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Don't Share This Item! Developing Digital Collections and Services in a Consumer-Licensed World

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Don't Share This Item! Developing Digital Collections and Services in a Consumer-Licensed World

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Abstract

Libraries have always faced unique challenges in providing non-academic content for academic use, but the digital age has brought particular problems of “one size fits all” consumer purchase models and vexing methods of digital rights management (DRM), wrapped up with a large bow of legal uncertainty for many institutions. These proceedings describe some practices for sharing consumer-licensed popular materials and confronting legal and technical barriers, as well as what some libraries are considering and encountering in applying the law, fair use, user expectations, and common sense in developing collections and services around digital content that is geared directly to end users.

Digital Collections in a Consumer-Licensed World

Libraries have always faced unique challenges in providing non-academic content for academic use, but the digital age has brought particular problems of “one size fits all” consumer purchase models and vexing methods of DRM, wrapped up with a large bow of legal uncertainty for many institutions. Traditional multimedia content including film and television is increasingly consumed through streaming services (e.g., Netflix, Hulu, and Amazon), and libraries naturally want to enter this space, both because streaming services offer convenience and are often most familiar to patrons. Further, many films and programs are available first or exclusively through proprietary streaming services, including award-winning and culturally significant productions; for example, Netflix's drama *House of Cards* and Amazon's Emmy- and Golden Globe-winning *Transparent*. Collecting new media such as video games raises similar issues, with an increasing number of games available exclusively as digital downloads through Steam or similar services. This trend toward digital and proprietary formats is likely to continue and increase over time, which will leave libraries unable to collect multimedia materials if they cannot engage with these services.

Unfortunately, most of these services are designed for consumer use and present logistical

and legal challenges for libraries hoping to share materials with their patrons. The traditional legal protections of first sale and section 108 are, at best, an uncomfortable fit and at times are simply not applicable to consumer-licensed products. These proceedings document the discussion at the 2015 Charleston Conference about these issues.

Current Library Contexts

Few librarian participants in this session indicated that their institutions were currently providing such consumer-oriented media. Several cited extremely risk-adverse legal counsel as a major institutional barrier, some a perceived lack of need or legitimacy of such media, and some concerns about budgeting funds or staff time to such collections.

This latter concern, of staff time, is especially important. These media artifacts are often device-specific, thus requiring that both device and associated media content be circulated or made available within a designated space. Because of the consumer-oriented nature of the content platforms, these media often must be either purchased separately and then “gifted” to an account for user access, or if the vendor does not allow for “gifting,” a secure means of hiding library account or credit card information and blocking unauthorized activity must be determined (typically, use of “parental controls”). Thus, consumer-oriented systems must be

carefully reengineered to serve library needs, and the workflows for providing such content are sometimes cumbersome, nearly always unique to the platform and vendor at hand, and may require periodic refreshing as interfaces change (often with little advance notice).

Models for Practice

The North Carolina State University (NCSU) Libraries was an early provider of a circulating Kindle e-books program. Designed as a technology lending program to incubate the use of emerging e-book reader technologies, the Libraries sought to provide user-desired content that could be coupled with these devices in order to encourage their use. This program resulted as well in a quick and easy means of providing popular titles—and even academic titles that were only available in Kindle format. This was and is not a program unique to the NCSU Libraries, and Amazon was consulted and informed along the way in its development, never specifically endorsing yet neither objecting to the Libraries’s use of Kindle content.

As consumer-oriented media have grown, the NCSU Libraries has expanded into other media, including video games and streaming video. Increasingly, video games are available in “download only” formats; it is not hard to envision a time when physical media may be altogether unavailable. With robust gaming and game development programs that cross four colleges at the University, we cannot afford to deny our users access to this type of content. Beginning with the Steam platform, and next the PlayStation 4, we are actively building collections of downloaded games for in-house use, and planning to make available circulating consoles to instructors for in-class demonstration purposes. Similarly, an increasing number of films and videos are now only available in streaming formats. To accommodate in-class teaching needs, we are beginning to circulate to instructors Roku devices that can be plugged in in the classroom, with preloaded access to purchased (but not leased) content. While such devices are not now nor envisioned to be the preferred means of accessing such content, the consumer focus

means that for much content this is the *only* means by which we can provide access.

Legal Challenges to Including Consumer-Licensed Products

Unfortunately, there are several major conflicts that must be addressed before a library deploys consumer-licensed services including Hulu, Netflix, Amazon Prime, or Steam. Most significantly, consumer-licensed services, especially those that offer streaming content, raise substantive issues about ownership and sharing. Because they do not sell specific items to the library, materials cannot circulate under sec. 109 of the Copyright Act, the “first sale doctrine.” Instead, they generally license content for a particular use, and those licenses reflect the assumption that an individual consumer will be making personal, or perhaps familial, use of the content.

The licenses and terms of service for every major consumer-focused service discussed above includes an explicit limitation to “personal” or “private” use which precludes wide-scale sharing of the type done by most libraries. This language is often paired with prohibitions on “sub licensing” or “distribution to third parties.” In many contexts this problem is addressed by a distinct institutional license, but we have seen no indication that this model is imminent for these services.

In addition, most of these consumer-focused licenses include terms that are incompatible with many academic institutions’ standard license requirements. Licenses for each of the major streaming services require binding arbitration and include provisions requiring choice of law and venue that may conflict with the legal obligations of state institutions. These licenses often also include a limitation on liability and express indemnification language which run afoul of legal and bedrock policy norms of many libraries. Each license also includes some version of a problematic “future license language changes” clause that binds the licensee to terms that may be changed at any time at the discretion of the company. These procedural issues may be seen as “boilerplate” language by corporate offices, but

they produce substantial—and at times intractable—challenges for academic libraries.

Conclusions

Despite these legal concerns, some libraries have moved forward with consumer-licensed services in their collection, as well as lending devices that rely on these services for their value. There have also been informal signals reported in blog posts and private conversations that some consumer-licensing companies have no objection to library use, particularly when a one-to-one relationship is maintained between service account and independent use. Certainly we have not seen major litigation around this issue in the way that we have for library practice around digitization and offering electronic reserves, areas viewed as less controversial by many librarians.

These bold actors and quiet conversations suggest that a path forward may exist. Navigating that path will require libraries to think seriously about how they manage risk in a legally uncertain context. It will also require librarians to think about business questions such as the reliability of consumer-licensed products at scale—how will an account designed for a single user function when used by a wide variety of distinct users and user groups—and the reliability of the company over time. A licensed partnership with a scholarly database should assure the library of reliable, sustainable service regardless of corporate mergers and new business plans; an unanticipated

use beyond those anticipated by the license may not have such assurances and is not negotiated at arm's length to adapt to the needs of the library and its patrons. The recent lawsuit over accessibility for Netflix content also reminds us that a for-profit company may have values that diverge from the needs and priorities of an academic library. Without a negotiated institutional license, the library has no way to express its priorities, especially when use of the product relies on “flying under the radar” of that company based on fear of a lawsuit.

These challenges may be daunting, but they must be addressed. Streaming content is already becoming the dominant way that media is shared, and libraries must enter that space if their collections are to remain relevant. The Copyright Office has promised to update the law in this area but has no timetable. Libraries also cannot be sure that any changes made by the Copyright Office will reflect the needs of users, rather than of the content industry that has captured so much of the attention of Congress and the Copyright Office.

Partnerships with specific services seem to be the most promising path forward, but they will be complicated by the specific agreements those services have with the content owners from whom they license materials. In the long term, legal changes, institutional licenses, or new business models may solve this problem. Until then, however, libraries will have to find their own path.