

# The Limits of Licensing: A Literature Review

## Executive Summary

*A growing share of library collections is digital. With books – a good – replaced by access to databases – a service – traditional acquisition is increasingly replaced by licencing agreements.*

*This has brought many advantages – costs related to physical storage and upkeep are falling, and libraries have access to a wider range of content than ever before. However, the move from purchased ‘hard’ copies to licensed ‘soft’ ones has also brought challenges.*

*In order to understand these, and the evidence behind them, IFLA commissioned a literature review in late 2016. This looked through the available academic and grey literature, from theoretical analyses to practical survey work on libraries’ experience of licensing, and its limits as a tool.*

*This work tells us that:*

- **Access is not ownership:** when libraries buy access to a digital service, it is not necessarily theirs to keep, as with books. Depending on national law, this can mean libraries can do less with digital resources than with physical ones.
- **Private regulation can undermine public law:** laws on copyright – including exceptions and limitations to it – have been designed over time to ensure balance and so promote innovation and education. However, this balance can be undermined by contract terms (as in licences for digital material) which are shaped more by market forces than a concern for overall welfare.
- **You can’t licence without a licensor:** in order to sign a licence, there needs to be someone who can offer it. In the case of orphan works (in particular works which were never made to be sold), it simply isn’t possible to identify and/or contact a rightholder. The fact that there may be many different ‘rightholders’ in a single book or piece of music makes the problem worse.
- **Licences can limit uses:** as highlighted, licences can remove or weaken possibilities given to libraries and their users by limitations and exceptions to copyright. This can be explicit (contract terms which prohibit the making of copies for preservation or to adopt them for people with disabilities), or implicit (such as limiting use to certain ‘authorised’ users means that supplying copies, even on an ad hoc basis, to others is ruled out).
- **Licences do not offer guarantees:** with licensed works often ‘stored’ on the rightholder’s servers (rather than the library’s), there is often no guarantee that libraries can keep these works when their subscription

ends, or they are made unavailable by the rightholder. Moreover, there is not necessarily any guarantee that the content has not (or will not) been changed.

- **Each licence can be unique:** with relative freedom to set terms, libraries can face a different set of rights and limitations for each different work. When works are bought from different countries, they must even negotiate a variety of legal systems. This imposes a major administrative burden on libraries.
- **Anti-piracy measures can become anti-user measures:** digital resources often come with technological protection measures. These are used to enforce contractual provisions. While they may have a role in fighting piracy, they can also prevent users benefitting from copyright exceptions, for example private copying, adding metadata, or preservation. Unless stated otherwise, such measures are protected themselves by law, and cannot be removed.
- **Licences can compromise privacy:** digital technologies allow for much greater monitoring and data collection about user behaviour. This is also the case for licensed works, where a large share of contracts either oblige the library to collect and share usage data, or simply allow the licensor to do this. This raises questions about academic freedoms.
- **Licensing can reduce library control over budgets:** with subscription fees for academic journals rising faster than inflation, libraries are being forced to take tough decisions about what they can, and cannot, offer to their users. Publishers which cannot offer 'big deals' often lose out.
- **Licensing weakens libraries hands in negotiations:** when libraries are buying licences for digital materials, negotiations are often conducted confidentially, which allows for much greater price discrimination. Forming consortia can help, but is not easy or without costs itself. Meanwhile, the small number of big publishers gives them a strong position in discussions.

Licensing is a fact of life when working with digital materials, and so it is not a case of being for or against it. However, in the same way that the best copyright laws seek to find a balance in order to ensure that fair remuneration of creators is balanced with access, licensing too needs to be used in a balanced way. It should not be applied where it is not suitable (orphan or unpublished works), should not give libraries and their users fewer rights than they enjoyed with physical books, should not undermine exceptions and limitations in copyright laws, and should not leave libraries struggling to pay for access to content.

ADDENDUM (15 September 2017): The literature review includes a number of Internet resources that offer further information about how librarians can work with licensing when this is in place.