grow. However, some commentators have called the legality of this program into question on grounds that Amazon may not have the appropriate rights to make such offerings.⁹⁵ Authors can also use Amazon's e-book publishing platform⁹⁶ to create and distribute a self-published e-book to large audiences in ex-

⁹¹ *Library Journal* E-Book Survey, *supra* note 13, pp. 5-7.

⁹² Bilbary, <http://bilbary.com/>.

⁹³ See Andrew Albanese, "Kindle Library Lending Goes Live," *Publishers Weekly*, September 21, 2011, <http://www.publisher-sweekly.com/pw/by-topic/book-news/libraries/article/48778-kindle-library-lending-goes-live.html>.

⁹⁴ See Michael Kelley, "Amazon Lending Library Now Holds Over 66,000 E-books," *The Digital Shift*, December 28, 2011, <http://www.thedigitalshift.com/2011/12/ebooks/amazons-library-lending-now-holds-over-65000-ebooks>.

⁹⁵ See Lloyd Jassin, "Amazon's Lending Library Liability," *CopyLaw*, November 10, 2011, <http://www.copylaw.org/2011/11/amazons-lending-library-liability.html>.

⁹⁶ Amazon, "Kindle Direct Publishing," <https://kdp.amazon.com/self-publishing/>.

change for 30% of sales revenues.⁹⁷ In sum, although these and other similar programs may not truly be direct competitors to public libraries and publishers, they do raise some questions about the future roles of public libraries and publishers in e-lending.⁹⁸

DRM, Interoperability, and Privacy

Although some in-copyright e-books are available DRM-free,⁹⁹ use of DRM has been a common practice by publishers for some time. DRM restrictions on e-books are notoriously unpopular with librarians because the technology limits their ability to make e-books easily accessible to patrons. For example, consider that many public library patrons may rely on the library for their basic technology needs because they cannot afford to own a computer, an e-reader, or a similar device, or how, in the case of disabled persons, DRM sometimes restricts the technologies that make digital works accessible to the hearing and seeing impaired. On a very basic level, DRM can also inhibit the ability of an individual to make use of a file across multiple devices. That said, copyright infringement remains a significant threat to publishers, and without DRM, publishers might not be willing to make any works available to libraries.¹⁰⁰

The use of DRM in e-book lending also feeds fears on the part of librarians about reader privacy. Technologies that track the usage of a given e-book might, librarians fear, lead to the identification of readers of certain works in ways that would not have been possible in a purely analog lending model.

Externalities

At least some of the uncertainty in this sector is exogenous to the specific topic of e-book licensing and lending practices. This uncertainty reflects indirect pressure points and challenges within the broader publishing industry environment. At a macro level, the sharp increase in demand and technologies for e-published materials is a significant disruption to the print paradigm that has existed for centuries; these forces are challenging traditional notions of strategy, organizational structure and culture, economic assumptions, and business models.

⁹⁷ Amazon, "Kindle Direct Publishing>Terms and Conditions>Pricing," <https://kdp.amazon.com/self-publishing/help?topicId=A29FL260KE7R7B>.

⁹⁸ See "Customers Love Kindle Owners' Lending Library – KDP Authors and Publishers Benefit," *Business Wire*, January 12, 2012, <http://www.businesswire.com/news/home/20120112005567/en/Customers-Love-Kindle-Owners%E2%80%99-Lending-Library-%E2%80%94>; Bill Rosenblatt, "A Nail in Public Libraries' Coffins," *Copyright and Technology*, May 20, 2012, <http://copyrightandtechnology.com/2012/05/20/a-nail-in-public-libraries-coffins/>; David Carnoy, "How to self-publish an ebook," *CNET*, June 1, 2012, http://reviews.cnet.com/8301-18438_7-20010547-82/how-to-self-publish-an-ebook/; Alan Jacobs, "Digital Self-Publishing: Should Publishers Be Worried?," *The Atlantic*, March 1, 2012, <http://www.theatlantic.com/technology/archive/2012/03/digital-self-publishing-should-publishers-be-worried/253830/>; Mathew Ingram, "Why the idea of a Netflix for e-books makes sense," *GigaOm*, September 12, 2011, <http://gigaom.com/2011/09/12/why-the-idea-of-a-netflix-for-e-books-makes-sense/>.

⁹⁹ Author J.K. Rowling, for instance, recently released e-book versions of her famous *Harry Potter* series through her Pottermore online unit without any DRM restrictions. See Mathew Ingram, "What book publishers should learn from Harry Potter," *GigaOm*, March 27, 2012, <http://gigaom.com/2012/03/27/what-book-publishers-should-learn-from-harry-potter/>.

¹⁰⁰ AAP, "Foreign Rogue Sites That Earned \$10 Million Annually from Copyrighted Content Shut Down by U.S. Publishers and International Alliance," AAP Press Release, February 15, 2012, <http://publishers.org/press/59/>; International Intellectual Property Alliance, "Copyright Industries in the U.S. Economy," 2011 Report, http://www.ippa.com/copyright_us_economy.html.

Additionally, publishers and other industry stakeholders have recently encountered litigation and regulatory scrutiny, including a pending state class action lawsuit against Apple, Macmillan, and Penguin filed by private litigants as well as a pending Department of Justice antitrust suit against Apple, alleging antitrust violations for collusion and price-fixing.¹⁰¹ While these legal actions are not directly related to the e-books in library debate, they are costly and only add to the dynamic flux in the market, potentially threatening the possibility of lawful collaborations and new business opportunities. Some commentators have suggested that these events may be indicative of negative consumer perceptions of the publishing industry.¹⁰²

And, as has been the case in other industries, copyright infringement puts revenues at risk and encourages publishers to look for risk-averse opportunities. Given the convergence of these and other external factors, such as the public's critical eye on publishing industry practices, shifting consumption patterns and consumer culture (for consumers and patrons), and the impact of disruptive innovation, stakeholders face a number of crosscutting challenges that add to the already strained environment.

¹⁰¹ See Electronista Staff, "Apple DOJ e-book collusion trial set for June 3, 2013," *Electronista*, June 26, 2012, <http://www.electronista.com/articles/12/06/26/date.a.compromise.between.apple.doj.requested.dates/#ixzz1z7gd4y0w>; Laura Hazard Owen, "As 17 more states join class action against book publishers and Apple, new details revealed," *paidContent*, May 14, 2012, <http://paidcontent.org/2012/05/14/e-book-class-action-new-details/>; Laura Hazard Owen, "Everything you need to know about the e-book lawsuit in one post," *paidContent*, April 11, 2012, <http://paidcontent.org/2012/04/11/everything-you-need-to-know-about-e-book-doj-lawsuit-in-one-post/>.

¹⁰² See e.g., Jeremy Greenfield, "Consumers Upset and Confused Over E-Book Pricing," *Digital Book World*, April 18, 2012, <http://www.digitalbookworld.com/2012/consumers-upset-and-confused-over-e-book-pricing/>; Rick Broida, "Burning Question: Why Do Ebooks Cost So Much?," *Wired*, August 30, 2010, http://www.wired.com/magazine/2010/08/pr_burning-question_ebooks/.

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