



How well did copyright laws serve libraries during COVID-19?

Research report

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Executive Summary

- 83% of responding library professionals - 114 from 29 countries - said they had copyright-related challenges providing materials during pandemic-related facility closures.
- Not all was fine pre-pandemic. COVID-19-related closures and copyright issues came on top of other ongoing challenges, including budget pressures, external financial crises, difficult negotiations with publishers, and demand for eBooks that outpaces publisher offerings.
- Costs for access to academic databases remain high. Single-user eBook licenses (where available) often cost significantly more than hardcover copies of the same publications. Contract terms and Digital Rights Management (DRM) tools prevent libraries and their patrons from conveniently using legitimately-accessed material in ways permitted under copyright law.
- Many publishers offered expanded access to services and content during the early months of the pandemic. These offers usually did not last for sufficient time for libraries to meaningfully integrate them into teaching and research activities, amid other pandemic-associated difficulties and the schedule of the academic calendar. 35% of respondents said that the offers publishers made covered the entirety of closure of their facilities, 48% said they did not, and 17% could not confirm the details. Longer access periods may have allowed better use.
- Textbooks posed particularly notable challenges. 69% of respondents who had challenges said these included issues providing access to textbooks, amid demand from students and reluctance of publishers to provide libraries with affordable, licensed access.
- The vulnerability of access to digital content was also clear. At least one digital platform - DawsonEra - ceased service during the pandemic (July 2020). Its content would have been effectively lost and service agreements not fulfilled had other platforms not agreed to host the material.
- Libraries supporting online classrooms faced legal issues around communicating content at a distance. These included whether it was allowed to play music or films in online class settings, as would have been done during in-person classes, or to record lectures that involved copyrighted material. Technical restrictions on conferencing and streaming platforms designed to limit unauthorized sharing of audio & video content restricted uses allowed under copyright. Licenses that allowed material to be accessed on-site only were not useful during closures, and were not necessarily re-negotiated to allow off-site access.

- In particular, 52% of libraries that had copyright challenges indicated challenges with providing access internationally, as students and faculty returned to their home countries where differences in licenses and technological infrastructure created difficulties. In other cases, libraries had difficulty providing articles and books to patrons who were not institutionally affiliated, but who would have otherwise been served as ‘walk-ins’ on-site.
- To provide content during lockdowns, some libraries made use of the HathiTrust’s Emergency Temporary Access program, which offered digital copies from the Trust’s collection for libraries to loan if they owned physical copies of the same material on a controlled 1:1 ratio. Some libraries also utilized the ‘Resource-Sharing during COVID’ (RSCVD) program, which sought requested materials through Interlibrary Loan and Open Access provisions. While these programmes proved highly useful during the pandemic, they were not available everywhere (due to differing copyright laws and programme requirements), and only could cover a share of content.
- Libraries looked to legal guidance where they could find it, as they sought to continue offering online access to established services such as children’s storytimes and physical content in their collections.
- Laws, nonetheless, often leave gray zones which create uncertainty about how content can be shared. This points to the need for clarified legal protections for libraries and the services they offer, in particular when working across borders.

Methods

In February and March 2022, the International Federation of Library Associations (IFLA) and Electronic Information for Libraries (EIFL) distributed a survey to their members and affiliates about challenges they faced during the pandemic related to copyright. 114 relevant responses were received to the question “Have you had copyright-related challenges providing access to library materials during COVID-19 closures and social distancing measures?”. All subsequent questions received at least 88 responses. 28 interviews with library professionals were conducted: 27 in English, and one in a written format utilizing translation software between Spanish and English.

Respondents were from 29 countries across six continents: the UK, Armenia, Palestine, Zimbabwe, South Africa, Canada, New Zealand, the Maldives, Lithuania, Switzerland, Botswana, Croatia, India, Kenya, the Netherlands, Brazil, Denmark, Argentina, Mexico, Iraq, Lesotho, Bahrain, Malawi, Bangladesh, Jamaica, Kuwait, Australia, Georgia, and the USA. 78% of respondents were from research libraries, 9% from public libraries, 3% from national libraries, 6% from special libraries, and 5% from other libraries.

Percentages have been rounded to the nearest point. Quotes have been identified by country, and edited for clarity and to preserve the anonymity of respondents. All online sources cited were accessed in April 2022.

Introduction

Over the last two years, the COVID-19 pandemic has brought immense challenges to libraries and other education, research and cultural institutions worldwide.

Online and digital offerings have been a growing part of libraries' services for some time, enabling them to support scholars, students, and the public, alongside physical offerings. However, the pandemic-related closures beginning March 2020 urgently increased the need for at-a-distance access to digital collections, digitized books, class materials, storytimes, and other materials and services. The desire to provide digital access to such materials, however, often met with legal ambiguities and problems. With their physical stacks off limits and the pandemic growing, libraries were forced to deal with publishers' reluctance to offer suitable eBook licenses; restrictions around offering digitized versions of content they owned physically; cross-border access challenges posed by international students and faculty who returned to their home countries; and whether teachers could present content online as they would have in person.

Library professionals around the world worked hard to meet these challenges, and expanded digital access where this was possible, although as will be made clear in this report, most were a long way from offering a full range of materials and services.

As the pandemic recedes and physical spaces re-open, it is not time to reverse what has been achieved. The possibilities and challenges related to the provision of digital services will remain with us. Moving forward, it is vital that libraries benefit from clear rights to share material in ways that do not cause unreasonable damage to legitimate rightholder interests and are in line with their patrons' (digital) expectations and the practical possibilities that digital creates.

To support reflection on the situation faced today, and what could be done next, this report documents challenges libraries experienced during the COVID-19 pandemic and evidences the needs for policymakers to produce clear legal safeguards on sharing and using content digitally, alongside for publishers to provide convenient, affordable access to digital content. The report highlights issues that libraries faced, their consequences for professionals and patrons, and how libraries responded. It draws from 114 survey responses and 28 interviews with library professionals worldwide.

Survey results summary

83% of library professionals who responded to the survey said they had challenges related to copyright during pandemic-related closures. 69% of these respondents had experienced challenges that included proving access to textbooks. Respondents also referred to issues around offering access to streaming video, eBooks, and out-of-print materials through digitization or license agreements (or a lack thereof) with publishers. 52% of respondents who indicated challenges said they had challenges with cross-border factors – such as students & faculty returning to their home countries or moving abroad to counties where licenses and technological policy and infrastructure rendered access difficult.

73% of libraries received offers from publishers of expanded access to content during the first few months of the pandemic. 35% of these offers covered the entire period of their facility closures but 48% did not; 9% of respondents were unsure of the time period.

For most libraries, these offers were granted during the pandemic's initial, particularly chaotic period, when students, faculty and staff were adapting to a rapidly changing 'new normal' and the stresses of pandemic life. The offers also did not always coincide easily with the schedule of the school year, and newly offered materials could not necessarily be incorporated into classwork. By the time longer-term plans were in place for online learning during social distancing, the offers were expiring and established challenges around service costs and limitations of access again became pronounced.

With access to physical texts limited, libraries and their users did not have 'usual' means of access to many materials and felt noticeably limited by legal limitations on digitizing content (usually between 10-30% of a text) and digital rights management (DRM) restrictions (which bound content to proprietary platforms and placed limits on individual users copying content for personal use and retaining long-term access to the text, notes, and related material). In response to these factors, 70% of libraries only provided a part of requested materials, 14.3% provided all material and 15% did not provide it at all.

Context: Before March 2020

This section discusses the range of issues already facing libraries when the pandemic arrived. Many had been increasingly offering digital content in recent years (often in response to reader demand) as part of a growing percentage of their budgets. Offerings were not necessarily enough to meet demand. This also sometimes occurred amid institutional budget cuts that made it all the more necessary to make decisions around which services and subscriptions to prioritize.

What would change when the March 2020 closures began - to be discussed in the following section - was that digital became the primary access point for materials, whatever infrastructure or plans had previously been in place.

Over the last few years, we'd been pivoting to an 'online first' model anyway. We have a large proportion of online learners, online teaching, and online appointments with students. (UK)

Because we're a library at a tech university, we have few books. Our researchers deal mainly in articles. (Denmark)

It was coming to this anyway, but the pandemic brought it to a head. If we can get something electronically, that will be our first port of call. (UK)

Rightholder remuneration requirements vary between countries, and with them the scope of libraries' obligations. Some countries – such as Canada¹ and Denmark² – have rights management agencies, which institutions pay to contact rightholders for use of copyrighted works. US law offers wider possibilities for libraries, thanks to 'first sale' or 'exhaustion', and fair use³.

There are particularities about the experience of university librarians, who often negotiate contracts with publishers for database access to scholarly journals individually or as part of a consortium. While library professionals accepted the need to compensate rightholders, they have often felt frustrated by relationships with these publishers. Frequent complaints around journal subscriptions

¹ The relationship between Access Copyright (<https://www.accesscopyright.ca/about-us/>) and Canadian universities has often been continuous in recent years, and many universities have opted not to engage with the group. For background see the 'Excess Copyright' blog (<http://excesscopyright.blogspot.com/>) and (<https://www.michaelgeist.ca/2019/12/copyrightboardactariff/>) .

In particular, one respondent cited the group's litigation against universities as having a chilling effect on use of material in class and a willingness to take risks in gray areas. One Canadian interviewee expressed frustration:

"If Access Copyright would accept the fact that universities already pay huge amounts of money for licenses to publishers, and on top of that we pay individually for eReserves. We don't need to pay that again to Access Copyright. We have staff whose job it is to get permission for our course readings, and Access Copyright is constantly pushing this line that we're not paying and stealing from publishers."

² <https://www.copydan.dk/>

³ ALA (2019), Copyright for Libraries: First Sale Doctrine, ALA, <https://libguides.ala.org/copyright/firstsale>. To note that there is an open question as to whether the first sale doctrine applies to digital works as concerns subsequent library uses

included cost; bundling practices that require subscriptions to undesired resources; and contract overlaps with different providers that result in libraries paying to subscribe to the same resource multiple times. Alternate access models - such as Patron Driven Acquisition - were not widely cited by interviewees.

I think the publishers have unfortunately predatory policies and it's very hard to deal with them sometimes. They have abusive clauses on their contracts, abusive prices, and in the last years [other institutions] and I have united so we could face that together, so I'm not the only one fighting for a specific clause or a specific price. But sometimes it's very hard. Sometimes they create restrictions that make it difficult to use what you're paying for. (Brazil)

We are experiencing the same problems that everyone else does. We buy large packages from different suppliers. The same content is in different packages, and we pay for it two or three times. (Denmark)

A notable exception was in Lebanon, which has been experiencing a major financial crisis beginning in 2019⁴. Four interviewees noted and appreciated publishers' understanding and willingness to work with the challenges associated with the crises.

Many of the publishers we work with are supportive and helpful. They offered us very good discounts and free article processing charges. Many are truly friends and supporters to [our institution]. That's how we're able to keep our subscriptions. (Lebanon)

When the [Aug 4, 2020] blast occurred, some libraries were destroyed. Then we had the economic depression. Then COVID hit. The library consortium was able to make deals. Some really went down with the prices. The Qatar National Library was able to provide online access to [certain databases]. Publishers were receptive to our call. (Lebanon)

For academic and public libraries, eBook lending increased significantly in the 2010s. The cost of eBooks for consumers in the trade sector was significantly shaped by Amazon's 2007 decision to price most consumer eBooks at \$9.99 in the US, and the 'big five' publishers' subsequent actions to join with Apple and contractually set resale prices at \$14.99. The latter action resulted in \$166 million in sanctions⁵. The result, in part, was that consumer eBooks went from costing less than print copies to costing more.

⁴Blair, E. (2022). Explainer: Lebanon's financial crisis and how it happened. *Reuters*, 23 Jan. <https://www.reuters.com/markets/rates-bonds/lebanons-financial-crisis-how-it-happened-2022-01-23/>

⁵Grady, C. (2019). The 2010s were supposed to bring the ebook revolution. It never quite came. *Vox*, 23 Dec. <https://www.vox.com/culture/2019/12/23/20991659/ebook-amazon-kindle-ereader-department-of-justice-publishing-lawsuit-apple-ipad>

Alabense, A.R. (2013). *The Battle of \$9.99*. Publishers Weekly. E-book.

Sagers, C., (2019). *United States v. Apple: Competition in America*. Harvard UP, Cambridge, MA.

Pricing points for libraries, however, far exceed those for private consumers, and often cover a set period of time⁶. Amazon did not sell eBooks to libraries until a 2021⁷. Some books published through its proprietary platform are unavailable in physical formats⁸. In 2019, Macmillan restricted sales of new release eBooks to one license per library during its first two months of release⁹, a policy it abandoned in 2020 following protests from libraries¹⁰. The American Library Association and others¹¹ have spoken out about these challenges, which frustrate library professionals seeking to serve patrons who sometimes blame them for the unavailability of content.

⁶Gross, D.A., (2021). The surprisingly big business of library e-books. *New Yorker*, 2 Sept. <https://www.newyorker.com/news/annals-of-communications/an-app-called-libby-and-the-surprisingly-big-business-of-library-e-books>

The article notes a key example:

“the [New York Public Library] sent me its January, 2021, figures for “A Promised Land”, the memoir by Barack Obama that had been published a few months earlier by Penguin Random House. At that point, the library system had purchased three hundred and ten perpetual audiobook licenses at ninety-five dollars each, for a total of \$29,450, and had bought six hundred and thirty-nine one- and two-year licenses for the e-book, for a total of \$22,512. Taken together, these digital rights cost about as much as three thousand copies of the consumer e-book, which sells for about eighteen dollars per copy... A few thousand people had checked out digital copies in the book’s first three months, and thousands more were on the waiting list.”

Meaden-Pratt, K. (2022). The eBook crisis and how it affects academic staff. *Cranfield University*, 19 April. <https://blogs.cranfield.ac.uk/library/the-ebook-crisis/>.

In 2020, the #ebookSOS campaign posted an open letter with over 4,700 signatories calling “on the UK Government to investigate the practices of the academic ebook publishing industry” (<https://academicebookinvestigation.org/>).

⁷ DPLA (2021). DPLA signs agreement with Amazon Publishing to make their ebooks available to U.S. libraries. 18 May. <https://dp.la/news/dpla-signs-agreement-with-amazon-publishing-to-make-their-ebooks-available-to-u-s-libraries>

⁸Fowler, G.A. (2021). Want to borrow that e-book from the library? Sorry, Amazon won’t let you. *Washington Post*, 10 Mar. <https://www.washingtonpost.com/technology/2021/03/10/amazon-library-ebook-monopoly/>.

The article notes that the “pandemic made digital collections only more crucial — several libraries told me e-book and audiobook checkouts surged by 40 percent or more in 2020.”

⁹Neary, L., (2019). You may have to wait to borrow a new e-book from the library. *NPR*, 1 Nov. <https://www.npr.org/2019/11/01/775150979/you-may-have-to-wait-to-borrow-a-new-e-book-from-the-library>.

¹⁰Albanese, A. (2020). Macmillan Abandons Library E-book Embargo. *Publishers Weekly*, 17 Mar. <https://www.publishersweekly.com/pw/by-topic/industry-news/libraries/article/82715-macmillan-abandons-library-e-book-embargo.html>

¹¹ALA (2019). Before the U.S. House of Representatives Committee on the Judiciary: Competition in Digital Markets. 29 Oct, <https://www.ala.org/news/sites/ala.org.news/files/content/mediapresscenter/CompetitionDigitalMarkets.pdf>

Most staff and students don't understand these things. They assume everything is available as an ebook. They don't understand these restrictions are not the libraries' choice, but the publishers'. It's difficult to respond to students who say 'why can't we access this?' If it's not available, my hands are tied. There's a lack of understanding on how publishers limit what people do with their resources. (UK)

Survey respondents from multi-lingual institutions noted the lack of digital publisher offerings for eBooks in French¹², Arabic and Portuguese compared to English - a likely issue for content in many languages - as well as the 'conservatism' of local publishers in offering digital content, features, and service.

All this digitized material is in English, then (some but less) in French and German. The Arabic content is very small. (Lebanon)

I've discussed [the Francophone market] with suppliers at length. The general suggestion is that they're paranoid about piracy. There's also a huge difference between working with larger vs smaller publishers in terms of acquisition options, the services you can get, metadata, statistics, and integration with our library tools. The bigger publishers offer KBAR records that give us a precise picture of what our holdings are... this makes the process of acquiring and integrating our library system and providing to our user community very simple and fluid. The platforms are easy to use. On the Francophone side, it's just not at that level. The platforms aren't very easy to use. It makes a big difference. They don't provide the meta-data, they don't integrate with ALMA. (Anonymous)

Publishers also often provide access to eBooks via designated or proprietary platforms, which were described as inconvenient to use. The platforms come with Digital Rights Management (DRM) restrictions designed to protect copyright by technically limiting users' capacity to copy text to other formats, and with it students' and researchers' capacities to 'work with the material' in ways allowed by law. These licenses and formats also restrict users' abilities to export notes and for students to take their work with them after completing classes, graduating or changing institutions. Some libraries noted that they had successfully negotiated with publishers to reconfigure inconvenient and undesired restrictions.

My main bugbear is DRM. I know the publishers want to protect their content, but all it does is provide a bad user experience. I want to be able to download a book, to print this chapter, and I can't. (UK)

One of our main eBook platforms doesn't allow that you export to PDF more than two pages at a time of a specific book. Sometimes, to answer a specific question for a patron, I have to export two pages at a time. The publishers want to protect the content, but they create a

The statement covers other topics to be discussed in this report including issues related to streaming and textbooks.

Moore, D., (2022). Publishing giants are fighting libraries on e-books. *Sludge*, 22 Mar.
<https://readsludge.com/2022/03/17/publishing-giants-are-fighting-libraries-on-e-books/>

¹²Couperin (2021). Lettre ouverte aux éditeurs francophones : pour une ouverture des contenus et une pluralité d'éditeurs francophones dans nos collections d'ebooks. 24 Jun.
<https://www.couperin.org/breves/1443-lettre-ouverte-aux-editeurs-francophones-pour-une-ouverture-des-contenus-et-une-pluralite-d-editeurs-francophones-dans-nos-collections-d-ebooks>

problem for consulting the content. For one platform, you could only buy a single access that every employee had to use. You could not buy 100 simultaneously. It didn't make any sense. You could not give different passwords for different people. We demanded they make it easier. (Brazil)

[A publisher] introduced into their eBooks that you can't copy anything. We had to push back. It was against copyright law, so they dropped it. It's indicative of what the publishers can do. (UK)

Finally, there is the question of the vulnerability of access, as demonstrated by the consequences of the DawsonEra platform going into administration 19 June 2020 and discontinuing service 31 July. This required users to export (or lose) notes they had saved in the platform, and forced rapid efforts to move content to other platforms¹³, in order to avoid libraries losing content for which they had already paid. This was of particular concern for French language content - according to one interviewee - as the platform had been preferred by many Francophone publishers who used it exclusively. The loss of content for such reasons is not a concern with print copies, or when back-up copies are allowed.

Libraries and copyright during closures

There's nothing in Fair Dealing that says when the world shuts down because of a global crisis, you can use more. (Canada)

In February 2020, libraries could still provide access to physical copies of books, textbooks, movies and other content, whether to allow on-site access, lend, or allow patrons to make copies within copyright law. In March 2020, closures and social distancing measures were enacted worldwide to mitigate the spread of COVID-19. For a period, physical collections became difficult to access for library staff and patrons. Libraries now *had* to serve their patrons digitally.

Initial closure logistics and publisher offers

The early pandemic was a chaotic period everywhere, including for libraries, educational institutions, and workplaces generally as on-site services closed and many employees shifted to working from home. Remote working arrangements were implemented quickly, amid uncertainty as to how long these measures would last, developing advice on public health strategy, and the personal stress the virus (and reasonable fear thereof) wrought on individuals. Considerable effort was expended developing plans for remote working and sharing information to get employees, faculty, and students on the same page regarding the new arrangements (including copyright considerations, to

¹³ NAG (2020). Dawsons/Bertrams in administration. 29 Jun. <https://nag.org.uk/dawsons-bertrams-in-administration/>

Loughborough University (2020). Access to Dawsonera ebooks. 27 July. <https://www.lboro.ac.uk/services/library/news/2019/0727---access-to-dawsonera-ebooks.html>

ebooks@cambridge (2020). Important information about dawsonera ebooks. 27 July. <https://ebookscambridge.wordpress.com/tag/dawsonera/>

be described below), as well as building IT capacity (both skill and technology) to make online classrooms functional. This was a particular challenge in countries lacking IT infrastructure or where students were unable to otherwise afford their own resources, and had relied on libraries for access. Some libraries which had undergone recent service prioritizations indicated that the process, somewhat ironically, had left them well-positioned to offer digital resources during the pandemic .

To be frank, it was terrible [at the start of closures]. At this time we learned that digital and electronic resources are very crucial. All the public institutions were closed, but the researchers were going on with their research. (Malawi)

There was chaos because it came suddenly. We had no time to plan. All universities closed. The universities already had systems in place for students to access eResources, but now students were shut out of the libraries. Now they had to depend 100% on online services. It was not as smooth as we would have wanted. We had not made any plans for how we could have a skeleton staff running the eResources. For a while there was a complete blackout. It took a while to re-group and start finding meaningful services. The main challenge being, with students away from campuses, how many had the budgets to access eResources - how many had the data, Wi-Fi, smartphones, laptops, or tablets to be able to do meaningfully. (Zimbabwe)

After the closure began, many publishers offered deals to university libraries, temporarily unlocking databases and expanded features for periods that would last several months¹⁴. Interviewees said that teachers, researchers and students were generally unable to integrate the offers into research and teaching activities, due to the general complications of the period, the offers' short length, and term schedules. These offers arrived – for differing institutions – at different points during academic terms, when lesson plans and syllabi were already established. Concern was thus usually focused on providing access to materials that had already been planned to be taught or used in research.

At the beginning of the pandemic, most of our students fled campus – some across the globe. The pandemic struck for us right before winter exams. It was a critical moment when students needed to have access. Some folks took whatever they had, some people left materials behind in their residence halls. So for many reasons, students didn't have ready access to their materials.

We were not in the position to go against a traditional copyright analysis. However, we made exceptions where we thought there was a legitimate emergency claim. We looked at every single class that was being offered, and if the texts were not reasonably available, we made larger selections available than would normally be. Once we got a couple of weeks in, some of the publishers created temporary access for electronic versions of some of our casebooks. They did not extend through the entirety of the term. We tried to negotiate with those vendors to extend access. Some did not. We were not digitizing entire volumes of works, and we didn't have the ability to purchase digital copies. There's so much DRM. There's no way to do that, to scale access to multiple people. So we made scans of physical copies from the library collection.

For almost the entirety of the next school year, all our classes were online. We continued to have issues - not as acutely as we did for that winter and spring quarter, but some real

¹⁴Anthony Sinnott (University of York) led the compilation of a list of offers between March and May 2020: <https://docs.google.com/document/d/1-eP8jUfqolty8LZ1LcpvSCweyqsVAHLgfolYxo927xQ/edit#heading=h.ryxso61j18fz>

hardship issues. For instance if a faculty member was using a non-traditional text for their class that was out of print, we had to find solutions. It was a big mess. (USA)

At the very beginning of the pandemic, March to June 2020, one provider gave students complimentary access to the online version of our citation guide. A few publishers also sent us pdf files of excerpts of required readings. From September 2020 on, I found that the willingness of our publishers and providers greatly diminished. Lots of material was made available which was excellent for PhD researchers but less good for undergrads who wanted what was on their reading lists. (Canada)

Technical factors also made it difficult to integrate these offers into university catalogs and discovery systems. In this environment, translating established services into an expanded digital space was a bigger priority than experimenting with databases and higher-end services - and by the time a provisional 'new normal' had been established around summer 2020 the offers had largely expired.

I don't believe [the offers] are still open, even if COVID is still around. (Zimbabwe)

The offers were thus largely received in the spirit of emergency relief – but they did not necessarily result in integration of more content into research and teaching. They were also widely viewed as a business move to encourage the purchase of more services.

Times were tough. We were scrambling and worried about so many things - including the health and safety of our students, faculty and colleagues - and trying to spin up as much as possible in the way of service. There are certainly some vendors that we personally like the interactions with, but it felt to me like the publishers saw this as an opportunity just to make more money and not really an opportunity to build stronger connections with us and our library. They offered free things for a very limited period of time. (USA)

Of course, they offered this material to try and hook academics. We were going to have to go back to staff and say the publishers were playing nice for three months, and now they're taking it away again. (UK)

It sounded really useful in principle, but given the finite amount of time, that the resources were not accessible through discovery services, and the time to explain the changes to staff and students – and the fact that we were concerned about significant cuts and the standstill budget at our institution – we were nervous about trials. We were nervous about promoting free resources we didn't know we would be able to maintain access to. (UK)

It was available for two months but needed a lot of signatures so we decided not to bother. (UK)

In this period, many library professionals viewed their jobs as providing access to materials, and gravitated towards available materials, sometimes seeking to share information on the pandemic itself through community-driven channels such as social media. Offers which were most appreciated were those that integrated well with established priorities and goals, and lasted for longer periods of time. An Australian library particularly appreciated how genealogical records service Ancestry.com offered free home access to its library edition in different countries through December 31, 2021¹⁵. A library in Kenya was also particularly thankful to Encyclopedia Britannica for the access it offered, to which the library could steer patrons (including parents and teachers) seeking resources and

¹⁵ Summit Free Public Library (2021). Remote access to Ancestry ending Dec. 31st. 15 Dec. <https://www.summitlibrary.org/remote-access-to-ancestry-ending-on-dec-31st/>

information. However, these offers did eventually end, leaving libraries to decide if they had the budget to continue providing access to services to which their users had grown accustomed.

We managed to come up with a list of resources that were available online and were relevant to children. A number of publishers had given free access to learning materials, but most students and parents weren't aware of that. We started teaching the parents and teachers how to access and how to use them. They were able to share with the students. One publisher that I appreciated was Britannica Online. They gave us free access during COVID. Now we have to subscribe, and the subscription fee is slightly high, so we have not subscribed. But we hope to soon. (Kenya)

We were given some offers for six months. Some were four months. That really helped. Users who were really far away could say, 'these are the articles we're looking for' and we'd send the resources. We wish that the publishers could open that again. It was really helpful fighting the information famine. (Malawi)

Digital and digitized collections

Libraries wanted to purchase and provide legal access to content. However, demand for electronic versions of books had long outpaced publisher offers, in addition to the complications posted by DRM restrictions discussed above. The demand was felt differently in different disciplines; some fields, such as art, have favored the quality of print for many publications. However, libraries seeking to make digital purchases ran into challenges related to what appeared to be 'price gouging'. They also met issues related to licenses designed for on-site access. Some turned to programs - such as the 'Resource-Sharing during COVID' (RSCVD) programme and the HathiTrust's emergency access plan - that offered limited access to digital and digitized materials.

Firstly, some important content remained analogue or inaccessible. An Australian library noted the difficulty of providing access to national technical standards during the pandemic, as the standards - with which legal compliance was mandatory - were only available in print. Some libraries had licensed content for on-site access which was not available during closures:

As we are one of the UK's Legal Deposit Libraries, we had 1000s of ebooks received via Electronic Legal Deposit which could only be accessed from designated terminals within the library. This is absolutely useless in a pandemic situation. (UK)

69% of libraries surveyed said they had issues related to textbooks. These involved publishers' reluctance to license digital textbooks for their use, in large and affordable quantities, as well as international students being unable to access material in their home countries due to licensing issues. If the textbooks were not available internationally, libraries were bound by restrictions on the quantity of content they could copy and share with students who required the material for class.

Some libraries accused publishers of 'price gouging' regarding their available digital content, at a time when digital access had just become the only feasible means of access. During the pandemic, the #eBookSOS campaign solicited comparisons from UK-based institutions on the costs of physical copies of books (many of them textbooks) and single user licenses for libraries, listing prices in the

hundreds or thousands of GBP for books whose print versions cost around £25-80. One textbook listed for a print price of £41.99; a single-user eBook license cost £1916.16¹⁶.

Publishers saw this as an opportunity - there's no two ways about it. They racked up the price, somewhat extortionately. You'd see eBooks that were 80 quid for maybe a two or three user license, all of a sudden being ratcheted up for £300 for a single user license... Sometimes it works out to hundreds of pounds to make an extra chapter available digitally, when you can buy 50 print books for the same money. (UK)

We were very aware that we had to provide equity of access to content for students, wherever they were in the world. We could no longer rely on our rich print collections. Often textbooks seem arbitrarily tagged as such by publishers, whereas they are only one more title on a reading list to our academics. Pricing and business models for textbooks (and some monograph titles) proved challenging, expensive, and time-consuming to make sense of. Some monograph titles were only available in publisher/supplier collections, not for title-by-title purchase. This is extremely frustrating when we only want one book out of a collection costing a four-figure sum. (US)

We stayed within our Fair Dealing rules when it came to international students. If they could not get a textbook at home due to publisher limitations or access to online sellers, we could only share one chapter or 10% of the textbook with them. They had to coordinate with their instructors to get different course materials or complete different assignments. The access to materials was severely limited. Campus was closed several times during COVID and the only materials to which we could provide access were electronic or scanned. Most textbook publishers and video rightholders made it difficult for libraries to provide meaningful access to digital copies of physical resources. Even if we wanted to buy an e-textbook and were willing to pay, many publishers won't sell to libraries. In some cases prices were ludicrous, over \$1000 for a single title. That is more than 1/3 of my entire discretionary budget for my subject area. (Canada)

We'd like to reduce the amount of money students have to spend – as far as we're concerned, students are already paying very high fees. That can include an element of waiting (for books)... but students shouldn't have to spend additional money. To the publishers, that's anathema. Our interests are fundamentally not aligned. (UK)

As libraries opened their stacks to limited numbers of employees, many libraries applied baseline principles limiting how much of a book's content could be copied for individual patrons. Other libraries opted to offer digital access to books they owned physically. EIFL released a tipsheet to help libraries navigate challenges around lending digital copies¹⁷. Benefiting from Fair Use, among the largest initiatives that aided digital lending was the HathiTrust's Emergency Temporary Access plan, under which libraries closed their physical collections in their entirety and 'lent' digitized copies to

¹⁶#eBookSOS (2020). EbookSOS campaign examples (IFLA/WIPO).

<https://docs.google.com/spreadsheets/d/1Y2F9v6gtV4fGgh1PfWMMYOI3WZIUOXyepIPGnDo3Bk/edit?usp=sharing>

¹⁷ EIFL (2022). Emergencies and copyright tips for librarians: How to provide access to printed resources when institutions are closed.

https://www.eifl.net/system/files/resources/202204/tipsheet_lockdown_copyright_2022_110422_v8.4.pdf

which the Trust had access, on a strict owned-to-loaned ratio based on the libraries' collections¹⁸. While HathiTrust did not use the term, the plan was a variation on Controlled Digital Lending (CDL)¹⁹ projects predating the pandemic and in which the pandemic increased interest. At the far end, The Internet Archive created a 'National Emergency Library' in March 2020, offering 1.4 million book scans for unlimited borrowing. Four publishers sued the Archive in June 2020 for copyright infringement. As of early May 2022, the suit remains unresolved²⁰.

Scholarship also needed to continue, and there were all kinds of issues for our researchers, faculty members, and fellows who couldn't get access to materials that were otherwise out of print. We made great use of the HathiTrust emergency provisions - that was hugely important - and the Internet Archive opening up their materials and making them available to users. Research would have gone to a complete halt if those two things could not happen. For materials that were otherwise not available, we would buy everything we could and send it to people. We had to fill in the gap. That meant we lost a lot of money. They were never added functionally back to our collection. (USA)

We were essentially doing CDL without defining it as CDL, because it was the only way to make [certain texts] available. We're starting very slowly and very carefully with CDL, with material that isn't available in any other way, that's out of print. Then we'll see what happens on the lawsuit front, before we move into it with broader collections. We probably wouldn't be considering it seriously if it wasn't for COVID. (Canada)

The requirement for complete physical collection closures with the HathiTrust plan, however, was not a trade-off that many libraries were willing to make permanently. While some considered it a vital service at the height of closures, many also discontinued it as physical access to building resumed. The service also posed problems for small higher education institutions who were not able to join and had previously relied strongly on Inter-library Loan (ILL) services. As digitized copies could not be lent through ILL, these libraries now could not access other libraries' materials.

Libraries also looked to Open Access to help meet demand. The 'Resource-Sharing during COVID' (RSCVD) programme²¹ saw librarians focused on ILL come together to help colleagues source materials, relying on a wide range of volunteers and tools for sourcing open access versions of

¹⁸HathiTrust (2020). Emergency Temporary Access Service. <https://www.hathitrust.org/ETAS-Description>

¹⁹ IFLA (2021). IFLA position on Controlled Digital Lending. 2 Jun. https://www.ifla.org/wp-content/uploads/2019/05/assets/clm/statements/ifla_position_-_en_-_controlled_digital_lending.pdf

²⁰Beemsterboer, S. (2021). Fahrenheit 2020: Torching the Internet's Library of Alexandria at the height of a global pandemic. 2021 *J.L. Tech. & Pol'y* 101. <https://ssrn.com/abstract=4037768>

Albanese, A. (2021). Judge extends discovery in Internet Archive Book scanning suit. 2 Dec. <https://www.publishersweekly.com/pw/by-topic/digital/copyright/article/88051-judge-hears-discovery-disputes-in-internet-archive-book-scanning-suit.html>

Internet Archive (2020). Defendant Internet Archive's answer and affirmative defenses to the complaint. *Hachette vs. Internet Archive*, US District Court of the Southern District of New York. https://www.publishersweekly.com/binary-data/ARTICLE_ATTACHMENT/file/000/004/4462-1.pdf

²¹ <https://rscvd.org>

relevant pieces of work. As of 20 April 2022, RSCVD received 19,387 requests from 26 countries, of which volunteers at over 80 libraries fulfilled 60% (11,639)²².

We joined the RSCVD group. We were allowed to get copies of electronic books free of charge, when the licence allows. The international ILL community helped to solve this issue. You have no idea how much it helped us! Everything was loaned free of charge. (Lebanon)

Digitization allowances, when offered, depended on access to physical collections, underscoring the need for content to be readily available in digital formats and for great flexibility in sharing digitized content.

[Relaxing digitization rules] was a great gesture on behalf of the CLA [Copyright Licensing Agency], but we had to have access to the physical stuff to be able to take advantage. We pressured the CLA to relax that term, so that if we had content that had already been digitized [by others], we could get a copy and use it under the relaxed terms of the license. Everybody was in the same boat. We couldn't get access to the stuff. A lot of stuff wasn't available electronically. (UK)

Teaching at a distance

Students and teachers faced a number of logistical considerations as they adapted to online classrooms: far-from-universal access to suitable hardware and connectivity among students; ensuring everyone had the necessary technological skills to login; and developing norms around presence and participation online. They also faced three main intellectual property-related complications: 1) legal issues and ambiguities around sharing and using content at a distance 2) technical barriers designed to protect intellectual property that complicated otherwise legal uses; and 3) cross-border & library membership factors, as students and faculty returned to their home countries where licenses and technological infrastructure created difficulties. Libraries also had difficulty providing articles and books to patrons who were not institutionally affiliated, but who would have otherwise been served as 'walk-ins' on-site.

The first issue concerned whether classes could continue over the Internet as they had in person. Many licenses and laws had been written with in-person classrooms in mind. In the COVID environment, adaptations that seemed intuitive and reasonable could run into challenges with copyright. It was unclear whether sharing material over the Internet counted as infringement, even if it was shared exclusively with students in particular classes. If, for example, the law says you may only use an excerpt of a 'work', would it be legal to play a musical recording that lasted several minutes – as would have been common practice in a music class? Universities also had to contend with whether recordings of classes could be made, and what restrictions were placed on their distribution and retention. Other services, such as reading books aloud for children's storytimes, now were also legally unclear. IFLA released a statement urging the right to storytimes be clarified and affirmed²³. Faculty at times did not take kindly to suggestions that previously standard practices – such as playing songs in class or showing YouTube videos – were now legally uncertain.

²² Bae, P. (2022). [IFLA-L] Two years of RSCVD Initiative. Email, 20 April.

²³ IFLA (2022). IFLA releases of statement on Online Storytimes. 5 April <https://www.ifla.org/news/ifla-releases-statement-on-online-storytimes/>

During COVID, a lot of students were missing classes, and a lot of instructors wanted to record lectures to make them available. Within those live or pre-recorded classes, they wanted to show more than Fair Dealing would allow. This came up a lot in music classes, where you could theoretically play a whole piece during class. In Canada, the Fair Dealing guidelines and norms tend to say 10% or less. We advised teachers to make a link to make the recordings available outside of class. (Canada)

Through informal group chats, professionals discussed shared challenges and assessed risk. In the US, Fair Use provisions generally allow for wide latitude to use materials for educational purposes without obligations to pay supplementary remuneration to rightholders.²⁴ Library professionals could look to published legal rationales²⁵.

In other cases, libraries turned to in-house counsel, who often offered conservative advice. Library professionals at some institutions believed that their lawyers advised them to act with less latitude than they may have been granted at more affluent institutions, willing to take greater risks. Fear of legal action thus has the potential to exacerbate inequalities between users and institutions.

We came together to have weekly webinars about copyright & online learning, and how we're dealing with things. Airing 'is there any risk involved,' to get it all out in the open, and come to a collective idea. (UK)

Copydan [the rights agency] said quite early that if you're streaming your teaching it's the same as if you're in the classroom, but the second you start recording it, copyright applies. When all the teaching at the university went online, that became sort of an issue. I actually don't think the publishers and rightholders were quite ready. (Denmark)

There was no case law [for making lecture recordings containing copyrighted material] but a lesson exception in the Copyright Act. It was very confusingly written. There were some folks at the big institutions who had their lawyers look at it, and they said it would be OK on the conditions that 30 days after submission of grades, all videos would be destroyed. Not just removed, but destroyed. (Canada)

²⁴ For examples of US Fair Use guidelines, see:

U.S. Copyright Office (2021). More information on Fair Use. May <https://www.copyright.gov/fair-use/more-info.html>

Lagola, K., (2021). A teacher's guide to copyright and Fair Use. *Edutopia*, 22 Mar. <https://www.edutopia.org/article/teachers-guide-copyright-and-fair-use>

²⁵ Provisional legal rationales for remote teaching considerations in the early days of the pandemic include:

Public statement of library copyright specialists: Fair Use & Emergency Remote Teaching & Research (2020): <https://docs.google.com/document/d/10baTITJbFRh7D6dHVvVfGiGP2zqaMvm0EHHZYf2cBRk/edit>

referenced and compared to Canadian law in:

Trosow, S., (2020). Fair Dealing and emergency remote teaching in Canada. *Samuel Trosow* blog, 21 Mar. <http://samtrosow.ca/2020/03/21/fair-dealing-and-emergency-remote-teaching-in-canada/>

These access factors are likely to remain with us in hybrid teaching environments, and as students seek to access material from classes they could not attend for illness or other reasons.

A second factor for at-a-distance teaching were the challenges that copy protection measures posed to sharing audio & video content in legally-permitted ways. Some educators found that the platforms they were using to host classes prohibited them from playing & streaming content. These DRM-type restrictions will be discussed in the following sub-section.

A third challenge concerned providing access to patrons who had moved internationally or were not institutionally affiliated. 52% of respondents who had copyright challenges said they had cross-border issues, as international students and faculty returned to their home countries. Sometimes, platforms such as YouTube – widely accessible in much of the world – were blocked in students’ home countries. As it pertains to copyright, content licenses are often bound by national borders and enforced by technical restrictions. When students returned home, some found they no longer had access to required class materials. For example, a streaming platform that licensed content to UK institutions and permitted use within the UK - according to interviewees - eventually offered access to UK institution-based students physically in the EU (for extra fees), but not for students based in other countries.

The international element was one part of broader challenges with identifying who counted now as ‘part’ of the library for access and licensing agreements. One university-based law library in the US that served a socio-economically diverse public had trouble providing access to law texts (already under expensive and specialized license agreements) to patrons without a direct affiliation to its law school:

I live in a wealthier area that for many years has had a standalone law library that attorneys and the public would use. We don’t have a standalone public law library in this county. A large number of our patrons are the public or attorneys. We have a huge number of people who are representing themselves in custody matters or personal litigation. They were 60% or more of our walk-up traffic before the pandemic. Now that we’ve returned, they’re 80% or 90% of walk-in traffic. So those are the people that we had a lot of issues with, because we could not get them access to the databases. We could only say go to Google Scholar or we could send some academic journal articles (US)

Audio and video content

Libraries – particularly in Canada and the UK – were eager to talk about issues related to sharing audio-video (A/V) content conveniently and at an acceptable level of quality, and the licensing issues that made material inaccessible.

Some institutions relied on published legal rationales on how to navigate online classes during closure – such as a paper by Emily Hudson of King’s College London²⁶ arguing for broad interpretations of exceptions and limitations allowing the sharing of A/V content in online classes. She has since argued this applies beyond COVID-related closures, which “accelerated the

²⁶Hudson, E., (2020). Copyright guidance for using films in online reaching during the COVID-19. *King’s College London Law School* research paper forthcoming, 4 Aug. <https://ssrn.com/abstract=3667025>

emergence of new copyright norms and interpretations in relation to educational copying exceptions” to protect against the impact of expansive broadcast rights.²⁷

Audio-visual material was a big concern. In the UK, one of the copyright exceptions is that an educational establishment can show or perform an artistic work, film piece of music to an audience of its own staff and students, in the course of its activities. You can show a film in a lecture theater if it has to do with a course that’s running. When we went into lockdown, this became problematic. How do you replicate that in an online environment? There was a lot of back and forth in Higher Education about this.

Emily Hudson at KCL is a lawyer who teaches copyright law. So she’s got a foot in both camps. She wrote this paper on how to carry on providing that, and what the risks are. One of the things she brought up was ‘illustration’ for instruction. Her point was that the teaching point might be expanded to include the whole work. That means that you could copy a film and make it available for your students. (UK)

Even with such justifications, however, to stream within legal guidance often involved convoluted processes that degraded image & audio quality.

The upshot [of Hudson’s rationale] was we could still use the exception that allowed us to show a film in a lecture theater, as long as the screening was done live through screen sharing. But it was impractical. The lecturers have to be there, and there were technical issues around quality and accessibility. You couldn’t read the subtitles if was a foreign language film [due to the degraded quality from screen sharing]. So it was impractical. (UK)

Of particular concern in Canada were laws that allowed for use of materials in educational settings, but did not allow circumventing technical restrictions or ‘locks’ to do so. Thus, rightholders could effectively deny legally-allowed access by putting up technical barriers.

We actually navigated COVID fairly well – we’d been going aggressively to e-Resources for 15 years. However, video stood out, and this oddball way of capturing a playback. We found that the faculty had strong dependencies on physical media that they showed every time they taught. Oftentimes, it was older stuff and commercial copies weren’t available.

They had physical DVDs they weren’t able to play online. A lot of students were missing class. With the DVDs, we played them and screen captured them. You can’t actually digitize it (directly) – that would be breaking a digital lock. It was this convoluted analog process. It took a lot of staff time. They had to fiddle with it to get good quality. It takes as long as the film is. Some discs had technological protection measures, especially the older DVDs. I think maybe some people are over-interpreting but we want to be very careful. (Canada)

Common complaints included the difficulty of tracking down rightholders for movies that were not recent or commercially-oriented. A particular challenge involved documentaries, which are commonly taught in class but have more limited availability than mainstream entertainment. In one case, a professor sought and received personal permission from the filmmakers / rightholders themselves but was ultimately not able to stream the films due to the online platform’s restrictions.

²⁷Hudon, E. (2022). Updated copyright guidance for using films, audiovisual works and images in online teaching: Beyond the Covid pandemic. 24 Feb, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4042770

Streaming services such as Netflix have also been reluctant to offer licenses for public screenings or educational use of their content. At least one institution stated they had successfully received a license from Netflix to use their content, but most others found communicating with the popular service daunting. Aside from a few films designed for classroom use, this material was native to streaming platforms and often not available outside of them on physical media.

Unsurprisingly, making copies of films available for students to watch on their own schedules seemed to be an easier solution – if one that not all institutions felt comfortable fell within limitations and exceptions. One UK institution was not willing to continue the practice after closures ended, despite faculty and student expectations of convenient access in line with how they otherwise watched movies for entertainment, outside of class.

At the beginning of this, we decided that we weren't going to carry on digitizing films when students had access to the libraries. The academics had signed a declaration and said they knew this was temporary, but while we were ripping films and digitizing, that became the norm. When we started to open up with hybrid teaching, we found that risk had increased. We withdrew our service for digitization of films and saw a pushback from academics. To preempt that we bought extra copies of the DVDs that more than met the number of students who were on campus and being taught. (UK)

Library professionals would oftentimes suggest that educators use one film over another – a challenge for courses where specific pieces of media were meant to be under discussion for their artistry, subject matter, or place in history.

We've had instructors seeking permission to use DVDs, trying to navigate who to ask. Oftentimes they know the people who made the movies. There are films that our own public broadcaster, the CBC (Canadian Broadcasting Corporation), made that are inaccessible to anyone because certain rights have expired within the production. These were made with tax money. It's nuts. (Canada)

Conclusion: toward the future

The issues around copyright - and its impact on access to digital and digitized content - were with us before COVID, and will remain after. The pandemic forced libraries and rightholders to confront them urgently. Challenges around database access costs, limited availability of eBooks (particularly textbooks), high costs of eBooks relative to print editions, and DRM restrictions were felt even more acutely, as digital and digitized content offered at a distance became the primary way to reach patrons. Without physical access, libraries, educators and students experienced many copyright-related technical and licensing issues around sharing content in and around online classes, streaming audio and video, and sharing content across international borders. These point toward an urgent need to clarify the rights, protections, limitations and exceptions afforded to libraries to continue their established services in a world where digital access is a key normative expectation.

What's at stake includes how the technical, legal, practical, and normative work together. Libraries have legal rights that afford them exceptions and limitations to copyright, so that they can share content with their patrons. These are key to teaching and research. Technology has greatly expanded the possibilities to share content with patrons, but with it their expectations also. Legal and technical restrictions that unduly inhibit the ways in which patrons work with digital content frustrate the well-established missions of libraries to connect their patrons to services and content.

Further inequality risks exist among institutions, between those who can and can't afford access, and those who are willing to take risks in gray areas and those who act cautiously.

For practical considerations, EIFL released a tipsheet to help librarians navigate copyright during emergency closures²⁸. The European Union Intellectual Property Office is advertising its guidelines on Facebook, aimed at educators²⁹. Yet much remains in doubt. As discussed above, lawsuits remain ongoing over the Internet Archive's decision to enact a 'National Emergency Library' and lend out more digital copies than physical copies were in its possession.

In line with the findings of this report, practical recommendations to preserve the rights of libraries and their patrons in the digital, COVID and post-COVID eras include:

Publishers should offer digital content and do so affordably. EBook licences should be brought in line with the cost of physical books and sold at similar rates to libraries per user licence as they are to individual consumers.

The right to share copyrighted content online, in the context of class sessions, should be clarified and made technically convenient. This includes removing restrictions on streaming audio and video material over platforms used in class.

Provisions should be made to allow students access to written and A/V material - including necessary class materials - across international borders.

Online video streaming platforms should develop educational portals, enabling students to login to access class content with institutional credentials and the platforms to receive remuneration.

A broader shift to more flexible exceptions and limitations would help create more resilience to future shocks, leaving libraries and users facing less uncertainty.

We must act with forethought to legally protect the capacity of libraries, in line with developing norms, to offer established services in digital formats to patrons who are not physically present.

²⁸ EIFL (2022). Emergencies and copyright tips for librarians: How to provide access to printed resources when institutions are closed.

https://www.eifl.net/system/files/resources/202204/tipsheet_lockdown_copyright_2022_110422_v8.4.pdf

²⁹ EUIPO Observatory (2022). FAQs on copyright for teachers.

<https://euipo.europa.eu/ohimportal/en/web/observatory/faq-for-teachers?fbclid=IwAR2zryCiUf8OnQhGOT4aFafzrsNBoAwIUwhxbl5XVMZOU8wORpU2UFnYkSk>