Academic libraries and their legal obligation for content accessibility

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Libraries, in addition to being clearly legally bound to provide equitable access for all who use their resources and services, have a long-standing commitment to accessibility. The challenges, however, that libraries face in providing equitable access can be significant. Some of these challenges arise because a library's ability to provide equitable access is often dependent on the actions of other entities. Some of these challenges are fairly unique to libraries, as the roles that they play with respect to ensuring accessibility are increasingly varied. As noted by Rosen [1]:

> "Our library is part of a larger ecosystem. Advocacy is key to promoting accessibility among partners whose work affects ours: vendors of electronic resources, publishers of content, creators of educational technology. We have a legal obligation to close the gap between inaccessible resources and user needs, but we have an ethical responsibility to improve accessibility in adjacent industries so more resources meet more users' needs."

Through the lens of academic libraries in the United States, this paper will explore the tensions between their commitment to and legal responsibilities for equitable access and the practical barriers they face in achieving this access, as it is in these institutions where the tensions are perhaps most prominent.

This paper begins by exploring the long-standing connections between libraries in the United States and a commitment to serving disabled community members, including promoting accessibility. Within this broader context, the paper focuses on the myriad accessibility opportunities, obligations, and challenges of academic libraries, many of which are unique to academic libraries. As many academic libraries are both providers of content created by others and creators of substantial content, provision of accessibility is a complex and vitally important defining aspect of the contributions of academic libraries. We contend that libraries should maintain their knowledge of technical and legal requirements and leverage their position of influence as purchasers of content to demand such content and resources be accessible to all users.

A long-standing commitment to accessibility

U.S. library organizations emphasized the importance of accessibility long before there were legal requirements to do so. Libraries, as the first social or governmental institution to include people with disabilities, have a deep history of inclusion. Libraries first began establishing collections of materials for users with print disabilities of collection in the mid-1800s, with these materials a common part of collections before 1900, followed by the establishment of special libraries for users with disabilities and field-wide standards for services to users with disabilities (Charlson, 2000; St. John, 1957). By the early 1960s, public, school, academic, and other libraries uniformly had mission statements and policies to ensure that community members with disabilities have access to materials, services, and facilities based on clear standards and best practices established by professional organizations, most notably the American Library Association (ALA) (Gibson, 1977). This reflects the profession's embracing of the social model of disability versus the traditional medical model, which views disability as a having a medical "problem," "defect," or "disorder." With the social model of disability, society itself is viewed as creating a restricting or problematic environment that limits participation by all individuals — in other words, society should seek to remove those restrictions by enabling access in any way possible. All institutions, including libraries, thus have the choice to either embrace their own responsibility to ensure access and inclusion or to passively (or actively) ignore their own role in creating and furthering limitations on certain members of society.

The issues surrounding accessibility are always evolving. In recent years, academic libraries have begun considering the accessibility of innovative technologies, such as virtual reality, that show potential for

increasing student engagement (Clark and Lischer-Katz, 2020). As the global COVID-19 pandemic ushered in an era of widespread distance learning, the need for digital access to educational resources sharply increased. The services provided by school and academic libraries during the pandemic, however, expanded to include responsibility for ensuring student digital literacy as many students with little or experience with online learning suddenly found themselves in online classes for weeks, months, and even over a year in some cases (Jaeger, *et al.*, 2021; Martzoukou, 2021).

Libraries also found themselves caught up in the information battle over fake news and misinformation, filling a need to provide information searching and fact checking knowledge during a time of distrust in information (Bangani, 2021). While many libraries embraced the provision of these essential additional services, these new responsibilities highlighted the need to ensure that digital library services are accessible to all. These challenges are significant forces shaping the activities of most libraries, but, because of their unique nature, no type of library is more affected than academic libraries.

The special case of academic libraries

U.S. academic libraries — the libraries of higher education entities, such as colleges and universities — exist in an unusual space. They exist within larger organizations, yet the other parts of these larger organizations are not libraries or even library-related. A public library system includes a number of libraries; it does not include a library, a football team, and a chemistry lab. Academic libraries in university systems (for state universities or universities with various branches or affiliated campuses), however, are not only connected to programs within the university but often also to the academic libraries of the other institutions in the system. All the libraries within the university system, for example, may be connected through contracts for services or subscriptions for library resources. Belonging to a university system does increase the ability of such libraries to leverage their collective weight in negotiations, strengthening their ability to demand accessible products. Academic libraries outside of such systems (whether private or public entities), however, lack such collective bargaining power.

These relationships serve as the basis for the unique accessibility challenges for academic libraries. As is true for libraries of all types, the ability to provide a truly equitable experience is often outside the control of the librarians. For any academic library at a public institution, their contract and licensing are also likely dictated by regulations and policies for all aspects of the state government. This does not mean that federal laws do not apply, but rather means that the staff or faculty at the academic library may not themselves have control over the rules implemented by their state. For example, guidelines related to contracts and licenses for materials may be set by state or local governments, with librarians uninvolved in either the development of these guidelines or the agreements themselves. This may adversely impact a library's ability to emphasize accessibility. Libraries are also limited in their ability to work together to negotiate for accessibility with publishers, as they represent a mix of state and private entities with many different rules and competing bureaucracies (Mates, 2009; Stewart, *et al.*, 2005; Tatomir and Tatomir, 2012).

A quandary exists when materials are not available in accessible formats, a subscription database is not designed to work with assistive technologies, or if an interface is simply inaccessible. The decision is whether to acquire the inaccessible item, knowing that only some people can use it and others will have to find an accessible alternative or live without it. For a public library or public library system, that decision is one that they make on a regular basis. As detailed earlier, for an academic library, that decision-making process may be much more convoluted and may very well be completely beyond the control of the library. Those guiding the process may in fact be administrators who lack a complete understanding of accessibility.

However, there are three other factors — beyond decision-making processes — that make accessibility a far more fraught concern for academic libraries. First, while members of the community served by a public

library may want specific resources, they are unlikely to depend on the public library to have resources on which their careers are dependent, in the way that academic researchers might. An academic library often has many members of their service community who need access to certain journals and databases to conduct their research and stay current for their teaching. Similarly, students want access to the materials they need for their education. Most of these users will be more concerned about access for their own needs than whether the product in question provides equitable access. This is particularly true when there is only a single source (or two) for a specific resource and no ability to negotiate based on the accessibility of that resource.

Second, libraries are frustrated by policies of new media content creators that maximize their profits through streaming on their own platforms. For example, Amazon has become a major publishing house that will not sell or license electronic or audiobook copies of its own publications to libraries. Another example is Netflix, which does not sell or license its in-house programs and films to libraries. This is a general annoyance for libraries, and in the case of Amazon, its refusal guarantees that the titles it publishes will not be available in accessible formats for libraries. But, for academic libraries, the absence of the materials in an accessible format may again be more poignant as such materials may be important resources for the research or teaching of a student or professor with a disability.

Finally, an additional layer of complexity to consider involves libraries taking on new roles related to information access, including the collation and distribution of electronic materials through campus digital repositories of preprints, theses, and other works created by faculty, staff, and students. Moreover, in some cases, libraries have stepped into the role of publisher, particularly with respect to open access electronic journals. An academic library doing either or both activities has become a publisher, rather than merely a content purchaser, requiring them to consider how to ensure that the content they are publishing is accessible. Such requirements for accessibility are, in fact, legal obligations.

Academic libraries as providers of content

Two civil rights laws — the Rehabilitation Act of 1973 (Rehabilitation Act) and the American with Disabilities Act (ADA) — provide the basis of academic libraries' legal obligations to provide equitable access to their resources and services. While both laws prohibit discrimination against individuals with disabilities, the scope of these laws differ. Titles II and III of the ADA apply to public entities and public accommodations. Public universities fall within the former category, and private universities fall within the latter category (which encompasses private entities that are open to the public or that provide goods or services to the public). Institutions must comply with the ADA, regardless of whether they receive federal funds. The U.S. Department of Justice (DoJ) enforces both Title II and Title III of the ADA. It is important to note that the DoJ enforces the ADA by responding to complaints, not by proactively searching for violations. In other words, ADA enforcement is a complaint-driven process.

For publicly-funded universities that fall under Title II of the ADA, there must be reasonable accommodation for equal access to all individuals, which includes equal access for people with disabilities. For private universities that fall under Title III of the ADA, it is essential to remember that, when a library with both a physical and an online presence is offering a digital resource as a public accommodation, that resource should be accessible to users with disabilities (ADA.gov, 2017).

While there may have been a time where academic libraries could claim that digital access to their resources was not the primary role of their libraries, that period is long past. This was never more evident than since the start of the COVID-19 pandemic. During the early period of the pandemic, physical access to most academic library resources was restricted altogether, and many academic libraries broadened their offerings to ensure access to digital resources. Even pre-pandemic, demand for digital resources was outpacing the demand for physical library resources. Americans were viewing publicly-funded libraries as

places where they could also depend on access to computers and the Internet (Pew Research Center, 2014). The 2019 "State of America's libraries" report by the American Library Association, released prior to the pandemic, found that academic libraries at that time were spending an average of 73.8 percent of their budgets on journal subscriptions (Rosa, 2019). This emphasizes the importance of guaranteeing that this large expenditure on such important resources is indeed accessible to all users. While the demand for digital library resources increased since the start of the COVID-19 pandemic, most libraries did not increase online accessibility for people with disabilities (Bielefield, *et al.*, 2021).

The parameters of the Rehabilitation Act, however, are a little less clear. Pursuant to Section 504 of the Rehabilitation Act, colleges and universities that receive federal funding are required to make physical programs and educational programs (including library facilities) accessible to individuals with disabilities. Section 508, which established the requirement that electronic and information technology procured by federal agencies be accessible, has received two major updates. In 1998, the United States Access Board, an independent agency under the U.S. Department of Health and Human Services, updated the rule to require federal agencies to make their electronic information accessible to people with disabilities. In 2017, the Access Board updated requirements for information and communication technology (ICT) covered by Section 508. This "refresh", which "replac[ed] the product-based approach with requirements based on functionality ensures that accessibility for people with disabilities keeps pace with advances in ICT" (U.S. General Services Administration [GSA], 2022).

Per the language of the Rehabilitation Act, Section 508 does not apply to the private sector nor impose requirements on recipients of federal funds. Federal agencies (most notably, the U.S. Departments of Education and Justice, however, have maintained a position that extends the reach of Section 508. The government's position is that the Assistive Technology Act of 1998 (AT Act) as well as its predecessor, the Technology-Related Assistance for Individuals with Disabilities Act of 1988 (Tech Act), require grant recipients to comply with Section 508 (Boyer, 2000). As any institution that has received grants through the AT Act or Tech Act must abide by Section 508, the U.S. Department of Education maintains that Section 508's reach extends to the realm of higher education (LaGrow, 2017). Beyond the ADA and the Rehabilitation Act, it is also important to note that the Marrakesh Treaty, which was signed into law in 2019, created an important exception to U.S. copyright law and made thousands of digital resources available to people with print disabilities, across international borders (Mazumdar, 2021).

What then does this all mean for academic libraries, particularly given the proliferation of roles they play? As a provider of print and electronic resources, it means that they have a legal obligation to ensure that the resources made available to nondisabled library users are also accessible to users with disabilities. With respect to their role as purchaser of electronic resources, it means any resource purchased should meet Section 508 standards. In this role, academic libraries have less bargaining power than vendors; however, one way for them to vet a product for Section 508 compliance is to request a voluntary product accessibility template (VPAT), a government-created aid to help people buy institutions purchase products that meet Section 508 standards (Wakimoto and Soules, 2011; Billingham, 2014; Blechner, 2015; DeLancey, 2015; Falloon, 2015; Ostergaard, 2015; Riley-Huff, 2015; DeLancey and Ostergaard, 2016; Mune and Agee, 2016; Kimura, 2018).

Through a VPAT, a vendor can explain how its product complies with the ADA and the Rehabilitation Act, as well as with the Web Content Accessibility Guidelines (WCAG) (Potnis and Mallory, 2021). Ideally, then, the library finds itself in a better position to make an informed decision that supports equitable access to resources and services by individuals with disabilities. The reality though is that those statements set forth in a VPAT need to be verified at some point, as VPATs often incorrectly assert that inaccessible products are accessible; such inaccessibility can usually only be identified after the purchase has already been made (Kimura, 2018). In the event that a library reasonably relies on a VPAT that erroneously asserts accessibility, it is not clear whether its actions could be found to violate Section 508.

The lack of power experienced by many academic libraries described above is exacerbated by their lack of understanding regarding the requirements imposed by law. Accessibility does not always receive as much

attention as other legal issues affecting academic libraries. Reference materials for licensing for libraries may not be much help. For example, a work entitled *Library licensing: A manual for busy librarians* discusses neither disability or accessibility [2]. The American Library Association (ALA) has made an effort to increase the visibility of accessibility issues. With the Library Services for Persons with Disabilities Policy, the ALA additionally has addressed issues related to content publishers, focusing on the content of accessible collections. Passed in 2001 by the ALA's Council (the governing body of the Association), the policy requires that library materials are accessible to all users, including people with disabilities. The policy advocates for materials to be available in a variety of formats and with accommodations, as long as the modified formats and accommodations are reasonable, do not fundamentally alter the library's services, and do not place an undue burden on the library. Although this policy does not have the force of the law, the extent to which it draws upon language used in the ADA is instructive and the intent of the policy is admirably far-reaching (Wentz, *et al.*, 2021). Moreover, in 2009, the ALA issued recommended guidelines to libraries for purchasing, procuring, using, maintaining, and contracting for electronic resources. These guidelines recommend that libraries obtain written guarantees from vendors that their products will comply with Section 508 regulations and other accessibility guidelines (Peacock and Vecchione, 2020).

The Big 10 Academic Alliance (https://btaa.org), for example, has developed standardized license language that clearly lays out electronic resource vendors' obligations to comply with accessibility requirements. This language addresses the issue raised above regarding a VPAT that erroneously asserts accessibility: "If the product does not comply, the Licensor shall adapt the Licensed Materials in a timely manner and at no cost to the Licensee in order to comply with applicable law." This contractual language clearly places the responsibility on the vendor to address the lack of accessibility; failure to do so on the part of the vendor could give rise to a breach of contract suit.

While there is not a large body of case law that directly addresses academic libraries' legal obligations under the ADA or the Rehabilitation Act, there are several cases pertaining to accessibility of electronic resources by college students with disabilities that highlight the key legal issues at play. As noted by Peacock and Vecchione [3], "[l]awsuits such as at the University of Montana have increased the visibility and need to put the ALA recommendations into practice in these libraries." This dispute, in which students brought a complaint against the University based upon its use of inaccessible electronic and information technology (including inaccessible library database resources), was resolved when an agreement was reached between the University and the U.S. Department of Education, Office of Civil Rights (OCR). Among the remediation efforts set forth in the agreement are several pertaining directly to library resources and services: "the University's library website shall be accessible in accordance with WCAG 2.0 Level AA standardand the Library shall implement a search engine that is accessible in accordance with WCAG 2.0 Level AA standard ... which can search across all library collections, including, but not limited to, e-journals, databases, and e-books" [4]. In the event that the university failed to abide by the terms of this agreement, OCR was to take "appropriate steps to address the problems."

In terms of disputes that ended up being adjudicated in a court of law, in the 2019 case of *Payan v. Los Angeles Community College District*, the defendant college was also found to have violated the ADA (Title II) and Section 504 of the Rehabilitation Act (Disability Rights Education & Defense Fund, 2022). The district court, after finding that a whole range of resources (including library databases) did not function with a screen reader and were thus inaccessible to blind students, ordered the college to remedy these barriers to access so long as doing so would not impose an undue burden or result in a fundamental alteration. The college appealed this decision to the Ninth Circuit Court of Appeals, arguing that their "unintentional discrimination" did not violate the Rehabilitation Act or the ADA. The appellate court rejected the College's argument, asserting that both laws were intended to address both intentional and unintentional discrimination.

Both matters establish that library resources are among the materials that institutions of higher education must ensure are accessible to students with disabilities. Thus, there is legal precedent to support for position that academic libraries (as part of an institution of higher education), when providing information resources,

are obligated to provide accessible resources under both the ADA and the Rehabilitation Act. These are not the only legal obligations for accessibility that affect academic libraries, as most academic libraries are also creators of content in numerous ways.

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Academic libraries as creators of content

While the advent of the World Wide Web and the ease of electronic publishing and dissemination has greatly increased the capacity of academic libraries to be publishers themselves, it is an activity that greatly predates the Internet. The history of libraries as publishers has been documented as far back as the great library and museum of Alexandria, which was founded around 300 BCE, copying items in its collection to have multiple copies for library users and to disseminate to other institutions (Conrad, 2017). Since that time, many libraries have taken on publishing roles of user guides, community materials, blogs, magazines, anthologies, and even books. The underlying goal of these publications has often been to reach new populations or to fill gaps in the collection, such as hiring local children's book authors to write on subjects of interest to children in the community (Katz, 2021). Years before the Internet changed the publishing landscape in significant ways, some academic libraries were partnering with publishers to create publications that support specific research needs, while others began their own publications to highlight research being conducted on their campus.

The significant difference of the current environment is that technology has greatly enhanced the scale and capacity of libraries to be publishers. No type of library has more strongly embraced these possibilities than academic libraries. The typical academic library now publishes blogs and electronic user guides, and runs a digital repository that makes student projects, theses, dissertations, pre-print versions of faculty articles, and other forms of scholarship freely available. Many academic libraries have also moved beyond these publishing activities to become publishers of electronic professional and scholarly journals and, in some cases, even digital monographs. Reflecting this trend, the library at the University of Michigan founded the *Journal of Electronic Publishing* (https://journals.publishing.umich.edu/jep/) in 1997 as a platform for libraries to share practices, insights, and broader issues related to digital publication by libraries. It is, of course, an electronic journal.

The considerations of disability in articles published in the *Journal of Electronic Publishing* are instructive of the ways in which disability has been considered in the context of libraries as academic publishers. While a decent number of articles in the more than 20 years of the journal reference disability access in relation to the very specific program, service, or tool being discussed, few address disability and accessibility as a holistic concern for libraries as publishers. The small number of broader engagements with disability and accessibility in the journal have focused on accessibility challenges that can be posed by digital rights management agreements (Kramer, 2007), discussions of international standards to promote born accessible electronic materials (Capiel, 2014), and the efforts of the HathiTrust to promote accessibility of the materials in its collection (Zaytsev, 2015).

The HathiTrust (https://www.hathitrust.org) — a collaboration between many academic and research institutions to provide online access to millions of digitized titles — has policies to try to promote accessibility in the materials that it makes available. Further, the creation of international standards to promote accessibility in commercial products, such as the Marrakesh Treaty, is obviously a positive development. However, neither of those efforts would address the need for accessibility for people with disabilities in all the materials created by individual academic libraries. At the time of the writing of this article, there is no published case law related to libraries as content publishers being sued under the ADA or the Rehabilitation Act. Without guidance from case law, academic libraries must determine the best ways to meet accessibility requirements as the technology used to deliver content are changing rapidly and the publishing roles are expanding.

How are academic libraries faring in their efforts to meet legal requirements regarding accessibility?

Due to the role that they play in the educational lives of students and students' increasingly reliance on digital resources, the progress — or lack thereof — that academic libraries have made with respect to accessibility gets a fair amount of attention (Kimura, 2018). As noted earlier, academic libraries have often adopted the approach of addressing accessibility during the purchasing and licensing of materials (*e.g.*, through the use of VPATs), but this approach does not always create accessible collections. What a vendor promises during procurement process may not, in fact, look quite different than what it is provided. This creates problems that not even adaptive technologies (ATs) can solve: "Collections stored in some library databases cannot be retrieved via AT (*e.g.*, screen-reading software), rendering the resources in those databases useless to individuals needing assistance. Similar to some collections, inaccessible documents (*e.g.*, PDFs) and Web pages (*e.g.*, LibGuides) published by faculty and staff members cannot be interpreted by AT" [5].

Academic libraries' efforts in this area have been documented by numerous researchers through studies of library Web sites (*e.g.*, Billingham, 2014; Comeaux and Schmetzke, 2013; Providenti and Zaj, 2007), databases (Tatomir and Durrance, 2010), digital special collections (Southwell and Slater, 2012), and e-books (Mune and Agee, 2016). According to Mulliken (2017), studies show that library Web sites and vendor provided e-resources continue to be inaccessible and, moreover, that librarians have yet to be adequately educated about pertinent accessibility issues (*e.g.*, adaptive technology). A small number of studies have gone further to offer ideas about how libraries can make digital materials more accessible by interviewing librarians or disabled users (Bertot, *et al.*, 2006; Beyene, 2018; Day and Fleischman, 2020).

These studies, however, do not get to the overall issues of the need for a comprehensive approach to accessible publishing for academic libraries. A recent survey of STEM journal editors for journals that might commonly be subscribed to by academic libraries revealed that most STEM journals do not have policies or instructions for making sure that articles that they publish are accessible for people with disabilities (Wentz, *et al.*, 2021). This highlights the complexity of the issue, as an academic library may need to provide access to a particular journal or publication for which there is no alternative, yet the journal or publication itself may not have any provision for ensuring the accessibility of the resource. What recourse does an academic library have in such situations? Is it following its legal obligation for accessibility when providing digital access to a resource that is not accessible? These specific questions have yet to be addressed through published courts opinions; however, given the myriad issues documented through research, it may be only a matter of time before a legal precedent is established. Nevertheless, this commitment to accessibility under the law should be met even without the threat of law; accessibility should be central to all library activities.

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