



THE BELIEFS, RIGHTS AND INTERESTS OF PUBLISHERS

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BCC/WIPO 2019

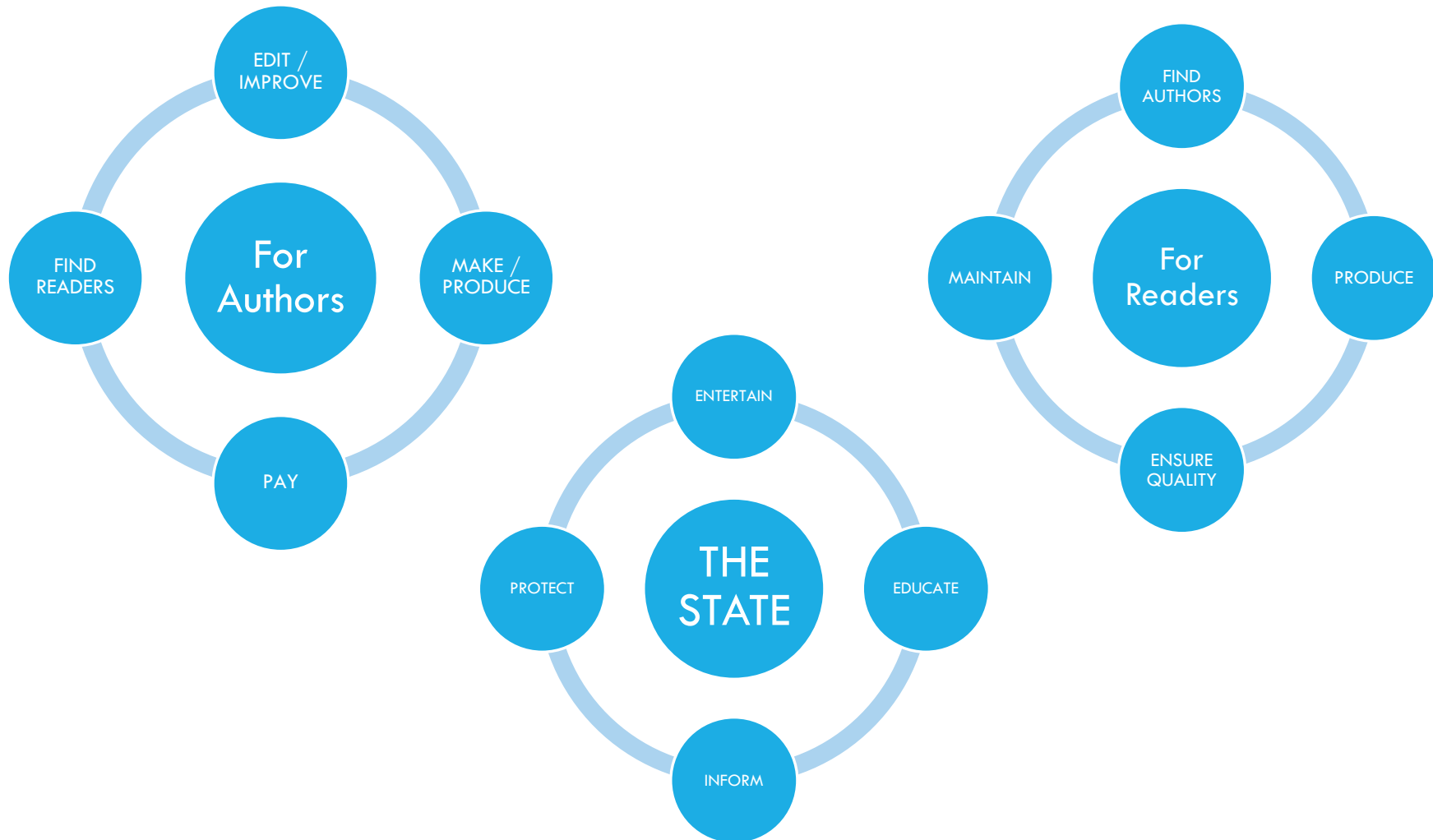
AGENDA

- 1. Who Publishers are, what we do and the state of Publishing today**
- 2. What factors do Policy makers need to take into consideration when regulating publishing?**
- 3. Copyright: What is it and how is it related to publishing?**
- 4. Copyright: Key issues today**
 - 1. Exploitation**
 - 2. Exceptions**
 - 3. Enforcement**
 - 4. Exhaustion and e-Lending**
 - 5. Employment**
- 5. The Policy Choice in front of us**

WHAT PUBLISHERS BELIEVE



WHAT PUBLISHERS DO

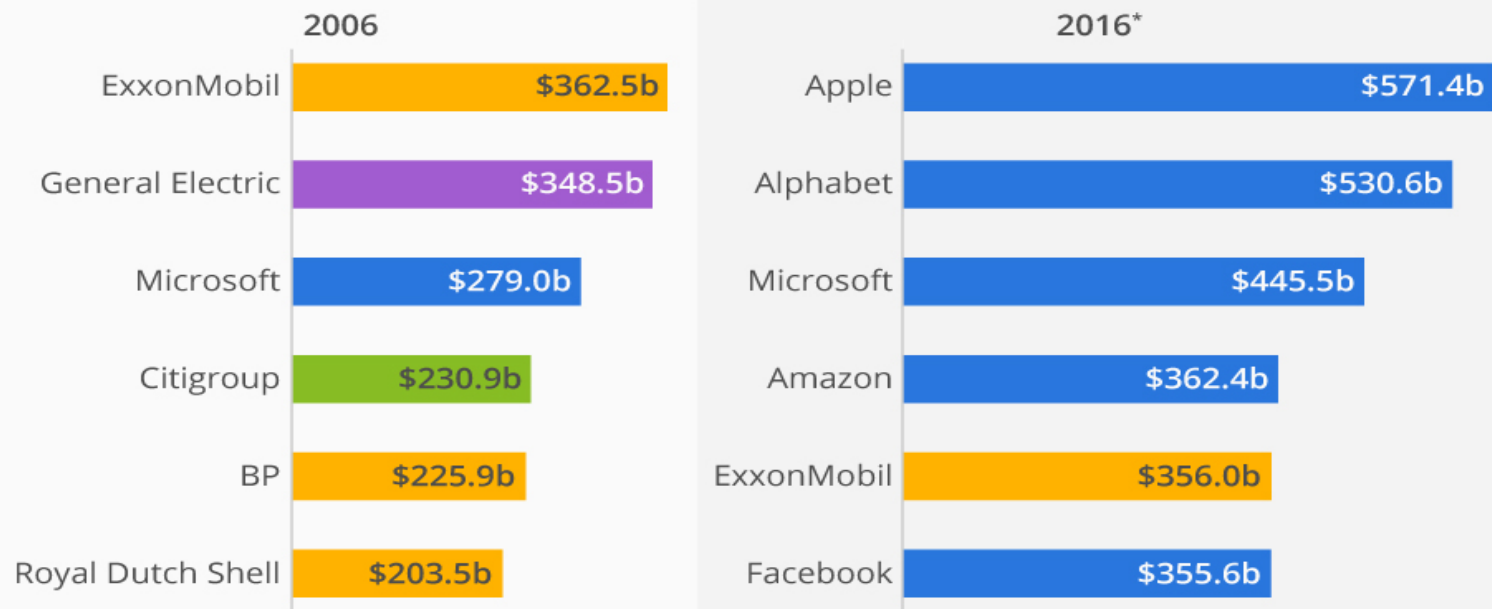


THE BEST OF TIMES?

The Age of Tech

Market capitalization of the world's most valuable public companies

■ Tech ■ Oil/Energy ■ Financial Services ■ Conglomerate



THE WORST OF TIMES?



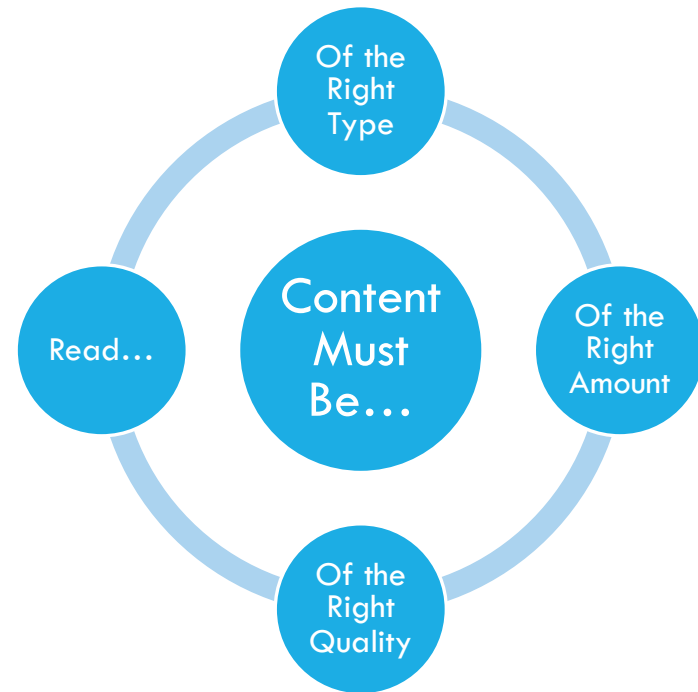
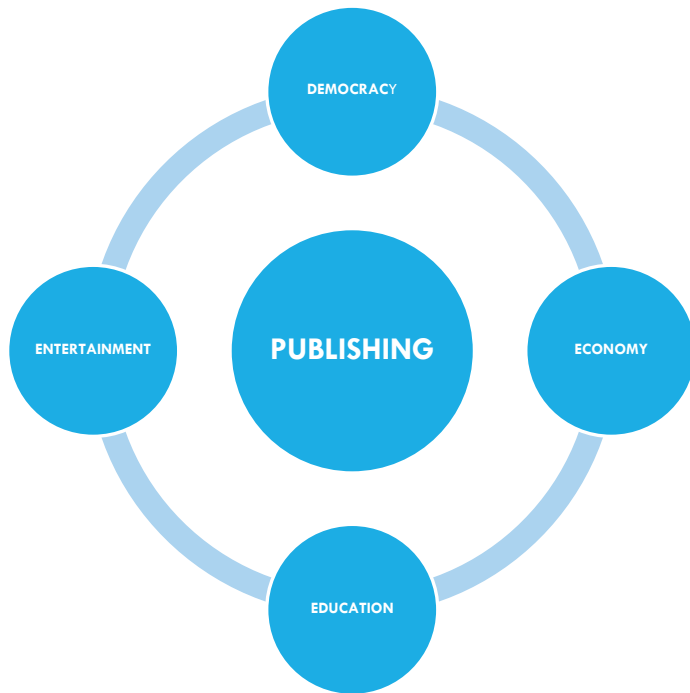
LIBRARY PRESENCE AND USE DECLINING

#shiningalight

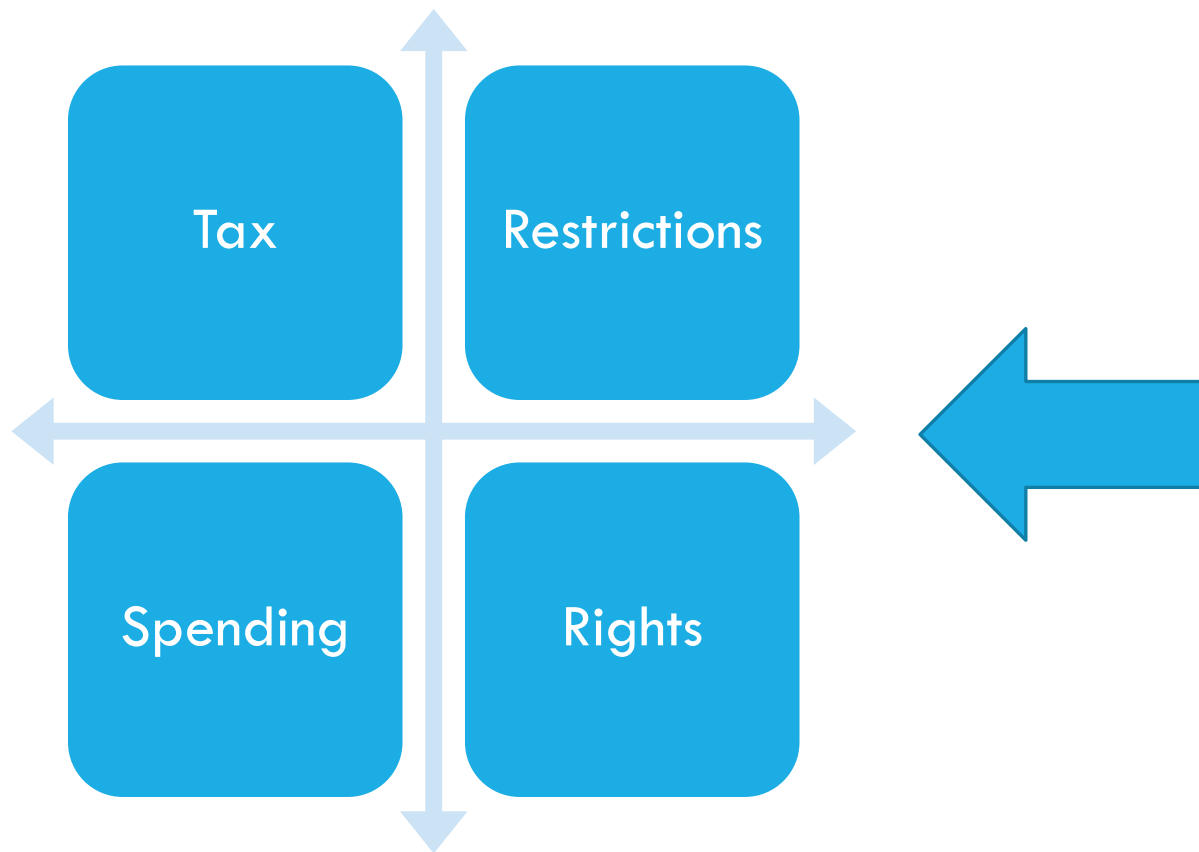
Use of and attitudes towards public libraries across
UK and Ireland in 2016 (%)



WHY PUBLISHING AND CONTENT MATTERS TO POLICY MAKERS



WHAT LEVERS CAN POLICY MAKERS PULL?



COPYRIGHT
(and other
rights)

PUBLISHER INTERESTS, RIGHTS AND SOURCES

Publisher Interests	Rights Required	Source of Rights
Freedom to Publish	An appropriate libel/freedom of speech framework	National/international law
Sufficient Rights to create a market for their product	Copyright	Authors
Flexibility to adapt & update	Copyright	Authors
Means of physical/digital product/supply	©, Database Right, contract	Authors, others
Investment	Copyright	Authors
Reputation / brand	Trade Mark	Publisher

AN ACT FOR THE ENCOURAGEMENT OF LEARNING: 1709

“[Parliament wishes] to encourage learned Men to compose and write useful books”

What Anne achieved:

1. **Freedom:** The individual creator, not the State, is the first owner of ideas
2. **Ongoing Supply:** Provides an incentive to write and publish that ensures the State and its citizens have a permanent supply of the books and information they need, whilst only paying for the books they want.
3. **Access for readers:** Transferability of rights meant access could be granted as needed. Legal deposit so all books available.
4. **Remuneration:** Those who brought books to life and to the public could be paid. This increased quality and professionalism.
5. **Accountability:** Legal Deposit helped ensure accountability for public or private harm, which also helped increased quality

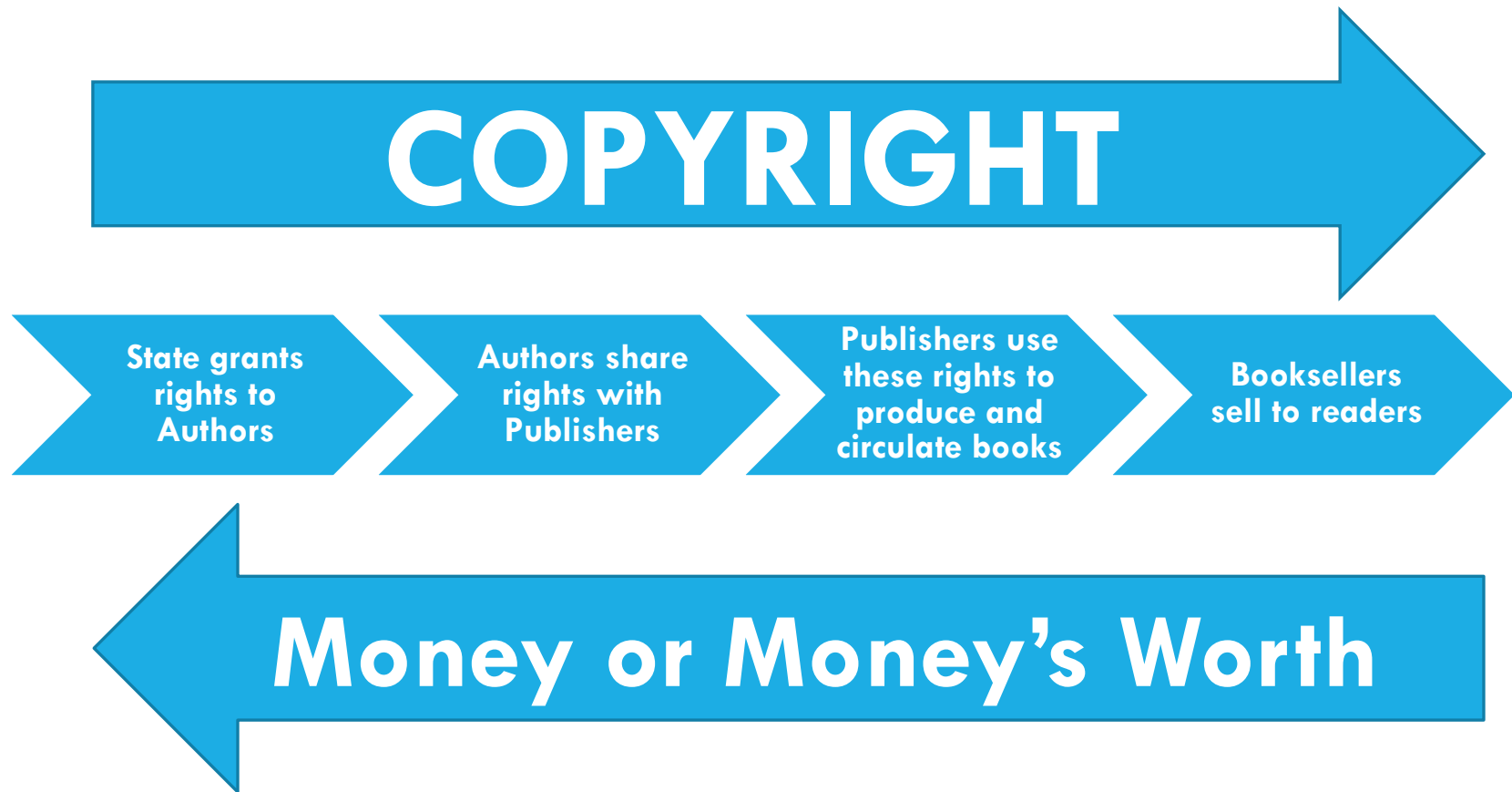
COPYRIGHT: KEY THEMES AND ISSUES TODAY

- 1. Exploitation**
- 2. Exceptions**
- 3. Enforcement**
- 4. Exhaustion and e-lending**
- 5. Employment**

For each of these, we will look at:

- 1. How copyright works in this context**
- 2. Current Issues and cases**

1. EXPLOITATION



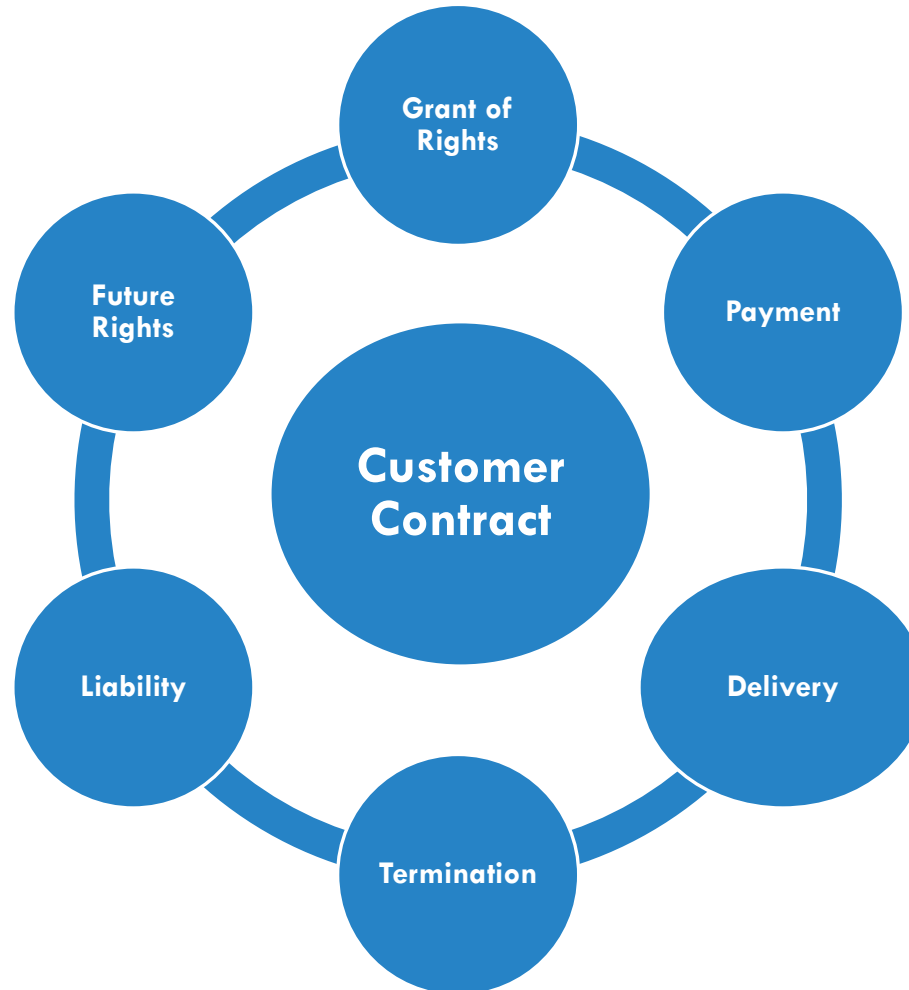
THE AUTHOR CONTRACT AND LICENSING PRACTICE

Note
Territorial /
Restricted
licensing
practices



THE CUSTOMER CONTRACT AND LICENSING PRACTICE

**Note
Secondary
and
Collective
Licensing**



EXCEPTIONS

Where a Government feels that the public interest outweighs the private interest it will create exceptions. Examples include:

- **Education**
- **Archives**
- **Parody / Pastiche**
- **News Reporting**

Note: Berne Convention Three Step Test. Exceptions must be limited to:

- 1. Certain special cases**
- 2. That do not affect normal exploitation of the work**
- 3. Does not unreasonably prejudice the interests of the rights holder**

The Importance of Guaranteeing Supply

Policy Makers must also consider Guaranteeing Supply: If too broad, will the work or type of work still be produced? And even if so, will quality diminish over time?

DEBATE ON EXCEPTIONS

Fair Use and Fair Dealing:

- *Authors Guild v. Google, Inc.* F3.d No.13-4829-cv.2015WL6079426 (2d Circuit Oct.16 2015)
 - “The ultimate goal of © is to expand public knowledge & understanding”
- *Cambridge University Press et. al v. Becker* No.1:08-cv-1425-ODE
- *The Chancellor, Masters and Scholars of Oxford & Ors v Rameshwari Photocopy Services and Ors [The Delhi University case]*

Debate at WIPO

Call for wider and globally harmonised exceptions

How do we widen access to educational materials whilst ensuring that supply and quality is maintained?

If the reader or librarian no longer has to pay for content, who will meet those costs?

OPEN ACCESS: A NEW WAY OF ENCOURAGING LEARNING?

Copyright is no longer the only way Policy makers are seeking to encourage learning.

UK Finch report (2012) recommends Open Access as a new model for scholarly books and journals. Supported by EU “Plan S” and UKRI

Content licensed to readers via a Creative Commons license for no charge;

Publishers paid fee by authors (or funders i.e. the State) instead of charging readers;

Enables use of and access to scholarly content free of charge to the user and on broadly flexible use terms

But poses questions:

- **How will the costs be met?**
- **Will funding be available for all subjects and types of publishing?**
- **What is academic publishing and what is not?**
- **Should the State have such direct control over its academics?**
- **How do authors get paid?**
- **Can it work across borders?**
- **Is it not just a new copyright exception? If so, is it consistent with the Three Step Test?**

3. ENFORCEMENT

Copyright is not always respected:

1. **Unaware infringers**
2. **Principled infringers**
3. **Regular infringers**
4. **Irregular / desperate infringers**
5. **For profit infringers**

Things we can do:

1. **Education**
2. **Prevention & Security**
3. **Cease & Desist & Notice / Take down**
4. **Work with Police & Customs**
5. **Bring infringement Actions**

SCIHUB: “THE PIRATE BAY OF SCIENCE”

The Website

Sci-Hub facilitates download and access to over 70m scientific articles, books & papers, downloading on average 2,000-8,500 new articles per day through 200,000 daily users

The system illicitly bypasses publishers' paywalls through institutional password 'donations' & identity theft

It is thought that 85% of the articles published in paywalled scholarly journals are in its database, representing around 69% of all published articles

Whack-a-mole - currently suspended & blocked domains (21)

Hosted in Russia, the site was briefly blocked there after local scientists named a new parasitic insect after Sci-Hub's owner

Legal Action

2 legal cases (Elsevier, ACS) in the USA, almost \$20m in damages awarded to the two affected publishers. ACS was granted a permanent injunction against all parties working with Sci-Hub *"including any Internet search engines, web hosting and Internet service providers, domain name registrars, and domain name registries"* to cease facilitating access to the service

Consequences:

For Authors and Publishers: The site undermines access to existing (legitimate) open access services and disincentivizes publishers from investing in new journals.

For Scientists and the State: Content stored in the database is not updated, which could potentially lead to major repercussions for scientists, academics and students using out of date information

4. EXHAUSTION AND E-LENDING

When a copy of a book is first sold, the author, publisher and bookseller get paid.

But if that the same copy is subsequently re-sold, who benefits? The copyright owner or the owner of the copy?

What if the rules are different from country to country?

Wiley v Kirtsaeng

What about ebooks and e-Lending?

NUV v Tom Kabinet

How will this case affect Libraries and Public Lending Right?

5. EMPLOYMENT

Who is the first owner?

S.1(1): Copyright is a Property right

S.11: First owner is the creator SUBJECT TO:

- Any agreement to the contrary
- An employer / employee relationship

S.11 is a restriction on author freedom, justified by benefits of certainty it brings to business.

But what about academics, government employees and journalists? In the UK:

1. **Journalists:** Editorial Firewalls to prevent corporate interference. But fewer journalists are employed within these structures thus weakening their effect
2. **Government employees:** UK changed Crown Copyright rules as part of FOI drive to take ownership and control of state employee works
3. **Academics:** Protected in law by principle of academic freedom. But there is a risk that Open Access movement will curtail this freedom and restrict their ability to opt out of S.11 rules.

THE POLICY CHOICE IN FRONT OF US

We live in polarised and populist times and are faced by huge challenges.

Conflict and terrorism, Population growth, Education, Volatile politics, Unstable financial system, Poverty, Emigration, Climate change, Technology.

As we seek answers, the battle for control of ideas and content has begun.

There are no easy or quick answers to complex problems.

And there is no such thing as “free content”

There are just “Books”. And the people that write them, make them and read them. Do we as a society value those people and their freedoms or not?

If we do, that means the single most urgent content Policy question right now is not “How do we make content free?” but instead “How is society going to pay for the content it needs?”

And if it will not, what are the long term implications of that for our society, our democracies, our economy and the pursuit of science, health and happiness?

Copyright isn't perfect. But it is the best tool we have.

CUP AND THE LETTERS PATENT — KING HENRY VIII 1534





QUESTIONS?