

D. J. Hoek

Licenses and acquisitions

The case of digital downloads

Academic libraries serve a variety of functions, but their most fundamental purpose is to collect, preserve, and coordinate access to resources pertinent to the educational mission of a particular institution. As technology has developed in recent decades and shaped the way information is published, delivered, interpreted, and applied, collections have shifted from being entirely print and analog to ever more digital. All the while, libraries have maintained the traditional, yet still vital, service of providing what patrons need.

With the gradual decline of physical formats and the steady increase of materials available solely as digital downloads, however, an unprecedented challenge has emerged: the complete inability to obtain certain materials. Due to restrictive licensing terms, librarians are now occasionally, and surely increasingly, finding themselves unable to acquire particular resources, including titles specifically requested by faculty for use in courses.¹

I encountered this firsthand last spring when Alexander Weheliye, associate professor of African American Studies and English at Northwestern University, asked the library to buy a variety of books, videos, and sound recordings for a course on African Diaspora in Britain and Germany. While the library successfully acquired most of the materials on the list, one item, the 2008 recording *Gender Riots* by the German pop group Sisters, was found to be unavailable on CD. Though the album was readily available by download from the

iTunes Store, Amazon, and other sites, the end-user license agreements (EULAs) governing download transactions allow only individuals, or “end users,” to obtain the files, precluding libraries entirely. Further, EULAs characteristically forbid lending or redistribution of any kind, so that even if the library were able to acquire *Gender Riots*, the recording could not be made available to faculty and students. With no CD version to be had, and no legal way to acquire the recording otherwise, the library regretfully informed Weheliye that we could not fulfill the request. Unable to rely on the library for this item, he modified his syllabus accordingly.

More than any other media type, music has been most widely accepted and successful in the download arena, so there are a number of examples of recordings released exclusively as digital files. These include Gustavo Dudamel conducting Mahler, some live recordings of U2 and R.E.M., a new work by Pulitzer Prize-winning composer Steve Reich, recently discovered performances by jazz greats Dexter Gordon and Woody Shaw, and the Grammy and Oscar winning soundtrack for the Disney movie *Up*. But digital information, no matter what it represents, is essentially much the same, so it is no surprise that the problems surrounding music have cropped up in other areas.

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At the University of Connecticut, this situation came up in September 2009 when a faculty member there asked the library to purchase *Prayers for Bobby*, a 2009 Lifetime television network film based on the Leroy F. Aarons book, starring Sigourney Weaver, and nominated for multiple awards. Though available via the iTunes Store, *Prayers for Bobby* had not been issued on DVD. Aware of the restrictions tied to the downloadable movie, a UConn library staff member turned to Videolib, an e-mail discussion list relating to videos in libraries, to ask, "Is there a legal workaround to this?" No solution was identified, and the requested video could not be acquired at that time.² Over a year later, A&E Home Video at last released *Prayers for Bobby* on DVD in December 2010. But since so much time had passed since the faculty member's request was submitted, it was presumably much too late for the film to be used in the classroom as hoped.

These are early signs of a trend that shows no indication of changing course. Physical formats, more and more, are giving way to digital downloads. At the same time, the grip of EULAs seems to be strengthening. Until now, libraries have been able to purchase published materials and lend them widely, thanks especially to the First Sale Doctrine, which dates back to 1908 and was formalized in Title 17 of the U.S. Copyright Act of 1976. According to First Sale, copyright holders may govern the initial sale of each copy of a work, but they do not control any subsequent sales or distribution. This provision allows books, CDs, DVDs, and other items to be sold at garage sales, in used bookstores, on eBay, and through other secondary markets. It also allows libraries the ability to lend materials.

In September 2010, the Ninth Circuit Court of Appeals, overturning a lower court's decision, ruled in *Vernor v. Autodesk* that these liberties associated with ownership do not apply to software-bearing licenses restricting resale or lend-

ing. That is, a software license, including the 5,000 word license iTunes users agree to each time they download a song, may severely restrict what the buyer (i.e., licensee) can do with that software, even if those restrictions undercut longstanding principles.

Vernor v. Autodesk does not touch on the prohibition of sales to institutions, nor does it directly consider the effects EULAs have on libraries or education. Even so, this case, which may yet be appealed further, does take on the sharing of information and materials, a foundational purpose of libraries. The legal outcome thus far has not favored continuity of this crucial service.

It should be noted that, though EULAs prevent item-by-item acquisition of digital downloads, library subscriptions to commercial databases of streaming audio and video do provide a means for legal access to a particular body of digital content. These products, such as Naxos Music Library or Alexander Street Press's Smithsonian Global Sound, help to bridge the gap. Still, these databases are relatively limited in scope and allow no way for librarians to respond to the specific needs of local clientele. To wit, none of the titles mentioned in this article is available through any subscription product.

It should also be noted that this predicament pertains specifically to popular materials, and, with the exception of budgetary limitations, the ability for academic libraries to provide scholarly publications is in no way under threat. While university presses and other academic publishers may also be shifting toward a largely digital model, it is certain that those materials will remain accessible through libraries, since libraries represent a significant percentage of those markets. But for resources that draw a broader audience, it is likely that the number of titles available only for download, and unavailable to libraries, will continue to grow. These popular materials may include any type of music (i.e., not only *popular* music), video recordings of

feature films and television programs, and before too long, books.

Already Stephen King's novella *Ur* is a prime example of Kindle-exclusive publishing that remains unavailable in print. (The effect of this trend on public libraries, where popular materials are especially central, is also disquieting.)

Though I'm sure that iTunes, Amazon, and other online retailers didn't craft their EULAs with libraries and institutions of higher learning in mind, the controls they have set out—apparently to limit illegal file sharing—nevertheless render libraries incapable of fully supporting teaching and learning. With the library unable to make certain materials available, faculty may find it necessary to modify curricula and related reading/listening/viewing lists to avoid certain lacunae. Navigating around those pitfalls, over time, may become very tricky. For this reason, the problem with digital downloads is not a problem just for academic libraries; it is a problem for higher education.

The severe restrictions imposed by EULAs offer little room for compromise. While technology certainly makes it possible for a library to establish an iTunes or Amazon account, pay for and download a desired title, deposit it on a server, and provide regulated access through streaming or another carefully managed process, legal barriers disallow any such solution. Given the litigiousness of trade associations like the Recording Industry Association of America, it is unlikely that a library attempting a workaround like this would go unnoticed. And given the unambiguous licensing terms, some of which have already been validated in court, it is unlikely that academic institutions would fare well defending their cause. On the other hand, couldn't it be argued that EULAs, in blocking higher education's access to certain materials, do not serve the nation's greater good? It is doubtful that any college or university legal office is ready to pursue that.

Admittedly, the unavailability of digital downloads to the academic community, as it now stands, is not a widespread crisis, since CDs, DVDs, books, and other tangible formats—materials not governed by EULAs, at least not yet—remain the primary modes of publication for most titles. The apparent drift toward a wholly online means for selling and delivering music, video, and other teaching resources, however, does invite worry. With a growing body of materials not available for purchase by institutions, the library's support role in higher education is weakening, and by extension, the range of subjects and materials faculty may include in their courses is slowly getting smaller. ❧

Notes

1. Other effects of digital downloads on library services are covered in D. J. Hoek, "The Download Dilemma: The Demise of the Compact Disc Signals an Uncertain Future for Library Sound Recording Collections" (*American Libraries* 40, nos. 8-9 [Aug.-Sept. 2009]: 54-57).

2. Chris McNevins, e-mail message to Videolib discussion list, Sept. 14, 2009. Thanks to McNevins for the follow-up correspondence she and I had on this matter. Thanks also to M. Claire Stewart for initially calling my attention to McNevins's posting on Videolib. ❧

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